

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

**[2016] SGHC 136**

Criminal Case No 45 of 2015

Between

Public Prosecutor

And

Pram Nair

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**JUDGMENT**

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[Criminal Law] — [Offences] — [Rape]

## TABLE OF CONTENTS

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<b>THE CHARGES.....</b>	<b>1</b>
<b>BACKGROUND .....</b>	<b>2</b>
<b>THE ISSUES.....</b>	<b>5</b>
<b>THE CASE FOR THE PROSECUTION AND FOR THE DEFENCE.....</b>	<b>6</b>
<b>THE ANCILLARY HEARING .....</b>	<b>6</b>
THE 7 MAY STATEMENT .....	7
<i>The accused's version of events .....</i>	<i>8</i>
<i>The Prosecution's version of events.....</i>	<i>11</i>
THE 21 MAY STATEMENT .....	13
<i>The accused's version of events .....</i>	<i>13</i>
<i>The Prosecution's version of events.....</i>	<i>15</i>
WHETHER THE ACCUSED HAD COMPLAINED OR MENTIONED ABOUT SSSGT TAY'S ALLEGED MISCONDUCT ON 7 AND 21 MAY 2012 .....	15
THE COURT'S CONCLUSION ON THE ANCILLARY HEARING .....	17
<b>WHETHER THE ACCUSED PENETRATED THE VICTIM'S VAGINA WITH HIS PENIS.....</b>	<b>21</b>
<b>WHETHER THE ACCUSED PENETRATED THE VICTIM'S VAGINA WITH HIS FINGER.....</b>	<b>27</b>
<b>THE CONSENT OF THE VICTIM.....</b>	<b>27</b>
THE EVIDENCE FOR THE PROSECUTION.....	27
THE EVIDENCE FOR THE DEFENCE .....	35
THE COURT'S CONCLUSION ON THE ISSUE OF CONSENT .....	38

**SECTION 79 PENAL CODE.....48**

**OUTCOME.....49**

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**Public Prosecutor**

**v**

**Pram Nair**

**[2016] SGHC 136**

High Court — Criminal Case No 45 of 2015

Woo Bih Li J

25–27 August; 1–2, 15–17 September 2015; 12–14, 21 April; 23 May 2016

18 July 2016

Judgment reserved.

**Woo Bih Li J:**

**The charges**

1 The accused faces the following two charges:

That you, **PRAM NAIR**,

1ST CHARGE

On or about 6 May 2012, at or about 2.25 a.m. at the Siloso Beach at 51 Imbiah Walk near “Wavehouse”, Singapore, did commit rape of one [V], a female then aged 20 years old (D.O.B. XXX), to wit, by penetrating the vagina of the said [V] with your penis without her consent, and you have thereby committed an offence under section 375(1)(a), punishable under section 375(2) of the Penal Code (Chapter 224, Revised Edition 2008).

2ND CHARGE on or about 6 May 2012, at or about 2.25 a.m. at the Siloso Beach at 51 Imbiah Walk near “Wavehouse”, Singapore, did sexually penetrate with your finger the vagina of one [V], a female then aged 20 years old (D.O.B. XXX), without her consent, and you have thereby committed an offence under section 376(2)(a), punishable under section 376(3) of the Penal Code (Chapter 224, Revised Edition 2008).

### **Background**

2 The accused is a 27 year old Singaporean male. He was 23 years old at the time of the alleged incident and was then working part-time as a beach patroller at Sentosa beach.

3 The victim is 24 years old. At the time of the incident, she was 20 years old and was teaching.

4 The victim met the accused for the first time on 5 May 2012 at a party held at the Wavehouse at Siloso Beach in Sentosa. The victim was invited to the party by a friend, [K], whom the victim met through Facebook. Through [K’s] invitation, the victim would be able to enter the party for free and obtain free drinks. The victim attended the party with one of her friends, [S], an Indian lady, whom she (the victim) had asked along. According to [S], the victim and her got along well with each other but were not the best of friends.<sup>1</sup>

5 The victim and [S] first arrived at the entrance of the Wavehouse at around 11pm on 5 May 2012. Thereafter, the victim notified [K] that she had arrived and [K] met her and [S] at the entrance to bring them into the Wavehouse. Upon entering the Wavehouse, [K] parted ways with the victim

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<sup>1</sup> Agreed Bundle of Documents (“AB”) at p 46, para 2.

and [S]. The victim and [S] then proceeded to wait near the bar counter for one of [K's] friends who would meet them and obtain free drinks for them.

6 The person who was supposed to meet the victim and [S] was one Jim Alif Bin Mohamed Yusof ("Jim"). At that point in time, Jim was working for an events company which organised events such as the party at the Wavehouse. Jim's main role was to procure patrons for these events. During the event itself, Jim would have to talk to and entertain the patrons he procured. That night, [K] had asked Jim to entertain the victim and [S].

7 Prior to meeting the victim and [S], Jim had met the accused at the bar counter. At that time, the accused was alone at the bar counter and was drinking a liquor called "Cointreau". The accused knew of the party at the Wavehouse through one of his friends and decided to attend it. The accused had offered some "Cointreau" liquor mixed with soft drinks to Jim and the two struck up a conversation.

8 Midway through their conversation, Jim called the victim and asked her to meet him at the bar counter. When the victim and [S] arrived, Jim proceeded to obtain some alcoholic beverages for them. Meanwhile, the accused, the victim and [S] entered into a conversation. This was the first time the victim and [S] met the accused. The four of them then stayed together at the bar counter for a while to drink.

9 [K] managed to find a table at the VIP area and so Jim went over to the table and asked the victim to go there. The victim was at times at the VIP table and at times at the bar counter.

10 The victim was also dancing at the dance floor. On occasions she danced with Jim and they were very close, hugging and French kissing each other. At one time, while the victim was dancing with Jim, she also turned to a Caucasian male and hugged and kissed him. Jim later walked to the VIP area.

11 According to [S], she subsequently called the victim on the phone and the victim said she was in the VIP section. [S] and the accused then obtained their VIP wristbands to enter the VIP section. They then entered the VIP section to look for the victim. The accused found the victim first and [S] met them at the intersection between the bar and the VIP section. The accused had his arm under the victim's armpit. The accused asked [S] to go and get the victim's bag from the VIP section. [S] went to do so but when she returned, she could not find the victim and the accused. Unknown to [S], the victim and the accused had left the Wavehouse and gone to the beach about 80 or 90 metres away from the Wavehouse and in front of a building known as Sapphire Pavilion.

12 [S] said she was looking for the victim inside and outside the Wavehouse but could not find her. She spoke to Jim who surmised that if the accused and the victim were not around, the accused had probably brought the victim home.

13 [S] said she eventually found the victim who was lying on the sand at a beach away from the Wavehouse looking like she had passed out. [S] tried to talk to the victim who did not respond. [S] realised that the victim was wearing her tank top but was naked below the waist. The accused was rummaging through his bag (which he had brought along). He threw a pair of red shorts to [S] and went over to help [S] to put the pair of shorts on the victim. [S] declined his help and he went back to the Wavehouse. [S] noticed

that the accused was wearing a t-shirt of a different colour from the one he was wearing when the victim and her first met him at the Wavehouse.

14 [S] tried to talk to the victim who was murmuring. [S] then saw the victim foaming at the mouth. [S] panicked and called the Singapore Civil Defence Force at around 2.50am on 6 May 2012. She reported that she suspected her friend had been raped and was foaming at the mouth. An ambulance eventually came and the victim was brought to Singapore General Hospital with [S] accompanying her.

15 In the meantime, a member of the public who was at Siloso Beach had called the police. The accused was eventually arrested at about 6.20am on 6 May 2012 at Imbiah Walk, Siloso Beach, Sapphire Pavilion, Singapore.

### **The issues**

16 The issues were:

- (a) whether the accused penetrated the victim's vagina with his penis;
- (b) whether the accused penetrated the victim's vagina with his finger;
- (c) whether the accused did either or both the alleged acts without the consent of the victim; and
- (d) whether the accused could rely on s 79 of the Penal Code (Cap 224, 2008 Rev Ed) ("the Penal Code").



### **The case for the Prosecution and for the Defence**

17 The Prosecution relied on the evidence of the victim and two statements made by the accused to establish that the accused had penetrated the victim’s vagina with his penis.

18 The Defence denied that there was penile penetration. However, the Defence did not deny that the accused had penetrated the victim’s vagina with his finger.

19 As for consent, the Prosecution’s case was that the victim did not factually give consent to either penetration. If she did, the victim was so intoxicated that her consent was invalid in law, in view of s 90(b) of the Penal Code.

20 The case for the Defence was that the victim did consent to the digital penetration with his finger and the penile penetration (if established) after a round of active sexual foreplay which the victim participated in. Also, the victim was not too drunk to give such consent. Alternatively, the Defence relied on s 79 of the Penal Code which excuses a person from an act which may constitute an offence if the act was done by that person under a mistake of fact, in good faith, believing himself to be justified by law in doing it.

### **The ancillary hearing**

21 After his arrest, the accused gave three statements to the police on three different occasions, viz, on 7, 15 and 21 May 2012 before he was charged. On all three occasions, the accused’s statements were recorded by Senior Staff Sergeant Aloysius Tay (“SSSgt Tay”) from the Serious Sexual Crimes Branch of the Criminal Investigation Department. The Prosecution

was relying on only two out of these three statements, namely, the statement recorded on 7 May 2012 (“the 7 May Statement”) and the statement recorded on 21 May 2012 (“the 21 May Statement”). These two statements were found in the Agreed Bundle (“AB”) at pp 10-17 and pp 18-21 respectively, as the accused had agreed to their inclusion in the AB. However, in the midst of the trial, the accused eventually challenged the admissibility of both statements and so an ancillary hearing was held to determine the admissibility of the two statements. For easy reference, I will refer to the page numbers in the AB where the two documents were located.

### ***The 7 May Statement***

22 There were three versions of the 7 May Statement that were tendered to court. The first version consisted of five pages (*ie*, pp 10, 11, 13, 15 and 17 of the AB) and contained the accused’s initial response to questions that were posed to the accused by SSSgt Tay.

23 The second version included handwritten amendments made by the accused, which comprised both deletions and additions of certain words, phrases and sentences. As there were quite a number of amendments, I will not set them out individually. However, I will refer to some of them in the course of giving my reasons for my decision in respect of the ancillary hearing. The second version comprised the same five pages as the first version (*ie*, pp 10, 11, 13, 15 and 17 of the AB).

24 The third version came about because SSSgt Tay said he decided to convert the accused’s handwritten amendments in the second version to typewritten format. In respect of the accused’s additions, SSSgt Tay typed it out in red font (as opposed to the black font used for the rest of the statement).

In respect of those parts that the accused deleted, he applied “strikethrough” to it. SSSgt Tay did this because he thought that the accused’s handwritten amendments in the second version made the statement rather messy and that a typewritten version would be neater. Before he printed out the typewritten amended version, he realised that he had a few additional questions for the accused. He proceeded to pose these questions to the accused and recorded the accused’s answers accordingly. This was why the third version contained an additional five questions as compared to the first and second versions.

25 To recap, the first version was essentially the accused’s initial statement. The second version was his initial statement with his handwritten amendments. The third version converted the handwritten amendments into typewritten format plus five additional questions and answers. The third version was found at pp 10, 11, 12, 14, 16 and 17 of the AB.

*The accused’s version of events*

26 The accused alleged that other than the handwritten amendment to correct the spelling of his name on the first page of the first version, the other handwritten amendments in the second version (and consequently, the typewritten amendments in the third version) were made involuntarily. He further alleged that his answers to the additional five questions posed by SSSgt Tay were also not given voluntarily.

27 The accused said he was eventually kept in police lock-up after he was arrested in the morning of 6 May 2012. Some time on 7 May 2012, the accused was escorted by a police officer out of the lock-up to an interview room at Cantonment Police Complex. Shortly after, SSSgt Tay entered the interview room whereupon the officer who escorted the accused left the room.

SSSgt Tay sat down across the accused, introduced himself and told the accused that he wanted to find out what had happened on 6 May 2012. SSSgt Tay then proceeded to ask the accused some questions on what transpired on 5 and 6 May 2012. The accused told SSSgt Tay the details of the events on those two days, all of which SSSgt Tay recorded by typing it out on his laptop. After SSSgt Tay finished recording the accused's answers, SSSgt Tay printed out a copy of what he had typed and passed it to the accused for the accused to read and sign. The accused did so and passed the copy back to SSSgt Tay. This was the first version.

28 I now come to the accused's allegations about events which he said constituted inducements, threats and promises for the purpose of vitiating the 7 May Statement under s 258(3) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC"). The accused alleged that:

- (a) SSSgt Tay left the interview room after the accused had signed and returned the first version. After a few minutes, SSSgt Tay returned to the interview room. His manner was very stern and he told the accused that he thought that the accused's statement was not accurate.
- (b) He warned the accused that he could charge the accused for lying if the police found out that the accused had sex with the victim.
- (c) He told the accused he could charge the accused for rape.
- (d) He also told the accused that he could lock the accused up for even longer.<sup>2</sup> The accused insisted that he did not have sex with the

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<sup>2</sup> Transcript (17 Sept 2015) p 56.

victim, but SSSgt Tay kept repeating that he could charge the accused for lying and for rape. The accused got very frightened, panicked and broke down in front of SSSgt Tay.

(e) At this moment, SSSgt Tay changed his manner. He went over to where the accused was seated and sat on the corner of a table. He told the accused, in “a friendly manner”,<sup>3</sup> that he was trying to find out what had happened and trying to help the accused.

(f) He also informed the accused that if the accused cooperated, the accused would be released on bail.

(g) SSSgt Tay then suggested that the accused amend the statement that he had already given. He told the accused that the accused was too drunk to remember anything and that he was trying to help the accused to remember.<sup>4</sup>

29 SSSgt Tay then passed the accused the signed copy of his statement along with a pen, and started directing the accused to cancel out certain portions of the statement and add in certain words and sentences. SSSgt Tay also instructed the accused to sign beside every amendment he made.<sup>5</sup> The accused did as he was instructed because he was frightened and petrified. He was afraid that SSSgt Tay might lock him up for even longer if he did not comply. After the accused finished making the handwritten amendments, SSSgt Tay returned to his laptop and typed out the handwritten amendments.<sup>6</sup>

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<sup>3</sup> Transcript (17 Sept 2015) pp 56-57.

<sup>4</sup> Transcript (17 Sept 2015) p 57.

<sup>5</sup> Transcript (17 Sept 2015) pp 64-65.

<sup>6</sup> Transcript (17 Sept 2015) p 57.

He then posed additional questions to the accused. According to the accused, SSSgt Tay had suggested the answers to the accused for these additional questions and the suggested answers were recorded as the accused's answers. The accused was then asked to sign a copy of the statement with the typewritten amendments, *ie*, the third version. After the accused did so, SSSgt Tay left the interview room. It was put to SSSgt Tay that he then returned looking pleased.<sup>7</sup> SSSgt Tay then informed the accused that he would be allowed station bail because he had cooperated. The accused was then led back to the lock-up where he called his mother to bring his passport. The accused's mother came and surrendered his passport and he was released on bail.

*The Prosecution's version of events*

30 On the other hand, SSSgt Tay testified that there was nothing atypical about the recording process for the 7 May Statement. SSSgt Tay was already seated in the interview room when the accused was brought in by the escorting officer at about 2pm.<sup>8</sup> SSSgt Tay then proceeded to ask the accused some questions regarding the accused's personal details, followed by what had happened on 5 and 6 May 2012. SSSgt Tay recorded the accused's answers by typing them out on a laptop. After he finished doing so, he printed out a copy of the statement for the accused to read and sign. The accused read the statement and indicated that he wanted to make some amendments. SSSgt Tay then passed the accused a pen and the accused used it to amend his statement and to sign beside the amendments. When the accused was done, SSSgt Tay decide to re-do the statement by typing out the accused's handwritten

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<sup>7</sup> Transcript (17 Sept 2015) p 30.

<sup>8</sup> Transcript (16 Sept 2015) p 44.

amendments. He did so because he felt that the amendments made the statement look very messy. Before SSSgt Tay printed a copy of the typewritten amended statement for the accused, he realised that he had a few more questions for the accused. He thus asked the accused more questions and recorded the accused's answers on his laptop accordingly. He then printed out the final statement for the accused to read and sign. The accused signed the statement without making any more amendments and was eventually released on station bail.

31 SSSgt Tay said that the accused had asked several times as to whether he would be released. He explained to the accused that he would be released on station bail if the investigation was completed.<sup>9</sup>

32 SSSgt Tay denied the allegations which the accused was relying on as constituting inducements, threats and promises. He denied that the accused had cried in front of him. He denied that it was he who suggested the amendments to be made by the accused. It was not disputed that the accused was released on station bail after he had completed giving the 7 May Statement (with the amendments).

### ***The 21 May Statement***

33 The 21 May Statement consisted of four pages and contained the accused's responses to a total of eight questions. This statement was recorded because SSSgt Tay had more questions he wanted to ask the accused and he had requested the accused to come down to his office at the Police Cantonment Complex, Serious Sexual Crimes Branch on 21 May 2012.

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<sup>9</sup> Transcript (16 Sept 2015) pp 67-68, 98-99.

*The accused's version of events*

34 The accused alleged that he met SSSgt Tay at his office desk on 21 May 2012. SSSgt Tay told the accused that he had some further questions for the accused and that he needed the accused to remember the amendments that the accused made to the 7 May Statement. He further said that the statement the accused was going to provide that day must corroborate with the 7 May Statement, including the amendments in that statement. He reminded the accused that if anything in the two statements differed, the accused could be charged for lying and for rape and could be brought back to lock-up.<sup>10</sup> It was put to SSSgt Tay that he also said to the accused that if the new statement was consistent with the 7 May Statement and if he was satisfied, he would close the case and return the accused's passport to him.<sup>11</sup> These were the allegations that the accused was relying on as inducements, threats and promises to vitiate the 21 May Statement.

35 Upon hearing what SSSgt Tay said, the accused alleged that he became frightened and he "made sure that [he] did what [he] needed to do according to [SSSgt Tay]".<sup>12</sup> At that time, SSSgt Tay had the 7 May Statement in front of him. According to the accused, for some of the questions that SSSgt Tay posed to him, SSSgt Tay had referred to the 7 May Statement and suggested what the accused's answer should be. SSSgt Tay typed out the suggested answers without waiting for the accused's response. He then asked if the accused agreed to it. The accused agreed and told SSSgt Tay that it was "per the statement that was stated on the 7th of May".<sup>13</sup> The accused alleged that he

<sup>10</sup> Transcript (17 Sept 2015) p 68.

<sup>11</sup> Transcript (17 Sept 2015) p 47.

<sup>12</sup> Transcript (17 Sept 2015) p 69.

<sup>13</sup> Transcript (17 Sept 2015) p 70 line 16 to p 71 line 3.



agreed only because he was afraid of what SSSgt Tay might do if he gave a different response. Out of the eight questions that were asked by SSSgt Tay that day, the answers to questions 3, 4 and 5 were recorded by SSSgt Tay in the manner just described. The answers to the other five questions came from the accused. At the end of the recording, SSSgt Tay printed a copy of the statement for the accused to read and sign, which the accused did. Thereafter, SSSgt Tay said that because everything was done, he was closing the case. SSSgt Tay returned the accused's passport to him and told him he was free.<sup>14</sup>

36 The accused said that after 21 May 2012, SSSgt Tay called him back once to do a blood test. At another time he was asked to go to Changi General Hospital for an assessment of his potency.<sup>15</sup> This was apparently done on 15 May 2013.<sup>16</sup> He did not hear anything further until a female investigation officer contacted him on 8 January 2014 to see her. He did so on the next day, *ie*, 9 January 2014, and she presented him with two charges, similar to the ones which he faced at the trial before me, for the purpose of taking a cautioned statement from him under s 23 of the CPC in respect of each charge. After he had given his cautioned statements, he was allowed station bail. He appeared in the Subordinate Courts on 13 January 2014 when the two charges were read out to him.

#### *The Prosecution's version of events*

37 SSSgt Tay testified that he posed a total of eight questions to the accused on 21 May 2012. After SSSgt Tay posed a question to the accused, he would wait for the accused to give his answer and then type the accused's

<sup>14</sup> Transcript (17 Sept 2015) p 71.

<sup>15</sup> Transcript (17 Sept 2015) p 79.

<sup>16</sup> Dr Teo Jin Kiat's report dated 20 May 2013 which is exhibit P39.

answer on his laptop accordingly. This process was repeated for all eight questions. Throughout the process, the accused was seated beside SSSgt Tay at the latter's office desk and was not restrained in any manner. At the end of the recording, SSSgt Tay printed out the statement and passed it to the accused for the accused to read and make any amendment. The accused made one minor amendment and signed the statement.

38 SSSgt Tay denied that he had made the statements attributed to him on 21 May 2012 which the accused was relying on to vitiate the 21 May Statement. It was not disputed that the accused's passport was returned to him after he completed making the 21 May Statement.

***Whether the accused had complained or mentioned about SSSgt Tay's alleged misconduct on 7 and 21 May 2012***

39 The accused elaborated that after he was first released on station bail on 7 May 2012, he told his parents and his sister that same day about how SSSgt Tay had threatened him by telling him that he could be charged for lying or for rape and how he could be kept in the lock-up. He also told them about how, as a consequence of all this, he broke down and cried and was frightened and petrified. A few days later he met two friends, Faisal Alam and "Gas", separately and told them about the threats.<sup>17</sup> There was no suggestion that the accused had similarly mentioned SSSgt Tay's alleged misconduct on 21 May 2012 to any family member or friend.

40 The accused said that he did not make a police report about SSSgt Tay's alleged misconduct (on 7 or 21 May 2012) after 21 May 2012

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<sup>17</sup> Transcript (17 Sept 2015) pp 94-98.

because SSSgt Tay had told him that his case was closed, everything was okay and he was returning him his passport.<sup>18</sup>

41 The accused did not mention SSSgt Tay's alleged misconduct when he was examined by Dr Teo Jin Kiat ("Dr Teo") at Changi General Hospital on 15 May 2013 for an assessment of his potency.

42 The accused said that he did not mention SSSgt Tay's misconduct to the female investigation officer on 9 January 2014 or to the court on 13 January 2014. Neither did he thereafter make any formal complaint about SSSgt Tay's misconduct.<sup>19</sup> The accused said that after 9 January 2014, he told his then lawyer (from Gloria James-Civetta & Co) about SSSgt Tay's misconduct. He did not think he had to make a police report about SSSgt Tay's misconduct as the lawyer said that he was going to handle everything.

43 He did not mention SSSgt Tay's misconduct to a doctor from the Institute of Mental Health when the doctor examined him in February 2014 when he was in remand.<sup>20</sup>

44 The accused's sister, Leena Nair, gave evidence in the ancillary hearing. She said that in the evening of 7 May 2012 (after the accused was first released on bail), she had a chat with him away from their parents. The accused looked upset, shaken and quiet. He did not want to say too much. His eyes were red although he was not crying in front of her. He told her he had

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<sup>18</sup> Transcript (17 Sept 2015) p 101.

<sup>19</sup> Transcript (17 Sept 2015) pp 102-107.

<sup>20</sup> Transcript (17 Sept 2015) pp 108-109.

spoken to the investigation officer. He had cooperated and everything would be okay. He did not elaborate as to why or how he had cooperated.<sup>21</sup>

***The court's conclusion on the ancillary hearing***

45 I was of the view that in respect of the accused's allegations about inducements, threats and promises, SSSgt Tay was a truthful witness and the accused was not. SSSgt Tay had candidly admitted that the accused had asked him several times on 7 May 2012 whether he would be released. He told the accused that he would be released on station bail if the investigation was completed. SSSgt Tay did not prevaricate about this evidence.

46 The crux of the accused's allegations about inducements, threats and promises was that they caused him to involuntarily agree to make the amendments on 7 May 2012 which were suggested by SSSgt Tay. He was suggesting that SSSgt Tay had caused him to incriminate himself by making the amendments. Likewise, as a consequence of the repetition of some of the inducements, threats and promises on 21 May 2012, he had signed the 21 May Statement although the answers to certain questions came from SSSgt Tay.

47 In my view, some of the amendments of 7 May 2012 were not even material. There would be no reason for SSSgt Tay to tell the accused to make such amendments.

48 Secondly, if SSSgt Tay was making inducements, threats or promises in order to get the accused to incriminate himself, as the accused was suggesting, the substance of the statements as amended would be quite different.

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<sup>21</sup> Transcript (13 Apr 2016) pp 4-7.

49 It is true that in the first version of the 7 May Statement, the accused said that he was not able to enter the victim's vagina because he did not have an erection and she was "tight". In one of his amendments, the accused added (at the bottom of p 13 of the AB) that he tried again and went in for a few seconds. Again, in the first version of the accused's answer to Q4, the accused said that he tried to have sex with the victim but he did not. In his amendment to his answer for Q4, he admitted that he did have sex with the victim but for only a few seconds.<sup>22</sup> While these two amendments appeared to incriminate the accused, other answers were still attempting to exonerate him:

(a) At p 15 of the AB, for Q3, his amendment was an attempt to exonerate himself. Part of the original answer was "What I meant was that the whole 'making out' was consensual". This was deleted and changed to "[The victim] and I were both drunk and she did not stop me, and she did ask me to do some sexual acts as stated above. I assumed that the whole session including sex was consensual".

(b) At p 16 of the AB, his answers to two new questions were that he did not force the victim to have sex with him and that she did not push him away or stop him from having sex with her.

(c) At p 16 of the AB, his initial answer to the last question was not amended, *ie*, he said, "I wouldn't have done anything that was against her will. Whatever I did I asked her before I did".

50 Thirdly, the accused had already admitted in his initial statement on 7 May 2012 that he had inserted his finger into the victim's vagina. There was

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<sup>22</sup> AB p 15.

no reason for SSSgt Tay to risk his career just to get the accused to admit that he had also penetrated the victim's vagina with his penis if this was untrue.

51 Fourthly, I did not accept the accused's evidence that he had mentioned SSSgt Tay's alleged misconduct of 7 May 2012 to his parents and sister and to his two friends. As mentioned above, only his sister gave evidence. Furthermore, she did not say that the accused had informed her about any misconduct or any inducement, threat or promise from SSSgt Tay. This was contrary to the accused's version that he did mention them to her. Her evidence that his eyes were red was neither here nor there. In my view, he had lied that he had mentioned SSSgt Tay's alleged misconduct of 7 May 2012 to various persons. He did not mention such misconduct to anyone because it did not occur.

52 Fifthly, there was also the fact that there was no complaint by the accused, whether in the form of a police report or not, about SSSgt Tay's alleged misconduct even after the accused was charged in court and even though he claimed that he had told his previous lawyer about such misconduct.

53 Sixthly, the two statements were included by consent as part of the AB until the midst of the trial as mentioned above. This suggested that the alleged misconduct of SSSgt Tay did not occur.

54 I concluded that the accused's allegations of such misconduct were false. I was also of the view that the amendments in the 7 May Statement, which were made initially in the accused's own handwriting, were initiated by the accused himself and not by SSSgt Tay. Likewise, the answers to the new

questions were not suggested by SSSgt Tay but came from the accused himself.

55 As for SSSgt Tay's statement to the accused that he could be released on station bail if the investigation was completed, I was of the view that this statement did not objectively constitute an inducement, threat or promise. In *Chai Chien Wei Kelvin v Public Prosecutor* [1998] 3 SLR(R) 619, the Court of Appeal was of the view that a call to cooperate was not a threat or inducement (at [55]). Furthermore, I was of the view that SSSgt Tay's statement did not operate on the mind of the accused to cause him to make the amendments so as to gain an advantage for the purpose of s 258(3) of the CPC. Indeed, the accused did not suggest that that statement alone had caused him to make the amendments.

56 As for the 21 May Statement, I did not accept the accused's evidence that SSSgt Tay had repeated some of the inducements, threats or promises made on 7 May 2012 for similar reasons.

57 The most material part in that statement were two sentences in the accused's very long answer to Q3 where he said, "I inserted my dick for a few seconds and had sex with her. Then I took my dick out and pee and I ejaculated". There was no dispute that these sentences meant that he had inserted his penis into the victim's vagina, withdrew it and ejaculated. In my view, there was no reason for SSSgt Tay to suggest the very long answer to Q3, as alleged by the accused, just to obtain these two sentences from the accused.

58 I also noted that when the accused was asked during cross-examination whether he would have signed the 21 May Statement if the statement said that

he had raped the victim or that the sex was not consensual, he said he would not have signed it.<sup>23</sup> This belied the accused's position that he continued to be so afraid that he signed the 21 May Statement which contained an incriminating answer supplied by SSSgt Tay.

59 In the circumstances, I was of the view that the Prosecution had established beyond a reasonable doubt that both the 7 May Statement and the 21 May Statement were made voluntarily. Therefore, I ruled that they were admissible in evidence.

**Whether the accused penetrated the victim's vagina with his penis**

60 The burden of proof is on the Prosecution to establish beyond a reasonable doubt that the accused did penetrate the victim's vagina with his penis. The victim's conditioned statement of 20 June 2014 stated at para 9 that she remembered that the accused brought her out of the party area and moved off although she could not remember if he took her out of the Wavehouse. In her oral evidence, she said she could not remember the accused bringing her out of the party area.<sup>24</sup>

61 At para 10, she said that the next thing she remembered was that she saw the accused on top of her. She felt like she was lying on sand. She remembered that there was penetration in her vagina and she felt pain. There was no express mention there that the penetration was done with the accused's penis.

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<sup>23</sup> Transcript (12 Apr 2016) p 22.

<sup>24</sup> Transcript (26 Aug 2015) p 11.



62 In oral evidence, the victim asserted that the penetration was in fact done by the accused's penis. The victim was certain that there was penile penetration. She did not see the accused's penis but felt it in her vagina. She had had sexual intercourse with her boyfriend before 6 May 2012 and knew what penile penetration felt like. The penile penetration by the accused was painful to the victim.<sup>25</sup>

63 I come back to para 10 of the victim's conditioned statement. She saw the accused on top of her. He pulled down her shorts. She said, "No..No..No.." and tried to push him away but was too weak and drunk. He said it was okay. There was penetration in her vagina. She felt pain and went blank. In part of her oral evidence, she said she had said "No, no, no" first and then she felt her shorts being pulled down and the penetration of the accused's penis.<sup>26</sup> From these two pieces of evidence, it appeared that she woke up before the penile penetration.

64 On the other hand, there were other parts of her oral evidence which indicated that it was the pain of the penile penetration which caused her to wake up.<sup>27</sup>

65 The accused had admitted in the 7 May Statement and the 21 May Statement that he had penetrated the victim's vagina with his penis. It is true that the admissions in the 7 May Statement came about by way of amendments. His initial statement was that he did not have sex with her.

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<sup>25</sup> Transcript (25 August 2015) pp 66, 74-77.

<sup>26</sup> Transcript (25 Aug 2015) p 75.

<sup>27</sup> Transcript (25 Aug 2015) pp 62-63, 92.

66 It will be recalled that the accused had alleged that it was SSSgt Tay who had suggested the amendments to him and that he wrote down the amendments because of inducements, threats and promises from SSSgt Tay. The accused had also alleged that it was SSSgt Tay who inserted the answers to Q3 to Q5 of the 21 May Statement which the accused agreed to because SSSgt Tay had reiterated some of the inducements, threats and promises. I had rejected the accused's allegations.

67 In oral evidence at the main trial, the accused also said that he could not achieve an erection of his penis "because ... it was in a public area" and "because of the sand and all".<sup>28</sup> The presence of other people in the vicinity was not disputed and I will say more about that later. However, it is not disputed that when the accused was examined by Dr Teo on 15 May 2013 for an assessment of his potency, he did not mention any occasion when he was unable to have an erection.<sup>29</sup>

68 The accused's cautioned statement given on 9 January 2014 in response to a charge of rape was that he did not commit the offence. This may be compared with his cautioned statement given also on 9 January 2014 in response to a charge of digital penetration. In the latter statement, he did not admit that he had inserted his finger into the victim's vagina without her consent. The focus in the latter statement appeared to be on the absence of consent. This suggested that in his cautioned statement for the rape charge, he was denying the act of penile penetration itself as he was not focussing on the issue of consent.

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<sup>28</sup> Transcript (13 Apr 2015) pp 82-83.

<sup>29</sup> Transcript (27 Aug 2015) p 35.

69 Dr Ravichandran Nadarajah (“Dr Nadarajah”) gave evidence about his medical examination of the victim on 6 May 2012. He revealed that the victim had told him that there was penile penetration by a stranger on 6 May 2012. The assailant was a 24-year-old Indian whom the victim had met at Sentosa Park.<sup>30</sup> The victim was very certain there was vaginal penetration and the assailant had ejaculated inside her vagina. Dr Nadarajah took a DNA sample from the victim’s vagina to test for sperm. The test was negative. In his opinion, there was no ejaculation inside the vagina.<sup>31</sup> In the 7 May Statement, the accused had amended the statement to say he had ejaculated onto the sand. I add that Kua Guo Wei, an analyst with the Health Sciences Authority (“HSA”), had done some tests between 12 and 19 July 2012 on the bikini bottom of the victim. A presumptive test for seminal and vaginal fluid was positive but a further test on two cuttings from the bikini bottom tested negative for semen.

70 Pelvic examination of the victim by Dr Nadarajah revealed an old tear over the hymen at three, seven and nine o’clock. He was not able to say that the absence of a fresh tear meant that there was no penile penetration recently. It depended on how much resistance was put up and on how much force was used during the intercourse.<sup>32</sup> If the victim was not resisting then there would be a low chance of a tear.<sup>33</sup>

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<sup>30</sup> Transcript (16 Sept 2015) pp 10 and 17.

<sup>31</sup> Transcript (16 Sept 2015) pp 26-27.

<sup>32</sup> Transcript (16 Sept 2015) p 31.

<sup>33</sup> Transcript (16 Sept 2015) p38.

71 In the circumstances, I am of the view that the absence of a fresh tear at the victim’s hymen, the absence of sperm in her vagina and the negative test for semen at two cuttings from her bikini bottom are neutral.

72 The Prosecution relied on *AOF v Public Prosecutor* [2012] 3 SLR 34 to submit that the court should conclude that there was penile penetration on the evidence of the victim alone as her evidence was unusually convincing. I do not find the victim’s evidence on penile penetration to be unusually convincing even though she maintained her evidence at trial.

73 First, the victim had informed Dr Nadarajah that the assailant had ejaculated inside her vagina but there was no evidence of sperm in her vagina.

74 Secondly, it was the Prosecution’s case that the victim was too intoxicated to have given any valid consent to penile or digital penetration. If that were so, her recollection about the penile penetration might have been impaired and it could be that she had mistaken digital penetration for penile penetration even though she said she knew what penile penetration felt like.

75 I add that the victim did also say that she did have “pockets of blackout in [her] memory” even before she left the Wavehouse with the accused.<sup>34</sup> There were also various instances when the victim said she could not remember. For example, although the victim said in para 10 of her conditioned statement that she tried to push the accused away, she clarified in oral evidence that she did not know if she had physically pushed him away and she could not recall if she had used her arms to push him away.<sup>35</sup>

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<sup>34</sup> Transcript (25 Aug 2015) p 57.

<sup>35</sup> Transcript (25 Aug 2015) p 64.

76 However, even though the victim's evidence on penile penetration was not unusually unconvincing, the accused had admitted in the 7 May Statement and 21 May Statement that he had penetrated the victim's vagina. He had also said in the 7 May Statement that he had ejaculated onto the sand after withdrawing his penis. In the 21 May Statement, he reiterated, in his answer to Q3, that, "Then I took my dick out and pee and I ejaculated". This would explain why there was no sperm found in the victim's vagina. Besides a challenge on the admissibility of the two statements, the Defence did not make any further submission as to why the accused had admitted to penile penetration in the two statements, if that was untrue.

77 I conclude that the victim's evidence about the accused's penile penetration is corroborated by the 7 May Statement and the 21 May Statement. I find that the Prosecution has established beyond a reasonable doubt that the accused did penetrate the victim's vagina with his penis. Furthermore, these two statements alone would warrant a finding that the accused did penetrate the victim's vagina with his penis.

#### **Whether the accused penetrated the victim's vagina with his finger**

78 It is for the Prosecution to establish beyond reasonable doubt that the accused penetrated the victim's vagina with his finger. However, there was no factual dispute about this issue. The accused admitted that he had inserted his finger into the victim's vagina more than once in the 7 May Statement even before any amendment was made thereto and he did not retract that admission during the trial.

**The consent of the victim**

79 Both the Prosecution and the Defence proceeded on the premise that the burden of proof is on the Prosecution to establish beyond a reasonable doubt the absence of consent by the victim to the digital and the penile penetration. I accept this premise.

***The evidence for the Prosecution***

80 Dr Wee Keng Poh of the HSA gave a report dated 5 October 2012<sup>36</sup> on the alcohol concentration in the victim's blood, a sample of which was taken at 7.30am of 6 May 2012. His report was that the blood alcohol concentration was 159 mg/100ml. Using a retrograde extrapolation of 15 mg ethanol/100 ml blood per hour, he was of the view that the victim would have had 256.5 mg ethanol/100 ml blood to 219 mg ethanol/100 ml blood between 1am to 3.30am on 6 May 2012, being 6.5 hours and 4 hours, respectively, before 7.30am, which was when the victim's blood was taken. He had been informed that the incident had occurred between 1am to 3.30am of 6 May 2012. He concluded that the victim would have been drunk between 1am and 3.30am on 6 May 2012. She would have needed assistance in walking. There would have been total mental confusion. There would have been dysphoria (anxiety and restlessness) and nausea may appear. There might have been some vomiting.

81 Dr Wee's report was based on the assumption that:

- (a) the victim had not taken further alcohol from 1am;
- (b) the victim was healthy; and

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<sup>36</sup> Exhibit P47.

(c) the victim's liver would reduce the alcohol in her system at the rate of 15 mg/100 ml per hour.

82 In respect of (a), the Prosecution submitted that in the 21 May Statement, the accused had said that he and the victim had left the Wavehouse at “1 plus am”. This was in the accused’s answer to Q6 which the accused admitted that he had given voluntarily. There was no evidence to suggest that the victim had been drinking after 1am before they left the Wavehouse. There was also no evidence that the victim had continued to drink alcohol after she left the Wavehouse with the accused.

83 With regard to (b), the Prosecution submitted that Dr Nadarajah said that he did not have any reason to be concerned about the victim’s health other than the rape complaint<sup>37</sup> and the victim herself had said that she did not have any health or medical problems.<sup>38</sup>

84 The Defence did not submit that the victim had in fact drank alcohol after 1am on 6 May 2012. The Defence also did not adduce evidence to show that the victim was not healthy.

85 In the circumstances, I accept the Prosecution’s submissions on these two assumptions of Dr Wee.

86 As for (c), (*ie*, the retrograde extrapolation of alcohol), Dr Wee had used an average of 15 mg ethanol/100 ml blood per hour. The range was 10 to 20 mg ethanol/100 ml blood per hour. Using either end of the range would still not affect his opinion that the victim was drunk.<sup>39</sup> Dr Wee was of the view that

<sup>37</sup> Transcript (16 Sept 2015) p 38.

<sup>38</sup> Transcript (26 Aug 2015) p 42.

the rate of elimination of ethanol would not vary very much from person to person and would not vary very much between a habitual drinker and a casual drinker.<sup>40</sup> The same elevated blood alcohol concentration would affect two people in the same way generally, although it was known for two people with the same concentration to be affected very differently.<sup>41</sup>

87 The Defence did not adduce any medical evidence to contradict Dr Wee's report and evidence.

88 The victim said that she had done binge drinking before between August 2011 to early 2012. She had gotten drunk before but could still go for supper.<sup>42</sup> However, she was not as drunk as she was on 5 May 2012, which was when she consumed the most alcohol she ever had on a single occasion.<sup>43</sup> She had never been drunk to the point of blacking out or passing out before.<sup>44</sup>

89 In her conditioned statement of 20 June 2014, she said at para 9 that she remembered that the accused had brought her out of the party area and moving off, although she could not remember if he took her out of the Wavehouse. However, in her oral evidence, she said she could not remember the accused bringing her out of the party area.<sup>45</sup>

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<sup>39</sup> Transcript (15 Sept 2015) p 71.

<sup>40</sup> Transcript (15 Sept 2015) pp 84-85.

<sup>41</sup> Transcript (15 Sept 2015) p 73.

<sup>42</sup> Transcript (25 Aug 2015) pp 106, 107, 118, 122 and Transcript (26 Aug 2015) p 40.

<sup>43</sup> Transcript (26 August 2015) pp 3 and 40.

<sup>44</sup> Transcript (26 Aug 2015) pg 42.

<sup>45</sup> Transcript (26 Aug 2015) p 11.



90 The next thing she remembered was that the accused was on top of her and the penetration of her vagina. I have referred to this evidence earlier (at [61] to [64]) and I will not repeat it. The victim could not remember having engaged in sexual foreplay or any of the details alleged by the accused as part of the alleged sexual foreplay.

91 According to Jim's conditioned statement at para 6, the victim had already appeared a little bit tipsy at the VIP table. Jim elaborated that the victim was very talkative, "hyper" and dancing alone. The victim was also repeating words but could walk.<sup>46</sup> When Jim and the victim were at the dance floor, the victim suddenly turned to a Caucasian male, went up to him and kissed and hugged him. The kiss was a peck on the lips.<sup>47</sup> He recalled that the victim had had "many shots of pure liquor without mixing" that night.<sup>48</sup>

92 [S] elaborated that at one point of time while she, the victim and the accused were still at the Wavehouse, the accused had learned that the victim was 20 years old. The accused suggested and the victim agreed that he poured liquor from a "Cointreau" liquor bottle into the victim's mouth for 20 seconds and this was done. There was a nozzle of some sort at the mouth of the bottle for this to be done.

93 There were also between four to eight occasions when liquor from a "Cointreau" liquor bottle was being poured into the victim's mouth for one or two seconds. [S] said that the victim also drank two glasses of "Cointreau" liquor mixed with orange juice.

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<sup>46</sup> Para 11 of Jim's conditioned statement and Transcript (2 Sept 2015) p 19.

<sup>47</sup> Para 7 of Jim's conditioned statement and Transcript (2 Sept 2015) p 36.

<sup>48</sup> Para 11 of Jim's conditioned statement.

94 I have mentioned above at [8] that the victim occasionally left [S] and the accused to go to the VIP section. On some occasions, she was at the dance floor and was dancing with Jim and hugging and kissing him. She also hugged and kissed a male Caucasian.

95 Eventually [S] and the accused went to look for the victim at the VIP section. The accused found the victim first and [S] found the both of them at the intersection between the bar counter and the VIP section. According to [S], the accused had his arm under the victim's armpit. The victim looked like she was really drunk. [S] had assumed that the victim had had more drinks of liquor after the victim left the company of [S] and the accused, as the victim was looking more drunk.<sup>49</sup> The victim's eyes were droopy and she could not stand without support.<sup>50</sup>

96 [S] said she had decided that she and the victim should leave for home. The accused asked [S] to get the victim's bag from the VIP section but when [S] returned, she could not find the victim and the accused. [S] said she tried to contact the victim on her handphone but there was no answer. Once, someone answered her call but did not say anything. There was no noise in the background. [S] called again. This time the accused answered the call. The accused told [S] that he and the victim were at the beach but told [S] not to go over but to stay at the Wavehouse and he would come over and find [S]. [S] however decided not to heed this request and went to look for the victim. She eventually found them at the beach away from the Wavehouse. The victim was naked below the waist. [S] tried to put on a pair of shorts on the victim which the accused had thrown to [S]. The victim looked like she had passed

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<sup>49</sup> Transcript (15 Sept 2015) p 43.

<sup>50</sup> Transcript (15 Sept 2015) pp 14-15.

out. [S] tried to talk to the victim who was murmuring. When [S] noticed that the victim was foaming at the mouth, she panicked and called for an ambulance and the victim was eventually brought to Singapore General Hospital.

97 I have also mentioned that, in the meantime, a member of the public had called the police. I now elaborate as to what he and a friend saw and why he called the police.

98 The member of the public who called the police was one Tan Jia Rong Kason (“Kason”). His evidence was that at about 2am of 6 May 2012, he and a friend Chung De Wei, Terence (“Terence”) were at Siloso Beach looking for another friend’s slippers. They had switched on the torch-light function on their handphones.

99 Kason said that he saw a dark figure at a distance near one of the trees at the beach near a lighthouse. The figure was naked from the waist down. The figure was kneeling and bending over a person whom Kason assumed was a female person as the body at the bottom was of a smaller frame. Kason thought that it was a couple making out and ignored them.

100 When he passed by the same location for the second time, he noticed that the male was kneeling in between the legs of the female. Kason thought that the male was fully naked this time. Kason continued to search for his friend’s slippers.

101 Terence then came to look for Kason and Kason told Terence what he had seen. Terence went to take a look for himself. According to Terence, he saw a dark-skinned male on top of a fair-skinned female who was naked from

the top. The female was lying down and there was little movement from her.<sup>51</sup> The hand of the male was moving around the female's lower part. He noticed onlookers looking in the direction of the two persons. He returned and told Kason that it was "not right". By this he was referring to "indecent" as there was a half-naked body lying on the beach.<sup>52</sup>

102 Kason went to take another look. This time around the couple were behind a tree. The male was wearing a long-sleeved yellow shirt with red shorts. This was the same attire worn by Sentosa beach patrollers. The female was naked. As he was walking past them, he saw the female trying to push the male away. She was using one hand to do so and she looked very weak. Kason walked away to look for Terence. He decided to call the police after seeing the female trying to push the male away. He thought she was being taken advantage of.

103 At about 2.25am on 6 May 2012, Kason called the police. He reported that:

There is a group of Indian man [*sic*] trying to do something to the girl. Can you send the police. The girl is naked and drunk. I am just passing by.

104 Kason said that he mentioned a group of male Indians because there was a group of Indian men in the vicinity standing near the couple. He had assumed that they were friends of the male Indian he had seen with the female.

105 At about 2.38am, Kason called the police again. He said he did so as he felt a sense of urgency. He reported that:

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<sup>51</sup> Para 5 of Terence's conditioned statement.

<sup>52</sup> Para 5 of Terence's conditioned statement and Transcript (1 Sept 2015) pp 64 and 67-69.

I called just now, I think the police should come faster as there are more guys coming in and doing something to this girl.

106 It was not disputed that the female and male persons that Kason and Terence saw were the victim and the accused respectively. Also, the evidence of Kason and Terence was undisputed by the Defence.

107 The police arrived at about 2.50am at Siloso Beach where the victim was. The police had some difficulty initially in lifting a barrier leading to Siloso Beach as the remote control they had obtained from a Ranger station was faulty. The accused was eventually arrested at about 6.20am on 6 May 2012 at Imbiah Walk, Siloso Beach, Sapphire Pavilion, Singapore.

### *The evidence for the Defence*

108 According to the accused, it was [S] who suggested that the victim drink from the bottle of “Cointreau” liquor for 20 seconds as it was the victim’s 20th birthday the previous week. The victim said she would do it on the condition that the accused did it with her. The accused agreed and proceeded to pour the “Cointreau” liquor into the victim’s mouth at the bar counter. He agreed that he did so for 20 seconds.<sup>53</sup>

109 After that, the victim walked away from the bar counter to the VIP section. However, she came back to the bar counter a few times. The accused thought that the victim was hitting on him as she came really close to him and her hand was touching his arm and his waist. She also kissed him.<sup>54</sup> The accused saw the victim dancing with three to four different males. He saw the

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<sup>53</sup> Transcript (13 Apr 2016) p 64.

<sup>54</sup> Transcript (14 Apr 2016) p 6.

victim French kiss Jim. The accused observed the victim to be high when she was on the dance floor. She was “a little tipsy”. The victim “would stagger a little bit to the left, to the right”.<sup>55</sup> However, the accused said that she was not drunk.<sup>56</sup>

110 Eventually, the accused informed [S] at the bar counter that he was going to send [S] and the victim home and he told [S] to get the victim’s bag from the VIP section. He then went up to the victim to ask if she wanted to leave the Wavehouse and offered to send her and [S] home. The victim told the accused “please take me away from all the guys” and hugged the accused. The victim also told the accused that she liked him.<sup>57</sup> The accused then took his bag and the both of them left the Wavehouse. The accused initially said that when he took the victim out of the Wavehouse, his intention was to send her home. However, he then changed his evidence to say that he wanted to make out with her.<sup>58</sup>

111 The accused and the victim subsequently walked to a beach that was nearby the Wavehouse. They sat against a tree and started French kissing. As they were kissing, the accused’s hand was touching the victim’s breasts, while the victim’s hand was rubbing the accused’s crotch outside his shorts. The accused then took off his T-shirt and asked if the victim wanted to take her top off. Although the victim mumbled her response, the accused assumed it was a “yes”. The accused removed all the victim’s clothes. It was not disputed that

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<sup>55</sup> Transcript (14 Apr 2016) p 21.

<sup>56</sup> Transcript (14 Apr 2016) p 22.

<sup>57</sup> Transcript (14 Apr 2016) p 8.

<sup>58</sup> Transcript (14 Apr 2016) p 10.

the victim was wearing a tank top and a bikini and a brassiere and a pair of shorts and bikini bottom. The accused removed his shorts as well.

112 The accused then started kissing the victim's cheek and neck. The victim asked the accused to suck her nipples, which the accused did. The victim then lay down on the sand and the accused penetrated the victim's vagina with his finger. While he was doing this, the victim was rubbing the accused's penis. The accused and the victim then switched positions, with the accused now lying on the sand and the victim on top of him. The accused asked the victim if she wanted to perform fellatio on him. The victim said she did. However, she only managed to do so for a few seconds as she then vomited. The accused wiped the victim's mouth. The two of them then rolled back onto the sand, this time with the victim lying on the sand and the accused on top. The accused and the victim continued kissing. She was fondling his penis and he was fondling her breasts. The accused then asked the victim if she wanted to have sex and the victim said, "Yes".<sup>59</sup> The accused was unable to obtain an erection and did not penetrate the victim's vagina with his penis. The accused subsequently felt an urge to urinate and did so outside the victim's vagina. He then continued to kiss the victim and the victim kissed his cheeks and ears.

113 All of a sudden, the victim started crying and pushing the accused away. The accused wiped her tears and asked her what was wrong and if she wanted to go back home. The victim replied that she wanted to go home. The accused then put on his clothes and proceeded to help the victim put on her tank top. He was about to help the victim put on a pair of red shorts that he

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<sup>59</sup> Transcript (13 Apr 2016) p 83 and Transcript (14 Apr 2016) p 28.

found inside his bag when [S] started calling the victim's phone. The accused answered and told [S] where he and the victim were.

114 Before [S] arrived and before the accused could put on the pair of red shorts for the victim, the accused spotted a number of foreign workers nearby. The accused got up to chase the foreign workers away. When he returned, [S] had already arrived. [S] and the accused both tried to comfort the victim. [S] also helped pull up the pair of red shorts for the victim. [S] then told the accused to stay away. The accused left and returned momentarily, but [S] insisted that the accused stay away. Hence, the accused walked back to the Wavehouse where he met a group of his friends and sat down with them. Just as the accused was about to leave, the police arrested him.

115 One Teo Jie Wei ("Teo") gave evidence for the Defence. He was working as a part-time waiter at the Wavehouse in May 2012 and he remembered serving as a waiter at the Wavehouse at an event promoting "Cointreau" liquor in May 2012. There was one such event in that month. In his conditioned statement given on 26 June 2014, he said he had noticed an Indian guy and a Chinese girl near the bar area. The guy had his hand around the girl's waist and it seemed to him like they were behaving like a couple. The guy seemed like he was protecting the girl from the crowd around them. He did not see them hug or kiss each other. By the time Teo gave his oral evidence on 21 April 2016, his memory of that night had lapsed. He could not recognise either the guy or the girl even from photographs which were shown to him but the Prosecution did not suggest that he was referring to anyone else other than the victim and the accused. Teo could not recollect any other detail as to how they were behaving.



***The court's conclusion on the issue of consent***

116 It was [S]'s unchallenged evidence that when she found the victim, the victim looked like she had passed out and was murmuring. The victim was naked below the waist and [S] had to help the victim put on a pair of shorts (see [13] and [96]). The questions are whether the victim had engaged in the active sexual foreplay described by the accused before the digital and penile penetration and before [S] found her and whether the victim had agreed to digital penetration and said "Yes" to sexual intercourse in the midst of such foreplay.

117 The victim said that she found the accused unattractive.<sup>60</sup> However, the Defence produced two photographs of the victim and the accused which were admitted and marked as Exhibit D1 and D2. In each photograph, the two were physically close together with one of the victim's arms placed over the accused's shoulder. The photographs were taken by [S] at the victim's suggestion.<sup>61</sup> The date on the photographs was 5 May 2012 and the time was 17:15. [S] explained that she had set the time to European time as she had travelled to Europe before 5 May 2012 and she had forgotten to reset the time back to Singapore time. It was undisputed that the photographs were taken before the victim and the accused left the Wavehouse. According to [S], the victim was "still okay" and the accused was high when the photographs were taken.<sup>62</sup>

118 While the photographs did not establish that the victim found the accused attractive, they did show that she was behaving in a friendly manner

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<sup>60</sup> Transcript (25 Aug 2015) p 54.

<sup>61</sup> Transcript (15 Sept 2015) p 47.

<sup>62</sup> Transcript (15 Sept 2015) p 47.

towards him and she was not as aloof towards him as she was suggesting. They also did go some way to supporting part of the accused's evidence that the victim and the accused were in close physical contact at least on that occasion.

119 The victim also said that she had not kissed anyone else besides Jim but Jim's evidence was that she did kiss another person, *ie*, a male Caucasian. Jim's evidence on this point was not disputed by the Prosecution. Perhaps the victim was lying on this point or she had forgotten some details due to her inebriated condition. I am of the view that it was the latter as she had no reason to lie about this since it was her own position that she was quite drunk.

120 There was no independent evidence that the victim had kissed the accused. I accept that Teo was referring to the victim and the accused who he had thought were behaving like a couple. However, in the absence of further details from him and as I do not find the accused to be a credible witness generally, I am not able to conclude that she was acting very flirtatiously towards the accused as submitted by the Defence. I do however accept that she had engaged in uninhibited behaviour generally.

121 Although the victim had gone binge drinking before, she said that she had never been as drunk as she was on the night of 5 May 2012 going into 6 May 2012. She could not even remember leaving the Wavehouse with the accused. The victim's allegation that she was very drunk before she left the Wavehouse was corroborated by [S] (see [95] above).

122 The accused did not agree that the victim was as drunk as the victim and [S] were saying. The accused suggested that [S] bore him a grudge because she was interested in him that night but he did not reciprocate her

interest in him. [S] denied this. She said she already had a boyfriend then and eventually married that boyfriend.

123 [S] said that she had met the victim at a course which [S] had attended in August 2011. They found out that they were staying in the same neighbourhood and became friends. They got along well but were not the best of friends. They had gone clubbing together once before 5 May 2012. According to the victim, she was no longer in contact with [S] by the time of the trial.<sup>63</sup> There was no reason for [S] to embellish her evidence at trial about the state which the victim was in before she lost sight of the victim when the victim and the accused left the Wavehouse.

124 I also do not accept the accused's allegation that [S] was interested in him and that he did not reciprocate her interest. I find [S] to be a mature witness who knew the gravity of the evidence she was giving. [S] was not someone who was nursing a grudge against the accused after so many years. I find her to be a steady witness and her evidence about the drinks which the victim took and the victim's condition was not shaken during cross-examination.

125 As mentioned above at [110], it was the evidence of the accused that he had said that he was going to send [S] and the victim home and he had told [S] to get the victim's bag from the VIP section. This meant that all three of them were going to leave the Wavehouse together. Yet, when [S] went to get the victim's bag, the accused brought the victim out of the Wavehouse and to the beach.

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<sup>63</sup> Transcript (25 Aug 2015) p 67.

126 The Defence submitted that if the accused had a criminal intent, he would not have asked [S] to get the victim's bag knowing full well that [S] would return and look for the victim. On the other hand, it would have been a simple matter for the accused to wait for [S] to return and tell [S] that he had changed his mind and wanted to go for a walk with the victim at the beach instead.

127 It was the evidence of [S], which I accept, that the victim was being physically supported by the accused and that the victim looked really drunk. This and the fact that (1) the accused asked [S] to get the victim's bag and (2) the accused then left the Wavehouse with the victim without informing [S] suggested that the accused had a sinister intention towards the victim.

128 It is not in dispute that the victim had said "No" to the accused at the beach. The victim said she had said this thrice to the accused. The accused said she had said it twice in the 7 May Statement. This was one of the amendments he had made. It is not material whether the victim said "No" thrice or twice. The question is when she said "No". As mentioned above, the victim's evidence on this point was not consistent. It was either before or during penile penetration. The accused said in the 7 May Statement that she said "No" after penile penetration.

129 However, even though it is not clear when the victim said "No", it was not in dispute that she pushed the accused away. Although the victim's evidence on this point was not clear (see [75]),<sup>64</sup> the accused had admitted in the 7 May Statement that she did do so. Page 13 of the AB stated (at the bottom) that, the victim kissed the accused's cheeks and ears. Then, "She

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<sup>64</sup> Transcript (25 Aug 2015) p 64.

*started sayin: [sic] 'No No' and Suddenly she pushed me away and started crying*". The words in italics were the amendments. The rest were already part of his initial statement. This admission that the victim had pushed the accused away tied in with the evidence of Kason who said he saw the female trying to push the male away but the female was weak. Kason was not challenged on his evidence that the female was weak when she was trying to push the male away and I accept that she was weak then.

130 Was this a situation where the victim had suddenly changed her mind after active sexual foreplay or a situation where there was no sexual foreplay at the beach and the victim had suddenly gained some consciousness to find the accused on top of her? The victim's conduct in trying weakly to push the accused away was more consistent with the latter. If, for example, the victim and the accused had been kissing and the accused was starting to undress the victim, it may be that the victim then decided to draw a line against anything more by rebuffing the accused's attempt to undress her. However, according to the accused, their clothes had been removed and they were already actively engaged in sexual foreplay. It was not logical for the victim to suddenly change her mind. In addition, the fact that the victim was weakly pushing the accused away suggested that she was in no condition to be engaged in active sexual foreplay just before that.

131 Furthermore, Kason never saw the female at the beach actively engaged in sexual foreplay. At most, he had assumed initially that the couple were making out. Eventually, he thought that she was being taken advantage of and was drunk, although he made an error as to whether the group of Indian men he saw were involved. Terence's evidence was that there was little movement from the female he had seen.

132 It was the evidence of [S] that her calls to the handphone of the victim went unanswered initially. Then one of her calls was answered but nothing was said to her. [S] then called again and this time the accused spoke up and said that they were at the beach but he asked [S] not to come over. The accused agreed that it was he who took both of the calls. However, he said that although the victim was drunk and lying down, she had not passed out.<sup>65</sup> Yet, he could not explain why he had not passed the handphone to the victim if she had not passed out. I am of the view that the accused had said that the victim had not passed out then as it was part of his evidence that the victim was awake all along until [S] found them at the beach. I do not accept his evidence that the victim had not passed out then.

133 There was also the accused's subsequent conduct which suggested a guilty conscience. It was [S]'s evidence that when she found the victim and the accused at the beach, the accused said that he had found the victim lying completely naked. Her evidence on this point was not challenged.

134 It was also the evidence of Andy Alfian Bin Hamdillah ("Andy"), who was doing his National Service then as a police officer that he and Inspector Yap Tze Chiang ("Inspector Yap") arrived at about 2.53am on 6 May 2012 at Siloso Beach. Two other police officers had already arrived at the location (at about 2.50am). Shortly thereafter, one of these officers asked Inspector Yap and Andy to join them. Andy and Inspector Yap found the victim lying motionless on the beach near Sapphire Pavilion. The victim was foaming from her mouth and another female was attending to her. Then, Andy and Inspector Yap were informed that a male fitting the description of the accused was spotted near a bicycle kiosk. They proceeded there and interviewed the

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<sup>65</sup> Transcript (14 Apr 2016) pp 24-25.

accused before they arrested him. The accused smelt strongly of alcohol and was mumbling. The accused told them that he had too much to drink and did not know what had happened because he had fallen asleep. When he woke up, he saw the victim lying naked next to him. The evidence of Andy was corroborated by Inspector Yap. In any event, it was not challenged by the accused. The accused was led back to the beach where [S] was. At 6.20am, he was placed under arrest.

135 At this point, I would mention that in the 7 May Statement, SSSgt Tay had asked the accused in Q3 as to why he had told Andy that there was consensual sex. The accused's answer was that he did not remember telling Andy this until at a hospital when Andy told him that he had said it was consensual. The accused added that both he and the victim were drunk. This question and the answer were not pursued in the cross-examination of SSSgt Tay or Andy. I am of the view that, at most, it may be that at some point in time, the accused had mentioned consensual conduct to Andy. However, even if he did say this, it does not detract from the unchallenged evidence of Andy and Inspector Yap that the accused did say in their presence, before he was arrested, that he had fallen asleep and that when he woke up he saw the victim lying naked next to him.

136 It will be recalled that there was no suggestion in the 7 May Statement and in the 21 May Statement that the accused had fallen asleep or that he had found the victim lying naked. Furthermore, there was no suggestion from the evidence of Kason or Terence that the male person they saw was asleep.

137 It is clear to me that the accused had lied both about falling asleep and finding the victim lying naked. He said he lied to [S] about finding the victim lying naked because he was not thinking right. He was panicking after the

victim started crying.<sup>66</sup> He said that after [S] had arrived and told him to go away, he went nearby, had a seat and was drinking alcohol with others. Thereafter, the police arrived. He lied to the police about falling asleep and finding the victim naked because he had panicked. He was not in the right state of mind.<sup>67</sup> In cross-examination, he also said:

I mean because when I saw the police coming and questioning, so I thought, Your Honour, that, oh---I mean---I mean I didn't do anything wrong. That's why I was---I did panic. I was nervous and---yah. I wasn't sure what was going to happen.<sup>68</sup>

He denied intentionally lying or making up a story to the police.<sup>69</sup>

138 As I have mentioned, notwithstanding the accused's denial, he did lie to the police about falling asleep. He also repeated his lie that he had found the victim naked. His only reason was that he had panicked. However, there was no reason for him to have panicked if indeed he and the victim were engaged in consensual sexual activity as he was alleging. Even assuming that the victim was crying, it was not logical for him to tell the lie about finding her naked if indeed she was a willing participant before. Besides, there was an interval between the time he had spoken to [S] and the police. He had spoken to [S] before she made a call for an ambulance at around 2.50am on 6 May 2012 (see [14]). The police arrived at Siloso Beach between about 2.50am to 2.53am (after Kason's calls). The police did not interview the accused immediately but only after they learned that he was near a bicycle kiosk. The accused had time to think over what he had said to [S] and to think about his

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<sup>66</sup> Transcript (14 Apr 2016) p 31.

<sup>67</sup> Transcript (14 Apr 2016) p 33.

<sup>68</sup> Transcript (14 Apr 2016) p 34.

<sup>69</sup> Transcript (14 Apr 2016) p 34.



error if he had truly made a false statement inadvertently. Furthermore, the evidence that he was drinking with others after he had left the victim and [S] at the beach did not suggest that he was in a state of panic.

139 In my view, the accused had deliberately lied. He did so because of a guilty conscience. He knew he had taken advantage of the victim who did not engage in any act of sexual foreplay before digital or penile penetration. If there was mutual sexual foreplay, the accused would not have told his lies. As mentioned above at [131], neither Kason nor Terence saw the victim actively engaged in any act of sexual foreplay.

140 I note that the victim did not say that there was digital penetration of her vagina. The evidence about such penetration came from the accused himself and not the victim. This supports the victim's evidence that she could not remember walking out of the Wavehouse and the next thing she could remember was that the accused was on top of her and she felt like she was lying on sand. The victim also could not confirm in oral evidence if she did push the accused away or if she used her arms to do so (see [75]).

141 All the undisputed evidence, including the evidence of the accused, was that the victim was high before she left the Warehouse. [S] went further to say that, before she went to get the victim's bag, the accused was supporting the victim with his arm under the victim's armpit. The victim looked like she was really drunk. Her eyes were droopy and she could not stand without support (see [95]).

142 The evidence in its entirety suggested that, at the beach, the victim was in no condition to and did not actively engage in sexual foreplay.

143 I also find that the accused was not a truthful witness on the issue of consent. As regards the accused's oral evidence that he had specifically asked the victim if she wanted to have sex and she said, "Yes", I note that in the 7 May Statement, the accused had initially made this allegation too but he then retracted it as that allegation was deleted. Furthermore, in the additional questions in that statement (at AB p 14), *ie*, Q4 and Q5, the accused was asked whether he had asked the victim if she wanted to have sex with him and whether the victim agreed to have sex with him. His answer was that he did not ask the victim and the victim did not say anything. The accused's vacillating evidence on this important point leads me to conclude that he did not ask the victim if she wanted to have sex and she did not say "Yes" to his question. Furthermore, as I have said, there was no mutual active sexual foreplay. As I have rejected the accused's evidence about mutual sexual foreplay before digital and penile penetration, there is also no question of implied consent from such conduct.

144 I add that even if the accused had asked the victim if she wanted to have sex and if she had said, "Yes", I would have concluded that her response is vitiated by s 90(b) of the Penal Code in view of her intoxicated state.

145 I find that the Prosecution has established beyond a reasonable doubt that the victim did not consent to digital or penile penetration.

### **Section 79 Penal Code**

146 As mentioned, the Defence also relied on s 79 of the Penal Code which excuses a person from an act which may constitute an offence if the act was done by that person under a mistake of fact, in good faith, believing himself to

be justified by law in doing it. This reliance is misplaced. It is premised on the accused's evidence about the mutual sexual foreplay, which I have rejected.

147 There is one other point I would like to address. The Defence submitted that because the Prosecution did not challenge the truthfulness of the accused's cautioned statements (see [68]), the Prosecution had tacitly accepted those statements. I am of the view that it is obvious from the trial that the Prosecution was alleging that the accused was guilty of both offences and thus had rejected the truth of those statements. Therefore, it was not necessary for the Prosecution to have challenged such statements specifically.

### **Outcome**

148 I find that the Prosecution has proved both the charges beyond a reasonable doubt. I convict the accused on both the charges which he faces.

Woo Bih Li  
Judge

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

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