

**IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

[2023] SGHC 79

Criminal Case No 32 of 2022

Between

Public Prosecutor

And

Yap Pow Foo

JUDGMENT ON SENTENCE

[Criminal Procedure and Sentencing — Sentencing — Principles]
[Criminal Procedure and Sentencing — Mitigation]

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Public Prosecutor

v

Yap Pow Foo

[2023] SGHC 79

General Division of the High Court — Criminal Case No 32 of 2022

Tan Siong Thye J

31 March 2023

31 March 2023

Judgment reserved.

Tan Siong Thye J:

Introduction

1 In *Public Prosecutor v Yap Pow Foo* [2023] SGHC 11 (the “*Conviction Judgment*”), I convicted Yap Pow Foo (“the Accused”) of a rape charge under s 375(1)(a) which is punishable under s 375(2) of the Penal Code (Cap 224, 2008 Rev Ed) (the “Rape Charge”) and an aggravated house-breaking charge under s 457 read with s 458A of the Penal Code (the “House-breaking Charge”). These Charges are as follows:

That you, YAP POW FOO,

FIRST CHARGE

between 3:05am and 3:44am on 30 January 2017, at [Address Redacted], did commit rape, *to wit*, you penetrated with your penis the vagina of [the Victim], without her consent, and you have thereby committed an offence under section 375(1)(a) punishable under section 375(2) of the Penal Code (Cap 224, 2008 Rev Ed).

SECOND CHARGE

sometime around 3:05am to 3:44am on 30 January 2017, at [Address Redacted], which is a building used as a human dwelling, did commit housebreaking by night in order to commit an offence punishable with imprisonment, *to wit*, you extracted [the Victim's] door key from under her door and used it to unlock her door and entered the said unit to commit rape of [the Victim], and you have thereby committed an offence punishable under section 457 of the Penal Code (Cap 224, 2008 Rev Ed); and further, that you were on 9 March 2007 convicted in District Court 8 (*vide* DAC/18174/04) of housebreaking and theft by night under section 457 read with section 458A of the Penal Code (Cap 224, 1985 Rev Ed) and sentenced to three years' imprisonment and two strokes of the cane, which conviction and sentence has not been set aside to date, and you are thereby liable for additional punishment of caning under section 458A of the Penal Code (Cap 224, 2008 Rev Ed).

2 I shall now give my reasons for the sentences which I shall impose on the Accused.

Facts relating to the Charges

3 The detailed facts of the Accused’s commission of the offences can be found in the *Conviction Judgment*. I shall only refer to the salient features of the Accused’s criminal conduct that are relevant to the issue of sentencing.

Brief facts leading up to the commission of the offences by the Accused

4 The Accused is a male Chinese Singaporean who is 47 years old. The Accused was 42 years old and unemployed at the time of the offences. The victim is a 39-year-old female Chinese national (“the Victim”) who worked as a beautician at the time of the commission of the offences.

5 In the early hours of 30 January 2017, the Accused unlawfully entered the residential unit of the Victim (“the Unit”) which is a private apartment (“the Apartment”) and raped the Victim. These offences were committed shortly after the Accused met the Victim for the first time at a KTV lounge located at Bugis Cube (“the KTV Lounge”) on the night of 29 January 2017.

6 On the afternoon of 29 January 2017, before heading to the KTV Lounge, the Victim was celebrating Chinese New Year with her friends at the Unit and had consumed alcohol. Sometime around 10.00pm on the same day, the Victim and her friends decided to go for a karaoke session at the KTV Lounge.

7 At the KTV Lounge, the Victim and her friends ordered more alcohol. At about 11.23pm, whilst the group was at the KTV Lounge, one of the Victim’s friends, Heng Kwok Hun, received a call from the Accused. The Accused, subsequently, joined the Victim and her friends at the KTV Lounge.

8 Shortly after, the Victim collapsed from heavy intoxication and lay asleep on the couch at the KTV Lounge. As her friends could not wake her up when they were leaving, the Accused helped to carry the Victim out of the KTV Lounge. The Accused then offered to drive the Victim and her friends home.

9 The Accused drove first to the Apartment. As the Victim was completely intoxicated and unconscious, she had to be carried to the Unit by two of her friends. Shortly after, the Accused arrived at the Unit, and he helped the Victim's two friends to put the Victim on her bed. The three of them then left the Unit. One of the Victim's friends locked the main door and slipped the key underneath the main door.

Facts relating to the commission of the offences

10 After sending all the Victim's friends home, the Accused returned to the Apartment alone. Along the way, the Accused had called the Victim on her handphone numerous times. There was, however, no response from the Victim. When the Accused arrived at the Apartment, he entered the side gate using the access code that he remembered earlier on when the Victim's friends sent the Victim home.

11 The Accused then went up to the Unit and retrieved the key from underneath the Unit's main door using a satay stick that he picked up along the way. The Accused then entered the Unit and went into the Victim's bedroom. There, he undressed the Victim before molesting the Victim and sexually penetrated her vagina with his penis.

12 The Victim was awakened by the rape, and despite her state of intoxication, she asked the Accused to leave the Unit after ascertaining his identity. The Victim telephoned one of her friends to inform her that she was

raped. The Victim also called the police to lodge a report that the Accused had raped her. Shortly after, the Accused was arrested.

The applicable law

House-breaking by night to commit an offence punishable with imprisonment

13 The Accused committed the offence of house-breaking by night to rape the Victim. This is an offence under s 457 of the Penal Code which states:

Lurking house-trespass by night or house-breaking by night in order to commit an offence punishable with imprisonment

457. Whoever commits lurking house-trespass by night or house-breaking by night, in order to commit any offence punishable with imprisonment, shall be punished with imprisonment for a term which may extend to 5 years, and shall also be liable to fine; and if the offence intended to be committed is theft, the term of the imprisonment shall be not less than 2 years and not more than 14 years.

14 Further, prior to this case, the Accused had at least one antecedent of house-breaking by night to commit theft, for which he was convicted in the District Court on 9 March 2007 and sentenced to three years' imprisonment and two strokes of the cane (see [49] below). Accordingly, the Accused's sentence under the House-breaking Charge would be enhanced pursuant to s 458A of the Penal Code, which states as follows:

Punishment for subsequent offence under section 454 or 457

458A. Whoever, having been convicted of an offence under section 454, ... 457 ... commits an offence under section 454 or 457 shall be punished with caning in addition to the punishment prescribed for that offence.

15 Accordingly, the Accused is liable to be sentenced to both an imprisonment term which may extend to five years and an additional punishment of caning.

The Rape Charge

16 For the Rape Charge, the relevant punishment provisions are s 375(1)(a) read with s 375(2) of the Penal Code:

375.—(1) Any man who penetrates the vagina of a woman with his penis —

(a) without her consent ...

...

shall be guilty of an offence.

(2) Subject to subsection (3), a man who is guilty of an offence under this section shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to fine or to caning.

Accordingly, the Accused is liable to be sentenced to an imprisonment term of up to 20 years and shall also be liable to caning.

17 The sentencing guideline framework for rape offences was laid down by the Court of Appeal in *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 (“*Terence Ng*”). In the application of the sentencing framework, a two-stage exercise is contemplated (see *Terence Ng* at [73(a)] and [73(c)]):

(a) First, the Court has to ascertain which of the three sentencing bands the Accused’s rape offence falls within, having regard to the *offence-specific* factors (*ie*, factors relating to the circumstances of the offence, such as the harm caused to the victim and the manner by which the offence was committed). Once the appropriate sentencing band has been identified, the Court derives an indicative starting point by

determining precisely where within the range of sentences the present offence falls.

(b) Second, the Court calibrates the appropriate sentence for the Accused by having regard to the *offender-specific* aggravating and mitigating factors. These are factors which relate to the offender's particular personal circumstances and, by definition, cannot be the same factors which have already been taken into account in determining the categorisation of the offence. One of the factors which the Court should consider at this stage is the value of a plea of guilt (if any).

18 The sentencing bands under the *Terence Ng* sentencing framework are summarised in the table below (see *Terence Ng* at [73(b)]):

| Band | Description | Sentencing range |
|-------------|---|---|
| 1 | Cases with no or limited offence-specific aggravating factors | 10 to 13 years' imprisonment and 6 strokes of the cane |
| 2 | Cases of a higher level of seriousness involving two or more offence-specific aggravating factors | 13 to 17 years' imprisonment and 12 strokes of the cane |
| 3 | Extremely serious cases owing to the number and intensity of offence-specific aggravating factors | 17 to 20 years' imprisonment and 18 strokes of the cane |

19 The Court of Appeal in *Terence Ng* further emphasised the need for the Court to clearly articulate the factors it has taken into consideration as well as the weight which it is placing on them. This consideration also applies to the second stage of the analysis, when the Court is calibrating the sentence from the

indicative starting point and at the end of the sentencing process. The Court also has to consider the totality principle in sentencing (see *Terence Ng* at [73(d)]).

Submissions on sentence

The Prosecution's submission on sentence

20 The Prosecution seeks a total sentence of 16 to 20 years' imprisonment and at least 15 to 16 strokes of the cane.¹ The individual sentences that the Prosecution seeks, before adjustments to take into account the totality principle, are as follows:²

| S/N | Charge | Sentencing position (individual sentences to run consecutively) |
|-----|--|--|
| 1 | 1st Charge Rape Section 375(1)(a) p/u s 375(2) of the Penal Code | 14 to 17 years' imprisonment and at least 12 strokes of the cane |
| 2 | 2nd Charge House-breaking by night to commit rape Section 457 read with s 458A of the Penal Code | 3 to 4 years' imprisonment and 3 to 4 strokes of the cane |

The Prosecution seeks for specific deterrence and the application of the escalation principle

21 The Prosecution highlights the Accused's lengthy list of antecedents involving property offences.³ The Prosecution relies on the Accused's

¹ Prosecution's Sentencing Submissions dated 6 February 2023 ("Prosecution's Sentencing Submissions") at para 5.

² Prosecution's Sentencing Submissions at para 5.

³ Prosecution's Sentencing Submissions at para 9.

antecedents to submit that the Accused is a persistent and inveterate offender. The Prosecution further highlights that there has also been an increase in the seriousness of the Accused's offences.⁴ In the circumstances, the Prosecution emphasises that specific deterrence and the escalation principle ought to apply in the present case.⁵ I shall consider the Accused's antecedents in detail below at [49]–[59].

The Rape Charge

22 The Prosecution seeks an individual sentence of 14 to 17 years' imprisonment and at least 12 strokes of the cane for the Rape Charge.⁶

23 Under the first stage of the *Terence Ng* sentencing framework, the Prosecution argues that there are multiple offence-specific aggravating factors present in this case:

(a) The Accused took advantage of the Victim when she was vulnerable by virtue of her severe intoxication.⁷ The Prosecution cites *Public Prosecutor v Ong Soon Heng* [2018] SGHC 58 ("*Ong Soon Heng*") in support of its position that this is an offence-specific aggravating factor.

(b) The nature of the sexual assault was highly intrusive, as evidenced by the Accused's conduct of outraging the Victim's modesty prior to the offence forming the Rape Charge.⁸ The Prosecution cites

⁴ Prosecution's Sentencing Submissions at paras 9 to 16.

⁵ Prosecution's Sentencing Submissions at paras 10, 12 and 16.

⁶ Prosecution's Sentencing Submissions at para 5.

⁷ Prosecution's Sentencing Submissions at para 20.

⁸ Prosecution's Sentencing Submissions at para 21.

Public Prosecutor v Bong Sim Swan Suzanna [2020] 2 SLR 1001 (“*Suzanna Bong*”) in support of its position that this is an offence-specific aggravating factor.

(c) There was an element of abuse of third-party trust, given that the Victim’s friends had trusted the Accused by allowing him to drive the Victim and her friends home and to help put the Victim on her bed.⁹ The Prosecution cites *Ong Soon Heng* in support of its position that the abuse of third-party trust would constitute an offence-specific aggravating factor.

(d) The Accused’s conduct was premeditated, given that he had taken deliberate steps towards the commission of the rape offence which shows his predatory conduct.¹⁰

(e) The Accused did not use protection during the rape offence and exposed the Victim to the risk of pregnancy and sexually transmitted diseases.¹¹ The Prosecution relies on *Chang Kar Meng v Public Prosecutor* [2017] 2 SLR 68 (“*Chang Kar Meng*”) and *Pram Nair v Public Prosecutor* [2017] 2 SLR 1015 (“*Pram Nair*”) in support of its position that this is an offence-specific aggravating factor.

(f) The Accused’s rape offence led to severe, lasting harm caused to the Victim in the form of psychological trauma, as evidenced by the finding made by a clinical worker and the Institute of Mental Health (“IMH”) that the Victim had the cardinal symptoms of post-traumatic

⁹ Prosecution’s Sentencing Submissions at para 22.

¹⁰ Prosecution’s Sentencing Submissions at para 23.

¹¹ Prosecution’s Sentencing Submissions at para 24.

stress disorder.¹² The Prosecution cites *Terence Ng* in support of its position that this is an offence-specific aggravating factor.

(g) The Accused sought to conceal his rape offence when he agreed to pay the Victim compensation if she withdrew the rape allegation.¹³ The Accused also had no intention to honour his promise to pay compensation to the Victim. The Prosecution cites *Vasentha d/o Joseph v Public Prosecutor* [2015] 5 SLR 122 (“*Vasentha Joseph*”) in support of its position that this is an offence-specific aggravating factor.

24 In view of the offence-specific aggravating factors identified by the Prosecution, the Prosecution submits that the present case falls within the middle to upper-end of Band 2 of the sentencing framework laid down in *Terence Ng*.¹⁴

25 As highlighted above at [18], under the *Terence Ng* sentencing framework, Band 2 would typically capture offences of a higher level of seriousness involving two or more offence-specific aggravating factors. The sentencing range for offences falling within Band 2 would be between 13 years’ imprisonment and 17 years’ imprisonment and 12 strokes of the cane.

26 Under the second stage of the *Terence Ng* sentencing framework, the Prosecution argues that the following offender-specific aggravating factors feature in the present case:

¹² Prosecution’s Sentencing Submissions at para 25.

¹³ Prosecution’s Sentencing Submissions at para 26.

¹⁴ Prosecution’s Sentencing Submissions at para 27.

(a) The Accused has demonstrated an evident lack of remorse, as seen by the unnecessary manner in which he conducted his defence despite the overwhelming evidence against him.¹⁵ The Prosecution cites *Terence Ng* and *Public Prosecutor v Ganesan Sivasankar* [2017] 5 SLR 681 (“*Ganesan Sivasankar*”) in support of its position that this is an offender-specific aggravating factor.

(b) The Accused made scandalous aspersions against the Victim, asking irrelevant questions at trial about her work as a former sex worker as well as falsely accusing her of having a motive to fabricate an allegation of rape.¹⁶ The Prosecution cites *Terence Ng* in support of its position that this is an offender-specific aggravating factor.

(c) The Accused has agreed to have a separate charge taken into consideration for the purposes of sentencing (hereinafter referred to as the “TIC Charge”). The TIC Charge involves an offence of sexual harassment of a different female victim.¹⁷ The Prosecution cites *Terence Ng* in support of its position that the TIC Charge ought to have some effect on the sentence imposed on the Accused for the Rape Charge.

(d) The Accused’s antecedents show a dramatic escalation of his previous sexual offending.¹⁸

27 In view of the offender-specific aggravating factors, the Prosecution submits that an indicative sentence of 17 years’ imprisonment with at least

¹⁵ Prosecution’s Sentencing Submissions at paras 29 to 30.

¹⁶ Prosecution’s Sentencing Submissions at para 31.

¹⁷ Prosecution’s Sentencing Submissions at para 32.

¹⁸ Prosecution’s Sentencing Submissions at para 33.

12 strokes of the cane would be appropriate for the Rape Charge.¹⁹ The Prosecution cites various precedents to support its indicative sentence for the Rape Charge.

28 The Prosecution points out that there is some overlap between the Rape Charge and the House-breaking Charge. The Prosecution also notes that there may be a need to adjust the sentence for the Rape Charge downwards in view of its position that both the sentences for the Rape Charge and the House-breaking Charge should be ordered to run consecutively. Therefore, in view of the totality principle, the Prosecution has proposed a downward adjustment of its indicative sentence to a sentence in the range of 14 to 17 years' imprisonment and at least 12 strokes of the cane for the Rape Charge.²⁰

The House-breaking Charge

29 The Prosecution seeks a sentence of three to four years' imprisonment and three to four strokes of the cane for the House-breaking Charge.²¹

30 The Prosecution emphasises that the Accused's antecedents show that this is his ninth house-breaking by night offence, and his 20th property offence.²² An uplift of at least one year is, therefore, necessary from his last set of house-breaking by night offences in 2007 where he was sentenced to three years' imprisonment and two strokes of the cane for each charge.²³ The Prosecution

¹⁹ Prosecution's Sentencing Submissions at paras 34 to 36.

²⁰ Prosecution's Sentencing Submissions at para 37.

²¹ Prosecution's Sentencing Submissions at para 38.

²² Prosecution's Sentencing Submissions at para 40.

²³ Prosecution's Sentencing Submissions at paras 39 to 40.

also submits that there should be an uplift in the number of strokes of the cane that is ordered.²⁴

31 The Prosecution opines that there is some overlap between the Rape Charge and the House-breaking Charge, given that one element of the House-breaking Charge is the Accused's intent to commit rape while breaking into the Victim's home. In the Prosecution's view, the sentences that it is seeking for the Rape Charge and the House-breaking Charge allow this Court to make the necessary adjustments to ensure that the Accused is not unfairly prejudiced by this overlap.²⁵

The Prosecution's total sentence

32 The Prosecution submits that the sentences for the Rape Charge and the House-breaking Charge should be ordered to run consecutively.²⁶

33 The Prosecution recognises that the one-transaction principle generally requires the sentences for offences which are connected in time, place, purpose, design and unity to run concurrently. However, the Prosecution argues that the focus must be on whether the additional offence adds to the totality of the offending, citing *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 ("*Shouffee*").²⁷ Here, the Prosecution argues that the Accused infringed separate and distinct interests of the Victim when he committed the

²⁴ Prosecution's Sentencing Submissions at para 41.

²⁵ Prosecution's Sentencing Submissions at paras 42 to 45.

²⁶ Prosecution's Sentencing Submissions at paras 46 to 47.

²⁷ Prosecution's Sentencing Submissions at para 46.

two offences.²⁸ Therefore, the Prosecution submits that the two sentences ought to run consecutively.

34 In considering the totality principle, the Prosecution argues that the total sentence it seeks is not crushing, since it is in keeping with the Accused's past record and his future prospects. The Prosecution emphasises that the Accused has a long list of antecedents and that his future prospects would not be eclipsed since he retains an expectation of a meaningful life after his release.²⁹ However, with a view to seek an objectively lengthy sentence, the Prosecution states that it would not be opposed to a further downward adjustment of the total imprisonment term by one year.³⁰ This would, therefore, lead to a total sentence of 16 to 20 years' imprisonment and 15 to 16 strokes of the cane.

The Defence's plea in mitigation

35 In its mitigation plea, the Defence urges the Court to impose a total sentence of 12 years' imprisonment and six strokes of the cane.³¹ The individual sentences the Defence seeks are as follows:³²

| S/N | Charge | Sentencing position (individual sentences to run concurrently) |
|------------|---|---|
| 1 | 1st Charge Rape Section 375(1)(a) p/u s 375(2) of the Penal Code | 12 years' imprisonment and 6 strokes of the cane |

²⁸ Prosecution's Sentencing Submissions at paras 46 to 47.

²⁹ Prosecution's Sentencing Submissions at paras 50 to 51.

³⁰ Prosecution's Sentencing Submissions at para 52.

³¹ Defence's Mitigation Plea dated 2 February 2023 ("Defence's Mitigation Plea") at para 31.

³² Defence's Mitigation Plea at paras 22 and 25.

| | | |
|---|--|---|
| 2 | 2nd Charge House-breaking by night to commit rape Section 457 read with s 458A of the Penal Code | 3 years' imprisonment and 3 strokes of the cane |
|---|--|---|

Background of the Accused, including his remorse and family circumstances

36 The Defence states that the Accused is sincerely remorseful for having committed the two offences.³³ According to the Defence, the Accused succumbed to his desire to have sexual intercourse with the Victim. The Defence also states that the Accused, on hindsight, wished that he had exercised greater prudence instead of giving in to his desire.³⁴

37 The Defence also highlights that this is the first time the Accused had committed a rape offence whilst the Accused has committed previous offences of house-breaking.³⁵

38 The Defence further submits that the Accused's family, including his wife and parents, will suffer during his period of incarceration.³⁶ The Defence also mentioned that the father of the Accused is in ill-health and his wife is facing financial difficulties.³⁷ The Defence states that extreme family hardship is a legitimate mitigating factor.

³³ Defence's Mitigation Plea at para 14.

³⁴ Defence's Mitigation Plea at para 14.

³⁵ Defence's Mitigation Plea at para 16.

³⁶ Defence's Mitigation Plea at paras 15 and 17.

³⁷ Defence's Mitigation Plea at paras 15 and 17.

39 Finally, the Defence states that the Accused's arrest following the commission of the offences, the police investigations and the court proceedings have been a grave punishment for the Accused.³⁸

The Rape Charge

40 The Defence submits that a sentence of 12 years' imprisonment and six strokes of the cane would be appropriate for the Rape Charge.³⁹

41 The Defence relies on *Public Prosecutor v Ridhaudin Ridhwan bin Bakri and others* [2020] 4 SLR 790 in support of its sentencing position. According to the Defence, there is only one offence-specific aggravating factor in the present case, namely that the Victim was vulnerable at the time of the rape offence given that she was intoxicated.⁴⁰ Therefore, the Defence views the offence as falling within Band 1 of the *Terence Ng* sentencing framework.

42 The Defence also highlights that there are mitigating factors, namely that the Accused is supporting his aged parents, he also has to bring his father for medical appointments and assist his father financially with the medical expenses.⁴¹

43 In view of the above, the Defence states that a sentence of 12 years' imprisonment and six strokes of the cane would be appropriate for the Rape Charge.

³⁸ Defence's Mitigation Plea at para 19.

³⁹ Defence's Mitigation Plea at para 22.

⁴⁰ Defence's Mitigation Plea at para 22(b).

⁴¹ Defence's Mitigation Plea at para 22(c).

The House-breaking Charge

44 The Defence submits that a sentence of three years' imprisonment and three strokes of the cane would be appropriate for the House-breaking Charge.

45 The Defence states that the sentence it seeks is appropriate in view of the absence of any aggravating factors.⁴²

The Defence's total sentence

46 The Defence submits that the sentences for the Rape Charge and the House-breaking Charge should be ordered to run concurrently.⁴³

47 The Defence states that the Rape Charge and the House-breaking Charge were committed as part of the same criminal transaction.⁴⁴ Therefore, in line with the one-transaction principle, the sentences ought to be ordered to run concurrently. In support of this position, the Defence relies on *Ong Soon Heng*, where Aedit Abdullah J ordered the individual sentences for an abduction charge and rape charge to run concurrently in view of the one-transaction principle.⁴⁵

48 Therefore, the Defence seeks a total sentence of 12 years' imprisonment and six strokes of the cane.⁴⁶

⁴² Defence's Mitigation Plea at para 24.

⁴³ Defence's Mitigation Plea at para 25.

⁴⁴ Defence's Mitigation Plea at paras 25 and 27.

⁴⁵ Defence's Mitigation Plea at para 27.

⁴⁶ Defence's Mitigation Plea at para 31.

My decision***The Accused's antecedents show a consistent pattern of reoffending***

49 I first consider the Accused's antecedents which are set out in the table below:

| Date of Conviction | Charge | Sentence imposed on the Accused |
|---------------------------|---|--|
| 9 March 1992 | One charge of theft | \$900 fine |
| 25 May 1999 | Two charges of theft | 6 months' imprisonment for each charge (concurrent) |
| | Two charges of house-breaking by night | 4 years' imprisonment for each charge (sentence for one charge to run consecutively) |
| | One charge of house-breaking by night (TIC) | Taken into consideration for the purposes of sentencing |
| | One charge of carrying an offensive weapon in a public place | 9 months' imprisonment with 6 strokes of the cane (consecutive) |
| | One charge of criminal intimidation (TIC) | Taken into consideration for the purposes of sentencing |
| | Total sentence: 4 years and 9 months' imprisonment and 6 strokes of the cane | |

| | | |
|-----------------|--|--|
| 9 March 2007 | Two charges of house-breaking by night | 3 years' imprisonment and 2 strokes of the cane for each charge (sentence for one charge to run consecutively) |
| | One charge of house-breaking by night | 24 months' imprisonment and 2 strokes of the cane (consecutive) |
| | Two charges of house-breaking by night (TIC) | Taken into consideration for the purposes of sentencing |
| | Total sentence: 5 years' imprisonment and 6 strokes of the cane | |
| 27 October 2014 | One charge of fraudulent possession of property, namely, 11 female undergarments | Mandatory Treatment Order for 12 months |

50 As can be seen from the table above, the Accused was first convicted for a property offence on 9 March 1992 when he was just 17 years old. He committed an offence of theft for which he was fined \$900.

51 Undeterred by his conviction in 1992, the Accused proceeded to commit a string of offences for which he was convicted on 25 May 1999 when he was 24 years old. This was just seven years after his previous conviction. Further, unlike his previous conviction which involved just a single offence of theft, the Accused's convictions in 1999 covered a series of offences. These included two charges of theft as well as more serious offences, namely two charges of house-breaking by night and one charge of carrying an offensive weapon in public. In addition, one charge of house-breaking by night and one charge of criminal

intimidation were taken into consideration for the purposes of sentencing. A significant sentence of four years and nine months' imprisonment and six strokes of the cane was imposed on the Accused following his convictions in 1999.

52 Yet, the Accused did not learn his lesson after his convictions in 1999. Slightly less than eight years after his convictions in 1999, the Accused was once again convicted for a fresh set of offences on 9 March 2007 when he was 32 years old. Between his convictions in 1999 and his convictions in 2007, the Accused would have served his sentence of four years and nine months' imprisonment and six strokes of the cane for his convictions in 1999. Even after taking into account any possible remission he might have been given for good behaviour, what is patently clear is that the Accused proceeded to commit further property offences just a few years after his release from prison. In 2007, he was convicted of three charges of house-breaking by night. Two other charges of house-breaking by night were taken into consideration for the purposes of sentencing. For two of the charges of house-breaking by night, the Accused was sentenced to three years' imprisonment and two strokes of the cane for each charge. For the third charge of house-breaking by night, he was sentenced to 24 months' imprisonment and two strokes of the cane. His total sentence in 2007, therefore, was a lengthy term of five years' imprisonment and six strokes of the cane.

53 Despite the lengthy imprisonment term following his convictions in 2007, the Accused was once again hauled back to court for an offence of fraudulent possession of property, namely 11 female undergarments. He was convicted for this offence on 27 October 2014 when he was 40 years old. Upon his conviction, he was issued a 12-month Mandatory Treatment Order.

54 In the present case, the Accused has been convicted of two very serious charges, *ie*, the Rape Charge and the House-breaking Charge. These offences were committed on 30 January 2017 when the Accused was 42 years old. This would have been slightly more than two years after his last conviction in October 2014.

55 What is abundantly clear from a careful scrutiny of the Accused's criminal record is that the Accused is a recalcitrant person who has been committing property offences, among others, since 1992 when he was just 17 years old. Between 1992 and 2017, *ie*, the year of his first conviction and the year that he committed the present set of offences, the Accused has been sentenced to a total imprisonment term of nine years and nine months' imprisonment and 12 strokes of the cane. What this means is that the Accused has spent a significant part of a 25-year period from 1992 to 2017 in prison. Despite this significant period in prison, the Accused has not demonstrated any commitment to move away from a life of crime. On the contrary, the Accused has instead proceeded to commit two offences which are significantly more serious. The Rape Charge carries a maximum sentence of 20 years' imprisonment. The House-breaking Charge carries a maximum sentence of five years' imprisonment.

56 The Accused has shown a complete disregard for the law. His antecedents show a consistent pattern of reoffending. More significantly, beyond the repeated nature of his reoffending, the Accused has also committed far more serious offences in the present case. In sentencing the Accused, therefore, I am mindful that the sentences imposed by this Court have to deter the Accused from committing further offences.

57 In *Public Prosecutor v Low Ji Qing* [2019] 5 SLR 769 (“*Low Ji Qing*”), the High Court emphasised that an escalation of sentences may be warranted where the offender’s antecedents disclose a complete disregard for the law (at [62]):

In considering the offender’s antecedents and the index offence, the court is inquiring into whether a cycle of offending exists, and if so, what has been the trend of offending behaviour. An escalation of sentences may be warranted where the offender’s antecedents disclose a “cavalier disregard for the law”: [*Tan Kay Beng v Public Prosecutor* [2006] 4 SLR(R) 10] at [16]; or as the Malaysian High Court put the point in *Soosainathan v PP* [2001] 2 MLJ 377 at 385D, where the offender’s prior criminality “demonstrate[s] that the current offence is no passing lapse, but evidence of a real unwillingness ... to comply with the law”.

58 Further, a review of the Accused’s antecedents and the Statements of Facts for his convictions in 2007 and his conviction in 2014 show that, by 2007, the Accused had begun to commit house-breaking by night for the purpose of stealing female undergarments. In the present set of offences, the sexual nature of the Accused’s offences escalated significantly when he raped the Victim. As was noted in *Low Ji Qing*, proportionality of the crime to the punishment may therefore demand a significantly heavier sentence to take into account this marked escalation in the Accused’s reoffending (at [75]–[76]):

75 ... [W]here the index offence is much more egregious, then proportionality may in fact demand a significantly heavier sentence to take account of the marked escalation in the accused person’s offending. What is essential is for the sentencing court to undertake a comparison of the *gravity* of the antecedent and the index offences, and consider how this should affect the sentence to be imposed for the index offence.

76 In order to have the correct factual basis for applying the principle of escalation, a sentencing court should also be alert to the fact that reference solely to an accused person’s antecedents in the form of the Criminal Records Office (“CRO”) record may be insufficient. The CRO record typically indicates the offences the accused person had been charged with, and the sentences imposed in respect of those charges. In order to have a fuller comparison between the index offence and the

antecedent offence, it might sometimes be helpful or necessary to have reference to, among other things, the charges, statement of facts, psychiatric reports, and grounds of decision (where available). It is not every case where this will be called for – but certainly where the principle of escalation is in play, a court should endeavour to have as complete a picture as possible.

[emphasis in original]

59 It is necessary to deter the Accused and would-be offenders from committing these serious offences.

60 I shall now consider the approach to dealing with an offender who is facing multiple charges.

The Court's approach to dealing with an offender who has multiple charges

61 It is well established that a sentencing court dealing with an offender who has multiple charges must first determine the appropriate individual sentence for each charge which the accused has been convicted of (see *Shouffee* at [26]). Once the individual sentences have been determined, the next stage is to consider whether the individual sentences should be ordered to run concurrently or consecutively in order to arrive at a suitable aggregate sentence (see *Shouffee* at [27]).

The appropriate sentence for the Rape Charge

The application of the first stage of the Terence Ng sentencing framework

62 Under the first stage of the *Terence Ng* sentencing framework, this Court has to ascertain which of the three sentencing bands the Accused's offence falls within, having regard to the offence-specific factors.

(1) Degree of planning, preparation and premeditation

63 I shall first consider the degree of planning, preparation and premeditation carried out by the Accused when committing the offence of rape. The court in *Terence Ng* had stated that the presence of planning and premeditation would, ordinarily, reflect greater criminality as it evidenced a considered commitment to law-breaking (at [44(c)]):

Premeditation: The presence of planning and premeditation evinces a considered commitment towards law-breaking and therefore reflects greater criminality. Examples of premeditation include the use of drugs or soporifics to reduce the victim's resistance, predatory behaviour (*eg*, the grooming of a child or young person), or the taking of deliberate steps towards the isolation of the victim (*eg*, by arranging to meet at a secluded area under false pretences).

64 The Prosecution argues that there was premeditation as the Accused had taken deliberate steps towards the commission of the offence.⁴⁷ Based on the evidence, the Accused was clearly an opportunist. The intention of the Accused to rape the Victim was not formed at the KTV Lounge. Rather, his intention to commit rape arose after he drove the Victim home and assisted the Victim's friends, namely Henry Tan Jun Yuan ("Henry") and Ma Jinzhe ("Ma"), to put the Victim on her bed. It was about this time that he knew that the Victim was unconscious from heavy intoxication and that the key to the Unit was easily accessible as he saw Henry slipping the key underneath the main door of the Unit.

65 When the Accused saw an opportunity to rape the Victim, he started to carefully execute his plan to rape her. He sent the Victim's friends home and thereafter he returned to the Apartment. However, the Accused made 12 calls to the Victim along the way. As I had found in the *Conviction Judgment* (at

⁴⁷ Prosecution's Sentencing Submissions at para 23.

[125]), the purpose of the 12 calls to the Victim was to confirm that the Victim remained intoxicated and unconscious before he entered the Unit. This would have enabled him to take full advantage of the Victim's state of unconsciousness to outrage her modesty with a view to rape her.

66 In light of the above, when the Accused knew that he could retrieve the key to enter the Unit, he started to plan to rape the Victim. Thus, the Accused had shown a considered commitment to commit serious offences and these reflect greater criminality.

(2) The vulnerability of the Victim

67 I next consider the vulnerability of the Victim. It is clear that the rape of a victim who is vulnerable would be an offence-specific aggravating factor, as set out in *Terence Ng* (at [44(e)]):

Rape of a vulnerable victim: The rape of a victim who is especially vulnerable because of age, physical frailty, mental impairment or disorder, learning disability. Concerns of general deterrence weigh heavily in favour of the imposition of a more severe sentence to deter would-be offenders from preying on such victims (see [*Public Prosecutor v Law Aik Meng* [2007] 2 SLR(R) 814] at [24(b)]). Such cases would often, but not invariably, be accompanied by evidence of an abuse of position/trust and/or some element of premeditation and planning.

68 The Court of Appeal also made clear in *Pram Nair* that an intoxicated victim can be considered vulnerable, if such intoxication resulted in the victim losing control over his or her ability to respond to sexual advances (at [125]–[127]):

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 a *permanent and enduring nature*, and not ... temporary intoxication” [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. 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 *PP 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 [*Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449] 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 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.

[emphasis in original]

69 In the present case, the Victim was severely intoxicated at the material time of the rape and the Accused took full advantage of the Victim’s complete helplessness to rape her. The Defence similarly accepts that the Victim was

vulnerable by virtue of her intoxication.⁴⁸ Therefore, the vulnerability of the Victim, which the Accused knew of and exploited, was an operative offence-specific aggravating factor.

(3) Lasting harm caused to the Victim

70 I now consider the harm caused to the Victim as a result of the rape. In *Terence Ng* (at [44(h)]), the court considered that the harm caused to the Victim would constitute an aggravating factor in sexual offences:

Severe harm to victim: As Rajah J stressed in [*Public Prosecutor v NF* [2006] 4 SLR(R) 849], every act of rape invariably inflicts immeasurable harm on a victim (at [46] and [47]). It seriously violates the dignity of the victim by depriving the victim's right to sexual autonomy and it leaves irretrievable physical, emotional and psychological scars. Where the rape results in especially serious physical or mental effects on the victim such as pregnancy, the transmission of a serious disease, or a psychiatric illness, this is a serious aggravating factor. In many cases, the harm suffered by the victim will be set out in a victim impact statement.

71 In the present case, there was serious harm caused to the Victim. The Accused committed the grave offence of rape in the Victim's bedroom. The Victim's bedroom was meant to be a safe haven for her to rest peacefully. Instead, the Accused breached that safe haven and proceeded to rape the Victim. In doing so, the Accused turned the Victim's bedroom into a constant reminder of the rape. The Accused's act was an outrageous and gross invasion of the Victim's privacy.

72 Further, the medical report by Dr Guo Song, a Psychiatrist and Senior Consultant at the Department of Addiction Medicine at IMH, which was

⁴⁸ Defence's Mitigation Plea at para 22.

adduced by the Prosecution, makes clear that the Victim suffered a lasting impact following the offence of rape by the Accused (at para 24):⁴⁹

Clinically, she did seem to experience some of the cardinal symptoms of Post-traumatic Stress Disorder related to the alleged rape, for which she had been referred to IMH for further psychological treatment.

73 The lasting impact of the Accused's rape offence on the Victim was, therefore, patently clear.

74 Further, the Prosecution has rightly pointed out that the Accused's failure to use protection exposed the Victim to the risk of pregnancy and sexually transmitted diseases.⁵⁰ In *Chang Kar Meng* (at [21(b)]), it was recognised that the offender's failure to use any protection would serve as an aggravating factor. The Court of Appeal in *Pram Nair* further explained, *albeit* in the context of distinguishing between penile penetration of the vagina and digital penetration of the vagina, why exposing a victim to unwanted pregnancy or risk of contracting a sexually-transmitted disease added to the trauma suffered by the victim (at [150(a)]):

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.

75 Therefore, the significant and lasting harm caused to the Victim as a result of the Accused's rape offence must be recognised by this Court when considering the appropriate sentence to be imposed on the Accused for the Rape Charge.

⁴⁹ Exhibit P3, IMH report by Dr Guo Song.

⁵⁰ Prosecution's Sentencing Submissions at para 24.

(4) The Accused's attempt to conceal the offence of rape

76 Here, the Accused offered the Victim monetary compensation as he thought that this might lead to the Victim not reporting the Accused to the police for rape. In other words, the Accused was seeking to conceal his offence of rape from the police by offering to compensate the Victim.

77 In *Vasentha Joseph*, Sundaresh Menon CJ stated, in the context of drug offences, that an offender's attempt to conceal his offence should be treated as an aggravating factor and explained the rationale for this (at [69]):

In my judgment, an offender's attempt to conceal or dispose of the evidence of his offence, such as drugs or paraphernalia, in order to avoid prosecution or a heavier sentence should be treated as an aggravating factor. The rationale for this is not dissimilar to the basis on which attempts to conceal the offence or prevent detection are treated as enhancing culpability. In these cases, the accused is generally seeking to do one or more of a number of things: to avoid detection in order to continue the unlawful conduct; to avoid the full and proper consequences of his illicit actions; or to thwart law enforcement efforts. The aggravating weight to be placed on this may depend on the circumstances. Where the offender has successfully disposed of the drugs in his possession, the sentencing judge must not speculate on the original quantity of drugs and attempt to sentence the offender as if the drugs had not been disposed of; but the judge would undoubtedly be entitled to enhance the sentence having regard to this aggravating factor.

78 In the present case, the Accused offered to compensate the Victim. The Accused sought to conceal the offence of rape to avoid the full and proper consequences of his illicit actions. When the Accused offered compensation to the Victim, he did not know that the Victim had already called the police. The Accused admitted that if he had known that the Victim had already reported the rape to the police, he would not have offered any compensation.

79 Further, the Accused's conduct of offering the Victim compensation was, in fact, a charade. The Accused did not have a real intention to compensate

the Victim. Rather, he offered a large sum simply to persuade her to drop the case against him. Once the Victim dropped her case, the Accused had no intention to fully compensate the Victim.

80 Therefore, the Accused's conduct is an aggravating factor.

(5) Whether there was any abuse of third-party trust

81 The Prosecution submits that there was an element of abuse of third-party trust in this case, given that the Victim's friends allowed the Accused to drive them all home and to help put the Victim on her bed.⁵¹

82 The Prosecution cites the case of *Ong Soon Heng* in support of its position. In *Ong Soon Heng*, the offender, the victim and several acquaintances were at a nightclub. The victim lost consciousness as a result of intoxication. The offender told the victim's friends and the staff of the nightclub that he would send the victim to her home. The offender was, therefore, entrusted by the others with control of the victim's person and movement to bring her home and keep her unharmed. Instead, the offender proceeded to drive the victim to his residence where he had sexual intercourse with her. The offender was convicted of a charge of abduction as well as a charge of rape.

83 It was in the context of the offender being entrusted by the victim's friends and the staff of the night to send the victim to her home that the court in *Ong Soon Heng* stated the following (at [142]–[143]):

142 While exploitation of entrustment by third parties was not expressly recognised by the Court of Appeal in *Ng Kean Meng Terence* as an example of an offence-specific aggravating factor, I was of the view that it would be appropriate to treat this factor as such. Where the safety or wellbeing of the victim

⁵¹ Prosecution's Sentencing Submissions at para 22.

is entrusted to an offender by third parties, the offender, although not in a position of trust or responsibility in the sense outlined in the previous section, nevertheless commits an analogous “dual wrong”: not only has he committed a serious crime, he has violated the trust placed in him by others to protect or at least refrain from causing harm to the victim. That would, to my mind, be sufficient to amount to an offence-specific aggravating factor.

143 On the present facts, the [a]ccused was given the opportunity to be alone with the [v]ictim and to be in control of the [v]ictim’s person and movement because the others had entrusted him with bringing her home and keeping her unharmed. In fact, the [a]ccused had told the [v]ictim’s friends, including Kwok, and the staff of Zouk that he would send the [v]ictim home. However, the [a]ccused violated such trust placed in him by the others; he exploited the situation and committed a heinous act on the [v]ictim. In the circumstances, I found that the exploitation of the entrustment that the third parties had reposed in the [a]ccused was an offence-specific aggravating factor in the present case.

84 The facts in *Ong Soon Heng* are quite different from the facts of the present case. The offender in *Ong Soon Heng* was specifically entrusted by the victim’s friends and the staff of the nightclub to send the victim to her home. The offender had, however, breached that trust by abducting the victim and bringing her to his own home. Although the facts in the present case are not the same as in *Ong Soon Heng*, the Accused had also breached the trust of the Victim’s friends, Henry and Ma. They allowed the Accused to go into the Unit as they trusted him. They also allowed the Accused to witness the slipping of the Victim’s door key beneath the main door of the Unit. Henry and Ma would not have allowed the Accused into the Unit if they had known of the insidious motive of the Accused to rape the Victim.

(6) The sentencing band which the Accused’s rape offence falls within

85 Having considered the offence-specific aggravating factors, I am unable to accept the Defence’s submission that this offence has only one offence-specific aggravating factor, *ie*, that the Victim was vulnerable given that she

was intoxicated.⁵² Rather, there are clearly numerous offence-specific aggravating factors which feature in the present case.

86 For the reasons above, this offence falls within Band 2 of the *Terence Ng* sentencing framework.⁵³ Band 2 provides a sentencing range of between 13 years' imprisonment and 17 years' imprisonment and 12 strokes of the cane.

The application of the second stage of the Terence Ng sentencing framework

87 Under the second stage of the *Terence Ng* sentencing framework, this Court must consider the aggravating and mitigating factors which are personal to the Accused to calibrate the sentence.

- (1) The Accused's evident lack of remorse in view of the manner in which he conducted his defence

88 I shall consider the Prosecution's submission that the Accused demonstrated an evident lack of remorse.⁵⁴ In *Terence Ng*, the court indicated when it would ordinarily draw a conclusion of an offender's evident lack of remorse (at [64(c)]):

Evident lack of remorse: Such a conclusion may be drawn if, for example, the offender had conducted his defence in an extravagant and unnecessary manner, and particularly where scandalous allegations are made in respect of the victim. In [*Public Prosecutor v AHB* [2010] SGHC 138], the offender not only failed to take responsibility, but also blamed his wife, whom he said had withheld vaginal intercourse from him, for his behaviour (at [21]).

⁵² Defence's Mitigation plea at para 22(b).

⁵³ Defence's Mitigation plea at para 22(b).

⁵⁴ Prosecution's Sentencing Submissions at para 29.

89 In the present case, the Prosecution argues that the Accused conducted his defence in an unnecessary manner, and also made scandalous allegations in respect of the Victim.⁵⁵

90 The Prosecution argues that the Accused conducted his defence in an unnecessary manner despite the fact that there was overwhelming objective evidence against the Accused. The Prosecution opines that there were HSA toxicology and DNA reports, CCTV footage, video footage and the Accused's statements to the police.⁵⁶

91 In the *Conviction Judgment*, I had found that the Accused continuously changed his evidence on significant events throughout the trial. In particular, I made the findings that the Accused had lied numerous times in the face of objective forensic and scientific evidence before the Court (see the *Conviction Judgment* at [275]). For example, the Accused was confronted with forensic evidence in the form of the DNA analysis of the high vaginal swab which showed that the Accused's DNA was found in the high region of the Victim's vagina. This indicated that the Accused's penis had penetrated deep into the Victim's vagina. Against this independent forensic evidence, however, the Accused defiantly claimed that his penis only entered "[j]ust a bit" into the Victim's vagina. To counter the forensic evidence, the Accused suddenly alleged in the course of trial that he had used his finger to penetrate deep into the Victim's vagina. This was raised for the first time on the second last day of the trial, and appeared to be an embellishment on the Accused's part. In my view, this clearly illustrated the Accused's defiant manner of conducting his defence despite the overwhelming evidence to the contrary.

⁵⁵ Prosecution's Sentencing Submissions at paras 29 to 31.

⁵⁶ Prosecution's Sentencing Submissions at para 29.

92 In *Ganesan Sivasankar*, the High Court set out quite clearly that it would be relevant during sentencing if an offender conducted his defence in a defiant manner despite being faced with overwhelming evidence which clearly contradicts his defence (at [35]):

It is well established that the mere fact of claiming trial is not an aggravating circumstance (*Kuek Ah Lek v PP* [1995] 2 SLR(R) 766 at [65]). At the same time, however, the fact that an accused maintains the correctness of his position “in a defiant manner right to the end, despite the overwhelming evidence to the contrary”, is a relevant factor to be taken into account (*Lee Foo Choong Kelvin v PP* [1999] 3 SLR(R) 292 at [36]), as is the fact that an accused has “all but spun an entire fairy tale in court” (*Trade Facilities Pte Ltd v PP* [1995] 2 SLR(R) 7 at [116]).

93 Thus, the Accused’s defiant manner of conducting his defence must be treated as an aggravating factor.

94 I was particularly troubled by the Accused’s scandalous allegations made against the Victim throughout the course of the trial.

95 The Accused advanced an unbelievable allegation that the Victim was intimate towards him at the KTV lounge when they first met. This was completely contrary to the evidence by the Prosecution’s witnesses.

96 The Accused made the above allegation to support his defence that the Victim had fabricated the claim of rape against him. The Accused alleged that the Victim made the false claim so that she could remain in Singapore for a longer period as she had to assist in the police investigations. This was, however, a completely absurd and scandalous allegation. Nevertheless, the Accused falsely alleged that the Victim had seduced him at the KTV Lounge, lured and invited him into the Unit, physically caressed him in the Unit, willingly had sex with him, disengaged in the midst of penetration, and then cried rape and called the police (see the *Conviction Judgment* at [286]). Such

scandalous aspersions against the Victim were entirely fabricated. These aspersions illustrated clearly that the Accused did not have an iota of remorse during the trial. Rather, his focus was simply to state whatever was necessary to avoid being found guilty of the Rape Charge.

(2) The Accused's expression of remorse in his mitigation plea

97 I am mindful that the Accused now expresses remorse for having committed the offence.⁵⁷ The Accused acknowledges in his mitigation plea that he has done wrong.⁵⁸

98 However, this must be balanced against the fact that no such remorse was forthcoming from him at the trial. On the contrary, as I have set out above, the Accused conducted his defence in an unnecessary and defiant manner and went one step further to cast scandalous aspersions against the Victim. Therefore, while he claims to be remorseful now, this expression of remorse only appears after he has been found guilty by this Court and is about to face punishment for his crimes. While I acknowledge his remorse, I must accord this remorse limited weight, and balance it against other factors in this case.

(3) The Accused's TIC Charge

99 The Accused has agreed for a third charge, *ie*, the TIC Charge, to be taken into consideration for the purposes of sentencing. The particulars of the TIC Charge are as follows:⁵⁹

That you, YAP POW FOO, at or around 12.31pm on 28 March 2017, in Singapore, did intentionally cause distress to [X], by

⁵⁷ Defence's Mitigation Plea at para 14.

⁵⁸ Defence's Mitigation Plea at para 15.

⁵⁹ Exhibit C3, 3rd Charge.

making an insulting communication, *to wit*, you sent [X] two photos of penises and a message “*Kns give u this*”, with the intent to cause distress to [X], and which did so cause her distress, and you have thereby committed an offence under section 3(1)(b) and punishable under section 3(2) of the Protection from Harassment Act (Cap 256A, 2015 Rev Ed).

100 The court in *Terence Ng* stated that charges which have been taken into consideration and which are of a similar nature to the proceeded charges would normally lead to a court increasing a sentence (at [64(a)]):

Offences taken into consideration for the purposes of sentencing (“TIC offences”): While a court is not bound to increase a sentence merely because there are TIC offences, it will normally do so where the TIC offences are of a similar nature (see [*Public Prosecutor v UI* [2008] 4 SLR(R) 500] at [38]).

101 In the present case, the TIC Charge is undeniably of a sexual nature, given that the Accused had harassed a different victim by sending her two photos of penises and a message. The offence forming the TIC Charge also occurred less than two months after the Accused raped the Victim. However, I am mindful that the TIC Charge is a charge under the Protection from Harassment Act (Cap 256A, 2015 Rev Ed) which makes it markedly different from the Rape Charge. Therefore, the presence of the TIC Charge should carry limited weight in my final decision on the appropriate sentence for the Rape Charge.

(4) The Defence’s submission that the Accused’s family will suffer exceptional hardship

102 The Defence has stated in its mitigation plea that the Accused’s family will suffer tremendous trauma and hardship if he is too harshly dealt with.⁶⁰

⁶⁰ Defence’s Mitigation Plea at para 17.

103 It is well settled law that, except in the most exceptional circumstances, hardship to the offender's family has very little, if any, mitigating value: *Lai Oei Mui Jenny v Public Prosecutor* [1993] 2 SLR(R) 406 at [11]; *Public Prosecutor v Yue Mun Yew Gary* [2013] 1 SLR 39 at [67]–[68].

104 The financial difficulties of the Accused's wife and the health issues of the Accused's elderly parents are not exceptional circumstances which carry any meaningful mitigating value. When the Accused committed the offences, he bore the risk that his conduct might eventually cause hardship to his family. This is nothing more than the inevitable result of the Accused's own conduct. He must, therefore, face the consequences of his conduct.

(5) The Prosecution's submission that the Accused's antecedents show a dramatic escalation from his previous sexual offending

105 I shall consider the Prosecution's submission that the Accused's antecedents show a dramatic escalation from his previous sexual offending.⁶¹ The Prosecution has adduced the Statements of Facts for the Accused's house-breaking by night offences in 2007 and the fraudulent possession of property offence in 2014.⁶² These offences were committed by the Accused to steal female underwear for his sexual gratification.⁶³ Thus, the present rape offence shows a dramatic escalation in the Accused's sexual offending.

⁶¹ Prosecution's Sentencing Submissions at para 33.

⁶² Prosecution's Sentencing Bundle of Documents and Authorities at Tabs 21 and 22.

⁶³ Prosecution's Sentencing Submissions at para 13.

The individual sentence that should be imposed on the Accused for the Rape Charge

106 In considering the appropriate sentence for the Rape Charge, I note that the Accused did not harm the Victim when she suddenly regained consciousness in the midst of the rape. As the Victim was still semi-conscious and defenceless, the Accused, who was in a dominant position, could have inflicted serious injuries on her if he had wanted to. Fortunately, the Accused abruptly stopped the rape and left the Unit when the Victim told him to leave. Having considered the offender-specific aggravating and mitigating factors at the second stage of the *Terence Ng* sentencing framework, the appropriate sentence for the Rape Charge is 13 years' imprisonment and 12 strokes of the cane.

The appropriate sentence for the House-breaking Charge

107 I shall now consider the appropriate sentence for the House-breaking Charge.

108 Looking at the Accused's antecedents, this is the Accused's ninth house-breaking by night offence.⁶⁴ Before the present offence, the Accused was convicted of five house-breaking by night offences, with three other house-breaking by night charges taken into consideration for the purposes of sentencing.

109 Further, as I have set out in the table at [49] above, the Accused previously received sentences of between 24 months' imprisonment and two strokes of the cane and four years' imprisonment for his past house-breaking by night offences. In his last set of house-breaking by night offences in 2007, the

⁶⁴ Prosecution's Sentencing Submissions at para 40.

highest individual sentence meted out on the Accused was three years' imprisonment and two strokes of the cane.

110 Despite being convicted multiple times for house-breaking by night offences, the Accused has not shown any commitment to refrain from reoffending. Therefore, it is necessary to deter the Accused and other would-be offenders from committing offences of house-breaking by night.

111 Further, the Accused's present offence of house-breaking by night was much more serious as he committed it for the purpose of committing a grave sexual offence of rape. If there was no house-breaking offence, there would not have been a rape. The Accused knew the severity of the punishment for house-breaking by night when he unlawfully entered the Unit as he had been previously punished for it. This did not deter him in any way. This serious escalation in the nature of the Accused's house-breaking by night offence cannot be ignored. However, I am mindful that the Accused has been convicted and is being sentenced separately for the Rape Charge.

112 In view of the foregoing, there must be a significant uplift in the sentence for the Accused's present offence forming the House-breaking Charge. Bearing in mind the sentences that have been imposed for the Accused's previous house-breaking by night offences, the appropriate sentence for the House-breaking Charge is four years' imprisonment and four strokes of the cane.

The aggregate sentence

113 Having determined the appropriate sentences in respect of each of the Charges, I shall determine a suitable aggregate sentence. In this regard, the general rule is that consecutive sentences should be ordered for unrelated offences, subject to the totality principle, the one-transaction rule, and any

statutory provisions that supersede the general rule (see *Public Prosecutor v Raveen Balakrishnan* [2018] 5 SLR 799 (“*Raveen*”) at [65]–[67]).

The one-transaction principle

114 The general rule, as stated in *Raveen* (at [54]), is that “sentences for unrelated offences should run consecutively, while sentences for related offences forming part of a single transaction should run concurrently”. Whether multiple offences form part of a single transaction depends on whether they form a “single invasion of the same legally protected interest” (*Raveen* at [39], citing D A Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2nd Ed, 1979) at p 53).

115 In the present case, the Prosecution submits that the sentences for the Rape Charge and the House-breaking Charge ought to run consecutively.⁶⁵ The Prosecution argues that different legally-protected interests were infringed upon by the Accused when he committed the offences of rape and house-breaking by night.⁶⁶ The Prosecution suggests a total sentence of 16 to 20 years’ imprisonment and 15 to 16 strokes of the cane, *ie*, 14 to 17 years’ imprisonment and 12 strokes of the cane for the Rape Charge and three to four years’ imprisonment and three to four strokes of the cane for the House-breaking Charge, after giving the sentencing discount.

116 Conversely, the Defence argues that the two offences were committed as part of the same criminal transaction.⁶⁷ Therefore, the Defence states that the two sentences ought to run concurrently, *ie*, 12 years’ imprisonment and six

⁶⁵ Prosecution’s Sentencing Submissions at paras 46 to 47.

⁶⁶ Prosecution’s Sentencing Submissions at para 47.

⁶⁷ Defence’s Mitigation Plea at paras 25 and 27.

strokes of the cane for the Rape Charge and three years' imprisonment and three strokes of the cane for the House-breaking Charge.

117 Therefore, the Defence seeks a total sentence of 12 years' imprisonment and six strokes of the cane.⁶⁸ I would like to pause here and mention that there is an error in the Defence's total sentence. The Defence urges the Court to order the imprisonment terms to run concurrently, *ie*, the total sentence of imprisonment would be 12 years' imprisonment. However, caning cannot be ordered to run concurrently.

118 In *Public Prosecutor v Chan Chuan and another* [1991] 1 SLR(R) 14 ("*Chan Chuan*"), Punch Coomaraswamy J stated (at [39]) that sentences of caning cannot be imposed as concurrent sentences. Coomaraswamy J further observed that the provisions in the then Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("CPC 1985") did not provide for such a possibility. He also placed emphasis on s 230 of the CPC 1985 which provided that:

When a person is convicted at one trial of any two or more distinct offences any two or more of which are legally punishable by caning the combined sentence of caning awarded by the court for any such offences shall not, anything in any Act to the contrary notwithstanding, exceed a total number of 24 strokes in the case of adults or 10 strokes in the case of youthful offenders.

119 In Coomaraswamy J's view (at [40]), "the sentences of caning are to be aggregated provided that, in the case of an adult, the maximum of 24 strokes is not exceeded".

120 The substance of s 230 of the CPC 1985 is now embodied in s 328 of the Criminal Procedure Code 2010 as follows:

⁶⁸ Defence's Mitigation Plea at para 31.

328.—(1) Despite any provision of this Code or any other law to the contrary, where an accused is sentenced at the same sitting for 2 or more offences punishable by caning (called in this section the relevant offences), the aggregate sentence of caning imposed by the court in respect of the relevant offences must not exceed the specified limit.

...

(6) In this section, the specified limit is 24 strokes in the case of an adult and 10 strokes in the case of a juvenile.

121 The position in *Chan Chuan* was affirmed by the Court of Appeal in *Yuen Ye Ming v Public Prosecutor* [2020] 2 SLR 970 (“*Yuen Ye Ming*”). In *Yuen Ye Ming* (at [26]), the Court of Appeal saw no need to revisit the position in *Chan Chuan*:

Against this backdrop of consistent and established jurisprudence, we see no reason to revisit the High Court decision in [*Public Prosecutor v Chan Chuan* [1991] 1 SLR(R) 14]. To reiterate the reasoning of the High Court in that case, if Parliament had intended to make available the power to impose concurrent sentences of caning, this power would have been provided for as in the case of imprisonment terms. This view has been reflected clearly and consistently in the courts’ sentencing practice and Parliament has not sought to change or to correct it by statutory amendment over these past decades although many major changes to the CPC have been made. Therefore, to invoke s 6 of the CPC for the purpose of introducing a non-statutory power relating to caning which Parliament has seen fit all these years not to incorporate into the CPC would be to contradict Parliament’s intention. The principle of proportionality must take reference from the legislative intent of Parliament. Where Parliament has expressed its intention clearly in the form of mandatory caning or a mandatory number of strokes while setting only the specified limit of 24 strokes for adult offenders in s 328 of the CPC, it is impermissible for the court to qualify or even to nullify such intention by the subtle use of non-statutory powers in a supposed quest for proportionality.

122 Therefore, though the Defence asks for the sentences of imprisonment for the Rape Charge and the House-breaking Charge to run concurrently, this would only affect the total imprisonment term and not the number of strokes of

the cane to be imposed on the Accused. Given the Defence's submissions on the appropriate sentences, the total sentence that the Defence is, in fact, seeking is 12 years' imprisonment and nine strokes of the cane.

123 I now return to the issue of the one-transaction principle. It is undeniable that the two different offences were temporally proximate. However, the focus must remain on the different legally-protected interests which were violated. The offence of rape and the offence of house-breaking by night infringed upon separate and distinct interests of the Victim. This was similarly the observation of the Court of Appeal in *Chang Kar Meng* (at [55] and [62]) when it dealt with an offender convicted of a charge of robbery with hurt as well as a charge of rape. The fact that the offences were proximate in time or involved the same victim carried little weight, in view of the fact that the offences led to different interests of the victim being infringed upon. The same principle must apply here.

124 Similarly, in *Muhammad Sutarno bin Nasir v Public Prosecutor* [2018] 2 SLR 647 ("*Sutarno*"), the Court of Appeal found that the offences of rape and house-breaking violated different legally-protected interests and should not be regarded as being part of a single transaction (at [22]):

Having determined the individual sentence for each charge, the next stage is for the court to consider whether they should run consecutively or concurrently. In our judgment, the Judge was correct in ordering all three sentences to run consecutively. First, s 307(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) provides that where a person is sentenced to imprisonment for at least three distinct offences, the court must order the sentences for at least two offences to run consecutively. Second, the possession charge relates to a separate transaction which took place about a month prior to the rape and house-breaking offences. Third, although the latter two offences were temporally proximate, the offences of rape and house-breaking violate different legally-protected interests and should not be regarded as being part of a single transaction: [*Chang Kar Meng v Public Prosecutor* [2017] 2 SLR

68] at [62]; *Mohamed [S]houffee bin Adam v PP* [2014] 2 SLR 998 (“*Shouffee*”) at [33]. Distinct offences should be punished separately with consecutive sentences so as to ensure that each legally-protected interest is properly vindicated. Otherwise, the imposition of concurrent sentences for unrelated offences would result in the perverse and unjust outcome of the offender not having to bear any real consequences for the further offending; [*Public Prosecutor v Raveen Balakrishnan* [2018] 5 SLR 799] at [41]–[46].

125 In view of the fact that the Accused’s two offences in the present case infringed separate and distinct interests of the Victim, the Court is unable to accept the Defence’s submission seeking for the sentences of imprisonment for the Rape Charge and the House-breaking Charge to run concurrently.

126 More significantly, however, the consequences of allowing the sentences for the Rape Charge and House-breaking Charge to run concurrently would be to marginalise the Accused’s house-breaking by night offence. This would mean that despite the Accused’s numerous house-breaking by night antecedents, he is only punished for the Rape Charge and he is not punished for the House-breaking Charge in terms of imprisonment. As was noted by the Court of Appeal in *Sutarno* (at [22]), the imposition of concurrent sentences would result in “the perverse and unjust outcome of the offender not having to bear any real consequences for the further offending”.

127 Therefore, the apposite punishment for the Accused is to order the sentences of imprisonment for the Rape Charge and the House-breaking Charge to run consecutively.

The totality principle

128 The totality principle requires that the Court first examine whether the aggregate sentence is substantially above the sentences normally meted out for the most serious of the individual sentences committed (see *Shouffee* at [54]).

The Court would then proceed to consider whether the effect of the sentence on the offender is crushing and not in keeping with his past record and his future prospects (see *Shouffee* at [57]).

129 To order the sentences for the Rape Charge and the House-breaking Charge to run consecutively would lead to a total sentence of 17 years' imprisonment and 16 strokes of the cane. In my view, this sentence cannot be said to be crushing or not in keeping with his past record and future prospects.

130 I highlight that the sentence imposed for the Rape Charge is already on the lower end of Band 2 of the *Terence Ng* sentencing framework. I would have imposed a sentence falling within the middle to higher end of Band 2 in view of the numerous aggravating factors. In *Ong Soon Heng*, the offender was untraced and claimed trial. There were only two offence-specific aggravating factors and no offender-specific aggravating factors. Despite this, the court in *Ong Soon Heng* imposed a sentence of 13 and a half years' imprisonment and 12 strokes of the cane.

131 In contrast to *Ong Soon Heng*, I have imposed a sentence which is on the lower end of Band 2, despite the fact that the present case featured additional offence-specific and offender-specific aggravating factors. Therefore, the total sentence of 17 years' imprisonment and 16 strokes of the cane cannot be said to be substantially above the sentences normally meted out for the most serious of the individual sentences committed.

132 Further, the Accused has multiple house-breaking by night antecedents. As I have elucidated above at [49]–[59], the Accused is a recalcitrant person and demonstrated a consistent pattern of reoffending. In ordering the sentences

to run consecutively, the total sentence cannot be said to be one which is not in keeping with his past record.

133 Finally, in view of the Accused's age and the severity of the Charges the total sentence is not crushing on the Accused.

Summary of findings on the sentences

134 In summary, my findings on the sentences are as follows:

(a) The sentence of 13 years' imprisonment and 12 strokes of the cane is appropriate for the Rape Charge. There are numerous offence-specific aggravating factors which make this offence falls within Band 2 of the *Terence Ng* sentencing framework. The Accused was an opportunist who had engaged in careful planning as soon as he spotted an opportunity to rape the Victim. The Accused also took advantage of the Victim who was vulnerable by virtue of her heavy intoxication. The rape had also caused lasting psychological harm to the Victim. The Accused also attempted to conceal his offence of rape from the police by offering to compensate the Victim. There are also a number of offender-specific aggravating factors. The Accused conducted his defence in an unnecessary manner and made scandalous allegations against the Victim. While he has expressed remorse in his mitigation plea, this remorse must be given little weight in view of his evident lack of remorse at the trial. The Accused had agreed for a third charge, *ie*, the TIC Charge, to be taken into consideration for the purposes of sentencing. In view of the offence-specific and offender-specific factors, a sentence of 13 years' imprisonment and 12 strokes of the cane is appropriate for the Rape Charge.

(b) The sentence of four years' imprisonment and four strokes of the cane is appropriate for the House-breaking Charge. This is the Accused's ninth house-breaking by night offence. The Accused had received sentences of between 24 months' imprisonment and two strokes of the cane and four years' imprisonment for his past house-breaking by night offences. Despite being convicted multiple times for house-breaking by night charges, the Accused has not shown any commitment to refrain from reoffending. There is a need to deter the Accused and would-be offenders from committing offences of house-breaking by night. The House-breaking Charge is egregious as it was committed to rape the Victim.

(c) The present case warrants the punishment for the Rape Charge and House-breaking Charge to run consecutively, *ie*, a total sentence of 17 years' imprisonment and 16 strokes of the cane. While the two offences were temporally proximate, the offence of rape and the offence of house-breaking by night infringed separate and distinct interests of the Victim. Conversely, to order the sentences to run concurrently, in light of the Accused's antecedents, would result in marginalising the severity of the Accused's crimes. This would be a perverse and unjust outcome.

(d) The total sentence of 17 years' imprisonment and 16 strokes of the cane cannot be said to be crushing or not in keeping with his past record and future prospects.

Conclusion

135 For all of the above reasons, I sentence the Accused to 17 years' imprisonment and 16 strokes of the cane.

Tan Siong Thye
Judge of the High Court

Chong Kee En and Susanna Yim (Attorney-General's Chambers) for
the Prosecution;
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