# Public Prosecutor *v* AOM
# [2011] SGHC 29

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| **Case Number** | : Criminal Case No 28 of 2010 |
| **Decision Date** | : 07 February 2011 |
| **Tribunal/Court** | : High Court |
| **Coram** | : Steven Chong J |
| **Counsel Name(s)** | : Gail Wong and Lee Lit Cheng (Attorney-General's Chambers) for the Prosecution; Defendant in person. |
| **Parties** | : Public Prosecutor — AOM |

*Criminal Procedure and Sentencing – Mitigation – General principle that consent is not a relevant mitigating factor for offences of statutory rape and sexual penetration of a minor*

*Criminal Procedure and Sentencing – Mitigation – General principle that absence of aggravating factor cannot ipso facto constitute a mitigating factor*

*Criminal Procedure and Sentencing – Sentencing – Aggravating factors – Offences of rape of minor below 14 years of age punishable under s 376(1) of the Penal Code (1985 Rev Ed) and s 375(2) of the Penal Code (2008 Rev Ed) – Offences of sexual penetration of a minor under 16 years of age punishable under s 376A(2) of the Penal Code (2008 Rev Ed) – Long period of sexual offences – Abuse of position of trust and authority – Exploitation of victim's innocence – Serious psychological and emotional harm caused – Transmission of sexual disease*

7 February 2011

**Steven Chong J:**

**Introduction**

1 The defendant (also referred to as [AOM]) pleaded guilty to and was convicted of the following charges:

(a) Two charges of rape of a minor below 14 years of age ("statutory rape") punishable under s 376(1) of the Penal Code (Cap 224, 1985 Rev Ed);

(b) One charge of rape of a minor below 14 years of age ("statutory rape") punishable under s 375(2) of the Penal Code (Cap 224, 2008 Rev Ed); and

(c) One charge of sexual penetration (penile-vaginal) of a minor below 16 years of age punishable under s 376A(2) of the Penal Code (Cap 224, 2008 Rev Ed).

2 In addition, the defendant consented to seven other charges to be taken into consideration ("TIC") for the purposes of sentencing. They are, in particular:

(a) Two charges of statutory rape punishable under s 376(1) of the Penal Code (Cap 224, 1985 Rev Ed);

(b) Two charges of statutory rape punishable under s 375(2) of the Penal Code (Cap 224, 2008 Rev Ed);

(c) Two charges of sexual penetration (penile-vaginal) of a minor below 16 years of age punishable under s 376A(2) of the Penal Code (Cap 224, 2008 Rev Ed); and

(d) One charge of sexual penetration (digital-vaginal) of a minor below 16 years of age punishable under s 376A(2)of the Penal Code (Cap 224, 2008 Rev Ed).

3 After considering the defendant's mitigation plea, the aggravating factors, the sentencing precedents, the Prosecution's submissions on sentencing, and the TIC charges, I imposed the following sentences on the defendant:

(a) 13 years' imprisonment and 12 strokes of the cane for each charge of statutory rape under s 376(1) of the Penal Code (Cap 224, 1985 Rev Ed) and s 375(2) of the Penal Code (Cap 224, 2008 Rev Ed); and

(b) 7 years' imprisonment for the charge of sexual penetration (penile-vaginal) of a minor below 16 years of age under s 376A of the Penal Code (Cap 224, 2008 Rev Ed).

4 I ordered the sentences for the two charges under s 376(1) to run consecutively, with the other sentences to run concurrently. In total, the defendant was ordered to serve 26 years' imprisonment (with effect from the date of arrest on 6 October 2009), and ordered to suffer 24 strokes of the cane. The defendant has since appealed against the sentences imposed. I now set out the reasons for the sentences.

**Facts**

5 Sometime in 2005, the victim's parents were divorced and the victim's mother was granted sole custody of the victim. The defendant was in a sexual relationship with the victim's mother. The defendant resided at [the Flat] with the victim and the victim's mother. The victim was entrusted to the defendant's care, acting as her *de facto* guardian and the victim effectively regarded the defendant as her father. As the victim was afraid of the dark, she would at times sleep with her mother and the defendant in their bedroom on the same bed.

6 The victim was only 12 years old when she was first sexually assaulted by the defendant. The defendant started touching the victim's breasts and vulva in 2007 when she was a Primary Six student. The first act of statutory rape took place in mid-2007. At that time, the victim did not know what sexual intercourse entailed. The defendant continued to commit statutory rape on the victim on several occasions when the victim's mother was not at home.

7 Sometime in 2008, the victim's mother obtained employment in a company located in Jurong. The victim's mother moved to an address in Jurong to be closer to her office. Thereafter, the relationship between the victim's mother and the defendant came to an end. The victim, however, continued to reside with the defendant at the Flat on weekdays as the Flat was closer to the victim's school. The victim would spend weekends and school holidays at her mother's place in Jurong. Throughout this period of time, the victim's mother had entrusted the victim to the defendant's care. In August 2009, the victim moved out of the Flat to stay with her mother permanently after the defendant had informed the victim's mother that the power supply to the Flat might be cut off as he had not paid the power bill. The victim would return to the Flat from time to time to collect her belongings. On occasions when the victim and the defendant were alone in the Flat between February and October 2009, the defendant repeated his acts of sexual penetration on the victim.

8 The defendant exploited the naivety of the victim by misleading her into believing that he had sex with her so that she would not be curious about sex and be cheated in the future. The defendant had also instructed the victim not to reveal their sexual intercourse to anyone, as he would be arrested, jailed and caned. It appeared that the victim did believe what she was told by the defendant. After receiving sex education in school when she was in Secondary Two (in 2009), the victim realised that what the defendant had been doing to her was wrong. Thereafter, the victim actually tried to stop the defendant on a few occasions when the defendant sexually assaulted her, but was at the same time fearful that the defendant would be annoyed with her. In the meantime, the victim did not tell anyone about the sexual assaults as she did not want the defendant to go to jail. She cared for the defendant and had treated him like her own father.

9 On 5 October 2009, the victim's mother asked the victim whether she was still a virgin. That was when the victim first disclosed to her mother the details of the multiple sexual assaults committed by the defendant. On 6 October 2009, the victim's mother confronted the defendant. The defendant initially denied having ever touched the victim. However, after some probing by the victim's mother, the defendant eventually admitted that he had had sexual intercourse with the victim. The victim's mother asked him to turn himself in to the police, but the defendant asked for one month to settle his personal matters. The victim's mother initially agreed to the defendant's request on condition that the defendant handed over his passport to her and on his written confirmation that he would turn himself in. Subsequently the victim's mother changed her mind and insisted that the defendant surrendered himself to the police immediately.

10 On 6 October 2009, the defendant was arrested after he turned himself in at a police post. The defendant confessed to the police that he had been having sex with the victim. Thereafter a police report was lodged by the victim after the police contacted the victim's mother following the defendant's surrender. The defendant is at present 43 years of age. He admitted to the Statement of Facts tendered by the Prosecution ("SOF") without qualification.

11 At the hearing before me, the Prosecution pressed for a sentence in excess of 24 years' imprisonment with 24 strokes of the cane. At the hearing, the defendant submitted a written mitigation plea. In paragraph two of his mitigation plea, the defendant alleged that the facts as presented by the Prosecution were "unfair, unreasonable, falsely incriminated and distorted with many doubtful points". When I highlighted to him that this aspect of his mitigation plea was in direct conflict with his unqualified admission to the SOF, the defendant informed the Court that he wished to delete it from his mitigation plea. I however advised the defendant that the decision was entirely up to him, and he should proceed as he deemed appropriate [note: 1]. He then confirmed his decision to delete the second paragraph of his mitigation plea [note: 2]. In the defendant's mitigation, he alleged that the sexual intercourse was consensual. He also sought to emphasise that no force, weapons, drugs or

alcohol was used in the commission of the offences. He also sought to attach weight to his guilty plea. I have considered and dealt with each of these alleged mitigating factors in my decision below. Before embarking on an examination of these factors, it would be appropriate to set out the sentencing benchmarks that are relevant to the present case.

**The decision**

***Sentencing precedents***

12 In *Public Prosecutor v NF* [2006] 4 SLR(R) 849 ("*PP v NF*"), the accused pleaded guilty to a charge of rape under s 376(1) of the Penal Code (1985 Rev Ed). The accused was the biological father of the 15 year old victim. V K Rajah J (as he then was) expressed the opinion that a review of the sentencing practice for rape cases was due and necessary. He set out four broad categories of rape. For the first category of rape ("Category 1 rape"), it was observed that (see [20]):

> At the lowest end of the spectrum are rapes that feature no aggravating or mitigating circumstances.

13 The second category of rape includes rape where aggravating factors are present ("Category 2 rape") (see *PP v NF* at [20]):

> The second category of rapes includes those where any of the following aggravating features are present:
>
> (a) The rape is committed by two or more offenders acting together.
>
> (b) The offender is in a position of responsibility towards the victim (eg, in the relationship of medical practitioner and patient, teacher and pupil); or the offender is a person in whom the victim has placed his or her trust by virtue of his office of employment (eg, a clergyman, an emergency services patrolman, a taxi driver or a police officer).
>
> (c) The offender abducts the victim and holds him or her captive.
>
> (d) Rape of a child, or a victim who is especially vulnerable because of physical frailty, mental impairment or disorder or learning disability.
>
> (e) Racially aggravated rape, and other cases where the victim has been targeted because of his or her membership of a vulnerable minority (eg, homophobic rape).
>
> (f) Repeated rape in the course of one attack (including cases where the same victim has been both vaginally and anally raped).
>
> (g) Rape by a man who is knowingly suffering from a life-threatening sexually transmissible disease, whether or not he has told the victim of his condition and whether or not the disease was actually transmitted.

14 The third category pertains to ***repeated rape of the same victim*** (such as that of the present case) or of multiple victims ("Category 3 rape") (sees *PP v NF* at [37]). Finally, the fourth category of rape involves rape where the offender had displayed perverted or psychopathic tendencies or gross personality disorder, and where he was likely, if at large, to remain a danger to women for an indefinite period of time ("Category 4 rape"). The Court then proceeded to set out the benchmark sentence for each category, as follows:

(a) For Category 1 rape, the benchmark sentence would be 10 years' imprisonment and not less than 6 strokes of the cane, in light of the decision of the Court of Criminal Appeal in *Chia Kim Heng Frederick v PP* [1992] 1 SLR(R) 63 ("*Frederick Chia*") (see *PP v NF* at [24]).

(b) For Category 2 rape, the benchmark sentence would be 15 years' imprisonment and 12 strokes of the cane (*id* at [36]).

(c) For Category 3 rape, the benchmark sentence would be the same as that for Category 2 rape, *ie*, 15 years' imprisonment and 12 strokes of the cane (*id* at [37]). Rajah J explained (*ibid*) that there was no overriding need to commence sentencing at a higher benchmark in respect of Category 3 rape. This was because the Prosecution would, in most cases, proceed with multiple charges against the offender and, where the offender was convicted of three or more distinct offences, the sentencing judge would have to order at least two (with the discretion to order more than two) of the sentences to run consecutively.

(d) For Category 4 rape, the maximum sentence of 20 years' imprisonment and 24 strokes of the cane was, in Rajah J's view, not inappropriate if the circumstances so dictated (see *PP v NF* at [38]).

15 The stated categories of rape and the corresponding sentencing benchmarks for each category were endorsed by the Court of Appeal in Public Prosecutor v Mohammed Liton Mohammed Syeed Mallik *[2008] 1 SLR(R) 601 at [94]–[95] (*"Liton*") and* Public Prosecutor v UI *[2008] 4 SLR(R) 500 at* [9] *(*"PP v UI*"). The Court of Appeal in* Liton *held that*, apart from considering the aggravating and mitigating factors in each case, in deciding the situations which may warrant a departure from the benchmark sentences as set out in *PP v NF*, the courts should be guided by three broad principles in assessing the appropriate sentence to impose (see *Liton* at [95]):

*(a) the degree of harm to the victim;*

*(b) the level of culpability of the offender; and*

*(c) the level of risk posed by the offender to society*.

16 In *PP v UI*, the offender (the biological father of the victim), pleaded guilty to three charges of rape under s 376(2) of the Penal Code (1985 Rev Ed). Two other charges of rape under s 376(2) and five charges of outrage of modesty were taken into consideration for the purposes of sentencing. The Court of Appeal considered the offences to be a betrayal of the familial relationship of trust and authority between the accused and the victim, and regarded it as an aggravating factor. The Court of Appeal also took into consideration the serial nature of the offences and the accused's further acts of perversion. The accused was convicted and sentenced to 12 years' imprisonment on each charge, with two charges to run consecutively for a global sentence of 24 years' imprisonment. He was spared from caning because he was above 50 years old.

17 The decision of *Public Prosecutor v ABJ* [2010] 2 SLR 377 ("*PP v ABJ*") is a relevant precedent for the offence of sexual penetration (penile-vaginal) under s 376A(1)(a) of the Penal Code (2008 Rev Ed). The accused was charged with 44 counts of multiple sexual assaults against his friend's daughter

at the victim's home over a period of seven years when the victim was between eight and 15 years old. He pleaded guilty to nine charges: five charges of rape under s 376(2) and one charge of carnal intercourse against the order of nature under s 377 of the Penal Code (1985 Rev Ed), one charge under s 7 of the Children and Young Persons Act (Cap 38, 2001 Rev Ed) ("CYPA"), and two charges under s 376A(1)(b) and s 376A(1)(a) of the Penal Code (2008 Rev Ed). The remaining 35 charges were taken into account for the purposes of sentencing. The Court of Appeal held that, in view of the deplorable and systemic nature of the offences committed, as well as the severe harm caused to the victim, the conduct of the accused ought to be denounced in the strongest possible terms. The Court of Appeal upheld the trial judge's decision that the following sentences were appropriate: 16 years' imprisonment for each of the five charges under s 376(2) of the Penal Code, one year imprisonment for the CYPA charge, 8 years' imprisonment for the s 377 charge; and 8 years' imprisonment for each of the charges under s 376A(1)(b) and s 376A(1)(a) of the Penal Code. The Court of Appeal ordered the first charge (one charge under s 376(2)), the 29th charge (the charge under s 377) and the 42nd charge (the charge under s 376A(1)(b)) to run consecutively, resulting in a global sentence of 32 years' imprisonment.

18 In *Public Prosecutor v YD* [2009] 1 SLR(R) 261 ("*PP v YD*"), the accused was charged with and claimed trial to 16 charges of statutory rape under s 376(1) of the Penal Code (1985 Rev Ed), and 26 charges of having carnal intercourse against the course of nature under s 377 of the Penal Code (1985 Rev Ed). The offences were committed against the accused's step-daughter, who was below 14 years of age. The Court held at [96] that the accused was "practically in the same position as her natural father", and found that such abuse of trust and authority to be an aggravating factor. The accused was sentenced to 10 years' imprisonment with 12 strokes of the cane for each of the 16 rape charges, and 5 years' imprisonment for each of the 26 charges of having carnal intercourse against the course of nature. The imprisonment terms for the first rape charge, the third rape charge, and the 42nd charge of having carnal intercourse against the course of nature were ordered to run consecutively, making a global sentence of 25 years' imprisonment with 24 strokes of the cane.

***Consideration of the facts in the present case***

19 The present case falls within Category 3 rape as it involved repeated rape of the same victim. As such, the appropriate sentence would *prima facie* be 15 years' of imprisonment and 12 strokes of the cane for *each* charge of rape. It is nonetheless imperative that the actual factual matrix be considered for the purposes of sentencing.

*Period of the sexual offences*

20 As admitted in the SOF, the defendant committed the first act of sexual assault by touching the private parts of the victim when she was only in Primary six (see SOF at [11]). The offences of statutory rape were committed when the victim was only 12 years old (see SOF at [16]–[21]). The defendant committed statutory rape on the victim on multiple occasions over a period of close to three years.

*Abuse of position of trust and authority*

21 Apart from the above, I found the defendant's betrayal and abuse of trust and authority to be a significant aggravating factor. It is clear that the defendant was in a position of trust and authority *vis-à-vis* the victim. The victim had initially addressed the defendant as "*Gan Die"* ("Godfather" in Mandarin). Later the victim's mother asked the victim to address the defendant as "Daddy" (see SOF at [5]). Indeed, the defendant made the following material admissions in the SOF (at [9]):

> The victim's mother trusted the accused, and frequently left the victim in the accused's care while she was at work. The victim treated the accused as her father, and both the victim's Primary and Secondary school administrations knew that the accused was her guardian.

22 It is therefore clear that the defendant was in effect in the position of a father figure to the victim. On one occasion in 2007, after the victim's birthday, the victim had asked the defendant to pat her to sleep as she was afraid of the dark. This, in my view, is an example of how the victim had regarded the defendant as her father figure. However, the defendant abused the trust placed in him and had sexually assaulted her while patting her to sleep. Although the defendant was entrusted with the trust, care and responsibility of the victim, he repeatedly violated this trust.

*Exploitation of the victim's innocence*

23 In addition, the defendant had exploited the victim's innocence by deceiving her into believing that the sex with her was to satisfy her curiosity so that she would not be cheated in future (see SOF at [29]). Ironically it was the defendant who "*cheated*" the victim in a most vile manner. The victim had clearly believed him as she only realised that what the defendant had been doing to her was wrong after receiving sex education in school (see SOF at [30]). This deception is, in my view, an extreme aggravating factor.

*Serious emotional and psychological harm caused*

24 I am also mindful that the depraved acts caused not only physical harm to the victim, but also inflicted serious emotional and psychological scars on the victim, some of which are long-term and could lead to interpersonal difficulties in her adult life. This reflects the gravity of the harm caused by the defendant, which was one of the major considerations highlighted by the Court of Appeal in *Liton* at [95]. It was stated in the SOF that (at [32]):

> Before the victim realised what the accused was doing to her, the victim trusted her family and friends. However, after she understood what the accused had done, the victim felt angry and sad. She also felt 'dirty' or unclean. She feared that boys would despise her and no one would want to be her boyfriend.

25 Dr [GH], consultant psychiatrist of the [TY clinic] also highlighted the long term detrimental effects on the victim's interpersonal relationships in her report dated 5 November 2009 (see Tab D, annexed to SOF):

> [The victim] has been feeling sad and angry since she had sex education in secondary school and realized that what the accused had done was wrong. *She has been having recurrent thoughts about the alleged abuse and is fearful of adult males*. *This could lead to interpersonal difficulties as well as problems with intimacy later in life*. She also feels guilty about having disclosed the abuse and causing him to be in prison.

26 In view of such unfortunate consequences caused by the defendant's depraved acts, the demands of retributive justice would require a sentence that is commensurate with the degree of harm caused to the victim.

*Transmission of sexual disease*

27 The Prosecution also highlighted another noteworthy aggravating factor. The defendant had infected the victim with a sexually transmitted disease ("STD"). The victim was examined by Dr [RW]

from [hospital 1] on 19 October 2009, and it was stated in Dr RW's report dated 18 November 2009 that the tests done on the victim revealed that she had Chlamydia trachomatis DNA (see Tab C annexed to the SOF). At around the same time, the defendant was also found to have Chlamydia Urethritis (see medical report dated 27 January 2010 of Dr [KH], a physician with Changi Prison Complex, Tab E, annexed to the SOF). It was not alleged by the defendant that the victim had sexual intercourse with persons other than himself. As such, the irresistible inference to be drawn is that the defendant must have transmitted the STD to the victim. Evidently his callousness in engaging in unprotected sex with the victim had caused her to contract the STD.

28 Having considered the relevant facts and aggravating factors, I now turn my attention to consider the alleged mitigating factors raised by the appellant.

***Consideration of mitigating factors***

*Is consent a relevant mitigating factor*

29 In his mitigation plea, the defendant sought to impress upon me that the sex with the victim was consensual (see 4th paragraph of the mitigation plea):

> …the victim has agreed [it was] consensual sex and she repeatedly say that she had sex with me…

30 This raised two important questions: to *what extent* should consent be *accepted* as a *relevant* mitigating factor for offences of statutory rape and sexual penetration of a minor; and secondly, *even if* accepted as a relevant mitigating factor, *how much weight* should be accorded to this factor?

31 In *Tay Kim Kuan v Public Prosecutor* [2001] 2 SLR(R) 876, the appellant pleaded guilty to a charge under s 140(1)(i) of the Women's Charter (Cap 353, 1997 Rev Ed) of having carnal connection with the victim, who at the material time was under 16 years of age. The appellant submitted before the court that the victim's consent was a mitigating factor. The Court, however, found that consent was not a relevant mitigating factor in determining the sentence for the offence under s 140(1)(i) of the Women's Charter:

> 13 In my view, *issues of consent are entirely irrelevant to offences under s 140(1)(i) of the Women's Charter, the policy of which is to afford blanket protection to young girls who are regarded by the statute as being mentally and emotionally unprepared to handle relationships of a sexual nature. Girls under the age of 16 are thus deemed by the law to be incapable of giving valid consent to a sexual act, and, in my view, rightly so, as many at that age are ill-equipped to handle the serious social consequences which often arise out of just one single night of reckless passion*. These girls often lack not just the resources but the emotional strength of mind to cope with the heavy responsibilities of an unplanned pregnancy and worse, the physical and psychological trauma of having to undergo an abortion. The spectre of unwanted children, its links to juvenile delinquency and the concomitant effects on the progress of modern society all collectively favour the legislative policy of strict liability where sexual intercourse with underaged girls is concerned. Much as these girls may have procured or actively initiated the encounter, the purpose of s 140(1)(i) is to place the onus on the male adult to exercise restraint and discipline in curbing his carnality. In this respect, the law may be said to be paternalistic, and perhaps even overprotective in seeking to guard young girls from a precocious desire for sexual experience. Nevertheless the social and humane reasons for such a welfare state of the law are too compelling to be ignored. In my view, the court has to send out a clear signal to the public that men who engage in sexual intercourse with girls under 16 do so at their own peril.

...

16 While I accepted counsel's argument that the extent to which a victim agreed to and encouraged what was done is relevant to an accused's mitigation, it was not the be-all and end-all of the matter. Many other factors also have to be looked at at the same time. As already alluded to, consent *per se* is not a defence to an offence under s 140(1)(i) of the Women 's Charter. Quite frankly, *I found the whole argument about consent to be difficult to comprehend since a lack of consent in the first place would have attracted a charge of rape under the more serious provisions of the Penal Code (Cap 224), rather than merely the statutory offence prescribed by the Women's Charter*. Similarly if there had indeed been any trickery, deception or violence, then any consent given by the woman would clearly have been vitiated, thus warranting a charge of rape as well. As a result, I am of the view that *consent of the girl should not be treated as a mitigating factor in cases under s 140(1)(i)* as it appears to me that such consent would in any event have been forthcoming in a majority of the cases brought under s 140(1)(i) anyway.

[emphasis added]

32 In *Annis bin Abdullah v Public Prosecutor* [2004] 2 SLR(R) 93, the appellant pleaded guilty to one charge of having carnal intercourse against the order of nature under s 377 of the Penal Code (1985 Rev Ed). The victim was 15 years old at the time the offence was committed. The Court likewise held that consent was irrelevant for the purposes of determining the sentence for offences under s 377 of the Penal Code:

50 In my view, as a general guide, "young victims" should be those under 16 years of age. This would be consonant with the protection of young women under s 140(1)(i) of the Women's Charter which was enacted on the basis that girls under the age of 16 are deemed to be incapable of giving valid consent to a sexual act. I was of the view that this principle should be extended to s 377 offences, such that in cases where the victim is under the age of 16 years, his or her consent is irrelevant for the purposes of sentencing. The underlying principle in this regard is that *young girls under the age of 16 may not have the experience or the maturity to make decisions in their own best interests about their own sexuality and that the law must step in to prevent their exposure to sexual activity regardless of their purported consent*.

51 The present case would fall under this category of cases and the fact that the victim had agreed to the act of fellatio should not be accorded mitigating weight.

[emphasis added]

33 The Court in *Public Prosecutor v Soh Lip Yong* [1993] 3 SLR(R) 364 similarly took the view that consent was immaterial in determining the appropriate sentence for the offence of statutory rape under s 376(1) of the Penal Code (1985 Rev Ed). If the offence was committed without consent, a charge of aggravated rape could be brought under s 376(2) of the Penal Code (1985 Rev Ed) (the equivalent of which is found in s 375(3) of the Penal Code (2008 Rev Ed)) (at [26]):

In my view, this would mean that since the underaged victim's consent is immaterial in determining whether the offence has been committed, it should also make no difference in considering what sentence to impose on the offender. This is clear from the fact that, where there is no consent given to sexual intercourse by the underaged victim, the offence is in fact considered to be aggravated and a charge can be brought under s 376(2) of the Penal Code which attracts a minimum sentence of eight years' imprisonment and 12 strokes of the cane. As

such, it must be the case that, even when the underaged victim has consented, the benchmark sentence in *Chia Kim Heng Frederick v PP* [[1992] 1 SLR(R) 63] applies in full force. Where she has not consented but the charge is nonetheless framed under s 376(1), it becomes an aggravating factor in determining the appropriate sentence to impose on the offender.

34 In my view, the considerations stated above with regard to the offence of statutory rape under s 376(1) or carnal intercourse against the order of nature under s 377 of the Penal Code (1985 Rev Ed) are applicable with equal force to the determination of sentences for the offence of statutory rape punishable under s 375(2) of the Penal Code (2008 Rev Ed); and for the offences of sexual penetration of a minor under 16 punishable under s 376A of the Penal Code (2008 Rev Ed). The underlying rationale behind these provisions is to protect young and vulnerable girls from being sexually exploited. Indeed, as a matter of societal morality and legislative policy, girls below 16 years of age are, due to their inexperience and presumed lack of sexual and emotional maturity, considered to be vulnerable and susceptible to coercion and hence incapable of giving informed consent. This is epitomized by the fact that the offences of statutory rape and sexual penetration of a minor are *strict liability* offences as far as consent is concerned. This was also alluded to by the Court of Appeal in *PP v UI* where it was commented that (at [60]) the "law *imputes an inability to consent* to the sexual acts committed against [the victim] as she is a minor". It would therefore be contrary to such considerations for the court to treat consent as a relevant mitigating factor for such offences. There will also be several *practical* problems if consent is to be regarded as a relevant mitigating factor: evidence would have to be adduced to show the degree of sexual and emotional maturity of the victim, the degree of coercion on the offender's part, and even whether the acts (if any) of the victim were allegedly sexually provocative or not [note: 3]. Furthermore, an offender's contention of consent is irrelevant because if there is indeed *no consent*, the offender would have committed the graver offences of rape under s 375(1)(a) or of aggravated rape under s 375(3) of the Penal Code (2008 Rev Ed).

35 I add here, parenthically, that I do not discount the possibility of *exceptional* cases where consent *may* be regarded as a relevant mitigating factor for statutory rape or sexual penetration of a minor, especially where the victim and the offender was of the *same or similar age* at the time the offences were committed (even in such cases however, the court should look at the age gap between the offender and the victim; the greater the age gap, *the lesser the mitigating weight* that may possibly be accorded to the purported consent). However, given that this is not the situation before me, I shall say no more.

36 Turning to the facts of the present case, to begin with, I am unable to accept the defendant's assertion that the sexual acts were consensual in the sense of *positive consent*. I am mindful that in the victim's first information report, it was stated that she had "been having *consensual* sex" with the defendant for over two years. However this statement must be read together with the SOF in which the defendant admitted that, sometime in 2007 when the defendant first touched the private parts of the victim while they were on the same bed with the victim's mother, the victim had moved her body in the hope that the defendant would stop (see SOF at [12]). Further the defendant also admitted that the victim had even tried to stop the defendant on a few occasions in 2009 but was afraid that the defendant would be angry with her (see SOF at [30]). What the defendant is effectively saying is that no force or violence was used by him in committing the offences. That is quite different from saying it was truly "*consensual*". This is a separate point which is dealt with below.

*Absence of force or violence*

37 The defendant also sought to emphasise in his mitigation plea that *he did not use any* force, weapons, alcohol or drugs during the commission of the offences. The defendant's contention is

wholly misconceived. The consideration and balancing of mitigating and aggravating factors is not a zero-sum process. As a matter of jurisprudential logic, the *absence of an aggravating factor* cannot *ipso facto* constitute a mitigating factor. This is because a mitigating factor is something which an accused is given credit for (see *Krishnan Chand v Public Prosecutor* [1995] 1 SLR(R) 737 at [7]; *Public Prosecutor v Lim Hoon Choo* [2000] 1 SLR(R) 221 at [14]; *Public Prosecutor v Ong Ker Seng* [2001] SGHC 226 at [29]; *Public Prosecutor v Chew Suang Heng* [2001] 1 SLR(R) 127 at [18]), and it cannot be said that the absence of an aggravating factor is something which the defendant should be *given credit for*. In the present case, it would be incongruous for any sentencing judge to give credit to the defendant for his omission to use force, weapons, drugs or alcohol in the commission of the statutory rape and sexual penetration. If the position was otherwise, an offender could conceivably compile a list of *negatives* (what he *did not do*) in order to gain a discount in sentence. This, in my view, does not serve any sentencing principle or objective. On the other hand, there is no doubt that had force, weapons, alcohol or drugs been used in the commission of the offences, it would have amounted to a severe aggravating factor.

*The defendant's plea of guilt*

38 In his mitigation plea, the defendant also sought to emphasise his plea of guilt (see 3rd and 4th paragraph of the mitigation plea):

> …my strong guilt…and conscience has spurred me to voluntarily surrender [*sic*] myself …I even go to the extent to share the consequences with the victim [and] to let her know what I've done is wrong[.]…[S]he has the right to expose me to bring me to justice…
>
> …I believe my action of making my confession, voluntarily surrender[ing] myself…speak[s] louder than any words I've said[,] and most of all it…prove[s] my sincerity of repentance…

39 It is accepted that a mere plea of guilt does not *ipso facto* entitle the defendant to a discount in the sentence (see *Fu Too Tong and others v Public Prosecutor* [1995] 1 SLR(R) 1 at [12]–[14], *Angliss Singapore Pte. Ltd v Public Prosecutor* [2006] 4 SLR(R) 653 and *Wong Kai Chuen Philip v Public Prosecutor* [1990] 2 SLR(R) 361 at [13]–[14]). The Court in *PP v NF* made the apposite observation that (at [57]):

> ...a plea of guilt does not *ipso facto* entitle an offender to a discount in his sentence. Whether an early plea of guilt is given any mitigating value depends on whether it is indicative of genuine remorse and a holistic overview of the continuum of relevant circumstances: *Angliss Singapore Pte Ltd v PP* [2006] 4 SLR(R) 653 at [77]. A court should also carefully examine the conduct of the offender after the commission of the offence in order to determine whether the offender is genuinely contrite.

40 I was not persuaded that the defendant's plea of guilt was indicative of his genuine remorse. The defendant had committed statutory rape and sexual penetration on ***11*** occasions over a span of ***close to three years*** , and never once did he stop to reflect upon his actions, or to consider turning himself in. In fact, the defendant's conduct is symptomatic of someone who had no regard for the gravity of his actions. For example, the defendant even had the temerity to ask the victim whether the sexual assault was "nice" (see SOF at [15]). Sometime between 5 February 2009 and 5 October 2009, the defendant instructed the victim not to disclose the statutory rape and sexual penetration to anyone because he would be arrested, jailed and caned (see SOF at [29]). In other words, he emotionally "blackmailed" her to maintain her silence. Indeed the defendant had initially denied ever having touched the victim when he was first confronted by the victim's mother. Even after his admission to the victim's mother, the defendant had *asked the victim's mother for a delay of one*

*month* before turning himself in to the police. The victim's mother had agreed on condition that the defendant surrendered his passport and acknowledged in writing that he would turn himself in to the police. In the letter, the defendant wrote that he "committed ***a*** sinful crime of ***sexual harassment*** " (see Tab B, annexed to the SOF). This was quite far from the truth since he had committed statutory rape and sexual penetration on the victim on multiple occasions. Finally, I was also disturbed by an allegation made by the defendant to Dr [QR] from [hospital 2] during the assessment of the victim's fitness to plead on 23 October 2009 (see Dr QR's report dated 3 November 2009 at Tab G, annexed to SOF):

> 13. …[the accused] reported surprise that [the victim] would initiate intimacy on occasion, and they began to have regular intercourse…

41 The defendant's disconcerting attempt to lay some blame on the victim is unsupported by the facts stated in the SOF, the mitigation plea and the oral submissions before me. Indeed, the attempt to lay blame on the victim is contrary to the facts admitted to by the defendant in the SOF. For example, the defendant admitted that the victim had hoped that the defendant would stop the sexual assaults (see SOF at [12]); and the victim had even tried to stop the defendant a few times in 2009 but she was afraid that the defendant would be angry with her (see SOF at [30]). In view of the defendant's conduct in totality, I was not satisfied that the defendant was genuinely remorseful of his actions. Nevertheless, I acknowledged that the defendant's plea of guilt did obviate the need for a trial and had thus spared the victim of the ordeal of revisiting the distasteful events in court.

*Lack of antecedents*

42 Finally, the defendant's lack of antecedents cannot be accorded any mitigating weight of significance in the circumstances of this case, given that the offences were carried out on 11 occasions over a period of close to three years.

**The sentences**

43 In the light of the undisputed facts, the present situation would fall under "Category 3" rape (see *PP v NF* at [37]) since it involved repeated acts of rape. The relevant sentencing benchmark for each charge would *prima facie* be 15 years' imprisonment and 12 strokes of the cane. The Court in *PP v NF* however observed that there is no requirement to increase the benchmark *beyond* 15 years' imprisonment for Category 3 rape for each charge as the sentencing court already has the discretion to impose consecutive sentences where multiple offences were committed (at [37]):

> Category 3 rapes are those involving repeated rape of the same victim or of multiple victims. I agree with the courts in Millberry ... that such offenders pose more than an ordinary danger to society and therefore ought to be penalised severely with draconian sentences. However, in most cases where the offender has terrorised the same victim multiple times or where he has assaulted multiple victims, the Prosecution would proceed with multiple charges against the accused. *A sentencing judge has then the option to exercise his discretion to order more than one sentence to run consecutively in order to reflect the magnitude of the offender's culpability. As such, there is no overriding need for judges to commence sentencing at a higher benchmark than that applied to category 2 rapes. In fact, to do so may in many cases result in double accounting and excessive sentences*
>
> [emphasis added].

44 Indeed, this exercise of judicial discretion to calibrate the appropriate sentence for each charge

in situations where consecutive sentences were imposed for repeated rape is exemplified in several precedents already discussed above (at [12] – [18]). In *PP v UI* (see above at [16]), the offender pleaded guilty to three charges of rape under s 376(2) of the Penal Code (1985 Rev Ed) and two other charges of rape were taken into consideration. He was convicted and sentenced to *12 years' imprisonment* on each charge with two charges to run consecutively with a global sentence of 24 years' imprisonment. In *PP v YD* (see above at [18]), the offender was sentenced to *10 years' imprisonment* with 12 strokes of the cane for each of the 16 rape charges under s 376(1) of the Penal Code (1985 Rev Ed), and 5 years' imprisonment for each of the 26 charges of having carnal intercourse against the course of nature under s 377 of the Penal Code (1985 Rev Ed). Two rape charges and one charge of having carnal intercourse were ordered to run consecutively, which resulted in a global sentence of 25 years' imprisonment with 24 strokes of the cane.

45 Furthermore, in *Public Prosecutor v MW* [2002] 2 SLR(R) 432, the offender pleaded guilty to three charges of rape under s 376(2) of the Penal Code (1985 Rev Ed). The victim was his 13 year old biological daughter. He was sentenced to *12 years' imprisonment* with 12 strokes of the cane per charge. Two of the sentences were ordered to run consecutively for a global sentence of 24 years' imprisonment with 24 strokes of the cane.

46 In *Public Prosecutor v MX* [2006] 2 SLR(R) 786, the accused pleaded guilty to 5 charges of rape under s 376(1) and 4 charges of aggravated rape under s 376(2) of the Penal Code. The accused's victims were his five daughters from his various wives. The accused was sentenced to *10 years' imprisonment* and 8 strokes of the cane for each of the charges under s 376(1) and *12 years' imprisonment* and 12 strokes of the cane for each of the charges under s 376(2). Two of the sentences for the s 376(1) charges and one of the sentences for the s 376(2) charges were ordered to run consecutively, totalling 32 years' imprisonment and 24 strokes of the cane.

47 As can be seen from the above decisions, where consecutive imprisonment sentences were imposed, the calibration of the individual sentences brought the individual imprisonment sentence for *each* charge of rape below the *prima facie* benchmark of 15 years' imprisonment set out in *PP v NF*. The sentences imposed for such cases typically ranged between 10 to 12 years' imprisonment *per charge* resulting in a global sentence between 24 to 32 years' imprisonment. Nevertheless, this should not be taken as a rigid and mechanical application of any sentencing formulae. It is pertinent to highlight that *PP v NF* merely observed that it would ordinarily not be necessary to go beyond the 15 years benchmark *per charge* for Category 3 rape. Accordingly, I do not rule out situations where a sentence of 15 years' imprisonment (or more) can be ordered for *each* charge *even where* consecutive sentences are imposed, especially where the offences were committed with egregious depravity or repulsive perversion to warrant the resolute force of the law such as in *PP v ABJ* (see [17] above) where the accused sexually assaulted the victim on 44 occasions, and was sentenced to, *inter alia*, 16 years' imprisonment for each charge of rape under s 376(2) of the Penal Code (1985 Rev Ed). Ultimately, in considering the relevant precedents (as set out above) where the *totality principle* was adhered to, the sentencing court should be mindful that the precise calibration of the sentences for each offence where consecutive sentences are ordered must be tailored to the specific factual circumstances of each case. The underlying principle is that the totality of the sentence imposed must fit the overall gravity of the offences committed (see also *ADF v Public Prosecutor* [2010] 1 SLR 874 at [146] and *Public Prosecutor v Law Aik Meng* [2007] 2 SLR(R) 814 at [60]). In the present case, there were two additional aggravating factors which were absent from the earlier precedents. The defendant had infected the victim with an STD and had deceived her into believing that the sexual intercourse was in her interest to prevent her from being cheated in future. In view of the aggravating factors as well as the lack of mitigating factors in the present case, and having considered the seriousness of the harm caused to the victim, I accepted the Prosecution's submission that a heavy sentence was warranted (the Prosecution had sought for a sentence in excess of 24

years' imprisonment with 24 strokes of the cane). Taking into consideration the multiple charges and s 18 of the CPC which mandates at least two consecutive imprisonment terms, I could have sentenced the defendant to 15 years' imprisonment for each charge resulting in a global sentence of 30 years' imprisonment. However, taking into account the totality principle and the fact that his plea of guilt did at least spare the victim of reliving the traumatic ordeal, I decided to sentence the defendant to 13 years' imprisonment (instead of 15 years per charge) and 12 strokes of the cane for each charge of statutory rape under s 376(1) of the Penal Code (1985 Rev Ed) and s 375(2) of the Penal Code (2008 Rev Ed); and 7 years' imprisonment for the charge of sexual penetration (penile-vaginal) of a minor under 16 years of age under s 376A of the Penal Code (2008 Rev Ed). I ordered the sentences for the two charges under s 376(1) to run consecutively, with all other sentences to run concurrently, making a total of 26 years' imprisonment with 24 strokes of the cane. I am of the view that the overall sentence of 26 years' imprisonment with 24 strokes of the cane would adequately reflect the gravity of the offences committed by the defendant.

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[note: 1] N/E at p 15.

[note: 2] N/E at p 15 to 17.

[note: 3] See generally Britton B. Guerroma, *Mitigating Punishment for Statutory Rape* 65 U Chi L Rev 4 (1998).