IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 105

Criminal Case No 35 of 2016

Between

Public Prosecutor

And

(1) Ridhaudin Ridhwan Bin Bakri
(2) Muhammad Faris Bin Ramlee
(3) Asep Ardiansyah

JUDGMENT

[Criminal law] — [Offences] — [Rape]
[Criminal law] — [Offences] — [Attempted rape]
[Criminal law] — [Offences] — [Sexual penetration]
[Criminal law] — [Offences] — [Outrage of modesty]
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Woo Bih Li J:

Introduction

1 Three accused persons, Mr Ridhaudin Ridhwan bin Bakri ("Ridhwan"), Mr Muhammad Faris bin Ramlee ("Faris"), and Mr Asep Ardiansyah ("Asep"), were jointly tried before me for a number of sexual offences allegedly committed against a female Singaporean ("the Complainant") on 26 January 2014 in Room 310 ("the Room") of a hotel formerly located along Duxton Road, Singapore ("the Duxton Hotel"). The Duxton Hotel has since been torn down. At the time of these alleged offences, the Complainant was 18 years of age, while each of the three accused persons was 20 years of age.

2 Ridhwan, the first accused, is a Singaporean male facing three charges:

(a) One charge of sexual assault by penetration under s 376(2)(*a*) of the Penal Code (Cap 224, 2008 Rev Ed) ("PC"), punishable under s 376(3) of the PC, for penetrating the Complainant's anus with his finger without her consent, in the living room of the Room, sometime on the morning of 26 January 2014 ("the 1st Charge").

(b) One charge of rape under s 375(1)(*a*), punishable under s 375(2) of the PC, for penetrating the Complainant's vagina with his penis without her consent, in the living room of the Room, sometime in the morning of 26 January 2014 ("the 2nd Charge").

(c) One charge of using criminal force with intent to outrage the modesty of the Complainant punishable under s 354(1) of the PC, for sucking her nipples, in the living room of the Room, sometime in the morning of 26 January 2014 ("the 3rd Charge").

3 Faris, the second accused, is a Singaporean male facing two charges:

(a) One charge of rape under s 375(1)(*a*), punishable under s 375(2) of the PC, for inserting his penis into the Complainant's vagina without her consent, in the bathroom of the Room, sometime in the morning of 26 January 2014 ("the 4th Charge").

(b) One charge of sexual assault by penetration under s 376(2)(*a*), punishable under s 376(3) of the PC, for penetrating the Complainant's vagina with his finger without her consent, in the living room of the Room, sometime in the morning of 26 January 2014 ("the 5th Charge").

4 Asep, the third accused, is also a Singaporean male, and he faces the following two charges:

(a) One charge of sexual assault by penetration under s 376(1)(*a*), punishable under s 376(3) of the PC, for penetrating the Complainant's mouth with his penis without her consent, in the bathroom of the Room, sometime in the morning of 26 January 2014 ("the 6th Charge").

(b) One charge of attempted rape under s 375(1)(*a*), punishable under s 375(2) read with s 511 of the PC, for attempting to insert his penis into the Complainant's vagina without her consent, in the bathroom of the Room, sometime in the morning of 26 January 2014 ("the 7th Charge").

5 In relation to a majority of these charges, the accused persons did not dispute that the relevant sexual activity had occurred between each of them and the Complainant, but argued that such activity had been consensual. Therefore, two of the main issues in contention are whether the Complainant had the capacity to give consent at the material time of the offences, and if so, whether she did in fact give such consent.

Background

6 I will first set out the background before dealing with the areas of contention in greater detail.

7 The alleged offences occurred in the morning of 26 January 2014. The three accused persons and the Complainant had met for the first time on the evening prior, on 25 January 2014, at a birthday party for Mr Muhammad Elmi Ching bin Aman ("Elmi") which was planned by his then-girlfriend, Ms Ros

Izzati Atiqah binte Mohd Zulkifli ("Izzati"). This party was held in the Room, which was internally divided into two floors. On the first floor was the living room, which comprised a seating area with tables, sofas and a television. The main door, which was the only entrance and exit out of the Room, was located on this floor. A spiral staircase connected the first floor to the mezzanine level, which I shall refer to as "the second floor". On this second floor was a bedroom containing a double bed and a cabinet, and the Room's only bathroom, which some witnesses also referred to as the "toilet". The bathroom layout was rectangular and on entering it, one would see a bathtub on the right, a water closet on the left, and the sink with a counter-top in front of the door. Above the sink was a mirror that faced the bathroom door.

8 The Complainant did not know and had not met the accused persons, Elmi, or Izzati prior to 25 January 2014. Her original plan for that evening was to meet some friends and then visit a nightclub. Shortly after 10pm, however, Mr Muhammad Fadly bin Abdull Wahab ("Fadly") messaged her and invited her to have drinks at Elmi's birthday party. Although Fadly repeatedly urged her to come alone,[1] the Complainant insisted on bringing along her friend, Mr Mohamed Affandi bin Ibrahim ("Affandi"), and Fadly eventually agreed.[2] Evidence showed that, at that time, Fadly was planning to get the Complainant drunk at the party and had brought along a bottle of vodka for that purpose.[3] The three accused persons were Elmi's friends and were also invited to the party.

9 The Complainant and Affandi arrived at the Duxton Hotel close to or slightly after midnight on 26 January 2014.[4] By the time they joined the party,

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1 Prosecution's bundle of documents ("PBOD") pp 203-205.

2 Notes of Evidence ("NE") Day 2, p 32 at lines 24-26, p 33 at lines 19-24.

3 Agreed Bundle ("AB") p 169; NE Day 36, p 26 at lines 23-31

4 AB p 161.

all three accused persons, together with Elmi, Izzati, and the other attendees, were already in the Room and were engaging in casual conversations at the first floor while consuming alcohol.[5] The Complainant sat next to Fadly on a sofa.[6] Conversations continued and, save for Izzati, all the attendees consumed alcohol.[7] The Complainant behaved normally at the time of her arrival,[8] and she subsequently interacted mostly with Fadly and Affandi.[9] According to the Complainant, she had not consumed any alcohol earlier that evening prior to arriving at the party.[10] I will elaborate later on the evidence on the type and amount of alcohol that she consumed at the party (see below at [141]).

10 After some time, an impromptu plan was made for the attendees of the party to head to a nightclub named Zouk.[11] At around 1am on 26 January 2014, as the attendees were preparing to leave the Room for Zouk,[12] the Complainant tried to stand up on her own but had difficulty doing so.[13] She collapsed onto the ground,[14] and some evidence suggested that she vomited on the floor.[15] Fadly then brought the Complainant to the bathroom on the second floor.[16] When it

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5 NE Day 2, p 58 at lines 23-30; Day 5, p 9 at lines 11-14, p 90 at lines 1-6.

6 NE Day 5, p 10 at lines 11-17.

7 NE Day 5, p 11 at lines 21-27, p 35 at lines 21-22, p 90 at lines 2-10; Day 18, p 19 at lines 20-25; Day 34, p 12 at lines 25-27.

8 NE Day 5, p 9 at lines 5-10, p 86 at lines 22-24.

9 NE Day 5, p 91 at lines 15-18.

10 NE Day 2, p 59 at lines 12-14.

11 NE Day 5, p 69 at lines 6-15.

12 NE Day 9, p 24 at lines 25-32, p 25 at lines 1-2; Day 18, p 24 at lines 6-11.

13 NE Day 5, p 91 at lines 18-23; Day 36, p 5 at lines 28-31.

14 NE Day 5, p 12 at lines 18-21, p 38 at lines 17-25.

15 NE Day 5, p 92 at lines 9-23; Day 27, p 28 at lines 27-31, p 29 at lines 1-4; Day 34, p 13 at lines 4-10; Day 36, p 28 at lines 26-28.

16 NE Day 5, p 93 at lines 23-26, p 94 at lines 1-7; Day 27, p 29 at lines 8-15; Day 34, p 13 at lines 13-17; Day 36, p 6 at lines 7-22, p 7 at lines 7-22, p 28 at line 31, p 29 at

became clear that the Complainant would not be able to go to Zouk, Fadly and Mr Muhammad Hazly Bin Mohamad Halimi ("Hazly") elected to stay behind with her while the other attendees made their way to the nightclub.[17] I shall refer to those who left for Zouk collectively as "the Group".

11 After the Group had left the Room, Fadly and/or Hazly brought the Complainant out of the bathroom and placed her on the bed on the second floor. The two men then took a photo of themselves with the Complainant partially undressed and her breasts exposed.[18] At this point, the Complainant was still unconscious.[19] Fadly then sent the photo to his friend at around 1.58am.

12 At around 2.20am, Elmi returned to the Room to pick up Izzati's identification card ("IC").[20] He testified that, upon his return, he saw that the Complainant was fully dressed by that time,[21] but she was in an unconscious state on the ground of the second floor of the Room. Fadly tried to wake the Complainant and asked if she was alright,[22] but she did not respond.[23] As Elmi was in a rush, he left quickly thereafter[24] and estimated that he had only spent around one to two minutes in the Room.[25]

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lines 1-6.

17 NE Day 5, p 94 at lines 7-22; Day 18, p 21 at lines 26-30.

18 NE Day 36, p 32 at lines 16-20.

19 NE Day 36, p 32 at lines 9-15.

20 NE Day 36, p 32 at lines 29-31, p 33 at lines 1-5.

21 NE Day 5, p 98 at lines 29-31.

22 NE Day 5, p 96 at lines 21-27, p 97 at lines 1-10.

23 NE Day 5, p 96 at lines 28-31.

24 NE Day 5, p 96 at lines 28-31.

25 NE Day 5, p 98 at line 32, p 99 at line 1.

13 After Elmi left, Fadly and Hazly raped the Complainant in the bedroom of the second floor while she was unconscious.[26] As at the time of this trial, they have pleaded guilty to charges of rape and have been convicted and sentenced by another court.

14 Meanwhile, at Zouk, Asep got into an altercation. His shirt was torn and thus he had to return to the Room.[27] He returned alone.[28] According to Asep, he initially sat on the sofa on the first floor.[29] He then went to the bathroom on the second floor. He said that he saw the Complainant seated in the bathtub,[30] and that she was leaning back and her legs were straight.[31] He soon left the bathroom and returned to the first floor.[32] Sometime later, Ridhwan and Faris also returned to the Room.[33] At this point, the persons in the Room were the three accused persons, as well as Fadly, Hazly, and the Complainant.

15 It was undisputed that, at some point after returning from Zouk, Faris went to the bathroom on the second floor and had sexual intercourse with the Complainant.[34] However, issues relating to the Complainant's consent and her capacity to do so remain in contention.[35] In essence, the Complainant could recall little about what had occurred in the bathroom that morning, and the Prosecution's case was that she had neither the capacity to consent, nor had she

26 NE Day 36, p 33 at lines 9-27.

27 NE Day 27, p 31 at lines 1-12.

28 NE Day 27, p 31 at lines 13-15.

29 NE Day 27, p 31 at lines 26-31, p 32 at lines 1-3.

30 NE Day 27, p 32 at lines 4-9.

31 NE Day 27, p 32 at lines 4-9.

32 NE Day 27, p 32 at lines 10-14.

33 NE Day 27, p 32 at lines 22-23; Day 34, p 44 at lines 3-8.

34 NE Day 18, p 26 at lines 5-8; Day 27, p 32 at lines 24-26.

35 NE Day 18, p 35 at lines 11-31, p 36 at lines 1-15.

in fact consented to sexual intercourse with Faris. On the other hand, Faris' account was that the Complainant had propositioned him for sex while he was in the bathroom with her, and thereafter consented to penile-vaginal intercourse with him. These events form the basis of the 4th Charge (see [3(a)] above).

16 Subsequently, after Faris exited the bathroom alone, Asep went to use the bathroom.[36] Similarly, while issues relating to the Complainant's consent and her capacity to do so remain in dispute, it was not contested that, while in the bathroom with the Complainant, Asep had inserted his penis into the Complainant's mouth, and that he had also attempted to insert his penis into her vagina although he did not eventually manage to do so as he lost his erection. These events form the basis for the 6th and 7th Charges (see [4(a)] and [4(b)] above).

17 Elmi and Izzati returned to the Room at around 5.04am while Asep and the Complainant were in the bathroom. They made their way to the second floor to use the bathroom.[37] They saw that the bathroom door was partially closed and one of them gave it a slight push,[38] causing it to swing open at a wider angle.[39] Elmi testified that although the bathroom was dark, he could see a reflection of Asep and the Complainant in the mirror.[40] According to him, the two persons were standing near the sink and facing the mirror with Asep standing behind the Complainant.[41] Both were topless,[42] though Elmi could not see if the bottom half

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36 NE Day 27, p 32 at lines 27-31, p 33 at lines 1-20.

37 NE Day 5, p 18 at lines 10-11; Day 5, p 100 at lines 18-21.

38 NE Day 5, p 18 at lines 12-17, p 19 at lines 8-32.

39 NE Day 27, p 34 at lines 14-21.

40 NE Day 5, p 101 at lines 1-10.

41 NE Day 5, p 102 at lines 4-22.

42 NE Day 5, p 101 at lines 8-21.

of their bodies were also exposed.[43] Izzati's evidence was that from where she stood near the bathroom door, she could not see anything because the bathroom lights were switched off.[44]

18 When Elmi pushed the door open, Asep quickly pushed the door shut.[45] A few minutes later, Asep emerged from the bathroom alone.[46] Izzati then entered the bathroom. She saw the Complainant and asked Elmi to get Fadly to help the Complainant out of the bathroom.[47] Fadly, who was initially on the first floor, then went to the second floor, assisted the Complainant out of the bathroom, and brought her to the first floor.[48] The witnesses' observations of the Complainant's condition at this time are material, and I will revisit them later in the analysis (see [160]-[164] below).

19 Eventually, the Complainant ended up lying down on the first floor near the main door of the Room.[49] At this point, the three accused persons, as well as Fadly and Hazly, were also on the first floor where they slept for the night.[50] Elmi, Izzati and another individual slept on the bed on the second floor.[51]

20 It was not in dispute that, sometime later that morning, Ridhwan, who initially slept near the spiral staircase[52] and later moved to sleep next to the

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43 NE Day 5, p 103 at lines 9-14.

44 NE Day 5, p 20 at lines 3-6.

45 NE Day 5, p 101 at lines 25-29, p 103 at lines 15-17.

46 NE Day 5, p 104 at lines 15-32.

47 NE Day 5, p 20 at lines 30-31.

48 NE Day 5, p 20 at lines 25-31, p 104 at line 32.

49 NE Day 34, p 17 at lines 1-27.

50 NE Day 5, p 22 at lines 26-28; Day 34, p 17 at lines 28-31.

51 NE Day 5, p 23 at lines 27-32.

52 NE Day 34, p 18 at lines 26-30,

Complainant,[53] had penile-vaginal intercourse with the Complainant and also sucked her nipples. These events form the basis for the 2nd and 3rd Charges (see [2(b)] and [2(c)] above), and in this regard, the contested issues again relate to the Complainant's consent and her capacity to do so. In essence, the Complainant's account was that she could remember some of these events that transpired in the living room that morning, but that she did not consent and had been too weak and confused to resist or scream at that time. On the other hand, Ridhwan claimed that the Complainant had consented to such intercourse and sexual activity with him, and had in fact initiated such activity. In addition, the 1st Charge against Ridhwan accuses him of digitally penetrating the anus of the Complainant at around the same time and location (see [2(a)] above). Ridhwan's explanation was that he had done so by mistake while trying to locate the Complainant's vagina.

21 In addition to the charges relating to events that occurred in the bathroom, Faris was also accused of inserting his finger into the Complainant's vagina in the living room around the same time that morning as when Ridhwan committed the alleged offences mentioned above. This forms the basis of the 5th Charge against Faris (see [3(b)] above). Faris disputed that such penetration had in fact occurred.[54]

22 According to the Complainant, after the events that transpired with Ridhwan and Faris in the living room, the next thing she remembered was waking up later that morning and hearing one male person, whom she subsequently identified as Ridhwan, saying "I pity her" in Malay ("aku kesian tengok dia"), and a male person whom she identified as Faris agreeing. She testified that she had pretended to sleep for a period because she wanted to know

53 NE Day 34, p 20 at lines 2-19.

54 Prosecution's closing submissions at para 236.

what the others were talking about, and because she felt shy, embarrassed, and disappointed.[55] Sometime later, she sat up and made her way to the bathroom on the second floor of the Room on her own. By that time, most of the persons in the Room were awake. The Complainant soon left the Duxton Hotel with Fadly and Hazly, who sent her to a nearby MRT station in a taxi.[56] From there, she made her own way home by public transport to Johor Bahru, Malaysia.[57]

23 In the ensuing period, the Complainant exchanged WhatsApp messages with some of her friends about what had allegedly happened in the morning of 26 January 2014 in the Room. Meanwhile, the accused persons and other attendees of Elmi's birthday party also exchanged messages regarding these events. These messages are material and I will elaborate on them later.

24 Two days later, on 28 January 2014, the Complainant filed a police report[58] which led to the separate arrests of the three accused persons on or around 29 January 2014.[59]

Overview of the evidence

Witnesses

25 In respect of the main trial, the Prosecution adduced evidence from a total of 54 witnesses. 16 of those witnesses (comprising 15 factual witnesses and one expert) testified in court and supplemented their conditioned statements

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55 NE Day 1, p 67.

56 NE Day 4, p 96 at lines 13-27, p 98 at lines 16-18.

57 NE Day 1, p 78 at lines 16-18.

58 AB p 348.

59 AB p 295; AB p 377; AB p 293.

with oral testimony. The conditioned statements of the remaining 38 witnesses were admitted by consent.[60]

26 As for the accused persons, they each testified in their defence at trial, and jointly relied on the evidence of one expert witness. In addition, Ridhwan also called Fadly as his witness.

The accused persons' statements to the police

27 The Prosecution relied heavily on the statements given by the three accused persons to the police during the course of the investigations. All of these statements were taken at the Police Cantonment Complex ("PCC"). I will briefly outline them here and elaborate on them where necessary in the analysis.

Faris' statements to the police

28 The Prosecution relied on two statements given by Faris to the police:

(a) The first was recorded by Inspector Thermizi Tho (as he then was) ("ISP Tho") on 30 January 2014 from about 12.45am to 2.05am pursuant to s 33 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC") ("Faris' 1st Statement").

(b) The second was recorded by then-Assistant Superintendent Arun Guruswamy ("ASP Guruswamy") on 16 October 2014 from about 6.50pm to 9.00pm pursuant to s 22 of the CPC ("Faris' 2nd Statement").

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60 Prosecution's closing submissions at para 10.

29 At trial, Faris challenged the admissibility of both of these police statements. An ancillary hearing was thus held, which I will discuss later.

Asep's statements to the police

30 Asep gave four statements to the police. The Prosecution relied on two of his statements:

(a) The first was recorded by Assistant Superintendent Mohamed Razif ("ASP Razif") on 30 January 2014 from around 12.28am to 2.00am pursuant to s 22 of the CPC ("Asep's 1st Statement").

(b) The second was recorded by ASP Guruswamy on 16 October 2014 from about 9.11pm to 11.15pm also pursuant to s 22 of the CPC ("Asep's 2nd Statement").

31 Asep challenged the admissibility of his 2nd Statement. I will discuss the relevant ancillary hearing later.

Ridhwan's statements to the police

32 Ridhwan gave four statements to the police. The Prosecution relied on three of his statements:

(a) The first was recorded by Assistant Superintendent Amos Tang ("ASP Tang") on 30 January 2014 from about 12.04am to 1.03am pursuant to s 22 of the CPC ("Ridhwan's 1st Statement").

(b) The second was recorded by Senior Investigation Officer Suzana Sajari ("SIO Sajari") on 3 February 2014 from about 11.30am to 1.50pm pursuant to s 22 of the CPC ("Ridhwan's 2nd Statement").

(c) The third was recorded by ASP Guruswamy on 5 February 2014 from about 12.00pm to 2.20pm pursuant to s 22 of the CPC ("Ridhwan's 3rd Statement").

33 Ridhwan did *not* challenge the admissibility of any of his police statements.

The expert evidence

34 As the issue of the Complainant's capacity to consent at the material time was heavily contested, both parties also relied on expert opinion to buttress their respective cases in this regard.

35 The Prosecution relied on the opinion of Dr Guo Song ("Dr Guo"), a senior consultant psychiatrist from the Institute of Mental Health ("IMH"). Dr Guo produced two written reports and supplemented them with oral testimony in court. The two reports were:

(a) The first dated 22 October 2015, comprising 11 pages in total. This report should be read together with (i) a two-page errata,[61] and (ii) several articles which Dr Guo referred to in the report and subsequently produced at trial. I shall refer to these documents collectively as "Dr Guo's 1st Report".

(b) The second dated 12 July 2016 ("Dr Guo's 2nd Report"), comprising two pages, was supplementary to Dr Guo's 1st Report.

36 The three accused persons relied on the expert opinion of Dr Munidasa Winslow ("Dr Winslow") of Promises Healthcare Pte Ltd. Dr Winslow

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[61] See Exhibit P180A.

produced one report of six pages dated 13 September 2016 ("Dr Winslow's Report") and supplemented it with oral testimony.

Preliminary matters

37 Before turning to the issues of criminal liability and the ancillary hearings proper, I will address two preliminary matters.

38 On the first day of trial on 2 August 2016, upon an application by the Prosecution, I granted a gag order pursuant to ss 8(3)(*a*) and (*b*) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), which prohibits, first, the publication of any identifying particulars that is likely to lead to the identification of the Complainant, and second, the doing of any act which is likely to lead to the same.[62] There was no objection. This order remains operative to date.

39 Second, at the commencement of trial, Asep objected to the conduct of a joint trial. The basis of the objection was that the Prosecution would be seeking to admit and rely on Faris' police statements, and that the contents of those statements – specifically, the parts relating to the Complainant's state of consciousness in the early morning of 26 January 2014 – would be prejudicial to his defence. In this regard, Asep relied on s 258(5) of the CPC and argued that since he and Faris were charged for distinct offences, the court was not allowed to rely on Faris' statements in determining his guilt.[63] In that light, a joint trial should be avoided as it would be practically difficult for the court to ignore Faris' statements while assessing Asep's guilt.

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62 NE Day 1, p 3.

63 NE Day 1, p 4.

40 The other two accused persons, Faris and Ridhwan, had no objections to the joint trial.[64]

41 In my view, the court had the power to order, and should in the present case order, a joint trial in respect of the three accused persons, including Asep and Faris, under ss 143(*b*) and/or (*c*) of the CPC. The relevant parts of ss 143(*b*) and (*c*) of the CPC read as follows:

> **Persons who may be charged and tried jointly**
>
> 143. The following persons may be charged and tried together or separately:
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> …
>
> (*b*) persons accused of different offences committed in the same transaction;
>
> (*c*) persons accused of 2 or more offences which form or are a part of a series of offences of the same or a similar character;

42 In relation to the court's power to order a joint trial, s 143(*b*) of the CPC permits joint trials to be conducted for persons accused of "different offences committed in the same transaction". In *Tse Po Chung Nathan and another v Public Prosecutor* [1993] 1 SLR(R) 308 ("*Nathan Tse*"), the Court of Criminal Appeal held that "the real and substantial test for determining whether several offences are connected together so as to form the same transaction depends upon whether they are so related to one another in point of purpose, or cause and effect, or as principal and subsidiary acts as to constitute one continuous action" (at [30]; affirmed in *Sharom bin Ahmad and another v Public Prosecutor* [2000] 2 SLR(R) 541 at [26]). While unity in purpose or design is the main inquiry, other relevant factors include proximity in time and place and continuity in

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64 NE Day 1, pp 5-6.

action (*Nathan Tse* at [31]). It is not necessary that all of four factors be present for the incidents to form part of the same transaction (*Nathan Tse* at [31]).

43 In the present case, I was of the view that the alleged offences of the three accused persons were committed "in the same transaction". The alleged offences clearly shared a close proximity in time and place, and there was also strong continuity in action as they formed part of a chain of events which related proximally to each other. As for unity in purpose, in so far as the Prosecution's case was concerned, the three accused persons shared similar motives and designs against the Complainant. Although there was no allegation that the accused persons had acted in concert, such an allegation was not necessary: "Community of purpose in the sense of conspiracy is not in any way necessary, though if it is present, its presence will be a further element supporting a finding that the offences are committed in the same transaction" (*Nathan Tse* at [31], quoting *Mitra on the Code of Criminal Procedure* (16th ed, 1987) at p 1385). Indeed, even if it could not strictly be said that the alleged offences were united in purpose, I was of the view that they were so proximally and circumstantially connected that the facts compelled their being treated as part of the same transaction.

44 In this regard, I also considered the High Court decision in *Lim Chuan Huat and another v Public Prosecutor* [2002] 1 SLR(R) 1 ("*Lim Chuan Huat*") to be analogous and persuasive. That case concerned the court's power to order a joint trial under the predecessor provision to s 143(*b*) in the Criminal Procedure Code (Cap 68, 1985 Rev Ed). There, the wife-employer who had assaulted a domestic helper on one day, and the husband-employer who had assaulted the same helper the day after, were jointly tried even though the offences were in some sense separate and there was no allegation of conspiracy. The court reasoned as follows:

> 31 Based on the foregoing, I found that the facts of the present case supported the trial judge's decision to allow the appellants to be tried together. Not only was there an identity of purpose in the separate acts of the appellants, but there was unity of place and proximity of time. Furthermore, common sense dictates that given the facts of this particular case, viz the victim was the sole employee of both the appellants and the offences took place in the intimate setting of a household over a consecutive period of two days, it is not against the interest of justice for the appellants to be jointly tried. …

45 In any event, even if the alleged offences were not so proximate as to constitute the same transaction under s 143(*b*) of the CPC, they would fall within s 143(*c*) of the CPC which permits joint trials to be held for persons accused of "2 of more offences which form or are a part of a series of offences of the same or a similar character". In my view, the present charges constituted a series of offences which shared a close physical, temporal, and circumstantial nexus. The charges also related to offences of the same or a similar character, *ie*, sexual offences of varying severity committed against the same complainant. Similar reasoning was adopted in *Public Prosecutor v Muhammad Rahmatullah Maniam bin Abdullah and another* [1999] SGHC 252 ("*Rahmatullah*") which considered the predecessor provision to s 143(*c*) of the CPC. There, the High Court held that two accused persons who had sexually assaulted the same victim on the same morning and at around the same place could be jointly tried, even though they had committed the offences without the knowledge or involvement of the other person (*Rahmatullah* at [25]), and even though there "was no indication of any common purpose or unity of purpose" (*Rahmatullah* at [26]), based on the following reasoning:

> 31 As the offences in the present case are alleged to be committed against the same person during the same morning and were committed at or on the way to the same flat, I was satisfied that there was a sufficient nexus between the offences for them to be regarded as a series of offences of the same or similar character.

46 As for the appropriate exercise of discretion in this case, I was of the view that the following factors supported the ordering of a joint trial:

(a) I agreed with the Prosecution that given the close proximity in time and place of the alleged offences, and the significant overlap in witnesses and evidence against each of the accused persons, it was in the public interest for the court to conduct a holistic examination of the entire sequence of events that transpired in the early morning of 26 January 2014 rather than to attempt to segregate and confine the evidence to very specific and isolated instances in that morning. This would be done subject to the caveat that a confession by any of the accused persons would not be used against another accused person since the accused persons were not charged for the same offence, thereby precluding s 258(5) of the CPC from being satisfied.

(b) If a joint trial had not been ordered, common witnesses for the trial for each accused person would have to attend separate trials to testify repeatedly about the same background facts as well as the condition of the Complainant at different points in time. This would apply to the witnesses for both the Prosecution and the Defence, including the expert witnesses who would have to repeat their evidence at each trial. This would cause unnecessary delay and expense, and there would likely also be discrepancies in the minute details which might distract the court from the material facts.

(c) Importantly, the Complainant would have to repeat much of her evidence more than once. Whether or not the Complainant was telling the truth, it would be unjust to require her to attend court and repeat most of her evidence for the trial of each accused person, with the difference

being the evidence for the occasion when each offence was allegedly committed.

47 Having addressed the provisions on joint trial under s 143 of the CPC, I turn now to Asep's argument about prejudice under s 258(5) of the CPC. The version of s 258(5) applicable at the material time stated as follows:

> (5) When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court may take into consideration the confession as against the other person as well as against the person who makes the confession.
>
> Explanation — "Offence" as used in this section includes the abetment of or attempt to commit the offence.
>
> *Illustrations*
>
> (*a*) *A* and *B* are jointly tried for the murder of *C*. It is proved that *A* said "*B* and I murdered *C*". The court may consider the effect of this confession as against *B*.
>
> (*b*) *A* is on trial for the murder of *C*. There is evidence to show that *C* was murdered by *A* and *B* and that *B* said "*A* and I murdered *C*". This statement may not be taken into consideration by the court against *A* as *B* is not being jointly tried.

Section 258(5) has since been amended but the amendments do not affect the present case.

48 I did not accept the argument that since the accused persons were not charged for the same offence and s 258(5) of the CPC was not satisfied here, the court should avoid a joint trial in order to prevent a cross-contamination of evidence between the accused persons. As the High Court observed in *Lee Kwang Peng v Public Prosecutor* [1997] 2 SLR(R) 569 at [57]–[58] in an analogous context concerning the joint trial of several charges laid against the same accused person, it is possible for the court to order a joinder but with a

view to analysing the evidence separately if required. Indeed, if the argument was correct, there would be few, if any, situations in which a joint trial should be ordered unless s 258(5) is first satisfied, *ie*, the accused persons are in fact tried for the same offence and one of them has given a confession affecting himself and the co-accused persons. That would mean, curiously, that the question of whether a joint trial should be ordered is dictated by the satisfaction of s 258(5) rather than whether any limb under s 143 applied. In my view, if that had been the intended position, Parliament would have made that clear. Thus, primacy must be given to s 143 in determining whether a joint trial should be ordered.

49 Accordingly, I granted the Prosecution's application for a joint trial of the three accused persons and proceeded on that basis. I should add that, apart from the initial objection by Asep, at no point during the trial or at closing submissions did any of the accused persons raise any issue of prejudice as a result of the joint trial. In any event, to err on the side of caution, I have not relied on Faris's police statements, whether or not they contain any confession, in assessing the guilt of Asep, and *vice versa*.

The ancillary hearings

The law on admissibility of police statements

50 The law on the admissibility of police statements was largely undisputed in the present case. The basic and fundamental principle is that a statement must have been given voluntarily to the police by the accused before it may be admitted in trial. This principle is codified in s 258(3) of the CPC, the material parts of which read as follows:

> (3) The court shall refuse to admit the statement of an accused or allow it to be used in the manner referred to in subsection (1)

> if the making of the statement appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused grounds which would appear to him reasonable for supposing that by making the statement he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.
>
> *Explanation 1.* — If a statement is obtained from an accused by a person in authority who had acted in such a manner that his acts tend to sap and have in fact sapped the free will of the maker of the statement, and the court is of the opinion that such acts gave the accused grounds which would appear to the accused reasonable for supposing that by making the statement, he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him, such acts will amount to a threat, an inducement or a promise, as the case may be, which will render the statement inadmissible.
>
> *Explanation 2.* — If a statement is otherwise admissible, it will not be rendered inadmissible merely because it was made in any of the following circumstances:
>
> …
>
> (*e*) where the recording officer or the interpreter of an accused's statement recorded under section 22 or 23 did not fully comply with that section; or
>
> …

51 The Prosecution bears the burden of proving beyond a reasonable doubt that the statements it seeks to admit were made voluntarily. In *Chai Chien Wei Kelvin v Public Prosecutor* [1998] 3 SLR(R) 619, the Court of Appeal explained the content of the test of voluntariness in the following terms at [53] (see also *Lim Thian Lai v Public Prosecutor* [2006] 1 SLR(R) 319 at [14]):

> The test of voluntariness is applied in a manner which is partly objective and partly subjective. The objective limb is satisfied if there is a threat, inducement or promise, and the subjective limb when the threat, inducement or promise operates on the mind of the particular accused through hope of escape or fear of punishment connected with the charge.

52 Although the main text of s 258(3) of the CPC mentions only "threat, inducement or promise", it is well accepted that other forms of oppressive conduct tending to or in fact sapping the will of the accused may also negate the voluntariness of a statement. In *Tey Tsun Hang v Public Prosecutor* [2014] 2 SLR 1189 ("*Tey Tsun Hang*"), the High Court explained at [88] that, under the present version of the CPC, oppression is rationalised within the framework of threat, inducements or promise, since Explanation 1 to s 258(3) states that if "a person in authority who had acted in such a manner that his acts tend to sap and have in fact sapped the free will of the maker of the statement … such acts *will amount* to a threat, inducement or promise" [emphasis in original]. This stands in contrast with the former approach where oppression was a distinct ground for a finding of involuntariness (*Tey Tsun Hang* at [88]). Despite this conceptual shift, however, the substantive law on oppression remains the same: "The litmus test for oppression is whether the investigation was, by its nature, duration or other attendant circumstances, such as to affect the accused's mind and will such that he speaks when he otherwise would have remained silent" (*Tey Tsun Hang* at [113]). I would add that the same standard applies even where the allegation is not that the accused would have remained silent, but that he would have given a different version of the statement, had he not been oppressed.

Ancillary Hearing in respect of Faris' statements

53 As mentioned, Faris challenged the admissibility of both of the police statements relied on by the Prosecution (see [28] above). Two main contentions were raised: (a) that material aspects of the statements were given in oppressive conditions and therefore not voluntary; and (b) that there were procedural irregularities during the statement-taking process which rendered the prejudicial effect of the statements greater than their probative value. At the end of the

ancillary hearing, I held that both statements were admissible. I will explain my decision in relation to the two statements in sequence.

Faris' 1st Statement

54 I begin with the content and formalities of Faris' 1st Statement. This statement was, on its face, recorded by ISP Tho at the PCC on 30 January 2014 from about 12.45am to 2.05am (see [28(a)] above). It was recorded in the English language and contained 14 paragraphs of prose over 5 pages:

(a) Paragraphs 1 to 7 introduced Faris, his particulars, and the background to Elmi's birthday party at the Duxton Hotel from 25 to 26 January 2014.

(b) Paragraph 8 stated that at the party, Faris drank "quite a lot and… felt tipsy subsequently". He did not pay attention to how much the others were drinking, but thought that "we all drank about the same amount" because they would refill their empty cups at the same time. Save for three individuals who did not drink, the rest of the attendees "were all tipsy". Faris also noticed the Complainant "had been vomiting. She even vomited on the bed." (It was not disputed that "drinking" in this context referred to the consumption of alcohol.)

(c) Paragraph 9 stated that the attendees decided to go to Zouk at about midnight, but observed the following of the Complainant's condition at that time:

> … [the Complainant] was very drunk. We were drinking at the living room and she can't even walk properly to the toilet at the 2nd floor. Someone helped her to get up to the toilet and she vomited inside and on the bed. … As [the Complainant] was very drunk, she cannot go Zouk. "Hazly" and "Fadly" then stayed back with her while the rest of us went to Zouk.

(d) Paragraphs 9 and 10 recorded certain events which occurred at Zouk. In essence, Faris consumed more alcohol there and returned to Duxton Hotel with Ridhwan soon after Asep left Zouk. When Faris and Ridhwan entered the Room, Faris noticed Hazly and Fadly watching television in the living room, while the Complainant was inside the bathroom. Faris heard the Complainant vomiting and went to take a look, whereupon he "saw her in the bathtub". Faris then went back to the living room and slept on the living room floor.

(e) The last part of paragraph 11 through to paragraph 14 of the statement are material as they were challenged as inaccurate by Faris, and they will be relied on in the analysis of the charges below (see [156]). They read as follows:

> 11 … I took out my shirt and lay on the living room floor. I subsequently fell asleep.
>
> 12 When I woke up, I realised the sky was bright and [the Complainant] was on my left. She was also lying down but her eyes were opened. Her body was turning to my side and facing me. On her left was [Ridhwan] and he was lying down and I could not see his face. On my right was a chair. The blanket was covering the 3 of us and I wanted to get up to drink some water. I then lifted up the blanket and I saw [the Complainant] was half naked. She was wearing a round neck t-shirt with length slightly above her belly button. She was also wearing a black and white short skirt. Somehow, her skirt was lifted up to her waist and I could see that she was not wearing any panties. I put the blanket down but I was already aroused. I then moved closer to her and I lay my head on her right upper arm and I put my right hand under the blanket and I used my fingers to touch her vagina. I used my fingers to rub her vagina at her "G" spot. The "G" spot was outside at the top of the vagina. I cannot remember which finger or fingers I used. I rubbed for a while and she pushed my hand away and I stopped. While I was rubbing her vagina, she looked at my [*sic*] blankly.
>
> 13 After she pushed away my hand and I stopped, I got up to get some water. I then went back to lie beside

> her again but I turned my body towards the right and faced away from her. At that time, [Ridhwan] was still lying beside her. A while later, I fell asleep again. When I woke up again, it was around 10 am plus or 11 am. The rest of them also started to wake up or already woke up. We then started to go off.
>
> 14 I only rubbed [the Complainant's] vagina. I did not insert my finger inside her vagina. I did not put my penis inside her vagina. I don't know whether [Ridhwan] did anything to her but he was lying beside her. I regretted what I had done.

55 Faris signed at least once at the bottom of each page of the statement. The final part of the statement was a paragraph which recorded, amongst other things, that ISP Tho had informed Faris prior to statement-taking that Faris may make any amendment to the statement. It also recorded that ISP Tho "did not offer any threat, inducement promise to [Faris] either before or during the recording of the statement. [Faris] gave the statement voluntarily". This paragraph was followed by the signatures of both Faris and ISP Tho.

56 Faris raised two main arguments as to why his 1st Statement was not admissible.

(a) First, he contended that the statement had been given as a result of oppression. Specifically, he said that he had agreed to the inclusion of the last part of paragraph 11 until paragraph 14 of the statement, even though they were not true, because of pressure from SIO Sajari who was also present at the time of statement-taking together with ISP Tho (*ie*, from 12.45am to 2.05am).[65] According to Faris, SIO Sajari made "suggestions" to him about what had happened, and Faris felt compelled to agree because SIO Sajari "kept shouting" at him, and he "d[id] not know what to do" and "just had to give her what she wanted".[66] He also

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65 NE Day 23, pp 34-47.

alleged that SIO Sajari had shouted "You think this is funny", told him that rape was a capital matter (which Faris understood to mean "a big case" that involved a long term of imprisonment[67]), and asked him to take off his t-shirt and squat for "quite a long time" with his hands placed behind his head and neck, until he had "pins and needles".[68] During this time, apart from asking a few introductory questions, ISP Tho was "just typing".[69]

(b) Second, Faris alleged that there had been several procedural breaches during the statement-taking process. It was not clear if he meant that these breaches in themselves negated the admissibility of the statement, or that they, coupled with the oppressive acts of the police, led to the recording of an untrue and inaccurate account in the statement.[70]

57 The Prosecution's case was that Faris' 1st Statement was voluntarily given and procedurally proper. In relation to the allegations against SIO Sajari, its version was that SIO Sajari had not even been present at the taking of Faris' 1st Statement. Instead, during the material period, she was elsewhere occupied with the handling of Ridhwan and his statements, and ISP Tho was the only person taking Faris' statement. Thus, Faris' allegations against SIO Sajari could only have been untruths belatedly contrived in a bid to escape liability. As for the alleged procedural irregularities, the Prosecution submitted that ISP Tho had complied with the requisite procedures.

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66 NE Day 23, p 38 at lines 11-12.

67 NE Day 23, p 45 at line 9.

68 NE Day 23, p 44.

69 NE Day 23, p 47 at line 13.

70 NE Day 23, pp 47-48.

58 In my view, there had been no oppression in relation to Faris' 1st Statement because SIO Sajari was not present at the taking of this statement, and could not have acted as Faris alleged. It was, therefore, not possible for any conduct on her part to sap the will of Faris in relation to this statement. I came to this view for the following reasons.

59 First, there was consistent and corroborated evidence that SIO Sajari was not present throughout the period when Faris' 1st Statement was taken.

(a) ISP Tho's evidence was that on 29 January 2014 at around 11.35pm, he and two other officers placed Faris under arrest when Faris reported to the Serious Sexual Crimes Branch ("SSCB") at the PCC. Faris was then escorted to an interview room in SSCB, where ISP Tho alone interviewed him from around 12.45am to 2.05am on 30 January 2014. This was consistent with the fact that only ISP Tho's name was reflected on Faris' 1st Statement. Thereafter, at around 2.15am, ISP Tho and ASP Guruswamy escorted Faris to the lock-up at the PCC.

(b) Deputy Superintendent Amos Tang Lai Hee ("DSP Tang") gave evidence that between 12.04am and 1.03am on 30 January 2014, he interviewed Ridhwan and took a statement from him.[71] DSP Tang's usual practice was to hand the statement over to the lead investigation officer ("IO") once he finished recording it,[72] and the lead IO in this case was SIO Sajari. While DSP Tang was referring to his usual practice and candidly said that he could not recall what had actually occurred in this case,[73] the Prosecution submitted that there was no reason for him to

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71 NE Day 22, p 11.

72 NE Day 22, p 6.

73 NE Day 22, p 6.

depart from this practice on 30 January 2014.[74] I agreed that some weight should be placed on DSP Tang's usual practice, particularly in the light of SIO Sajari's role as the lead IO and the fact that she was the person who had instructed DSP Tang to take the relevant statement from Ridhwan in the first place.[75] I add that 1.03am, which was around the time DSP Tang handed the statement over to SIO Sajari, was sometime *after* the commencement of the recording of Faris' 1st Statement.

(c) SIO Sajari similarly testified that she received Ridhwan's statement from DSP Tang at slightly after 1.03am.[76] Between then and 2.00am, she was reading it and using it to prepare the form for Ridhwan's type-written cautioned statement for use with him later.[77] At around 2.00am, SIO Sajari and DSP Tang escorted Ridhwan from SSCB to the lock-up for a medical examination, and then at around 2.15am, she commenced recording Ridhwan's cautioned statement using the form that she had earlier prepared.[78] In my view, the timeline was credible. SIO Sajari's account that she had escorted Ridhwan to his medical examination at around 2.00am was also corroborated by DSP Tang.[79] (I should add that Ridhwan's cautioned statement was in relation to a charge under s 376(1)(*a*) of the PC for penile-anal penetration,[80] which appeared not to have been pursued as it was not a charge before this court.)

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74 NE Day 22, p 11 at lines 22-25; Prosecution's submissions on the ancillary hearing at para 17.

75 NE Day 22, p 11 at lines 9-11.

76 NE Day 21, p 26 at lines 3-9.

77 NE Day 21, pp 6-7.

78 See Exhibit TWT-P5 at paras 10-11.

79 See Exhibit TWT-P10 at para 8.

80 See Exhibit TWT-P5 at para 11.

60 While it would have been better if there had been objective contemporaneous evidence of SIO Sajari's whereabouts, I accepted her explanation that she had disposed her field book and other confidential documents when she left the police force and was told in 2016 that she would not be required as a witness in this case.[81] Indeed, it was apparently Faris' counsel who had told the Prosecution in 2016 that SIO Sajari would not be required as a witness, in reliance on which SIO Sajari disposed of her field book and documents when the Prosecution conveyed the same to her.[82] Faris' counsel said she took this position because the Prosecution had initially said that it was not relying on his 1st Statement. On the other hand, the Prosecution said that they had not intended to rely on Faris' 1st Statement until he took a certain position. Thus, when the parties' cases morphed later, SIO Sajari's oral testimony was again needed, but the field book and documents could no longer be retrieved. This was unfortunate but I did not consider it to suggest anything untoward on the part of SIO Sajari. Neither did Faris suggest that SIO Sajari had given a false reason for disposing her field book and other confidential documents.

61 Second, and in contrast, there was a material inconsistency in Faris' own account of when SIO Sajari had been present at the statement-taking.

(a) Initially, during the cross-examination of SIO Sajari in the ancillary hearing, Faris asserted through his counsel that SIO Sajari had been present with him and ISP Tho from 11.45pm on 29 January 2014 to about 2.00am on 30 January 2014.[83] This time period would include both the pre-interview conversation between Faris and the officers

81 NE Day 21, pp 12-13.

82 NE Day 21, pp 12-19.

83 NE Day 21, p 27 at lines 1-4.

(11.45pm to 12.45am), and the entire duration of the statement-taking proper (12.45am to 2.05am).

(b) Subsequently, however, after the evidence of the Prosecution had been given, Faris testified in cross-examination that only ISP Tho was with him during the pre-interview stage, and that SIO Sajari had entered the room "halfway when recording the statement".[84] When pressed on when exactly SIO Sajari had entered the room, he said that he could not remember, even though he stressed that it was before paragraph 12 of his 1st Statement was taken.[85] He accepted that this was a change from the position that his counsel had taken when she cross-examined SIO Sajari.[86]

62 In my view, this inconsistency raised doubts about the accuracy and veracity of Faris' account. The Defence sought to play this down by stressing that Faris had been consistent in maintaining that SIO Sajari was present at least during the latter half of the interview,[87] but this did not inspire confidence. It seemed that he had tailored his evidence to try and meet the evidence that the Prosecution had adduced. In fact, Faris' evidence suggested further inconsistencies with other parts of his statement, for instance, that ISP Tho had played only a passive role and was "just typing" during the interview.[88] Surely ISP Tho would have taken on a more active role had he been the only officer present during the first half of the interview.

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84 NE Day 25, p 13 at lines 24-29.

85 NE Day 25, p 14 at lines 1-7.

86 NE Day 25, p 48 at lines 19-20.

87 NE Day 26, p 60 at lines 12-17.

88 NE Day 23, p 47 at line 13.

63 Third, the parts of the statement which, according to Faris, were suggested by SIO Sajari aggressively and agreed to by him in fear included *exculpatory* content. In particular, paragraph 14 of Faris' 1st Statement stated specifically "I did *not* insert my finger inside her vagina" and thereafter "I did *not* put my penis inside her vagina" [emphases added]. Yet, Faris insisted in attributing the contents of the entire paragraph to SIO Sajari:[89]

> Q [from Faris' counsel]: … Faris, is there anything else in the rest of your statement that was recorded inaccurately from you?
>
> A The whole paragraph 14.
>
> Q Okay, the whole paragraph is inaccurately recorded?
>
> A Yes.
>
> Q Okay, so can you tell us what happened during the recording of paragraph 14?
>
> A As usual, she shouted at me. She asked me, "So you just rub [the Complainant's] vagina?" I just agreed. Everything that is stated here, she asked me and I just agreed. …
>
> …
>
> Q … Okay, Faris, can you clarify? Okay, you said that this paragraph is inaccurately recorded but now you're telling us that this is actually what you did agree with [SIO Sajari].
>
> A Yes. This is what I--- this is not what I said. This is what she said and I just agreed.

64 I agreed with the Prosecution that this further undermined the credibility of Faris' account. It beggared belief that SIO Sajari would be shouting at Faris and accusing him of committing offences in one moment, and then volunteering exonerative facts to Faris to be recorded in his statement in another.[90] No plausible explanation was put forth by Faris to reconcile such contrasting accounts of the conduct of SIO Sajari.

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89 NE Day 23, p 45 at lines 10-31.

90 Prosecution's submissions in the ancillary hearing at para 23.

65 Fourth, I found Faris' contemporaneous conduct and reaction to be inconsistent with the abuse and indignity that he had allegedly suffered at the hands of SIO Sajari.

66 In particular, Faris did not tell any person about the alleged abuses for a significant period of time. It was not entirely clear when he first raised this issue with his counsel or with the Prosecution, but it was undisputed that this was after he had engaged counsel and it was not near the time of statement-taking.[91] He did not file a complaint or raise the issue with any other police officer. Faris explained that he did not know what would happen if he complained to a police officer about another police officer.[92] But even if that were the case, there were other persons he could have spoken to and would naturally have done so had the alleged abuses been true, even without the benefit of counsel. For instance, he could have complained to his parents. He did not do so, and during the ancillary hearing he explained that he did not wish for his parents to get involved.[93] However, since his parents were the ones who had bailed him out after his initial arrest, they must have already known that there was some allegation of a criminal nature against Faris. Furthermore, as the Prosecution pointed out, Faris could have told his parents about the police's abusive conduct without telling them any detail about the charges.[94] In any event, Faris also did not mention any of the alleged abuses to his then-girlfriend or his friends, even though they were quite serious allegations.[95] I found this to be inexplicable.

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91 NE Day 25, p 33 at lines 16-17.

92 NE Day 25, p 33.

93 NE Day 25, p 33 at lines 10-12.

94 NE Day 25, p 52 at lines 26-27.

95 NE Day 25, p 33; Day 26, p 43, pp 56-59.

67 A further reason Faris provided for not having told anyone about the alleged abuses was that he did not initially realise that SIO Sajari had done anything wrong.[96] He did not, for example, know whether the police was allowed to ask an accused person to squat and take off his shirt when taking his statement. However, when pressed further, Faris accepted that he knew that it was "not normal" for police officers to put answers into the mouths of accused persons in the statement-taking process. In my view, if his allegations about SIO Sajari were true, he would have known that the alleged misconduct was wrongful. He was simply trying to come up with an excuse as to why he did not complain about the misconduct to someone else sooner thereafter.

68 Indeed, Faris later conceded that he had suspected that something was wrong and that ISP Tho was merely recording whatever SIO Sajari had "suggested" to him.[97] Yet, despite these suspicions, he did not at any time make an attempt to read or amend the statement. He claimed to have signed once at the bottom of each page of the statement because he was told to do so, without reading the contents because he "didn't get the time to read".[98] But he too did not request for more time to do so. He attributed his passivity to his perceived need to obey the police as a "higher power".[99] But it was doubtful if he could have been so overwhelmed by fear or respect for authority since, by his own admission, he had lied to the police in the same interview so as to ward off criminal liability.[100]

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96 NE Day 25, pp 31 and 34.

97 NE Day 25, pp 34-35.

98 NE Day 25, p 36 at line 3.

99 NE Day 25, p 18 at line 11, p 37.

100 Prosecution's submissions in the ancillary hearing at para 22.

69 For these reasons, I did not find Faris' account of what had occurred at the taking of his 1st Statement to be credible.

70 Faris submitted that if he had wanted to lie, it would have been easier for him to make allegations against ISP Tho rather than SIO Sajari.[101] I did not give this argument too much weight. It was not for the court to speculate as to Faris' intentions. It should also be pointed out that SIO Sajari was the lead IO and, in that regard, played a more central role than ISP Tho. The Defence also argued that if SIO Sajari was to be believed, "then Faris could not possibly recognise her".[102] But the chronology should not be confused. It would not be unexpected for Faris to know of the identity and role of SIO Sajari by the time he surfaced these allegations against her, even if he did not know of her at the time of the statement-taking.

71 Finally, turning to the procedural irregularities alleged, Faris raised the following complaints in relation to his 1st Statement:[103]

(a) He was not expressly asked the language that he wished to give his statement in. If given a choice, he would have preferred to give his statement in Malay rather than English, even though he had not expressed such a preference at the time of statement-taking.

(b) His statement was not read back or explained to him, nor was he given the chance to read it. In fact, the first time Faris read this statement was when his first lawyer gave it to him at a much later date.

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101 Defence's submissions in the ancillary hearing at para 29; NE Day 26, p 59 at lines 11-23.

102 Defence's submissions in the ancillary hearing at para 30.

103 Defence's submissions in the ancillary hearing at para 15.

(c) He was not informed that he could make edits to the statement. He was also not asked if he would like to edit the statement when his 2nd Statement was taken.[104]

(d) He was not asked to confirm if the statement was true and correct. Even though he had signed every page of the statement, he did so only because he "was just told to sign".[105] He was not given the option of not signing his statement at all.

72 Faris' 1st Statement was taken under s 22 of the CPC, the material part of which reads as follows:

> **Power to examine witnesses**
>
> 22.— …
>
> …
>
> (3) A statement made by any person examined under this section must —
>
> (*a*) be in writing;
>
> (*b*) be read over to him;
>
> (*c*) if he does not understand English, be interpreted for him in a language that he understands; and
>
> (*d*) be signed by him.

(There have since been amendments to s 22 of the CPC, but those amendments were introduced after the ancillary hearing.)

73 I should highlight at the outset that not every procedural breach, even if of a requirement expressly stated in s 22 of the CPC, would render a statement inadmissible if it is otherwise admissible. Explanation 2 to s 258(3) of the CPC states:

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104 NE Day 23, p 50.

105 NE Day 23, p 48 at lines 11-20.

> *Explanation 2.* — If a statement is otherwise admissible, it will not be rendered inadmissible merely because it was made in any of the following circumstances:
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> …
>
> (*e*) where the recording officer or the interpreter of an accused's statement recorded under section 22 or 23 did not fully comply with that section. …

74 Faris relied on the following paragraph of the Court of Appeal's decision in *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 ("*Kadar*") at [62]:

> Statements taken in deliberate or reckless non-compliance… in relation to procedural requirements will generally require more cogent explanation from the Prosecution to discharge its burden, as compared to where the irregularities are merely careless or arising from some pressing operational necessity. This would be because the *bona fides* of a recording police officer who deliberately breaches the requirements or knowingly disregards them would necessarily be more questionable. Further, such conduct should not be encouraged. The court should be wary of accepting any explanation by way of ignorance of the correct procedures…

75 However, this did not support a broad proposition that every procedural irregularity or non-compliance would render a statement inadmissible. In the present case, it is not disputed that *Kadar* stood for the existence of a common law discretion to exclude a statement even if voluntarily taken. The test in deciding whether to exercise such a discretion is whether the prejudicial effect of the statement exceeds its probative value (*Kadar* at [55]). This test, while perhaps easy to state, is not so easy to apply. Where the prosecution seeks to rely on a statement, there is bound to be some probative value in it; and where the defence seeks to challenge the admissibility of a statement, it is most likely the case that admitting the statement will lead to some prejudice to the defence's case. But the central inquiry underlying this discretionary power is the court's fundamental concern with the *reliability* of the police statement. Therefore, the

twin factors of "probative value" and "prejudicial effect" must be assessed with this broader question of reliability in mind. This much is clear on a closer reading of *Kadar*, where the Court of Appeal repeatedly stressed the need for the court to be satisfied of the reliability of a statement, including at [55] that "where prejudicial effect exceeds the probative value, *the very reliability of the statement sought to be admitted is questionable*" [emphasis added]. Viewed in this light, it will become apparent that Faris' procedural complaints did not materially impinge on the reliability of either of his statements.

76 Furthermore, as I mentioned (at [56(b)]), it was not clear if Faris' argument was that the procedural breaches in themselves rendered his statement inadmissible, or that they facilitated the recording of an inadmissible statement taken together with the allegedly oppressive acts by SIO Sajari. It appeared that Faris was arguing the latter, since the thrust of his allegation was not so much about inadvertent inaccuracy but rather that he was coerced into signing on the 1st Statement. If so, then his argument must fail as I have rejected his account of the alleged oppression. Even if the argument was of pure procedural irregularity, I was of the view that there was no material irregularity in respect of Faris' 1st Statement for the following reasons.

(a) First, in relation to the language in which the statement should be taken, s 22(3)(*c*) of the CPC clearly states that interpretation must be provided "if the person does not understand English". But it was not the Defence's case that Faris *did not understand* English at the time he gave the statement. Rather, the Defence's case was that Faris would *prefer* to give his evidence in the Malay language (see [71(a)] above).[106] Indeed, having observed and heard Faris in court, it was clear to me that Faris could understand and speak simple English. At various points when

106 NE Day 26, p 68.

giving evidence, Faris would slip into English despite the presence of a court interpreter for the Malay language. Faris' own testimony was that if he could not understand what was said to him in English, he would have clarified or asked for a Malay interpreter at the time his statement was recorded,[107] which he did not. It was also not his case that he had expressed his preference for the Malay language but that ISP Tho had rejected the request. To the contrary, ISP Tho's evidence was that he had asked Faris which language he preferred to converse in prior to the recording of the statement, and that Faris had indicated English.[108] During her oral submissions, counsel for Faris accepted that s 22(3)(*c*) of the CPC did not require the statement-taker to positively ask the accused which language he wanted to give his statement in.[109] Although she suggested that this might be an internal guideline for the police,[110] this was speculative and not put to the Prosecution witnesses.

(b) As for the reading back of the statement, s 22(3)(*b*) requires that a police statement be "read over" to the accused person, even though an explanation is not expressly required. On the evidence, I preferred ISP Tho's version that he had read over the statement to Faris after it was recorded. This account was largely unshaken in court, and it accorded with the paragraph at the end of the statement, where it was stated at two instances that "my statement was read and explained to me".[111] Faris had signed immediately below this paragraph. In any event, Faris agreed that he was given the chance to and had in fact made

107 NE Day 25, p 84 at lines 1-14.

108 NE Day 20, p 46.

109 NE Day 26, p 68.

110 NE Day 26, pp 68-69.

111 NE Day 20, pp 65-66.

amendments to his 1st Statement in his 2nd Statement. In this light, the reliability of the 1st Statement read together with his 2nd Statement is not compromised, and I did not consider that the prejudicial effect of admitting the 1st Statement would be greater than its probative value.

(c) As for the alleged irregularities highlighted at [71(c)] and [71(d)] above, for similar reasons, I was of the view that Faris had been given the opportunity to amend his statement and to confirm its truth and accuracy. In any event, such omissions did not relate to any statutory procedural obligation under the CPC. Faris accepted this,[112] but sought to argue that they nevertheless weighed against the accuracy and hence admissibility of Faris' 1st Statement. I was not persuaded since in any event, as I mentioned, Faris was given the chance to and had in fact made amendments to his 1st Statement when he gave his 2nd Statement.

77 For the foregoing reasons, I held that Faris' 1st Statement was admissible in evidence.

Faris' 2nd Statement

78 Turning to Faris' 2nd Statement, this was recorded by ASP Guruswamy on 16 October 2014 from about 6.50pm to 9.00pm (see [28(b)] above). Faris raised two similar challenges in respect of the voluntariness and admissibility of this statement: (a) that it was taken in circumstances that were oppressive, and (b) that it was procedurally irregular in several aspects.

112 NE Day 26, pp 71-72.

79 Faris' 2nd Statement was 5 pages long and recorded in question-and-answer format. There were a total of 29 sets of questions and answers, of which the following points are material:

(a) Faris indicated that he wanted to add the following facts to paragraph 11 of his 1st Statement (Questions 1 and 2):

> When I went into the toilet on the second floor of the hotel room, I saw [the Complainant] seated inside the bath tub. I went to urinate first at the toilet bowl. I saw that [the Complainant] was drunk. She was already vomiting when we had left the hotel earlier to Zouk. [The Complainant] got out of the bathtub and knocked herself out against the door. This caused the door to be slightly closed. She then stood near the door and was just standing there. I then walked towards her and she fell on me as she could not stand on her own. She then put her hands on my shoulder to support herself. She subsequently leaned back on the door and this caused the door to close. Her face was near my neck. I then lifted up her skirt and I realised that she was not wearing any panties. I opened my pants and underwear and pulled it down to my ankle level. I then started "fucking" her".

He explained that he had not mentioned this in his 1st Statement because he was "scared to admit to my mistake" and that he decided to "come clean" now because he was "feeling scared as to when the truth will come out." (Questions 3 and 4).

(b) Several clarificatory questions then followed. First, Faris clarified that by "fucking", he meant that he had penile-vaginal intercourse with the Complainant (Question 6). As for the issue of consent, Faris provided the following answers:

> **Q9: Did you ask [the Complainant] whether you can have sex with [her]?**
>
> A9: When she leaned on the toilet door and the toilet door closed, I asked her whether I could have sex with her.

> **Q10: Did she give you a reply when you asked her whether you can have sex with her?**
>
> A10: She did not reply. Her eyes were halfway closed and she still appeared drunk.
>
> **Q11: If she did not say yes to you having sex with her, why did you still proceed to have sex with her?**
>
> A11: I don't know. I was just feeling horny and wanted to have sex.

(c) Faris also stated the following observations regarding the condition of the Complainant at the material time:

> **Q18: When you were having sex with [the Complainant] in the toilet, did she look you in the eye?**
>
> A18: She wasn't. Like I mentioned, her face was just bowed down near my shoulder.
>
> **Q19: Was [the Complainant] vomiting when you went up to the toilet?**
>
> A19: I think she stopped vomiting already. But I saw some vomit on the side of the bathtub.
>
> **Q20: Was [the Complainant] in a condition to walk properly or stand up properly?**
>
> A20: I cannot remember really. But I know that she looked drunk and when she walked towards the door, she knocked herself against the door.
>
> **Q21: If [the Complainant] still looked drunk to you, do you think it would have been possible for [her] to have given consent to having sex with you?**
>
> A21: No.
>
> **Q22: If she could not have given consent to you, why did you still proceed to have sex with her?**
>
> A22: I don't know.

80 At the outset, I should mention that several areas of contention raised by Faris had no clear bearing on the voluntariness of his 2nd Statement. They may be summarised as follows:

(a) There was a dispute over the order in which ASP Guruswamy had made certain phone calls in the morning of 16 October 2014 when arranging for Faris to have his statement recorded later in the day. According to ASP Guruswamy, he had made four calls at around 10.35am. His field book, which he said he had updated immediately after making all the calls,[113] showed an entry at 10.35am for Faris' father, his mother, him, and his then girlfriend in that order.[114] On the other hand, Faris' version was that ASP Guruswamy had called only him slightly after 12pm and no one else. Faris submitted that ASP Guruswamy must be lying as it made no sense that he was not recorded as the first person to whom a call was made in his field book. However, ASP Guruswamy explained that he had recorded the entry after making *all* the calls, and thus could not confirm that the order in the field book was the actual sequence in which the calls were made.[115] He also accepted that he could have called Faris first.[116] It did not seem to me obvious that ASP Guruswamy would have known that the sequence in which he recorded the calls would later be contested. There was also no evidence from Faris' mother, father, or then-girlfriend. In any event, the relevance of this dispute was not clear. Even if Faris' version was taken at face value, it only meant that this entry in ASP Guruswamy's field book was not entirely accurate.[117] But it did not mean that any other

113 NE Day 22, p 55 at lines 22-23.

114 See Exhibit TWT-P13.

115 NE Day 22, pp 55-56.

116 NE Day 22, p 56 at lines 13-20.

evidence of ASP Guruswamy was unreliable or that Faris' 2nd Statement was involuntary. Faris' counsel did not elaborate why Faris' argument in this regard was material.

(b) There was also a dispute about the circumstances in which police officers had picked up Faris to escort him back to the PCC for the statement to be taken. Much of this was also irrelevant, such as whether Faris was sitting with his then-girlfriend alone, or with a group of friends at that time. In so far as the escorting officers had apparently made certain threatening statements to Faris, I will consider those later separately (see [82]).

(c) According to Faris, he arrived at the PCC at around 2.00pm. However, before his 2nd Statement was taken, DSP Burhanudeen Bin Haji Hussainar ("DSP Burhanudeen") brought Faris into his office and had a 4-hour long[118] conversation with him about the alleged offences. During this time, DSP Burhanudeen was said to have handed Faris a dildo and asked him to demonstrate how he had sex with the Complainant. According to Faris, ISP Tho entered the office midway through this conversation, and when DSP Burhanudeen referred to the dildo and asked Faris "Big enough or not?", both the police officers laughed.[119] DSP Burhanudeen and ISP Tho denied that this had occurred. DSP Burhanudeen testified that he did not bring Faris into his office and had instead waited with him at a sofa area a short distance from his office.[120] He claimed that he was only with Faris for 25 minutes and so,

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117 NE Day 26, p 62 at lines 15-21.

118 NE Day 25, p 67 at lines 19-26.

119 NE Day 25, p 69 at lines 26-29

120 NE Day 23, p 4.

while there was a short conversation about the alleged offences, there could not have been the extensive interview (including the use of a dildo as a prop) as Faris alleged. This was corroborated by an entry in DSP Burhanudeen's field book which showed that Faris and he had arrived at the PCC at 5.50pm and that he had handed Faris over to ASP Guruswamy at 6.15pm.[121] In so far as Faris could give a broad description of DSP Burhanudeen's office layout, DSP Burhanudeen explained that there was a "huge window" in his office and that his door was always open. Thus, Faris could have seen his office without actually entering it.[122] In my view, DSP Burhanudeen's field book posed a significant obstacle to Faris' claims. There was no suggestion that the entry was incorrect or fabricated. In any case, the relevance of this dispute was again questionable. Faris' point was merely that the use of a dildo made him feel "shy" and "ashamed".[123] But he did not say that this incident had caused him to give his 2nd Statement involuntarily or to make any false allegation in the statement. Even taking his account at face value, that did not amount to oppression sapping his will and negating the voluntariness of the 2nd Statement.

(d) Faris testified that after his 2nd Statement was taken, he told DSP Burhanudeen that he had no money or ez-link card to go home and DSP Burhanudeen gave him some coins. DSP Burhanudeen testified, however, that he had left office at around 8.32pm that evening and was at home by the time Faris' statement-taking ended. Again, these timings were corroborated by his field book. In any case, Faris accepted that this

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121 See Exhibit TWT-P18.

122 NE Day 23, p 19.

123 NE Day 25, p 73 at lines 20-22.

incident did not have any bearing on the 2nd Statement or its voluntariness.[124]

81 In so far as the foregoing areas of dispute were concerned, I agreed with the Prosecution[125] that they were not material to the issue of voluntariness of Faris' 2nd Statement. There were, however, two contentions which warranted closer consideration.

82 The first was Faris' allegation that at the time the escorting officers came to escort him to the PCC for statement recording, two statements were made to him: (a) ASP Guruswamy told him "You can wave goodbye to your girlfriend, you won't see her today", and that (b) subsequently, ASP Lee Tian Huat ("ASP Lee") said to him "just confess, we already have your DNA".[126]

83 In relation to ASP Guruswamy's comment, it was not put to the officer that he had said this to Faris when the officer was cross-examined. Accordingly, I did not believe that the officer had made the comment in question. In any event, even if the comment had in fact been made, I did not think it amounted objectively to a threat, inducement, or promise having reference to the voluntariness of any statement by Faris. Furthermore, it was not suggested that Faris had in fact viewed this statement as a threat to him to cooperate.

84 I also disbelieved Faris' allegation about ASP Lee. ASP Lee denied having spoken to Faris at all.[127] He explained that he could not have told Faris anything about his DNA tests as he did not have sufficient information about

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124 Defence's submissions in the ancillary hearing at para 70.

125 Prosecution's submissions in the ancillary hearing at para 29.

126 Defence's submissions in the ancillary hearing at para 45.

127 NE Day 21, p 49 at lines 13-14.

the case, save that the investigations were for a "gang rape which involved five male persons".[128] Further, if he had spoken to Faris, he would have recorded it on his field diary which did not show such a record.[129] In my view, not much weight could be placed on the second explanation. There could be other reasons for why there was no record of any conversation. For example, if he had in fact made the alleged statement, he would not have been so foolish as to record it. However, I saw some force in ASP Lee's first explanation. Although the statement "we already have your DNA" was not particularly specific, it was premised on factual assumptions of which only one who was familiar with the state of investigations would be aware. I did not think that ASP Lee would be foolish enough to make that statement in order to deceive Faris, when such an approach might backfire in that Faris might then know that ASP Lee was bluffing. It was not Faris' case that ASP Lee had a larger role in this case than he claimed. Furthermore, Faris also did not explain how such a statement had operated subjectively on his mind and made him give an involuntary statement.

85 The second contention was Faris' claim that ASP Guruswamy did not accurately record in the 2nd Statement what Faris had told him. Instead, the officer had allegedly consistently denied Faris' account and recorded a different version from what Faris had said. For example:[130]

(a) At Question 2, Faris claimed to have said that the Complainant got out of the bathtub *on her own*, and that *she* had unbuttoned and unzipped his pants. However, ASP Guruswamy did not record these italicised nuances accurately in the 2nd Statement (see [79(a)] above).

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128 NE Day 21, p 49 at lines 19-21.

129 NE Day 21, p 52 at lines 10-20.

130 Defence's submissions in the ancillary hearing at para 58.

(b) At Question 5, Faris claimed to have stated that he could not sleep properly because he had lied in his 1st Statement, but ASP Guruswamy instead recorded that Faris "cannot [*sic*] sleep properly since this case started".

(c) At Question 21, Faris claimed not to have said "no", and had instead told ASP Guruswamy that the girl looked high and that she had started it. ASP Guruswamy had failed to include this in the statement.

86 I did not accept this contention for three main reasons. First, as the Prosecution pointed out, the 2nd Statement was taken in a question-and-answer format, and several questions flowed from the preceding answer. It would thus not have made sense if the answers were not recorded accurately. For instance, Questions 4 and 5 flowed as follows:

> Q4: What were you scared of?
>
> A4: I was scared to admit to my mistake.
>
> Q5: If you were scared of admitting to your mistake, what made you decide now to tell me the truth?
>
> A5: I cannot sleep properly ever since this case started. When I report for bail, I was always feeling scared as to when the truth will come out. That is why I decided to come clean on what I did.

87 Question 5 started with "If you were scared of admitting to your mistake", which was the exact answer in Answer 4. But Faris claimed in examination-in-chief that, in relation to Question 4: "I did say that I was scared. But I was---I also told him that I was scared that the girl would tell the police a different story."[131] When pressed in cross-examination on how the reference to "mistake" could appear in Question 5 if that had not been provided in Answer 4,

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131 NE Day 24, p 8 at lines 11-12.

Faris insisted that he had never used the word "mistake" and that he thought that the questions were unrelated.[132]

88 I did not believe Faris' explanation. Question 5 was clearly premised on Answer 4. There was no reason for ASP Guruswamy to have framed Question 5 as such if Answer 4 had not referred to a "mistake". There was also no reason for Faris not to have at least raised some queries if ASP Guruswamy had erroneously referred to a "mistake" when that was not what Faris said.

89 Furthermore, Question 5 was not the only instance of a "follow up" question. Question 21, for instance, started with "If [the Complainant] still looked drunk to you, do you think…" This was a clear reference to Answer 20, which I reproduced in full above at [79(c)] and contained a reference that "I know that she looked drunk…" According to Faris, what he had in fact told ASP Guruswamy was that "the girl could stand up on her own at the bathtub and got out of the bathtub on her own. And the girl was the one who came to me and lean against my body. That was when I fell backwards and hit the door".[133] If Faris' present account was to be believed, Question 21 would have made no sense at all. And it would not have been logically possible for Faris to provide an answer to Question 21, even if he thought Questions 21 and 20 were wholly distinct questions, which was itself unbelievable.

90 Secondly, Faris was not consistent in his own testimony of how ASP Guruswamy had distorted the contents of his statement. For instance, Faris insisted that in Answer 20, he did not use the word "drunk" and had only described the Complainant as "high". But Faris had already used the word "drunk" to describe the Complainant in Answer 2: "… I saw that [the

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132 NE Day 26, p 8.

133 NE Day 25, p 4 at lines 1-3.

Complainant] was drunk. …" When pressed in cross-examination to explain why he did not say that the reference to "drunk" in Answer 2 was also erroneous when specifically asked by his counsel in examination-in-chief as to the accuracy of that answer, Faris explained "[b]ecause I thought I have explained that I did not use the word 'drunk' to [ASP Guruswamy]. I only used the word 'high' to [ASP Guruswamy]."[134] This was simply incredible. Faris was asked about the accuracy of Answer 2 before he was asked about Answer 20.[135] He did not deny the accuracy of Answer 2. Yet he was certain that he did not use "drunk" for Answer 20.

91 Thirdly, Faris' conduct in response to ASP Guruswamy's alleged manipulation of his 2nd Statement contradicted his claim that such manipulation had in fact occurred. According to Faris, even though he felt something was wrong and that his answers were not being recorded properly, he did not raise any issues and simply continued to answer the questions.[136] Indeed, at the end of the recording, he had an opportunity to read the first four or five lines of the statement and allegedly knew in fact that it was inaccurately recorded. Yet, Faris made no protest and signed each page of the statement dutifully.[137] Once again, Faris said that he did not raise the issue because he had an absolute regard for the authority of the police. For similar reasons as I have explained above (see [66]-[68]), I did not accept this explanation. In fact, by the time of his 2nd Statement, Faris clearly knew that the investigations against him were for serious offences involving harsh consequences, and that was so pressing on his mind that he had even decided to come clean and amend his 1st Statement to admit sexual intercourse (albeit on a consensual basis) rather than to deny

134 NE Day 26, p 19 at lines 3-4.

135 NE Day 24, pp 5-8; Day 25, pp 3-4.

136 NE Day 26, p 12.

137 NE Day 26, pp 12-14.

intercourse entirely.[138] Against that backdrop, it was not believable that he would then have been content to let incriminating inaccuracies in his 2nd Statement remain without raising any concerns immediately or subsequently complaining to the police, his parents, or his then-girlfriend.

92 Turning to the issue of procedural breaches, Faris made the following allegations in relation to his 2nd Statement which significantly overlapped with those he made in relation to the 1st Statement (see [71] above). Again, it was not entirely clear whether his argument was that these breaches in themselves negated the admissibility of his 2nd Statement, or that they, taken together with the allegedly oppressive conduct negated such admissibility. However, neither argument succeeded as I had rejected his account of the allegedly oppressive acts and, in any case, I did not agree that there had been any material procedural breach:[139]

(a) As was the case with his 1st Statement, Faris said that he was not asked which language he wished to give his 2nd Statement in. If he had been given a choice, he would have indicated a preference for Malay. For reasons as I stated above (see [76(a)]), I did not consider this a breach of s 22(3)(*c*) of the CPC. As I explained, the question was not one of preference but one of whether he could not understand English. It was Faris' own evidence that he could understand simple English and that if he did not understand he would have sought clarification or an interpreter. Faris also said that he believed ASP Guruswamy would have arranged for a Malay interpreter if he had asked for one.[140] In any case, it was recorded on ASP Guruswamy's field diary that "[b]efore

138 NE Day 25, pp 79-80.

139 Defence's submissions in the ancillary hearing at paras 59 and 65.

140 NE Day 25, p 84 at lines 15-23.

recording [the 2nd Statement], [ASP Guruswamy] double checked with [Faris] if he is comfortable in giving his statement in English and whether or not he requires a Malay interpreter".[141] Nothing before me cast doubt on the accuracy or reliability of this entry.

(b) Faris claimed that after the statement was recorded, it was not read back or explained to him. He was also not given a chance to read or amend his statement, or informed that he had the option of doing so. As I explained above (see [76(b)] above), the only statutory duty was for the statement to be "read over" to the accused after it was taken. In the present case, there was evidence that the statement was read over to him: (a) in the statement itself, a handwritten paragraph close to the end stated that "The statement was read over to me in English by [ASP Guruswamy]" and Faris' signature was appended both above and below this paragraph; and (b) in ASP Guruswamy's contemporaneous field diary it was recorded that "I read over the statement to Faris and he also read through it and made one amendment to his statement".[142] I did not think the reliability of these could be rebutted by Faris' belated complaints. Faris submitted that the statement could not have been read over to him because there remained obvious mistakes such as a reference to "first floor of the toilet" when that clearly meant the "first floor of the Room".[143] I did not think such an inference, or any other conclusion of unreliability, could be drawn from the mere existence of typographical errors which did not appear material.

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141 See Exhibit TWT-P13; NE Day 24, p 85.

142 See Exhibit TWT-P13.

143 Defence's submissions in the ancillary hearing at para 67.

(c) Faris also complained that he had not been expressly given an option of not signing his statement. In my view, there is no basis for this requirement in the CPC, or indeed in common sense.

93 For the above reasons, I concluded that Faris' 2nd Statement was admissible in evidence.

Ancillary Hearing in respect of Asep's statement

94 Asep challenged the admissibility of his 2nd Statement only. This was taken by ASP Guruswamy on 16 October 2014 from about 9.11pm to 11.15pm. Two grounds of challenge were raised:[144]

(a) that the statement was given under oppressive conditions and was therefore not voluntary; and/or

(b) that procedural irregularities in the course of statement-taking rendered the prejudicial effect of the statement greater than its probative value.[145]

95 Asep's 2nd Statement was recorded in the English language and contained responses to a total of 37 questions over six pages. The material parts included:[146]

(a) Asep indicated that he wished to make certain amendments to his 1st Statement (Questions 1 to 4). In his 1st Statement, he had denied having any sexual activity with the Complainant. In this 2nd Statement, he admitted that, after Faris left the bathroom, he went into the bathroom

144 See Exhibit P205 at pp 1 and 6.

145 NE Day 31, pp 23-24.

146 See Exhibit P205.

and received fellatio from the Complainant, as well as attempted to have penile-vaginal intercourse with her. However, in his 2nd Statement, his portrayal of the facts suggested that the Complainant was able to give consent and had in fact given consent to the sexual acts.

(b) Asep also made observations as to the condition of the Complainant at and around the time of the alleged offences:

> Q10: The first time you went inside the toilet before Faris returned to the hotel, which part of the toilet was [the Complainant] in?
>
> A10: She was in the bathtub.
>
> Q11: What was she doing?
>
> A11: She was at the bathtub vomiting and there was vomit all over the bathtub.
>
> Q12: How would you describe her condition?
>
> A12: She was drunk and she seemed to be sleepy state.
>
> Q13: When Faris went into the toilet subsequently, do you think [the Complainant] was in a state to have sex with anyone or have given consent to have sex?
>
> A13: I don't think so.
>
> Q14: Can you explain your reasons on why you don't think [the Complainant] was in a state where she could have had sex or could not have given consent to sex?
>
> A14: It is because when I saw her earlier in the toilet, she was drunk and she seemed tired.
>
> Q15: Do you think she was in a state to have had sex or given consent to you when you went inside the toilet after Faris?
>
> A15: Yes I think so.
>
> …
>
> Q32: You mentioned in your first statement in your answer to question 10 that the last time you saw [the Complainant], she was very drunk in the bathtub and she was vomiting. Is this correct?

A32: Yes it is correct.

Q33: If she was very drunk in the bathtub and she was vomiting the last time you saw her, could she have consented to have sucked your dick?

A33: Yes she could have.

96 Asep's argument concerning oppression was founded on his account of four sets of events, all on the day of 16 October 2014, which may broadly be summarised as follows:[147]

(a) *The Call Allegation*: Asep alleged that at about 6pm, he received a call from ASP Guruswamy who informed him that his case was closed and that he was required to sign some documents.[148] ASP Guruswamy then informed Asep that he would be coming down to Asep's residence. Fifteen minutes later, Asep went to the void deck below his residence.[149] Asep alleged that he then received a call from an unknown number, later ascertained to belong to ASP Lee, directing him to walk to the car park.[150] He expected to meet ASP Guruswamy but was surprised when he was instead met by three unknown police officers – ASP Lee, Inspector Thinagaran Krishnasamy ("Insp Thinagaran") and Senior Staff Sergeant Lim Kar Wui ("SSS Lim").[151]

(b) *The Assault and Threat Allegations*: In the car, Insp Thinagaran was seated in the front passenger seat, ASP Lee was seated in the right rear passenger seat, and Asep was seated in the left rear passenger seat.[152]

147 NE Day 31, p 25 at lines 5-16.

148 NE Day 29, p 3 at lines 4-11.

149 NE Day 29, p 3 at lines 8-15.

150 NE Day 29, p 3 at lines 16-23.

151 NE Day 31, p 26 at lines 27-29.

152 NE Day 29, p 4 at lines 3-4.

Asep alleged that on the way to the PCC, ASP Lee asked him to tell him the truth about the case. ASP Lee then hit him on the chest with his left elbow. ASP Lee also allegedly told him "Your case is very small. [ASP Guruswamy] handles kidnappers and murderers. You think you want to lie to me? No point lying to me."[153]

(c) *The Pre-Interview Allegation*: On arriving at the PCC, Asep was put into a room with DSP Burhanudeen. Asep alleged that he was alone with DSP Burhanudeen, who then took out a dildo and threw it on top of the table. DSP Burhanudeen then asked Asep to "demonstrate how [Asep] had sex with the girl" before demonstrating a "doggy position" with the dildo.[154] Asep told him what had transpired between him and the Complainant while they were in the bathroom. At this point, ASP Chris Lee opened the door and informed, "Sir, the special room is ready" to which DSP Burhanudeen replied, "It's okay, Asep is ready to tell the truth. Get ASP Guruswamy to take down his statement".[155]

(d) *The Interview Allegation*: After being brought out of DSP Burhanudeen's office, Asep alleged that he saw Insp Thinagaran and ASP Lee showing each other videos on their phones.[156] He was then brought to ASP Guruswamy's cubicle for the recording of his statement.[157] During the recording, ASP Guruswamy asked Asep leading questions in an aggressive manner which made him so fearful that he could only agree with ASP Guruswamy's suggestions.[158]

153 NE Day 29, p 4 at lines 5-10.

154 NE Day 29, p 4 at lines 12-16.

155 NE Day 29, p 4 at lines 18-27.

156 NE Day 29, p 5 at lines 6-7.

157 NE Day 29, p 5 at lines 9-10.

158 NE Day 31, p 15 at lines 16-17.

97 The Prosecution's case was, in essence, that Asep's allegations were fabrications and that, in any event, there was objectively no oppression.

98 In my view, there was no oppression in relation to Asep's 2nd Statement as the Assault and Threat Allegations were fabricated by Asep. As for the other allegations, I did not believe them and/or they would not have constituted oppressive conduct as envisioned in s 258 of the CPC such as to make Asep's statement inadmissible.

99 In relation to the Assault and Threat Allegations, ASP Lee's evidence was that on 16 October 2014 at about 6pm, together with SSS Lim and Insp Thinagaran, he picked Asep up at the car park in front of Asep's residence at about 6.53pm before travelling back to the PCC. During the journey, the police officers chatted amongst themselves and none of them engaged Asep in conversation. ASP Lee did not use his left elbow to hit Asep on the chest or utter any threat.[159] Upon reaching the PCC, Asep was escorted to DSP Burhanudeen's office at about 7.53pm.[160] ASP Lee's evidence on the timeline of events was supported by contemporaneously recorded entries in his field book.[161] SSS Lim and Insp Thinagaran also corroborated ASP Lee's account, testifying that they did not see ASP Lee elbow Asep or hear any sound from the blow.[162] They further testified that they did not hear ASP Lee uttering the alleged threatening words to Asep.[163]

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159 NE Day 27, p 66 at lines 26-28.

160 NE Day 27, p 73 at lines 8-11.

161 NE Day 27, pp 72-74.

162 NE Day 28, p 7 at lines 13-15; Day 28, p 16 at lines 24-27.

163 NE Day 27, pp 66-67; Day 28, pp 6-8, pp 16-17.

100 Weighing the evidence of Asep against that of the Prosecution's witnesses, I was of the view that the Assault and Threat Allegations were a self-serving fabrication by Asep for four main reasons.

(a) First, Asep urged me not to accept ASP Lee's account as ASP Lee was allegedly "agitated" when questioned on these allegations in cross-examination and was also folding his arms tightly and "turning red".[164] This was said to indicate a "guilty mind" on ASP Lee's part.[165] I did not agree that there was any conduct or demeanour on ASP Lee's part in court that was out of the ordinary or suggestive of guilt.

(b) Second, it was also argued that Asep had nothing to gain by claiming that he was assaulted by ASP Lee.[166] I disagreed. Asep's statement was incriminating and its rejection would have dealt a blow to the Prosecution's case.

(c) Third, I was urged to accept that the testimony of Asep's fiancée, Ms Nurul Syafiqah Binte Sahlan ("Nurul"), corroborated Asep's account. Asep produced phone records of a call he made to Nurul at 11.23pm on 16 October 2014, a short time after he had given his 2nd Statement.[167] Nurul's evidence was that Asep had told her about the alleged police misconduct in this phone call. According to her, Asep was crying and contemplating suicide because the police did not believe him, but she was able to convince him not to do so. Nurul further testified that she met with Asep the next day where he detailed some of the abuses he suffered at the hands of the police, including how he had been

164 NE Day 31, p 26 at lines 18-20.

165 NE Day 31, p 26.

166 NE Day 31, p 26 at lines 23-24.

167 NE Day 30, p 56 at lines 2-11.

elbowed in the chest.[168] However, I did not place much weight on the evidence of Nurul, given the following factors:

(i) One, Nurul was not an entirely independent witness as she was Asep's fiancée.

(ii) Two, when confronted by the Prosecution with phone logs showing that her call with Asep had lasted only ten minutes, Nurul said that she was busy at that time and had to instead resort to texting Asep.[169] However, she was unable to provide any explanation as to what had cropped up to stop the conversation. I found it hard to believe that, being on the phone with her boyfriend who had just told her that he was contemplating suicide, something so urgent came up that it required her to cut their conversation short.[170] Furthermore, Nurul also did not elaborate on why she did not call Asep back but instead had to text him. Even then, no text messages were produced to establish that Nurul and Asep did in fact have such a text conversation.

(iii) Three, Asep's testimony also differed from Nurul's in material aspects.[171] Asep testified that Nurul was on the phone throughout his journey home,[172] while Nurul said that the call lasted only ten minutes. Asep also testified that he had told Nurul "everything" about the improper recording of the statement,[173] while Nurul stated that he had only complained that the police

168 NE Day 30, pp 62-63, p 74 at lines 3-9.

169 NE Day 30, p 75 at lines 4-20.

170 NE Day 30, p 75 at lines 16-27.

171 NE Day 31, pp 20-22.

172 NE Day 29, p 20.

173 NE Day 30, p 41.

"didn't want to believe him".[174] These material discrepancies cast further doubt on both Asep's and Nurul's accounts.

(d) Fourth, I also found it implausible that, having suffered such egregious abuse at the hands of the police, Asep did not see it fit to inform anyone else apart from Nurul or make a complaint until, belatedly, the time for his challenge of the admissibility of his 2nd Statement.[175] While Asep said that he had informed his mother about the alleged assault, he notably did not elect to call her as a witness.[176]

101 I now address the remaining allegations:

(a) First, with regard to the Call Allegation, I did not see how even if Asep was surprised to have been picked up by three "unknown police officers", or that he was initially told that his case was "closed" before later being asked to record a further statement, could be considered oppression capable of sapping his will. While Asep was insinuating that these events affected him, he did not actually say that they rendered his statement involuntary. Neither did Asep elaborate as to why this sapped his will.

(b) Second, with regard to the Pre-Interview Allegation, I did not believe Asep's account. DSP Burhanudeen testified that he interviewed Asep in his office between 7.53pm and 8.20pm and that the door to his office was open at all times.[177] During this interview, Asep recounted

174 NE Day 30, p 83 at lines 19-25.

175 NE Day 29, p 36 at lines 10-11.

176 NE Day 29, p 35 at lines 1-4.

177 NE Day 28, p 36 at lines 11-13.

that the Complainant had performed oral sex on him consensually and did not discuss any other details.[178] DSP Burhanudeen denied that he had utilised a dildo at any point during the interview. DSP Burhanudeen and ASP Lee also testified that the latter did not interrupt the interview to inform the former that the "special room" was ready.[179] Further, it was not put to ASP Lee and Insp Thinagaran that the Pre-Interview Allegation was true even though they were both in a position to have heard or seen the alleged acts, having both testified that the door to DSP Burhanudeen's office was open at all times and that they were seated outside the office during the interview.[180] In any case, I failed to see how DSP Burhanudeen's alleged use of the dildo, or ASP Lee's supposed vague references to a "special room", had sapped Asep's will with regard to his 2nd Statement which was recorded by ASP Guruswamy without either of them being present. Again, Asep did not actually say that this incident had sapped his will. Nor did he elaborate as to why it had rendered his statement involuntary.

(c) Finally, with regard to the Interview Allegation, the only allegation made against ASP Guruswamy was that he had asked Asep leading questions in an aggressive manner. ASP Guruswamy denied this allegation, which was short on elaboration. Hence, I did not believe the Interview Allegation.

102 Asep also alleged the following procedural irregularities in the recording of his 2nd Statement:

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178 NE Day 28, p 38 at lines 8-11.

179 NE Day 27, p 70.

180 NE Day 27, p 72; Day 28, p 18.

(a) ASP Guruswamy did not read over the statement to him as is required by s 22 of the CPC.[181]

(b) ASP Guruswamy did not get Asep to countersign against a handwritten amendment made to the written statement.[182]

(c) ASP Guruswamy had added the handwritten paragraph at the end of the 2nd Statement, which acknowledged that the statement was accurately recorded without any threat, inducement or promise, at a later date as it was not present at the time when Asep signed the statement.[183]

(d) ASP Guruswamy did not allow Asep to make amendments to his statement but had rather fabricated portions of his statement and pressured him to sign it.[184]

103 So far as Asep's allegations of procedural irregularities were concerned, I was of the view that they were either untrue and/or they did not render the prejudicial effect of the statements greater than its probative value. I have reproduced s 22 of the CPC, pursuant to which Asep's 2nd Statement was taken, at [72] above.

104 First, I found that ASP Guruswamy had complied with the requirement in s 22(3)(*b*) of the CPC for him to read over the statement to Asep. Asep alleged that ASP Guruswamy had only allowed him to read the statement himself, but did not read the statement over to him.[185] On the other hand, ASP Guruswamy

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181 NE Day 31, pp 23-24.

182 NE Day 28, p 66 at lines 2-5.

183 NE Day 30, pp 44-45.

184 NE Day 30, pp 38-40.

185 NE Day 29, p 5 at lines 29-30.

gave evidence that after the statement recording was completed at around 11.06pm on 16 October 2014, he read the statement over to Asep *and* thereafter handed it to Asep for him to read it himself. Asep finished reading the statement at 11.15pm and signed it.[186] During cross-examination, much was made of the fact that it would have been impossible for ASP Guruswamy to read over the six-page statement to Asep, and then allow Asep to read the statement for himself, all within nine minutes.[187] In my view, this was speculative. Counsel for Asep could have asked ASP Guruswamy to read over the statement to demonstrate the time needed to do so and to buttress her case of impossibility, but she did not do so.[188] In any event, there was evidence that ASP Guruswamy had made amendments to the statement at Asep's request. This must have been done either during the reading over of the statement or when Asep read the statement for himself.[189]

105 Second, while ASP Guruswamy omitted to get Asep to countersign against an amendment to Answer 2 of the statement, this irregularity did not have the effect of making the statement's prejudicial effect outweigh its probative value.

(a) There is no express provision in the CPC requiring an accused person to countersign against every amendment although this would be the sensible approach to take.

(b) In any event, as I stated above at [75], a statement's prejudicial effect would exceed its probative value where there were genuine concerns as to its reliability. Statements taken in deliberate or reckless

186 NE Day 28, pp 79-82.

187 NE Day 28, pp 80-81.

188 NE Day 31, p 36 at lines 17-18.

189 NE Day 28, p 82 at lines 20-30.

non-compliance of procedural requirements without a reasonable explanation would fall within this category and be excluded (see *Kadar* at [61]-[62]). However, this was not the case here. The only procedural irregularity pertained to the fact that Asep had not countersigned against an amendment which he did not disavow. Further, the amended answer, that the Complainant "held [Asep's] dick and put [*sic*] in her mouth", appeared favourable to Asep as it implied that the Complainant had consensually performed fellatio on Asep, while the original answer, that Asep "put [his] dick into [the complainant's] mouth", suggested that he could have done so against the Complainant's will. In any case, Asep did not suggest that the amended answer was less favourable to him. ASP Guruswamy conceded that the omission to get Asep to countersign against the amendment was an oversight on his part.[190] In my view, ASP Guruswamy's explanation was credible, and the oversight certainly did not amount to a "blatant disregard of the procedure" such as to warrant an exclusion of the statement.[191]

106 Third, I did not accept Asep's evidence that the handwritten paragraph at the end of the statement was only added by ASP Guruswamy at a later date. A perusal of Asep's statement shows that he had signed twice on the final page of the statement, once after his answer to the final question posed to him and before the handwritten paragraph, and once again at the bottom of the handwritten paragraph. If Asep's version is to believed, this would mean that when ASP Guruswamy had asked Asep to sign twice on the final page, there was a significant gap between the signatures in which ASP Guruswamy would later fill with the handwritten paragraph.[192] This seemed unlikely. More

190 NE Day 28, p 66 at lines 2-6.

191 NE Day 31, p 35 at lines 21-29.

192 NE Day 29, p 19 at lines 14-29.

importantly, this allegation was not put to ASP Guruswamy during cross-examination and it only arose subsequently during Asep's examination-in-chief. In any event, the handwritten paragraph stated that the statement was recorded accurately without any threat, inducement or promise. Even if it was inserted belatedly, it had no material bearing on the issue of the voluntariness of Asep's 2nd Statement if the statement was otherwise voluntarily given.

107 Fourth, I was not persuaded by Asep's argument that ASP Guruswamy had refused to make amendments to Asep's statement and fabricated certain portions of his answers.[193] Asep attempted to show that the answers were not his as he could not possibly have used certain phrases such as "contrary to what I had said", "prior to this", and "held".[194] ASP Guruswamy's testimony was to the contrary. It seemed to me illogical for ASP Guruswamy to have volunteered apparently exculpatory answers on behalf of Asep (see [105(b)] above) if his goal was, as Asep suggested, to incriminate Asep. Further, this was a belated allegation on Asep's part. Even Nurul, the only person Asep had allegedly informed about the police misconduct, did not know about this.[195] It also became clear in the course of the ancillary hearing that Asep possessed a reasonable grasp of the English language and could have used the phrases which he sought to deny. Accordingly, I disbelieved Asep's account that ASP Guruswamy had fabricated parts of his 2nd Statement.

108 Finally, I should mention that Asep had wavered as to whether he ought to challenge the admissibility of this statement. He raised the challenge in his amended Case for the Defence served on 22 April 2016. However, midway through the trial on 11 September 2017, Asep indicated that he would no longer

193 NE Day 28, pp 62-83.

194 NE Day 28, pp 63-64.

195 NE Day 30, p 83.

be mounting the challenge. He later resiled from this position and once again challenged the admissibility of the statement on 26 September 2017.[196] There was no explanation provided by him as to these changes in position. In my view, this negatively affected his credibility. Indeed, if it were true, as he claimed, that the police misconduct was so egregious that he had intended to commit suicide after giving his 2nd Statement, there would be no conceivable reason as to why he would waver about a challenge to the admissibility of his statement.

109 For the foregoing reasons, I held that Asep's 2nd Statement was admissible in evidence.

My decision on the charges

The applicable law

110 Before I turn to the charges proper, I deal first with the law on three areas which arise in relation to several of the charges that will be discussed: (a) the standard of scrutiny of the Complainant's evidence, (b) the definition of and the principles assisting the determination of consent, and (c) the defence of mistake of fact.

Standard of scrutiny

111 In all criminal cases, the burden lies on the Prosecution to prove the elements of the charge beyond a reasonable doubt. In particular, in cases where a conviction turns solely on the bare words of the complainant, the complainant's testimony must be weighed against that of the accused, and the court should not convict unless it finds on a close scrutiny that the evidence of

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196 NE Day 31, pp 7-9.

the complainant is unusually convincing. As the Court of Appeal explained in *AOF v Public Prosecutor* [2012] 3 SLR 34 ("*AOF*") at [111]:

> It is well-established that in a case *where no other evidence is available*, a complainant's testimony can constitute proof beyond reasonable doubt… but only when it is so 'unusually convincing' as to overcome any doubts that might arise from the lack of corroboration…
>
> [emphasis added]

112 The "unusually convincing" standard is a cognitive aid and does not change the ultimate standard of proof required of the Prosecution (*XP v Public Prosecutor* [2008] 4 SLR(R) 686 at [31]; *Haliffie bin Mamat v Public Prosecutor and other appeals* [2016] 5 SLR 636 at [29]). If the complainant's evidence is not unusually convincing, a conviction based solely on his or her bare words would be unsafe unless there is adequate corroboration of his or her testimony (*AOF* at [173]).

113 The preliminary question in this case, however, is whether the unusually convincing standard even applies. I note the assumption shared by the parties that the standard applies to all of the charges in contention. Perhaps it was thought that this standard would apply to all sexual offences where there is an allegation and a denial to be weighed. But the question of applicability of this standard is, in my view, more nuanced, and regard must be had to the reason for the development of the standard in the first place: to ensure that a conviction can safely be sustained *solely* on the testimony of the complainant because *no other evidence is available*.

114 Bearing this in mind, I am of the view that the unusually convincing standard does not apply to any of the charges in the present case.

115 In relation to the alleged offences in the bathroom on the second floor, the standard does not apply because there is other evidence available, which indeed is relatively extensive. This includes the expert opinions, the testimonies of the other witnesses present at the party, and the prior statements of the accused persons to the police. This is, therefore, not a case where there is no other evidence and the court must simply weigh the Complainant's word against the accused's.

116 In relation to the charges concerning the alleged offences in the living room, the unusually convincing standard is also not engaged. Although unlike the charges relating to the offences in the bathroom, the Prosecution's case here involves reliance at least in part on the Complainant's testimony as to the events that transpired in the living room, it remains inappropriate to apply the unusually convincing standard given that there is evidence in other forms, apart from the complainant's testimony, that is relevant to the charge, including, again, the expert opinions, the other witnesses' testimonies, and the police statements of the accused persons.

117 In any event, the burden of proof remains indisputably on the Prosecution to establish each element of the charge beyond a reasonable doubt. In that light, whether the standard applies or not as a cognitive aid, it remains incumbent on the court to carefully examine all the evidence placed before it and determine if that legal standard of proof has been satisfied.

Consent

118 Turning more specifically to the question of consent, the material provision is s 90(*b*) of the PC, which provides as follows:

> **Consent given under fear or misconception, by person of unsound mind, etc., and by child**

> 90. A consent is not such a consent as is intended by any section of this Code —
>
> …
>
> (*b*) if the consent is given by a person who, from unsoundness of mind, mental incapacity, intoxication, or the influence of any drug or other substance, is unable to understand the nature and consequence of that to which he gives his consent; or
>
> …

119 As can be seen, the statute defines consent in the negative: intoxication can *negate* consent if the person is "unable to understand the nature and consequence to which he gives his consent". In *Pram Nair v Public Prosecutor* [2017] 2 SLR 1015 ("*Pram Nair*") at [96], the Court of Appeal laid down the following principles on the construction and application of s 90(*b*):

> We would identify the following as the relevant general principles:
>
> (a) Under s 90(*b*), a person who is unable to understand the nature and consequence of that to which that person has allegedly given his consent has no capacity to consent.
>
> (b) The fact that a complainant has drunk a substantial amount of alcohol, appears disinhibited, or behaves differently than usual, does not indicate lack of capacity to consent. Consent to sexual activity, even when made while intoxicated, is still consent as long as there is a voluntary and conscious acceptance of what is being done.
>
> (c) A complainant who is unconscious obviously has no capacity to consent. But a complainant may have crossed the line into incapacity well before becoming unconscious, and whether that is the case is evidently a fact-sensitive inquiry.
>
> (d) Capacity to consent requires the capacity to make decisions or choices. A person, though having limited awareness of what is happening, may have such impaired understanding or knowledge as to lack the ability to make any decisions, much less the particular decision whether to have sexual intercourse or engage in any sexual act.

> (e) In our view, expert evidence – such as that showing the complainant's blood alcohol level – may assist the court in determining whether the complainant had the capacity to consent.

120 A landmark decision on the issue of consent in sexual offences is *Ong Mingwee v Public Prosecutor* [2013] 1 SLR 1217 ("*Ong Mingwee*"). Here, one important issue was whether the victim was so intoxicated that she could not have given her consent for sexual intercourse with the accused. The High Court analysed the surrounding circumstances and found that the victim was able to provide such consent even though she was intoxicated at the material time. Relevant facts included her "deliberate and considered" decision to enter a taxi with the accused outside the club prior to the alleged offence (at [28]), and the passage of time between her consumption of alcohol and the alleged offence which meant that she "would have started to sober up" (at [28]).

Defence of mistake of fact

121 Section 79 of the PC provides for the general exception of defence as to mistake of fact, and it provides as follows (omitting the illustrations):

> **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.

122 To establish this defence, the accused person bears the burden of showing, on a balance of probabilities, that "by reason of a mistake of fact… in good faith" he believed himself to be justified by law to engage in the relevant sexual activity with the complainant (see *Public Prosecutor v Teo Eng Chan and others* [1987] SLR(R) 567 at [26]; *Pram Nair* at [110]). This provision is supplemented by the following:

(a) In the present case, the justification by law refers to the consent of the Complainant to engage in that sexual activity with the relevant accused.

(b) The concept of "good faith" is defined in s 52 of the PC in a negative formulation:

> Nothing is said to be done or believed in good faith which is done or believed without due care and attention.

(c) Under s 26 of the PC, a person has "reason to believe" a thing "if he has sufficient cause to believe that thing, but not otherwise".

123 Therefore, for the defence of mistake of fact as to consent to succeed, it appears that the Defence must show on a balance of probabilities that:[197]

(a) there was sufficient cause for the relevant accused person to believe that the Complainant consented;

(b) the accused had exercised due care and attention; and

(c) the accused's belief was in good faith.

124 It may be that these are overlapping inquiries, but it appears that they are nevertheless conceptually distinct requirements in law.

125 With these in mind, I turn to address the charges in the chronological order in which the offences are alleged to have occurred.

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197 Faris' closing submissions at para 20.

4th Charge – Faris, bathroom, penile-vaginal penetration

126 I start first with the 4th Charge under s 375(1)(*a*) of the PC, which is that against Faris for rape (*ie*, penile-vaginal penetration) of the Complainant in the bathroom on the second floor of the Room sometime in the morning of 26 January 2014 (see [3(a)] above). The relevant provision reads as follows:

> **Rape**
>
> 375.—(1) Any man who penetrates the vagina of a woman with his penis —
>
> (*a*) without her consent; or
>
> (*b*) with or without her consent, when she is under 14 years of age,
>
> shall be guilty of an offence.
>
> (2) Subject to subsection (3), a man who is guilty of an offence under this section shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to fine or to caning.

127 In essence, the Prosecution's case was that the Complainant was severely intoxicated at the material time and therefore could not have, and did not in fact, consent to sexual intercourse with Faris.

128 Faris did not dispute that sexual intercourse had occurred in the bathroom, but his evidence was that the Complainant had actively initiated and participated in the sexual activity with him. His evidence in court is summarised below at [154]. The defence was that the Complainant was at the material time of the alleged offences merely suffering from anterograde amnesia (also referred to as a "blackout"), wherein she lost her ability to record memories of events but did not lose consciousness or the ability to consent. Therefore, even though she could not remember as such, the Complainant had in fact consented to sexual intercourse and/or had conducted herself in a manner that led Faris to believe that she had consented to sexual intercourse.[198] A comprehensive

definition of anterograde amnesia, which is consistent with the undisputed explanation of the condition by Dr Guo in the present case,[199] was set out in the following terms in *Public Prosecutor v Azuar Bin Ahamad* [2014] SGHC 149:

> [15] Anterograde amnesia is a state in which a person is unable to form new memories. Events are not recorded to memory, and a person in this state will have no recollection of anything that happens to her. She may even engage in activity and have no idea afterwards that she had done anything at all. …
>
> …
>
> [17] It must be highlighted that a person under these effects is not necessarily unconscious. There is a spectrum of sedation that stretches from minimal sedation to general anaesthesia. Anterograde amnesia can be induced at the stage of conscious sedation (or moderate sedation). In that stage, the person retains a purposeful response to verbal or tactile simulation, and yet has no recollection of those conscious responses made. …

129 Accordingly, the main issues in dispute are (a) whether the Complainant had the capacity to consent to sexual intercourse at the material time; (b) if so, whether she in fact consented to such intercourse; and (c) whether Faris could rely on the defence of mistake of fact.

Consent

(1) Expert opinions

130 I begin by considering the expert evidence.

131 The Prosecution's expert was Dr Guo, who was the Senior Consultant Psychiatrist and Head of Research in the Department of Addiction Medicine at the IMH and had been working with IMH's Department of Addiction Medicine

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198 Faris' closing submissions at para 8.

199 See Exhibit P181.

for more than 13 years.[200] He had also specialised in the area of addiction medicine for more than 20 years.[201]. As I mentioned, he produced two written reports and supplemented them by oral testimony in court. In his 1st Report, he stated as follows, amongst other things:

(a) In relation to the Complainant's blood alcohol concentration ("BAC") levels on the morning of 26 January 2014:

(i) The Complainant's BAC level immediately after alcohol consumption, given approximations of the amount of alcohol she had consumed, the premise that she was consuming alcohol on an empty stomach in a relatively short period, and that she had no history of tolerance to its effects, was as follows:[202]

BAC = (alcohol consumption by weight) / [body weight x 54%]

= (60ml x 3 x 40%) / (53kg x 54%)

= 251.6mg%

(ii) Given her gender and weight as at 28 January 2014, and the average alcohol clearance rate of 120mg/kg/hr, the Complainant's hourly reduction of BAC was estimated using the following formula:[203]

BAC clearance per hour = (120mg/kg/hr x bodyweight) / (bodyweight x 54%)

= (120mg/kg/hr x 53kg) / (53kg x 54%)

= 22mg% per hour

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200 See Exhibit P180 at p 1; NE Day 14, p 4 at lines 14-31.

201 NE Day 14, p 4 at lines 14-31.

202 See Exhibit P180 at para 26.

203 See Exhibit P180 at para 25.

(iii) On the basis that the Complainant would take 30 minutes to reach her peak BAC level, her peak BAC level would be:[204]

251.6mg% - 22mg% = 229.657mg%

(iv) Based on this, Dr Guo calculated the Complainant's BAC levels at different hourly intervals to be as follows:[205]

Time (on 26 January 2014)	**BAC (mg%)**
At 1am	229.57
At 2am	207.57
At 3am	185.57
At 4am	163.57
At 5am	141.57
At 6am	119.57
At 7am	97.57
At 8am	75.57
At 9am	53.57
At 10am	31.57

(b) Dr Guo also arrived at the following conclusions regarding the Complainant's mental state based on his calculations of her estimated BAC levels as well as her account of events:

(i) The Complainant could have been in the disinhibition phase when her BAC levels were increasing during the early phase of alcohol intoxication (*ie*, between 1am and 2am on

204 See Exhibit P180 at para 27.

205 See Exhibit P180 at para 28, read with Exhibit P180A at p 1.

26 January 2014). This would have contributed to her "euphoria, impaired judgment and feelings of confidence and assertiveness, talkativeness as well as increased risk-taking behaviour with strangers". She could also have been experiencing impaired motor functions which could have resulted in unsteadiness in gait. It was also possible that the Complainant experienced a "blackout" when she was at the peak of her intoxication with her BAC levels between 229.57mg% and 185.57mg% (*ie*, between 1am and 2am on 26 January 2014).[206] According to Dr Guo, it was possible that the Complainant could have consented to sex under the euphoric and disinhibiting effects of alcohol during this period. It was also likely that she might have had very poor memory of her actions due to a "blackout" during this period that possibly resulted from her BAC levels increasing rapidly.[207]

(ii) Between 3am and 5am, the Complainant would still have been intoxicated with alcohol and was likely to have been in a state of heavy sedation, despite her BAC levels dropping continuously (from 185.57mg% to 119.57mg%).[208] At this stage, it was unlikely that the Complainant could have consented to sex as she would have been in a heavily sedated state due to her intoxication.[209]

(iii) Between 6am and 9am on 26 January 2014, the Complainant would have been in the early recovery stage from her alcohol intoxication and "it is possible that the effects of

206 See Exhibit P180 at para 31, read with Exhibit P180A.

207 See Exhibit P180 at p 9.

208 See Exhibit P180 at para 34, read with Exhibit P180A.

209 See Exhibit P180 at p 9.

> intoxication should have been gradually wearing off at this period of time". She might be partially aware of her actions and surroundings. Nevertheless, it was also a possibility that "the sedative effects of alcohol influenc[ed] her thoughts and behaviour and contribut[ed] to poor judgment of her actions".[210]

132 In Dr Guo's 2nd Report, he responded to certain questions raised in relation specifically to anterograde amnesia. Of relevance is his answer in response to a question on the effect of alcohol intoxication on memory:

> People in alcohol induced en-bloc amnesia (blackout) would experience anterograde amnesia in which they would not be able to remember what they have done after the start of the blackout though they can perform complex actions as per normal during the episode of blackout. However, people in alcohol induced fragmentary blackout would be able to remember a part of the activities they have performed during the blackout.

133 In court, Dr Guo elaborated on his reports and the general stages of the effects of intoxication on an individual. In relation to the alleged offences committed in the bathroom, Dr Guo maintained that the Complainant was in a state of "heavy sedation" at that time, and that it would have been impossible for her to:

(a) take another's penis and put it in her own mouth,[211]

(b) kneel on the floor,[212]

(c) lick or suck another's penis consciously,[213]

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210 See Exhibit P180 at p 9.

211 NE Day 16, p 48 at lines 20-23.

212 NE Day 16, p 48 at lines 25-27.

213 NE Day 16, p 48 at lines 28-32, p 49 at line 1.

(d) maintain a doggy position (*ie*, with the female standing in front facing forward, and male standing right behind her),[214] or

(e) stand with one leg up on the edge of a bathtub and the other on the floor.[215]

134 In Dr Guo's view, a sedated person would be unable to perform all these actions as they required fine coordination and strength of the muscles.[216]

135 Dr Winslow was the Defence's expert. At the time of trial, he was a Senior Consultant Psychiatrist with Winslow Clinic, and an Adjunct Associate Professor with the Yong Loo Lin School of Medicine at the National University of Singapore. The relevant parts of Dr Winslow's report stated as follows:

> **How Dr. Guo concluded that the average proportion of body water available for alcohol distribution is 54% for females?**
>
> 4. This is the commonly accepted average proportion of body water available for alcohol distribution in females held by medical professionals.
>
> **Why alcohol clearance rate is 120mg/kg/hr?**
>
> 5. The most commonly accepted rates of blood alcohol metabolization (alcohol clearance) are 0.015% for novice drinkers (15mg per hour), 0.018% for social drinkers (18mg per hour), 0.02% for regular or frequent drinkers (20mg per hour), and o.025% for heavy drinkers or alcoholics (25mg per hour) (Miller, 2010 pp170). I believe that the estimates in Dr. Guo Song's report are valid.
>
> **Whether this clearance rate is linear, if not, what models or systems are there to demonstrate that it is not?**
>
> 6. It is widely accepted that the clearance rate is linear. It is possible for this rate to be affected by factors such as interfering substances, food and liver disturbances/abnormalities.

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214 NE Day 16, p 50 at lines 3-6.

215 NE Day 15, p 17 at lines 14-31; Day 16, p 50 at lines 7-10.

216 NE Day 15, p 17 at lines 14-30, p 18.

Would this clearance rate be affected by the victim throwing up? When she throws up, does that mean she's throwing up some of the consumed alcohol, and therefore the effect of alcohol intoxication would be less pronounced?

7. If a person vomits, it is possible that all of the alcohol ingested is not absorbed into the body. This is the body's mechanism to protect itself against alcohol poisoning.

What was the victim's likely rate of increase of BAC until it peaked?

8. An individual's rate of increase in BAC until peak is difficult to know and can only be based on estimates. The victim's peak BAC has already been calculated in Dr. Guo Song's medical report and appears to be accurate.

Would a rapid rise in the victim's BAC more likely cause her to suffer a blackout?

9. Impaired consciousness ('blackout') can occur from blood alcohol concentration of 0.25-0.4 grams/100mL and above (Dubowski, 1997), independent of the rate of consumption.

From the victim's account of her past alcohol consumption and blackout at her 18th birthday, would it be likely that she also suffered a blackout on 26 January 2014?

10. The likelihood of blackout is based on the level of blood alcohol concentration. As mentioned, impaired consciousness can occur from blood alcohol concentration of 0.25-0.4 grams/100mL and above. In addition, if an individual has a history of blackouts, they may be more likely to have a blackout in future with similar drinking patterns.

What are the physical symptoms of intoxication and whether such symptoms vary according to level of intoxication?

11. Clinical signs and symptoms of alcohol intoxication based on level of intoxication can be found in Table 1, [Annex] A.

When a person is faced with events she cannot understand is it natural for her to create memories of what happened (i.e. confabulations)?

12. At certain levels where memory is fragmentary, it is possible for people to confabulate or make up for the gaps in memory with events that may or may not be true.

136 In court, Dr Winslow made the following observations regarding the Complainant's condition:

(a) Dr Winslow stated that the Complainant's behaviour before the Group had left the Room for Zouk was consistent with her being in a state of alcohol-induced anterograde amnesia.[217] Dr Winslow also stated that the Complainant was probably in the pre-stuporous stages where her BAC level was rising, and she was probably functioning at a very high BAC level at this point in time.[218]

(b) The Complainant would have been sedated to the point of unconsciousness when Elmi first returned to the Room to retrieve Izzati's IC (see [12] above). This conclusion was based on Elmi's testimony that he saw the Complainant passed out on the floor and was unresponsive despite being tapped on her arms and having her name called.[219]

(c) Dr Winslow thought that it was quite possible for the Complainant to have been sedated or sleepy between 3am to 6am on 26 January 2014, not purely due to alcohol intoxication but as a result of inadequate rest over the preceding 24 hours.[220] Dr Winslow testified that the word "sedation" meant a state where a person feels sleepy, has difficulty staying awake, or is both physically and mentally inactive.[221] He agreed that there are different degrees of sedation. While a person may not necessarily feel sleepy or sedated when her BAC level is

217 NE 9 April 2018, p 40 at lines 22-32.

218 NE 9 April 2018, p 41 at line 1.

219 NE 9 April 2018, p 41 at lines 24-26.

220 NE 9 April 2018, p 20 at lines 20-26.

221 NE 9 April 2018, p 11 at lines 2-6, p 36 at lines 26-32, p 37 at line 1.

decreasing, there is nevertheless a correlation between one's BAC level and the level of sedation.[222]

(d) He disagreed with Dr Guo on the question of whether a heavily sedated person could perform complex actions. Dr Winslow's view was that a heavily sedated person could perform complex actions so long as her BAC level was not extremely high (*ie*, over 200mg/100ml).[223] Specifically, he also stated that a heavily sedated person could:

(i) use her hand to take another person's penis and place it into her own mouth,[224]

(ii) kneel down on the floor,[225]

(iii) lick another person's penis consciously,[226]

(iv) position herself in front of another person in a "doggy position",[227]

(v) walk down the stairs with assistance,[228] and

(vi) respond to strong stimuli such as loud voices.[229]

(e) When presented with Faris' version of what took place in the bathroom, Dr Winslow agreed that that Complainant's behaviour as described was consistent with the Complainant being in a state of

222 NE 9 April 2018, p 11 at lines 16-29.

223 NE 9 April 2018, p 19 at lines 21-23, p 20 at lines 2-7, p 24 at lines 8-10.

224 NE 9 April 2018, p 22 at lines 6-15.

225 NE 9 April 2018, p 22 at lines 16-18.

226 NE 9 April 2018, p 22 at lines 19-21.

227 NE 9 April 2018, p 22 at lines 22-27.

228 NE 9 April 2018, p 22 at lines 28-32, p 34 at lines 1-4.

229 NE 9 April 2018, p 23 at lines 5-17.

alcohol-induced anterograde amnesia .[230] Thus, Dr Winslow opined that the Complainant was likely to have been able to express an intention to continue or discontinue any sexual activities that she found herself participating in between 4am to 6am on 26 January 2014.[231]

(f) However, Dr Winslow also accepted that if the Complainant behaved as Faris and Asep had described in their police statements (which I will elaborate on below), she would most likely have been floating in and out of a stuporous alcoholic state. In such a state, the Complainant's motor skills would have been impaired,[232] and it would have been difficult for her to perform complex coordinated movements of her limbs, or to have sex while standing with one leg on the ground and the other on the water closet and changing positions thereafter.[233]

137 Faris submitted that Dr Guo was an unreliable witness whose evidence was both internally and externally inconsistent.[234] In my view, the purported inconsistencies in Dr Guo's evidence were not real or material. For instance, Faris highlighted that Dr Guo had opined that the Complainant could not have performed complex actions, but later under cross-examination agreed that a person in a "blackout" (*ie*, with anterograde amnesia) could have gotten out of a bathtub.[235]

138 However, on closer examination, there is no inconsistency here since the former opinion was specific to the Complainant, while the later observation was

230 NE 9 April 2018, p 17 at lines 9-27.

231 NE 9 April 2018, p 24 at lines 26-31, p 25 at lines 1-3.

232 NE 9 April 2019, p 43 at lines 1-2

233 NE 9 April 2019, p 44 at lines 2-19.

234 Faris' closing submissions at para 112.

235 Faris' closing submissions at para 113.

premised on a generic individual who was suffering anterograde amnesia. In fact, it was clear from Dr Guo's testimony that if an individual had suffered more than mere anterograde amnesia, there would have been psychomotor limitations:

> Q My question was that if a person was going through a blackout---
>
> A Yah.
>
> Q ---could that person get out of the bathtub?
>
> A Yah.
>
> Q Yes.
>
> A Yah. In the blackout that person may not be so severe sedated.
>
> Court: I see.
>
> A Means that the---the---the movement is not severely impacted by the alcohol. So---if so, the person can still do that. But that the---also possible that the person was under the severe intoxication. In this case, the person won't be able to do that. So that's why my answer is that---
>
> Court: If the blackout is caused by severe intoxication or if the blackout amounts to severe intoxication?
>
> A If the blackout---in addition to blackout, that the person also severely intoxicated that---that the person won't be able to do that.
>
> Q Okay. So, Dr Guo, if I may clarify. You are saying that if a person is going through a blackout but is also severely intoxicated, then there are some things that a person cannot do.
>
> A Yes.

139 Similarly, other purported inconsistencies in Dr Guo's evidence were, in my view, premised on a misinterpretation of his evidence out of context.

140 Nevertheless, this is not a case in which much weight could be placed on the evidence of either expert in so far as the estimations of the Complainant's BAC levels are concerned. There are four main reasons.

141 First, these BAC calculations are predicated on estimations of how much alcohol the Complainant had consumed. However, in this case, reliable evidence of that fact cannot be found. Rather, most of the witnesses gave vague and inconsistent estimations:

(a) The Complainant testified that she did not drink anything before going to the Room on the material day.[236] After reaching the Room, she drank roughly three to four 1/2-full cups of an unknown liquor mixed with an unknown soft drink,[237] before drinking another four ¾-full cups of vodka mixed with Red Bull.[238] She did not know the proportion of alcohol mixed into these drinks.[239] Nor could she remember the type of alcohol and the soft drink mixed for the first three to four cups she had consumed.[240]

(b) Izzati testified that the Complainant started drinking immediately upon arrival at the Room.[241] In her recollection, the Complainant's cup was filled about three to four times.[242] She did not remember what was poured into the cup,[243] but she remembered that at that time a bottle of Jagermeister and vodka were opened because they were left on the ground.[244] She also recalled that the soft drink mixers available that day were green tea and Red Bull.[245]

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236 NE Day 2, p 59 at lines 12-14.

237 NE Day 2, p 63 at lines 15-22; Day 3, p 82 at lines 18-29.

238 NE Day 2, p 63 at lines 1-3 and 15-22; Day 3, p 82 at lines 13-29.

239 NE Day 3, p 82 at lines 13-17, p 83 at lines 4-21, p 84 at lines 6-7.

240 NE Day 2, p 62 at lines 16-20.

241 NE Day 5, p 35 at lines 27-32, p 36 at line 1.

242 NE Day 5, p 11 at lines 28-31, p 12 at lines 18-19.

243 NE Day 5, p 36 at lines 22-23.

244 NE Day 5, p 36 at lines 24-31.

(c) Elmi recalled that the Complainant had drunk not more than three cups of alcohol mixed with soft drinks at the Room,[246] but admitted that this was just an assumption and that he did not know how many cups she had actually drunk.[247] Nor could he remember the type or the amount of alcohol in each cup.[248]

(d) Affandi testified that he was not sure how many cups of alcohol the Complainant had consumed.[249] He did however, recall Fadly pouring Chivas for the Complainant.[250]

(e) Fadly could only remember that he had poured cups of drinks for the Complainant that morning.[251] He could not remember how many cups he had poured or how much alcohol was in each cup.[252]

(f) Faris initially testified that the Complainant had drunk "around… three cups only".[253] However, during cross-examination he admitted that this was only a guess,[254] and that he had arrived at that number by assuming that the Complainant had consumed the same number of cups as he did.[255] He also admitted that he was not really

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245 NE Day 5, p 11 at lines 12-16.

246 NE Day 5, p 91 at lines 19-31.

247 NE Day 6, p 79 at lines 19-31, p 80 at lines 7-8; Day 7, p 42 at lines 1-3.

248 NE Day 5, p 91 at line 32, p 92 at lines 1-3; Day 6, p 22 at lines 10-15.

249 NE Day 9, p 89 at lines 11-14.

250 NE Day 9, p 13 at lines 5-7, p 90 at lines 1-3.

251 NE Day 36, p 27 at lines 29-30, p 28 at line 1.

252 NE Day 36, p 28 at lines 2-5.

253 NE Day 18, p 20 at lines 6-9.

254 NE Day 19, p 24 at lines 2-10 and 27-31, p 25 at lines 1-3.

255 NE Day 19, p 24 at lines 2-4 and 11-17.

paying attention to the Complainant during that period because he was talking to other attendees at the party.[256]

(g) Asep only gave evidence that the Complainant was drinking,[257] but did not say how much she drank. He testified that apart from noticing the Complainant drinking and talking to Fadly, he did not really pay much attention to her.[258]

(h) In Ridhwan's 1st Statement, he stated that everyone except Izzati consumed alcohol, and that Elmi "drank a little bit only, while the rest drinks quite a lot".[259]

142 Second, the experts agreed that whether the Complainant was incapable of giving consent, or merely in a state of anterograde amnesia and able to give consent, depended on the underlying factual premise. For instance, when asked, Dr Guo accepted that *if* Ridhwan's version as to the facts was to be believed, then the Complainant would have been in a much milder state of intoxication and would have been able to perform the acts indicated above at [136(d)]. Similarly, Dr Winslow accepted that if it was true that the Complainant was unable to open her eyes and could not resist sleeping, she would not have been in a state of mere anterograde amnesia and could not have behaved in the manner the accused persons claimed. In the circumstances, it would beg the question to rely on expert opinion premised on a factual state that is both the premise and the conclusion to be determined.

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256 NE Day 19, p 24 at lines 18-20.

257 NE Day 32, p 11 at lines 27-30.

258 NE Day 32, p 11 at lines 24-32, p 12 at lines 1-5.

259 See Exhibit P214 at para 5.

143 Third and relatedly, the experts were also not entirely at odds in their expert opinion. For instance, as to the Complainant's state at between 3am to 5am, which was around or slightly before the time of the alleged offences committed by Faris and Asep in the bathroom, Dr Guo opined that the Complainant was in a state of heavy sedation, and that it would not have been possible for her to perform acts like those mentioned above at [133] as they were complex acts requiring fine coordination and strength which the Complainant did not possess at that time. Dr Winslow did not disagree that the Complainant would be in a state of heavy sedation between 3am and 5am, although he was of the view that her state could be partly due to sleepiness. He was also of the view that she could have performed the acts in question even in her state of sedation. However, Dr Winslow accepted that if her state of unconsciousness was as serious as described in the police statements of Faris (and Asep), it would have been difficult for her to perform the acts in question which required coordination. Therefore, Dr Winslow's opinion did not rule out the possibility that the Complainant had been too sedated to perform the acts in question. On the other hand, while Dr Guo was of the view that it was impossible for the Complainant to perform such acts, it was unsafe to place too much weight on his opinion alone in view of the limitations I have mentioned.

144 Fourth, and importantly, the experts were also in agreement that the impact of alcohol consumption on persons varied significantly, and that the most important assessor of one's level of intoxication was his or her clinical manifestations.[260] In particular, Dr Guo testified that a person's degree of sedation at any given time is assessed with reference to how responsive that person is to external stimuli.[261] In this regard, a clinical assessment based on the

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260 Prosecution's closing submissions at paras 17 and 24.

261 NE Day 16, p 13 at lines 17-25.

witnesses' observations as well as the person's own account is more accurate than drawing inferences based on his or her estimated BAC level.[262] Similarly, Dr Winslow agreed that the assessment of a person's level of intoxication cannot be based on her estimated BAC level alone, and must be accompanied by a clinical assessment (or, in Dr Winslow's words, by looking at her "functioning capacity"). This is because even at a specific BAC level, the effects of alcohol manifest differently in different people.[263]

145 For these reasons, not much weight could be placed on the expert evidence in the present case in assessing the Complainant's capacity to consent at the material time.

(2) Complainant's account

146 I turn now to the factual evidence, beginning with the Complainant's version of events.

147 The Complainant did not remember much about what had happened in the morning of 26 January 2014. Her last memory of what happened before the Group left for Zouk was of her sitting on the sofa, and her next memory was that she was in the bathroom.[264] She could not recall when the Group decided to go to Zouk,[265] when the Group actually left for Zouk,[266] whether she vomited on the first floor before they left,[267] or how she ended up in the bathroom.[268] She

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262 NE Day 15, p 26 at lines 10-17; Day 16, p 13 at lines 20-30.

263 NE 9 April 2018, p 32 at lines 31-32, p 33 at lines 1-4.

264 NE Day 2, p 69 at lines 17-21.

265 NE Day 2, p 85 at lines 21-26.

266 NE Day 2, p 85 at lines 13-27.

267 NE Day 2, p 88 at lines 27-30.

268 NE Day 2, p 87 at lines 9-11.

testified she was "not 100% awake" and kept falling asleep.[269] As regards what happened in the bathroom, she only had a few flashes of memory, though she could not tell whether these flashes happened in sequence:[270]

(a) First, she recalled that at some point she felt like vomiting while standing in front of the sink,[271] with Asep standing beside her at that point,[272] and someone knocking on the door.[273]

(b) Second, she recalled being kissed by an unidentified male on the lips while standing up in the bathroom.[274] She felt uncomfortable but could not do anything about it because she was too drunk and could not balance herself.[275]

(c) Third, she remembered that at another point, she found herself lying down on her back on the bathroom floor beside the water closet,[276] and that a man with a circular tattoo on his left arm and who was not wearing any pants,[277] was standing "in front of her".[278] She did not see the face of this man, but she subsequently identified him as Faris as she recognised his tattoo.[279]

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269 NE Day 1, p 54 at lines 23-24.

270 NE Day 2, p 89 at lines 29-30, p 102 at lines 20-25.

271 NE Day 2, p 86 at lines 6-21.

272 NE Day 2, p 86 at lines 6-21, p 87 at lines 2-8.

273 NE Day 2, p 88 at lines 8-14.

274 NE Day 1, p 53 at lines 16-28.

275 NE Day 1, p 54 at lines 6-22.

276 NE Day 2, p 89 at lines 22-25.

277 NE Day 1, p 53 at lines 7-15.

278 NE Day 2, p 97 at lines 19-30, p 98 at lines 1-6.

279 NE Day 2, p 97 at lines 19-30; Day 3, p 53 at lines 28-29.

148 Faris submitted that the Complainant's evidence was not reliable and might have been a result of "confusion due to memory loss". Therefore, it did not meet the threshold of "unusually convincing" evidence.[280]

149 As I have discussed earlier (at [111]-[117]), I am of the view that the unusually convincing standard does not apply in the present case where there is other evidence available for consideration apart from the Complainant's testimony.

150 In my view, the Complainant's account of what had occurred in the bathroom, taken together with other evidence in the present case, provides evidence that she did not have the capacity to consent to sexual intercourse with Faris in the bathroom at the material time, and that she had not in fact consented to such intercourse.

151 First, the Complainant's account as to her condition at the material time is corroborated by the evidence of the other witnesses and also with Faris' own statements to the police. I will elaborate more on these aspects below.

152 Second, the Complainant's account is also corroborated by her text messages with Affandi later in the day of the alleged offence on 26 January 2016. In those messages, the Complainant confided that she suspected that she had been sexually violated earlier that morning. She also stated that she was told that she had consumed most of a bottle of Vodka the night before,[281] and that she "immediately went into trauma" and "don't know anything" save that when she woke up (in the morning in the living room beside Faris and Ridhwan)[282]

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280 Faris' closing submissions at para 61.

281 AB pp 219-220.

282 NE Day 2, p 28 at lines 28-30.

she was still feeling drunk and was "half naked" and felt pain in her vagina.[283] In my view, as these text messages were sent near-contemporaneously, they buttress the Complainant's evidence that she had been severely intoxicated and not in the condition to give consent at the material time.

153 Third, apart from the observation that her testimony was "generally vague and piecemeal",[284] Faris did not raise anything material that suggested that the Complainant had been untruthful in her evidence. On the contrary, I am of the view that the Complainant was forthcoming in all material aspects. For instance, when counsel put aspects of Faris' case to her, such as the allegation that she had "moaned with pleasure" during the intercourse, the Complainant did not deny or disagree with the statements, but had rather conceded that she did not know or could not remember.[285]

283 AB pp 220-221.

284 Faris' closing submissions at para 56.

285 See, for instance, NE Day 3, pp 49-52.

(3) Faris' testimony in court

154 As alluded to above, Faris's account of events in court was vastly different from the Complainant's, and it portrayed the Complainant as an initiator and active participant in sexual intercourse with him. The material parts of Faris' testimony in court may be summarised as follows:

(a) When he entered the bathroom after returning from Zouk, he saw the Complainant sitting inside the bathtub with her top on but her skirt rolled up around her waist.[286] He also saw a bit of vomit at the side of the bathtub,[287] and thought that she was not wearing any underwear.[288] During examination-in-chief, he testified that "she was looking at me",[289] but later in cross-examination, he stated that her head was "resting on the wall" and her eyes were "halfway closed".[290]

(b) Faris then told the Complainant in Malay that he was going to pee ("aku nak kenching"), and proceeded to do so. Thereafter, when he was washing his hands at the sink, the Complainant "stood up normally and got out of the bathtub" on her own.[291] She did so in one movement without stumbling, even though she had to step over the edge of the bathtub.[292] She apparently stood in front of the sink, next to Faris, and was not wearing any bottoms. She then leaned on him, causing him to fall back a little which in turn caused the bathroom door to close. Faris

286 NE Day 18, p 26 at lines 5-8, p 27 at lines 20-31.

287 NE Day 18, p 27 at lines 22-23.

288 NE Day 18, p 27 at lines 30-31.

289 NE Day 18, p 28 at lines 3-4.

290 NE Day 19, p 29 at lines 25-29, p 30 at lines 8-19.

291 NE Day 19, p 36 at lines 16-20.

292 NE Day 19, p 36 at lines 21-23.

asked her "Are you for real" ("kau betul ketal betul ni?") in Malay in response to which she unbuttoned and unzipped his pants, and then pulled down his pants and underwear to his knee-level. In doing so, she had to "use some effort" and "bend down a little".[293] She then raised her right leg onto the water closet.[294] In Faris' view, this series of conduct amounted to consent to sexual intercourse with him.[295]

(c) Faris and the Complainant then had penile-vaginal intercourse in three different positions. First, for "a few minutes", the Complainant's right leg was on the water closet.[296] During this time, the Complainant's head switched from the left to the right side of Faris' head "a few times".[297] Second, after Faris and the Complainant "switched places", the Complainant's back was to the bathroom door, with her left leg on the water closet, while Faris faced the door.[298] The third position was with the Complainant's back to the sink and Faris standing in front of her.[299] To reach this third position, Faris had pulled his penis out of the Complainant's vagina and "then [the Complainant] walk[ed] towards the sink and lean against the sink, and [Faris] followed her".[300] Throughout the entire session, apart from the initial question "[a]re you for real?" which Faris asked, there was no conversation between the parties, and the Complainant was apparently moaning in pleasure.[301]

293 NE Day 19, p 39 at lines 11-13.

294 NE Day 18, pp 30-31.

295 NE Day 18, p 33 at lines 24-26.

296 NE Day 18, p 35 at lines 15-19.

297 NE Day 19, pp 43-44.

298 NE Day 18, p 35; Day 19, pp 44-45.

299 NE Day 18, p 36 at lines 11.

300 NE Day 19, p 47 at lines 1-2.

301 NE Day 19, p 46 at lines 10-18.

(d) Thereafter, Faris ejaculated into the water closet. He then told the Complainant "I go out first, okay?" in Malay ("aku keluar dulu, okay"), exited the bathroom alone, and went to the first floor of the Room, while the Complainant remained in the bathroom.[302] At the time of his exit, she was "standing at the spot where she got out from the bathtub".[303]

155 In my view, Faris' account in court is not credible for reasons to which I will now turn.

(4) Faris' police statements

156 The statements that Faris had given to the police are highly probative, as they materially contradict the exculpatory account of events that he gave in court, and also corroborate the Complainant's testimony as to the severe extent of her intoxication at the material time. I have summarised the salient parts of Faris' 1st and 2nd Statements at [54] and [79] above respectively. The important observation is that at no point in Faris' statements did he say that the sexual intercourse he had with the Complainant was consensual. Indeed, it was his own evidence in his 2nd Statement that the Complainant was, at the material time, drunk and in no condition to have given consent.

157 In his 1st Statement, Faris stated that, at the time he returned from Zouk to the Room, the Complainant was in the bathtub in the bathroom and was vomiting:[304]

> 11 [Ridhwan] and I arrived back at the hotel and we met 'Asep' at the hotel lobby and we went up together. I cannot

302 NE Day 18, p 36 at lines 16-31, p 37 at lines 1-9.

303 NE Day 19, p 49 at lines 24-27.

304 See Exhibit P213 at para 11.

> remember what time we arrived back at the hotel. I remember one of us knocked on the room door and it opened. I don't know who opened the door. After I entered the room, I noticed 'Hazly' and 'Fadly' were watching TV at the living room. As for [the Complainant], she was still inside the toilet. I heard her vomiting at the toilet and I went up to take a look and I saw her in the bathtub. I went back down to the living room, I took out my shirt and lay on the living room floor. I subsequently fell asleep.

158 In his 2nd Statement, Faris sought to amend paragraph 11 of his 1st Statement, but even with the amendments, his position was that the Complainant was severely intoxicated. Indeed, he specifically confirmed that the Complainant was *not* in a position to have given consent. The salient parts of the 2nd Statement are reproduced below:

> **Q2: What are the facts that you would like to amend in paragraph 11 [of your 1st Statement]?**
>
> Ans: When I went into the toilet on the second floor of the hotel room, I saw [the Complainant] seated inside the bath tub. I went to urinate first at the toilet bowl. I saw that [the Complainant] was drunk. She was already vomiting when we had left the hotel earlier to Zouk. [The Complainant] got out of the bathtub and knocked herself against the door. This caused the door to be slightly closed. She then stood near the door and was just standing there. I then walked towards her and she fell on me as she could not stand on her own. She then put her hands on my shoulder to support herself. She subsequently leaned back on the door and this caused the door to close. Her face was near my neck. I then lifted up her skirt and 1 realized that she was not wearing any panties. I opened my pants and underwear and pulled it down to my ankle level. I then started "fucking" her. When I was about to shoot out my sperm, I took out my penis from her vagina and shot my semen on the toilet bowl. I then put on my pants and underwear and went out of the toilet. [The Complainant] went to seat on the toilet bowl after I left the toilet. When I came out of the toilet, I immediately went down to the first floor of the toilet. I saw Asep there. Asep asked me where is [the Complainant], I told him that she was still inside the toilet. Asep then went up to the toilet. I knew Asep was going to have sex with her.
>
> …
>
> **Q8: What was [the Complainant] doing when you were putting your penis into her vagina?**

> Ans: Her head was just bowed down on my shoulder. She did not talk or say anything.
>
> **Q9: Did you ask her whether you can have sex with [the Complainant]?**
>
> Ans: When she leaned on the toilet door and the toilet door closed, I asked her whether I could have sex with her.
>
> **Q10: Did she give you a reply when you asked her whether you can have sex with her?**
>
> Ans: She did not reply. Her eyes were halfway closed and she still appeared drunk.
>
> **Q11: If she did not say yes to you having sex with her, why did you still proceed to have sex with her?**
>
> Ans: I don't know. I was just feeling horny and wanted to have sex.
>
> …
>
> **Q20: Was [the Complainant] in a condition to walk properly or stand up properly?**
>
> Ans: I cannot really remember. But I know that she looked drunk and when she walked towards the door, she knocked herself against the door.
>
> **Q21: If [the Complainant] still looked drunk to you, do you think it would have been possible for [the Complainant] to have given consent to having sex with you?**
>
> Ans: No.
>
> **Q22: If she could not have given consent to you, why did you still proceed to have sex with her?**
>
> Ans: I don't know.

159 There were three references to "drunk" in the above-quotation from Faris' 2nd Statement. In my view, this accurately reflects the degree of the Complainant's intoxication at the material time from Faris' point of view. To the extent that the Defence argues that little weight should be placed on the contents of these statements because of irregularities in the statement-taking process and/or oppression, I do not accept this submission as I have found in the ancillary hearing that there was no basis to the allegations made (see [53]-[93]

above). In so far as Faris appeared to suggest that his references to "drunk" meant merely that the Complainant was "high" which apparently referred to a lesser degree of intoxication, I also do not accept this because, as Faris himself explained in court, "drunk" refers to when one does not know his or her surrounding, "high" means one knows his surrounding but is simply "a bit tipsy", and one cannot be high and drunk at the same time.[305] Furthermore, the word "drunk" was used in the text of Question 21, and so it would have been plainly obvious to Faris if that was not the term that he had used or intended.

(5) Other witnesses' accounts

160 Furthermore, the clinical manifestations of the Complainant and her condition at and around the material time of the alleged offence, as observed by the other witnesses present in the Room, point strongly against Faris' account which portrayed the Complainant as the initiator and an active participant. They suggest that the Complainant was severely intoxicated, physically weak, and at least close to a state of unconsciousness. As I mentioned, both experts agreed that the most important assessor of the impact of alcoholic intoxication on an individual are the clinical manifestations of his or her condition. Therefore, the observations of the other witnesses are highly probative.

161 Before I elaborate on the specific testimonies, I should explain that strictly speaking, these testimonies relate primarily to the Complainant's condition during and immediately after her sexual activity *with Asep* rather than Faris. But it was undisputed that the Complainant's sexual activity with Asep immediately followed her activity with Faris. Indeed, the Defence stated in the closing submissions that there was only a "short difference in time" between the Faris' and Asep's alleged offences in the bathroom.[306] Therefore, the witnesses'

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305 NE Day 19, pp 25-26.

observations of the Complainant's condition remain relevant in relation to the alleged offences of Faris in the bathroom.

162 The material aspects of the witnesses' evidence may be summarised as follows:

(a) Elmi's testimony was that he left Zouk at around 5.00am and upon his return to the Room, either he or Izzati wanted to use the bathroom but were unable to do so because it was occupied.[307] Elmi went to investigate further and saw the bathroom door partially opened.[308] Upon pushing the door open further, he saw the Complainant standing on her own in front of the sink with Asep about a shoulder width behind or beside her.[309] Both were facing the sink.[310] Through the reflection in the mirror, Elmi also saw the Complainant's breasts exposed as well as a topless Asep.[311] To him, the Complainant "looked drunk" at that time.[312] However, he was unable to see much else because Asep quickly pushed the door shut.[313] About a minute later, Asep emerged from the bathroom alone.[314] After realising that the Complainant remained in the bathroom for "a quite few minutes" after Asep had emerged,[315] Elmi asked Fadly to go up to the second floor to bring her out as he believed that she was

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306 Faris' closing submissions at para 134.

307 NE Day 5, p 100 at lines 18-25.

308 NE Day 6, p 44 at lines 20-22, p 45 at lines 26-32, p 46 at line 1.

309 NE Day 5, p 102 at lines 4-22; Day 6, p 46 at lines 26-32; Day 7, p 42 at lines 13-18.

310 NE Day 5, p 102 at lines 4-22.

311 NE Day 5, p 101 at lines 1-10; Day 6, p 49 at lines 19-22.

312 NE Day 5, pp 103-104.

313 NE Day 5, p 101 at lines 22-30.

314 NE Day 5, p 104 at lines 15-32.

315 NE Day 6, p 55 at lines 11-14.

"drunk".[316] Elmi did not see what the Complainant was doing in the bathroom during the few minutes she was in there alone,[317] but when Fadly brought the Complainant out of the bathroom, Elmi again formed the view that she "looked drunk".[318] In examination-in-chief, Elmi explained that by "drunk", he meant that she was "unconscious".[319] Under cross-examination, he reiterated that the Complainant appeared "weak and drunk"[320] and that this did not merely mean that "she needed support to walk", even though he did not know for a fact whether she was aware of her surroundings at that time.[321] According to Elmi, Fadly had supported the Complainant out of the bathroom with his right arm on her shoulder and her left arm around his neck.[322] He could not recall if the Complainant was being dragged along by Fadly, or if she was walking with some assistance from him.[323] Fadly then helped her down the spiral staircase to the first floor,[324] though Elmi did not watch them go all the way down the stairs.[325]

(b) According to Izzati, she could not remember whether it was her or Elmi who pushed the bathroom door open, but she remembered Asep saying that he was peeing.[326] The bathroom lights were switched off at

316 NE Day 5, p 104 at lines 28-32,

317 NE Day 6, p 55 at lines 21-23.

318 NE Day 5, p 105 at lines 10-15; Day 7, p 13 at lines 20-21.

319 NE Day 5, p 105 at lines 10-15.

320 NE Day 6, p 56 at lines 7-12.

321 NE Day 6, p 56 at lines 14-16; Day 7, p 13 at lines 9-10.

322 NE Day 5, p 105 at lines 6-9 and 29-32.

323 NE Day 7, p 13 at lines 27-32.

324 NE Day 7, p 14 at lines 13-15, p 15 at lines 1-2.

325 NE Day 7, p 15 at lines 10-13.

326 NE Day 5, p 18 at lines 12-17.

that time and the bathroom looked dark.[327] As a result, Izzati could not see what was going on inside.[328] Izzati also said that the lights on the second floor outside the bathroom were switched on during this time.[329] Asep emerged from the bathroom after about five minutes and went down to the first floor.[330] When Izzati entered the bathroom, she saw the Complainant inside and asked Elmi to inform his friends to "help her out".[331] She did not remember where the Complainant was located inside the bathroom,[332] and why she had to get Elmi to ask his friends to help the Complainant out.[333] Izzati testified that she saw Fadly helping the Complainant down to the first floor,[334] although she did not notice how he had done so[335] or how the Complainant looked at this point in time,[336] except that she was fully clothed.[337]

(c) Fadly recalled that, after Elmi, Izzati and another attendee returned from Zouk, the Complainant had to be supported down from the second floor to the first floor as she was "too drunk to come down unsupported".[338] However, he did not remember who had supported her or how exactly she was supported,[339] though he did remember that the

327 NE Day 5, p 18 at lines 26-28.

328 NE Day 5, p 20 at lines 3-6.

329 NE Day 5, p 19 at lines 1-6.

330 NE Day 5, p 20 at lines 10-18.

331 NE Day 5, p 20 at lines 24-31.

332 NE Day 5, p 64 at lines 20-26.

333 NE Day 5, p 21 at lines 1-3.

334 NE Day 5, p 22 at lines 9-18.

335 NE Day 5, p 22 at lines 9-18.

336 NE Day 5, p 22 at lines 23-24.

337 NE Day 5, p 47 at lines 21-28.

338 NE Day 36, p 37 at lines 9-15.

Complainant was supported by a person who was standing right beside her,[340] and that she was "weak and drunk" at this point.[341]

163 In my view, the evidence of Elmi, Izzati, and Fadly clearly contradicted Faris' evidence as to what had occurred in the bathroom. Elmi and Fadly testified that the Complainant was severely intoxicated when she was helped out of the bathroom. They used words such as "unconscious", "drunk" and "weak" to describe her condition. They also stated that the Complainant was so intoxicated that she needed to be helped by someone else to come out of the bathroom and to the first floor of the Room. In particular, I found Elmi's evidence to be largely detailed and salient, save in relation to one point, where he agreed with a question posed to him that the Complainant was "standing on her own" in the bathroom next to the countertop of the sink.[342] It was not entirely clear whether he meant that there was some distance between her and any other person around her, or that she was sufficiently sober as to be exerting her own strength to keep upright. Izzati could not remember the details about the Complainant's state at that time, but confirmed that she had told Elmi to ask his friends to help the Complainant out of the bathroom a few minutes after Asep emerged. In my view, it would have been odd for her to do so had she been of the view that the Complainant was capable of getting out of the bathroom herself. Given the condition of the Complainant as described by the witnesses, I do not believe that the Complainant had, as Faris claimed in court, stepped out of the bathtub on her own, propositioned sex with him by, amongst other things, pulling down and unzipping his pants and underwear, and thereafter engaged actively in sexual intercourse with him in three different positions.

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339 NE Day 36, p 37 at lines 16-18.

340 NE Day 36, p 37 at lines 16-21.

341 NE Day 36, p 39 at lines 5-6.

342 NE Day 6, p 47 at lines 2-4.

164 I should add that it transpired during trial that in Elmi's police statement dated 29 January 2014 at 8.00pm, he had described the Complainant as "sober" when she was helped out of the bathroom by Fadly. Faris sought to rely on this to contradict Elmi's oral testimony that the Complainant had been "drunk", "unconscious", and "weak" at that time (see [162(a)] above). However, in court, Elmi recanted this part of his earlier police statement. He stated and subsequently confirmed that he had lied to the police in his earlier statement when he said that the Complainant looked "sober", because he was trying to cover up for his friends at that time.[343] In the circumstances, I accept Elmi's testimony in court as a reliable account. Indeed, in my view, Elmi was a truthful and forthcoming witness in court. He made appropriate concessions when he could not remember the specifics of the Complainant's condition and did not embellish or exaggerate his evidence even where there were opportunities to do so. There was also no suggestion of any reason for him to lie when he recanted the part of his earlier police statement on the Complainant's condition.

Conclusion on the 4th Charge

165 For the foregoing reasons, I find that the 4th Charge against Faris has been established beyond a reasonable doubt. In my view, the evidence taken holistically makes clear that Faris' account of how the Complainant had propositioned him for sex and engaged actively in sex with him is untenable. The truth, rather, is that the Complainant was severely intoxicated and at least close to unconsciousness at the material time, and was in no condition to have consented to any sexual conduct. Her physical condition and level of sedation at that time meant that she could not have been and was not simply, as Faris claimed, suffering from anterograde amnesia. On the basis of the foregoing, I am also of the view that she did not in fact consent, even if she could have.

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343 NE Day 6, p 64 at lines 9-10, p 65 at lines 12-25, p 71 at lines 9-12.

Defence of mistake of fact

166 In the light of the discussion above, it would be clear that Faris must have known that the Complainant was not in a condition to consent and did not in fact consent to sexual intercourse with him. Again, I emphasise that nowhere in his police statements did Faris say that the Complainant was a consenting party. Indeed, quite the opposite, Faris stated that the Complainant looked drunk and appeared incapable of giving consent in Answers 21 and 22 of his 2nd Statement (see [79(c)] above). Faris' defence of mistake of fact must therefore fail, especially since it is he who bears the burden of establishing this defence (see [122] above). There is accordingly no need for me to consider the other questions of sufficient cause, due care and attention, and good faith on Faris' part (see [122]–[124] above).

6th and 7th Charges – Asep, bathroom, fellatio and attempted rape

167 The 6th and 7th Charges were brought against Asep for, respectively (see [4(a)] and [4(b)] above):

(a) sexual assault by penetration under s 376(1)(*a*), punishable under s 376(3) of the PC, for penetrating the Complainant's mouth with his penis without her consent, in the bathroom of the Room; and

(b) attempted rape under s 375(1)(*a*), punishable under s 375(2) read with s 511 of the PC, for attempting to insert his penis into the Complainant's vagina without her consent, in the bathroom of the Room.

168 I have reproduced the provision on rape above at [126]. Section 511 of the PC provides for the law on criminal attempts and it reads as follows (omitting the illustrations):

Punishment for attempting to commit offences

511.—(1) Subject to subsection (2), whoever attempts to commit an offence punishable by this Code or by any other written law with imprisonment or fine or with a combination of such punishments, or attempts to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code or by such other written law, as the case may be, for the punishment of such attempt, be punished with such punishment as is provided for the offence.

(2) The longest term of imprisonment that may be imposed under subsection (1) shall not exceed —

(*a*) 15 years where such attempt is in relation to an offence punishable with imprisonment for life; or

(*b*) one-half of the longest term provided for the offence in any other case.

169 As for sexual assault by penetration, the relevant provision in the PC reads as follows:

Sexual assault by penetration

376.—(1) Any man (A) who —

(*a*) penetrates, with A's penis, the anus or mouth of another person (B); or

(*b*) causes another man (B) to penetrate, with B's penis, the anus or mouth of A,

shall be guilty of an offence if B did not consent to the penetration.

(2) Any person (A) who —

(*a*) sexually penetrates, with a part of A's body (other than A's penis) or anything else, the vagina or anus, as the case may be, of another person (B);

(*b*) causes a man (B) to penetrate, with B's penis, the vagina, anus or mouth, as the case may be, of another person (C); or

(*c*) causes another person (B), to sexually penetrate, with a part of B's body (other than B's penis) or anything else, the vagina or anus, as the case may be, of any person including A or B,

> shall be guilty of an offence if B did not consent to the penetration.
>
> (3) Subject to subsection (4), a person who is guilty of an offence under this section shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to fine or to caning.

170 As with Faris, Asep did not dispute the fact that the relevant sexual activity had occurred, but rather claimed that they had been consensual. Therefore, the main issues in dispute are (a) whether the Complainant had the capacity to consent to sexual intercourse at the material time; (b) if so, whether she in fact consented to such intercourse; and (c) whether Asep could rely on the defence of mistake of fact.

Consent

171 As I mentioned above, I do not consider the expert evidence in the present case to be too helpful in assessing the Complainant's capacity to consent at the material time. I thus focus on an analysis of the facts.

(1) Complainant's account

172 The Complainant's account in relation to the 6th and 7th Charges is materially the same as her account in relation to the 4th Charge (see [146] to [153] above). This is so because of the close proximity in time between the incidents. Again, I am of the view that the unusually convincing standard does not apply in the present case (see [111]-[117]). Similar to my findings in respect of 4th Charge against Faris, I find that the Complainant's account of what had occurred in the bathroom with Asep, corroborated by the evidence in other forms in the present case, provides some evidence that she did not have the capacity to consent to any sexual activity with Asep in the bathroom at the material time, and that she had not in fact consented.

(2) Asep's testimony in court

173 As against the Complainant's evidence, Asep's account in court presented a very different picture of what happened in the bathroom between him and the Complainant, and a very different picture of what the Complainant was able to do at the material time. In essence, like Faris, Asep's defence was that the Complainant had consented to the sexual acts constituting the 6th and 7th Charge. The consent was evidenced by the Complainant allegedly nodding her head in response to Asep's questions on whether she wanted to have certain sexual activity. The Complainant also allegedly actively participated in the sexual activity and actively moved around in the bathroom, including unilaterally lifting her leg up onto the bathtub, to facilitate certain sexual acts with Asep. Asep's account in court may be summarised as follows:

(a) When Asep entered the bathroom, he saw the Complainant standing just outside the bathtub adjusting her top.[344] He then asked her if he could use the bathroom, and she nodded in response. This was the first time he had spoken to her.[345]

(b) Asep proceeded to wash his hands after passing urine in the Complainant's presence. As he was doing so, he noticed the Complainant looking at him and he asked her if she wanted to fellate him.[346] She nodded her head in response and approached him, while he removed his pants and underwear.[347] She then took his penis and put it into her mouth.[348]

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344 NE Day 27, p 33 at lines 1-15; Day 32, p 54 at lines 16-24.

345 NE Day 32, p 62 at lines 15-16.

346 NE Day 27, p 33 at lines 15-21.

347 NE Day 27, p 33 at lines 24-25.

348 NE Day 27, p 33 at lines 20-28.

(c) About two minutes later, Asep asked her if she wanted to "have the doggy position". The Complainant stood up, turned around, bent forward, and lifted her skirt. He then tried to penetrate her vagina with his penis from behind but failed as he lost his erection.[349]

(d) Subsequently, Asep asked the Complainant if she wanted him to lick her vagina. She nodded her head, moved to the area near the bathtub, and placed her right leg onto the bathtub. As he was about to kneel down in front of her, Elmi opened the door. Asep quickly pushed the door shut and pulled up his pants while the Complainant pulled down her skirt.[350] She also started gagging (*ie,* sounding like she wanted to vomit), and she made her way to the basin and turned on the tap. Asep asked if she was fine, and she nodded her head.[351]

(e) Asep then exited the bathroom and made his way down to the first floor of the Room before falling asleep there.[352]

174 In my view, Asep's account in court is not credible as it materially contradicts several other pieces of evidence, including his own statements to the police to which I now turn.

(3) Asep's police statements

175 The relevant parts of Asep's police statements may be summarised as follows:

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349 NE Day 27, p 33 at lines 21-30, p 34 at lines 1-2.

350 NE Day 27, p 34 at lines 3-27.

351 NE Day 27, p 34 at lines 30-31.

352 NE Day 27, p 35 at lines 1-3.

(a) In his 1st Statement, Asep stated that he went up to the bathroom on the second floor after returning to the hotel from Zouk. When he entered the bathroom, he saw the Complainant lying in the bathtub, with some vomit inside the bathtub.[353] She also sounded like she was still vomiting.[354] He could not remember what she was wearing at that point.[355] Thereafter, Asep washed his face and exited the bathroom.[356]

(b) In his 1st Statement, Asep did not admit to any sexual activity with the Complainant. He explained in his 2nd Statement that this was because he was afraid that it was an offence for the Complainant to perform fellatio on him (see Questions and Answers 4 and 5). However, what is material is that he did record in his 1st Statement his observation of the Complainant being "very drunk" when he returned from Zouk:

> 12 When I went to the toilet, I saw [the Complainant] lying in the bath tub and she was vomiting. There was some vomit in the bathtub. I could still hear her gagging like she was still vomiting. I then washed my face and went back out.
>
> …
>
> **Q10 Did you see anyone near the girl when you woke up in the morning?**
>
> Ans She was at the left side of the [R]oom near the door. No one was around her. Come to think of it, I am also not sure how she got to the first floor because the last that I saw her, she was very drunk in the bathtub and she was vomiting.
>
> **Q11 You saw a girl in the bathtub who was drunk. Did it cross your mind that you could take advantage of that situation with her?**

353 Exhibit 2TWT-P10 at paras 11-12.

354 Exhibit 2TWT-P10 at para 12.

355 Exhibit 2TWT-P10 at Q1.

356 Exhibit 2TWT-P10 at para 12.

> Ans No because she vomited all over herself and it was disgusting.
>
> …

(c) In his 2nd Statement, Asep maintained that he saw the Complainant lying and vomiting in the bathtub when he first entered the bathroom after returning from Zouk,[357] but he changed his version of what happened thereafter. He stated that about half an hour after he exited the bathroom, Faris returned to the Room from Zouk and went up to the bathroom immediately before spending at least half an hour inside with the Complainant.[358] After Faris exited the bathroom, Asep entered the bathroom for the second time, and he saw the Complainant adjusting her top.[359] He deduced that Faris had sex with her but did not think that she was in a condition to have sex with Faris or to consent to doing so, as she was drunk and seemed tired when he last saw her in the bathroom.[360] Nevertheless, Asep asked if the Complainant could fellate him. Asep did not know whether she said anything in response but thought that she had nodded her head. He then removed his pants, and she knelt down before holding his penis and putting it into her mouth.[361] About a minute or two later, Asep helped the Complainant up and turned her around so that she would be in a "doggy position". He then tried to penetrate her vagina with his penis, but was unable to do so as he had lost his erection. Asep then asked the Complainant if he could lick her vagina. She appeared to have nodded her head, but Elmi suddenly opened the bathroom door as he was about to kneel down to do so. This

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357 See Exhibit P205 at Q32.

358 See Exhibit P205 at Q2, Q6, and Q7.

359 See Exhibit P205 at Q2.

360 See Exhibit P205 at Q13.

361 See Exhibit P205 at Q2.

took Asep by surprise, and he reacted by closing the door and putting on his pants before leaving the bathroom, while the Complainant adjusted her skirt.[362] Asep claimed that the Complainant *was in a state to consent to sex at the time when sexual activity transpired between them*, despite the initial condition in which he found her in when he first entered the bathroom.[363]

176 In my view, Asep's 1st and 2nd Statements are consistent in depicting the Complainant's severe state of intoxication which negated her ability to give consent. In both statements, Asep had repeatedly and consistently described the Complainant as "drunk". In particular, in his 2nd Statement, Asep described the extent of her intoxication as follows:

(a) *Before* Asep had any sexual activity with the Complainant, Faris had entered the bathroom and at that time, Asep was of the view that the Complainant was not "in a state to have sex with anyone or have given consent to have sex" (Question and Answer 13 of Asep's 2nd Statement).

(b) *After* Asep had sexual activity with the Complainant, the Complainant was so intoxicated that Asep stated that someone needed to carry the Complainant out of the bathroom and down to the living room (Question and Answer 16 of Asep's 2nd Statement).

177 Yet, Asep insisted in court that *when* he had sexual activity with the Complainant, the Complainant was capable of consenting and had in fact consented to sexual activity with him. In my view, it is simply incredible that the Complainant would be in a severely intoxicated state both before and after

362 See Exhibit P205 at Q2.

363 See Exhibit P205 at Q15.

sexual activity with Asep, but yet regained sobriety only for the material period while Asep was in the bathroom with her. In that context, in so far as Asep claimed in his 2nd Statement that the Complainant could have and did in fact consent, I find that this was simply a self-serving attempt to escape criminal liability and should be given no weight. Instead, Asep's description of the Complainant as being "drunk" and "very drunk" in the other parts of his police statement are truthful observations of the Complainant's condition.

(4) Other witnesses' accounts

178 The testimonies of Elmi, Izzati, and Fadly, which I have summarised above in relation to Faris (see [160]-[164]), also apply here with equal force given the short passage of time between these alleged offences in the bathroom. As I mentioned, I find the witnesses' recounted observations of the Complainant's condition at the material time – and in particular that of Elmi's – to be credible and probative. These testimonies buttress the Complainant's evidence and they materially contradict Asep's account of her condition in the bathroom.

(5) Post-offence contact between Asep and the Complainant

179 In closing submissions, the Defence relied on contact between Asep and the Complainant after police investigations had commenced to support Asep's case that the Complainant's testimony was not reliable. Three specific instances of contact were relied on:

(a) Asep allegedly spoke with the Complainant on the phone using the phone of a mutual friend sometime after his 1st Statement was recorded on 30 January 2014. During this conversation, Asep asked the Complainant why he was involved in the police investigations.[364]

(b) Asep also met the Complainant several months later at a shopping mall with a group of friends sometime before the recording of his 2nd Statement.[365] There, he again asked the Complainant why he was involved in the investigations, and the Complainant allegedly told him that he was "not like the rest of them because she knows that it was consented [*sic*]".[366]

(c) Finally, Asep and the Complainant exchanged text messages between 12 November 2014 and 21 January 2015 during which the Complainant suggested meeting up with him and it was said that she appeared friendly towards Asep.[367]

180 Asep's argument was that the Complainant's willingness to communicate and even meet with a person whom she suspected could have sexually violated her "is totally irrational" and not consistent with her account of trauma arising from the alleged sexual assault.[368]

181 I am not persuaded by this argument and do not consider that it detracts from the weight of the Complainant's evidence and other evidence which supports the Prosecution's case.

182 First, it is questionable whether Asep's account of the contact between him and the Complainant after the time of the alleged offences on 26 January 2014 was accurate or complete.

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364 NE Day 33, p 54-56.

365 NE Day 33, p 63 at lines 20-25.

366 NE Day 33, pp 56-59.

367 NE Day 31, p 59.

368 Asep's closing submissions at pp 67-69.

(a) On the alleged phone call which occurred sometime after 30 January 2014, the Complainant was not cross-examined and no objective evidence was produced to corroborate Asep's claim about the existence of such a call.

(b) As regards the meeting at a shopping mall, the Complainant's testimony was that Asep had joined the group for dinner and that she was not sure that the conversation Asep alleged had in fact transpired.[369] Asep was similarly unable to produce any evidence to support his bare assertion that the Complainant had told him then that she consented to the sexual activity with him, nor did any other witness before me testify to such effect.

(c) As for the text messages between Asep and the Complainant, they were produced midway through the trial and the Complainant was not cross-examined on them or given an opportunity to explain these messages. Also, Asep only managed to produce screenshots of the messages and admitted that he had selectively deleted several messages.[370]

183 Second, and in any event, I do not consider that much could be made out of the Complainant's alleged post-offence interaction with Asep. Three points should be made in this regard.

(a) One, while it is true that in one of the Complainant's earlier text message to her friend later in the morning of the alleged offences, she might have mentioned Asep by description as the one who was wearing spectacles and stated that she believed that he was one of the

369 NE Day 3, pp 107-110.

370 NE Day 33, p 77 at lines 29-31.

perpetrators, it was clear from the collective of her messages that she was not herself certain as to what had actually happened at the Duxton Hotel.

(b) Two, it also seems to me that the Complainant was not clear in her own mind as to how to interact with Asep thereafter, if at all. Indeed, based on Asep's evidence, it was not the Complainant who sought to make contact with Asep in the first two interactions but the other way round.

(c) Three, it appears to me that the Complainant is a simple person who was more comfortable relying on her friends than her family members. In fact, the first persons the Complainant contacted later in the morning of the alleged offences, when she suspected that she had been sexually assaulted, were her friends, and she did not want to inform her parents about the matter. When she made a police report, she was also accompanied by a friend and not any family member. It appeared that she did not have the benefit of much parental guidance after the date of the alleged offences.

184 Third, I am mindful of the risks and inaccuracy of accepting the underlying premise of Asep's submission that there should be a single mould of how a victim of sexual abuse should act. As Abdullah JC (as he then was) observed in *PP v BLV* at [154]:

> 154 I have discomfort with the notion that there is an archetypal victim of sexual abuse, or that there is any standard as to how a victim of sexual abuse should or should not have aspects of his or her life visibly affected by the abuse.

Conclusion on the 6th and 7th Charges

185 For these reasons, I am of the view that the 6th and 7th Charges against Asep are made out beyond a reasonable doubt. The Complainant's condition at the time of these offences was not different from her condition at the time of the 4th Charge (see [165] above). Accordingly, I find that she lacked the requisite capacity to consent to any sexual activity with Asep at the material time.

Defence of mistake of fact

186 In so far as the defence of mistake of fact is concerned, I find that this has not been established by Asep on a balance of probabilities. Regrettably, the Defence did not elaborate on the applicability of this defence in their closing submissions except to mention it.[371]

187 So far as his subjective belief was concerned, Asep did claim that the sexual activity between him and the Complainant was consensual in his testimony in court and in his 2nd Statement. However, as I mentioned, I disbelieved Asep's testimony and found that the portions of his 2nd Statement which suggested that the sexual activity between him and the Complainant was consensual were self-serving and untruthful (see [174]-[177] above). In the light of these points, and also my findings as to the severely intoxicated state of the Complainant at the material time, I find that Asep has not discharged his burden of proving that he had been mistaken in good faith at the material time that the Complainant was capable of giving consent and had in fact given her consent to the sexual activity with him in the bathroom.

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371 Asep's closing submissions at para 156.

1st, 2nd and 3rd Charges – Ridhwan, living room, digital-anal penetration, rape, and outrage of modesty

188 The 1st, 2nd, and 3rd Charges against Ridhwan are for the following offences respectively, all of which allegedly occurred sometime later in the morning of 26 January 2014 in the living room of the Room (see [2] above):

(a) Sexual assault by penetration under s 376(2)(*a*) of the PC, punishable under s 376(3) of the PC, for penetrating the Complainant's anus with his finger without her consent.

(b) Rape under s 375(1)(*a*), punishable under s 375(2) of the PC, for inserting his penis into the Complainant's vagina without her consent.

(c) Using criminal force with intent to outrage the modesty of the Complainant punishable under s 354(1) of the PC, for sucking her nipples.

189 The relevant provisions for sexual assault and rape have been reproduced above at [169] and [126] respectively. In relation to outrage of modesty under s 354(1) of the PC, the provision reads as follows:

> **Assault or use of criminal force to a person with intent to outrage modesty**
>
> 354.—(1) Whoever assaults or uses criminal force to any person, intending to outrage or knowing it to be likely that he will thereby outrage the modesty of that person, shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with caning, or with any combination of such punishments.

190 The Prosecution submitted that all three charges against Ridhwan are established as the Complainant was so intoxicated at the material time that she lacked the capacity to consent to the relevant sexual acts with Ridhwan, or, in

the alternative, that she did not in fact consent to such acts. The Prosecution based its submissions primarily on the following pieces of evidence:

(a) evidence of the Prosecution's expert witness;

(b) the Complainant's testimony;

(c) other witnesses' observations of the Complainant's condition when she was brought down to the living room;

(d) Ridhwan's statements to the police; and

(e) Ridhwan's actions after the alleged offences.

191 Ridhwan's defence in relation to all three charges was that, at the material time, the Complainant had the capacity to consent and did in fact consent to the relevant sexual acts with him. He suggested that the Complainant may have consented to the relevant sexual acts while suffering from anterograde amnesia such that she simply could not remember having done so.[372] Further, specifically in relation to the 1st Charge, he argued that he had intended to digitally penetrate the Complainant's vagina and only penetrated her anus by accident because they were underneath a blanket.[373] On that premise, he submitted that he did not have the requisite *mens rea* for the 1st Charge, and some suggestion was also made that the defence of accident under s 80 of the PC applied in his favour.

192 In the ensuing analysis, I will deal first with the issues that concern all three charges against Ridhwan, which are (a) the Complainant's capacity to consent at the material time; (b) whether she in fact consented to the sexual acts;

372 Ridhwan's closing submissions at para 97.

373 NE Day 34, p 92 at lines 2-4 and 24-26.

and (b) the defence of mistake of fact. Thereafter, I will deal with the two issues that specifically concern only the 1st Charge, which are (a) the requisite *mens rea* for the charge, and (b) the defence of accident.

193 Before I turn to the analysis proper, I make two observations about the chronology of events.

(a) First, the exact time at which the sexual acts between Ridhwan and the Complainant took place was disputed. The Prosecution's version was that they had taken place between 5.04am and 7.16am, the latter being the time of sunrise on 26 January 2014. Ridhwan's position was that it happened between 7.16am and 9.54am, *ie*, after sunrise on 26 January 2014. For reasons which I will discuss below, I do not consider that the precise timing of the sexual encounter between Ridhwan and the Complainant is material. I add that the same time period covers the alleged offence underlying the 5th Charge against Faris.

(b) Second, as the charges against Ridhwan concern acts in the living room which occurred sometime after the alleged offences in the bathroom, my findings above on the Complainant's incapacity to consent to sexual acts in the bathroom do not necessarily extend to the present charges, even though they may nevertheless be relevant.

Consent

194 In the present case, apart from the expert reports and the accounts of the Complainant and Ridhwan (including his police statements), there is less objective evidence as to the Complainant's condition at the time of the sexual

acts in the living room. Rather, the Complainant's condition has to be inferred from evidence about other proximate points in time, which include:

(a) other witnesses' observations of the Complainant's condition when she was brought from the bathroom to the living room (which was *prior to* the events constituting the living room charges) and in the morning before she left the Duxton Hotel (which was *after* the events constituting the living room charges),

(b) CCTV footage of the Complainant leaving the Duxton Hotel at around 10am on 26 January 2016, and

(c) the post-offence conduct of the Complainant and Ridhwan after they left the Duxton Hotel.

195 In assessing such evidence, I reiterate the following principle which the Court of Appeal identified as salient to the determination of capacity to consent in *Pram Nair* at [96] (see full quotation at [119] above):

> (d) Capacity to consent requires the capacity to make decisions or choices. *A person, though having limited awareness of what is happening, may have such impaired understanding or knowledge as to lack the ability to make any decisions, much less the particular decision whether to have sexual intercourse or engage in any sexual act.*
>
> [emphasis added]

(1) Expert opinions

196 The contents of Dr Guo's 1st Report and 2nd Report have been discussed above at [131]-[132]. To reiterate briefly, Dr Guo estimated the Complainant's BAC level to be between 141.57mg% and 53.57mg% from 5am to 9am on 26 January 2014. At this time, the Complainant "would have been in an early recovery stage from the [alcohol] intoxication" and it was "possible

that she would have been still sedated and her judgment of her actions…still somewhat impaired".[374] Dr Guo concluded as follows:[375]

> During the early hours in the morning [6AM and 9AM], based on her estimated BAC, it is possible that the effects of intoxication should have been gradually wearing off at this period of time. Despite being sedated, she might be partially aware of her actions and surroundings during this period but one could still not fully rule out the possibility of the sedative effects of alcohol influencing her thoughts and behaviour and contributing to the poor judgment of her actions.

197 In court, Dr Guo explained that his reference to "poor judgment" on the part of the Complainant meant that she "may still [*sic*] unable to fully understand the purpose of the… stimulation and what kind of response she should take [*sic*]."[376] Dr Guo went on to opine that given the Complainant's sedated state, it would have been almost impossible to do certain acts which Ridhwan alleged that she did (see [227] below):

(a) bend her knees and use her hands to push her panties down to her feet;[377]

(b) engage in voluntary sexual intercourse;[378]

(c) guide another's penis with her hand towards her vagina;[379] or

(d) pull the waist of another towards her.[380]

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374 See Exhibit P180 at para 34; NE Day 17, p 4 at lines 5-14.

375 See Exhibit P180 at p 9 read with Exhibit P180B.

376 NE Day 15, p 21 at lines 23-27.

377 NE Day 15, p 28 at lines 18-24.

378 NE Day 15, p 28 at lines 25-32.

379 NE Day 15, p 29 at lines 11-13.

380 NE Day 15, p 29 at lines 17-29.

198 Dr Guo also gave evidence that the Complainant could not have been suffering from anterograde amnesia at the time she woke up as anterograde amnesia would end once a person fell asleep.[381] Against this, Dr Winslow's evidence was that the Complainant could still have been suffering from anterograde amnesia after waking up.[382]

199 Under cross-examination, Dr Guo accepted that his opinion that the Complainant was in a state of "severe sedation" between 6am and 9am on 26 January 2014 was primarily based on the Complainant's account of her condition taken together with her estimated BAC levels.[383] However, if Ridhwan's account of events was accurate, Dr Guo would revise his assessment of the Complainant's condition to one of a milder state of intoxication.[384] This milder state of intoxication would be more in line with Dr Guo's estimate of the Complainant's BAC levels. It would also not have been nearly impossible for the Complainant to perform the acts stated above at [197].[385]

200 Dr Winslow testified that given the estimate of the Complainant's BAC levels between 6am and 9am on 26 January 2014, it was likely that she would have been able to voluntarily partake in the sexual acts alleged by Ridhwan (see below at [227]) and have no memory of it.[386] However, Dr Winslow also accepted that if the Complainant's account of events were true, it was likely that she was still "stuporous… floating in and out of being so slightly awake" and possessed impaired motor skills.[387]

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381 NE Day 16, p 21 at lines 7-11.

382 NE Day 37, p 15

383 NE Day 16, p 78 at lines 10-26.

384 NE Day 16, p 80 at lines 18-32.

385 NE Day 16, p 81 at lines 1-32, p 82 at lines 1-13.

386 NE Day 37, pp 27-28.

201 Similar to my findings in respect of the alleged offences in the bathroom, I am unable to draw any definitive conclusion from the expert witness testimony except that neither the Complainant's nor Ridhwan's account can be ruled out. If the Complainant's recount of her physical condition at the time of the alleged offences was true, many of the acts which Ridhwan alleged that she committed would have been difficult, if not impossible.[388] The converse would be true if Ridhwan's version was correct. Both Dr Guo and Dr Winslow broadly accepted that the clinical manifestations of the Complainant are the most determinative factor.[389]

202 The effect of the expert testimony is that the precise time at which the sexual encounter between Ridhwan and the Complainant took place is not material in the circumstances. As I understand it, the parties' focus on the timing of the sexual encounter with Ridhwan was mainly due to the fact that this would affect the Complainant's estimated BAC levels, and correspondingly the likelihood of her being severely intoxicated and unable to consent. In the light of the joint conclusion that clinical manifestations are a better assessor of a person's level of intoxication (see [144] above) and the limitations of the BAC estimates in this case (see [141] above), I do not think that a definitive finding on this issue was crucial to the outcome of the case.

203 For completeness, I add that I have some difficulty accepting Dr Guo's evidence that anterograde amnesia would cease the moment the person suffering from one fell asleep and would not re-occur when that person awoke. Dr Winslow, on the other hand, stated that anterograde amnesia does not necessarily cease when a person falls asleep.[390] I find that Dr Guo's position is

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387 NE Day 37, p 45 at lines 16-26.

388 NE Day 15, p 28 at lines 18-24; Day 37, p 47 at lines 16 to p 48 at line 6.

389 NE Day 37, pp 32-33 at line 31 to p 33 at line 4.

somewhat at odds with some of the medical literature he cited in his reports, which stated that anterograde amnesia had been recorded lasting as long as three days,[391] and his admission at trial that anterograde amnesia could last as long as three days.[392] If Dr Guo's evidence is to be accepted, this will mean that the subjects in the study did not sleep for a period of 72 hours and there is nothing to suggest that here. In the circumstances, I am not prepared to accept that the Complainant's anterograde amnesia, if she was indeed suffering from it, ceased the moment she fell asleep on the morning of 26 January 2014.

(2) Complainant's account

204 I turn now to assess the Complainant's testimony on what had occurred in the living room. As I alluded to above (at [111]-[117]), I do not think that it is necessary for the Prosecution to establish that the Complainant was an unusually convincing witness.

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390 NE Day 37, p 15 at lines 24-27.

391 See Exhibit P180D at p 189.

392 NE Day 16, p 35 at lines 13-21.

205 The Complainant's account was that while she only remembered flashes of the events that transpired in the living room as she kept falling asleep. She had a vague idea of what was happening around her during the alleged sexual assault and tried to indicate that she did not consent, but she was too weak to resist.[393] In particular, the Complainant testified that:

(a) It was dark in the Room when she woke up.[394] She was lying between Faris on her right and Ridhwan on her left, with her panties removed.[395] The three of them were sharing a blanket.[396] The Complainant felt someone "fingering" her vagina and concluded it was Faris as he was facing her and staring at her.[397] The Complainant was aware of what Faris was allegedly doing and was able to attempt to push his hand away, although she was not able to exert much strength in doing so and eventually fell asleep.[398]

(b) The Complainant was then awakened by a feeling of pain in her anus. She suspected that it was a penis which was being inserted into her anus and that Ridhwan was responsible as she was facing Faris and Ridhwan was behind her.[399] The Complainant testified that she shook her head to demonstrate her unwillingness to partake in the alleged sexual activity.[400] She then remembered Ridhwan being on top of her

393 NE Day 1, p 59 at lines 16-26, pp 60-61.

394 NE Day 1, p 55 at lines 24-26.

395 NE Day 1, p 55 at lines 27-30, p 57 at lines 1-11.

396 NE Day 1, p 58 at lines 4-5.

397 NE Day 1, p 59 at line 3.

398 NE Day 1, p 59 at lines 16-17.

399 NE Day 1, p 60 at lines 4-26.

400 NE Day 1, p 60 at lines 1-3, p 61 at lines 1-13.

while he was inserting his penis into her vagina.[401] Ridhwan also sucked her nipples.[402]

(c) The Complainant's next memory was of overhearing a conversation in the living room between Ridhwan and Faris where the former said "I pity her" in Malay and the latter agreed.[403] She pretended to continue to sleep before she felt Faris' head on her "tummy".[404] Eventually, the Complainant pulled up her panties and went to the bathroom on the second floor.[405] She subsequently left the Duxton Hotel with Fadly and Hazly.[406]

206 Ridhwan submitted that there were material inconsistencies in the Complainant's testimony:[407]

(a) The Complainant was uncertain as to the precise sequence of sexual acts with Ridhwan. During her examination-in-chief, she testified that Ridhwan first inserted his penis into her anus and then climbed on top of her to have sexual intercourse. At some point, Ridhwan also sucked her nipples.[408] However, under cross-examination, she said that she was unsure whether the sexual intercourse or anal penetration came first.[409]

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401 NE Day 1, p 62 at lines 1-10.

402 NE Day 1, p 63 at lines 19-23.

403 NE Day 1, p 64 at lines 6-9; PBOD p 149.

404 NE Day 1, p 67 at lines 10-13.

405 NE Day 1, p 68 at lines 18-25.

406 NE Day 1, p 74 at lines 4-7.

407 Ridhwan's closing submissions at pp 30-34.

408 NE Day 1, pp 60-63.

409 NE Day 4, p 44 at lines 23-25.

(b) The Complainant could not give evidence on the details such as how her body was positioned when Ridhwan was sucking her nipples and how long she felt the pain in the anus last for.

(c) The Complainant was unable to recall whether she had put on her panties before or after she allegedly heard Ridhwan say "I pity her" in Malay.

(d) The Complainant gave evidence that Faris had laid his head on her "tummy", but admitted under cross-examination that she could not definitively confirm this.

207 I agree with Ridhwan that the Complainant's evidence was not entirely satisfactory as she was uncertain as to and/or unable to recall the material details of the assault such as whether the digital-anal penetration or sexual intercourse took place first.[410]

208 However, I do not agree with Ridhwan's submission that the Complainant had in fact consented to the sexual acts but simply could not remember having done so because she was suffering from anterograde amnesia.[411] This is so even though I was prepared to accept that it was possible that she could have suffered from anterograde amnesia after waking up (see [203] above). First, the experts' evidence concerning the issue of anterograde amnesia was largely premised on a person being in complete anterograde amnesia. In that regard, since the Complainant did have some recollection of the sexual activity with Ridhwan in the living room, she could not have been in such a state of complete anterograde amnesia.[412] Second, while there is some

410 NE Day 4, p 44 at lines 23-25.

411 Ridhwan's closing submissions at para 97.

412 See Exhibit P181 at para 3.

evidence of a state called the "fragmentary blackout",[413] this was not seriously pursued in trial and the expert testimony on the point was piecemeal. More pertinently, for reasons which will become apparent, I am of the view that Ridhwan's account of the Complainant's alleged active physical participation in the sexual activity with him (see [227] below) is inconsistent with the Complainant's actual physical state at the material time. She was weak and unable even to resist falling asleep despite her awareness that she was being sexually violated. Therefore, even if the Complainant was suffering anterograde amnesia, that still does not advance Ridhwan's present case.

209 Ridhwan further sought to undermine the Complainant's testimony by referring to four aspects of her post-offence conduct. I am not persuaded that they materially undermine the credibility of the Complainant.

210 First, Ridhwan drew the court's attention to the Complainant's testimony that she had remained in the Room for some time after she awoke in the morning after the alleged offences (see [205] above). Ridhwan submitted that this was implausible for someone who had just been the victim of a sexual assault.[414] Had she been a genuine victim of sexual assault, he argued, she would not have remained in the Room after having woken up, or had the "presence of mind and awareness" to "pretend to sleep" to overhear what her alleged assailants were saying.[415] Against this, the Complainant's testimony was that she felt confused, ashamed and afraid at that time.[416]

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413 See, for instance, Exhibit P181 at para 3.

414 Ridhwan's closing submissions at para 43.

415 Ridhwan's closing submissions at paras 44-46.

416 NE Day 4, p 74.

211 For reasons I have explained at [184] above, I do not agree that much could be made of this single aspect of Complainant's post-offence conduct.

212 Second, the Complainant was captured on CCTV to have left the Duxton Hotel at about 9.58am on 26 January 2014. The CCTV footage was played in court before the Prosecution's expert witness, Dr Guo, who opined that the Complainant at one point could be observed walking with an unsteady gait.[417] The Prosecution relied on this while the Defence denied that such unsteadiness was observable. Having watched the CCTV footage myself, I am unable to tell whether the Complainant was walking unsteadily at any point. The resolution of the footage was not sufficiently clear. Furthermore, it would be doubtful how much weight should be given to an unsteady gait at that time unless the unsteady gait was so obvious as to support a suggestion that she was still in some state of sedation in the living room.

213 The third aspect relates to the numerous text messages exchanged between the Complainant and her friends, including Affandi, after the Complainant left the Duxton Hotel. These messages suggest that the Complainant was attempting to piece together the events which occurred on 25 and 26 January 2014. While she was unsure of what exactly had transpired and did not document the specific allegations in these messages, they make clear that she suspected that she had been sexually violated by multiple men, including Faris and Ridhwan.[418]

214 Ridhwan submitted that some of the Complainant's text messages contradicted her evidence in court. For instance, the Complainant texted one of her friends that "[t]he last thing [she] could remember [was] when [she was]

417 NE Day 16, pp 91-92.

418 PBOD pp 144-145, pp 66-186, pp 27-39, pp 1-26, pp 40-64.

sitting in the sofa".[419] This was held out as contradicting the Complainant's testimony in court, where she gave evidence as to flashes of events which she remembered. It was also suggested that if the Complainant had not consented to the sexual acts with Ridhwan, she would have informed her friends of this contemporaneously.[420]

215 I agree that there is some inconsistency between the Complainant's testimony in court and the text messages which she sent to her friends shortly after the alleged offences. For instance, her text message that she was unable to remember any of the events following her sitting down on the sofa[421] appeared to be inconsistent with her testimony in court that she remembered flashes of the sexual acts with Ridhwan and Faris when she woke up.[422] However, the more important consideration is that little weight can be placed on the point that she did not specifically mention the issue of lack of consent in the text messages. One, I am of the view that her absence of consent is clear from the overall context and tonality of her text messages. If she had been of the view that she had consented to the sexual activity, she would not have described herself as a victim of sexual assault. Two, and in any event, the Complainant was at the time of the text messages only trying to piece together an account of what had occurred.

216 The fourth aspect relates to the Complainant's post-offence medical examinations. In total, the Complainant went for three such examinations. The first took place on 28 January 2014 at the Emergency Department of the National University Hospital with Dr Shakina Rauff ("Dr Rauff"). The second

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419 PBOD p 45.

420 Ridhwan's closing submissions at para 53.

421 PBOD p 45.

422 NE Day 4, p 73 at lines 21-26.

and third took place on 25 April 2014 and 5 May 2014 at the IMH with Dr Cai Yiming ("Dr Cai").

217 Dr Rauff's medical report dated 25 July 2014 stated that the Complainant "was calm… looked well and her mental state was normal". The report recorded the following information which the Complainant provided at the medical examination on 28 January 2014:[423]

(a) The Complainant could not remember how much alcohol she drank but knew that after a few drinks she "got drunk and passed out".

(b) The Complainant could not recall what happened after she passed out except that there were people touching her "below" which she believed was Faris and another male.

(c) There was digital-vaginal penetration and digital-anal penetration by Faris.

(d) There was penile-vaginal and penile-anal penetration by another unknown assailant, but the Complainant could not confirm if ejaculation had occurred.

(e) The Complainant woke up at around 8am on 26 January 2014 with her underwear taken off and two men sleeping beside her.

423 AB pp 16-17.

218 According to Dr Cai's medical report and clinical notes dated 7 May 2014,[424] the Complainant had told him that:

(a) She vaguely remembered being in the bathroom vomiting while accompanied by one or two of Fadly's friends and lying on the floor just beside the water closet.

(b) A male person inserted his penis into her anus and had sexual intercourse with her "front and back", and also hugged and kissed her.

(c) Faris "finger[ed]" her private parts.

219 Dr Cai also opined that the Complainant demonstrated signs and symptoms suggestive of post-traumatic stress disorder.[425]

220 It seems that the Complainant's oral testimony is not entirely consistent with the medical report of Dr Rauff dated 25 July 2014. In the medical report, Dr Rauff recorded an allegation of digital-anal penetration by Faris. Dr Rauff testified that this answer came from the Complainant and that she had simply recorded it down.[426] However, at trial, the Complainant did not give evidence about any act of digital-anal penetration by Faris. The Complainant also testified that she did not remember telling Dr Rauff about such an instance of digital-anal penetration by Faris.[427] Further, in so far as Dr Cai's report was concerned, the Complainant clarified in court that the "unknown assailant" she had referred to was Ridhwan, but conceded that she was not certain that there had been penile-anal penetration.[428]

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424 PBOD pp 19-22; Exhibit P182.

425 NE Day 8, p 11 at lines 26-27.

426 NE Day 7, p 63 at lines 23-30.

427 NE Day 3, p 18 at lines 16-28.

221 Nevertheless, I am of the view that the Complainant was not lying. The inconsistencies arose from her difficulty in trying to recollect some aspects of the past including what she had said to third parties. In my view, the Complainant was a candid witness on the stand who was trying to give her evidence as best she could.

222 I add that Ridhwan also submitted that the Complainant might have motives to falsely accuse Ridhwan of the alleged offences. This was based on: (a) the Complainant's concern about her reputation; and (b) the Complainant genuinely not remembering that she had consented to the sexual activity and could not accept that she had done so.[429]

223 I do not understand the second reason. If the Complainant genuinely could not remember that she had consented to the sexual activity, and would not accept that she had consented, that does not constitute a motive to falsely accuse Ridhwan. Even if the Complainant had incorrectly thought that she did not consent, when in fact she did consent, this would have been due to her condition at the material time. It is not a false motive as a false motive suggests that she knew otherwise but nevertheless chose to falsely accuse Ridhwan.

224 As for the Complainant's concern about her reputation, there was no suggestion in the evidence that she was more concerned about her reputation then what had actually happened to her. Further, some reputational concern on the part of an alleged victim regarding an allegation of sexual offence is not surprising.

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428 NE Day 4, p 43 at lines 9-29.

429 Ridhwan's reply submissions at paras 14-15.

225 In my view, Ridhwan had not discharged his evidential burden to raise a plausible motive for the Complainant to falsely implicate him (see *AOF* at [215]-[216]). As mentioned above, I find her to be a candid witness who was trying to give her evidence as best she could.

226 In any event, this is not a case in which the Prosecution is seeking to obtain a conviction solely on the testimony on the Complainant. The Prosecution also relied on the testimonies of other witnesses and the fact that Ridhwan had lied in his police statements and in his testimony to corroborate the Complainant's account. It is to such other evidence that I now turn.

(3) Ridhwan's testimony in court

227 I begin with Ridhwan's account of the relevant events in court, which may be summarised as follows:

(a) When the Complainant was brought down to the living room after the events in the bathroom, she was able to do so unassisted with Fadly standing behind her to catch her if she was about to fall.[430]

(b) In the living room, Ridhwan slept next to the Complainant and shared the same pillow and blanket with her.[431]

(c) When Ridhwan woke up, he noticed through the window that it was already broad daylight.[432] At this time, the Complainant, who was originally facing Faris, turned around to face Ridhwan.[433] The Complainant then put her right arm around Ridhwan's neck and

430 NE Day 34, p 68 at lines 2-10.

431 NE Day 34, p 20 at lines 10-16.

432 NE Day 34, p 21 at lines 20-24.

433 NE Day 34, p 21 at lines 24-32.

"smirked" at him. Ridhwan looked at the Complainant in the eye and leaned forward to kiss her. The Complainant reciprocated.[434] Ridhwan then pulled down the Complainant's brassiere and sucked her nipples before proceeding to digitally penetrate the Complainant's vagina with his left middle finger.[435] During this time, the Complainant was moaning with pleasure.

(d) Ridhwan followed by pulling down the Complainant's panties to her knees and unzipping his own pants. The Complainant removed her panties completely on her own. This took place while both Ridhwan and the Complainant were still under the blanket.[436] Ridhwan then digitally penetrated the Complainant's vagina once again with his left middle finger before trying to insert his penis into her vagina but was unable to do so because he was facing the Complainant and the position was "too awkward".[437] Ridhwan pushed the Complainant's right shoulder and she turned around. He tried to digitally penetrate the Complainant's vagina but accidentally penetrated her anus.[438]

(e) Ridhwan then tried to insert his penis into the Complainant's vagina but was still unable to do so.[439] He pulled the Complainant's left shoulder so that she once again faced him. Ridhwan once again tried to insert his penis into the Complainant's vagina but failed. He only managed to insert his penis into the Complainant's vagina when the Complainant pulled his waist towards her, following which he pushed

434 NE Day 34, p 22 at lines 9-18.

435 NE Day 34, p 23 at lines 1-14.

436 NE Day 34, p 23 at lines 17-31.

437 NE Day 34, p 24 at lines 18-25.

438 NE Day 34, p 25 at lines 12-22.

439 NE Day 34, p 25 at lines 24-27.

> the Complainant's right shoulder and climbed on top of her. The Complainant then guided his penis into her vagina with her hands.[440]

228 Ridhwan's evidence was that the sexual intercourse with the Complainant lasted about five minutes with Ridhwan failing to ejaculate.[441] In total, the entire sexual encounter lasted about 15 to 20 minutes. Ridhwan then laid down beside the Complainant while she put on her panties.[442]

229 I note that Ridhwan did not put material parts of his evidence to the key witnesses who were present in court. For instance, although his account was that the Complainant was supposedly "moaning in pleasure" throughout the encounter,[443] Faris, who was lying next to the Complainant underneath the same blanket,[444] was not asked by Ridhwan's counsel if he had heard any such moan even though, as I will elaborate later, Faris was apparently not asleep throughout the period he was in the living room.

230 For this and other reasons which I will elaborate, I disbelieve Ridhwan's account of events in court as it materially contradicts several other pieces of evidence, including his own police statements.

(4) Ridhwan's police statements

231 As I mentioned above, the Prosecution relied on three statements given by Ridhwan to the police (see [32] above). In his 1st and 2nd Statements given on 30 January 2014 and 3 February 2014 respectively, he denied any form of

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440 NE Day 34, p 26 at lines 6-23.

441 NE Day 34, p 26 at lines 27-30.

442 NE Day 34, p 28 at lines 11-15.

443 NE Day 35, p 7, p 8 at line 1.

444 NE Day 34, p 21 at lines 17-32, p 22 at lines 1-5, p 42 at lines 16-30.

sexual contact with the Complainant. Ridhwan's 3rd Statement given on 5 February 2014 admitted to the sexual acts but took the position that they were consensual. Ridhwan did not challenge the voluntariness of any of his statements.

232 In all three statements provided by Ridhwan, he recorded observations of the Complainant's state of intoxication. In his 1st Statement, Ridhwan mentioned that the Complainant "was drunk", "unsteady", and had to be carried by her arms up to the bathroom before the Group proceeded to Zouk.[445] There were also multiple references to the Complainant being "drunken" and "knock[ed] out":

> 9 I returned to the hotel at around 5.30am… When I reached the hotel room… I felt the urge to pee. I then went up to the toilet and heard a vomiting voice. I push the door ajar and… saw the same girl who got drunk earlier vomiting… The guy that came with the *drunken girl* did not come back to the hotel after Zouk.
>
> …
>
> 11 [A]round 11.30am or 12 noon we all decided to go home. Faris, Asep and I left first. Elmi, her girlfriend, the two guys, that *drunkard girl* was still inside the hotel room when the three of us left.
>
> …
>
> **Q14: Among the group are you able to tell who is the lousiest drinker?**
>
> Ans: That *drunkard girl*. Only she *knocks out* and vomited.
>
> [emphasis added in italics]

445 See Exhibit P214 at para 6.

233 Similar references are also found in Ridhwan's 2nd Statement:

> **Q1: Can you identify the girl in this photograph (Herein refers: Victim)?**
>
> Ans: Yes, she is the *drunkard girl* at the hotel…
>
> …

234 It is notable that the 2nd Statement contained an explicit denial of various sexual acts with the Complainant as opposed to an omission to mention them:

> **Q51: Did the drunkard girl slept between Farish[sic] and you in the hotel room that early morning?**
>
> Ans: No
>
> …
>
> **Q54: What do you have to say to the drunkard girl's calm [*sic*] that you had inserted your penis into her anus from behind and after that you had inserted your penis into her vagina?**
>
> Ans: I did not do that
>
> **Q55: Did you kiss the drunkard girl's lip during those times?**
>
> Ans: No
>
> **Q56: Did you suck the drunkard girl's nipples that morning?**
>
> Ans: No
>
> **Q57: What do you have to say that the drunkard girl claimed that you had kissed her on the lips and sucked her nipples that morning in the living room?**
>
> Ans: I did not do that.

235 Yet at trial, Ridhwan accepted that he did engage in the sexual acts in question with the Complainant.

236 In his 2nd Statement, Ridhwan also commented on the Complainant's condition when she was brought down to the living room from the bathroom:

> **Q38: What happened to the drunkard girl after she was in the toilet with the two unknown male guys after 10 minutes?**
>
> Ans: They brought her down by guiding her by her arms. She appeared to be conscious and aware of her surroundings. I cannot remember where the two guys put girl after that. As for me, I just had some food, smoked and watched TV. At that time, I was with Acep, Farish [*sic*], the two unknown guys and the drunkard girl.

237 Although this statement mentioned that the Complainant "appeared to be conscious and aware of her surroundings", it also mentioned that the two unknown male guys brought her down and that he could not remember where the two guys put her after that. It suggested that she still needed help to be brought to some place in the living room.

238 Tellingly, in his 3rd Statement, Ridhwan said that the Complainant had to be brought down from the second floor to the first floor and "put… to lie down" at the entrance of the Room:

> **Q26: When did the drunkard girl come down?**
>
> Ans: I know *someone brought the girl down* and *put her to lie down* near the hotel entrance door [emphasis added]. I am not sure when exactly but it was before I went to sleep beside her.

239 In my view, Ridhwan was not truthful at trial about the extent of the Complainant's intoxication when she was subsequently brought down to the living room from the second floor. In his testimony in court, Ridhwan sought to portray the Complainant as being able to walk down the spiral staircase unassisted. In cross-examination, Ridhwan elaborated:[446]

> She went downstairs on her own and Fadly was behind her. She was---he was not holding to her. He was getting ready to catch her in case she fell---in case she fall and she's---in case she's unsteady…

---

446 NE Day 34, p 16 at lines 28-30.

240 However, this account is contradicted by Ridhwan's 2nd and 3rd Statements. In both these statements, he mentioned that she was brought to a spot by others. The 3rd Statement was even more telling where he said "I know someone brought the girl down and put her to lie down near the hotel entrance door".[447] The words here are important because it meant that the Complainant was so sedated that someone had to help to bring her down and also to place her in a lying position in the living room near the door of the Room. It must be borne in mind that according to Ridhwan, he had stated the truth in the 3rd Statement because he wanted to tell the truth after his first two statements.[448] Therefore, he would have been even more careful about what he was saying in the 3rd Statement.

241 When cross-examined on the discrepancy between his police statements and his version of events at trial on the Complainant's condition when she was brought down to the living room from the second floor, Ridhwan explained that he did not know that he had to be "specific" in his statements.[449] I am of the view that this discrepancy cannot be put down to a lack of specificity. Ridhwan's statements suggest that the Complainant required assistance to come down the staircase to the living room and even to lie down. This is clearly at odds with the version which he asserted at trial – that the Complainant made her way down on her own, with Fadly only serving as a failsafe to catch her if she fell.[450] The difference is not simply a matter of specificity. Rather, it appears to be an attempt by Ridhwan to change his position from his earlier incriminating statements in a bid to bolster his case at trial that the sexual acts were consensual.

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447 See Exhibit P206 at A26.

448 NE Day 35, p 3 at lines 8-11.

449 NE Day 34, p 65 at lines 10-13 and 20-23.

450 NE Day 34, p 16 at lines 28-30.

(5) Other witnesses' accounts

242 In so far as the Complainant's condition immediately after the alleged offences in the bathroom and *before* the alleged offences in the living room was concerned, Izzati, Fadly and Elmi gave probative testimonies in this regard (see [162]). To recapitulate, Elmi testified that when the Complainant was brought down to the living room, she "looked drunk" and was "unconscious".[451] According to Elmi, the Complainant had to be supported by Fadly, who had to put his right arm on her shoulder and her left arm across his neck to bring her down to the living room.[452] However, Elmi conceded that he did not pause to observe Fadly support the Complainant all the way down to the living room.[453]

243 As for the Complainant's condition *after* the alleged offences in the living room and before she left the Duxton Hotel, Izzati's evidence was that in the morning, the Complainant "looked normal" and her "voice tone looks like cranky".[454] Fadly's evidence was that the Complainant looked "tired".[455] Elmi said that the Complainant looked "grumpy and moody".[456]

244 Ridhwan sought to cast doubt on Elmi's testimony, asserting that there were material inconsistencies in his testimony and that he ought not to be believed.[457] It was alleged that Elmi contradicted himself in his evidence-in-chief by first stating that the Complainant "looked drunk" and was helped out of the bathroom with Fadly "supporting her shoulder", but subsequently saying

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451 NE Day 5, p 105 at lines 8-15.

452 NE Day 5, p 105 at lines 17-31, p 107 at lines 1-2.

453 NE Day 7, pp 14-15.

454 NE Day 5, p 24 at lines 23-25.

455 NE Day 36, p 17.

456 NE Day 6, p 2 at line 27.

457 Ridhwan's closing submissions at para 74.

that the Complainant was "unconscious".[458] Elmi also allegedly could not recall facts such as what about the Complainant's face "made her look drunk" and whether he had knocked on the bathroom door before asking Fadly to bring the Complainant out of the bathroom.[459] It was further alleged that Elmi's first statement to the police on 29 January 2014, where he said that the Complainant looked "sober" when she came out of the bathroom, was more accurate.[460]

245 In my view, it is clear that Elmi had used the words "drunk" and "unconscious" interchangeably.[461] I also do not find the facts which Elmi could not recall as being material such as to undermine his credibility. I have discussed my reasons for accepting Elmi's testimony in court notwithstanding his admission that he had lied to the police in his earlier statement (see [164] above).[462] Taken together with the evidence of Izzati and Fadly, I am of the view that the witnesses' observations as to the Complainant's state of intoxication and the manner in which she was helped out of the bathroom and down to the living room remain highly probative and they serve as corroboration of the Complainant's account of her condition at the time of the alleged offences in the living room.

246 I should add that although some time had passed between the time of the offences in the bathroom and the time of the offences in the living room (see [193] above), the witnesses' observations as to the former time frame remain relevant as they provide an important reference point against which the accounts of the Complainant and Ridhwan as to the latter time frame can be weighed.

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458 Ridhwan's closing submissions at para 74.

459 Ridhwan's closing submissions at paras 74(a)-(b).

460 Ridhwan's closing submissions at paras 74(c)-(d).

461 NE Day 5, p 105 at lines 10-15.

462 NE Day 7, p 32 at lines 1-7.

Further, as I have explained, the issue of precise timing of the living room offences is not dispositive because the case does not turn on the estimations of the Complainant's BAC level at the material time.

247 Therefore, I am of the view that Ridhwan's testimony at trial about the Complainant's condition is further contradicted by the independent eyewitness evidence of Elmi, Izzati and Fadly.

(6) Ridhwan's post-offence conduct

248 I turn now to a further reason why the credibility of Ridhwan's testimony in court was materially compromised. It transpired that after the alleged offences occurred and the accused persons found out that the police was involved, Ridhwan conspired with Asep and Faris to deny that any sexual acts with the Complainant had taken place.[463] In text messages exchanged between Ridhwan and Asep, they agreed that their stories should "link up" and that they would say that they did not "do anything".[464] Ridhwan subsequently deleted these text messages in an attempt to prevent the Police from discovering them if his phone was searched.[465] He then acted on this plan when questioned by the police. In his 1st and 2nd Statements, Ridhwan flatly denied any sexual act with the Complainant. It was only in his 3rd Statement that he confessed that the sexual acts had taken place, albeit with the claim that the acts had been consensual.

249 When confronted with these falsehoods at trial, Ridhwan explained that he had decided to lie in his initial statements out of fear and because he was afraid that the police would not believe him if he told the truth of the alleged

463 NE Day 35, p 33 at lines 14-26.

464 NE Day 35, p 32 at lines 20-29.

465 NE Day 35, p 39 at lines 8-11.

consensual sexual encounter.[466] Ridhwan also claimed that he did not want to jeopardise Asep's case as he had agreed with him to proffer a bare denial of any sexual contact with the Complainant.[467]

250 To my mind, this is not a situation where Ridhwan's seemingly innocuous explanation could be accepted. Upon receiving notice that the police were investigating the events that transpired at the Duxton Hotel, Ridhwan's first reaction was to contact Asep and Faris in order to coordinate their stories.[468] Ridhwan further had the presence of mind to delete any incriminating messages on his phone with Asep discussing their plans prior to his arrest.[469] This was a calculated attempt on Ridhwan's part to prevent the police from finding out that he had any sexual contact with the Complainant. It does not strike me as the actions of a person motivated by fear of being wrongfully accused of a crime he did not commit. There was no explanation as to why he thought that the police would not believe him if the Complainant had consented to their sexual encounter. This point also applies to Faris and Asep for the alleged offences in the bathroom, *ie*, there was no explanation of why they were afraid that the police might not believe them if they had simply stated from the outset that the Complainant had consented to the sexual acts.

(7) Inference from lies

251 The fact that an accused person has lied may in certain limited circumstances amount to corroboration because it indicates a consciousness of guilt (*Public Prosecutor v Yeo Choon Poh* [1993] 3 SLR(R) 302, citing *R v*

466 NE Day 35, p 34 at lines 1-10.

467 NE Day 34, p 38 at lines 10-16.

468 NE Day 34, p 31.

469 NE Day 35, pp 38-39.

Lucas (Ruth) [1981] QB 720 ("*Lucas*")). The requirements for such corroboration were set out in *Lucas* at 724F:

> To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly it must relate to a material issue. Thirdly the motive for the lie must be a realisation of guilt and a fear of the truth… Fourthly the statement must be clearly shown to be a lie by… admission or by [independent] evidence…

252 On the facts, I have no hesitation in concluding that Ridhwan's multiple lies satisfied the test in *Lucas* and are capable of corroborating the Complainant's testimony against him. Ridhwan lied in relation to at least two material issues. First, in relation to whether there was sexual contact between the Complainant and him, Ridhwan had denied any form of sexual contact in both his 1st and 2nd Statements. Second, on the Complainant's condition when she was brought down to the living room from the bathroom, I have found that he had clearly lied in his testimony in court when that evidence is compared with his police statements and the evidence of other witnesses. These lies were clearly deliberate and related to an important fact in issue, namely, whether the Complainant had the capacity to consent to the sexual acts with him.

253 What is also damning is the fact that Ridhwan conspired with both Asep and Faris to lie to the police and deny any form of sexual contact with the Complainant. To this end, Ridhwan also deleted incriminating messages from his phone prior to his arrest. To my mind, the inference of guilt from such series of conduct is irresistible and I do not accept his explanation that he had done so out of fear that he would not be believed if he had told the truth. No specific criminal allegation had yet been made against him at the time. Nor was there any indication that he would not be believed if he had told the truth. While I accept that not every lie warrants an inference of guilt, the calculated nature of Ridhwan's demonstrable falsehoods sufficient persuades me that this is an

appropriate case to draw such an inference. At the very least, Ridhwan's lies meant that he was an untrustworthy witness whose testimony ought not to be accepted.

Conclusion on the 2nd and 3rd Charges

254 For the foregoing reasons, I am of the view that the totality of the evidence compels me to the conclusion that the Complainant did not have the requisite capacity to consent to the sexual acts with Ridhwan at the material time. The facts of the case fell within category (d) of the guidelines on consent identified in *Pram Nair* at [96] (see [119] above). As the Complainant's own evidence suggests, she had limited awareness of what was transpiring and she could not resist falling asleep during the sexual acts with Ridhwan. The Complainant's severe state of intoxication at that time, corroborated by Ridhwan's police statements, other witnesses' accounts, and Ridhwan's post-offence conspiracy to cover up and other lies, demonstrate that she had lacked the ability to decide whether to engage in any sexual activity with him. In so far as Ridhwan's testimony in court presented a different account, I disbelieve it as a fabrication arising out of a wholly self-serving attempt to escape criminal liability.

255 I add that even if the Complainant had the capacity to consent to the sexual acts with Ridhwan, I would find beyond a reasonable doubt that she did not in fact consent to such acts for the same reasons as I have mentioned.

256 For the foregoing reasons, I find that the Prosecution has proved the 2nd Charge of rape under s 375(1)(*a*) punishable under s 375(2) of the PC, and the 3rd Charge of outrage of modesty punishable under s 354(1) of the PC, against Ridhwan beyond a reasonable doubt.

Defence of mistake of fact

257 The second issue which relates to all three charges against Ridhwan is whether the defence of mistake of fact under s 79 of the PC is made out. Ridhwan alleged that he had mistakenly believed that the Complainant had consented to sexual intercourse with him at the material time. On the totality of the evidence, I am of the view that he has failed to prove the defence on a balance of probabilities.

258 First, most of the factual premise on which Ridhwan relied to substantiate his defence arose out of his testimony in court, which I have set out at [227] above and which I disbelieve.

259 Second, Ridhwan also relied on the premise that it "had been so long since she had her last cup of alcohol and hours [had] passed. She had slept and she had vomited a lot of times." I accept the undisputed expert evidence that the Complainant's BAC levels may be lowered by vomiting and the effluxion of time.[470] However, as I stated at [122]-[124], an element of the defence is that the mistake must be made in good faith, which requires due care and attention on the part of the accused person seeking to invoke the defence. On the facts, even if Ridhwan was in fact mistaken as to the Complainant's consent, he cannot be said to have been labouring under such a mistake in good faith. I have found that the Complainant was still severely intoxicated when she was brought down to the living room after the offences committed in the bathroom. Indeed, the Complainant had to be helped down by another person to the living room and be placed into a lying position on the ground. Ridhwan was aware of the Complainant's condition at that time. I have also rejected Ridhwan's account that the Complainant had actively propositioned him for sexual activity later

470 NE Day 16, p 7 at lines 1-3.

that morning. In that light, I am of the view that the initiation of a sexual encounter with the Complainant when she was known to be so intoxicated, purely on the basis that she had vomited and not consumed alcohol for some time, cannot without more satisfy the requisite due care and attention to sustain the defence of mistake of fact.

260 I add that the instant case can be distinguished from *Ong Mingwee*, where the High Court found that the defence of mistake of fact was made out on the basis that the complainant there had, amongst other things, boarded a taxi with the accused, chose not to leave the accused bedroom although she was not restrained, spoke with her mother on the phone and passed the phone to the accused, and she did not protest during sexual intercourse. On my findings, the Complainant was not in a state to have chosen to leave or to physically resist sexual activity with Ridhwan, and in that context, nothing can be inferred from her absence to protest which stemmed more from an inability to do so than a choice not to do so.

Mens rea *for the 1st Charge*

261 I turn now to discuss the two issues specific to the 1st Charge.

262 Ridhwan's first specific defence in relation to the 1st Charge was that he did not possess the requisite *mens rea*. Ridhwan accepted that he had digitally penetrated the Complainant's anus "two or three times".[471] However, he claimed that he had intended to digitally penetrate the Complainant's vagina and had only digitally penetrated her anus by accident because they were underneath a blanket.[472]

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471 NE Day 34, p 91 at lines 29-31.

472 NE Day 34, p 92 at lines 2-4 and 24-26.

263 The Prosecution submitted that Ridhwan's explanation was not credible. One, Ridhwan's account that the penetration was done while the Complainant was lying on her stomach as he searched for her vagina with his finger was illogical.[473] Having turned the Complainant around to lie on her stomach, the logical inference was that he had wanted an easier way to digitally penetrate the Complainant's anus. Two, given that Ridhwan had by his own admission digitally penetrated the Complainant's vagina earlier on the same morning,[474] and had also had similar prior sexual experiences in his private life,[475] he could not possibly have unknowingly penetrated the Complainant's anus multiple times completely by accident.[476]

264 I do not accept Ridhwan's argument that he lacked the requisite *mens rea* for the 1st Charge. In my view, it is extremely unlikely that one could have unintentionally penetrated the wrong bodily orifice on multiple instances with a finger. This was especially so for someone in Ridhwan's position who was reasonably experienced in such matters.

Defence of accident for the 1st Charge

265 It is not entirely clear if the defence of accident under s 80 of the PC is being relied on by Ridhwan, but for completeness, I would add in any event that this defence is not made out on the facts. For ease of reference, s 80 of the PC is set out as follows:

> 80. Nothing is an offence which is done by accident or misfortune, and without criminal intention or knowledge, in the

473 Prosecution's closing submissions at para 268.

474 NE Day 34, p 93 at lines 28-29.

475 NE Day 34, p 93 at lines 21-27.

476 Prosecution's closing submissions at paras 268-271.

> doing of a lawful act in a lawful manner, by lawful means, and with proper care and caution.

266 Given the fact that Ridhwan had digitally penetrated the Complainant's anus without her consent on multiple instances, and my finding that he had done so with the requisite intention to digitally penetrate her anus, there is no basis to find that the defence of accident has been proven on a balance of probabilities.

Conclusion on the 1st Charge

267 In the circumstances, the Prosecution has proved the 1st Charge against Ridhwan for sexual assault by penetration under s 376(2)(*a*) of the PC and punishable under s 376(3) of the same beyond a reasonable doubt, and no valid defence operated.

5th Charge – Faris, living room, digital-vaginal penetration

268 Finally, I turn back to Faris who faces an additional charge under s 376(3) of the PC for penetrating the Complainant's vagina with his finger without her consent, while in the living room of the Room. The relevant provision has been set out above at [169].

269 The Prosecution submitted that the court should find that Faris had digitally penetrated the Complainant's vagina on the basis of her evidence and Faris' 1st and 2nd Statements.

270 Faris' defence was a denial of the *actus reus*. He denied that he had penetrated the Complainant's vagina with his finger. He sought to show that the Complainant's testimony was not unusually convincing as it was riddled with inconsistencies.[477] He also submitted that the Complainant may have mistaken

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477 Faris' reply submissions at paras 10-17.

Ridhwan's finger for Faris' and that she may have confabulated certain aspects of her testimony.[478]

271 The main issues before the Court are therefore as follows:

(a) whether Faris had digitally penetrated the Complainant's vagina;

(b) whether the Complainant was capable of consenting to digital-vaginal penetration by Faris; and

(c) if the Complainant was capable of giving such consent, whether she did in fact consent to digital-vaginal penetration by Faris.

272 Similar to my analysis above, I am of the view that this is not a charge where the unusually convincing standard applies. The Prosecution does not base its case solely on the testimony of the Complainant (see [111]-[117] above; *AOF* at [111]). Expert opinion and both the 1st and 2nd Statements of Faris were relied upon to corroborate the Complainant's version of events.

Digital-vaginal penetration

(1) Expert opinions

273 Dealing first with the expert evidence, the main points with respect to the expert evidence have been mentioned above at [196] to [203]. However, in respect of the argument made by Faris that the Complainant may have confabulated certain aspects of her testimony, the unchallenged evidence of Dr Guo and Dr Winslow was that this was a condition which afflicted persons with a long history of drinking.[479] As it was not alleged that the Complainant

478 Faris' reply submissions at paras 28-29.

479 NE Day 16, p 27 at lines 3-32; Day 37, p 49 at lines 6-21.

had a long history of drinking, I do not think that the expert evidence could itself constitute a basis to find that the Complainant had confabulated.

(2) Complainant's account

274 The Complainant testified that she felt fingers being inserted into her vagina as she drifted in and out of consciousness in the living room.[480] At that time of such penetration, she was facing Faris and Faris was looking at her. She therefore concluded that Faris was the one responsible for the penetration.[481] She tried to push Faris away with her hand but only managed to do so weakly, as her eyes kept closing and she kept falling asleep.[482]

275 In my view, there are several notable inconsistencies in the Complainant's evidence in relation to this charge. When referred to Dr Rauff for a medical examination on 28 January 2014,[483] the Complainant informed Dr Rauff that Faris had digitally penetrated her anus.[484] However, during cross-examination, the Complainant could not recall having informed Dr Rauff of this.[485] The Complainant also did not testify that Faris had committed an act of digital-anal penetration even though this was recorded as her account in Dr Rauff's medical report (see [217] above).

276 Further, the Complainant's basis for inferring that Faris, and not anyone else, had digitally penetrated her vagina was the fact that he was facing her and

480 NE Day 1, p 59 at lines 1-3.

481 NE Day 1, p 58 at lines 19-30, p 59 at lines 1-7.

482 NE Day 1, p 59 at lines 10-30.

483 NE Day 7, p 55 at lines 25-31.

484 NE Day 7, p 63 at lines 8-32; AB pp 16-17.

485 NE Day 3, p 18 at lines 16-28.

looking at her.[486] She did not in fact see him committing the alleged act and was lying between Faris and Ridhwan[487]

(3) Faris' account

277 In so far as his court testimony was concerned, Faris denied having touched the Complainant's vagina in the living room on the morning of 26 January 2014 at all.[488]

> Q So Mr Faris, you have told the Court that once you came back from Zouk and after you came out from the toilet, you had no interest in the girl's vagina. What I mean is this, after you came out of the toilet, even though you slept beside the girl in the living room, you did not touch her vagina at all, is that your evidence?
>
> A After I went out of the toilet?
>
> Q Yes.
>
> A Yes, Your Honour.
>
> Q So your evidence is that after you came out of the toilet, you did not touch her vagina at all?
>
> A Yes, Your Honour.

278 Faris' testimony in court, however, was significantly different from the account that he had given in his 1st and 2nd Statements. In his 1st Statement, he admitted to "rubbing" the Complainant's vagina and stopping only when the Complainant pushed his hand away.[489] Faris also mentioned that the Complainant "looked at [him] blankly".[490] To a limited extent, this was consistent with the testimony of the Complainant that she and Faris were

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486 NE Day 1, pp 58-59.

487 NE Day 2, p 108 at lines 22-29.

488 NE Day 27, p 6 at lines 20-29.

489 Exhibit P213 at para 14.

490 Exhibit P213 at para 12.

looking at each other (see [274] above). In his 2nd Statement, Faris also maintained that he had "rubbed" the Complainant's vagina.[491] This was so even though the 2nd Statement was taken some nine months after the 1st Statement, and it afforded him the opportunity to put things straight had he not been truthful in his 1st Statement.

Conclusion on the 5th Charge

279 Having regard to the totality of the evidence, it is probable that some sexual act had occurred between Faris and the Complainant in the living room which was not consensual and which, for reasons I have explained, the Complainant was not in a position to have consented to. This is borne out of the similarities between the Complainant's account of the alleged digital-vaginal penetration by Faris, and Faris's own admissions in his police statements, which were inexplicable and not explained. I therefore disbelieve Faris' testimony in court which denied any sexual contact in the living room.

280 However, the fact that the accused person's testimony in court is rejected does not necessarily mean that the Prosecution's burden of proof on the existing charge is hence satisfied. In particular, two issues about the evidence troubled me:

(a) First, it is not clear that it was in fact Faris and not Ridhwan who had digitally penetrated the Complainant's vagina. In this regard, the Complainant's evidence as to the identity of the perpetrator was weak. Further, Ridhwan's evidence was also that he had intended to digitally penetrate the Complainant's vagina at around the same period of time. While Ridhwan's intention is not mutually exclusive with misconduct

491 Exhibit TWT-P12 at p 3.

on Faris' part, it does raise a question as to whether this could have been a case of mistaken identity.

(b) Second, it is not clear as to what in fact had transpired between Faris and the Complainant. In this regard, even if we take Faris' police statements as the true version of his account, those statements only went as far as admitting to "rubbing" on the outside of the Complainant's vagina. He did not say that he had *penetrated* the Complainant's vagina. On the Complainant's account, there is also the possibility that she was conflating the possible types of contact. The Complainant's description of the sexual act in court was inconsistent, with varying descriptions of Faris' fingers being "[inserted] *on* [her] vagina"[492] and "[inserted] *into* [her] vagina"[493] [emphases added]. The fact that the Complainant used the word "on" on several occasions to describe the sexual contact raised a material doubt as to the satisfaction of the charge, which was for digital-vaginal *penetration*.

281 To my mind, the two areas of material uncertainty render it unsafe to convict Faris on the 5th Charge. Neither the Prosecution nor the Defence had raised the possibility of a conviction on an alternative charge, and it is unsafe in the circumstances to say that no prejudice would result to Faris if he were convicted on a charge of outrage of modesty instead.

Overall conclusion

282 For the foregoing reasons:

(a) I convict Ridhwan on the 1st, 2nd, and 3rd Charges.

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492 NE Day 2, p 108 at lines 9-11.

493 NE Day 3, p 2 at lines 21-23.

(b) I convict Faris on the 4th Charge and acquit him on the 5th Charge.

(c) I convict Asep on the 6th and 7th Charges.

283 I will hear parties on the issue of sentence.

Woo Bih Li
Judge

For the 1st tranche (2/8/2016 to 19/8/2016):
Sharmila Sripathy-Shanaz, Charlene Tay Chia, Tan Soo Tet (Attorney-General's Chambers) for the Prosecution;
Mohamed Niroze Idroos (I.R.B. Law LLP) for the first accused;
Ng Huiling Cheryl and Ahmad Firdaus (CLAS) for the second accused;
Ngiam Hian Theng Diana and Sunil Sudheesan (Quahe Woo & Palmer LLC) for the third accused.

For the 2nd tranche (12/9/2017 to 13/10/2017):
Sharmila Sripathy-Shanaz, Charlene Tay Chia, Michael Quilindo and Amanda Chong Wei-Zhen (Attorney-General's Chambers) for the Prosecution;

Ng Joel Yuan-Ming, Ngiam Hian Theng Diana and Sunil Sudheesan (Quahe Woo & Palmer LLC) for the first accused;
Ng Huiling, Cheryl (Intelleigen Legal LLC) and Khadijah Bte Yasin (CLAS) for the second accused;
Tan Chor Hoon Alice and Low Jian Hui (Dew Chambers) for the third accused.

For the 3rd tranche (23/1/2018 to 26/1/2018):
Sharmila Sripathy-Shanaz, Charlene Tay Chia, Michael Quilindo and Amanda Chong Wei-Zhen (Attorney-General's Chambers) for the Prosecution;
Ng Joel Yuan-Ming (Quahe Woo & Palmer LLC) for the first

accused;
Ng Huiling, Cheryl (Intelleigen Legal LLC) for the second accused;
Tan Chor Hoon Alice and Low Jian Hui (Dew Chambers) for the third accused.

For the 4th tranche (9/4/2018):
Sharmila Sripathy-Shanaz, Charlene Tay Chia, Michael Quilindo and Amanda Chong Wei-Zhen (Attorney-General's Chambers) for the Prosecution;
Ng Joel Yuan-Ming (Quahe Woo & Palmer LLC) for the first accused;
Ng Huiling Cheryl (Intelleigen Legal LLC) for the second accused;
Low Jian Hui and Wong Li-Yen, Dew (Dew Chambers) for the third accused.
