IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 58

Criminal Case No 29 of 2017

Between

Public Prosecutor

And

Ong Soon Heng

GROUNDS OF DECISION

[Criminal law] — [Offences] — [Rape]
[Criminal law] — [Offences] — [Abduction]
[Criminal procedure and sentencing] — [Sentencing] — [Sexual offences]

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v
Ong Soon Heng

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16 March 2018

Aedit Abdullah J:

Introduction

1 In the early hours of 24 July 2014, Ong Soon Heng ("the Accused"), the victim ("the Victim"), and several of their acquaintances visited a nightclub, Zouk. The Victim consumed alcoholic beverages and seemed to have lost consciousness as a result of intoxication. At about 4.00am that morning, the Accused drove the Victim to his residence at No 4 Hume Heights ("the Residence"), where the Accused had sexual intercourse with the Victim.

2 The Accused was charged with one count of rape under s 375(1)(*a*) of the Penal Code (Cap 224, 2008 Rev Ed) ("PC") and one count of abduction *simpliciter* under s 362 of the same Act. The Prosecution's case was that the Victim was unconscious at the material time of the alleged offences due to severe alcohol intoxication. As a result, she lacked the capacity to consent, and

did not in fact consent, to being taken to the Residence or to sexual intercourse with the Accused.[1] The Defence denied the Prosecution's case, and further alleged that the Victim and the Accused had been in an intimate relationship with each other in the period before and around 24 July 2014.

3 Having considered the evidence, I found that, at the material time of the alleged offences, the Victim could not have and did not in fact consent to sexual intercourse with the Accused. I also found that the Accused had by force compelled the Victim to move from Zouk to the Residence. Accordingly, I convicted the Accused on both charges and sentenced him to a global imprisonment term of 13 years and 6 months, and 12 strokes of the cane. I also granted a compensation order of $76, in default one day of imprisonment.[2]

Background

The parties

4 The Victim was a 22-year-old undergraduate student at a local university at the material time.[3] As of mid-2014, she had been in a relationship with her boyfriend, [W], for a period of two years. In May 2014, the Victim started her internship at Kombi Rocks, which was a company dealing in food and beverage and event management.[4] The internship was supposed to last for three months until the end of July 2014, but the Victim ended her stint after the incident on 24 July 2014.[5]

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1 Prosecution's submissions at the end of trial dated 26 May 2017 ("PCS") at para 5.

2 NE dated 13 November 2017 at pp 25-26

3 PCS at para 14.

4 PCS at para 17.

5 PCS at para 20.

5 The Accused, who was also known as "Osh", was 37 years old and worked as an understudy bunker surveyor at the time of the alleged offences.[6]

The parties' relationship

6 The Accused was a close friend of Lim Tiam Hai ("Lim TH") and his wife, who were the owners of Kombi Rocks,[7] and would help out at its premises on occasion.[8] In the course of her internship, the Victim became acquainted with the Accused,[9] who helped her at work and advised her on her work relationships. The precise status of the relationship between the two was disputed: the Victim maintained they were just friends, while the Accused maintained that they had a secret romantic relationship.

Events at Zouk

7 On 23 July 2014, the Victim made plans to visit Zouk with one "Maria" and one Kwok Wing Shan ("Kwok"), who were the Victim's fellow employees at Kombi Rocks. The Victim was initially reluctant to attend but later decided to join them at Zouk.[10] The Accused and his friends were also there.[11]

8 On the night of 23 July 2014, at around 11.00pm, Maria and Kwok went to Zouk together from Kombi Rocks, while the Victim went home first. The Victim arrived later at Zouk at around 1.00am on 24 July 2014. On her arrival, she texted the Accused, who had arrived earlier, to sign her into the club. The

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6 Defence closing submissions dated 26 May 2017 ("DCS") at para 11.

7 PSC at para 21.

8 DCS at paras 12 and 111.

9 PCS at paras 20-21.

10 NE dated 5 April 2017 at p 12.

11 PCS para 28; NE dated 5 April 2017 at pp 12-13.

Victim then met up with Maria and Kwok at a main table in the club.[12] It was undisputed that the Victim had consumed alcoholic drinks while she was at Zouk, but there was disagreement as to whether she had any at the main table before she went with Kwok to consume an alcoholic cocktail at a wine bar at another part of Zouk's premises. The Victim's movement thereafter was also not clear: Kwok testified that they had gone to another part of the club, known as "Phuture", before returning to the main table, while the Victim said that they had returned to the main table directly.

9 In any event, the Victim, Kwok and the Accused eventually returned to the main table, where the Victim consumed more alcohol. In the meantime, the Victim texted her boyfriend, [W], to keep him updated on how things were going at Zouk. According to the Victim, the last thing she could remember in the early morning of 24 July 2014 was that she was holding a cup of alcoholic drink and texting [W].[13]

From Zouk to the Residence

10 CCTV records at Zouk showed that at around 3.48am later that morning, the Victim was unconscious and lying supine on a bench in Zouk. The Accused, Kwok, and others attempted to help her to her feet but failed. The Accused then lifted the Victim and carried her over his shoulder, in what was known as a fireman's lift, from the premises of Zouk to the carpark where his car was located. At around 4.00am, the Accused drove off with the Victim in the backseat of his car.[14] What happened thereafter, and in particular whether the Victim had the capacity to consent to sexual intercourse with the Accused, was

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12 PCS at para 29; Exhibit P101.

13 NE dated 5 April 2017 at p 13.

14 PCS at paras 4 and 37.

the primary issue of contention at trial.

11 By the Victim's account, she had no recollection at all of what had happened between the time she fell unconscious in Zouk, and the time she was awaken by [W] in a very brightly lit room, lying on a mattress on the floor, wearing an unfamiliar t-shirt and pair of boxer shorts. She had no recollection of how she got to the room and was unable to recognise it. She did not consent to any sexual intercourse with the Accused.

12 The Accused's version was that when he drove off from Zouk with the Victim lying in the backseat of the car, he realised that he did not know her residential block and unit number. When he asked her about this, she responded by telling him that she wanted to go to his place. Subsequently, at the Residence, the Victim was conscious and consented to having sexual intercourse with him.

Events after the Victim left the Residence

13 Around 5.00am to 6.00am on 24 July 2014, the Victim's boyfriend, [W] tracked the Victim's location to the Residence using a mobile application after she failed to respond to his calls and text messages.[15] [W] arrived at the Residence at around 6.30am. He testified that when he was allowed into the Residence by the Accused's roommate, Benjamin Lim, he found the Accused and the Victim lying on a mattress under a blanket in one of the bedrooms.[16] After asking the Accused a series of questions and waking the Victim, he left the Residence with the Victim and drove her to her residence.[17]

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15 NE dated 6 April 2017 at pp 7-8.

16 NE dated 6 April 2017 at p 9.

17 NE dated 6 April 2017 at pp 10-11.

14 Subsequently, the Victim was brought to KK Women's and Children's Hospital ("KKH"). The Victim's father and brother, as well as [W], returned to the Residence to retrieve the Victim's mobile phone. There, they questioned the Accused, who denied that anything had happened between him and the Victim. A voice recording of this conversation was made.[18] Later that afternoon, a police report was made and a medical examination conducted of the Victim.

15 A few days later, the Victim's father met up again with the Accused. This conversation was also recorded by the Victim's father.[19] The Accused at this stage admitted that he had sexual intercourse with the Victim but maintained that it was consensual.[20]

The charges

16 The Accused claimed trial to the following two charges brought against him:[21]

First Charge	… on 24 July 2014, at about 4.04am, at the driveway of Zouk located at No. 17 Jiak Kim Street, Singapore ("Zouk"), did abduct [the Victim], by using force to compel her to go from Zouk to No 4 Hume Heights, Singapore, and you have thereby committed an offence under section 362, and punishable under section 363A, of the Penal Code (Cap 224, 2008 Rev Ed).
Second Charge	… on 24 July 2014 sometime between 4.04am and 6.30am at No. 4 Hume Heights, Singapore, did commit rape of [the Victim], to wit, by penetrating the vagina of [the Victim] with your

18 NE dated 6 April 2017 at pp 12-13; Agreed Bundle ("AB") at pp 92-100.

19 NE dated 31 March 2017 at 47-48; AB at pp 101-124.

20 AB at pp 101-124.

21 PCS at paras 6-7.

> penis without her consent, and you have thereby committed an offence under section 375(1)(a), and punishable under section 375(2), of the Penal Code (Cap 224, 2008 Rev Ed).

17 At the commencement of trial, the Prosecution applied for a gag order under s 8(3) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) in relation to the Victim's identity, and for the Victim's evidence to be given *in camera* under s 153(1) of the Women's Charter (Cap 353, 2009 Rev Ed). The Defence did not object and, accordingly, I granted both applications.[22]

The Prosecution's case

18 In relation to the rape charge, it was not disputed that sexual intercourse did in fact occur between the Accused and the Victim between 4.04am and 6.30am on 24 July 2014; the issue was whether the Victim had consented.

19 The Prosecution's case was that the Victim had been unconscious as a result of severe alcohol intoxication for the material period between about 4.04am and 6.30am on 24 July 2014, during which the two offences were allegedly committed. The Victim lacked the capacity to consent and did not consent to any sexual intercourse with the Accused at the Residence.[23]

20 As for the abduction charge, the Prosecution submitted that given the intoxicated and unconscious state of the Victim at the material time, she could not have consented to the Accused moving her in his car from Zouk to the Residence. The Accused must therefore had by force compelled her to be so moved within the meaning of s 362 of the PC.[24]

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22 NE dated 30 March 2017 at pp 2 and 31 March 2017 at pp 86-87.

23 PCS at para 11.

24 PCS at para 9.

21 Further, the Prosecution submitted that the Accused and the Victim were never romantically involved with each other.[25] Raising this purported relationship, kept secret from [W], was only an attempt by the Accused to obfuscate the pertinent issues at trial.[26]

22 Although the Defence did not in fact raise a defence under s 79 of the PC, the Prosecution argued that the Accused could not have been mistaken in good faith that the Victim had consented to the events constituting the two charges. The Accused and the Victim were not in a secret romantic relationship. Further, there was no evidence that the Victim had acted in a seductive or flirtatious manner on the morning of 24 July 2014 which could have given the Accused any misimpression. The Prosecution also submitted that there was a lack of good faith on the part of the Accused.[27]

The Defence's case

23 The Defence's case was that the Victim did not lack the capacity to consent to the events constituting the two charges.[28] At the material time, the Victim was not so intoxicated that she was unable to understand the nature and consequence of her consenting to sexual intercourse with the Accused.

24 Further, according to the Accused, the Victim had in fact consented to the events constituting the two charges. Concerning the rape charge, the Victim had given actual consent to the Accused during the intercourse.[29] As for the abduction charge, the Victim had told the Accused that she wanted to go to his

25 PCS at paras 23-27.

26 PCS at para 119.

27 PCS at paras 160-166.

28 DCS at paras 191, 231-234 and 240.

29 DCS at paras 188-189.

place soon after they had driven off from Zouk, while she was in the backseat of the Accused's car.[30] The Defence also submitted that such consent was consistent with the fact that the Victim and the Accused had been in a romantic relationship in the period immediately prior to the offences.[31] In fact, the Victim and the Accused behaved intimately on the very morning of 24 July 2014 while they were at Zouk, just prior to the alleged offences. The Victim's denial of the relationship and interaction was because she had been caught by [W] red-handed in bed with the Accused, and such untruthful denial rendered her evidence less than credible.[32]

25 In addition, for the abduction charge, even if there had been no consent, the charge was not made out because s 362 of the PC required resistance to be put up by the Victim, and that was not satisfied.

The alleged offences

26 Having considered the evidence, I found that the elements of both offences were established and accordingly convicted the Accused of the two charges.

The law

27 In its submissions, the Prosecution stated that in a sexual assault case, the complainant's evidence must either be unusually convincing or corroborated by evidence for the charge to be proved beyond reasonable doubt (see *AOF v Public Prosecutor* [2012] 3 SLR 34 ("*AOF*") at [111]).[33] The Defence did not

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30 DCS at paras 186-187, 240.

31 DCS at para 184.

32 DCS at para 191(ii).

33 PCS at para 71.

challenge the Prosecution's position, and in fact adopted the same unusually convincing standard in its own submissions.[34]

28 Under the approach set out in *AOF*, the Court should not convict an accused unless it finds on a close scrutiny that the complainant's evidence is unusually convincing, based on (a) the complainant's demeanour in Court, (b) the internal consistency of his or her evidence, and (c) its external consistency when assessed against extrinsic evidence such as the evidence of other witnesses or documentary evidence or exhibits (see *AOF* at [115]). However, as I mentioned in *Public Prosecutor v BLV* [2017] SGHC 154 at [24], the modern judicial tendency appears to lean in favour of relying more heavily on the last two inquiries rather than an assessment of the complainant's demeanour.

29 If the complainant's evidence is not unusually convincing, a conviction is unsafe unless there is adequate corroboration of the complainant's account of the events (see *AOF* at [173]). Subsequent statements by the complainant himself or herself constitute corroboration so long as those statements implicating the accused were made at the first reasonable opportunity after the commission of the offence (see *Public Prosecutor v Mardai* [1950] MLJ 33 at 33; *AOF* at [173]).

30 It was not entirely clear that the unusually convincing standard applied to the present case. As the Court of Appeal in *AOF* explained (at [111]), that standard applied "in a case where no other evidence is available" apart from the testimonies of the complainant and the accused. In those situations, the unusually convincing standard is the cognitive aid that helps untie the "evidential Gordian knot… if proof is to be founded solely from the

[34] Defence Reply Submissions dated 12 June 2017 ("DRS") at paras 1-4.

complainant's testimony against the accused" (*XP v Public Prosecutor* [2008] 4 SLR(R) 686 at [31]; *Haliffie bin Mamat v Public Prosecutor and other appeals* [2016] 5 SLR 636 ("*Haliffie bin Mamat*") at [29]). In practice, the unusually convincing standard usually applies in trials of sexual offences where the complainant and the accused each provides a diametrically opposite account of what had occurred and the Court has to weigh the complainant's word against the accused's word (see, *eg*, *AOF*). However, that may not mean that the standard necessarily applies to all issues in all trials of sexual offences. The question is whether the conviction turns solely on the complainant's testimony, not whether the charge is one involving a sexual offence.

31 In the present case, the primary contested issue was whether the Victim had the capacity to consent to the events constituting the alleged offences at the material time. In this regard, there was such other evidence, in the form of the video evidence and the expert testimonies adduced by the Prosecution and the Defence. Therefore, at least in relation to this issue, the rationale for the unusually convincing standard did not appear to apply. This may be a point that needs to be addressed in a subsequent appropriate case. For present purposes, however, given the position taken jointly by the parties, and since the difference was not material insofar as I was of the view that the Victim's evidence was in fact unusually convincing, I proceeded on the basis that the unusually convincing standard set out in *AOF* applied.

Capacity to consent

32 As mentioned, the first and primary point of contention was whether, at the material time of the offences, the Victim was intoxicated from alcohol to the extent that she lacked the capacity to consent to the events constituting the two charges. Section 90(*b*) of the PC provides that consent is "not such a consent as

is intended by any section of this Code… if the consent is given by a person who, from… intoxication… is unable to understand the nature and consequence of that to which he gives his consent".

33 The Prosecution's case was that the Victim had been unconscious as a result of severe alcohol intoxication for the material period between about 4.04am and 6.30am on 24 July 2014. In support of its case, the Prosecution relied on the Victim's evidence that there was a complete blank in her memory between the time that she passed out at Zouk (*ie*, around 3.00am on 24 July 2014) and the time that she was woken up by [W] at the Residence (*ie*, around 6.30am on 24 July 2014).[35] The Victim's evidence was said to be internally consistent, and also externally consistent with three categories of evidence:[36]

(a) evidence relating to the Victim's state when she was at Zouk in the early morning of 24 July 2014 prior to the alleged offences;

(b) expert evidence of Dr Guo Song ("Dr Guo") as to the Victim's state at the material time; and

(c) evidence relating to the Victim's state following her departure from the Residence at around 6.30am on 24 July 2014 after the alleged offences.

34 The Defence submitted that the Prosecution bore the burden of proving beyond a reasonable doubt that the Victim was unconscious at the material time of the offences.[37] In this regard, the Victim was not intoxicated to the extent that she was unable to understand the nature and consequences of that to which she

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35 PCS at para 73.

36 PCS at paras 76-78.

37 DCS at para 234.

had consented. Reliance was placed on the opinion of the Defence's expert, Dr Tommy Tan ("Dr Tan"), that the Victim, while not fully conscious, was nevertheless of sufficient consciousness as to be able to consent to sexual intercourse.[38] Further, the Defence pointed out that nowhere in Dr Guo's reports did he "categorically state that [the Victim] was unconscious at the material time".[39] Apart from the expert evidence of Dr Tan, the Defence also relied on

(a) the Accused's evidence as to the Victim's state before, during, and after the alleged offences, and

(b) the evidence of the Accused's roommate at the Residence, Benjamin Lim, as to the Victim's state when she left the Residence at around 6.30am on 24 July 2014.[40]

Victim's state at and before 4.00am on 24 July 2014

35 I start first with the evidence of the Victim's state of intoxication and consciousness immediately before she left the premises of Zouk.

36 The Prosecution relied on seven CCTV video clips from Zouk to show the Victim's severe state of intoxication and unconsciousness immediately before she left Zouk at around 4.04am on 24 July 2014.[41] According to the Prosecution, the CCTV records were "[t]he most damning piece of evidence" in the present case, and may be briefly described as follows:[42]

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38 DCS at para 227.

39 DCS at para 233.

40 DCS at para 174; NE dated 11 April 2017 at p 69.

41 PCS at para 37.

42 PCS at para 37.

File name	Time	Description
File ending 110342	3:48:00	Victim was lying supine on a bench in Zouk.
	3:48:10	Victim fell off the bench.
	3:50:11	Victim was unable to remain upright.
	3:52:53	A group of individuals attempted to drag the Victim to her feet.
	3:53:12	Victim was dragged towards emergency stairwell.
	3:53:41	Accused lifted Victim's body and carried it over his shoulder in a fireman's lift.
File ending 114405	3:53:53	Accused carried Victim's body towards Zouk's emergency stairwell.
File ending 115141	3:53:56	Accused carried Victim's body down emergency stairwell. Victim was still slung over his shoulder and appeared unresponsive.
File ending 120335	3:54:22	Accused placed Victim's body on the steps outside emergency stairwell.
	3:54:47	Accused left the scene to fetch his car.
	3:58:25	Kwok and another lady tended to Victim; Victim remained unresponsive.
	4:00:39	Accused returned, lifted the Victim's body and carried her away.
File ending 150034	4:00:45	Accused carried Victim's body through the passageway; Victim remained unresponsive.

37 The CCTV recordings covered a period of approximately 12 minutes prior to the Victim's departure from Zouk. It captured Kwok, the Accused, and other acquaintances attempting initially to get the Victim to her feet, and

thereafter the Accused carrying the Victim out of Zouk using a fireman's lift. It was clear to any viewer that the Victim's body was limp and unresponsive. The Victim was eventually placed in the backseat of the Accused's car, even though the front passenger seat was not occupied.

38 The CCTV recordings were very strong evidence that the Victim had been unconscious at the material time of the offences. The accuracy and reliability of these records were not disputed by the Defence. Given her state as depicted, it was unbelievable that the Victim could have, by the Accused's account, woken up soon after leaving the club and responded that she wanted to go to his place. Notably, the Accused did not say that he had physically roused the Victim from her slumber, and there was no one else in the car who could have done so. Similarly, the recordings cast serious doubt on the Accused's evidence that the Victim was sufficiently conscious at around an hour or so thereafter to give consent for sexual intercourse with the Accused.

39 The conclusion about the Victim's state from the CCTV recordings was buttressed by evidence given by several of the Prosecution's witnesses:

(a) Kwok's conditioned statement[43] dated 26 September 2016 stated that at about 3.30am on 24 July 2014, the Victim became "very drunk and looked very faint".[44] A group of them tried to get the Victim to stand up, but "it was very difficult" as the Victim was "so knocked out that her eyes were perpetually closed. She was also not responding to anything at all".

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43 AB at pp 1-4.

44 AB at p 2.

(b) Hafiza bte Faizal @ Hailey Fiza Frost ("Hafiza"), a security officer at Zouk at the material time, stated in her conditioned statement[45] that on 24 July 2014 at about 3.00am, she noticed the Victim "appeared to be drunk" and that she "was not responding to anyone at all". While waiting for the Accused to drive his car over, the Victim vomited and "did not seem to know the condition that she was in". Hafiza commented that "[the Victim] looked like she must have drunk a lot, or had very little tolerance for alcohol, as she was vomiting and appeared to be very knocked out. I am very sure that the [Victim] did not know what was happening around her."

(c) Kow Foo Oon ("Kow") was a Service Supervisor at Zouk at the material time. The conditioned statement[46] dated 27 September 2016 recorded that at about 3.00am on 24 July 2014, the Victim "appeared to be knocked out" and "did not respond to us at all". Kow recounted that the Victim "was so knocked out that she did not seem to know what was happening". At the carpark, "she could not stand up straight as she was very drunk". While helping to place the Victim in the backseat of the Accused's car, Kow entered the rear door on the other side and helped to guide the Victim's head in safely. Up to the point the Accused drove off, the Victim "remained unconscious".

40 The evidence of Kwok, Hafiza, and Kow were consistent in showing that the Victim had been in an unresponsive and unconscious state at the time she left Zouk with the Accused. The Victim could not perform basic functions, and Kow had to guide the Victim's head in to the backseat of the Accused's car to ensure her safety. Indeed, the Victim's intoxicated state was so apparent that

45 AB at pp 5-7.

46 AB at pp 8-10.

Hafiza was confident enough to state that she was "very sure" that the Victim was not aware of what was happening around her. In the circumstances, the severity of the Victim's intoxication and unconsciousness at around 4.00am on 24 July 2014 could not be, and indeed was not, disputed.

Victim's state at the material time of the offences

41 As the Accused and the Victim were alone from around 4.00am to 6.30am on 24 July 2014, the Victim's state of intoxication and consciousness at the material time of the offences turned primarily on the conflicting expert testimony.

(1) The Prosecution's expert

42 The Prosecution's expert was Dr Guo, who was a senior consultant psychiatrist and the head of research in the addiction medicine department of the Institute of Mental Health ("IMH").[47] Dr Guo held a PhD in psychopharmacology, which is the study of the impact of substances such as drugs and alcohol on human mood, thought, and behaviour.[48] In practice in Singapore since 2003, his specialisation at IMH was addiction psychiatry, which included the management of alcohol addiction,[49] and he would see around 30 to 35 patients with alcohol-related psychiatric issues per week.[50] Dr Guo had given expert evidence in about four to five cases relating to the retrospective calculation or estimation of a person's blood alcohol concentration ("BAC").[51]

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47 AB at p 23.

48 NE dated 31 March 2017 at p 6.

49 NE dated 31 March 2017 at p 6.

50 NE dated 31 March 2017 at p 7.

51 NE dated 31 March 2017 at p 7.

43 For the present case, Dr Guo produced two written reports. The first report was dated 8 June 2015.[52] Dr Guo considered the Victim's BAC level at the time of her medical check-up at 12.45pm on 24 July 2014, which was 62mg% (also represented as 62mg/100ml), as well as the various statements given by the Victim, the Accused, and the witnesses. He noted that the Victim had started consuming alcohol when she was around 20 years old and would normally drink once in 2 to 3 months. Further, Dr Guo recorded in his report aspects of the Zouk outing on 24 July 2014 as recounted by the Victim during his interviews with her, including the Victim not being able to recall the actual amount of alcohol she had consumed, but being able to recall that she had consumed a variety of alcoholic drinks including beer, champagne, wine, and hard liquor. She had also recounted that after one of her female colleagues got drunk, she was persuaded by other friends to drink even more. She drank faster than usual. The Victim's last memory was of a moment at around 3.00am on 24 July 2014, when she was holding a glass of wine and sending a message to her boyfriend. The next thing she could remember was her boyfriend shouting at her at the Residence. She was only able to recall "some fleeting memories" of her being taken into her boyfriend's car, and her subsequent stay in the hospital and at her residence. She did not recall ever giving consent to the Accused for sexual intercourse.

44 Amongst other things, Dr Guo drew the following conclusions in his first report:

> (a) The Victim's alcohol habits prior to the incident suggested that it was unlikely that she would have developed a high degree of tolerance to the effects of alcohol.[53]

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52 AB at pp 22-44.

53 AB at p 29.

(b) According to the Victim's toxicology report, her BAC level was 62mg/100ml (also expressed as 62mg%) at the time of the medical check-up at 12.45pm on 24 July 2014. Using the equation "BAC clearance = 120mg/kg/hr x bodyweight / (bodyweight x 54%)", the Victim's hourly BAC clearance rate (*ie*, the hourly rate of clearance of alcohol from the blood) was estimated to be 22mg%/hr.[54] The 54% value referred to the average proportion of body water available for alcohol distribution for females. The 120mg/kg/hr referred to the alcohol clearance rate for females. The Victim's body weight was recorded as 47kg.

(c) Based on her BAC level as at 12.45pm and her estimated BAC clearance rate, the Victim's estimated BAC level during the material time from 4.00am to 6.00am on 24 July 2014 was between 254.50mg% and 210.50mg%.[55] This was "clearly a case of binge drinking" that could have made the Victim highly vulnerable to intoxication.

(d) A person with the Victim's BAC at the material time "would not be fully conscious of his or her actions". The Victim was "highly likely to be in a state of severe intoxication with significant impaired consciousness at the time of the alleged incident. It is highly unlikely that she would have been able to understand and follow any verbal instructions given to her at the time of alleged incident… Therefore it is highly unlikely that she would have consensually participated in the alleged incident that took place in that eventful night".[56]

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54 AB at p 27.

55 AB at p 28.

56 AB at p 29.

45 Dr Guo's second report, dated 4 October 2016, made in response to Dr Tan's medical report which will be elaborated on later, maintained Dr Guo's conclusion in his first report and added that:

(a) Alcohol tolerance develops only after a period of chronic and daily alcohol consumption. Based on the Victim and her father's account of the Victim's prior consumption habits, it was "unlikely that she would have developed a high degree of tolerance to the effect of alcohol".[57]

(b) The Victim's BAC level at the material time fell within the BAC range in which "unconsciousness could have happened". The CCTV records at Zouk showed the Victim's impairment in motor performance and cognitive function at around 4.00am on 24 July 2014. This was consistent with the BAC level that could have led to unconsciousness.[58]

46 In Court, Dr Guo clarified his written reports as follows:

(a) His assessment as to the Victim's condition was based not only on her estimated BAC level, but also on her psychomotor performance immediately prior to 4.00am that same day as observable on the CCTV recordings, as well as interviews with and statements given by the Victim and the witnesses.[59] It was the entirety of the evidence that led Dr Guo to "rule out" the possibility that the Victim might have been conscious at the material time.[60]

(b) When Dr Guo stated in his report that the Victim suffered from "impaired consciousness", he meant that she was unconscious at that

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57 AB at p 48.

58 AB at p 48.

59 NE dated 31 March 2017 at p 34.

time.[61] To Dr Guo, "unconsciousness" meant that the subject had "very minimal response to stimulat[ion]",[62] and such an unconscious person would be "unable to give any consent" and "[u]nable to judge… what has happened… around her and also unable to make a decision."[63]

(c) At the material time, the Victim "could be aroused by… very strong stimuli… but it does not mean that the… conscious[ness] will come back to her".[64] Further, she may also have been able to provide "involuntary answer(s)", meaning that she would respond to a stimuli, but not understand what she was talking about.[65]

(d) Based on the hourly BAC clearance rate of 22mg%/hr and an estimated BAC level of around 254mg% at about 4.00am, it would take around eight to ten hours for the Victim to recover and reset her psychomotor function.[66]

(2) The Defence's expert

47 The Defence's expert was Dr Tan from the Novena Psychiatry Clinic, who was a specialist in forensic psychiatry. Dr Tan provided one written report dated 11 May 2016, in which he opined that:

(a) Dr Guo's estimation of the Victim's BAC level was "acceptable".[67]

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60 NE dated 31 March 2017 at pp 22-23.

61 NE dated 31 March 2017 at p 11.

62 NE dated 31 March 2017 at p 11.

63 NE dated 31 March 2017 at p 11.

64 NE dated 31 March 2017 at pp 12 and 20.

65 NE dated 31 March 2017 at p 21.

66 NE dated 31 March 2017 at pp 38-39.

(b) A person with the Victim's estimated BAC level at the material time who is non-tolerant of alcohol would have "poor judgment, with other symptoms of slurred speech, ataxia and vomiting". However, the Victim might not be non-tolerant as "she had drunk alcohol in the past".[68]

(c) "[I]t was possible that the [Victim] could have given consent to having sexual intercourse with [the Accused], although her consent would be the result of impaired judgment caused by the acute alcohol intoxication."[69]

48 Dr Tan's assessment of the Victim's condition at the material time had a different nuance from Dr Guo's. In Court, Dr Tan clarified that:

(a) When he used the term "impaired judgment", he meant that "[s]he probably was aware what's happening but she just didn't give thought to the consequences of her actions. She did not fully consider all the possible… factors that… might happen, could have happened after… her actions… She probably didn't consider that she have boyfriend and how it might affect the relationship with the boyfriend".[70]

(b) On the assumption that the Victim's BAC level was 232.50mg% at 5.00am on 24 July 2014 as put forth by Dr Guo, at the material time of the alleged offences the Victim "is not fully conscious but she is still conscious. She's definitely not unconscious, she's definitely not in a state of coma or anaesthesia. She's still conscious."[71]

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67 Dr Tan's report dated 11 May 2016 at para 42.

68 Dr Tan's report dated 11 May 2016 at para 45.

69 Dr Tan's report dated 11 May 2016 at para 46.

70 NE dated 12 April 2017 at p 16.

(c) Around 35 minutes after 4.05am, which was the estimated time that the Victim had arrived at the Residence, the Victim would have been able to wake up. The Victim would also "likely" have been able to hear, understand, and respond to the question "What is your block and unit number?".[72] It was also "likely" that the Victim would have known that the Accused was removing her dress and underwear. It was "likely" and "very possible" that the Victim would have been able to respond and call out the Accused's name while they were having sexual intercourse.[73] After the sexual intercourse, the Victim would have been able to respond "no" to the Accused's question whether she wanted a glass of water, and she would have been able to say "But I'm feeling cold".[74] At around 6.00am to 7.00am, the Victim "probably" can walk out of the Residence herself unaided.[75]

49 In coming to the above conclusions, Dr Tan relied on the interviews that he conducted with the Accused, Benjamin Lim, Lim TH, and one Handoyo Halim who was present at Zouk on the morning of 24 July 2014, as well as Dr Guo's report dated 8 June 2015, and the Accused's statement to the police. Dr Tan's report referred to the Accused's version of events, including the Victim having told the Accused to go to his house when he asked her which block and unit she stayed in. The Accused also told Dr Tan that the Victim "did not resist him" when they had sexual intercourse and that she was "calling his name when they were having sex". Further, when [W] woke the Victim up, the

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71 NE dated 12 April 2017 at p 15.

72 NE dated 12 April 2017 at p 13.

73 NE dated 12 April 2017 at p 14.

74 NE dated 12 April 2017 at p 14.

75 NE dated 12 April 2017 at p 17.

Victim had a "surprised look", which the Accused described as a "as if got caught" look.

(3) Assessment of the Expert Evidence

50 I accepted Dr Guo's opinion that the Victim had been unconscious at the material time of the alleged offences, between 4.00am and 6.00am on 24 July 2014, to the extent that she could not have given consent to any of the events constituting the two charges which would have satisfied s 90(*b*) of the PC (see [32] above). I was also satisfied that Dr Guo's assessment of the Victim's state at the material time was performed based on a proper and justified estimation of the Victim's BAC level and clearance rate.

51 It was undisputed that, based on the Victim's toxicology report, her BAC level was 62mg% as at 12.45pm on 24 July 2014 (see [44(b)] above). The dispute was over how a retrospective estimation of the Victim's BAC level during the material period from 4.00am to 6.30am earlier that morning should have been done. Dr Guo had arrived at his estimates by applying a BAC clearance rate of 22mg%/hr (see [44(b)] above).

52 Counsel for the Defence suggested that Dr Guo's BAC assessment was inaccurate because the BAC clearance rate applied by Dr Guo was too high, and therefore the Victim's estimated BAC level at the material time was also too high. Counsel pointed to the decision of *Public Prosecutor v Pram Nair* [2016] 4 SLR 880 ("*Pram Nair (HC)*"), which also involved a serious sexual offence and the issue of whether the victim had the capacity to consent to sexual intercourse at the material time. There, expert evidence on the victim's estimated BAC at the material time was given using a BAC clearance rate of 15mg%/hr. Counsel submitted that if the same 15mg%/hr value had been used

in the present case, instead of the 22mg%/hr value in fact used by Dr Guo, the Victim's estimated BAC level at the material time would have been significantly lower.

53 I did not accept this argument. First, a BAC clearance rate accepted in relation to an individual in one case may not necessarily apply to all other individuals in other cases. As Dr Guo and Dr Tan agreed, BAC clearance rates differ from person to person.[76] In fact, it would be more accurate to calibrate the BAC clearance rate according to a particular individual's weight, gender, build, and alcohol tolerance.[77] Further, the factual and evidential matrixes of each case differ and it is a matter of judgment for the trial Court whether or not, in each particular case, an expert's use of a particular BAC clearance rate is sufficiently reliable.

54 Secondly, even though the Defence raised *Pram Nair (HC)*, the Defence's expert, Dr Tan, did not in fact present an alternative set of BAC values or estimations. According to him, there was nothing told to him by the Accused or by Handoyo Halim, both of whom were present at Zouk on the morning of 24 July 2014, to indicate how much the Victim had consumed, or the speed at which she had done so, during the outing.[78] Nor did Dr Tan manage to obtain the Victim's build, weight, and other factors relevant to his assessment of the Victim's BAC clearance rate.[79] Apparently, Dr Tan had wanted to interview the Accused's other friends who were at Zouk that morning, but the Accused said that he could not get them.[80] In any event, Dr Tan had himself

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76 See, *eg*, NE dated 31 March 2017 at p 39; NE dated 31 March 2017 at pp 25-26; NE dated 12 April 2017 at pp 5-6.

77 NE dated 31 March 2017 at p 7 and 24.

78 NE dated 12 April 2017 at p 22.

79 NE dated 12 April 2017 at p 22.

accepted in his written report that Dr Guo's estimation of the Victim's BAC level was "acceptable" (see [47(a)] above). Similarly, in Court, Dr Tan stated that although the 22mg%/hr BAC clearance rate adopted by Dr Guo was on the high side for a female, the value was nevertheless "still acceptable".[81] Indeed, Dr Tan opined that the difference in the BAC estimations between Dr Guo and the Defence's proposal was immaterial, since in his view, the Victim "can give consent although it may be… due to impaired judgment… It doesn't matter [whether the estimated BAC at the material time was] 170 or 230, that's why [Dr Tan] didn't quibble too much about the alcohol level."[82]

55 Thirdly, Dr Guo's assessment of the Victim's state was not solely based on her estimated BAC level at the material time, but rather on the entirety of the evidence available to Dr Guo, including Zouk's CCTV recordings which provided objective evidence of the Victim's psychomotor performance immediately prior to 4.00am on 24 July 2014.[83] According to Dr Guo, the Victim's clinical manifestation was the main factor that he had taken into account in assessing her condition at the material time.[84] Therefore, even if the Victim's BAC level was in fact lower than his estimation, unconsciousness during the material period would have been possible based on the Victim's clinical manifestation.[85]

56 There were two minor issues concerning Dr Guo's BAC estimations. First, Dr Guo had used 47kg as the Victim's body weight in calculating the BAC

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80 NE dated 12 April 2017 at p 31.

81 NE dated 12 April 2017 at p 5.

82 NE dated 12 April 2017 at p 26.

83 NE dated 31 March 2017 at pp 30-31 and 34.

84 NE dated 31 March 2017 at pp 30-31.

85 NE dated 31 March 2017 at p 30.

clearance rate (see [44(b)] above), when her actual body weight at the material time was 49kg. However, the parties agreed that this minor discrepancy did not affect the assessment in any material way.[86] Second, even though Dr Guo had used the word "likely" in his written report to describe his estimation of the Victim's BAC at the material time, that was because it was an estimation and not a lab test of the blood sample at the material time.[87] In Dr Guo's view, his method of calculation remained "the most… accurate estimation" of the Victim's material BAC,[88] and such a view was not contradicted by Dr Tan.

57 Based on Dr Guo's estimation, the Victim's estimated BAC level from 4.00am to 6.00am on 24 July 2014 was between 254.50mg% and 210.50mg%.[89] As mentioned above (at [44(d)]), Dr Guo's view was that the Victim was highly likely to be in a state of severe intoxication with significantly impaired consciousness, and highly unlikely to have been able to understand and follow any verbal instructions given to her, and therefore highly unlikely to have consented to the events constituting the two charges. In contrast, Dr Tan's view was that it remained possible for the Victim to give consent to sexual intercourse, even though her consent would be the result of "impaired judgment".

58 I did not accept the evidence of Dr Tan on the Victim's condition at the material time for three main reasons.

59 First, Dr Tan's opinion was not grounded on sufficient or relevant facts. I have summarised the respective resources that Dr Guo and Dr Tan had access

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86 NE dated 31 March 2017 at p 9; see also Dr Tan's report dated 11 May 2016 at para 40.

87 NE dated 31 March 2017 at p 22.

88 NE dated 31 March 2017 at p 21.

89 AB at p 28.

to in the preparation of their reports above (see [46(a)] and [49]). Four important resources were regrettably not considered by Dr Tan:

(a) One, he did not interview the Victim even though she was the subject of his psychiatric assessment. For instance, after observing that the Victim was aware of her circumstances but did not fully consider the consequences of her action (at [48(a)] above), Dr Tan responded to the Prosecution's next question "Anything else?" with a curious remark that "I haven't seen her so… I really---cannot really comment but certainly she didn't use all her… faculties".[90] This was an unexplained incongruity in Dr Tan's evidence, and it undermined the reliability of his earlier assessment that the Victim had simply not considered the consequences of her action.

(b) Two, as mentioned above, friends of the Accused who were there with the Accused and the Victim, and who could have provided an account of the Victim's state while she was at Zouk, were not available to be interviewed by Dr Tan (see [54] above). Dr Tan also did not have the benefit of the evidence of the persons at Zouk who had helped the Victim on the morning of 24 July 2014.[91]

(c) Three, until close to the end of his cross-examination, Dr Tan was not shown the CCTV recordings of what had happened at Zouk on 24 July 2014 immediately prior to the Victim and the Accused's departure, even though these CCTV records presented the most objective and observable account of the Victim's condition immediately prior to the commission of the alleged offences.

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90 NE dated 12 April 2017 at p 16.

91 NE dated 12 April 2017 at p 32.

(d) Four, Dr Tan did not see Dr Guo's second written report until one week prior to trial. When he was shown that report in Court and asked to respond orally to it, Dr Tan's assessment appeared to shift in nuance. Rather than suggesting that the Victim was conscious and responsive, he commented that the Victim "definitely could be sleeping… she would be very sleepy, yes. But she's not in a… comatose stage that she can't be woken up."[92] When pressed further, Dr Tan accepted that, at the time the Victim was in the Accused's car, she would have been sleeping if she had not been woken up.[93]

60 In the round, I was of the view that the reliability of Dr Tan's assessment suffered due to inadequacies of the resources on which his assessment was based.

61 Secondly, Dr Tan's assessment of the Victim's capacity to consent at the material time (at paragraph 46 of his written report) appeared to have been premised on an erroneous view that the Victim "may not be non-tolerant of alcohol" (at paragraph 45 of his written report). Dr Tan's sole basis for this view was that "she had drunk alcohol in the past". However, as Dr Guo explained, past consumption did not mean that one would develop tolerance; tolerance depended on the frequency and amount of alcohol used.[94] Pharmacologically, alcohol tolerance would only develop if a person consumed alcohol for five consecutive days, and even then that tolerance would diminish in one week and disappear in two weeks.[95] Therefore, in Dr Guo's assessment, even if the Victim consumed alcohol once a week, she was of "low or no [alcohol] tolerance".[96]

92 NE dated 12 April 2017 at p 16.

93 NE dated 12 April 2017 at p 19.

94 NE dated 31 March 2017 at pp 13-14.

95 NE dated 31 March 2017 at pp 14-15.

Dr Guo's evidence in this regard was subsequently unchallenged and un-contradicted. Dr Tan did not cite any other reference or provide any other reason for his assessment that the Victim could have given consent to sexual intercourse with the Accused.

62 Thirdly, close to the end of cross-examination, Dr Tan made a significant change in position. The Prosecution showed Dr Tan the CCTV recordings at Zouk[97] and gave him a summary of the evidence given by Prosecution's witnesses as to the Victim's state immediately prior to her leaving Zouk.[98] The accuracy of the summary was not challenged. At this point, Dr Tan opined that (a) as at 4.04am on 24 July 2014, the Victim was unconscious but arousable,[99] and (b) between 4.00am and 6.30am, the Victim was "[p]robably unconscious" based on what was shown on the CCTV records:[100]

> Q … between the time of 4.00 and---4.00am and 6.30am---
>
> A Yes.
>
> Q ---in your opinion, is it more likely that she was unconscious or conscious?
>
> A Probably unconscious, based on what you had shown me on the video, yes.
>
> Q Okay.

63 Dr Tan was then shown the statement of a police officer who recorded his observations of the Victim at KKH at around 11.00am on 24 July 2014.[101] When asked whether at around 5 minutes after 4.04am earlier that day the

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96 NE dated 31 March 2017 at p 12.

97 NE dated 12 April 2017 at pp 33-36.

98 NE dated 12 April 2017 at pp 36-37.

99 NE dated 12 April 2017 at p 39.

100 NE dated 12 April 2017 at p 40.

101 NE dated 12 April 2017 at pp 41-43.

Victim could have responded "go to your home" when the Accused allegedly asked the Victim what was her block and unit number, Dr Tan opined:[102]

> A More unlikely than likely, yes. He---I mean, you have to---she's so unconscious, you've got to prop her. It's still possible that she could have answered but, I mean, doing---given the probability---
>
> Q Anything is possible, right?
>
> A Yes.
>
> Q Yes.
>
> A Given the probability, it's more likely that she couldn't have answered.

64 In my view, it was significant that, having the benefit of the CCTV recordings and the evidence of the other witnesses, the Defence's own expert took the position that the Victim was "probably unconscious" at the material time.

65 In any event, Dr Tan's initial opinion that the Victim could have given consent at the material time could not be given much weight. This was because Dr Tan appeared to have had in mind a different kind of "consent" from that envisaged by s 90(*b*) of the PC. In examination-in-chief, when the Defence counsel asked Dr Tan on the Victim's condition assuming a BAC clearance rate of 15mg%/hr, Dr Tan drew a clear distinction between the Victim's ability to consent, and her ability to give "valid" consent:[103]

> Q Yes. Could you give us your opinion on whether a person with that blood alcohol concentration would be able to know and understand what is happening?
>
> A Yes, probably.
>
> Q Would that person be able to give valid consent to having sexual intercourse?

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102 NE dated 12 April 2017 at p 44.

103 NE dated 12 April 2017 at p 10.

> A Er, she would be able to give consent. I'm not sure about the validity of it but definitely she'll be able to give consent.

66 In further cross-examination, when the Prosecution asked Dr Tan if the Victim could only give simple and intuitive responses, rather than "responses which would… require thinking", Dr Tan opined that using an average BAC level between 170mg% and 230mg%, the Victim would be able to respond but it was not clear "whether it was a conceded [*sic*] response or not".[104] The transcript reference to "conceded" should have been "considered".

67 Section 90(*b*) of the PC stipulates that no valid consent can come from someone who is unable to understand the nature and consequence of that to which consent is apparently given. In my judgment, Dr Tan's evidence suggested that his assessment of the Victim's capacity to consent at the material time was not consistent with the statutory conception of consent.

68 In relation to Dr Guo's opinion, I accepted his assessment that the Victim had been unconscious from 4.00am to 6.30am on 24 July 2014 such that she could not have given consent for any of the events constituting the two charges. Dr Guo's written reports were well-reasoned, well-referenced, and based on far more complete and objective information. In particular, he had access to still images of the CCTV records at Zouk, and his evidence remained consistent even after he was shown the CCTV footage in Court. Further, Dr Guo's opinion was externally consistent with the evidence of the Victim's state prior and subsequent to the 4.00am to 6.30am period in question.[105] In particular, his view that the Victim would take around eight to ten hours to recover her psychomotor functions was consistent with the witnesses' evidence

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104 NE dated 12 April 2017 at p 52.

105 PCS at para 112.

on the Victim's impaired psychomotor functions at various times of the day on 24 July 2014.

69 Finally, I note that even if I had accepted the Defence's argument that a lower BAC clearance rate should have been applied, that would not have changed my conclusion. It was the Defence's expert's own position that:

(a) The 10mg%/hr BAC clearance rate suggested by the Defence counsel based on *Pram Nair (HC)* was "really on the low side".[106]

(b) Assuming an hourly BAC clearance rate of 15mg%/hr, the Victim's BAC level would be 178.25mg% at 5.00am, and at this level, the Victim would "still be intoxicated but less intoxicated. Her judgment is still be [*sic*] impaired".[107]

(c) It did not matter whether Dr Guo's or the Defence counsel's value of the Victim's estimated BAC level at the material time was adopted: "It doesn't matter its [*sic*] 170 or 230, that's why I didn't quibble too much about the alcohol level."[108]

Victim's state at and after 6.30am

70 The Prosecution's case was further buttressed by evidence relating to the Victim's condition at and after 6.30am when [W] found the Victim.

71 According to the Victim, her last memory at Zouk on the morning of 24 July 2014 was of her texting [W].[109] The next thing she could remember was

106 NE dated 12 April 2017 at pp 7-8.

107 NE dated 12 April 2017 at p 10.

108 NE dated 12 April 2017 at p 26.

109 NE dated 5 April 2017 at p 13.

of [W] shouting at her: "Wake up. Look at where you're at now. Look at what you are wearing now."[110] She opened her eyes and found herself in an unfamiliar room. [W] and the Accused had an exchange, but the Victim "was drifting in and out so [she] could not remember clearly about what exactly happened".[111] She could only remember [W] dragging her out of the house, and that she saw pebbles on the floor and her legs being dragged. She similarly could not recall exactly what had happened subsequently when she was in [W]'s car, at her own residence, at KKH, and at the police station, as she was drifting in and out of consciousness throughout these events.[112] After she returned home, she "just crashed throughout" because she "felt… so tired" and she "never had been so tired before".[113]

72 The Victim's account was consistent with that of [W]'s, her father's, as well as that of a police officer who had tried to interview her on the morning of 24 July 2014.

73 [W]'s account of events on the morning of 24 July 2014 was as follows. After he identified the Victim's location at around 5.50am, he drove down to the Residence. Benjamin Lim opened the front door. [W] went to the Accused's room and turned on the lights. The Accused immediately woke up and told [W] that he did not do anything. The Victim remained unconscious when [W] pulled down her blanket. [W] tried to wake the Victim up but could not. She could not even open her eyes. [W] held her upright, but the Victim was still not awake.

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110 NE dated 5 April 2017 at p 13.

111 NE dated 5 April 2017 at p 13.

112 NE dated 5 April 2017 at p 13.

113 NE dated 5 April 2017 at p 14.

74 After an exchange with the Accused during which the Victim remained motionless, [W] grabbed the Victim's shoulder and "shook her really hard".[114] The Victim could barely open her eyes. She looked at [W] and appeared "lost". She then fell back into an unconscious state. [W] raised his voice and told the Victim that they had to go. He then "really use[d] all [his] strength just to dragged her up [*sic*]".[115] He had to drag her out of the Residence, with the Victim's arm over his shoulder, and his arm holding the Victim's waist and grabbing her by her pants.[116] Only with his support did the Victim manage to get out of the Residence. At the front door, the Victim was not able to wear her own shoes, so [W] used his feet to put on slippers for her. [W] himself went barefoot. The Accused pointed to a grass patch in front of his house and told [W]: "This was the place where [the Victim] was drunk and she was lying here flat yesterday" and "She was so drunk that---that she was just sleeping here so I had to get her inside".[117] The Accused then took the Victim's handbag which was left on his car and passed it to [W]. [W] drove off with the Victim towards the Victim's own residence.

75 While in the car, [W] asked the Victim several questions. The Victim was unconscious throughout and did not respond. At one point, [W] shouted out of frustration and the Victim still remained unresponsive. The Victim probably opened her eyes once. [W] suspected that the Victim was drugged.[118]

76 [W] further testified that at the Victim's residence, the Victim appeared to be in extreme discomfort and just slept on the sofa.[119] The Victim's mother

114 NE dated 6 April 2017 at p 10.

115 NE dated 6 April 2017 at p 10.

116 NE dated 6 April 2017 at pp 10-11.

117 NE dated 6 April 2017 at pp 10-11.

118 NE dated 6 April 2017 at pp 10-11.

brought the Victim to KKH. [W] and the Victim's father and brother first visited the Residence to retrieve the Victim's mobile phone, and later went to KKH. While at KKH, [W] tried to talk to the Victim, but the Victim did not have the strength to reply, saying only that she was tired and then falling back to an unconscious state.[120] Later that day, the Victim was supported by her family and [W] to a nearby police station to make a report. There, the Victim was so tired that she had to lean on [W]'s lap to rest while waiting for her statement to be taken. For most parts of the day until the afternoon, the Victim was unconscious.[121]

77 The Victim's father testified in Court and corroborated [W]'s evidence.[122] When [W] brought the Victim back home, the father asked her "What's wrong with you", and she replied "Where am I? I'm very giddy". The Victim then went to rest on the sofa. The father suspected that the Victim might have been drugged and thus asked the Victim's mother to send her to a hospital while he, his son and [W] went to the Residence to retrieve the Victim's mobile phone and to question the Accused.[123] The Victim's phone was eventually retrieved from the backseat of the Accused's car. The Accused said that he placed the Victim in the backseat because she was drunk and he was afraid that she would puke.[124]

78 At KKH, the father observed that the Victim was not fully awake.[125] When the father left the Victim to lodge a police report on the Victim's behalf,

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119 NE dated 6 April 2017 at p 19.

120 NE dated 6 April 2017 at p 13.

121 NE dated 6 April 2017 at p 14.

122 NE dated 31 March 2017 at pp 41-75.

123 NE dated 31 March 2017 at pp 44-45.

124 NE dated 31 March 2017 at p 45.

she was lying "almost subconsciously on… the bed".[126] Later in the afternoon, the family brought the Victim home. The father testified that "I've never seen [the Victim] slept [*sic*] for hours and hours. Almost like a whole day which makes me even more convinced that something is wrong… being drugged is very highly suspected".[127]

79 I accepted the evidence of [W] concerning the state of the Victim when he had found her at about 6.30am on 24 July 2014 at the Residence. He remained unshaken in cross-examination and conceded matters he was unsure of. No reason was put forward by the Defence for him, or the Victim's father, to provide anything but the truth as they perceived it.[128] The evidence by the Victim, her father, and [W] were credible and consistent in the material respects. The common thread was that the Victim had been in a severely intoxicated state in the morning of 24 July 2014 and was largely unresponsive. The Victim was only arousable by strong physical stimuli such as [W] shaking her firmly. However, even then, the Victim was not coherent or cogent in her speech or conduct, and would inevitably fall back quickly into her drunken stupor. The Victim was in such an extreme state that both [W] and her father had taken the view that she must have been drugged.

80 The Victim, her father, and [W]'s evidence was also corroborated by the evidence of Senior Investigation Officer Chng Wee Boon ("SIO Chng"). In his conditioned statement dated 28 September 2016,[129] which was admitted without dispute, SIO Chng stated that when he reached the KKH ward at about 11.00am

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125 NE dated 31 March 2017 at p 50.

126 NE dated 31 March 2017 at p 46.

127 NE dated 31 March 2017 at p 47.

128 PCS at para 116.

129 AB at pp 61-62.

on 24 July 2014 to interview the Victim, the Victim was asleep on the bed. He tried to wake her up, but the Victim was "extremely drowsy and unable to even sit up". Despite SIO Chng's attempts to wake the Victim, she "was unable to respond… She would slip in and out of consciousness throughout the time." In total, SIO Chng spent around 10 minutes trying to engage the Victim, but the Victim remained in no state to respond.

81 In my view, SIO Chng's evidence was material. As the Prosecution noted, SIO Chng was an objective and disinterested third party who had no reason to fabricate or exaggerate his evidence.[130] Indeed, his evidence was not challenged by the Defence. His description of the Victim's condition corroborated the Victim's, her father's, and [W]'s accounts in a material respect – that the Victim was not in a responsive or fully conscious state as at 11.00am on 24 July 2014. Further, insofar as SIO Chng's evidence showed that the Victim's condition had not significantly improved even around seven hours after she had left Zouk with the Accused, his evidence was consistent with Dr Guo's opinion that, based on the BAC clearance rate of 22mg%/hr and the estimated BAC level of around 254mg% as at 4.00am, the Victim would take around eight to ten hours to recover and reset her psychomotor function (see [46(d)] above).[131]

Assessment of the Defence's evidence on capacity to consent

82 In contrast, the Defence's evidence was not sufficiently cogent or credible to challenge the strength and consistency of the Prosecution's evidence.

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130 PCS at para 111.

131 NE dated 31 March 2017 at pp 38-39.

83 The Accused's account of events, which was largely consistent between his police statement dated 31 July 2014[132] and his account of the events in Court, was that while at Zouk on the morning of 24 July 2014, the Accused and the Victim danced with each other, hugged, and kissed.[133] Later, at around 4.00am, when he discovered that the Victim was drunk, he carried the Victim over his shoulder out of the club. At that time, the Victim was "actually very hard to handle because she couldn't stand up."[134]

84 After the Accused drove off with the Victim in the back of the car, he realised within 5 minutes that he did not know the block and unit number of the Victim's residence. When he asked her about this, she responded "Go to your place".[135] The Accused did not physically shake or prod the victim; he merely asked the question and the Victim responded.[136] The Accused also did not look into her handbag to find her NRIC and address because he respected the decision of the Victim.[137]

85 When the Accused and the Victim arrived at the Residence around 35 to 45 minutes later, the Accused woke the Victim up and they walked together to the unit. The Accused held the Victim's shoulder to support her.[138] The Victim's handbag was left on the car.[139] At the front door, the Accused led the Victim to sit on a chair and helped her to take off her shoes.[140] The Accused denied that

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132 Defence Exhibit D1.

133 DCS at para 93

134 NE dated 7 April 2017 at p 52.

135 NE dated 7 April 2017 at p 53.

136 NE dated 7 April 2017 at p 53.

137 NE dated 7 April 2017 at p 53.

138 NE dated 7 April 2017 at p 54.

139 NE dated 7 April 2017 at p 54.

the Victim had ever laid down on the grass patch in the vicinity.[141] They then walked into the Accused's room together. At this point, the Victim was "a bit… unstable, but… still can walk".[142] In the Accused's bedroom, the Accused sat the Victim down, closed the door, and "[w]ent back to [the Victim] then [they] kiss[ed] and hug[ged]".[143] When the Accused unzipped the Victim's dress, she did not resist. He removed her underwear, then his own clothes, put on a condom, and had sexual intercourse with the Victim.[144] During intercourse, they kissed and hugged. The Victim called out the Accused's name and asked him to push harder.[145] Thereafter, the Accused disposed of the condom in a dustbin. He put on his clothes, and then helped the Victim to put on a boxer and a t-shirt. He asked her whether she wanted water. She declined but said that she was cold. He then covered her with a blanket and they both went to sleep.[146]

86 Later that morning, he heard someone open the door and immediately recognised that it was the Victim's boyfriend. The Accused denied having done anything because [W] looked angry and the Accused was trying to protect the Victim.[147] [W] questioned the Accused on what he had done. Then the Victim "[stood] up and then they walk[ed] out together… from my room to the [front] door" with [W]'s hand on the shoulder of the Victim.[148] At the door, because the Victim wore boots the previous night, the Accused offered his slippers to the

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140 NE dated 7 April 2017 at p 55.

141 NE dated 7 April 2017 at p 55.

142 NE dated 7 April 2017 at p 55.

143 NE dated 7 April 2017 at p 56.

144 NE dated 7 April 2017 at p 56.

145 NE dated 7 April 2017 at p 57.

146 NE dated 7 April 2017 at p 57.

147 NE dated 7 April 2017 at p 58.

148 NE dated 7 April 2017 at p 59.

Victim, but [W] rejected that, instead offering his own slippers. The Accused then lied to [W] that the Victim had lain on the front porch the previous night in order to "cover up for [the Victim]".[149] The Accused also passed the Victim's dress and belt in a plastic bag to [W] while [W] was at the front door. While the Accused and [W] were standing at the front door, the Victim walked unaided through the lawn to the gate of the Residence.[150] By that time, Benjamin Lim was in the vicinity. The Accused then walked towards [W]'s car. He retrieved the Victim's bag from the backseat of his own car and passed it to the Victim who was sitting at the passenger seat of [W]'s car. The Victim gave the Accused "the expression like sticking out her tongue". To the Accused, that meant that the Victim was thinking "Oh, shit. Get [*sic*] caught. Don't know how to explain".[151] [W] and the Victim then drove off.

87 About an hour later, the Victim's father, brother, and [W] confronted the Accused at the Residence.[152] They looked very angry and the Accused was afraid that he would be beaten. Thus, he told them that the Victim was drunk the previous night and that nothing had happened. The three of them questioned the Accused and searched his room and his mobile phone.[153] The Victim's mobile phone was retrieved from the backseat of his car.

88 At a separate meeting with the Victim's father days after the incident, the Accused told the father that the Victim had wanted to go to his place on 24 July 2014. Further, when they arrived at the Residence from Zouk, the Victim had walked into the Accused's room together with him. It was because

149 NE dated 7 April 2017 at p 59.

150 NE dated 7 April 2017 at p 60.

151 NE dated 7 April 2017 at p 60.

152 NE dated 7 April 2017 at p 61.

153 NE dated 7 April 2017 at pp 64-65.

she had walked in with him, and had kissed and hugged him, that the Accused thought that she was "okay already".[154]

89 I did not accept the evidence of the Accused. First, it ran against the mass of evidence that established the Victim's severe state of intoxication on the morning of 24 July 2014. The Victim could not have consented to the events constituting either charge. As I have explained, this was borne out not only by the observations of the witnesses, but also by experts' assessment of her mental state at the material time, including that of the Accused's own expert, and also the objective CCTV recordings.

90 Second, in my view, the Accused's evidence was internally inconsistent. At around 4.00am, the Victim had difficulty standing up (based on the Accused's account) and was entirely unconscious and unresponsive (based on the objective and undisputed CCTV recordings). She had to be lifted onto the backseat of the Accused's car, even though the front seat was empty, and then guided into a horizontal position because she could not sit upright. Yet, shortly thereafter, she apparently could cogently process the Accused's question about where she stayed, and provide a sensible response "Go to your place". In fact, around 35 to 45 minutes later, she could even walk together with the Accused from his car to the Accused's room. However, in another twist of events, the Victim then became so reliant that the Accused had to help the Victim take off her shoes, and subsequently the Victim could not even take off her own clothes or underwear whilst they were in the Accused's room.[155] One would also have thought that if the Victim had indeed been sufficiently conscious and recovered, she would not have left her handbag and her mobile phone in the Accused's car.

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154 NE dated 7 April 2017 at p 68.

155 NE dated 11 April 2017 at p 21.

Nor would the Accused have been so concerned about the Victim vomiting during the night that he had to put a towel on her pillow for that purpose.[156]

91 The Accused's account of what happened after sexual intercourse was also unbelievable. On the one hand, the Victim could not independently wear her own clothes and underwear. She also did not take any of her belongings or clothes from the Accused's place when she left the Residence.[157] Further, the Victim was apparently not in a state to wear her own boots and had to be lent slippers. On the other hand, the Victim could stick out her tongue cheekily at the Accused to signal feigned guilt at being caught red-handed. She could also walk unaided from the front door of the Residence to the gate. In my view, the Accused's account of the events on the morning of 24 July 2014 was unbelievable, and he had been less than generous with the truth.

92 I add that I did not find persuasive the Accused's explanation for his change of position between the versions that he told the Victim's father (and her brother and [W]) on 24 July 2014, and during his subsequent meeting with the father. According to the Accused, he did not tell the Victim's father the truth on 24 July 2014 because there were three men confronting him angrily and he was afraid of being beaten up. However, it appeared that several of the things he said on 24 July 2014 would more likely have raised suspicions and anger amongst the Victim's family and [W]. For instance, he initially told the Victim's father that he had to drag the Victim into the Residence, even though he subsequently claimed that the truth was that the Victim had walked in together with him. Speaking the truth earlier would have helped the Accused avoid accusations from the Victim's family, for instance, regarding why he had changed the

156 NE dated 11 April 2017 at p 29.

157 NE dated 11 April 2017 at p 40.

Victim's clothes. In my view, the Accused had hoped on 24 July 2014 to convince the Victim's family that no sexual intercourse had taken place. Being confronted a second time by the Victim's father a few days after 24 July 2014, he worried about the flimsiness of his initial account and decided to concede to having had sexual intercourse with the Victim, albeit claiming that it had been consensual.[158]

93 According to the Defence, the Accused's evidence regarding how the Victim had left the Residence on the morning of 24 July 2014 was supported by the testimony of Benjamin Lim, who was the Accused's roommate at the Residence and had known the Accused for more than ten years. Benjamin Lim's evidence in Court was that when the Accused was standing at the front door of the Residence with [W], the Victim was already outside the Residence's main gate which was some distance away.[159] The implication appeared to be that the Victim had walked unaided to the main gate.

94 I had significant doubts about the reliability of Benjamin Lim's evidence. His evidence directly contradicted the Prosecution's evidence, particularly the CCTV records. Even Dr Tan had expressed doubts about the plausibility of the Victim walking unaided out of the Residence at 6.30am on 24 July 2014:[160]

> Q You have seen this additional information about this girl. How likely is it that this girl would have just popped out of bed at about 6.30am---
>
> A Mm.
>
> Q ---when she was aroused, get up and just walked out on her own, completely unaided?

158 See NE dated 11 April 2017 at p 30.

159 NE dated 11 April 2017 at p 64.

160 NE dated 12 April 2017 at p 49.

> A "Completely unaided", possible. Erm, more likely that she need some aid, yah.

95 Furthermore, in Dr Tan's written report, there was a section titled "Interview with Mr Benjamin Lim". In that section, Dr Tan recorded that, as regards what had happened on the morning of 24 July 2017, Benjamin Lim had told him that he could not recall how the Victim walked. In Court, Dr Tan explained that Benjamin Lim "could not recall" witnessing the victim walking unaided at any point in time.[161] Under cross-examination, Benjamin Lim initially responded that he could not remember what he had told Dr Tan.[162] Subsequently, when pressed further, Benjamin Lim maintained that Dr Tan had not asked him anything about the Victim's walking out of the Residence.[163]

96 As the Prosecution noted, Benjamin Lim's evidence was simply too out of line with the objective evidence to be believed.[164] In any event, I would not have placed much reliance on his evidence given that he did not in fact see the Victim walk unaided.

97 On the whole, the evidence as to the Victim's mental and physical state immediately before, during and after the material time of the two alleged offences established that she was in no capacity to consent to sexual intercourse or to being moved by the Accused to the Residence. At the time she left Zouk around 4.00am on 24 July 2014, she was severely intoxicated and unresponsive. When she later left the Residence at around 6.30am, she was still unable even to execute basic functions such as walking or talking. In my judgment, the Victim was too intoxicated at the material time to understand the nature and

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161 NE dated 12 April 2017 at p 45.

162 NE dated 11 April 2017 at p 70.

163 NE dated 11 April 2017 at pp 71, 80.

164 PCS at para 115.

consequence of giving consent, and she could not therefore have consented to the movement by force, or to the subsequent sexual intercourse with the Accused. Valid consent under s 90(*b*) of the PC was not given in respect of either offence. Insofar as the unusually convincing standard applied, I found that the Victim's evidence was indeed unusually convincing, and was, in any event, corroborated by the evidence of Dr Guo and the Prosecution's witnesses.

Factual consent

98 Having decided that the Victim lacked the capacity to consent to the events constituting either of the charges at the material time, there was no strict need to consider the issue of whether, assuming she was not so intoxicated as to have lacked the capacity to do so, the Victim had in fact given consent. Indeed, there might be some conceptual difficulties for the trial Court to consider this issue in the alternative, since the Victim's evidence was that she could not remember anything.

99 Nevertheless, an assessment could be made of the Defence's argument that the Accused and the Victim had at the material time a secret romantic relationship and that, as an incident of the relationship, the Victim consented to sexual intercourse with the Accused.[165] The Defence relied on photographs of the Accused and the Victim extracted from the Accused's mobile phone taken prior to 24 July 2014,[166] a number of WhatsApp messages between the Accused and the Victim prior to 24 July 2014,[167] the Victim's testimony that the Accused had kissed her on the lips twice and once on her cheek on separate occasions prior to 24 July 2014,[168] and evidence that the Victim and the Accused had

165 DCS at paras 96 and 184.

166 DCS at para 95.

167 DCS at paras 97-106.

kissed on the mouth on the very morning of 24 July 2014 at Zouk just prior to the alleged offences.[169]

100 In my view, the issue of the parties' relationship was immaterial. It has no probative relationship with the Victim's capacity to give consent. Even if the issue of factual consent had arisen, and even taking the Defence's case at the highest, a romantic relationship between the Victim and the Accused did not mean that the Victim had given consent to sexual intercourse with him on this occasion.

101 In the circumstances, I was of the view that nothing said by the Accused sufficed to raise any question about the Victim's evidence that she did not in fact give consent to any of the events that had occurred on the morning of 24 July 2014. The Victim's evidence was internally and externally consistent. As mentioned, even if the Victim had been friendly with the Accused, and even if they had an amorphous and secretive romantic relationship, that did not amount to consent to the Accused moving the Victim to the Residence by force, and all the more did not amount to consent to sexual intercourse with the Accused. Further, under cross-examination, the Accused accepted that they had never engaged in sexual intercourse prior to 24 July 2014, even though there might have been "ample opportunity" to do so.[170] Contrary to the Defence's submission, I did not consider that the Victim's denial of any secret relationship with the Accused impeached her credibility, as the evidence did not bear out that she had lied or been untruthful in any material respect of her testimony. I also found the Accused's account of the events, such as the Victim telling the Accused that she wanted to go to his place despite her intoxicated state (which

168 DCS at para 62.

169 DCS at paras 177-179.

170 NE dated 11 April 2017 at pp 19-20.

even if not to the extent that negated her capacity to consent, was undeniably of a serious extent) to be unbelievable.[171]

Submissions on the abduction charge

102 I turn now to address the legal submissions made on the abduction charge.

103 At the close of the Prosecution's case, even though the Defence made no submission of no case to answer, I requested the parties to submit on whether the elements of the offence of abduction under s 362 of the PC could be made out if the alleged victim was unconscious and therefore could not and did not put up any resistance.[172] Having heard the parties' submissions, I found that there was a sufficient case for the defence to be called on the abduction charge.[173] Further submissions on the charge were made by the parties in their closing submissions.

104 The Prosecution's case was that the Accused had by force compelled the Victim to go from Zouk to the Residence on the morning of 24 July 2014. The Defence's submission was that the term "compel" indicated that the person being compelled must have been forced or constrained to do something despite resisting to do so. Thus, if the Victim was unconscious at the material time when the Accused carried her out of Zouk and drove her to the Residence, the offence of abduction would not be made out.[174]

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171 DCS at para 240.

172 NE dated 5 April 2017 at pp 104-105; NE dated 6 April 2017 at p 63; NE dated 7 April 2017 at pp 1-21.

173 NE dated 7 April 2017 at p 23.

174 DCS at paras 242-248

105 Section 362 read with s 363A of the PC provides for the offence of abduction *simpliciter* as follows:

> **Abduction**
>
> 362. Whoever by force compels, or by any deceitful means induces any person to go from any place, is said to abduct that person.
>
> **Punishment for abduction**
>
> 363A. Whoever abducts any person shall be punished with imprisonment for a term which may extend to 7 years, or with fine, or with caning, or with any combination of such punishments.

106 Notably, the offence of abduction *simpliciter* was newly created pursuant to amendments to the Penal Code in 2007. Prior to 2007, abduction was punishable only as an auxiliary act, *ie*, when it was done with the specific intentions mentioned under ss 364 to 369 of the PC, such as abduction in order to murder, to wrongfully confine, or to force into marriage. In 2007, s 363A of the PC was introduced to make abduction *simpliciter* an offence.

107 In the present case, the only issue was whether the fact that the Victim had been unconscious at the material time negated the applicability of s 362 on the basis that she could not and did not resist. Insofar as I was aware, there was nothing in the legislative or consultative materials relating to the 2007 amendments that shed light on the applicability of s 362 to an unconscious victim. Further, as of the date of my judgment, there appeared to have been no case in Singapore involving the abduction of an unconscious victim.[175]

108 Having considered the submissions, I accepted the Prosecution's argument that a charge of abduction could be made out even if the Victim was unconscious at the material time and thus could not and did not put up

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175 Prosecution's Submissions on Abduction ("PS Abduction") at para 8.

resistance. The requirement of resistance or consciousness had no basis in the statutory language of s 362 (or for the matter, s 363A). A plain and ordinary reading of the word "compel" did not exclude an unconscious victim from the scope of the provision and from being the subject of an abduction ordinarily so understood.[176] Indeed, if s 362 was limited to conscious victims, an absurd outcome might result where movements forced and compelled upon an unconscious or sleeping person would be exempted from criminal liability however egregious the offence might have been and even though the victim would have been more helpless and in need of protection. That, in my view, left precisely the most vulnerable persons outside the scope of s 362.

109 The Prosecution submitted that the prohibition of abduction under s 362 read with s 363A reflected Parliament's intention to protect personal liberty and autonomy, but it accepted that there was no direct evidence as to the legislative purpose of these provisions in the present context where an unconscious victim was concerned. In my view, while regard should be had to the purpose of a statutory enactment, such purpose must be ascertained with care. In the absence of a sufficiently clear statement of purpose in the relevant Parliamentary debate or other preparatory material, the Court should be careful not to ascribe an artificial purpose, as that may amount to judicial legislation. In the present case, I did not find that there was sufficient relevant material to indicate the purpose underlying ss 362 and 363A that would be relevant to its application on the facts. It was clear that the provisions aimed at the protection of liberty and movement and perhaps autonomy, but how these considerations were to apply in respect of an unconscious victim was not at all clear.

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176 PS Abduction at paras 42-43.

110 I appreciated that this interpretation of s 362 may create a broad scope of criminal liability, insofar as the movement of a sleeping spouse, the assisting of a person in a wheelchair, or a Good Samaritan's moving of an unconscious victim out of harm's way would *prima facie* constitute an offence. Nevertheless, there are general defences in the PC, as well as the discretion of the Public Prosecutor, that will limit any injustice that may be caused by this reading of s 362 of the PC. In addition, a different interpretation will be inconsistent with the plain and ordinary reading of the word "compel" as explained above.

111 I add that even though submissions were made on the Indian position, that did not to my mind assist. First, unlike the position recently adopted in Singapore, the Penal Code (Act No 45 of 1860) (India) ("the Indian Penal Code") did not recognise abduction *simpliciter* as an offence. Second, as the Fifth Indian Law Commission recognised, in relation to s 362 of the Indian Penal Code, it was "not clear as to whether the definition takes into its ambit the act of bodily lifting and carrying away a person when he is unconscious or asleep".[177] A subsequent proposal to clarify that s 362 did apply was apparently not adopted by inadvertent lapse of time.[178]

112 For these reasons, I did not accept the Defence's submission that the present case fell outside the scope of s 362 of the PC on the basis that the Victim was unconscious and therefore could not and did not resist the Accused's moving her by force from Zouk to the Residence. In my view, the Victim had in fact been compelled by the use of force to go from Zouk to the Residence through her being transported there by the Accused in his car.

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177 PS Abduction at para 35.

178 PS Abduction at para 35.

The defence of mistake of fact

113 The defence of mistake of fact is provided for under s 79 of the PC:

> **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.

114 To establish the defence, the accused bears the burden to show, on a balance of probabilities, that "by reason of a mistake of fact" he "in good faith" believed himself to be justified by law in doing what he did which constituted the offence (*Public Prosecutor v Teo Eng Chan and others* [1987] SLR(R) 567 at [26]; affirmed in *Pram Nair v Public Prosecutor* [2017] 2 SLR 1015 ("*Pram Nair*") at [110]). Under s 52 of the PC, no fact is believed "in good faith" if it is so believed "without due care and attention".

115 At the outset, I should note that the defence was not in fact raised by the Defence in its submissions. Nevertheless, the Prosecution addressed the defence out of an abundance of caution. The Prosecution submitted that (a) the factual basis for such a mistaken belief, namely, the purported secret relationship between the Victim and the Accused had not been proved on the evidence, (b) there was no evidence that the Victim had, in the morning of 24 July 2014, conducted herself in any manner that could have misled the Accused, and in any case, such conduct did not induce the Accused to believe that the Victim had wanted to go to the Residence and have sexual intercourse, and (c) there was a lack of good faith on the part of the Accused.

116 I agreed with the Prosecution that the defence was not made out on the facts of the case in relation to either of the offences.

117 For the rape charge, the Accused could not in good faith have believed that the Victim had consented to sexual intercourse with him. First, he was aware of the Victim's severe state of intoxication at the material time. As mentioned, the CCTV recordings showed that the Victim had completely passed out at around 4.00am on the morning of 24 July 2014. She could not even exit the premises of Zouk on her own with assistance, and the Accused had to carry her out over his shoulder by way of a fireman's lift. Even by the Accused's own evidence, the Victim was unstable on her feet and apparently could not remove her own dress or underwear immediately prior to the sexual intercourse.[179] Second, insofar as the purported secret relationship and the allegation that the Victim and the Accused had kissed at Zouk in the early morning of 24 July 2014 were concerned, I did not consider that such relationship and conduct could give rise to a mistaken belief in good faith that the Victim had consented to sexual intercourse. Notably, as the Prosecution suggested, even taking the Accused's case at its highest, there appeared to have been a far gap between the purported state of their relationship on 24 July 2014 and consensual sexual intercourse.[180] As mentioned, under cross-examination, the Accused accepted that they had never engaged in sexual intercourse or physical intimacy of such kind and degree even though there had been "ample opportunity" to do so prior to 24 July 2014.[181] Thirdly, I note that Dr Tan, who was the Defence's expert, testified that the Accused had said that he "did not know whether she could or could not give consent".[182] Subsequently, Dr Tan again repeated the point that the Accused did not know whether or not the Victim could or could not have given consent:[183]

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179 NE dated 11 April 2017 at p 21.

180 PCS at para 165.

181 NE dated 11 April 2017 at pp 19-20.

182 NE dated 12 April 2017 at p 28.

183 NE dated 12 April 2017 at p 29.

> A […] I'm asked by counsel to see Mr Ong.
>
> Q Yes.
>
> A All right, he---basically he asked me, whether there's any alternative reason, so Mr Ong is my subject so to speak, okay, on---he's not my patient because I never treated him.
>
> Q Yes.
>
> A So he's my subject. So I am actually saying, so why is Mr Ong making that kind of mistake. Why---sorry, not a mistake, *why couldn't---he couldn't understand whether, you know, the consent---whether the---the woman has given consent or not.* That was the reason, that's the alternative I said.
>
> Q But your inquiry is not so much into what Mr Ong understood or how he reacted in the situation. Your inquiry really is to understand why she consent or did not consent as in was she able to consent. That is the inquiry, isn't it?
>
> A No. No. My inquiry---my inquiry could also encompass why the, er---the defendant couldn't understand what's happening. *Why couldn't he understand that he---whether she or---she or---she could or could not give consent.*
>
> [emphasis added]

118 In my judgment, it was not plausible that the Accused had believed in good faith that the Victim had consented to sexual intercourse or to going to his place in her utterly inebriated state on 24 July 2014. Rather, the irresistible inference was that the Accused had decided to take advantage of the Victim's intoxication even though he knew that she was not in any state to give consent.

The appropriate sentence

The rape charge

Sentencing principles applicable to rape cases

119 Rape is a grave offence. It severely violates the dignity and bodily integrity of the victim, often causing deep-seated trauma. In this light, I was of

the view that the primary sentencing considerations were, as with other serious sexual offences, retribution and the need for deterrence of similar heinous acts.

120 At the same time, I was mindful of the need for consistency, certainty and proportionality in the meting out of the sentence. The Court of Appeal in *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 ("*Ng Kean Meng Terence*") set out a revised framework for the sentencing of rape offenders, which involves a two-step approach as follows (at [39]):

> (a) First, the court should identify under which band the offence in question falls within, having regard to the factors which relate to the manner and mode by which the *offence* was committed as well as the harm caused to the victim (we shall refer to these as "offence-specific" factors). Once the sentencing band, which defines the range of sentences which may *usually* be imposed for a case with those offence-specific features, has been identified the court should then determine precisely where within that range the present offence falls in order to derive an "indicative starting point", which reflects the intrinsic seriousness of the *offending act*.
>
> (b) Secondly, the court should have regard to the aggravating and mitigating factors which are *personal to the offender* to calibrate the appropriate sentence for that offender. These "offender-specific" factors relate to the offender's particular personal circumstances and, by definition, *cannot* be the factors which have already been taken into account in the categorisation of the offence. In exceptional circumstances, the court is entitled to move outside of the prescribed range for that band if, in its view, the case warrants such a departure.
>
> [emphasis original]

121 In relation to the first step of the sentencing framework, the offence-specific factors relevant to the case should be identified. The Court of Appeal in *Ng Kean Meng Terence* provided a non-exhaustive list of offence-specific factors including group rape, abuse of position and breach of trust, premeditation, violence, rape of a vulnerable victim, forcible rape of a victim below the age of 14, hate crime, severe harm to victim, and deliberate infliction of special trauma (at [44]).

122 Once the offence-specific factors are identified, the case can be classified into one of three sentencing bands set out by the Court of Appeal in *Ng Kean Meng Terence* (at [47]). Band 1 is applicable to cases at the lower end of the spectrum of seriousness where there are no offence-specific aggravating factors or where these factor(s) are present to a very limited extent. Band 2 comprises cases involving a higher level of seriousness where there are usually two or more offence-specific aggravating factors. Band 3 is applicable to extremely serious cases of rape by reason of the number and intensity of the aggravating factors. The sentencing range for each band were prescribed as follows (*Ng Kean Meng Terence* at [47]):

(a) Band 1: 10 – 13 years' imprisonment, 6 strokes of the cane.

(b) Band 2: 13 – 17 years' imprisonment, 12 strokes of the cane.

(c) Band 3: 17 – 20 years' imprisonment, 18 strokes of the cane.

123 In relation to the second step of the sentencing framework, the Court should have regard to the aggravating and mitigating factors which are personal to the offender. In other words, the offender-specific factors which relate to the offender's personal circumstances are to be considered (*Ng Kean Meng Terence* at [39(b)]). The Court should then determine the weight that should be placed on these factors and the effect of these factors on the sentence to be imposed. An adjustment beyond the sentencing range prescribed for the band identified in the first step is permissible, but clear and coherent reasons should be provided if this is done (*Ng Kean Meng Terence* at [62]). Examples of offender-specific factors include: offences taken into consideration for the purposes of sentencing, the presence of relevant antecedents, display of evident remorse, youth, advanced age, and pleas of guilt (*Ng Kean Meng Terence* at [64]–[71]).

124 Subsequent to this two-step approach, in cases where an offender has been convicted of multiple charges, the Court may, if it thinks necessary, make further adjustments to the sentence to take into account the totality principle and to ensure that the global sentence is appropriate and not excessive (*Ng Kean Meng Terence* at [72]–[73]).

The parties' positions

125 The Prosecution submitted that the applicable sentencing band for the present case was Band 2 based on the presence of four offence-specific aggravating factors:

(a) rape of a vulnerable victim;

(b) abuse of position and breach of trust;

(c) premeditation; and

(d) severe harm to the victim.

126 In the circumstances, the Prosecution submitted that a sentence of 14 years' imprisonment and 12 strokes of the cane was appropriate in respect of the rape charge.[184]

127 The Defence argued that there was only one offence-specific aggravating factor, *ie*, the exploitation of the Victim's vulnerability, and therefore that the appropriate sentencing band was Band 1.[185] On the facts, a

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184 Prosecutions submissions on sentence dated 21 August 2017 ("PS Sentence") at para 27.

185 Defence's further submissions on sentence dated 31 October 2017 ("DFS Sentence") at paras 5-7.

sentence of 10 years' imprisonment and 6 strokes of the cane was appropriate in respect of the rape charge.[186]

The decision

128 In my view, the case fell within Band 2 of the sentencing framework and I accordingly sentenced the Accused to 13 years and 6 months' imprisonment and 12 strokes of the cane in respect of the rape charge.

(1) Vulnerability of the Victim

129 The prosecution submitted that the present case involved the rape of a vulnerable victim as the Accused had exploited the Victim's severely intoxicated state when he raped her. The Prosecution cited the case of *Pram Nair* in support of its position that there is no basis to distinguish between a victim who is vulnerable because of a permanent characteristic and one who is vulnerable because of a temporary condition for the purposes of sentencing. The Victim in the present case was highly vulnerable because of her unconsciousness and unresponsiveness at the material time.[187]

130 The Defence accepted that following the decision in *Pram Nair*, the Victim was to be considered a vulnerable victim due to her intoxication at the material time.[188] However, the Defence argued that the Accused was less culpable than the accused in *Pram Nair* because latter did not use a condom, was convicted of digitally penetrating the victim in addition to rape, and was in a position of trust or responsibility *vis-à-vis* the victim. In addition, the victim

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186 DFS Sentence at para 15.

187 Prosecution's further submissions on sentence dated 30 October 2017 ("PFS Sentence") at paras 1-8.

188 DFS Sentence at paras 5-7.

in *Pram Nair* was severely intoxicated at the material time and when found, was unresponsive until she started foaming at the mouth.[189]

131 The Court of Appeal's decision in *Pram Nair* made it clear that an intoxicated victim can be considered vulnerable, if such intoxication resulted in the victim losing control over his or her ability to respond to sexual advances. The Court of Appeal explained in *Pram Nair* (at [126]):

> [W]e see no basis for distinguishing between a victim who is vulnerable because of permanent characteristic and one who is vulnerable because of a temporary condition – for example, one who is physically frail because of a sprained ankle or mentally impaired because of heavy intoxication. The latter might also become targets because they are less able to fend off the offender's sexual advances in the moment of the offence. … A victim with only a temporary disability or impairment may be less likely to be subjected to such a course of sexual assault, but it does not mean she is not vulnerable on the single occasion on which she is assaulted. The essential feature of this aggravating factor is that its existence makes it easier for the offender to commit the rape of the victim. The offender who targets an intoxicated victim exploits the same advantage.

132 In the present case, I found that the Victim was severely intoxicated at the material time of the rape offence to the extent that she lacked the capacity to respond to or to resist the sexual advances of the Accused. In my view, the vulnerability of the Victim, which the Accused knew of and exploited, was an operative offence-specific aggravating factor.

(2) Abuse of position

133 The Prosecution submitted that the Accused had been in a position of trust and responsibility *vis-à-vis* the Victim and that his abuse of such position constituted an offence-specific aggravating factor. Although the Accused and the Victim were never in a romantic relationship with each other, the Accused

189 DFS Sentence at paras 8-13.

was nevertheless a friend and mentor of the Victim. In particular, the Victim confided in the Accused and treated him as a confidante who would mediate between her and her bosses. The Accused was thus someone whom the Victim came to rely on and trust during her internship at Kombi Rocks.[190] While acknowledging that the present case was not a "classic abuse of trust scenario (such as between employer and employee, or parent and child)", the Prosecution urged the Court to find that the Accused's breach of the Victim's trust from being a close friend of the Victim was an offence-specific aggravating factor.[191]

134 On the other hand, the Defence submitted that there could be no abuse of position where the perpetrator and the victim were merely friends as that would result in too broad a scope for the aggravating factor of abuse of position.[192]

135 I was unable to accept the Prosecution's argument on abuse of position in the manner that it was framed. In *Ng Kean Meng Terence,* abuse of position as an offence-aggravating factor was explained as follows (at [44(b)]):

> *Abuse of position and breach of trust*: This concerns cases where the offender is in a position of responsibility towards the victim (*eg*, parents and their children, medical practitioners and patients, teachers and their pupils), or where the offender is a person in whom the victim has placed her trust by virtue of his office of employment (*eg*, a policeman or social worker).

136 Further, in *Public Prosecutor v NF* [2006] 4 SLR(R) 849 ("*NF*"), abuse of position was described as requiring the accused to be "related to the victim in a way that allows him to abuse his position of trust or authority" (at [25]).

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190 PFS Sentence at para 14. NE dated 13 September 2017 at p 7.

191 PS Sentence at para 17.

192 NE dated 13 September 2017 at p 11.

137 The cases made clear that it was only where the offender exploited his or her position of trust or responsibility that this offence-specific aggravating factor would be found to be present. Where the offender was in a position of responsibility towards the victim (*eg*, parents and their children, medical practitioners and patients, teachers and their pupils) or where the offender was a person in whom the victim had placed trust by virtue of the offender's office of employment (*eg*, a policeman or social worker), such exploitation was evident by virtue of the very nature of the relationship between the offender and the victim. On the other hand, the exploitation or abuse of position would not be evident where there was merely a friendship or a collegial relationship between the offender and the victim. In such circumstances, I was of the view that an abuse of position could only be relied on as an aggravating factor in exceptional circumstances, such as where there was evidence that there had been a deliberate exploitation of the friendship or collegial relationship in the commission of the offence. Save in such exceptional circumstances, the requisite nexus between the relationship and the offence would not usually be satisfied.

138 On the facts, in relation to the nature of the relationship between the Accused and the Victim, I found that they were merely close friends or colleagues. While the Accused may have dispensed informal advice to the Victim from time to time, that did not amount to the assumption of a position of responsibility equivalent to that between, for instance, parents and their children, medical practitioners and patients, and teachers and their pupils. Nor, in my view, did the Victim repose such trust in the Accused by virtue of the latter's office of employment. On these premises, abuse of position could not be established on the basis of the parties' relationship alone. It might have been material, for instance, if the Accused had exploited his position as a friend or

colleague to induce the Victim to accompany him to Zouk and plied her with alcoholic drinks with an eye to exploiting her vulnerability thereafter. However, there was no evidence of any such attempt. The Victim had willingly gone to Zouk to celebrate Maria's departure and there was no evidence that the Accused had plied her with alcoholic drinks in order to get her into a vulnerable state.

(3) Exploitation of entrustment

139 I turn now to a distinct but related offence-specific aggravating factor: the exploitation of entrustment by third parties.

140 Abuse of position is an offence-specific aggravating factor for the following reason as explained in *Ng Kean Meng Terence* (at [44(b)]):

> When [an offender who is in a position of responsibility or position of trust] commits rape, there is a dual wrong: not only has he committed a serious crime, he has also violated the trust placed in him by society and by the victim.

141 Although there was no abuse of position in the present case, I found that the Accused had exploited the entrustment to the Accused of the Victim's safety by the other individuals at Zouk on the morning of 24 July 2014, including the friends and colleagues of the Victim, as well as the staff members of the club.

142 While exploitation of entrustment by third parties was not expressly recognised by the Court of Appeal in *Ng Kean Meng Terence* as an example of an offence-specific aggravating factor, I was of the view that it would be appropriate to treat this factor as such. Where the safety or wellbeing of the victim is entrusted to an offender by third parties, the offender, although not in a position of trust or responsibility in the sense outlined in the previous section, nevertheless commits an analogous "dual wrong": not only has he committed a serious crime, he has violated the trust placed in him by others to protect or at

least refrain from causing harm to the victim. That would, to my mind, be sufficient to amount to an offence-specific aggravating factor.

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

(4) Premeditation

144 The Prosecution submitted that the rape offence had been premediated because there was a significant period that transpired between the time that the Accused and the Victim left Zouk and the time that they arrived at the Residence.[193] In addition, the Accused had brought the Victim to the Residence even though he had another place of residence that was closer to her residence purportedly because he had wanted to avoid being noticed by the public. The Residence, being a private property, was more secluded than his other place of residence which was in a public housing district.[194]

145 The Defence disagreed that there had been premeditation as there was no evidence that the Accused had deliberately plied the Victim with alcoholic drinks at Zouk. The intention to commit the offences was formed only at some

193 PS Sentence at para 19; NE dated 13 September 2017 at pp 8-9.

194 PS Sentence at para 19; NE dated 11 April 2017 at p 51; NE dated 13 September 2017 at p 9.

point after the Accused and the Victim left Zouk. The Defence referred to *Pram Nair*, in which the Court of Appeal indicated that premeditation requires a significant degree of planning and orchestration, and argued that this was absent in the present case. [195]

146 I did not accept the Prosecution's submission that the rape offence in the present case had been premeditated. In *Ng Kean Meng Terence,* the Court of Appeal explained that premeditation is an offence-specific aggravating factor because it reflects a "considered commitment towards law-breaking" and thus reflects greater criminality (at [44(c)]). Examples of premeditation include the use of drugs or soporifics to reduce the victim's resistance, predatory behaviour, or the taking of deliberate steps towards the isolation of the victim (at [44(c)]).

147 The requirements for finding premeditation as an offence-aggravating factor for serious sexual offences were further clarified in *Pram Nair*, where the Court of Appeal found that there had been no premeditation and explained as follows (at [136]–[138]):

> 136 … [I]n the circumstances of the present case, as we have mentioned, what happened appears to us to be a case of an offender seizing an opportunity rather than having acted in a calculated manner.
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> 137 This is all the more so when we compare the appellant's behaviour with the kind of sexual offences that our courts have characterised as being premeditated. To take but a few recent examples:
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> (a) In *Ng Jun Xian v PP* [2017] 3 SLR 933 ("*Ng Jun Xian*"), the victim wanted to return to the hostel she was staying at. The offender persuaded her to rest at a hotel and he reassured her that she would be left alone and allowed to sleep. After bringing the victim to the hotel room, he took the opportunity to sexually assault her. See Kee Oon JC observed that there was premeditation because

195 DFS Sentence at paras 3-4.

> the offender had 'sought to set the stage by sending the victim to the hotel despite her initial reluctance and he took the opportunity when it presented itself to commit the sexual assault' (at [42]).
>
> (b) In *PP v Lee Ah Choy* [2016] 4 SLR 1300, the offender observed the victim for a period of time and came to understand her morning routine. He took the victim to a HDB block and even brought along a paper-cutter which he used to threaten her. Hoo Sheau Peng JC observed that this 'demonstrated his resolve to see his plan through to completion' and that he did not commit the offence on the spur of the moment (at [51]).
>
> (c) In *PP v Sim Wei Liang Benjamin* [2015] SGHC 240, the accused had used the internet with the clear intention of ensnaring his victims and luring them to engage in sexual activities with him (at [30]). This court noted in *Terence Ng* ([117] supra) that the offender had acted in a 'predatory manner' (at [55]).
>
> 138 These examples show that the kind of premeditation which the law regards as aggravating an offence involves a significant degree of planning and orchestration. The appellant's acts did not really involve any pre-planning. Before their meeting on that fateful day, they were strangers to each other. It appears to us that the appellant's moves that night were hatched on the spur of the moment.

148 In *Pram Nair*, the offender had raped and sexually assaulted a heavily intoxicated victim. They had met at a party several hours prior to the offence. The Court of Appeal found that the offender had not deliberately offered drugs or soporifics to the victim and that his acts did not involve any pre-planning. It was a case of the offender seizing an opportunity rather than him having acted in a calculated manner (at [135]–[136]).

149 As was the case in *Pram Nair*, there was no evidence that the rape offence in the present case was premediated by the Accused. It was not proven that the Accused had deliberately chosen to bring the Victim to the Residence as opposed to his public housing residence for the reason that the former was more secluded and there would be fewer witnesses. Since the offence was

carried out within the four walls of a bedroom rather than at a public location, it was not of material significance whether it took place in a bedroom in the Residence or a public housing residence. I also found that the Accused's explanations for having driven the Victim to the Residence instead of his public housing residence, *ie*, that he had himself been staying at the Residence, that it was nearer to his workplace, and that he desired to avoid road blocks en route to his public housing residence,[196] were not unbelievable. In addition, there was no evidence that the Accused had deliberately plied the Victim with drinks or had drugged her so that he could take advantage of her vulnerable state.

150 In the circumstances, there was no premeditation by the Accused in relation to the rape offence. Instead, it appeared a fairer characterisation that the Accused had been opportunistic in the moment in taking advantage of the Victim's vulnerability.

(5) Harm to victim

151 The Prosecution submitted that the psychological trauma suffered by the Victim was a further offence-specific aggravating factor. This was evident from the Victim's Impact Statement, in which the Victim stated that she was plagued by suicidal thoughts after the incident and suffered insomnia, anxiety and depression.[197] The Defence did not make submissions in relation to the harm to the Victim.

152 I accepted that instances of rape, by their inherently violent and intrusive nature, often cause the victim to suffer significant psychological and physical harm. The suffering of victims usually justifies the sentencing consideration of

196 NE dated 11 April 2017 at p 50.

197 PS Sentence at para 21.

retribution which in turn translates into heavy sentences passed down, being measured in years rather than months. Indeed, following the revised sentencing framework set out in *Ng Kean Meng Terence*, sentences of less than a decade will be relatively rare for offenders convicted of rape.

153 In the present case, it was clear from the Victim Impact Statement that the Victim was significantly and adversely affected by the criminal conduct of the Accused. On her unchallenged account, she had suffered insomnia, mood swings, suicidal thoughts, loneliness, loss of trust, and reduced productivity after the incident.

154 However, invidious though the process of comparison of trauma may be, and without discounting in any way what the Victim had undeniably suffered, there needs to be a relatively severe state of psychological or physical harm shown in order for the Court to find that there is an additional offence-specific aggravating factor bringing the case to a higher sentencing band.

155 In *Ng Kean Meng Terence,* the Court of Appeal provided three examples of the serious physical or psychological effects on the victim which would aggravate the offence. These were pregnancy, the transmission of a serious disease, or a psychiatric illness. Further, in *NF*, the Court stated (at [53]):

> [B]efore a court considers the impact of a crime on a victim, it is necessary and crucial that there be a firm evidential basis for the determination of the extent of the damage that the crime has had on the victim. When such evidence is available the court should carefully assess the harm that has befallen the victim in arriving at a sentence that fairly and accurately represents the gravity of the offence …

156 In the present case, there was no evidence adduced to establish any of the situations identified in *Ng Kean Meng Terence*, or that the Victim had

suffered any other condition of equivalent or greater severity. I recognised that the psychological impact of the incident on the Victim was substantial, but it was not to the extent that would bring the case within Band 3 of the sentencing framework.

(6) The appropriate sentence

157 The Prosecution submitted that there were four offence-specific aggravating factors, bringing the case within Band 2 of the sentencing framework established in *Ng Kean Meng Terence*.

158 The Defence submitted that there was only one offence-specific aggravating factor, *ie*, the vulnerability of the Victim. Accordingly, this case fell within Band 1 of the sentencing framework as Band 2 cases involved offence-specific factors which were far more aggravating. In this respect, the Defence sought to distinguish the present case from cases cited in *Ng Kean Meng Terence* as examples that would fall within Band 2.[198] Further, according to the Defence, the Accused was less culpable than the offender in *Haliffie bin Mamat*, a case cited by the Court of Appeal in *Ng Kean Meng Terence* as falling within Band 1. This was because *Haliffie bin Mamat* involved deception, ejaculation into the victim, physical violence, humiliation of the victim, physical injury, and the victim there had suffered post-traumatic stress disorder.[199]

159 For the reasons stated above, in my view, there were two offence-specific aggravating factors in the present case: (a) the fact that the Victim was vulnerable as a result of her severe intoxication, and (b) the fact that the Accused had exploited the entrustment to him of the Victim by third parties

198 Plea-in-mitigation dated 21 August 2017 at paras 11-12.

199 Plea-in-mitigation dated 21 August 2017 at paras 16-18.

at Zouk. Following the sentencing framework set out in *Ng Kean Meng Terence*, the present case fell within Band 2. Cases with only one offence-specific aggravating factor, such as *Haliffie bin Mamat* and *Pram Nair*, both of which fell within Band 1 of the sentencing framework, were distinguishable. Within Band 2, I found that the present case was at the lower end of the spectrum given the number and intensity of the offence-specific aggravating factors.

160 With regard to the second step of the two-step approach articulated in *Ng Kean Meng Terence,* no offender-specific aggravating or mitigating factors were raised by the Prosecution or the Defence. The Prosecution submitted that there were no offender-specific mitigating factors.[200] No submissions were made by the Defence on offender-specific factors. Accordingly, no adjustment was made to the sentence to take into account any offender-specific factors.

161 For the foregoing reasons, I was of the view that a sentence of 13 years and 6 months' imprisonment and 12 strokes of the cane was appropriate in respect of the rape charge.

The abduction charge

162 Section 363A of the PC provides that the sentencing rage for abduction *simpliciter* is imprisonment up to seven years, and/or fine, and/or caning. The Prosecution submitted that the appropriate sentence for the abduction charge was eight months' imprisonment,[201] while the Defence argued in favour of an imprisonment term of less than eight months.[202]

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200 PS Sentence at paras 23-26.

201 PS Sentence at para 29.

202 Plea-in-mitigation dated 21 August 2017 at paras 19-20.

163 As at the time of my decision, there was no relevant High Court or Court of Appeal sentencing precedent for abduction *simpliciter* under s 362 of the PC of a similar nature to the present case, *ie*, of an unconscious victim. The closest precedent was the unreported District Court judgment in *Public Prosecutor v Ng Siang Hai* DAC 942299/2016 (17 July 2017) ("*Ng Siang Hai*"), in which eight months' imprisonment was imposed for the abduction of an unconscious and intoxicated person. In that case, the victim had gone drinking with a friend and that same friend had sent the victim home to her apartment block. Seeing that the victim was lying unconscious and intoxicated on the ground of the lift lobby, the accused, who was a neighbour of the victim, abducted the victim from the lift lobby to his flat by carrying her into his flat. There was no issued grounds of decision for that case.

164 The other cases under s 362 of the PC highlighted by the Prosecution and the Defence differed significantly on the present facts, and were thus of little relevance. This included *Public Prosecutor v Chong Voon Keong Jeffrey and another* [2011] SGDC 210 ("*Jeffrey Chong*"), in which the two accused persons abducted the victim by compelling him into a motorcar and driving him to a cemetery where he was beaten up by a group of persons. The accused persons were each sentenced to eight months' imprisonment for the abduction charge.

165 There were sentencing precedents in relation to other abduction and kidnapping offences under the PC. In *Public Prosecutor v Chee Cheong Hin Constance* [2006] 2 SLR(R) 707, the accused was charged under s 361 of the PC for kidnapping from lawful guardianship, punishable under s 363 of the PC. The High Court stated the following in relation to the relevant sentencing considerations for an offence under s 363 of the PC (at [24]):

> 26 … The duration of the act, the motive for the abduction and any harm caused to the victim are all relevant considerations.
>
> 25 In determining the appropriate sentence in this case, I am mindful that the *single transaction* and *totality* principles must not be overlooked … To that extent, I am conscious of that the accused's subsequent act in causing [the victim] to fall from the Block should not figure as a sentencing consideration in this offence, as it has already been dealt with in the sentence for the culpable homicide offence.
>
> [emphasis original]

166 I was of the view that in determining the appropriate sentence in relation to an abduction charge under s 362 and punishable under s 363A, the duration of the abduction, the motive for the abduction, and any harm caused to the victim in the abduction are likewise relevant considerations. The vulnerability of the victim is also a relevant sentencing factor.

167 In the present instance, the abduction charge was framed in relation to the compelled movement of the Victim from Zouk to the Residence. In this context, during the period of travel, there was no harm or injury inflicted on the Victim by the Accused. The Accused did not use violence to compel her to move. Nor did he assault the Victim at any time during the car ride. On this basis, the Defence submitted that the Accused should receive a sentence of less than eight months' imprisonment because he was less culpable than the accused persons in *Jeffrey Chong* who had assaulted the victim during the abduction.[203]

168 Although the absence of injury to the Victim was relevant, I did not consider that this automatically merited a lower sentence than that imposed in *Jeffrey Chong*. Other sentencing factors must be taken into account. In the present case, the Accused had abducted the Victim while she was in an exceptionally vulnerable state of unconsciousness and unresponsiveness,

[203] Plea-in-mitigation dated 21 August 2017 at paras 19-20.

similar to what the accused had done in *Ng Siang Hai*. He had taken advantage of the Victim's severe intoxication and the entrustment to him of the Victim by the Victim's friends and the staff of Zouk. More importantly, the abduction had placed the Victim in a position of isolation and greater vulnerability, creating the opportunity for the separate offence of rape to be committed. Weighing the relatively short duration of the abduction and the lack of violence inflicted against the aggravating factors present, I was of the view that a sentence of eight months' imprisonment was appropriate for the abduction charge.

Running of sentences

169 The Defence asked for the sentences to be run concurrently.[204] The Prosecution did not argue against this.[205] Given that the offences of abduction and rape in the present case were committed as part of the same criminal transaction, and in the light of the overall culpability of the Accused, it was appropriate in my judgment for the sentences for the rape charge and the abduction charge to be run concurrently.

170 In the circumstances, I sentenced the Accused to a global sentence of 13 years and 6 months' imprisonment and 12 strokes of the cane.

Compensation order

171 The Prosecution sought compensation from the Accused for the out-of-pocket medical expenses incurred by the Victim as a result of the Accused's offences. This amounted to $76. The Defence did not object.[206]

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204 Plea-in-mitigation dated 21 August 2017 at para 21.

205 PS Sentence at paras 27, 29 and 30.

206 NE dated 13 September 2017 at pp 19-21; NE dated 13 Nov 2017 pp 18-19.

172 Under s 359(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC"), the Court is required to consider whether or not to make a compensation order against an accused in favour of a victim who was injured in respect of his person, character or property. Section 359(1) of the CPC reads:

> **Order for payment of compensation**
>
> 359.—(1) The court before which a person is convicted of any offence shall, after the conviction, consider whether or not to make an order for the payment by that person of a sum to be fixed by the court by way of compensation to the person injured, or his representative, in respect of his person, character or property by —
>
> (a) the offence or offences for which the sentence is passed; and
>
> (b) any offence that has been taken into consideration for the purposes of sentencing only.

173 In addition, under s 359(2) of the CPC, the Court must make a compensation order if it is of the view that it is appropriate to do so:

> (2) If the court is of the view that it is appropriate to make such an order referred to in subsection (1), it must do so.

174 The purpose of a compensation order has been well considered and articulated. In *Soh Meiyun v Public Prosecutor* [2014] 3 SLR 299 ("*Soh Meiyun*"), the Court reiterated that "compensation orders are meant solely to provide redress to the victim and are not intended to punish the offender" (at [56]). Further, in *Public Prosecutor v Donohue Enilia* [2005] 1 SLR(R) 220 ("*Donohue Enilia*"), the Court established that there must be a causal connection between the offence committed by the accused and the injury, loss, or damage suffered by the victim before a compensation order can be made (at [22]). Such injury, loss, or damage should also be readily ascertainable and not subject to significant dispute (*Donohue Enilia* at [24]).

175 In assessing whether the compensation order sought by the Prosecution was appropriate in the present case, I was aware that compensation orders are most suitable and are usually ordered where the victim has grounds to commence a civil suit against the offender but faces practical difficulties such as the lack of expenses to do so (see *Soh Meiyun* at [56], *Public Prosecutor v AOB* [2011] 2 SLR 793 at [23]–[24]; *Donohue Enilia* at [19]). There was no suggestion that the Victim in the present case was unable to commence a civil suit due to impecuniosity. In addition, no precedents in which a compensation order was made in relation to a sexual offence were brought to my attention.

176 Nevertheless, on the facts of the present case, I was satisfied that the making of a compensation order was appropriate. First, the sum involved was such that it would not have been practicable for the Victim to seek civil redress from the Accused. Second, there was a clear direct link between the medical expenses for which compensation was sought, and the offences committed by the Accused. Third, the Accused did not dispute the monetary sum or the making of a compensation order.

177 In the circumstances, I was of the view that a compensation order of $76 would be appropriate and would be consistent with the fundamental purpose of such orders to provide redress to the victim rather than to punish the accused.

178 Under s 360(1)(*d*) of the CPC, the Court may direct that a person suffer imprisonment for a certain term in default of payment of the compensation sum. Section 360(1)(*d*) reads:

> **Provisions as to money payable as compensation**
>
> 360.—(1) Subject to the provisions of this Code, where any person is, under this Code, for any reason whatsoever, ordered to pay any sum of money by way of compensation, the court making the order may at any time before that sum has been

> paid in full, in its discretion, do all or any of the following things:
>
> …
>
> > (*d*) direct that in default of payment of the compensation sum, that person must suffer imprisonment for a certain term, which imprisonment must be consecutive with any other imprisonment to which he may be sentenced or to which he may be liable under a commutation of sentence; …

179 Accordingly, I ordered that one day's imprisonment be imposed in default of payment of the compensation sum of $76.

Miscellaneous matters

180 At the end of his testimony in Court, the Victim's father made certain remarks about the impact that the Accused's conduct had caused to his daughter, [W], and the family.[207] As I indicated to him and to the parties, while I appreciated the emotions that ran high in the present case, it was not appropriate to hear his account in this regard prior to the determination of the Accused's guilt. If the case proceeded to the sentencing stage, evidence on the emotional impact of the Accused's conduct could be adduced then. For the avoidance of doubt, I placed no weight on the Victim's father's evidence in this regard, insofar as the issue of conviction was concerned.

Conclusion

181 In conclusion, I convicted the Accused of rape under s 375(1)(*a*) read with s 375(2) of the PC and abduction *simpliciter* under s 362 read with s 363A of the same Act as I was satisfied that both offences had been proven beyond a reasonable doubt.

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[207] NE dated 31 March 2017 at pp 67-75.

182 Having considered the applicable sentencing principles, I sentenced the Accused to a global imprisonment term of 13 years and 6 months, and 12 strokes of the cane. I also granted a compensation order of $76, in default one day of imprisonment.

183 I would like to record my gratitude to counsel for both sides for their assistance in and fair conduct of this case.

Aedit Abdullah
Judge

Sellakumaran Sellamuthoo & Siti Adrianni Marhain
(Attorney-General's Chambers) for the Prosecution;
Peter Keith Fernando (Leo Fernando) (up to 6 August 2017)
Sunil Sudheesan & Diana Ngiam (Quahe Woo & Palmer LLC)
(7 August 2017 onwards) for the accused.