IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 286

Magistrate's Appeal No 9179 of 2015/01

Between

Ng Jun Xian

… *Appellant*

And

Public Prosecutor

… *Respondent*

Magistrate's Appeal No 9179 of 2015/02

Between

Public Prosecutor

… *Appellant*

And

Ng Jun Xian

… *Respondent*

GROUNDS OF DECISION

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Introduction

1 These were cross-appeals against the sentence imposed on the offender, Ng Jun Xian, for various offences, including an offence of sexually assaulting a 23-year old female by way of penetration under s 376(2)(*a*) punishable under s 376(3) of the Penal Code (Cap 224, 2008 Rev Ed) ("the sexual assault charge"). The offender appealed on the basis that a term of reformative training was more appropriate, while the Prosecution argued that the sentence of seven years' imprisonment and three strokes of the cane imposed by the learned District Judge for the sexual assault charge was manifestly inadequate and that a sentence of nine years' imprisonment and six strokes of the cane should have been meted out instead.

2 After hearing the parties' submissions, I dismissed the offender's appeal and allowed the Prosecution's appeal, enhancing the sentence for the sexual assault charge to eight years and six months' imprisonment and six strokes of the cane. I gave brief reasons orally for my decision at the hearing on 5 July 2016, and I now set out my full grounds so as to cover several issues that were raised in the course of the appeals.

Background

The charges

3 The offender pleaded guilty to the following three charges before the District Judge on 12 August 2015, a day before he turned 21 years old:

(a) the sexual assault charge;

(b) a charge of attempted rape under s 375(1)(*a*) punishable under s 375(2) and s 511 of the Penal Code ("the attempted rape charge"); and

(c) a charge of riotous behaviour under s 20 of the Miscellaneous Offences (Public Order and Nuisance) Act (Cap 184, 1997 Rev Ed) ("the riotous behaviour charge").

Additionally, the offender consented to two further charges being taken into consideration for the purpose of sentencing. These two charges were a charge of outrage of modesty under s 354(1) of the Penal Code ("the outrage of modesty charge") and a charge of voluntarily causing hurt under s 323 of the Penal Code ("the VCH charge"). All the charges except the riotous behaviour charge concerned the same victim.

4 The District Judge sentenced the offender to (a) seven years' imprisonment and three strokes of the cane for the sexual assault charge; (b) four years' imprisonment and three strokes of the cane for the attempted rape charge; and (c) two weeks' imprisonment for the riotous behaviour charge. The District Judge ordered the sentence for the sexual assault charge and the riotous behaviour charge to run consecutively, making the total sentence seven years and two weeks' imprisonment and six strokes of the cane. The appeals concerned only the sentence for the sexual assault charge.

The facts

5 The offender was 20 years old and was serving national service at the time of the offences, which took place in November 2014. He admitted to the Statement of Facts ("SOF") without qualification at the time he pleaded guilty.

6 According to the SOF, the victim is a 23-year old female from Taiwan. At the material time, she was a tourist on a social visit pass, and was in Singapore to visit her boyfriend.

7 The offender and the victim first met while they were drinking with their respective friends in a club located along Orchard Road ("the Club"). They exchanged telephone numbers. A few weeks later, on 8 November 2014, the offender sent the victim a text message sometime before 2.30am and asked to meet her at the Club. The victim agreed and proceeded to the Club to meet the offender and his friend, Ng Chee Ngee ("Ng").

8 The three of them had some drinks at the Club until about 4am, when the victim said that she wanted to return to the hostel that she was staying at. The offender offered to send her to a hotel instead so that she may rest there.

The victim initially hesitated but eventually obliged after the offender assured her that she would be left alone in the hotel room to sleep.

9 Thereafter, the victim, the offender and Ng left in a taxi for the hotel, located at Lavender Street. When they arrived at the hotel, the offender told Ng to wait at the lobby while he went up to the hotel room with the victim. When the offender and the victim reached the hotel room, the victim lay on the bed and asked the offender to leave because she wanted to rest. The offender did not leave, but tried to kiss her on the lips. The victim was shocked and bit his lip in response. The offender also touched the victim's buttocks twice, and pushed the victim onto the bed before forcefully taking off her brassiere and squeezing her left breast.

10 The victim put up a hard struggle and kept shouting "bu yao, bu yao, bie peng wo" in Mandarin, translated as "don't want, don't want, don't touch me". During the struggle, the victim also bit various parts of the offender's body. The victim's cries were heard by Ng, who proceeded to the hotel room after smoking outside the hotel. Ng repeatedly knocked on the room door and shouted the offender's name but there was no response from the offender.

11 The offender tried to cover the victim's mouth with his hand and sat on top of her in order to prevent her from escaping. Thereafter, he turned the victim's body around such that she lay face down on the bed. He continued his assault by grabbing her waist and forcefully pulling down her pants and panties, before using the index and middle fingers of his left hand to penetrate the victim's vagina two to three times. He then unzipped his jeans and attempted to insert his penis into the victim's vagina with a view to having non-consensual sexual intercourse with her. The victim felt the offender's

penis rubbing and thrusting towards the outside of her vagina from the back, but he did not successfully penetrate her with his penis.

12 The victim continued struggling and eventually managed to push the offender off the bed. As a result of the struggle, the victim suffered several bruises on her hands, face, arms and legs. After she broke free, she ran towards the door in an attempt to escape. The offender caught her before she managed to do so, and slapped her hard on her left cheek. The victim felt giddy, and was pushed onto the bed by the offender. They continued struggling until the victim managed to grab hold of a coffee cup and threw it at him.

13 Shortly after this, the offender stopped struggling with her and suddenly knelt down and apologised to her. The victim took this opportunity to escape after putting on her clothes. The hotel staff at the lobby saw the victim coming out of the lift alone and noticed that she was crying and that her face was red and swollen. That same morning, at about 8.29am, the victim lodged a police report about the incident. The offender was arrested later that day, and was charged with the sexual assault charge, the attempted rape charge, the outrage of modesty charge and the VCH charge.

14 The victim was examined at KK Women's and Children's Hospital on the same day, and was found to have sustained the following injuries:

(a) bruising over her left cheek;

(b) a chipped left front tooth;

(c) a 4-cm cut over her left upper arm;

(d) skin excoriation (chafing) on her fourth interphalangeal joint (her finger); and

(e) bluish discolouration on her shins and her left knee.

15 Two weeks later, on 22 November 2014, the offender was arrested for the riotous behaviour charge. The offender and some of his friends got into a fight with another group of patrons at about 12.10am while they were drinking at JD Pub, located at Golden Mile Complex. The offender behaved in a riotous manner by throwing a chair at one of his opponents and punching another person.

The proceedings below

16 The sexual assault charge and the attempted rape charge involved offences that are ordinarily triable in the High Court (pursuant to the First Schedule of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC")). The offender did not object to the Prosecution's application under s 9(3) of the CPC for the matter to be tried in the District Court.[1]

17 The offender pleaded guilty and was convicted of the charges on 12 August 2015, a day before he turned 21. He was thus still eligible for reformative training pursuant to s 305(1)(*a*) of the CPC. On the request of counsel for the offender and in spite of the Prosecution's objection, the District Judge called for a reformative training suitability report. The report that was eventually prepared by the prison authorities reflected that the offender was suitable for reformative training.[2]

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1 [5] of the Grounds of Decision.

2 Record of Proceedings ("ROP") Bundle at p 119.

The parties' submissions on sentence

18 The Prosecution submitted that reformative training was not an appropriate or sufficiently severe sentence given the nature of the offences and the need for deterrence. The Prosecution further highlighted the offender's pattern of criminality, pointing out that (a) the offender had reoffended and committed the riotous behaviour offence while on bail; and that (b) he had antecedents, one of which involved violence. The details of the offender's antecedents can be summarised as follows:

(a) Slightly more than four years before the present offences, in May 2010, the offender was convicted of a charge of robbery with common intention under s 392 read with s 34 of the Penal Code. A further charge of theft with common intention under s 379 read with s 34 of the Penal Code was taken into consideration for the purposes of sentencing. The offender was 15 years old then. He was sentenced to a term of 24 months' probation with conditions imposed.

(b) Slightly less than half a year before the present offences, in June 2014, the offender, who was then 19 years old, was convicted of a charge of cheating and dishonestly inducing the delivery of property under s 420 of the Penal Code and a further charge of dishonest misappropriation of the property of the Singapore Armed Forces ("SAF") under s 43(*a*) of the Singapore Armed Forces Act (Cap 295, 2000 Rev Ed). He was court-martialled and sentenced to four weeks' military detention for the offences.

19 For the above reasons, the Prosecution submitted that the court should impose the following sentences:

(a) four years' imprisonment and four strokes of the cane for the attempted rape charge;

(b) nine years' imprisonment and six strokes of the cane for the sexual assault charge; and

(c) two to three weeks' imprisonment for the riotous behaviour charge.

The Prosecution urged the court to order the sentences for the sexual assault charge and the riotous behaviour charge to run consecutively, and that for the attempted rape charge to run concurrently. Consequently, the total sentence would be nine years and two or three weeks' imprisonment and ten strokes of the cane.

20 Counsel for the offender urged the District Judge to impose a term of reformative training instead of imprisonment. Counsel emphasised that rehabilitation ought to be the paramount sentencing principle in the light of the offender's young age. Apart from this, counsel highlighted the background of the offender, and asked that the court accord mitigating weight to the following factors: (a) his early plea of guilt; (b) his willingness to cooperate with the police; (c) his genuine remorse; and (d) the fact that the offences were committed on the spur of the moment and were not premeditated.[3]

The District Judge's decision

21 The District Judge did not agree with counsel for the offender that reformative training was a suitable form of punishment. He found the nature and manner of the commission of the sexual assault and attempted rape

[3] Mitigation plea at ROP Bundle from p 185 onwards.

offences to be sufficiently serious and heinous, thus displacing rehabilitation as the dominant sentencing principle notwithstanding the offender's young age. In his view, a more deterrent form of punishment was warranted.[4]

22 As for the appropriate imprisonment term to be imposed, the District Judge found the precedents for the offence of attempted rape that were provided by the Prosecution to be broadly consonant with the facts before him. The sentences imposed in those precedents were generally in the range of four to six years' imprisonment and four to six strokes of the cane. The District Judge imposed a sentence of four years' imprisonment and three strokes of the cane for this offence.

23 The District Judge also accepted the Prosecution's submission in respect of the riotous behaviour charge and imposed a sentence of two weeks' imprisonment.

24 The District Judge did not, however, find the precedents provided by the Prosecution for the offence of sexual assault by penetration to be useful. He was of the view that they involved more aggravated circumstances and involved the more serious offence of *aggravated* sexual assault by penetration, which necessitated a mandatory sentence of eight years' imprisonment and 12 strokes of the cane (pursuant to s 376(4) of the Penal Code).[5]

25 The District Judge found a sentence in the region of six years' imprisonment with caning to be the appropriate starting point of the offence of sexual penetration under s 376(2)(*a*) of the Penal Code.[6] He derived this

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4 [19] and [24] of the Grounds of Decision.

5 [26] of the Grounds of Decision.

6 [56] of the Grounds of Decision.

starting point by calibrating the sentences imposed for aggravated sexual assault by penetration offences under s 376(4) of the Penal Code, which he noted were similar to "Category 1" penile rape offences (as defined in *Public Prosecutor v NF* [2006] 4 SLR(R) 849) and were in the region of ten years' imprisonment and 12 strokes of the cane.

26 After taking into account the specific circumstances of the case including the aggravating and mitigating factors, the District Judge concluded that the sentence should be higher than the starting point. He imposed a sentence of seven years' imprisonment and three strokes of the cane for the offence of sexual assault by penetration. He identified the following aggravating factors:[7]

> (a) the offender displayed planning and deception in the commission of the sexual offences, and had abused the victim's trust;
>
> (b) the offender continued and escalated his attack even when the victim was struggling and shouting and even after she bit him;
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> (c) the attack was persistent and perverse;
>
> (d) the attack necessarily caused the offender much fear, anguish and pain, both physically and emotionally; and
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> (e) the offender displayed scant regard for law and order by committing the present offences in spite of his previous brushes with the law and having previously undergone probation and military detention, and by committing the riotous behaviour offence while on bail.

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7 [42] to [49] of the Grounds of Decision.

The District Judge was also concerned that the offender did not accept full responsibility for the offences and instead sought to attribute blame to the victim.[8] He noted that this had been set out in a section in the reformative training suitability report. The District Judge was of the view that the offender's cavalier and defiant stance did not show a demonstrably high capacity for reform but was instead suggestive of a higher risk of reoffending.

27 As for mitigating factors, the District Judge took into account the fact that offender had pleaded guilty and that he was remorseful. In particular, the District Judge accorded mitigating weight to his sudden and unexpected act of kneeling before the victim and apologising to her after the sexual assault while they were in the hotel room (see [13] above), noting that he must have known that this would give her a chance to escape.

28 The District Judge determined that the sentences for the sexual assault charge and the riotous behaviour charge should run consecutively. The total sentence imposed was thus seven years and two weeks' imprisonment and six strokes of the cane.

Arguments on appeal

29 Both the Prosecution and the offender filed appeals against sentence, being dissatisfied with the District Judge's decision. The focus of the appeals was the sexual assault charge.

The offender's appeal

30 The offender argued that the District Judge was wrong to have imposed a custodial term for the offences and should have ordered him to

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8 [40] of the Grounds of Decision.

undergo reformative training. He raised the following arguments in support of his appeal:

(a) The District Judge erred in rejecting, or failing to give due consideration to, the recommendation in the reformative training suitability report that the offender was suitable for reformative training.[9]

(b) The District Judge erred in failing to give due consideration to the provision in s 305 of the CPC (which governs the sentence of reformative training) and to the relevant authorities that set out the approach towards sentencing young offenders.[10] His argument, in short, was that the District Judge had given insufficient weight to rehabilitation as a sentencing consideration.

(c) The District Judge erred in accepting the unsupported allegations and assumptions put forward by the Prosecution, which were not in the SOF. In particular, the offender argued that the District Judge should not have accepted the Prosecution's submission on the severity of the psychological impact suffered by the victim as this was not substantiated by a victim impact statement.[11]

(d) The District Judge erred in taking into account the offender's previous brush with the law when he was 15 years old (see [18(a)] above) as a previous "conviction" when s 11(1) of the Probation of Offenders Act (Cap 252, 1985 Rev Ed) provides that such a record "shall be deemed not to be a conviction for any purpose".[12] The

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9 Appellant's skeletal arguments at p 28.

10 Appellant's skeletal arguments at p 41.

11 Appellant's skeletal arguments at paras 142 and 149.

12 Appellant's skeletal arguments at para 151.

> offender submitted that this was prejudicial to him as it was relied on to portray him as a person who was not only prone to violence but also without any prospect of rehabilitation.[13]

31 Additionally, there were suggestions embedded in the offender's submissions that the victim was "not just an ordinary 'tourist'" who was visiting Singapore for an innocuous purpose, but was in fact a hostess at the Club where they met.[14] Further, there were also insinuations in the offender's submissions that the victim might have led him on by giving him "mixed signals", causing him to think that she liked him.[15]

The Prosecution's appeal

32 The Prosecution's appeal was narrower, and pertained only to the sentence for the sexual assault charge. The Prosecution took the position that the District Judge had correctly found that reformative training was not an appropriate sentence, but had erred in imposing a sentence that was manifestly inadequate in respect of the sexual assault charge.

33 The Prosecution submitted that in view of the serious and aggravated nature of the offence of sexual assault, and the absence of mitigating factors, a sentence of around nine years' imprisonment and six strokes of the cane was appropriate.[16] It made the following further arguments in support of its submission:

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13 Appellant's skeletal arguments at para 162.

14 Appellant's skeletal arguments at paras 20, 47 and 169.

15 Appellant's skeletal arguments at para 49.

16 Prosecution's submissions at para 6(d).

(a) The District Judge erred in concluding that the starting point of the sexual assault charge is six years' imprisonment with caning.[17] The Prosecution submitted that digital-vaginal penetration is, broadly speaking, an offence that is analogous to rape as both involve the non-consensual penetration of the victim's vagina and the greatest level of intrusion possible into the victim's bodily integrity and privacy. The respective sentencing benchmarks should therefore be largely similar. The Prosecution submitted that the appropriate starting point ought to have been eight years' imprisonment and six strokes of the cane.

(b) The District Judge erred in according mitigating value to the offender's plea of guilt and in extending a discount to his supposed remorse.[18] The Prosecution submitted that the offender had not shown any genuine remorse and that his act of kneeling before the victim and apologising was not a show of remorse but was "engineered to enhance the possibility that the victim would not file a police report".[19]

My decision

34 After hearing submissions from the parties, I allowed the Prosecution's appeal and enhanced the sentence for the sexual assault charge. I shall first set out my reasons for dismissing the offender's appeal before explaining why I concluded that a sentence of eight years and six months' imprisonment and six strokes of the cane was the appropriate sentence for the offence.

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17 Prosecution's submissions at paras 6(a) and (b).

18 Prosecution's submissions at para 6(c).

19 Prosecution's submissions at para 74.

Reformative training was not appropriate

35 At its core, the key plank of the offender's case was this – rehabilitation was the paramount consideration in the light of the offender's youth and thus the court should sentence him to reformative training instead of a custodial term.

Rehabilitation was not the only or main sentencing consideration

36 There can be no dispute that rehabilitation is an important consideration in the sentencing of young offenders. But as observed by Sundaresh Menon CJ in *Public Prosecutor v Koh Wen Jie Boaz* [2016] 1 SLR 334 ("*Boaz Koh*") at [30], rehabilitation is neither a singular nor unyielding consideration, and can be diminished or even eclipsed by other considerations such as deterrence or retribution where the circumstances of the case warrant it. Menon CJ further observed that this would, broadly speaking, be justified in cases where (a) the offence is serious; (b) the harm caused is severe; (c) the offender is hardened and recalcitrant; or (d) conditions do not exist to make rehabilitative sentencing options such as probation or reformative training viable.

37 The present case was clearly such an instance. In the light of the severity and the nature of the offences and the harm perpetrated on the victim, the District Judge was correct to have found that rehabilitation was no longer the core sentencing consideration. There was no basis for the offender to argue that the District Judge had erred in failing to give due consideration to s 305 of the CPC or to the relevant authorities that set out the approach towards sentencing young offenders. The approach adopted by the District Judge was correct and in line with the relevant authorities.

The offence involved a serious and violent sexual assault

38 There was no doubt that this was a serious offence, and the offender (rightly) did not seek to suggest otherwise.[20] The sexual assault was serious, violent and prolonged. It involved the offender sitting atop the victim to prevent her from escaping, forcibly pulling down her pants and panties, inserting his fingers into her vagina and attempting to penetrate her with his penis. Even after the victim managed to break free and attempted to escape, the offender chased after her and slapped her hard on the cheek before pushing her back to the bed and attempting to violate her again. Throughout the attack, the victim was struggling and shouting for help. She even resorted to biting the offender to break free, and yet he did not relent in his assault.

39 The principles set out in cases such as *Boaz Koh* pertaining to the sentencing of young offenders are clear. The offences in the present case were of such a severity that rehabilitation had to give way as a sentencing consideration to deterrence. In *Mohd Noran v Public Prosecutor* [1991] 2 SLR(R) 867 ("*Mohd Noran*"), the Court of Appeal observed that as a general rule, neither probation nor reformative training is suitable in cases of rape as it is one of the most serious offences under the Penal Code. The court held that where the offender is of mature age and understanding, he should be given a custodial sentence unless exceptional circumstances are present. These observations have been amplified in subsequent cases such as *Boaz Koh* and *Public Prosecutor v Mohammad Al-Ansari bin Basri* [2008] 1 SLR(R) 449. Although the offender was not convicted of a *rape* charge, the observations in *Mohd Noran* were still relevant and applicable given that the offender had sexually assaulted the victim with his fingers and had attempted to rape her. His attempt was only thwarted because the victim fought back with tenacity. I

[20] Appellant's skeletal arguments at para 98.

found no compelling reasons to justify the imposition of anything less than a substantial custodial sentence in the present case.

40 Regrettably, at various parts of his submissions, counsel for the offender tried to shift some blame on the victim in order to downplay the offender's culpability. He argued that this was not a case of an accused "accosting a total stranger whom he met on the streets, or who attacked her while she was in the hotel room";[21] instead, the victim had acceded to the offender's request to meet him at the Club in the early hours of the morning "on account of their friendship".[22] He further pointed out that the victim had given the offender "mixed signals"[23] and had "agreed to accompany [him] to the hotel, instead of returning to her hostel" and argued that this was a fact that "should not be understated".[24] There was also some suggestion that she was "not just an ordinary 'tourist'" who was in Singapore for the innocuous purpose of visiting her boyfriend as she had claimed but was in fact working as a hostess in the Club (see [31] above).

41 I found these to be obvious insinuations that the victim was a woman of questionable morals who had somehow led the offender on and caused him to think that she liked him. Collectively, they were a barely-disguised attempt to shift at least part of the blame to the victim. To make things worse, these insinuations were factually inaccurate and hence without basis. The offender's portrayal of the facts was clearly inconsistent with what was set out in the SOF which he had admitted to. The relevant paragraphs of the SOF (paragraphs 5 to 11) detailed that the victim had agreed to meet the offender *and Ng* and that

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21 Appellant's skeletal arguments at para 43.

22 Appellant's skeletal arguments at para 42.

23 Appellant's skeletal arguments at para 49.

24 Appellant's skeletal arguments at para 43.

all three of them had drinks before proceeding to the hotel. However, in the offender's submissions, any reference to Ng's presence was glaringly omitted – the omission was so plainly obvious that it could not have been inadvertent. It was also clear from the SOF that the victim had originally wanted to return to her hostel and that it was the offender who had persuaded her to go to the hotel. The victim agreed only after she was assured that she would be left alone to rest, and she must have thought that Ng would be present throughout. I could not discern any provocative "signal" from the victim, let alone anything resembling a sexual overture, from these admitted facts.

42 With respect, it was singularly unhelpful and unnecessary for the offender and his counsel to portray what were ironically termed by them as "objective facts" in a selective and misleading manner before making a vague assertion that "there [were] questions which [could not] be answered". [25] For that matter, even if I accepted the offender's account, it was irrelevant whether the victim was a hostess or whether she had agreed to go on a date with the offender. Neither of these aspects would have mitigated or justified his conduct. The offender had admitted that all the acts in question had been perpetrated without the victim's consent and with the use of considerable force against her will. In fact, it would appear that there was some degree of premeditation and planning on his part; at the very least, he had sought to set the stage by sending the victim to the hotel despite her initial reluctance and he took the opportunity when it presented itself to commit the sexual assault.

43 Having regard to the offensive nature of the submissions made, I am compelled to remind counsel to refrain from making baseless submissions that disparage the character, integrity or morality of a victim in an attempt to shift

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[25] Appellant's skeletal arguments at para 104.

blame to the latter. Menon CJ issued a similar reminder in *Public Prosecutor v Ong Jack Hong* [2016] 5 SLR 166 at [23], where he observed that such submissions are seldom helpful in the context of sexual offences and that counsel, as officers of the court, should always be mindful of the importance of ensuring the appropriateness and relevance of the submission that he or she is making, especially where such a submission impugns the character or integrity of a person who is not only not on trial but is in fact the victim. I will also add that such submissions will often be a disservice to the accused, especially one who has pleaded guilty and accepted that he has committed an offence, because they invariably reflect a startling lack of remorse and insight into his behaviour.

Harm caused to the victim

44 The severity of the offences was in itself sufficient basis to conclude that reformative training was an unsuitable form of punishment. The harm that was caused to the victim—this being the second category of cases set out in *Boaz Koh* where rehabilitation may recede into the background—was further basis for such a finding.

45 The offender attempted to argue that the harm suffered by the victim was not as serious as suggested by the Prosecution. He did so by first submitting that given the absence of a victim impact statement, the harm suffered by the victim, *if any*, must have been minimal and it would be dangerous to speculate on its magnitude.[26] It was also correspondingly submitted that the Prosecution cannot seek to augment the SOF and introduce new facts, such as the harm or trauma suffered by the victim, through its sentencing submissions. Further, he also thought it necessary to highlight that

[26] Appellant's skeletal arguments at paras 99 and 102.

the medical report reflected that the victim "appeared calm" throughout her medical examination after the sexual assault and that the victim had been sexually active since a relatively young age and last had sexual intercourse not long before the incident.[27] It was even pointed out that the victim was five years older than the offender.

46 I found neither of these submissions persuasive or helpful. The CPC, specifically s 228(2)(*b*), provides that the Prosecution may address the court on sentence and such an address *may* include reference to a victim impact statement. But this in no way means that the Prosecution is precluded from submitting that the victim had suffered psychological and physical trauma if a victim impact statement had not been tendered. Contrary to the suggestion made by counsel for the offender, the tendering of a victim impact statement or the use of it to prove that harm was occasioned is not a prerequisite in the "normal course" of the proceedings. As pointed out by the Prosecution, if it were asserting that particularly unique psychological trauma or harm had been occasioned, it bore the burden of proving this and one way of doing so might be to tender a victim impact statement.[28] But this did not mean that the Prosecution is obliged in all cases to tender such a statement before it could submit that *harm*—of any extent or form—was occasioned. It certainly need not do so where the harm in question is a natural consequence of the offence.

47 The objective and undisputed facts in the present case were sufficient to support the Prosecution's submission that the victim suffered psychological and physical trauma. There was plainly no basis to suggest, as the offender sought to do, that the victim was not traumatised or that her injuries were "relatively minor".[29] The SOF itself stated that the victim was crying and that

[27] Appellant's skeletal arguments at paras 100 and 101.

[28] Prosecution's submissions at para 54(a).

her face was red and swollen as she escaped from the hotel. She shouted, struggled and resisted when the offender forced himself on her. Her cries were so loud that they could be heard by Ng outside the room. Given the sexual assault that she was put through and the extent to which she struggled and fought back, there could be no doubt that she must have been in fear and shock. The physical injuries that she suffered (see [14] above), which included bruising, a 4-cm cut on her left upper arm and a chipped front tooth, were also serious by any objective standard.

48 There was also no merit to the related argument made by counsel for the offender that the Prosecution should not be allowed to augment the SOF and introduce fresh facts at the sentencing stage. It is uncontroversial that sentencing submissions by the Prosecution following a plea of guilty are dependent on and circumscribed by the facts contained within the SOF. The sentencing stage is not an opportunity for the Prosecution to introduce new facts or details that may potentially be contested and have not been admitted by the offender. But this does not preclude the Prosecution (or the defence) from making submissions at the sentencing stage to invite the court to draw *suitable and reasonable inferences* from the facts which have been set out in the SOF. This is consistent with my observations in *Public Prosecutor v Development 26 Pte Ltd* [2015] 1 SLR 309 and those of Chan Seng Onn J in *Public Prosecutor v Andrew Koh Weiwen* [2016] SGHC 103. What the Prosecution sought to do in the present case was therefore permissible and unexceptionable.

49 I also found it wholly unnecessary for counsel for the offender to specifically highlight that the victim was older, was a hostess, was sexually

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[29] Appellant's skeletal response at para 58.

experienced or that she was calm when she was examined by the doctor. These insinuations were ultimately targeted at suggesting that the sexual assault that took place was somehow "excusable" or less grave on account of the fact that the victim was older, sexually active, or that minimal harm had arisen from the sexual assault. As I emphasised at [43] above, such insinuations or aspersions were aimed at attacking the victim's character; they were wholly unhelpful and indeed were, as submitted by the Prosecution, offensive and deplorable. Again, these did not diminish the offender's culpability; to the contrary, they result in the conclusion that he was not genuinely remorseful.

The offender was not suited for reformative training

50 I agreed with the Prosecution and the District Judge that in the light of the offender's antecedents and the lack of remorse and insight to his behaviour that he had shown in the course of these proceedings, reformative training was not a suitable punishment.

51 On the issue of antecedents, counsel for the offender sought to argue that the offender's previous brush with the law when he was 15 years old should not be taken into account as it was not to be regarded as a previous "conviction" pursuant to the Probation of Offenders Act.[30] He argued that the District Judge had erred in taking this into account and that the offender was thus prejudiced. I found this argument unpersuasive. It is true that this antecedent was not a conviction as a matter of law. But all that was relevant for the purposes of the appeal on sentence was that this was not the first time the offender had a run-in with the law (see [18] above). When he was 15 years old, he committed robbery and theft and was sentenced to probation. He re-offended again when he was 19 years old, and was sentenced to detention for

[30] Appellant's skeletal arguments at para 151.

cheating and dishonestly inducing the delivery of property and dishonestly misappropriating property belonging to the SAF. It was further aggravating that the offender committed the riotous behaviour offence a mere two weeks after he was released on bail for the first set of offences.

52 As I have observed above, the offender had displayed a startling lack of remorse and insight into his behaviour in the course of these proceedings, by seeking to blame the victim, casting aspersions and making insinuations about her character. This was also borne out by an observation made in the reformative training suitability report under the section "Attitude/Orientation", which was worded as follows:[31]

> Although [the offender] was cogni[s]ant that his actions were "wrong" and he had hurt his victim psychologically, he did not take full responsibility for his actions and attributed blame to the victim for asking him to stay with her and attacking (biting) him first when he refused.

53 Counsel for the offender took issue with the District Judge's finding in this regard and argued that the court should accord due deference to the "recommendation" in the reformative training suitability report that the offender was "suitable" for reformative training because this was made by an institutional specialist (*ie*, a correctional rehabilitation specialist from the prison authorities).[32]

54 This argument called into question the purpose or effect of a reformative training suitability report and the conclusion contained therein. Counsel's use of the word "recommendation" was imprecise and potentially misleading. A reformative training suitability report does not contain a positive "recommendation" for an offender to undergo reformative training.

[31] ROP Bundle at p 124.

[32] Appellant's skeletal arguments at p 28.

As set out in s 305(3) of the CPC, such a report, which has to be obtained before the court imposes any sentence of reformative training, merely addresses "the offender's physical and mental condition and his suitability for the sentence". This provision does not confer any mandate for the prison authorities to make any "recommendation" as to whether an offender ought to be sentenced to reformative training as opposed to other forms of punishment. It would perhaps be more accurate to say that such a report is meant to reflect whether an offender is physically and mentally fit, and in that sense suitable, for reformative training. In any event, it certainly cannot be that in each case where the reformative training suitability report states that an offender is suitable for reformative training, the court will simply follow suit and mete out that sentence even if it thinks that probation or a custodial term is more suitable. The sentencing judge retains full discretion to decide whether an offender should be sentenced to reformative training or to other forms of punishment, and he must apply his mind based on all the information and facts before him in each case.

Conclusion – reformative training was not appropriate

55 For the above reasons, I dismissed the offender's appeal and upheld the District Judge's decision that reformative training was not an appropriate sentence.

The sentence was manifestly inadequate

56 In this next section, I set out my reasons for allowing the Prosecution's appeal and enhancing the sentence for the sexual assault charge from that of seven years' imprisonment and three strokes of the cane to eight years and six months' imprisonment and six strokes of the cane.

Whether the sentences for digital penetration and rape should be equated

57 I begin with the Prosecution's submission that digital penetration is akin to rape as both offences involve the non-consensual penetration of the victim's vagina, and similarly grave intrusions into the bodily integrity and the privacy of the victim.[33] The Prosecution argued that even accounting for any minor sentencing discount that may be given for digital penetration in view of the lack of likelihood of transmission of diseases when contrasted with other forms of penetrative sexual offences, the sentencing norms for digital penetration ought to, broadly speaking, be aligned to those for rape.[34] The Prosecution raised three points in support of this submission.

58 First, the Prosecution submitted that this was supported by a reading of the cases. In this regard, it highlighted that in the High Court decision of *AQW v Public Prosecutor* [2015] 4 SLR 150, Menon CJ did not articulate any distinction between penile penetration and other forms of penetration such as digital penetration in observing that penetrative sexual activity as a whole represents the greatest intrusion into the bodily integrity and privacy of the victim (in that case a minor). Additionally, the Prosecution highlighted the case of *Public Prosecutor v Azuar bin Ahamad* [2014] SGHC 149 ("*Azuar*"), where the offender, who was a serial rapist, had pleaded guilty to three charges of rape and one charge of sexual assault by penetration (specifically, digital penetration was committed).[35] 29 other charges were taken into consideration. The Prosecution pointed out that in sentencing the offender to 12 years and six months' imprisonment and 12 strokes of the cane for each of

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33 Prosecution's submissions at para 90.

34 Prosecution's submissions at para 90.

35 Prosecution's submissions at para 95.

the charges, Chan Seng Onn J did not draw a distinction between the offences involving penile penetration and the offence involving digital penetration.

59 Second, the Prosecution contended that this was also supported by the statutory framework of the two provisions, as the scheme of prescribed punishments in s 375 of the Penal Code (which pertained to rape) and s 376 (which pertained to sexual assault by penetration) reflected that Parliament must have viewed these two offences as being of broadly similar severity.[36] For one, the statutorily stipulated punishments for both offences were the same, with 20 years' imprisonment being the maximum imprisonment. Further, the *aggravated* forms of each offence were also a parallel of each other, requiring the same predicate facts and entailing the same minimum and maximum punishments: ss 375(3)(*b*) and 376(4)(*b*) of the Penal Code. The Prosecution further submitted that this was also apparent from the Explanatory Statement to the Penal Code (Amendment) Bill (Bill No 38 of 2007), which stated that s 376 (which was introduced into the Penal Code pursuant to this bill) also provided for "an enhanced penalty for aggravated forms of sexual assault by penetration *which is analogous to aggravated forms of rape*" [emphasis added].

60 Third, the Prosecution highlighted that this approach was very much in line with the attitudes and jurisprudential approaches taken in other jurisdictions, in particular, in the United Kingdom ("the UK") and Australia.[37] It pointed out that in Australia, the courts of New South Wales have, in recent times, made plain that one should eschew the suggestion that the objective seriousness of the two offences can be categorised such that rape is the more severe offence compared to sexual assault by penetration. The following

[36] Prosecution's submissions at para 93.

[37] Prosecution's submissions at para 97.

observations of the New South Wales Court of Criminal Appeal in *R v AJP* [2004] NSWCCA 434 (at [24] and [25]) were highlighted:

> It is not possible to create some kind of hierarchy of the seriousness of the various kinds of sexual intercourse contemplated by [the offence] … It is the facts and circumstances of each case, including the nature of the intercourse that enables the proper evaluation of objective seriousness …
>
> …
>
> Other appropriate areas of inquiry in the consideration of the objective seriousness of [such an offence] are, for example, how the offences took place, over what period of time, with what degree of force or coercion, the use of threats or pressure before or after the offence to ensure the victim's compliance with the demands made, and subsequent silence, and any immediately apparent effect on the victim.

The Prosecution also relied on the following observations by the court in *R v Hibberd* [2009] NSWCCA 20 (at [19], [20] and [21]):

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

> offence is wholly dependent on the facts and circumstances of the particular case … any resort to prima facie assertions that one form of penetration is likely to be or generally will be more serious than another, is to be avoided. It can, in my view, only lead a sentencing judge to erroneously attribute more weight to the general proposition or assumption than the particular facts of the case.

Relying on these observations, the Prosecution submitted that neither offence should be taken to be less or more serious than the other, and the sentencing framework should therefore reflect that.[38]

61 The Prosecution further highlighted that the UK had also, in recent times, noted the need for the two offences to be viewed as being similar to each other, as it would be a misconception to assume that one offence ranks above the other in some hierarchy of severity.[39] This, it argued, was the position taken in the consultation paper published by the UK Sentencing Council on 6 December 2012, which noted, among other things, that "the means of penetration, whether it be penile, another body part or object, may not in every case make a difference *to the victim* as the violation incurred by the penetration is as severe" [emphasis added].[40]

62 At first glance, the Prosecution's position was slightly ambiguous, or even inconsistent. This was because while its arguments as set out above *appeared* to have been advanced to convince the court that the benchmarks—or at least the starting sentences—for rape and digital penetration should be *equated* because the two offences are akin to each other, it went on in the next section to submit that the appropriate starting point for an offence of digital

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38 Prosecution's submissions at para 98.

39 Prosecution's submissions at para 101.

40 Prosecution's submissions at para 102; UK Sentencing Council, Sexual Offences Guideline Consultation (published on 6 December 2012) at p 31 (Tab 28 of Prosecution's Bundle of Authorities).

penetration should be eight years' imprisonment and six strokes of the cane (and not ten years' imprisonment and six strokes of the cane, which was the starting point for a rape charge). Looking at its submissions as a whole, the Prosecution's point was *not* that the sentencing benchmarks of the two offences should be equated but that the sentences for the offence of digital penetration should be closer (and in appropriate cases, higher) than those for the offence of rape. Thus, the courts should be slow to assume that the former is always a less severe offence than the latter. Insofar as this was what the Prosecution was submitting in terms of principle, I agreed with it.

63 It would appear, however, that the High Court might have gone a step further in *Public Prosecutor v Pram Nair* [2016] 5 SLR 1169 ("*Pram Nair*")—which was decided after I gave judgment in the present case and which had in fact made reference to this case—and held that there is no reason for any marked differentiation between the benchmark sentences for the two offences (at [56]). The High Court came to this view for two main reasons:

> (a) First, the court found there to be little, if any, difference between the emotional scars that are experienced by victims of sexual assault by penetration and those of rape (at [56]). The court found the act of inserting one's finger to the vagina of the victim to be similar to that of inserting one's penis, as both were certainly a grave violation of the victim. While the court recognised that there are risks of pregnancy and of contracting sexually-transmitted diseases in the case of rape, it doubted that such risks should give rise to a difference between the benchmark sentences of the two.

(b) Second, the court was of the view that the structure of ss 375 and 376 of the Penal Code suggested that both offences were considered by Parliament to be of the same severity (at [57]).

This led the High Court to impose the same punishment (which in that case was 12 years' imprisonment and six strokes of the cane) on the accused for the offence of digital penetration as had been imposed for the offence of rape. Both offences had been committed in the same transaction.

64 *If*, and insofar as, the holding in *Pram Nair* was that the benchmark sentences or the starting point for the offences of rape and digital penetration should be *equated*, I would respectfully disagree with the learned judge. I am in full agreement with the Prosecution's submission as summarised at [62] above that the court must be slow to assume that the offence of digital penetration is always less severe than that of rape and thus attracting a lower sentence. The harm and consequences of digital penetration cannot be underestimated or understated. It represents a very serious violation of the bodily integrity and privacy of the victim, and is undoubtedly an act deserving of severe punishment. I also agree that the punishment for an offence of digital penetration *simpliciter* (*ie*, without aggravating factors) should be closer to that of rape *simpliciter* (*ie*, Category 1 rape). But I would not agree that the starting points for the two should be the same.

65 While it is true that s 375 (pertaining to the offence of rape) and s 376 (pertaining to the offence of sexual assault by penetration) of the Penal Code have identical sentencing structures, it must be borne in mind that s 376 covers not only digital penetration but other forms of sexual assault by penetration, both by the accused as well as by another person where the accused had caused the act. For instance, s 376(1) deals with non-consensual penis-mouth

and penis-anus penetration by the accused as well as another person where the act is caused by the accused, and s 376(2)(*a*) covers a situation where someone uses a body part other than the penis to commit penetration of the victim's vagina or anus. With respect, it cannot therefore be concluded that the sentences for rape and *digital* penetration (as opposed to other forms of sexual assault by penetration) *must* be equated simply because the sentencing schemes for the two offence provisions are identical.

66 The approach taken by the court in *Pram Nair* and *Azuar* (see [58] above), where identical sentences were meted out for the offences of rape and digital penetration, may also be explicable due to the fact that both categories of offences were committed in the same transaction in both cases and thus the court may have formed the view that the sentences should not be differentiated. But on the facts of the present case, I did not think that it was appropriate to deal with the offender *as if* he had committed the offence of rape and apply the starting point for sentencing of a Category 1 rape offence in deriving the sentence for the sexual assault charge.

The appropriate sentence

67 I agreed with the Prosecution that the District Judge's starting point of six years' imprisonment with caning was too low, and that an appropriate starting point for an offence of digital penetration was in the region of eight years' imprisonment and six strokes of the cane.

68 The Prosecution contended that given the aggravating factors present in this case (*ie*, element of premeditation, violent and prolonged assault, lack of remorse or insight in the course of proceedings, the offensive insinuations and allegations made by the offender against the victim, the presence of other

charges taken into consideration, which have been articulated in the earlier section in which I dealt with the offender's appeal), the appropriate sentence ought to be higher than the starting point. It submitted that nine years' imprisonment and six strokes of the cane was appropriate.[41] Further, the Prosecution submitted that the District Judge had erred in according mitigating weight to the offender's act of kneeling before the victim and apologising to her at the end of the assault. It submitted that this was not a genuine show of remorse but was simply prompted by a fear of the consequences of his actions.[42]

69 While I agreed with the Prosecution that there were various aggravating factors, I did not agree with its submission in respect of the "kneeling apology". Like the District Judge, I viewed this as a genuine indication of his spontaneous remorse, and did not agree that it was "engineered" in the hope that the victim would not file a police report. His apology was also accompanied by a measure of self-restraint. He desisted from further violating the victim and she was then able to put on her clothes and leave the hotel room. But having said that, I agreed with the Prosecution that apart from this single act that occurred shortly after the assault, there were no other clear indicators of genuine remorse. Indeed, as I have pointed out above, the manner in which he had strenuously attempted to downplay the seriousness of his conduct suggested otherwise.

70 Looking at the circumstances of the assault as a whole, I was of the view that a sentence of eight years and six months' imprisonment and six strokes of the cane was a more carefully calibrated and appropriate sentence for the sexual assault charge.

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41 Prosecution's submissions at para 111.

42 Prosecution's submission at paras 113 and 114.

Conclusion

71 For the reasons above, I dismissed the offender's appeal and allowed the Prosecution's appeal. The sentence for the sexual assault charge was enhanced to eight years and six months' imprisonment and six strokes of the cane. With the relevant sentences imposed by the District Judge for the attempted rape charge (which was to run concurrently) and the riotous behaviour charge (which was to run consecutively), the total sentence was therefore eight years, six months and two weeks' imprisonment, and nine strokes of the cane.

See Kee Oon
Judicial Commissioner

A Rajandran (M/s A Rajandran) and Tan Gee Tuan (M/s Gee Tuan Tan) for the appellant in MA 9179/2015/01 and the respondent in MA 9179/2015/02;
Mohamed Faizal and James Chew (Attorney-General's Chambers) for the respondent in MA 9179/2015/01 and the appellant in MA 9179/2015/02.