# Ong Mingwee (alias Wang Mingwei) *v* Public Prosecutor
# [2012] SGHC 244

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| **Case Number** | : Magistrates Appeal No 77 of 2011/01 |
| **Decision Date** | : 30 November 2012 |
| **Tribunal/Court** | : High Court |
| **Coram** | : Quentin Loh J |
| **Counsel Name(s)** | : Subhas Anandan and Sunil Sudheesan (RHTLaw Taylor Wessing LLP) for the appellant; Leong Wing Tuck and Sanjna Rai (Attorney General's Chambers) for the respondent |
| **Parties** | : Ong Mingwee (alias Wang Mingwei) — Public Prosecutor |

*Criminal Law – Offences – Rape*

30 November 2012 Judgment reserved.

**Quentin Loh J:**

**Introduction**

1 The appellant, Ong Mingwee ("the appellant"), a 29-year old male, was charged and convicted by the learned District Judge ("DJ") of committing rape on Ms B ("the complainant"), a 25-year old female, an act punishable under s 375(2) of the Penal Code (Cap 224, 2008 Rev Ed) ("the PC") ("the alleged rape"). The following charge was preferred against the appellant on 27 December 2010 ("the charge"):

> You, Ong Mingwee (Wang Mingwei), NRIC No. XXX, Male, 28 Years old, Singapore Citizen, are charged that you, in the early hours of the 12th day of February 2009, at Block 203 Toa Payoh North #02-1115, Singapore, committed rape on [the Complainant], female/ 23 years old (D.O.B 8 February 1987), and you have thereby committed an offence punishable under Section 375(2) of the Penal Code, Chapter 224.

The appellant was sentenced to seven years' imprisonment and eight strokes of the cane by the DJ. The appellant appealed against his conviction and sentence before me.

2 The following relevant facts relating to the incident were undisputed. The complainant and her friend, one Miss Z, met at the complainant's house sometime between 11 pm and 11.30 pm on 11 February 2009. Miss Z stated that she and the complainant consumed four shots of vodka before they left slightly after midnight for Zouk Club ("the club"), which was located at Jiak Kim Street. [note: 1] Miss Z testified that she and the complainant met the appellant for the first time at around 3 am on 12 February 2009 at the bar in the club. They were introduced to him by a mutual friend. The complainant spent the remaining time at the club (approximately an hour) dancing and drinking with the appellant. Miss Z stated that [note: 2]:

> [W]e were dancing just with the same people. [The complainant] was dancing with the [appellant] then I was dancing with Alvin all the way till the end of the night."

3 The complainant testified that she was dancing with the appellant and that there was "body contact" between them. [note: 3] While Miss Z was with her friend, one Alvin, during this time, it was Miss Z's evidence that the complainant was dancing with the appellant with her arms around his neck while his arms were placed on her waist/hips. [note: 4] At around 4 am when the lights in the club came on, signalling the end of the night, the complainant, the appellant, Alvin and Miss Z proceeded to leave the club while discussing their plans to go home.

4 The complainant's friend, one Nicholas, testified that he saw the complainant leave the club in a taxi with the appellant sometime between 4.20 am and 4.30 am. [note: 5] Miss Z and Nicholas testified that the complainant willingly boarded the taxi with the appellant. They also testified that the complainant boarded the taxi unsupported. The complainant testified that she was "quite spaced out" [note: 6] and could not remember how she had got into the taxi. [note: 7] What transpired during the taxi ride is disputed by the parties and this will be dealt with below. Next, the appellant and the complainant arrived at his home at Block 203 Toa Payoh North #02-1115, Singapore ("the appellant's house") and the complainant waited in the appellant's bedroom while he went to the bathroom to relieve himself. The appellant smoked a cigarette in the bathroom before returning to his bedroom.

5 What happened in the appellant's bedroom was vigorously contested. At some point between 4.55 am and 6.22 am on 12 February 2009, the appellant and the complainant had sexual intercourse. [note: 8] The complainant says she was raped as she did not consent to the same. The appellant says she consented.

6 After the appellant ejaculated, he handed the victim her things, assisted her in dressing herself and walked her to the door.

7 One prosecution witness, one Mr Tan, gave evidence that he was riding his three-wheeled motor bicycle near his grandson's school in Lorong 1 Toa Payoh at around 6.15 am on 12 February 2009 when he saw the complainant trying to wave down a vehicle with both her arms. [note: 9] The complainant boarded Mr Tan's motorcycle of her own accord after which he told her that he would send her home. They did not speak during the remaining ride to the complainant's home but Mr Tan testified that the complainant looked afraid. [note: 10] Mr Tan did not state when he dropped the complainant off at her house. Mr Tan testified that the complainant's mother, was waiting for the complainant in the front of their house.

8 Prior to that, at about 5.54 am on 12 February 2009, the complainant's mother had made the following police report ("the police report"): [note: 11]

> My daughter called me earlier and informed [sic] that a guy refused to let her go unless she have [sic] sex with him. I do not know where she is. I tried to call her but she did not pick up. I also tried calling the guy's handphone but no one pick [sic] up. My daughter's name is [Ms B] ... The guy is Ken....

**The decision below**

***Conviction***

9 The DJ found that the Prosecution relied "principally" on the complainant's evidence (at [60] of her Grounds of Decision at [2011] SGDC 308 ("GD")), and that the evidence of Miss Z, the complainant's mother, the call tracing report (P 36) and the statements of the appellant supported, in

part, the complainant's version of the events, establishing the elements of the charge. The DJ made the following findings of fact in support of her decision to convict the appellant. She found that the complainant's account as to what happened in the appellant's home, specifically in his bedroom, was substantially corroborated by Miss Z, the complainant's mother and the call tracing records. The DJ also found that it "must have been" during one of the three telephone conversations lasting over a minute between the complainant and Miss Z that she communicated her fears and requested Miss Z to come and get her. In the two conversations between the complainant and her mother at 5.13 am and 5.33 am which also lasted for about a minute, the DJ found that in the later conversation the victim told her mother that the appellant would not let her leave if she did not have sex with him. [note: 12] The DJ found that this evidence was corroborated by the police report made by the complainant's mother at about 5.45 am, shortly after the phone conversation with her daughter. Thus the DJ found that the complainant's mother's evidence and the police report made supported the complainant's "unequivocal expression of fear" and "repeated desire to go home". [note: 13] The DJ also stated that that complainant "did not want to stay in the [appellant's] flat or in his bedroom...since there were only 2 of them in the bedroom the victim must have been afraid of the [appellant]". [note: 14] On the basis that the complainant was crying on the phone with her mother and had communicated her desire to go home on more than one occasion, the DJ found it "incredible that she [the victim] would then be willing to have sex with the accused of her own free will". The DJ also accepted the complainant's evidence that she was in fear and crying throughout the "ordeal". [note: 15]

10 Rejecting the appellant's counsel's suggestion that the complainant was lying, the DJ found that the complainant appeared to be a "level headed and sane young lady" and that it was "unfathomable" that she would lie to her mother at such an "unearthly hour" as there was no "advantage or benefit" for her to do so. [note: 16] The DJ also found that the complainant gave a "clear, coherent, compelling and credible account of what happened in the [appellant's] bedroom which led him to raping her". [note: 17] The DJ found that on the evidence, the appellant was "the person in charge" during the material time as he admitted to saying "let's have sex first and you can go home" in his statement (P37) and because he had snatched the complainant's phone away from her on more than one occasion. The DJ also placed considerable weight on the appellant's statement that he had "allowed" the complainant to make phone calls. [note: 18] The DJ reasoned that as the complainant was a young adult, there was no reason for her to seek the appellant's permission unless he was "in a dominant position in comparison to herself". [note: 19]

11 While the DJ recognised that the appellant was consistent in his evidence that he told the complainant that he would not hurt or harm her, the DJ took the view that the appellant must have recognised that the complainant was "genuinely in fear" and "with this fear lurking in her [the victim] which he did not completely erase as she expressed the same feelings later to [Miss Z] and her mother repeatedly, it would take a leap of faith to believe that the victim then changed her stance and segue to having sex consensually with the [appellant]". [note: 20] The complainant's conduct and emotional state (supported by the testimony of Mr Tan, her mother and Miss Z) after the incident was found to be consistent with her having been forced to have sex with the appellant. [note: 21]

12 The DJ also found that the appellant was an evasive witness. She noted that under cross-examination the appellant repeatedly responded to questions asked of him with the following phrases: "I cannot remember" and "I cannot explain". The DJ also found that the appellant was unable to recollect specific details of the incident such as how much he drank and how long he danced etc. The DJ took the view that the appellant's failure to offer any explanation as to why he failed to ask the

complainant why she was afraid led to the "inescapable conclusion" that it did not matter to him that she was scared and that she cried. [note: 22] The DJ found that the appellant had no interest in the complainant as an individual, that he did not offer her any refreshments and that all he wanted to do was to have sex with her. [note: 23] Further the DJ stated that the complainant could not have been a willing party "because if she had been happy to have sex with the [appellant] one would have expected her to linger on in his flat and not be unceremoniously booted out from his flat after he was done with her". The DJ also found that the appellant did not reveal his address to Miss Z and the complainant's mother so as to avoid detection in order "to complete the deed". [note: 24]

13 The DJ also accepted the evidence of Dr Zuzarte (PW 13) who confirmed that the complainant had told her when she examined her that she was not allowed to leave the flat unless she had sex with the appellant. PW 14, Dr Wee, took the view that the complainant was physically and mentally incapacitated by her alcohol consumption and was not capable of consenting, evidence which was also accepted by the DJ. The DJ found that the complainant's alcohol consumption would prevent her from protecting herself physically and to fight back in terms of "yelling". The DJ found that the victim did not resist the appellant as she was "overawed into submission". [note: 25]

14 Based on the facts found above, the DJ convicted the appellant.

***Sentencing***

15 The DJ relied on the Court of Criminal Appeal decision of *Chia Kim Heng Frederick v PP* [1992] 1 SLR 361 for the proposition that the starting point in contested rape cases should be ten years' imprisonment and not less than six strokes of the cane. The subsequent decision of *PP v NF* [2006] 4 SLR 849 reviewed the sentencing practice for rape convictions and reiterated that the ten years' imprisonment and six strokes of the cane benchmark applied when there were no aggravating or mitigating circumstances. The DJ found that the following aggravating factors justified her imposition of seven years' imprisonment and eight strokes of the cane: [note: 26]

(a) The appellant "agreed and assured" Miss Z and the complainant's mother that he would be sending the complainant home. The appellant had abused the trust which Miss Z and the complainant had in him to send her home.

(b) The appellant was not "chivalrous and decent" as he did not send "a young intoxicated lady to her home". He was not interested in having "meaningful conversation" with her. The appellant knew that the complainant was "vulnerable" and he exploited her vulnerability when he brought her back to his flat on the pretext of wanting to talk to her to get to know her better.

(c) The appellant's conduct in going to the bathroom to relieve himself as well as smoking a cigarette supported the finding that the incident was "pre-meditated" as he had the opportunity of "weighing the consequences" of his course of action.

(d) The appellant ignored the complainant's pleas to leave his home and did not do the "decent thing" to let her leave and thus the DJ found that he "confined her against her will". The DJ also found that the appellant had lied to the complainant's mother and was hurting the complainant's mother as well as the complainant when he proceeded to have sex with the complainant without her consent.

16 The DJ found that there were no relevant mitigating factors and sentenced the appellant as a first time offender.

**The issues before the court**

17 It was undisputed by the Prosecution before the DJ as well as before me that the appellant did not physically restrain the complainant or use any weapons to incite fear or threaten her during the alleged rape. The only question raised by this appeal is whether or not, on the evidence adduced before the DJ, the complainant can be said to have consented to sexual intercourse with the appellant. The following issues arise on the facts of this case:

( a ) *Issue 1*: Whether the Prosecution had proved beyond a reasonable doubt that the complainant did not consent to sexual intercourse with the appellant; or in the alternative

(b) *Issue 2*: Whether the appellant could successfully raise a mistake of fact defence under s 79 of the PC, *ie* that on a balance of probabilities he reasonably believed that the complainant consented to sexual intercourse with him.

**Issue 1: Whether the Prosecution had proved beyond a reasonable doubt that the complainant did not consent to sexual intercourse with the appellant**

***Law on consent***

18 Factual consent (*ie*, whether there is sufficient evidence to establish that the victim did consent) is governed by s 90 of the PC which states as follows:

> **Consent given under fear or misconception, by person of unsound mind, etc., and by child**
>
> **90.** A consent is not such a consent as is intended by any section of this Code —
>
> (*a*) if the consent is given by a person —
>
> (i) under fear of injury or wrongful restraint to the person or to some other person; or
>
> (ii) under a misconception of fact, and the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception;
>
> (**b**) **if the consent is given by a person who, from unsoundness of mind, mental incapacity, intoxication, or the influence of any drug or other substance, is unable to understand the nature and consequence of that to which he gives his consent**; or
>
> (*c*) unless the contrary appears from the context, if the consent is given by a person who is under 12 years of age.
>
> [emphasis added in bold]

***Whether the complainant's consent was vitiated by her intoxication***

19 I will first consider the Prosecution's evidence that the complainant and appellant had been consuming alcohol throughout the night of the incident. In so far as the complainant's level of intoxication was concerned, Dr Wee testified that at the time of the incident, the complainant would have been too intoxicated to consent to sexual intercourse. This evidence *prima facie* triggered s 90(b) of the PC. However, I note it was not the Prosecution's case that the complainant was intoxicated to the point of being unable to consent. In fact, the Prosecution relied on Dr Wee's

evidence for the submission that the complainant's alcohol consumption caused her to be vulnerable and to have dulled reflexes, but it was not argued that she had lacked the *capacity* to consent. The DJ did not make any such finding under s 90(*b*) of the PC either. A closer look at Dr Wee's evidence is merited at this juncture.

20 Dr Wee did not personally examine the complainant but based his report on the facts of the case as given to him by the "Investigating Officer Azman Mohd Hussin". [note: 27] He extrapolated in his report, using the metabolic rate of 15 x 5 mg/100 ml of ethanol, that the complainant's "expected blood alcohol level" at 5.30 am on 12 February 2009 was 225 ml ethanol per 100 ml of blood. He determined this value to be above the "toxic level", effectively physically and mentally incapacitating the complainant and rendering her unable to consent. [note: 28]

21 I find that Dr Wee's evidence on the complainant's blood alcohol level at 5.30 am on 12 February 2009, derived using a generic calculus from her blood alcohol level at 10.35 am, was, with respect, speculative and of limited value. Dr Wee had failed to take into account the fact that each individual has a unique rate of metabolism of alcohol. In fact, under cross-examination he conceded that the rate at which alcohol is metabolised "varies from person-to-person from … the sex whether from male or female [or] whether the person was accustomed to drinking or teetotaler". [note: 29] Thus, Dr Wee's conclusion that the complainant would have lacked the ability to protect herself and to resist both physical and verbal assault was speculative as the complainant's actual blood alcohol at the time of the incident was an unknown value upon which no accurate deduction could have been premised. Dr Wee also testified that the symptoms of such toxicity in the blood included impaired balance reduction incorporation, staggering or erratic gait, nausea, vomiting, drowsiness, increased reaction time, confusion and disorientation. [note: 30] Dr Wee stated that at 250 ml of blood alcohol concentration, the signs and symptoms identified would be apparent due to the severe alcoholic intoxication regardless of whether the person in question was accustomed to alcohol or not.

22 As against Dr Wee's evidence, the contemporaneous evidence regarding the complainant's behavior must be weighed in order to deduce her capacity to consent to sexual intercourse with the appellant.

23 First, Miss Z's undisputed evidence was that after the lights were turned on in the club at about 4 am, signalling its closure, she, Alvin, the complainant and the appellant were standing outside the club making small talk regarding their respective plans to go home. Nicholas later joined them. Miss Z testified that the complainant was "quite high" and "wasn't very stable", although she was still standing. Miss Z then testified that the complainant was not drunk but she was "close to it". [note: 31] Nicholas testified that the complainant was "considerably tipsy" [note: 32] and could not really walk properly without help. [note: 33] However, his description of the complainant at the material time, *viz* that she was slightly slurred in speech and required some help from her friends to stand, was consistent with his description of the complainant when he had seen her at other times after spending time at Zouk. [note: 34] He testified that on these other occasions, the complainant was also "tipsy but not drunk to the extent that she could not, uh, control herself or make a---make an informed decision". [note: 35] Moreover, Nicholas's testimony on this score was not entirely consistent. During cross-examination, he testified that the complainant was standing with her friends. [note: 36] When the DJ asked him to clarify whether she was standing, Nicholas answered in the affirmative, and further testified that after the complainant "stumbled" over to him to give him a hug, she went back to "stand *next to* the accused" [emphasis added]. [note: 37]

24 More importantly, the evidence suggests that by the time the complainant got into the taxi, she had already started to sober up. Nicholas was unable to remember whether the complainant was supported by the appellant when she got into the taxi. [note: 38] Miss Z's evidence, which was uncontested on this score, was that when the complainant walked with the appellant to the main road to get a taxi, her arm was "looped" around the appellant and she got into the taxi unsupported and unaided. [note: 39] The appellant also adduced video footage from the club showing that the complainant walked unassisted when leaving the club. [note: 40] The evidence thus did not support the contention that the complainant showed signs of severe intoxication, much less intoxication severe enough to impair her ability to protect herself or to give consent.

25 Secondly, Miss Z's and Nicholas's undisputed evidence was that the complainant chose to go home with the appellant rather than Nicholas. [note: 41] Nicholas testified that he had earlier sent a SMS text message to the complainant asking if she would like a lift home to which she responded affirmatively. She was thus capable of understanding and responding to messages sent to her mobile phone. Nicholas also testified that he saw the complainant standing with her friends outside the club and that when he spoke to her, he could not remember what she said. He testified that when the complainant decided to go back with the appellant he was "slightly upset", [note: 42] but he did not see anything wrong with letting the appellant send the complainant home. [note: 43] Nicholas testified multiple times on the stand that he considered himself a good friend of the complainant's. If he had reason to believe that the complainant could not protect herself or make an independent decision, I find it hard to believe that Nicholas would have been so ready to allow the complainant to be sent home by the appellant. Miss Z also testified:

> A: I think I asked [the complainant] how she was going back and--- (clears throat) and she told me that the accused had offered to send her home.
>
> Q: And what did---sorry, Your Honour. And what did you say to that?
>
> A: *I asked her if she was okay with that and she said yes*.
>
> Q: Who said yes?
>
> A: [The complainant] said yes.
>
> [emphasis added]

26 Miss Z further testified in relation to Nicholas's offer to send the complainant home that "because [the complainant] already agreed with the [appellant] that he would be sending her home… *[the complainant] told [Nicholas] it was unnecessary*" [emphasis added]. [note: 44] The complainant was clearly capable of making a positive decision in favour of the appellant, rejecting Nicholas's offer which she had earlier accepted, and later communicating and confirming this decision to Miss Z and Nicholas. Both Miss Z and Nicholas's accounts of the events outside the club indicate that the complainant was capable of making coherent conversation with her friends and was not as severely intoxicated as Dr Wee's findings might suggest.

27 I also note that the complainant clearly had not exhibited a level of intoxication which would have caused her friends to be concerned about her well being. On the evidence, there was no suggestion that the complainant exhibited any of the physical symptoms identified by Dr Wee such as vomiting, nausea or erratic gait. As such, I find that the contemporaneous evidence did not support

Dr Wee's findings.

28 I am therefore satisfied that the complainant had made a deliberate and considered choice to enter a taxi with the appellant and, at that time, had the necessary capacity to consent under s 90 of the PC. *A fortiori*, the complainant would have been capable of consenting to intercourse sometime later at the appellant's house given that she stopped consuming alcohol after leaving the club and would have started to sober up. Whether she did consent was another matter. The question to be asked is whether on the evidence, it can be said that the respondent had established beyond a reasonable doubt that the complainant, who was capable of consenting, did not *in fact* consent to sexual intercourse with the appellant.

***Examination of the evidence of key witnesses in the trial below***

*The complainant's recollection of events before she reached the appellant's house*

29 Having had the benefit of observing the complainant on the witness stand, especially when subjected to cross-examination, the learned DJ found her to be a forthright and candid witness who was able to give a clear, coherent, compelling and credible account of what happened to her in the appellant's bedroom which led to him raping her. I have reminded myself that such a finding and assessment by the trial judge should be given great weight and should not be lightly disturbed. Unfortunately, and with great respect, having gone through the evidence with that principle in mind, I find that there are huge gaps in the complainant's evidence.

30 On the events leading up to the alleged rape, the complainant had minimal, if any, recollection of what happened. She testified that she was "quite spaced out" and did not remember a lot of the night. [note: 45] In particular, she did not remember whether she danced with anyone other than the appellant [note: 46] or how she got into the taxi with the appellant. [note: 47] She also did not remember whether the appellant had paid for the drinks at the club, whether she had arranged to meet Nicholas the next day, whether any arrangements had been made for her to go home from the club and whether she had any physical difficulties walking when leaving the club. [note: 48] When cross-examined about whether she had told the appellant that she wanted him to be her boyfriend, she remarked: [note: 49]

> Q: Now, whilst dancing with the accused, can you remember telling – can you remember telling the accused, "Can you be my boyfriend?
>
> A: No, I – I can't remember.
>
> Ct: No, you didn't say or you can't remember saying such a thing?
>
> A: I can't remember.

31 While the complainant could remember being introduced to the appellant and dancing with him that night, when questioned about what she remembered when she was leaving the club, her evidence during her examination in chief was as follows: [note: 50]

> Q: Now, outside Zouk, can you remember who you were with before you got into the cab?
>
> A: No, I can't remember.

Q: Now, do you remember being with the accused outside Zouk before the cab came?

A: I can't remember.

Q: Okay. You mentioned – okay, so you don't even remember how you got into the cab, alright, that's your evidence.

A: Yes.

Notwithstanding being *completely unable* to recollect any specific detail leading up to her getting into the taxi with the appellant, it was the complainant's testimony that she remembered being "inside a cab". [note: 51] When probed on what she remembered from being inside the taxi, the complainant stated that she could not remember hearing the appellant tell the taxi driver to drop her off at her home address. She however *did not* deny that he may have done so and that she simply could not recall him doing so. She also could not remember kissing the appellant in the taxi, as the appellant alleged, but on re-examination, conceded that there was a "small chance" that this had happened. [note: 52] She also could not remember the appellant asking her to go to his house, but she did not deny that this may also have happened. [note: 53]

*The complainant's recollection of what happened when she reached the appellant's house*

32 The complainant's evidence then was that "*the next thing I knew I was – when I woke up I was on the floor*". [note: 54] She clarified that she was in a bedroom which was dimly lit and was not very big but she could not remember if there were any windows. She recalled that when she awoke in the appellant's bedroom, she was no longer wearing shoes and that she was seated on the floor. [note: 55] The appellant explained why she was barefooted in his room; he testified that while walking up the stairs to his house he helped her remove her shoes as they were hurting her.

33 The complainant could not remember if she was alone when she awoke but she testified that she tried calling Miss Z, and later her mother. [note: 56] The call tracing records adduced into evidence reflected that it was in fact Miss Z who first called the complainant at 4.56 am after which the complainant called her back at 4.58 am. As reflected in the records, they spoke for over a minute in each of the two conversations. The complainant testified that "[the appellant] appeared" when she was on the phone with either Miss Z or her mother (the earliest call from the complainant to her mother was placed at 5.13 am) but she could not remember which of the two she was speaking to. [note: 57] I note that the complainant's testimony is also not entirely consistent with the call tracing records. The call tracing records reflect the complainant making and receiving multiple calls from about 5.10 am to 5.15 am (a 75 second call from Miss Z to the complainant at 5.10 am, a 53 second call from the complainant to her mother at 5.13 am, a 37 second call from the complainant to Alvin at 5.15 am, and a 21 second call from an unknown number to the complainant also at 5.15 am). If the phone had been snatched away from her while she was speaking to her mother at 5.13 am, she would not have been able to then make a call to Alvin (who was not called as a witness) and receive a call from an unknown number some 2 minutes later. If the phone had been snatched away from her while she was speaking to Miss Z at 5.10 am, the multiple calls she continued to make and receive indicate that she did have access to her phone, contrary to the Prosecution's case. If the complainant's allegations are true, it is likely that this event would have happened early on, at 4.58 am, before the complainant alleged that she was made to stay in the flat against her will. I also note the evidence that while the complainant's mother was on the complainant's speed dial, Miss Z was not; in order to call Miss Z, the complainant had to find Miss Z's number in her contact list or at the very least had to

redial Miss Z's number using the recent call option in her mobile phone in order to speak to Miss Z.

34 Next, the complainant testified that the appellant "snatched" her phone away from her, but when probed she could not remember where her phone was when she woke up. [note: 58] When he snatched her phone, who was she was talking to? And if he had said anything, when did he do so and what did he say? Despite being unable to recollect any of these details, the complainant testified that when she tried to get her phone back by standing up and reaching over, she "ended up falling on the bed". [note: 59] When pressed under cross-examination as to how this had happened, she stated: [note: 60]

> Q: Now, when learned Prosecution asked you in exam-in-chief yesterday, how you tried to get your phone back, and you said by standing up and trying to reach over to get it back, then you can't remember how it went but end up falling on the bed. Can you remember saying those words?
>
> A: Yes, I remember.
>
> Q: So did you stand up to try and get it from him?
>
> A: I suppose likewise, I like – I mean it all just happened quite fast. I – I don't know how to – how --- how the whole thing went but 1 minute I was trying to get my phone, the next minute, I was on the bed so – so I supposed that I – I don't know.

35 The complainant also could not remember how she got her phone back from the appellant in order to make and receive all the calls reflected in the call tracing record. She testified during her examination in chief: [note: 61]

> Q: Now, when you – now can you tell the Court, how did you manage to call – how did you manage to speak with [Miss Z] or your mum over the phone and told [sic] them this [that the appellant would not let the complainant leave unless she had sex with him]?
>
> A: I can't remember but at that point I had my phone after which I lost it again like –
>
> Q: What do you mean by after that you lost it again?
>
> A: Because when I was crying on the phone, saying that I wanted to go home and that he would not let me go home unless I sl--I had sex with him. It was snatched out of my hand or it was pushed down onto the floor. I can't remember but I lost it.

In other words, she could not remember whether she snatched the phone back from the appellant, whether she lost her phone or whether the appellant gave her the phone back and if anything else happened in between.

36 When questioned about why she formed the view that the appellant would not let her go home if she did not have sex with him [note: 62] or how she pleaded with the appellant, which was a pivotal aspect of the charge, the complainant could not recall the details. The complainant testified that she had told her mother that the appellant would not let her go home because he was on top of her at the material time and refused to give her his address:

> Q: Now, did you manage to get the phone back from the accused after he snatched it from you?

A: I --- yes, I think so.

Q: Yah, go on what happened next?

A: I remember at one point, I ---I was talking to my mum and I told her that I was very scared and that I wanted to go home, but [the appellant] would not let me go home unless I had sex with him.

...

Q: Now, my question is what led you to telling your mum this?

A: Because at that point of time, he was on top of me and he wouldn't let me go home.

...

Q: Now, did you—okay, now what led you to think that he would not let you go home?

A: Because if he would, he would have told. He would have told me his address, so I could tell somebody. But he also said not to make things so difficult and all I had to do was just to sleep with him and I could go home. [note: 63]

37 However, the complainant's evidence on this score was also uncertain. First, she could not remember how the appellant ended up being on top of her, nor could she remember how he was positioned over her. [note: 64] Secondly, when questioned whether she had asked the appellant for his address in order to elicit a negative response, her answers were equivocal and indefinite, with phrases such as "I think so" and "I suppose so". [note: 65] Even if she were able to give a definitive answer, she was unable to recall when her mother and Miss Z had asked for the appellant's address, and when she would have conveyed that query to the appellant. The import of her testimony was that she had inferred from the appellant's actions that he would not let her go. She also claimed that he had said words to this effect. However, when asked what his exact words had been, she testified equivocally that he had said something "along those lines [that all she had to do was sleep with him and she could go home]". [note: 66] It was only during cross-examination that she changed her tune, although she did so only hesitantly and only when pressed:

A: No, he told me specifically why make things so difficult? All you have to do is just to have sex with me and I will let you go home.

Q: Were those the exact words used by him?

...

Ct: He said specifically why make things difficult, all you have to do is have sex with me.

A: And I will let you go home.

Ct: Alright.

Q: Grateful your Honour. [Ms B], were those the exact words used by the accused?

A: Those were the words.

Q: Those were the exact words?

A: *Ye—it was---that was---yes, those were the words*.

[emphasis added]

38 The complainant's testimony as to how she was able to continue to speak on the phone with the appellant on top of her was similarly equivocal:

Q: Now – now, can you explain to the Court? Okay, how it happened, okay that he could be on top of you and yet you could talk to either [Miss Z] or your mum?

A: I don't know.

Ct: What do you mean you don't know?

A: I---I don't know 'cause I had my phone but like what I said after that he snatched it away.

...

Ct: How do you manage to make a phone call when the accused is on top of you?

A: I pleaded with him to give me my phone.

Ct: And then?

A: Which he did and I made the call.

Ct: He must have heard what you were saying over the phone?

A: Yes, that's why when I told my mum that he will not let me go home unless I slept with him. That was when he took the phone away from me again. [note: 67]

39 I have serious difficulties with this part of the complainant's evidence. It was unclear to me why she formed the view that she could not leave the appellant's home particularly when it was undisputed that the appellant did not threaten her with violence or physically restrain her in any way. What was stopping her from insisting on leaving or just getting up and leaving? There were some very minor bruises, and as noted by the learned DJ below, the complainant did not attribute any of these to the appellant. The complainant's poor recollection of any of the details prior to arriving at the appellant's house and during the time she was in his bedroom is deeply troubling.

40 I also note that the DJ in her judgment and the Prosecution during the appeal painted a picture of the appellant asserting power over the complainant by controlling access to her communication lines to Miss Z and her mother. The Prosecution claimed that this demonstrated the truth of the complainant's assertion that the appellant had refused to let her go. However, on the complainant's *own admission* that the appellant gave her the phone when asked, this picture is inaccurate. I will elaborate on this point later in [62] below.

41 Moving on to the alleged rape itself, the complainant testified that she said no to having sex

with the appellant but could not remember how many times or when she said this. She could not remember how or when her panties were removed or whether she was wearing her brassiere. [note: 68] Under cross-examination however, the complainant seemed to remember that she was wearing her brassiere and her panties. [note: 69] She did however maintain that she was conscious enough at this point to know who the appellant was. [note: 70] The complainant testified that while the appellant penetrated her, she looked at the wall and did not shout or scream as she feared that "something was might---might happen" [note: 71] . It was only when pressed for what this something might be that she proffered the explanation that she afraid that the appellant would hurt her and that she "feared for [her] life as well". [note: 72] I note and am troubled by the fact that she could not offer any explanation as to why she suddenly feared for her life and what the appellant did in order to create such fear in her. She also could not remember if the appellant pushed her panties aside while penetrating her or what he was doing with his hands at the time. [note: 73] When asked about how long the appellant penetrated her, she testified that it was "not long", "a few seconds". [note: 74] The complainant did not know if the appellant ejaculated in her. She testified that immediately after the alleged rape, the appellant passed her "... my stuff, my things and he showed me out of the door." The complainant could not remember the directions out of the appellant's house but she testified that she "ended up at the coffee shop downstairs". The complainant also could not remember when she stopped Mr Tan, whether she was wearing a helmet, what she told him and whether she gave him her address. [note: 75]

42 Even if I was to accept the explanation that the complainant's intoxication was the reason behind her poor recollection of the events that took place on 12 February 2009, which I do not accept, when I considered the complainant's evidence on general questions put to her under cross-examination at the trial below about herself prior to and after the alleged rape, her evidence was in similar vein. For example, she could not remember when she first met Nicholas, an unrelated event which occurred months prior to the alleged rape. [note: 76] When she was questioned under cross examination about how long it was before she started drinking and/or went clubbing again after the alleged rape or even how long it was before she lost contact with Miss Z, she was unable to recall these matters. [note: 77]

43 Having considered the evidence, with respect, I am regretfully unable to agree with the learned DJ's characterisation of the complainant's evidence as a "clear, coherent, compelling and credible account of what happened in the [appellant's] bedroom which led him to raping her".

44 As noted above (at [9]), the DJ recognised that the Prosecution "principally" relied on the complainant's evidence in support of its case. I hasten to add that the complainant's poor memory of the alleged rape did not inexorably lead to the conclusion that she was lying. However, her inability to recall with some clarity the details of what had transpired between her and the appellant directly affected the question of whether the Prosecution had discharged its burden of establishing the elements of the charge (*ie*, that the complainant did not consent to sexual intercourse with the appellant) beyond a reasonable doubt. This brings me to the next question of whether the complainant's evidence could be said to be unusually convincing as required by the law particularly in the context of sexual offences, where corroborative evidence is typically unavailable or of little assistance to the court.

*Whether the complainant's evidence can be said to be "unusually convincing"?*

45 In *Tan Wei Yi v Public Prosecutor* [2005] 3 SLR(R) 471 ("*Tan Wei Yi*"), when considering the

various aspects of the reasonable doubt standard and reliance on the victim's testimony the court (as stated in the headnote) held as follows:

> (1) If the district judge had properly applied his mind to the evidence before him, he would have come to the conclusion that the Prosecution had not proven beyond a reasonable doubt that the appellant had indeed assaulted the victim. In this respect, it bore repeating that although the burden on the Prosecution was not to overcome every imaginable doubt in the case unless these doubts were real or reasonable, the Prosecution most certainly had the duty of proving every relevant ingredient of the charge beyond a reasonable doubt in order to establish its case: at [20] and [21].
>
> (2) It was clear that the district judge relied solely on the victim's testimony in convicting the appellant, despite the fact that the victim's testimony was uncorroborated. Although there was no prohibition against relying on the evidence of one witness, there was an inherent danger in convicting an accused based only on the evidence of a single witness. The court had to be mindful of this danger and had to subject the evidence before it to careful scrutiny before arriving at a decision to convict an accused person on the basis of a sole witness' testimony. In such circumstances, it was trite law that a conviction may be sustained on the testimony of one witness only if the court made a finding that the witness' testimony was so compelling that a conviction could be based solely on it: at [22] and [23].

46 In elaborating on the role of a trial judge when examining the evidence of witnesses, the Court of Appeal in *Public Prosecutor v Mohammed Liton Mohammed Syeed Mallik* [2008] 1 SLR(R) 601 at [37]–[39] held as follows:

> 37 The rule as to corroboration in so far as sexual offences are concerned was laid down in the local context in the Singapore High Court decision of *Khoo Kwoon Hain v PP* [1995] 2 SLR(R) 591 ("*Khoo Kwoon Hain*"), where Yong Pung How CJ held that while there was no rule of law in this country that in sexual offences, the evidence of the complainant must be corroborated, it was nonetheless unsafe to convict in cases of this kind unless the evidence of the complainant was "unusually convincing" (*Khoo Kwoon Hain* at [50]; ...
>
> 38 As to what "unusually convincing" means, Yong CJ, in *Teo Keng Pong v PP* [1996] 2 SLR(R) 890, clarified (at [73]) that *this simply meant that the witness's testimony must be "so convincing that the Prosecution's case was proven beyond reasonable doubt, solely on the basis of the evidence"* (see also *Lee Kwang Peng v PP* [1997] 2 SLR(R) 569 ("*Lee Kwang Peng*") at [69]–[70] and *Kwan Peng Hong* ([37] supra) at [33]). Rajah J in *Chng Yew Chin* ([37] supra) also adopted this meaning, holding thus (at [33]):
>
> > In this context, dicta in case law abound cautioning judges to scrutinise the evidence before them with a fine-tooth comb, given both the ease with which allegations of sexual assault may be fabricated and the concomitant difficulty of rebutting such allegations: *Ng Kwee Piow v Regina* [1960] MLJ 278. Therefore, it is necessary that the testimony of such complainants be "unusually convincing", which is to say, it must be sufficient to establish guilt beyond reasonable doubt: *Teo Keng Pong v PP* [1996] 2 SLR(R) 890 at [73]. [emphasis added]
>
> 39 Given that the standard of proof required in a criminal case is already that of "beyond a reasonable doubt" (see [34]–[35] above), the expression "unusually compelling" must mean something more than a mere restatement of the requisite standard of proof. Indeed, Prof Michael Hor notes, in "Corroboration: Rules and Discretion in the Search for Truth" [2000] SJLS 509 at 531, *that the expression must clearly mean something apart from the standard of proof.* If, in

fact, one scrutinises closely the observations of Rajah J in *Chng Yew Chin* ([37] supra) quoted in the preceding paragraph, it will be seen that the *true emphasis is not on the standard of proof in the abstract, but, rather, on the sufficiency of the complainant's testimony.* By its very nature, the inquiry is a factual one. It is also a question of judgment on the part of the trial judge that is inextricably linked to the high standard of proof, ie, "beyond a reasonable doubt". *In our view, therefore, the "extra something" implied by the word "unusually" must refer to the need for the trial judge to be aware of the dangers of convicting solely on the complainant's testimony as well as of the importance of convicting only on testimony that, when weighed against the overall backdrop of the available facts and circumstances, contains that ring of truth which leaves the court satisfied that no reasonable doubt exists in favour of the accused.* Since a mandatory warning from the judge to himself is not required, *the implication is that the appellate courts will scrutinise the trial judge's grounds of decision to see whether the trial judge was indeed aware of the danger of convicting on the bare word of the complainant as well as whether the quality of the testimony itself was consistent with the high standard of proof beyond a reasonable doubt.*

[emphasis added]

47 In the recent Court of Appeal decision of *AOF v Public Prosecutor* [2012] 3 SLR 34 ("*AOF v PP*"), the Court affirmed (at [113]) that the law on "unusually convincing evidence" does not change the "ultimate rule that the Prosecution must prove its case beyond a reasonable doubt. The Court went on to distil the elements of what would be considered "unusually compelling" evidence (at [114]). The elements relevant to the present case are as follows:

(a) Subsequent repetition of the complainant's complaints by the complainant are not corroborative evidence if the complainant's testimony was not, in the first place, unusually convincing;

(b) An "unusually convincing" testimony is not enough to overcome materially and/or inherently contradictory evidence to prove guilt beyond a reasonable doubt. As the court held (at [114(d)]):

> The phrase "unusually convincing" is not a term of art; it does not automatically entail a guilty verdict and surely cannot dispense with the need to consider the other evidence and the factual circumstances peculiar to each case. Nor does it dispense with having to assess the complainant's testimony against that of the accused, where the case turns on one person's word against the other's…

(c) Even where there is corroboration, this does not mean that there is automatically enough evidence to convict.

48 The Court in *AOF v PP* further observed (at [115]):

Moving from the level of scrutiny to the elements of what an unusually convincing testimony consists of, it is clear that a witness's testimony may only be found to be "unusually *convincing*" by weighing the *demeanour* of the witness alongside both the *internal and external consistencies* found in the witness' testimony. Given the inherent epistemic constraints of an appellate court as a finder of fact, this inquiry will *necessarily* be focussed on the internal and external consistency of the witness's testimony. However, this is *not* to say that a witness's credibility is *necessarily* determined *solely* in terms of his or her demeanour. As Rajah JA observed in *XP* (at [71]–[72]):

> I freely and readily acknowledge that a trial judge is usually much better placed than an appellate judge to assess a witness's credibility, having observed the witness testifying and being cross-examined on the stand. ***However, demeanour is not invariably determinative; contrary evidence by other witnesses must be given due weight, and if the witness fails to recall or satisfactorily explain material facts and assertions, his credible demeanour cannot overcome such deficiencies.*** As I explained in *PP v Wang Ziyi Able* [2008] 2 SLR(R) 61 at [92]–[96], an appellate judge is as competent as any trial judge to draw necessary inferences of fact not supported by the primary or objective evidence on record from the circumstances of the case.
>
> *While an appellate court should be more restrained when dealing with the trial judge's assessment of a witness's credibility, there is a difference between an assessment of a witness's credibility based on his demeanour, and one based on inferences drawn from the internal consistency in the content of the witness's testimony or the external consistency between the content of the witness's evidence and the extrinsic evidence. In the latter two situations, the trial judge's advantage in having studied the witness is not critical because the appellate court has access to the same material and is accordingly in an equal position to assess the veracity of the witness's evidence* (see *Jagatheesan s/o Krishnasamy v PP* [2006] 4 SLR(R) 45 ("*Jagatheesan*") at [40], citing *PP v Choo Thiam Hock* [1994] 2 SLR(R) 702 at [11]).

[emphasis added in italics and bold italics]

49 I have already set out my assessment of the complainant's evidence, bearing in mind these authorities. In my view, the complainant's evidence cannot be characterised as "unusually compelling". The complainant did not recall crucial details such as whether she was crying on the phone, who she was on the phone with, how the appellant snatched the phone from her, what the appellant had told the taxi driver, when and how he told her or gave her the impression that she could not leave without having sex with him and then how he made her fear for her life. I accept that this case differs from *Tan Wei Yi* (cited at [45] above) in that there can be said to be some corroborative evidence from Miss Z and the complainant's mother. Nonetheless, the complainant's evidence leads to the unavoidable conclusion that it cannot be fairly characterised as *unusually compelling*. Furthermore, the complainant's mother's evidence (which is in essence a repetition of the complainant's evidence as the mother was not a witness at the scene) could fall within Rajah JA's pronouncements on this issue, namely that if the complainant's evidence is not unusually convincing, repetition of the same evidence subsequently does not add to its weight.

50 Taking the complainant's evidence at its highest, it seems plausible that she could have consented to sexual intercourse with the appellant but was very upset by his unceremonious dismissal of her after having sex. A fundamental principle in criminal law is that a reasonable doubt ought to be resolved in favour of the accused, in this case, the appellant. Crucially, after having reviewed the appellant's evidence alongside the complainant's evidence, it will be seen that but for her assertion that she communicated that she did not want to have sex with the appellant, her evidence was largely consistent with the appellant's version of the incident including how he assisted her to dress herself and walked her to the door. For the reasons stated thus far, I find that the DJ's characterisation of the complainant's evidence was unsupported by the totality of the evidence before the court. I will now turn to what corroborative value, if any, is to be found in the evidence of her mother and Miss Z.

*The phone calls between the complainant, her mother and Miss Z*

51 One of the key pieces of corroborative evidence adduced by the Prosecution was the content of the phone calls made by the complainant to Miss Z and her mother. First, when cross-examined on her telephone conversations with Miss Z, the complainant stated as follows: [note: 78]

Q: Now, you remember, you were on the---talking to Miss Z on the phone?

A: Yes.

Q: Can you remember what you said to her that conversation?

A: I don't remember everything, but I knew but [sic] there's something along the lines that I wasn't at home, I didn't know where I was and I – I want to go back home.

Q: How long were you on the phone with Miss Z, can you remember?

A: I can't remember.

Q: Now, whilst you were on the phone with Miss Z, the [appellant], was he in the room?

A: I can't remember.

Q: And did you finish the telephone conversation with Miss Z?

A: I can't---I can't remember.

When questioned about the telephone conversations with her mother, the complainant also could not remember how many times she called her, when she made the calls and what was said during these conversations. She also could not remember if the appellant went out of the room to speak to her mother. [note: 79] Her evidence was thus of little assistance.

52 Turning to Miss Z's evidence, by way of background, her recollection of the appellant's conduct in the club clearly established that the complainant willingly spent her time at the club with the appellant. After the complainant left in a taxi with the appellant, Miss Z spoke with her on three occasions. With reference to the call tracing log, it is clear that Miss Z first sent an SMS text message to the complainant at 4.43 am after she had left the club. Next, Miss Z called the appellant once at 4.55 am and the complainant once at 4.56 am. Miss Z's call to the complainant lasted for 79 seconds and her call to the appellant did not get through. The complainant then called Miss Z back at 4.58 am (the only time over the course of the night that she called Miss Z) and they then spoke for 91 seconds. Later, at 5.10 am Miss Z called the complainant and they spoke for 75 seconds. After 5.10 am, Miss Z called the complainant 14 times (*ie* 5.19 am, 5.19am, 5.23 am, 5.25 am, 5.31 am, 5.35 am, 5.37 am, 5.49 am, 5.50 am, 5.59 am, 6.00 am, 6.05 am, 6.23 am and 6.36 am), but, as the phone calls lasted between one and seven seconds, I formed the view, and the Prosecution accepted, that they were not answered by the complainant. Notwithstanding having had three conversations with Miss Z, I note that the complainant could not recall any details of what they spoke of. The details that she did remember, *viz* that Miss Z or her mother had asked for the appellants address, she could not be certain of (see [37] above).

53 Miss Z testified during her examination in chief that in her phone conversations with the complainant, the complainant told her that she was not at home and that she wanted to be picked up but that she did not know where she was. Crucially, Miss Z stated as follows: [note: 80]

Q: Okay. Now, she didn't know where she was, did you ask her to ask [the appellant] where she was?

A: Yes, I did.

Q: And what happened?

A: I think she asked him or passed the phone to him but after that the call got cut off.

Thus Miss Z was under the impression that the complainant willingly handed the phone over to or "passed the phone" to the appellant. Crucially, Miss Z also stated that the complainant was not crying on the phone when they spoke. Their last conversation was at 5.10 am. [note: 81] When asked about the specific details of any of her three conversations with the complainant, Miss Z could not remember very much either. She was not sure if she had called the complainant or if the complainant had called her, she could not be certain whether the complainant had told her that she was scared, or if the complainant had told her that the appellant had said that he would not release her if she did not have sex with him. [note: 82] When queried under cross-examination, I found her evidence to be tentative and non-committal: [note: 83]

Q: You can't remember. Did you ask her [the complainant] why did she not tell you over the phone... about the accused not letting her go unless she would have sex with him?

A: No.

Q: You didn't ask her?

A: No. I think she might have told me that he didn't let her go.

Ct: Do you think that she might have told you that he did not let her go?

A: Yah, during the phone calls or late that night when I was trying to find out where she was. I think she might have told me that he wasn't letting her go.

Q: *You're not certain, guessing?*

A: *Yah.*

[emphasis added]

I thus found that Miss Z's evidence suffered from the same lack of particulars, depth and conviction as the complainant's. Perplexingly, I noted from the call log, that while the complainant answered phone calls from unknown numbers twice (at 5.37 am for 44 seconds and 5.45 am for 56 seconds), she did not pick up Miss Z's phone calls which were made at the same time or minutes later (*ie* 5.37 am, 5.49 am and 5.50 am). This casts serious doubts on the complainant's evidence of fear and suggests that the complainant was in fact in control of her phone and chose to speak to certain persons but not others. The Prosecution did not adduce any evidence as to who these callers were and neither the appellant nor the complainant contended that these unknown phone calls were answered by the appellant. I entertain serious doubts about the level of panic, anxiety and distress that the complainant had experienced during her time at the appellant's flat. Miss Z's evidence did not assist the Prosecution's case in establishing such a state of mind on the part of the complainant and the complainant's own evidence did not shed very much light on her state of mind either (see also

[41] above). In fact, Miss Z's account contradicted the complainant's evidence in so far as the complainant maintained that when she awoke she was crying and remained in such a state until she left the appellant's house. Further, the fact that the complainant chose to answer phone calls from unknown callers was a stone which had been unfortunately left unturned in the conduct of this case by the Prosecution. The only known evidence of an unknown or unlisted number was the complainant's mother's testimony that her house phone number was unlisted and that she could have made some calls from her house phone. [note: 84] However the complainant's mother could not say when these calls were placed nor did she testify that she believed that all the unknown calls originated from her. The complainant's mother's evidence was, at best, equivocal and I am not able to place any weight on it.

54 These factors made me doubt the degree of distress the complainant was experiencing, particularly because Miss Z called her almost 14 times, between 5.19 am and 6.36 am, presenting her with an avenue of help which she could have pursued but failed to pursue for an unexplained reason. I was also perplexed as to why the complainant did not tell Miss Z that she was being forced to have sex with the appellant, an allegation which she only made to her mother in a phone conversation minutes later. It was also puzzling why Miss Z did not call the police or take some other action if she indeed formed the impression after having spoken to the complainant that the appellant was holding her in his flat against her will. In light of all the difficulties I have identified, I find that the complainant's evidence was barely, if at all, corroborated by Miss Z's evidence in furtherance of the Prosecution's case.

55 I now turn to the complainant's mother's evidence. From the call tracing records, the complainant called her mother at 5.13 am and spoke to her for about 53 seconds. Twenty minutes later, her mother called her back at 5.33 am and spoke with her for 50 seconds. Later, her mother made three more calls to her – once at 5.35 am and twice at 6.00 am – none of which were answered. The complainant's mother stated that she received a call from the complainant crying and shouting "Mommy" (presumably the first call at 5.13 am). [note: 85] It was her evidence that she could not clearly understand what the complainant was saying as she was "mumbling" and that the line got cut off. She could not recall any other details of this 53-second conversation. As noted earlier, the next call made by the complainant's mother to the complainant was at 5.33 am. However, the complainant's mother testified when the line got cut off from the 5.13 am conversation, she immediately called the complainant back on her mobile number but it was the appellant who answered the phone identifying himself as her "friend".

56 From the call tracing record, I note that a call was made from an "unknown number" at 5.15 am which the complainant answered for 21 seconds. If the complainant's mother's evidence is accurate, it was during this "unknown call" that she could have spoken to the appellant. Otherwise, the complainant's mother was mistaken that the line got cut off when in fact the complainant may have passed the phone to the appellant as she did while she was speaking to Miss Z. The DJ did not address this discrepancy between the objective evidence and the mother's testimony.

57 Setting aside my difficulties with this for a moment, when the complainant's mother spoke to the appellant soon after she spoke to the complainant, she testified that the appellant answered the phone and that he had said, "Hi Auntie, I'm …. I'm [the complainant's] friend". The complainant's mother then asked the appellant where her daughter was, to which he said "don't worry, i'll send her home". [note: 86] The complainant's mother stated that the appellant was "nice and polite" to her. [note: 87]

58 In her evidence in chief, the complainant's mother stated that after having spoken to the

appellant, she went down to wait for the complainant for about 20 minutes and as the complainant was not yet home by that time, she called the complainant back (between 5.13 am when the first call was made by the complainant to her mother lasting 53 seconds and 5.33 am when the complainant's mother called her back and they spoke for 50 seconds). [note: 88] When questioned about the 5.33 am conversation, the complainant's mother testified that the complainant said, "please come and get me". The complainant's mother also stated that it was during this phone call that the complainant allegedly told her that she did not know where she was and that the appellant would not let her go home if she did not have sex with him. The complainant's mother testified that the line then got cut off [note: 89] and that she tried to call her daughter back but that her phone was switched off (presumably the call at 5.35 am). The complainant's mother testified that she then called Miss Z, obtained the appellant's number and called him repeatedly but was unable to get through to him. However, the call tracing records revealed that it was in fact the appellant who first called her at 6.13 am and she only called him back at 6.15 am. No other calls were reflected in the call tracing records between the complainant's mother and the appellant.

59 After her conversation with her daughter at 5.33 am, unable to reach the complainant, the complainant's mother then made a police report. In the police report made at 5.54 am, the complainant's mother stated as follows: [note: 90]

> My daughter called me earlier and informed that a guy refused to let her go unless she have sex with him. I do not know where she is. I tried to call her but she did not pick up. I also tried calling the guy's handphone but no one pick up. My daughter's name is …. The guys is ....

After having made the police report and informing her husband (who was in Malaysia) of what had happened, the complainant's mother testified that she continued to call the appellant's and complainant's phone numbers. However as noted above, the records reflect that she only called the complainant twice at 6.00 am and next spoke to the appellant while returning his phone call at 6.15 am. It was the complainant's mother's evidence that during her conversation with the appellant (at 6.15 am which lasted for a lengthy 246 seconds), the appellant told her that the complainant was on her way home. He told her that the complainant could not get in touch with her because her "hand phone battery was flat" and he assured her that she was on her way home. [note: 91] It was only during this conversation that the complainant's mother asked the appellant where he lived, to which he said that his address was "confidential" or "private". She stated that she did not press the appellant on this, as she was afraid that the appellant would hurt her daughter if she upset him. [note: 92] When asked why she got the impression that the appellant would hurt her daughter, the complainant's mother was unable to point to any evidence of the contents of the conversation or the appellant's tone, but relied wholly on the fact that the complainant was not yet home and had told her that the appellant would not let her go until the complainant had had sex with him. [note: 93] The complainant's mother could not remember any other details of this conversation. [note: 94] The following excerpt from the complainant's mother's cross-examination is telling: [note: 95]

> Q: That he was very nice and polite with his tone, you agree that from the tone, he will not
>
> Q: Then, in that same conversation, where you asked him for his address, and he says it's private, did you ask him whether he forced her to have sex with him?
>
> A: I cannot remember. I don't think so because I don't want to make --- make him angry or some --- I –I don't think I asked him that.

Q: And in --- in that conversation did you try and tell him not to do anything to [the complainant]?

A: I cannot remember.

Q: Cannot remember?

A: No.

60 A few points can be made from the complainant's mother's evidence. First, she was not at all alarmed having spoken to the appellant and she did not panic even after hearing her daughter cry over the phone (at 5.13 am) as she simply thought that the complainant had had too much to drink. [note: 96]

61 Piecing together Miss Z's and the complainant's mother's evidence, it was curious that the complainant was not crying when she spoke to Miss Z (latest at 5.10 am) but that she was crying and mumbling at her first conversation with her mother at 5.13 am. Also the complainant's mother's evidence was inaccurate in relation to her statement about calling the appellant repeatedly as well as what was said in the conversations with both the complainant and the appellant. Secondly, in relation to the complainant's hand phone being switched off, the call tracing records reflected that the last conversation the complainant had was with an unknown number caller at 5.45 am for 56 seconds. After this point, on the evidence, she did not answer her phone. In her examination-in-chief, the complainant's mother testified that the complainant's hand phone battery was found in her purse a few days later and when she tried to use it, it was "not flat, it [had] 2 bar[s]". [note: 97] When pressed under cross examination she stated as follows: [note: 98]

Q: You said earlier that [the complainant] found her hand phone battery in her purse a few days later, did you ask [the complainant] why was the battery in her purse?

A: Um, probably, she says that after that he just put all her things – he just dropped all her – her hand phone or what inside her purse and ask her to go. So, she didn't know the battery was inside too.

However, no evidence was adduced to the effect that it was the appellant who had snatched the phone away from the complainant after 5.45 am and that he had taken the battery out. In fact, the complainant's own testimony was that the phone had been snatched from her at the beginning of her time at the appellant's flat, when she woke up and found herself in the appellant's room and attempted to contact her mother and Miss Z (see [33] above). I find that the complainant's mother's evidence was *only* corroborative of the complainant's evidence in so far as the content of the police report was made at 5.54 am, nearly 20 minutes after her conversation with her daughter.

62 From the call tracing records, it is clear that after the complainant's conversation with her mother at 5.33 am, while she did not answer both calls from her mother and Miss Z at 5.35 am, she was in possession of her phone or was capable of retrieving it, and had in fact answered two calls from unknown numbers at 5.37 am and 5.45 am which lasted for 44 seconds and 56 seconds respectively. I am perplexed why, if the appellant had indeed told the complainant that he would not let her go without having sex with her sometime prior to the complainant's conversation with her mother at 5.33 am, he had allowed her to continue to speak on the phone until 5.45am. I am also troubled by the fact that the complainant chose not to answer her mother's phone call and instead answered an unknown caller, unidentified on the evidence before me, especially if she had just told

her mother of the state she was allegedly in. As noted earlier, I am similarly troubled that the complainant chose not to answer the numerous calls made by Miss Z after she was under the impression that the appellant was likely to rape her. I also found that it was very unsatisfactory that neither party sought to adduce evidence as to who the complainant was speaking to in these calls which came from "unknown numbers". In fact, as noted before, the call records confirm that the complainant spoke to unknown person(s) at 5.15 am (21 seconds), 5.37 am (44 seconds) and 5.45 am (56 seconds). Had the individual(s) who had telephoned the complainant been called to give evidence or at the very least been identified, the information revealed could have shed light on what transpired in the appellant's room. In a similar vein, I noted that the complainant also spoke to Alvin (who was not called as a witness) at 5.15 am for 47 seconds, and Alvin subsequently sent numerous SMS text messages to the appellant (eight times between 6.40 am and 6.58 am). The contents of these exchanges are highly relevant and ought to have been pursued by those tasked with investigating these allegations and produced before the court. Setting aside the deficiencies in the evidence before me for a moment, in the light of the nine conversations which the complainant had between 4.56 am and 5.45 am, I find it curious that the DJ found that the appellant was "in control" of the complainant particularly when she managed to repeatedly gain control of her phone. The better explanation, which is supported by the evidence, seems to me to be that the complainant was in control of her phone and that when she wanted to use it she was able to retrieve it either from the appellant or from wherever it was in his bedroom. Recreating the events as they unfolded from the evidence of the complainant, Miss Z and her mother, it appears that the alleged rape took place between 5.45 am (final call answered by the complainant) and 6.13 am, when the appellant called the complainant's mother back. This chronology is corroborated by the fact that Mr Tan, the good Samaritan who dropped the complainant at her home, testified that he picked the complainant up from the side of the road at around 6.15 am after dropping his grandson off at school. Further, this chronology is consistent with the call tracing records which reflect that the appellant had returned calls from the complainant's mother, Miss Z and Alvin from 6.13 am onwards. Keeping in mind these deep seated difficulties with the Prosecution's case, I now turn to the appellant's case.

*The appellant's case*

63 It was the appellant's evidence that after he met the complainant at the club, she "pulled him to the dance floor", danced "sexily" and asked him to be her boyfriend. [note: 99] He testified that he told her that they could be friends. When the appellant told Miss Z that he would take the complainant home, Miss Z told him the complainant's address verbally. When the appellant boarded the taxi with the complainant, he told the taxi driver her address and thereafter they started kissing. The appellant asked the complainant if she wanted to go back to his place and as she said yes, he directed the taxi driver accordingly. [note: 100] As noted above, while the complainant could not recollect what had happened in the taxi the Prosecution took the view that the appellant was lying. When they arrived at his house, the appellant went to the toilet leaving the complainant sitting on his bed. Contrarily, the complainant stated that she was sitting on the floor. When the appellant returned to his bedroom he stated that the complainant was crying and that she said that she was scared and wanted to go home. He tried to calm her down by telling her that he "would not hurt or harm her in any way". [note: 101] When pressed under cross-examination as to how he tried to calm her down the appellant stated that he simply did not ask her why she was scared but tried to calm her down by patting her back and giving her tissue to wipe her tears. There was some objective evidence in support of the appellant's story as six pieces of tissue without any blood and semen were recovered from his room which could reasonably have been given to the complainant to wipe her tears. [note: 102] Further, when asked why he did not take the complainant home, the appellant stated, "I like her. I like [the complainant] and I would like to spend even more time with her". [note: 103] The appellant

also admitted that he took the phone away from the complainant as she was crying and the sound of her crying was like "poking something into my ears". [note: 104] When asked during cross-examination whether it was obvious that the complainant wanted to go home because she was crying, the appellant remarked as follows: [note: 105]

> Q: Yes, Right, the question is, wasn't it obvious to you that [the complainant] wanted to go home?
>
> A: (long pause 19 seconds), Yes.
>
> Q: So why did you still keep her in the room?
>
> A: (long pause 13 seconds) I liked [the complainant] and I thought that I could calm her down.
>
> ...
>
> A: The first time the – when she cried, I managed to calm her down. And it don't seems like she want to go home already after I calm her down.
>
> Q: Okay, good. Okay ... but now your answer is that, it's obvious to you she wants to go home. So why didn't you let her?
>
> A: The second time when she cried, she just said she want to make a phone call to me.
>
> ...
>
> Q: My question is, when you snatched the phone from her, [the complainant] wanted to go home or she wanted to stay on?
>
> A: From what I know, after I took off the phone, she's just sitting on my bed but it seems like she wanna go home.

64 The appellant testified that after he calmed the complainant down, they then started kissing, he removed her panties and he attempted to penetrate her but was unable to as he was not able to sustain an erection. Having studied the call tracing records, this must have occurred before 4.56 am, when the complainant first spoke to Miss Z. This chronology of events is consistent with the appellant's evidence that after he was unable to sustain an erection, the complainant then called Miss Z stating that she was scared and wanted to go home. The appellant testified that after the complainant got off the phone, presumably at about 4.58 am, he asked her if she would have sex with him, to which he testified that she responded, "I will f--- you like never before". [note: 106] The appellant admitted that he snatched the phone from the complainant as her cries were irritating him. He also stated that he tried to calm her down and let her call her mother (presumably at 5.13 am) but he took the phone from her and talked to her mother in the kitchen (presumably at 5.15 am – the unknown number call or later at 5.33 am, the call in which the complainant's mother claimed that the complainant told her that she was being held at the appellant's house against her will). The appellant could not explain why he took the phone from the complainant and decided to talk to the complainant's mother in the kitchen. [note: 107] However it should be noted that looking at the call tracing records the complainant regained possession and control over her phone immediately or soon after in order to have nine more telephone conversations with the last at 5.45 am for 56 seconds. After the conversation between the complainant and her mother, the appellant stated that he

returned to the room and the complainant was awake and she was not crying. As noted above, the records reflect that she answered two phone calls to unknown numbers at 5.37 am and 5.45 am. The appellant stated under cross-examination that after he managed to calm her down, the complainant did not cry and did not say that she wanted to go home anymore. At this point, presumably at about 5.45 am, the appellant stated that he asked her if he could have sex, that she "nodded her head" and that they started kissing. He then penetrated her, ejaculated and cleaned her up. He helped her get dressed and then walked her to the door. [note: 108] The appellant could not explain why he did not ask her to stay or what led her to leave. [note: 109] As noted, the complainant was likely to have left the appellant's home by 6.13 am, after which he contacted her mother, Miss Z and Alvin.

65 The appellant's conduct in calling the complainant's mother at 6.13 am and subsequently answering her phone call at 6.15 am (for 246 seconds), is inconsistent with the DJ's characterization of him as single-mindedly pursuing his goal of having sex with the complainant and is in fact more consistent with his case that he never forcibly penetrated the complainant. The fact that the appellant also responded to Miss Z's text messages at 6.24 am (informing Miss Z that he would send the complainant home) [note: 110] and called the complainant twice at 6.22 am and 6.39 am further supports his version of events. Giving the appellant the benefit of a reasonable doubt as is required by law, the complainant's unexplained erratic behaviour is also consistent with his case. It is entirely plausible, in light of the evidence as adduced, that after the conversation with her mother at 5.33 am wherein the complainant told her mother that the appellant would not let her go without having sex with her (a statement upon which the mother relied to make the police report at 5.54 am) that she calmed down and consented to sexual intercourse with him.

66 Looking at the evidence in its totality, I am not able to understand why the complainant was afraid for her life, why she formed the view that the appellant would not let her leave without having sex with her, why she made no attempt at all to leave the flat, especially when there was no physical restraint or threats or violence by the appellant, when she formed this view, why she did not call the police herself, why she was selective in answering phone calls made by Miss Z and her mother to her, why she did not communicate to Miss Z that she was in such distress, what she actually spoke about during her telephone conversations and why in the absence of any threat of violence or explanation as to the basis of her fear she did not resist the appellant's advances.

67 On the evidence and having considered the learned DJ's reasoning, with respect, I am not satisfied that the complainant was in a state of panic and distress and that she was under the impression that the appellant was going to rape her. In the absence of evidence to establish these individual facts beyond a reasonable doubt, I entertain serious doubts as to whether the finding was rightly made that the complainant did not consent to sexual intercourse with the appellant. On the evidence, there remains the plausible explanation that between 5.45am and the time she left the appellant's apartment the complainant had in fact consented to sexual intercourse with the appellant. The fact that the complainant's recollection of the alleged rape was poor, that the call tracing records reflected that she regained control or retrieved her phone repeatedly, that she did not herself call the police, that the complainant's mother was not initially alarmed and formed the view that the appellant was "polite", the discrepancies between the complainant's mother and Miss Z's evidence of the complainant's state of mind and the lack of any threat of violence or the appellant holding the complainant in his house against her will lends weight to the appellant's case. I am particularly troubled by the fact that the complainant could not explain why she simply did not leave or even attempt to leave and what the appellant did to make her believe that he would not let her leave. The fact that she did answer the phone selectively, particularly in relation to calls made by Miss Z and when she spoke to unknown callers are inconsistent with the degree of panic or fear she alleged that she was in. Such control or capacity for choice also begged the question of why, if not by reason of

fear of the appellant, the complainant did not resist the appellant's advances. On the evidence as adduced, it is possible, particularly in light of the complainant's erratic behaviour, that she calmed down and consented to sexual intercourse with the appellant. These doubts are heightened by the lack of evidence as to the communications between the complainant and the unknown caller(s) as well as the content of the text messages between the appellant, Miss Z and Alvin.

68 The law requires that the Prosecution establishes its case *beyond a reasonable doubt*. The appellant's case was largely consistent with what the complainant, Miss Z and her mother testified to. The crucial dispute was whether the appellant had told the complainant that she could not leave without having sexual intercourse with him. The complainant's evidence of this utterance was corroborated by the police report and her mother's evidence. This was the most difficult hurdle for the appellant to overcome. However, the appellant stated in his statement that "I asked [the complainant] if I could have sex with her before she leave" and in light of the totality of the evidence before me, I find it difficult for that to become a condition for her to leave such that it negatived any possible consent. I also note that the corroboration of the police report and the complainant's mother all originated from the same phone call from the complainant to her mother, which I have already found to be less than reliable given the lack of any explanation of what had been said to the complainant or how she had formed the impression tht she was being forced to stay at the appellant's flat. The police report and the complainant's mother's testimony are therefore not corroborative evidence in the sense of being independent accounts of what transpired at the material time." I formed this view, giving the appellant the benefit of the doubt as there was no other evidence to indicate that he was holding the complainant in his house against her will. In fact, while the appellant did admit to snatching the phone from the complainant, he willingly spoke to both Miss Z and the complainant's mother (who described him in that conversation to be polite) both while the complainant was in his house and after she had left.

69 The benefit of these doubts created by the deficiencies and gaps in the evidence before the court must be given to the appellant. I note that the appellant's evidence in court was consistent with his statement which was taken hours after the incident. The appellant consistently maintained that he did not use any force on the complainant and that she consented when he had sexual intercourse with her. The very fact that it is difficult to fathom why a person would cry rape is not, contrary to the findings of the DJ, evidence the Prosecution can rely on to help establish its case. I recognise that the burden on the Prosecution is not to overcome every imaginable doubt in the case, unless these doubts are real or reasonable: *Tang Kin Seng v Public Prosecutor* [1996] 3 SLR(R) 444 at [93]; *Kwan Peng Hong v Public Prosecutor* [2000] 2 SLR(R) 824 at [44]. However, with respect, the DJ's wholesale acceptance of the complainant's evidence and inflation of the corroborative force of Miss Z's and the complainant's mother's evidence was unwarranted in light of all the deficiencies and gaps in their evidence and the other evidence put forward by the Prosecution. These deficiencies and gaps were not identified nor addressed in the GD.

70 As noted in *Tan Wei Yi* (cited at [45] above) (at [34]):

> [A]n appellate court ought to be slow to overturn a trial judge's findings of fact, especially where they hinged on the trial judge's assessment of the credibility and veracity of witnesses. However, this was not an unassailable rule, and *where an appellate court was convinced that a trial judge's findings of fact were plainly wrong or against the weight of the evidence, the appellate court had to obviously intervene.*
>
> [emphasis added]

71 In a later decision, V K Rajah J, as he then was, remarked as follows in *Jagatheesan s/o*

*Krishnasamy v Public Prosecutor* [2006] 4 SLR(R) 45 ("*Jagatheesan*") (as stated in the headnote):

> Judicial restraint had to be exercised by an appellate court when overturning or modifying findings of fact by a trial court. This was all the more so in relation to a trial court's assessment of a witness's credibility*. Intervention by an appellate court was justified when the inferences drawn by a trial court were not supported by the primary or objective evidence on record*: at [35], [38] and [40].
>
> [emphasis added]

72 In the present case, with respect, the findings and inferences or factual assumptions made below were unsupported by the primary or objective evidence. In my judgment, the Prosecution's legal burden adjudged on a beyond reasonable doubt standard was not satisfied. As noted by V K Rajah J, as he then was, in *Jagatheesan* (as stated in the headnote):

> ... Reasonable doubt could also arise by virtue of the lack of evidence submitted, when such evidence was necessary to support the Prosecution's theory of guilt. ...

Endorsing Wood JA's dictum in the British Columbia Court of Appeal decision in *R v Brydon* (1995) 2 BCLR (3d) 243 at [44], the learned judge in *Jagatheesan* advocated a *qualitative* definition of reasonable doubt that he found both apt and meaningful (at [53]):

> [I]t is difficult to think of a more accurate statement than that which defines reasonable doubt as a doubt for which one can give a reason, so long as the reason given is logically connected to the evidence.

I must highlight the Court of Appeal's comments in *AOF v PP*, relating to the importance of correctly applying the standard of proof in criminal trials, which were as follows (at [314]–[315]):

> 314 It cannot be overemphasised that the need to convict an accused person [such as the appellant] based on the standard of proof beyond a reasonable doubt is – as pointed out above – a time-honoured and integral part of our criminal justice system (and, to the best of our knowledge, all other criminal justice systems as well). ...
>
> 315 Indeed, any approach to the contrary would be wholly inconsistent with the presumption of innocence that is the *necessary* hallmark of any criminal justice system. It is precisely this presumption that underlies the fundamental principle set out at the outset of this Judgment ... – that the Prosecution bears the legal burden of proving its case against the accused (here, the Appellant) *beyond a reasonable doubt*.
>
> [emphasis added]

73 For all the reasons stated above, I find that the Prosecution has not proved the complainant's lack of consent to sexual intercourse with the appellant beyond a reasonable doubt.

**Issue 2: Whether the appellant could successfully raise a mistake of fact defence**

74 In light of the presence of reasonable doubt, it is not strictly necessary to consider the possibility of a defence based on mistake of fact. The defence of mistake of fact was a point which was not raised in the appellant's defence at the trial below and only came up during appeal. I called for further submissions which were duly filed on 13 April 2012. I now deal briefly with this point for

completeness.

75 In *Public Prosecutor v Teo Eng Chan* and others [1987] SLR(R) 567 ("*PP v Teo Eng Chan*"), the High Court ruled that in situations where the accused sought to argue that he believed that the victim was consenting, it was best for the court to approach the matter through the mistake of fact defence under s 79 of the PC rather than through a *mens rea* analysis. Section 79 of the PC states as follows:

> **Act done by a person justified, or by mistake of fact believing himself justified by law**
>
> **79**. Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law, in doing it.

76 The mistake of fact in the present case is the appellant's good faith belief that the complainant had consented to sexual intercourse with him. While the defence was not made out on the facts of *PP v Teo Eng Chan*, P Coomaraswamy J noted as follows (at [16]–[26]):

> 16 ... For this, reliance was placed on the English case of *Director of Public Prosecutions v Morgan* [1976] AC 182 where the House of Lords, by a majority of three to two, held that if an accused in fact believed that the woman had consented, he could not be found guilty of rape, whether or not that belief was based on reasonable grounds. Counsel placed heavy reliance on the decision of the learned Chief Justice, Dato Sir Denys Roberts, sitting as a trial judge in Brunei Darussalam in the case of *PP v Zainal Abidin bin Ismail* [1987] 2 MLJ 741 . The Chief Justice applied the *Morgan* principle in this case of rape against the accused. Counsel before me relied upon the case of *Zainal Abidin* because the Penal Code of Brunei is, with differences immaterial for present purposes, similar to ours. Section 375 is identical in the two Penal Codes. They therefore argued that I should follow the decision in *Zainal Abidin*.
>
> 17 In my view, the law on consent and mistake of fact are contained in the Penal Code itself. Under Chapter IV dealing with exceptions, consent is defined negatively in s 90(*a*). In the light of the defence taken, this provision is applicable to the present case. Under this provision, consent is not consent if given by a person under fear of injury and if the person doing the act knows or has reason to believe that such consent was given in consequence of such fear.
>
> 18 For a person to have "reason to believe" a thing, s 26 of the Penal Code provides that he does so only if he has sufficient cause to believe that thing. The word "injury" which appears in s 90(*a*) is defined in s 44 as any harm whatever illegally caused to a person in body, mind, reputation or property. The word "mind" needs emphasis in this case.
>
> ...
>
> 22 The next question for me to consider is whether there was a mistake of fact in the minds of the accused persons when they presumed that she consented. The law on this is contained in s 79 of the Penal Code which provides that "nothing is an offence which is done by any person ... who by reason of a mistake of fact ... in good faith believes himself to be justified by law, in doing it". Sex with a woman over 14 years with her consent is justified by law, incest aside.
>
> 23 "Good faith" is further defined by s 52 of the Penal Code which reads:
>
> Nothing is said to be done or believed in good faith which is done or believed without due

care and attention.

24 In view of these specific provisions in our law, the majority decision of the House of Lords in *Morgan* ([16] *supra*) does not, in my humble view, have any application in Singapore. There is also nothing in the transcript of Dato Sir Denys Roberts' decision in *Zainal Abidin*'s case ([16] *supra*) that he was referred to the provisions of the Penal Code to which I have just referred and will hereafter refer.

25 Section 79 of the Penal Code appears in Chapter IV of the Code. This chapter deals with "General Exceptions". Section 107 of the Evidence Act provides that the burden of proving the existence of circumstances bringing a case within the general exceptions in the Penal Code is upon the accused person and the court shall presume the absence of such circumstances.

26 In the light of the provisions to which I have referred, the burden of proof under s 79 is upon the accused. Acknowledgedly, the quantum of proof with which this burden is to be discharged is on a balance of probabilities and not beyond a reasonable doubt.

On the evidence, the court in *PP v Teo Eng Chan* found that all the accused persons had not discharged their burden of proof in order to avail themselves of a s 79 PC defence.

77 In the present case, keeping in mind the totality of the evidence before me, I find that on the evidence below, the complainant's conduct was construed in good faith by the appellant as consent to sexual intercourse.

78 First, she chose to board the taxi with him and on her evidence, possibly kissed him on the way to his flat. [note: 111] Secondly, she did not leave or even attempt to leave his bedroom even though there was no evidence to indicate that he was restraining her against her will. Thirdly, she willingly gave the phone to the appellant and he spoke to her mother and Miss Z willingly and on his evidence she calmed down when he tried to pacify her. The complainant was not crying when she was speaking to Miss Z and when she was, her cries could have been perceived by the appellant as a bad reaction to the alcohol that she had consumed (as was assumed by her mother). The appellant was noted to be polite on the phone by the complainant's mother. Fourthly, the complainant did not protest when they had sexual intercourse or attempt to push him off or away. It was also the appellant's evidence that she nodded when he asked her if she wanted to have sexual intercourse. The appellant contacted the complainant twice after she had left his house which was consistent with his evidence that he was concerned that she had reached home. He also contacted her mother and Miss Z to let them know that she was on her way home. The appellant's statement and evidence in court were also consistent with his belief that she consented to sexual intercourse with him.

79 I have already dealt with the evidence fully in the main judgment. The appellant has discharged his burden on a balance of probabilities. I find that on the evidence before me this defence under s.79 PC has been made out.

**Conclusion**

80 For the reasons stated above, I allow the appellant's appeal against conviction, acquit the appellant of the charge against him, and set aside the sentence.

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[note: 1] Record of Proceedings, Volume 1 of 2 at p 172; 208.

[note: 2] Record of Proceedings, Volume 1 of 2 at p 214.

[note: 3] Record of Proceedings, Volume 1 of 2 at p 325.

[note: 4] Record of Proceedings, Volume 1 of 2 at p 216-217.

[note: 5] Record of Proceedings, Volume 1 of 2 at p 151; NE Day 6 line 23 – 28.

[note: 6] Record of Proceedings, Volume 1 of 2, at p 326.

[note: 7] Record of Proceedings, Volume 1 of 2, at p 327.

[note: 8] Record of Proceedings, Volume 2 of 2 pp 924 – 926 (call tracing records).

[note: 9] Record of Proceedings, Volume 1 of 2 pp 55-56.

[note: 10] Record of Proceedings, Volume 1 of 2 p 59.

[note: 11] Record of Proceedings, Volume 2 of 2 at p 896.

[note: 12] Record of Proceedings, Volume 2 of 2 at p 844 at [62].

[note: 13] Record of Proceedings, Volume 2 of 2 at p 845 at [64].

[note: 14] Record of Proceedings, Volume 2 of 2 at p 845 at [64].

[note: 15] Record of Proceedings, Volume 2 of 2 at p 849 at [71].

[note: 16] Record of Proceedings, Volume 2 of 2 at p 846 at [66].

[note: 17] Record of Proceedings, Volume 2 of 2 at p 849 at [72].

[note: 18] Record of Proceedings, Volume 2 of 2 at p 848 at [69].

[note: 19] Record of Proceedings, Volume 2 of 2 at p 848 at [70].

[note: 20] Record of Proceedings, Volume 2 of 2 at p 850 at [73].

[note: 21] Record of Proceedings, Volume 2 of 2 at p 850 at [74].

[note: 22] Record of Proceedings, Volume 2 of 2 at pp 852-853 at [77]-[78].

[note: 23] Record of Proceedings, Volume 2 of 2 at p 853 at [79].

[note: 24] Record of Proceedings, Volume 2 of 2 at p 856 at [82].

[note: 25] Record of Proceedings, Volume 2 of 2 at pp 856- 857 at [83]-[84].

[note: 26] Record of Proceedings, Volume 2 of 2 at pp 858-861 at [88]-[94].

[note: 27] Record of Proceedings, Volume 1 of 2 at 451.

[note: 28] Record of Proceedings, Volume 2 of 2 at pp 937-938.

[note: 29] Record of Proceedings, Volume 1 of 2 at p 450.

[note: 30] Record of Proceedings, Volume 1 of 2 at pp 451-452.

[note: 31] Record of Proceedings, Volume 1 of 2 at p 228.

[note: 32] Record of Proceedings, Volume 1 of 2 at p 117.

[note: 33] Record of Proceedings, Volume 1 of 2 at pp 117; 119.

[note: 34] Record of Proceedings, Volume 1 of 2 at pp 130-131.

[note: 35] Record of Proceedings, Volume 1 of 2 at p 129.

[note: 36] Record of Proceedings, Volume 1 of 2 at p 138.

[note: 37] *Ibid.*

[note: 38] Record of Proceedings, Volume 1 of 2 at p 145.

[note: 39] Record of Proceedings, Volume 1 of 2 at p 233-234; 237.

[note: 40] Record of Proceedings, Volume 1 of 2 at p 512.

[note: 41] Record of Proceedings, Volume 1 of 2 at p 151.

[note: 42] Record of Proceedings, Volume 1 of 2 at p 139;144.

[note: 43] Record of Proceedings, Volume 1 of 2 at pp 118-119.

[note: 44] Record of Proceedings, Volume 1 of 2 at p 180.

[note: 45] Record of Proceedings, Volume 1 of 2 at pp 325-326.

[note: 46] Record of Proceedings, Volume 1 of 2 at p 367.

[note: 47] Record of Proceedings, Volume 1 of 2 at p 325.

[note: 48] Record of Proceedings, Volume 1 of 2 at p 326-327.

[note: 49] Record of Proceedings, Volume 1 of 2 at p 367-368.

[note: 50] Record of Proceedings, Volume 1 of 2 at p 327.

[note: 51] Record of Proceedings, Volume 1 of 2 at p 327.

[note: 52] Record of Proceedings, Volume 1 of 2 at p 413.

[note: 53] Record of Proceedings, Volume 1 of 2 at p 369.

[note: 54] Record of Proceedings, Volume 1 of 2 at p 327.

[note: 55] Record of Proceedings, Volume 1 of 2 at p 331.

[note: 56] Record of Proceedings, Volume 1 of 2 at p 332.

[note: 57] Record of Proceedings, Volume 1 of 2 at p 334.

[note: 58] Record of Proceedings, Volume 1 of 2 at p 371.

[note: 59] Record of Proceedings, Volume 1 of 2 at p 334-335.

[note: 60] Record of Proceedings, Volume 1 of 2 at p 373-374.

[note: 61] Record of Proceedings, Volume 1 of 2 at p 338; p 373.

[note: 62] Record of Proceedings, Volume 1 of 2 at p 378.

[note: 63] Record of Proceedings, Volume 1 of 2 at p 336.

[note: 64] Record of Proceedings, Volume 1 of 2 at p 336.

[note: 65] Record of Proceedings, Volume 1 of 2 at p 337.

[note: 66] *Ibid*.

[note: 67] Record of Proceedings, Volume 1 of 2 at p 339.

[note: 68] Record of Proceedings, Volume 1 of 2 at p 343.

[note: 69] Record of Proceedings, Volume 1 of 2 at p 378.

[note: 70] Record of Proceedings, Volume 1 of 2 at p 343.

[note: 71] *Ibid.*.

[note: 72] Record of Proceedings, Volume 1 of 2 at p 344.

[note: 73] Record of Proceedings, Volume 1 of 2 at p 383.

[note: 74] Record of Proceedings, Volume 1 of 2 at p 345.

[note: 75] Record of Proceedings, Volume 1 of 2 at p 348-349.

[note: 76] Record of Proceedings, Volume 1 of 2 at p 396.

[note: 77] Record of Proceedings, Volume 1 of 2 at p 392-393.

[note: 78] Record of Proceedings, Volume 1 of 2 at p 371.

[note: 79] Record of Proceedings, Volume 1 of 2 at p 382.

[note: 80] Record of Proceedings, Volume 1 of 2 at p 185.

[note: 81] Record of Proceedings, Volume 1 of 2 at p 238.

[note: 82] Record of Proceedings, Volume 1 of 2 at p 238-239.

[note: 83] Record of Proceedings, Volume 1 of 2 at p 199.

[note: 84] Record of Proceedings, Volume 1 of 2 at p 79.

[note: 85] Record of Proceedings, Volume 1 of 2 at p 78.

[note: 86] Record of Proceedings, Volume 1 of 2 at p 80.

[note: 87] Record of Proceedings, Volume 1 of 2 at 90.

[note: 88] Record of Proceedings, Volume 1 of 2 at p 80.

[note: 89] Record of Proceedings, Volume 1 of 2 at p 81.

[note: 90] Record of Proceedings, Volume 2 of 2 at p 896.

[note: 91] Record of Proceedings, Volume 1 of 2 at p 85-86.

[note: 92] Record of Proceedings, Volume 1 of 2 at p 103.

[note: 93] Record of Proceedings, Volume 1 of 2 at pp 105-106.

[note: 94] Record of Proceedings, Volume 1 of 2 at p 91; p 104; Volume 2 of 2 at p 895.

[note: 95] Record of Proceedings, Volume 1 of 2 at 106.

[note: 96] Record of Proceedings, Volume 1 of 2 at p 102.

[note: 97] Record of Proceedings, Volume 1 of 2 at p 89.

[note: 98] Record of Proceedings, Volume 1 of 2 at p 108.

[note: 99] Record of Proceedings, Volume 1 of 2 at p 470.

[note: 100] Record of Proceedings, Volume 1 of 2 at p 474.

[note: 101] Record of Proceedings, Volume 1 of 2 at p 477.

[note: 102] Record of Proceedings, Volume 2 of 2 at p 916.

[note: 103] Record of Proceedings, Volume 1 of 2 at p 575.

[note: 104] Record of Proceedings, Volume 1 of 2 at p 619.

[note: 105] Record of Proceedings, Volume 1 of 2 at p 622.

[note: 106] Record of Proceedings, Volume 1 of 2 at p 478.

[note: 107] Record of Proceedings, Volume 1 of 2 at p 639.

[note: 108] Record of Proceedings, Volume 1 of 2 at p 480-81.

[note: 109] Record of Proceedings, Volume 2 of 2 at p 700.

[note: 110] Record of Proceedings, Volume 1 of 2 at p 188-189.

[note: 111] Record of Proceedings, Volume 1 of 2 at p 413.