IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 44

Criminal Case No 34 of 2019

Between

Public Prosecutor

And

Isham bin Kayubi

GROUNDS OF DECISION

[Criminal Law] — [Offences] — [Sexual offences] — [Rape] — [Section 375(1)(*a*) of the Penal Code]

[Criminal Law] — [Offences] — [Sexual offences] — [Sexual assault by penetration] — [Section 376(1)(*a*) of the Penal Code]

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Introduction

1 The accused was charged with four counts of rape and two counts of sexual assault by penetration. The charges related to two young female victims, both of whom were only 14 years old at the time of the alleged offences.

2 At trial, the accused denied committing these offences. He alleged that the victims had consented to the sexual acts in question. He also averred that one of the victims and/or her friends had conspired against him.

3 After carefully considering the parties' submissions and the evidence before me, I was satisfied that the Prosecution had established its case beyond a reasonable doubt. I proceeded to convict the accused and sentence him. He has since filed an appeal against his conviction and sentence. I set out the reasons for my decision below.

The charges

4 The accused faced six charges under the Penal Code (Cap 224, 2008 Rev Ed) ("the Penal Code"). Four of the charges related to the first victim ("V1") and two related to the second victim ("V2"). Both victims were 14 years old at the material time. On account of their age and the nature of the offences, an order was imposed pursuant to s 8(3) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) to prevent the reporting of any information that might lead to their identification. The six charges were as follows:

(a) One charge under s 376(1)(*a*) and punishable under s 376(3) of the Penal Code for sexually assaulting V1 by penetration on 29 October 2017 ("the First Charge");

(b) Two charges under s 375(1)(*a*) and punishable under s 375(2) of the Penal Code for raping V1 on 29 October 2017 ("the Second Charge" and "the Third Charge", respectively);

(c) One charge under s 375(1)(*a*) and punishable under s 375(2) of the Penal Code for raping V1 on 3 November 2017 ("the Fourth Charge");

(d) One charge under s 376(1)(*a*) and punishable under s 376(3) of the Penal Code for sexually assaulting V2 by penetration on 15 October 2017 ("the Fifth Charge"); and

(e) One charge under s 375(1)(*a*) and punishable under s 375(2) of the Penal Code for raping V2 on 15 October 2017 ("the Sixth Charge").

Preliminary issue: whether the accused was fit to plead

5 Before addressing the substantive issues in this case, it is apposite for

me to highlight various pertinent events throughout the court proceedings. These pertained to the accused's conduct in court during August and September 2019, on the initial dates scheduled for the hearing, as well as from 14 January 2020 when the trial proper commenced up to 20 January 2020 when I decided to call upon the accused to enter his defence.

The events in August and September 2019

6 The accused's trial was originally scheduled to commence on 1 August 2019 and conclude on 20 August 2019. However, the accused behaved erratically when he first appeared in court on 1 August 2019. When invited to state his plea after the charges were read to him and when queries were addressed to him, he gave stock responses and repeatedly muttered (in English), "I don't know", "I can't remember", "My mother asked me to go back home" and "This is not my place".[1] He also stood up at random intervals, and, more shockingly, exposed his penis[2] and later urinated on himself[3] while court proceedings were ongoing.

7 The Prosecution informed me that the accused had given similar irrelevant verbal responses at the last two pre-trial conferences before the Assistant Registrar on 25 June and 16 July 2019. However, he did not behave in a similar fashion at any prior court attendances. I enquired verbally from the Prison warders escorting the accused whether they had observed the accused exhibiting any unusual behaviour in the Prisons van. They informed me that he had appeared normal in the van and had remained quiet throughout the journey

[1] NE, 1 August 2019, 2/32-4/17

[2] NE, 1 August 2019, 3/2

[3] NE, 1 August 2019, 5/12

from the remand prison to the courthouse.[4]

8 The Prosecution had sought a report from the Prisons psychiatrist on the accused after the last pre-trial conference on 16 July 2019. The ensuing report that was furnished noted the possibility that he was malingering but recommended a full assessment by a psychiatrist from the Institute of Mental Health ("IMH").[5]

9 In light of these events, the accused's fitness to plead and his ability to make his defence to the charges was unclear. I was not in a position then to decide if he was indeed malingering or whether there were genuine issues with his mental health. On the Prosecution's application pursuant to s 247(3) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC"), I ordered that the accused be remanded at IMH in order to ascertain his fitness to plead. The original trial dates were vacated and the accused was subsequently remanded at IMH for five weeks from 8 August to 4 September 2019 for observation and assessment.[6]

10 On 4 September 2019, the Prosecution tendered an IMH report prepared by Dr Jerome Goh Hern Yee dated 3 September 2019 ("the 3 September IMH report"). This report stated in no uncertain terms that:

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[4] NE, 1 August 2019, 5/22-29

[5] NE, 1 August 2019, 6/9-16

[6] Exhibit C

> The accused's current presentation … was not consistent with the nature of mental illness(es), and he retained volitional control in his responses and behaviours in this remand and during his recent Court hearing. He was, and is malingering.

The 3 September IMH report also categorically certified that the accused was fit to plead. I thus granted the Prosecution's application for the accused's trial to resume as there was no reason to suspect that the accused was of unsound mind or unable to give his plea. A fresh set of hearing dates was assigned in due course, with the trial scheduled to commence on 14 January 2020.

The events from 14 to 20 January 2020

11 On 14 January 2020, the first day of trial, I was given to understand that the accused had defecated in his trousers just before court proceedings were about to begin. I gave directions for the Prison warders to have him change out of his soiled prison attire, but he refused to cooperate.[7] Apparently, he had also touched the faeces on his trousers and then rubbed his soiled hands on his shirt.

12 All this resulted in some delay in the commencement of the trial. When the trial eventually commenced at 11.11am, the accused was present in the courtroom in his soiled prison attire. I began by reminding him of the contents of the 3 September IMH report. After the charges were read to the accused, he again did not give a plea. A refusal to enter a plea meant that he would be deemed to be claiming trial, and thus the Prosecution proceeded to call its witnesses.

13 During the first day of hearing, the accused did not speak throughout the time he was in the courtroom. He was unresponsive and uncommunicative, and

[7] NE, 14 January 2020, 1/17-25

did not cross-examine any of the Prosecution's witnesses. For no apparent reason whatsoever, about an hour after the trial had commenced, he smeared his faeces on the glass panel surrounding the dock while the first Prosecution witness was giving his evidence.[8] In the face of his bizarre behaviour, I was left with no option but to require the accused to be fully restrained for the rest of the trial.

14 Later that evening, the accused was examined by a doctor from the Singapore Prison Service, Dr Cheok Liangzhi ("Dr Cheok"). Dr Cheok noted that the accused had complained of diarrhoea but was "well and oriented", "relevant", "not depressed" and "not psychotic". Accordingly, he concluded that the accused was fit to attend court the next day.[9]

15 On the second day of the hearing (15 January 2020), the accused was less uncommunicative, and was able to tell the court that he needed a lawyer. He also claimed to be "sick" and "in pain".[10] After returning to remand prison that evening, the accused was reviewed by Dr Lee Chee Sean from the Singapore Prison Service, who found that the accused's alleged symptoms were resolving and that his physical examination was unremarkable.[11]

16 By the third day of the hearing (20 January 2020), the accused was able to respond normally to my directions, cross-examine the Prosecution's witnesses and even put his defence(s) to them. He claimed that he had just

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[8] NE, 14 January 2020, 15/6

[9] Exhibit D

[10] NE, 15 January 2020, 6/25-26

[11] Exhibit E

recovered from memory loss[12] and did not complain of any physical and/or mental unwellness for the remaining duration of his trial.

17 In my assessment, the accused was clearly fit to plead. The Prisons doctors had explained that the accused was on regular laxatives for chronic constipation and I accepted Dr Cheok's evidence that this may have affected his ability to control his bowels on 14 January 2020.[13] However, I saw no correlation between the accused's use of laxatives for his alleged medical condition and (a) his decision to rub his soiled hands on his shirt, (b) his refusal to change out of his soiled attire or (c) his action of smearing faeces on the glass panel surrounding the dock. These were all clearly volitional acts for which he had no reasonable excuse. Having regard to the 3 September IMH report and the evidence of the Prisons doctors, I found that he was again malingering and being deliberately uncooperative and obstructive in his conduct.

18 Furthermore, I disbelieved the accused's claim that he had just recovered from memory loss. Deputy Superintendent of Police Kwa Beng Hwee ("DSP Kwa"), who was responsible for supervising the accused while he was in remand, testified that the accused had not shown any signs of memory loss from 3 September 2019 to 14 January 2020. Dr Jacob Rajesh, a senior consultant psychiatrist from the Singapore Prison Service who examined the accused during his remand, also testified that the accused had not displayed any signs of memory loss since 3 September 2019.[14] The accused did not seek to challenge their evidence.

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[12] NE, 20 January 2020, 2/12-14

[13] NE, 20 January 2020, 44/25

[14] NE, 2 January 2020, 38/25-27

19 With these premises, I had no doubt that the accused was fit to plead to the charges and make his defence. I now proceed to summarise the material aspects of the evidence concerning the alleged offences.

The Prosecution's case

20 The accused is a 49-year-old male Singaporean. At all material times, he was employed as a part-time food deliveryman, and resided alone in a flat at Block 457 Jurong West Street 41 #03-772, Singapore.

21 The Prosecution's case was that the objective evidence overwhelmingly supported the victims' evidence that the accused had brought them to his flat and sexually assaulted them.[15] This was buttressed by the testimonies of the victims, who were credible and consistent witnesses.[16] Moreover, it was clear that the victims did not consent to any of the sexual acts committed against them.[17]

Evidence relating to V1

V1's evidence

22 V1 testified that the accused had sexually assaulted her on two occasions, 29 October and 3 November 2017.

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[15] PCS at para 4

[16] PCS at [8]

[17] PCS at [12]

(1) The incident on 29 October 2017

23 V1 claimed that she was first introduced to the accused by PW16 on the evening of 29 October 2017.[18] V1 knew PW16 through her then-boyfriend, PW15.[19] At that time, V1 was staying with PW15 at his family's residence at Teck Whye Lane as she was not close to her own family. PW16 informed V1 that the accused had requested for her (V1) to take care of his house for him, and that he had offered to buy her a handphone in exchange.[20]

24 V1 agreed to assist the accused, who then brought her back to his flat on his motorcycle. As V1 was hungry and did not have any money, the accused bought her food from Boon Lay Shopping Centre.[21] They proceeded to his flat where they ate their meals together. When V1 had finished her meal, the accused then asked her to take a shower and she complied. He subsequently told her to go into his bedroom and rest. She did not want to do so but he pulled her inside.[22]

25 When V1 was inside the accused's bedroom, the accused asked her to take off her clothes but she refused to do so. The accused then told V1 that he would call his friends to strip her naked if she did not comply. Speechless and very terrified, V1 kept quiet and did as she was told.[23]

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[18] NE, 16 January 2020, 5/17

[19] NE, 16 January 2020, 4/27

[20] NE, 16 January 2020, 5/22-30

[21] NE, 16 January 2020, 6/22-24

[22] NE, 16 January 2020, 8/15-9/30

[23] NE, 16 January 2020, 10/12-29

26 After removing her clothes, V1 warned the accused not to assault her but he threatened to call his friends to come over and "gang-bang" her if she did not give in to his demands.[24] At the material time, V1 was aware that the accused belonged to a gang known as "Black Pirate".[25] The accused then raped V1 and forced her to fellate him. He also used his mobile phone to record videos of the sexual assault and threatened to make these videos go "viral" if V1 did not perform the sexual acts he demanded of her.[26] After V1 had performed oral sex on the accused for a while, she stopped as she felt like vomiting.[27] He then asked her to go on top of him and again threatened to call his friends to "gang-bang" her if she refused. She was unwilling to do so but complied out of fear. The accused then proceeded to rape her a second time (the two instances of rape mentioned in this paragraph will be collectively referred to "the first incident").[28]

27 When the sexual assaults came to an end, V1 started to cry quietly and repeatedly pleaded with the accused to send her back home. Eventually, the accused sent V1 home on his motorcycle and gave her $20 "to buy food or anything that [she] wanted".[29] He also warned her not to tell anyone about the first incident or he would make her sex videos go "viral" on social media.

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[24] NE, 16 January 2020, 11/4

[25] NE, 16 January 2020, 45/11

[26] NE, 16 January 2020, 12/3

[27] NE, 16 January 2020, 12/10-16

[28] NE, 16 January 2020, 12/20-31

[29] NE, 16 January 2020, 14/6

(2) The incident on 3 November 2017

28 V1 testified that she next encountered the accused on the night of 2 November 2017. At that time, she was with PW15 and his friends at the void deck of PW15's flat. The accused allegedly approached her while carrying a "stick" in his bag, and requested to speak to her at a coffeeshop near PW15's block.[30] Despite fearing that the accused would sexually assault her again, V1 agreed to get onto the accused's motorcycle because she was worried he would carry out his threat to make the sex videos of her go "viral".[31]

29 Contrary to V1's wishes, the accused rode V1 back to his block in Jurong West. When they arrived at the accused's block, the accused informed V1 that he wanted to leave his motorcycle helmet in his flat and requested for V1 to accompany him upstairs while he was doing so. She was initially unwilling to follow him but agreed after the accused reassured her that they would return downstairs thereafter.[32] After putting away the accused's helmet, they proceeded to buy drinks from a coffeeshop near the accused's block and sat down to talk at the void deck beneath the accused's flat.[33]

30 While at the void deck, the accused asked V1 if she had informed anyone about the incident on 29 October 2017 and she admitted that she had told some of her friends including PW15 and PW16. The accused was upset and forced V1 to send a message to PW15 telling him that she and the accused had become

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[30] NE, 16 January 2020, 17/2

[31] NE, 16 January 2020, 19/11-12

[32] NE, 16 January 2020, 19/29-20/4

[33] NE, 16 January 2020, 20/11-13

a couple.[34] She complied as the accused still had the sex videos of her and she was worried that he might make them go "viral".

31 Subsequently, the accused told her to follow him up to his flat. She refused at first but eventually complied because he threatened to beat her up if she did not. While in his bedroom, he told V1 that if she refused to remove her clothes, he would make her sex videos go "viral". She told him she did not want "it" to happen again. However, although she was unwilling, she "just let it happen" as she was afraid and did not know what to do.[35] The accused thus raped her for the third time in his bedroom in the early hours of 3 November 2017 (the sequence of events that began on the night of 2 November 2017 and culminated in the rape of V1 on 3 November 2017 is hereafter referred to as "the second incident").[36]

32 After the assault, V1 asked the accused to send her back home on his motorcycle because she did not have any money for transport. The accused reminded her not to tell anybody about the second incident or he would make her sex videos go "viral".[37]

PW15's and PW16's evidence

33 The Prosecution also led evidence from two factual witnesses, PW15 and PW16, to corroborate V1's account of the incidents on 29 October and 3 November 2017.

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[34] NE, 16 January 2020, 21/13-21

[35] NE, 16 January 2020, 26/22

[36] NE, 16 January 2020, 25/24

[37] NE, 16 January 2020, 27/25-28/2

34 PW15 gave evidence that he met V1 at his void deck at about 3.00am on 30 October 2017. He noticed that she looked "scared and paranoid", "like she had finished crying".[38] Eventually, V1 disclosed to him that the accused had forced her to remove her clothes and to perform sexual acts on him.[39]

35 PW15 also testified that on the night of 2 November 2017, the accused had come to his void deck carrying a stick-like object in his bag.[40] PW15 saw the accused conversing with V1 but lost sight of them as they were walking towards a carpark.[41] Subsequently, PW15 enlisted the help of his friends to find and confront the accused, which ultimately culminated in a police report being made and the accused's arrest in the early morning of 3 November 2017.[42]

36 PW16 testified that she had met the accused through a Facebook message he had sent her. She had regarded him as her boyfriend at the material time. She gave evidence that she had introduced V1, who was her god-sister, to the accused on 29 October 2017, and that V1 had agreed to follow the accused to his house.[43] She also testified that she had seen V1 crying and looking fearful in the aftermath of the alleged sexual assault on 29 October 2017.[44]

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[38] NE, 16 January 2020, 51/19-24

[39] NE, 16 January 2020, 52/32

[40] NE, 16 January 2020, 54/26-55/1

[41] NE, 16 January 2020, 55/23

[42] NE, 16 January 2020, 57/14-64/4

[43] NE, 20 January 2020, 8/6-26

[44] NE, 20 January 2020, 11/9

The objective evidence

37 The Prosecution tendered video and digital evidence to support V1's testimony. These included the following:

(a) Videos retrieved from the accused's mobile phone depicting V1 having sexual intercourse with, and sucking the penis of an unknown male subject. These were allegedly the videos which the accused had recorded in his bedroom on 29 October 2017, when he sexually assaulted V1 for the first time.

(b) Videos from the lift CCTV cameras and POLCOM cameras facing the lift lobby at the ground floor of the accused's block, Block 457 Jurong West Street 41. These video footages depicted the accused and V1 entering and exiting the lift together on three occasions, *ie*, once on 29 October 2017 and twice on 3 November 2017.

(c) Communication records retrieved from the accused's mobile phone, consisting of call records, text messages, voice messages and photographs which showed that the accused had gone to confront V1 and PW15 on 2 November 2017.

38 The Prosecution also led medical and forensic evidence:[45]

(a) From Dr Lee Wai Kheong Ryan ("Dr Lee") of KK Women's and Children's Hospital, who found fresh tears on V1's hymen when he examined her on 3 November 2017;[46] and

[45] Prosecution's Opening Address at paras 18-19

[46] Prosecution's Bundle of Documents at pp 35-36

(b) From two HSA analysts, who analysed the DNA content of the semen samples found on V1's vaginal swabs and panties. The accused was found to be a major contributor to the spermic fraction of the DNA profile obtained from these samples.[47]

Evidence relating to V2

V2's evidence

39 V2 testified that she first came to know the accused when he sent her an unsolicited Whatsapp message on 22 September 2017.[48] Between 22 September and 14 October 2017, the accused and V2 exchanged voice and text messages through Whatsapp. At no point during this period did V2 meet the accused in person.

40 On 15 October 2017, the accused offered to pay V2 $150 to clean his house.[49] V2 agreed because she had run away from home at that time and needed the money to cover her expenses.[50] Subsequently, the accused picked V2 up and bought food for her before bringing her back to his house.

41 After V2 consumed the food, the accused pulled her into his bedroom and told her to take off her clothes. She refused and reminded him that she had only agreed to help him clean up his house. The accused told her to take her clothes off or he would tear them off. V2 was afraid and began to cry. She also

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[47] Prosecution's Bundle of Documents at pp 49-63

[48] NE, 15 January 2020, 42/15-17

[49] NE, 15 January 2020, 62/25

[50] NE, 15 January 2020, 61/11

tried to push the accused away.[51] The accused then repeatedly threatened to call his "gang members" to come if V2 did not listen to him. At the material time, V2 was aware that the accused belonged to a motorcycle gang.[52] As such, she understood the accused's threat to mean that he would call his gang members to come and do "inappropriate" things to her if she did not comply with his demands.[53]

42 The accused took V2's clothes off although she tried to stop him from doing so. He then proceeded to rape her[54] and made her fellate him.[55] V2 felt very frightened while this was happening to her. She also noticed that the accused was holding a handphone while he was sexually assaulting her, and she assumed that he was either taking a photograph or a video of their sexual acts.[56] Eventually, the accused sent V2 home on his motorcycle. He also gave V2 a motorcycle helmet, a Bluetooth earpiece and $20.[57]

43 Subsequently, V2 told her best friend about the incident and was advised to lodge a police report. However, she did not do so as she was afraid and did not want her family, with whom she was not on good terms, to know about the incident.[58]

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[51] NE, 15 January 2020, 73/11-27

[52] NE, 15 January 2020, 74/1-3

[53] NE, 15 January 2020, 74/4-6

[54] NE, 15 January 2020, 74/31

[55] NE, 15 January 2020, 75/19

[56] NE, 15 January 2020, 75/22

[57] NE, 15 January 2020, 76/17

[58] NE, 15 January 2020, 81/12-25

The objective evidence

44 The Prosecution adduced digital and video evidence to support V2's allegations against the accused. These included:

(a) Videos retrieved from the accused's mobile phone depicting V2 having sexual intercourse with, and sucking the penis of an unknown male subject. These were allegedly the videos which the accused had recorded in his bedroom on 15 October 2017.

(b) Videos from the lift CCTV cameras and POLCOM cameras facing the lift lobby at the ground floor of the accused's block, Block 457 Jurong West Street 41. These video footages depicted the accused and V2 entering and exiting the lift together on 15 October 2017.

(c) Communication records retrieved from the accused's mobile phone, consisting of call records, text messages, voice messages and photographs which showed that the accused had communicated with V2 prior to her alleged sexual assault on 15 October 2017.

45 The Prosecution also led medical evidence from Dr Serene Lim ("Dr Lim") from Singapore General Hospital, who prepared a medical report on V2 based on outpatient notes which had been taken by Dr Renuka Devi Rajkumaralal ("Dr Renuka"). The medical report stated that there were old tears on V2's hymen.[59]

[59] Prosecution's Bundle of Documents at p 46

The accused's refusal to state if he would enter a defence

46 After the Prosecution had called its witnesses and closed its case on the fourth day of the hearing (20 January 2020), I ruled that the Prosecution had established a *prima facie* case and had adduced evidence, not inherently incredible, which satisfied all the elements of the charges. I therefore proceeded to administer the standard allocution and called upon the accused to enter his defence to the charges. Regrettably, in spite of my numerous attempts to elicit a response, the accused refused to state whether he would or would not enter his defence. Instead, he repeatedly insisted that he needed a lawyer to assist him and maintained that he was not refusing to cooperate.

47 It was implicit from what the accused had said that he was seeking an adjournment so that he could attempt to obtain legal representation. I rejected his request for two reasons. First, the accused was previously represented by lawyers assigned by the Criminal Legal Aid Scheme ("CLAS"), who had discharged themselves in November 2018 with his consent. CLAS had also informed the accused that he would not be assigned another CLAS lawyer. Secondly, the accused had been given ample time since then to engage counsel if he wished to do so before the commencement of his trial in January 2020, but he had not done so. As such, I held that the accused had, by his conduct, impliedly elected not to give a defence. I had also made it clear to him that I was entitled to draw appropriate inferences, including adverse ones, from his decision to remain silent.

48 After the Prosecution had made its closing submissions on 23 January 2020, pursuant to the accused's request, I allowed him an adjournment to peruse the transcripts of the hearing and prepare his written closing submissions. As set out in s 230(1)(*u*) of the CPC, the accused is permitted to sum up his case at

the close of the Defence's case. It has been suggested that this subsection is flexible enough to allow an accused person who had elected not to give evidence to nonetheless have an opportunity to sum up his case: see *The Criminal Procedure Code of Singapore: Annotations and Commentary* (Jennifer Marie & Mohamed Faizal Mohamed Abdul Kadir eds) (Academy Publishing, 2012) at 12.063. I agreed that this was a fair and sensible course to adopt.

49 The accused's written submissions were duly prepared and tendered in advance of the adjourned hearing date on 5 February 2020.

The accused's defence

50 As noted above, the accused did not formally elect to give a defence. The consequence was that there was no evidence put forward by the accused in rebuttal of the Prosecution's case.

51 Nevertheless, I was able to glean the accused's case from some of the questions which he posed in cross-examination of the Prosecution's witnesses, as well as his closing submissions.

52 I understood the accused's defence to consist of essentially two limbs. First, the accused alleged that both victims had consented to the sexual acts which had been committed against them. In particular, he denied threatening or coercing them at any point in time, and argued that they had voluntarily and willingly followed him home.[60] He questioned why V1 did not try to escape or

[60] DCS at paras 10, 12, 13, 14, 16, 19 and 25

call for help on 2 November 2017[61] and further queried why V2 did not lodge a police report if he had raped her.[62]

53 Further or alternatively, the accused claimed that he was the victim of a conspiracy by V1 and/or her friends.[63] He maintained that there were inconsistencies and/or gaps in the Prosecution's evidence which suggested that V1's, PW15's and PW16's accounts were fabricated to set him up.[64] He also alleged that V1 was lying and fabricating evidence.[65]

54 Tangentially, the accused also suggested that he was not the person seen in the video footage from his mobile phone as the footage did not reveal exactly who the male subject was.[66] Among various other allegations, he argued that V1 was trying to fabricate evidence against him since the DNA analysis conducted on V1's panties showed the presence of another unknown male person's DNA (as well as his own).[67] In addition, he claimed that he had confronted V1 on 2 November 2017 because she had stolen money from him.[68]

Substantive issues to be determined

55 Based on the foregoing, the following key issues arose for my determination:

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[61] DCS at para 10

[62] DCS at para 26

[63] NE, 20 January 2020, 23/3-7

[64] DCS at para 21, DCS Conclusion at paras 4-5

[65] DCS at para 15

[66] DCS at para 8

[67] DCS at para 8

[68] DCS at para 14

(a) Whether the accused performed the relevant sexual acts on the victims;

(b) Whether the victims consented to the relevant sexual acts; and

(c) Whether the accused was the victim of a conspiracy or fabrication of evidence.

Whether the accused performed the relevant sexual acts on the victims

56 I first considered the issue of whether the accused performed the relevant sexual acts on the victims. My decision on this issue hinged on my assessment of the credibility of the victims' evidence, viewed alongside the objective evidence tendered by the Prosecution.

Objective evidence

57 In my view, the objective evidence on record overwhelmingly supported the Prosecution's case that the accused performed the relevant sexual acts on the victims, and that the accused had used his mobile phone to record these acts.

58 First, the lift CCTV and POLCAM footage from the accused's block confirmed that the accused had brought V1 to his block and up to the level of his unit on 29 October 2017 at about 10.12pm, 2 November 2017 at about 10.50pm and 3 November 2017 at about 12.04am.

59 Second, the videos retrieved from the accused's mobile phone showed an unknown male subject performing the relevant sexual acts with V1 on 29 October 2017 and with V2 on 15 October 2017. Mr Mohammad Azhri, who performed the forensic examination of the accused's phone, testified that the data extracted from these videos was consistent with the fact that they had been

recorded on the accused's phone itself.[69] Furthermore, the time stamps on these videos coincided with the period of time during which each victim was at the accused's flat, as evidenced by the lift CCTV and POLCAM footage. Finally, the layout of the room depicted in the videos resembled the layout of the accused's bedroom, and the yellow bedsheet seen in the videos recorded on 15 October 2017 was found in the accused's flat during investigations.[70]

60 Third, the accused's semen was detected on V1's intra-vaginal swabs and on the interior front of her panties after the second incident (on 3 November 2017). A medical examination conducted on the same day also revealed fresh tears on V1's hymen.

61 Taken together, these pieces of evidence overwhelmingly supported the conclusion that the accused and the victims performed the sexual acts which form the basis of all the accused's charges. Apart from a passing suggestion that the videos found on his mobile phone did not actually reveal who the male person in the said videos actually was, the accused himself did not make any serious attempt to deny this.

Credibility of the victims' evidence

62 Furthermore, I was of the view that the two victims were credible and reliable witnesses. In making this assessment, I took three factors into consideration: (a) the internal consistency of the victims' evidence; (b) the external consistency between their evidence and the other evidence on record;

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[69] NE, 14 January 2020, 25/13-14

[70] P13 at p 23

and (c) their demeanour in court (see *Jagatheesan s/o Krishnasamy v Public Prosecutor* [2006] 4 SLR(R) 45 at [39]).

V1's evidence

63 The accused contended that there were internal inconsistencies between V1's testimony and her statement recorded by Dr Lee in the medical report dated 20 January 2018.[71] These inconsistencies were as follows:

(a) In the medical report, V1 was recorded as saying that the accused digitally penetrated her during the first incident which was on 29 October 2017.[72] However, V1 later testified in court that she was unsure if the accused had digitally penetrated her.[73]

(b) Dr Lee also recorded V1 as stating that she was raped twice by the accused during the second incident and that there was "oral, digital and penile sexual penetration".[74] However, V1 subsequently testified in court that the second incident only involved penile penetration, and that the accused had only raped her once.[75]

64 The accused also pointed out that there were external inconsistencies between V1's evidence and the extrinsic evidence on record:

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[71] DCS at [6]

[72] Prosecution's Bundle of Documents at p 35

[73] NE, 16 January 2019, 37/7-9

[74] Prosecution's Bundle of Documents at p 35

[75] NE, 16 January 2019, 37/21-30

(a) In the medical report prepared by Dr Lee, V1 was recorded as stating that the accused's residence was located at Jurong West Block 106. However, the accused's actual address was Block 457 Jurong West Street 41.[76]

(b) V1 testified that the accused was carrying a "stick" when he arrived at PW15's void deck on 2 November 2017.[77] However, PW16 later testified that the accused had been carrying a baseball bat.[78]

65 In my view, these inconsistencies did not materially affect V1's credibility. In relation to the discrepancies concerning V1's medical report, I accepted the Prosecution's explanation that the differences highlighted by the accused could be due to mistakes or misunderstandings in the history-taking process.[79] It is also important to bear in mind that V1 was examined by Dr Lee on 3 November 2017, *ie*, the very day on which she had allegedly been raped by the accused for the third time. The raw emotional trauma of this experience may have negatively impacted V1's ability to accurately recall and/or recount the precise details of her encounters with the accused.

66 I did not place weight on V1's inability to accurately describe the object carried by the accused on 2 November 2017. First, PW16's evidence was purely hearsay, as she had not been present at PW15's void deck at the material time.[80] Secondly, investigations revealed that the object carried by the accused was

[76] DCS at [6]

[77] NE, 16 January 2020, 55/1

[78] NE, 20 January 2020, 14/11

[79] PCS at [11(a)]

[80] NE, 20 January 2020, 14/17

likely to have been a hockey *stick*, and not a baseball bat as PW16 testified. This is closer to what V1 claimed to have observed.

67 Conversely, the Prosecution was able to satisfy me that V1's evidence had a high degree of external consistency. In relation to the first incident, which occurred on 29 October 2017, I agreed with the Prosecution that V1's evidence on how she came to meet the accused and how he persuaded her to follow him back to his flat is largely consistent with PW16's testimony.[81] PW15's and PW16's testimonies on V1's behaviour and noticeably distressed demeanour in the early hours of 30 October 2017[82] also corroborated V1's evidence that she was sexually assaulted by the accused on 29 October 2017.

68 In relation to the second incident, which occurred on 3 November 2017, I acknowledged that there were several gaps in V1's account which were not fully accounted for. For instance, V1 could not remember how she felt when she went up with the accused to his flat on 3 November 2017.[83] Nevertheless, V1's evidence of the second incident was largely corroborated by the objective evidence on record. For example, it was evident from the CCTV and POLCOM footage that V1 was visibly hesitant to enter the lift with the accused to go up to his flat on 2 November 2017 at about 10.50pm, and that she had lingered outside the lift at level 3 instead of readily following the accused when he exited the lift.[84] This supported V1's testimony that she was frightened and anxious at the material time, and that she had been unwilling to follow the accused to his

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[81] NE, 20 January 2020, 8/6-26

[82] NE, 16 January 2020, 51/19-24; NE, 20 January 2020, 11/9

[83] NE, 16 January 2020, 44/10

[84] Exhibit 9, PCS at [10(d)]

flat because he had sexually assaulted her on an earlier occasion. Moreover, V1's testimony that the accused had forced her to send voice messages to PW15 about her relationship with the accused was corroborated by the contents of the voice messages which were retrieved from PW15's friend's handphone.[85]

69 On the whole, I found that V1 was candid and straightforward in her testimony, and I saw no reason for her to fabricate or embellish her evidence in order to falsely implicate the accused.

V2's evidence

70 The accused also sought to challenge V2's credibility on the basis that her testimony in court contradicted the account which she had given to Dr Renuka during her medical examination on 20 November 2017.[86] In particular, V2 had informed Dr Renuka that the accused was a man who was unknown to her,[87] but later testified in court that she knew the accused because he had conversed with her via Whatsapp prior to meeting her in person.[88]

71 When questioned about this discrepancy, V2 explained that she had told Dr Renuka a different version of events because she was "not comfortable" to tell him the truth at that point in time.[89] In my judgment, this was a reasonable explanation for V2's behaviour. More importantly, the material aspects of V2's evidence, as recorded in her medical report, are wholly consistent with her

[85] P15d at S/N 47 and 48

[86] DCS at [25]

[87] PBD at pp 40 and 46

[88] NE, 15 January 2020, 78/26-30

[89] NE, 15 January 2020, 79/2

testimony in court. In both accounts, V2 stated that the accused had (a) offered her a cleaning job at his home,[90] (b) given her food before taking a shower,[91] and (c) took her to his bedroom, where he pulled down her underwear and inserted his penis inside her vagina and in her mouth.[92] I therefore found that V2's evidence had a high degree of internal consistency.

72 Furthermore, V2's evidence was externally consistent with the extrinsic evidence tendered by the Prosecution. The Whatsapp communications between V2 and the accused which were retrieved from the accused's handphone corroborated V2's evidence that she had not known the accused personally before he contacted her via Whatsapp, and that the accused had offered her a cleaning job at his house for three days.[93] The screenshot image concerning the "Bluetooth pairing request" that V2 sent to the accused and their subsequent exchange was also consistent with V2's evidence that the accused had given her a Bluetooth earpiece after the incident.[94] Finally, V2's evidence that the accused had also given her a helmet was supported by the fact that a helmet was recovered from her home during investigations.[95]

73 Overall, V2 presented a candid and coherent account of her encounter with the accused on 15 October 2017. Like V1, V2 had no apparent reason to frame the accused. In my judgment, both V1 and V2 were credible witnesses.

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[90] PBD at pp 40 and 46; NE, 15 January 2020, 62/22-23

[91] PBD at pp 40 and 46; NE, 15 January 2020 72/16-20

[92] PBD at pp 40 and 46; NE, 15 January 2020, 74/31 and 75/6-19

[93] P15f at S/N 141 and 228

[94] P15f at S/N 245-250

[95] PCS at [9(d)]

Conclusion on the first issue

74 I was conscious of the well-established legal proposition that the uncorroborated evidence of a victim must be "unusually convincing" if it is to be accepted as the sole basis for convicting an accused person (see *Public Prosecutor v GCK and another matter* [2020] SGCA 2 at [1]; *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2019] 2 SLR 490 at [58]). This principle applies with especial force in cases involving sexual offences, where there is seldom, if ever, any eyewitness testimony other than the evidence of the victim.

75 However, given the strength of the corroborative evidence led by the Prosecution, I was of the view that the "unusually convincing" standard did not feature in this case. Ultimately, the minor inconsistencies in the victims' accounts did not detract from the cogency of the totality of the evidence put forth by the Prosecution. In my judgment, the Prosecution had proven beyond a reasonable doubt that the victims performed the relevant sexual acts on the accused.

Whether the victims consented to the relevant sexual acts

76 I next considered the first limb of the accused's defence, which was that V1 and V2 consented to the sexual acts which form the basis of the accused's charges.

77 In relation to V1, the accused relied on the following pieces of evidence:

(a) On the night of 2 November 2017, V1 voluntarily followed the accused to his motorcycle despite the fact that he had allegedly sexually assaulted her on 29 October 2017.[96]

(b) On the night of 2 November 2017, V1 could have attempted to escape or shout for help when she was with the accused at his void deck and, subsequently, when the accused was taking a shower in his unit. However, she did not do so.[97]

(c) The lift CCTV footage depicted V1 smiling at the accused as they were going up to his unit on 3 November 2017.[98]

78 In relation to V2, the accused asserted that he had not used any threat and/or force when asking her to have intercourse with him.[99] He also pointed out that V2 had messaged him at about 11.45pm on 15 October 2017 to ask him how to use the Bluetooth earpiece which he had given her earlier on that day.[100] This was ostensibly inconsistent with V2's claim that she had been unwilling to participate in sexual activity with the accused.

79 The law on consent is codified under s 90 of the Penal Code, which states:

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[96] DCS at [10]

[97] DCS at [10] and [11]

[98] DCS at [12]

[99] DCS at [25]

[100] DCS at [26]

> **90.** A consent is not such a consent as is intended by any section of this Code —
>
> (*a*) if the consent is given by a person —
>
> (i) under fear of *injury* or wrongful restraint to the person or to some other person; or
>
> (ii) under a misconception of fact,
>
> and the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception;
>
> …
>
> [emphasis added]

80 "Injury" is defined under s 44 of the Penal Code as follows:

> **44.** The word "injury" denotes any harm whatever illegally caused to any person, in body, mind, reputation or property.

81 Section 90 of the Penal Code was discussed in further detail in *PP v Iryan bin Abdul Karim* [2010] 2 SLR 15. In that case, the High Court (at [123]) cited *Ratanlal & Dhirajlal's Law of Crimes: A Commentary on the Indian Penal Code 1860* vol 2 (C K Thakker & M C Thakker eds) (Bharat Law House, 26th Ed, 2007) at p 2061 for the proposition that:

> *A mere act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance or passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be 'consent' as understood in law.* Consent on the part of a woman, as a defence to an allegation of rape, requires voluntary participation, not only after the exercise of intelligence, based on the knowledge of the significance and the moral quality of the act, but after having freely exercised a choice between resistance and assent. Submission of her body under the influence of fear or terror is not consent. …
>
> [emphasis added]

82 The High Court also observed (at [125]) that the definition of "injury" under s 44 of the Penal Code is "wide enough to enable threats of a non-physical nature to vitiate consent".

Whether V1 consented

83 In my judgment, V1 did not voluntarily give any consent in both incidents. With respect to the first incident (on 29 October 2017), V1 was initially resistant to the accused's sexual demands and only became compliant when the accused threatened to call his friends to "gang-bang" her. Immediately after the incident, she confided in her friends, including PW15 and PW16, about what the accused had done. She was observed to be in a distressed state. If the incident had been wholly consensual, it defies logic for V1 to have complained of it and/or to have reacted the way she did.

84 With respect to the second incident (on 3 November 2017), I accepted V1's explanation that she only followed the accused to his motorcycle because she wrongly assumed that he was driving her to a coffeeshop located near PW15's block. I also agreed that it was reasonable that V1 did not try to escape or call for help because she did not have a handphone or money, and was frightened that the accused would make good his threat to circulate her videos on social media and make them go "viral" if she stopped complying with his demands. Finally, I was of the view that no inferences could be drawn from the fact that V1 seemed to have smiled as she was going up in the lift to the accused's unit. As the Prosecution pointed out, it is not impossible for a person to smile even when he or she is feeling nervous or afraid.[101]

[101] PCS at [23]

Whether V2 consented

85 I was also satisfied that V2 did not voluntarily give consent to any of her sexual acts with the accused. The accused's assertion that he had not used any threat or force on V2 before fellating her and having penile-vaginal intercourse with her was completely unsubstantiated. By contrast, V2's testimony that she was threatened by the accused was corroborated by her despondent demeanour in the videos that the accused had taken of her. She was in a state of fear and helpless resignation. Moreover, in the video clip titled "IMG_1140", which depicts V2 performing fellatio on the accused, V2 asked the accused "how long more" and told him "I don't know how to do it". This further buttressed her evidence that the acts were non-consensual.

86 I was unable to place any weight on the fact that V2 had initiated conversation with the accused by asking him how to use the Bluetooth device which he had given to her. Nor was it significant that V2 had failed to report her alleged sexual abuse to the police.

Observations in relation to the victims' reactions

87 It is well-established that victims of sexual assault cannot be expected to react or behave in a stereotypical way or conform to a standard behavioural template (see *Public Prosecutor v Yue Roger Jr* [2019] 3 SLR 749 at [30] ("*Roger Yue*"); *Public Prosecutor v Wee Teong Boo* [2019] SGHC 198 at [98]). In addition, there is no general rule which requires all victims of sexual assault to report the offences to the authorities in a timely fashion (see *Roger Yue* at [30]); *DT v Public Prosecutor* [2001] 2 SLR(R) 583 at [62]).

88 It would appear that the accused had blithely capitalised on the victims' youthful innocence and naïveté by employing various devious means to gain

their trust while playing on their fears and insecurities. One illustration can be seen from how he would buy food for both victims to eat in his flat before proceeding to bring them into his bedroom where he would sexually assault them. Another illustration is the manner in which the accused persuaded V1 to accompany him up to his flat on 2 November 2017, ostensibly so that he could leave his motorcycle helmet there. Although V1 was initially reluctant, he persuaded her to follow him by saying that they would simply head back downstairs for drinks and conversation. He made good on this assurance and presumably was able to regain some of her confidence and trust as a result. By the time they had drinks and ended their conversation at the void deck, he wanted to bring her up to his flat again – except that this time, he resorted to threatening to beat her up if she were to refuse. Consequently, V1 felt compelled to follow him out of fear.

89 In addition, by giving the victims money or other items and sending them home on his motorcycle, the accused was again playing mind games with them. In my assessment, these actions were intended to show that he had not forced himself upon them and was, in his own words as put to V1, a "good person".[102] In all likelihood, they were no more than mere manipulative devices designed to confuse the victims into thinking that they were willing parties all along, or to be used (as was evidently done in his trial) to back up his own defence of consent should a subsequent complaint be made.

90 Ultimately, it had to be borne in mind that both victims were young, vulnerable and impressionable, being merely 14 years of age at the time of the alleged offences. Further, both of the victims were susceptible to manipulation

[102] NE, 16 January 2020, 39/3

and abuse: V1 was not in possession of a handphone, and neither victim had money with them at the material time. Both apparently came from troubled family backgrounds. It is understandable that they would have felt intimidated, helpless and frightened when threatened by the accused, particularly when he was (to their knowledge) a member of a gang. It is also clear from s 90(*a*)(i) of the Penal Code that submission which is clouded by fear of injury cannot amount to consent at law. I therefore rejected the accused's defence of consent.

Whether the accused was the victim of a conspiracy or fabrication of evidence

91 Finally, I considered the second limb of the accused's defence, which was that he was the victim of a conspiracy by V1 and/or her friends. I also evaluated the accused's suggestion, in his closing submissions, that V2 had lied and fabricated evidence to implicate him.

92 In my view, these assertions were completely untenable. The accused offered no evidence to support his theory, choosing neither to testify nor to call any other witnesses in support of his defence. He did not even cross-examine V2, leaving her evidence unchallenged. I saw no plausible reason why either V1 or V2 and/or V1's friends would have fabricated evidence against him.

93 The other allegations the accused made, some of which I had referred to earlier (see [54] above), were of no assistance to him as they did not affect the cogency of the Prosecution's evidence. In my judgment, V1, V2, PW15 and PW16 were all consistent and credible witnesses, and I did not see any material discrepancies in the accounts which they had put forth before this court.

94 For the above reasons, I found that the Prosecution had proven all the elements of the proceeded charges beyond a reasonable doubt. Accordingly, I

found the accused guilty and convicted him on four charges of rape under s 375(1)(*a*) and punishable under s 375(2) of the Penal Code, and two charges of sexual assault by penetration under s 376(1)(*a*) and punishable under s 376(3) of the Penal Code.

Sentence

Prosecution's submissions on sentence

95 The Prosecution contended that the dominant sentencing considerations in this case were that of deterrence and retribution. The principle of general deterrence featured in this case because the accused's offences were committed against young and vulnerable victims. The principle of specific deterrence was also relevant because the accused was traced for related offences.[103]

96 In terms of the precise sentence sought, it was submitted that the applicable sentencing framework for the offence of rape was that laid down in the Court of Appeal's judgment in *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 ("*Terence Ng*"), while the appropriate framework for the offence of sexual assault by penetration was that set out by the Court of Appeal in *Pram Nair v Public Prosecutor* [2017] 2 SLR 1015 ("*Pram Nair*"). According to the Prosecution, the accused's offences fell within the mid-region of Band 2 of both the *Terence Ng* and *Pram Nair* frameworks, which translated into a sentence of at least 15 years' imprisonment and 12 strokes of the cane for each of the accused's rape charges, and at least 12 years' imprisonment and eight strokes of the cane for each of the accused's sexual assault by penetration

[103] NE, 5 February 2020, 12/15-24

charges. The Prosecution therefore urged this court to impose a global sentence of at least 30 years' imprisonment and 24 strokes of the cane in this case.[104]

Mitigation

97 In his written mitigation plea, the accused continued to maintain that he was not guilty of the charges against him. He also pleaded for leniency on the basis that he had been separated from his aged father after being incarcerated.[105]

My decision on sentence

The dominant sentencing considerations

98 I agreed with the Prosecution's submissions that the key sentencing considerations in this case were that of retribution and deterrence. I was of the view that specific deterrence was particularly important given that the accused had previous related antecedents with unfortunate parallels to the present case. In 2008, the accused was convicted on four charges of carnal intercourse against the order of nature under s 377 of the Penal Code, and three charges of having unlawful carnal connection with a girl below the age of 16 years except by marriage under s 140(1)(i) of the Women's Charter (Cap 353, 1997 Rev Ed). The charges related to four separate victims, three of whom were under the age of 16.[106] The accused's *modus operandi* for these offences bore substantial similarities with the present case. In each set of offences, the accused reached out to young girls and used various pretexts to bring them to a location where he could commit sexual acts against them. Furthermore, the accused almost

[104] NE, 5 February 2020, 12/8-14

[105] NE, 5 February 2020, 22/12-19

[106] CRO of Isham bin Kayubi

always used his mobile phone to take photographs and/or videos of these sexual acts.[107] I was therefore mindful that the accused's sentence had to be severe enough to deter him from perpetrating offences of a similar nature in the future.

The applicable sentencing frameworks

99 I now turn to consider the relevant sentencing frameworks in this case. In *Terence Ng*, the Court of Appeal set out a two-stage sentencing framework for rape offences, which it summarised thus (at [73]):

[107] NE, 5 February 2020, 15/9-15

(a) At the first step, the court should have regard to the *offence-specific* factors in deciding which band the offence in question falls under. Once the sentencing band, which defines the range of sentences which may *usually* be imposed for an offence with those features, is identified, the court has to go on to identify precisely where within that range the present offence falls in order to derive an 'indicative starting point'. In exceptional cases, the court may decide on an indicative starting point which falls outside the prescribed range, although cogent reasons should be given for such a decision.

(b) The sentencing bands prescribe ranges of sentences which would be appropriate for contested cases and are as follows:

(i) Band 1 comprises cases at the lower end of the spectrum of seriousness which attract sentences of 10–13 years' imprisonment and six strokes of the cane. Such cases feature no offence-specific aggravating factors or are cases where these factors are only present to a very limited extent and therefore have a limited impact on sentence.

(ii) Band 2 comprises cases of rape of a higher level of seriousness which attract sentences of 13–17 years' imprisonment and 12 strokes of the cane. Such cases would usually contain two or more offence-specific aggravating factors (such as those listed at [44] above).

(iii) Band 3 comprises cases which, by reason of the number and intensity of the aggravating factors, present themselves as extremely serious cases of rape. They should attract sentences of between 17–20 years' imprisonment and 18 strokes of the cane.

(c) At the second step, the court should have regard to the aggravating and mitigating factors which are *personal to the offender* to calibrate the sentence. These are factors which relate to the offender's particular personal circumstances and, by definition, *cannot* be the same factors which have already been taken into account in determining the categorisation of the offence. One of the factors which the court should consider at this stage is the value of a plea of guilt (if any). The mitigating value of a plea of guilt should be assessed in terms of (i) the extent to which it is a signal of remorse; (ii) the savings in judicial resources; and (iii) the extent to which it spared the victim the ordeal of testifying. Thus under our proposed framework, while for the first step an uncontested case will proceed in the same way as a contested case, it is at the second

> step that the appropriate discount will be accorded by the court for the plea of guilt by the offender.
>
> (d) The court should clearly articulate the factors it has taken into consideration as well as the weight which it is placing on them. This applies *both* at the second step of the analysis, when the court is calibrating the sentence from the indicative starting point *and* at the end of the sentencing process, when the court adjusts the sentence on account of the totality principle. In this regard, we would add one further caveat. In a case where the offender faces two or more charges, and the court is required to order one or more sentences to run consecutively, the court can, if it thinks it necessary, further calibrate the individual sentence to ensure that the global sentence is appropriate and not excessive. When it does so, the court should explain itself so that the individual sentence imposed will not be misunderstood.
>
> [emphasis in original]

100 In *Pram Nair*, the Court of Appeal transposed the *Terence Ng* framework to the offence of digital penetration. However, the range of starting sentences for each band was calibrated downwards to reflect the lesser gravity of the offence. It was held (at [159]) that the appropriate sentencing bands for a digital penetration offence was as follows:

> (a) Band 1: seven to ten years' imprisonment and four strokes of the cane;
>
> (b) Band 2: ten to 15 years' imprisonment and eight strokes of the cane;
>
> (c) Band 3: 15 to 20 years' imprisonment and 12 strokes of the cane.

101 Although *Pram Nair* specifically concerned digital-vaginal penetration, the Court of Appeal in *BPH v Public Prosecutor and another appeal* [2019] 2 SLR 764 ("*BPH*") subsequently clarified (at [55]) that the *Pram Nair* framework was applicable to all forms of sexual assault by penetration, including the penetration of a female victim's mouth by a male accused's penis under s 376(1)(*a*) of the Penal Code.

102 Given that the offence-specific and offender-specific factors outlined in *Terence Ng* apply equally to the offences of rape and sexual assault by penetration (see *Pram Nair* at [158]; *PP v BRH* [2020] SGHC 14 at [33]), I analysed the applicable factors for both types of offences concurrently.

First stage: Offence-specific factors

103 I agreed with the Prosecution that there were a number of offence-specific aggravating factors in this case. These were as follows:[108]

(a) *Vulnerability of the victims:* Both V1 and V2 were only fourteen years of age at the time of the accused's offences. Furthermore, V1 did not own a handphone, and both V1 and V2 were in need of money. V1 did not live with her own family and V2 had run away from home at the material time. The accused intentionally capitalised on these circumstances to lure the victims into his flat.

(b) *Premeditation:* The accused's offences demonstrated a high level of premeditation. Apart from targeting the victims and devising spurious reasons to bring them to his flat, the accused also manipulated and intimidated them and repeatedly used specific threats to compel them to comply with his sexual demands.

(c) *Threat of harm:* The accused threatened both victims that he would call his friends to sexually assault them if they did not perform the sexual acts demanded of them. He also threatened to harm V1's reputation by circulating videos of her sexual acts on social media.

[108] NE, 5 February 2020, 17/3-18/26

(d) *Recording of sexual acts on mobile phone:* The accused used his mobile phone to record the sexual acts which he had perpetrated on the victims. This intensified the victims' distress as they were forced to live with the knowledge that the sensitive footages in the accused's mobile phone could be exposed to a wider audience without their consent.

(e) *Failure to use condom:* Finally, the accused failed to use a condom when he engaged in penile-vaginal intercourse with both victims. This created a risk of pregnancy and/or the transmission of sexually-transmitted diseases.

104 Thus, I was satisfied that this was a case which fell squarely within Band 2 of the *Terence Ng* and *Pram Nair* frameworks.

Second stage: Offender-specific factors

105 I also found that there were offender-specific aggravating factors which were relevant to the second stage of the *Terence Ng* and *Pram Nair* frameworks. Specifically, the accused's previous convictions clearly demonstrated his proclivity towards committing sexual offences against minors. Moreover, the accused displayed an astonishing lack of remorse for his actions. He did not spare the victims from having to give evidence in court and reliving the trauma of their respective ordeals. His lack of remorse was also evident from his mitigation plea where he continued to maintain his innocence, as well as his egregious conduct during the court proceedings, including his wilful refusal to change out of his soiled clothes and his act of smearing faeces on the glass panel surrounding the dock.

106 In my judgment, the accused had exhibited "wholly-exceptional contempt" for the court proceedings, which could in ordinary circumstances be

validly regarded as an aggravating factor (see *Zeng Guoyuan v Public Prosecutor* [1997] 2 SLR(R) 556 at [37]). However, while I formed this view of the accused's conduct, I remained conscious that he would in all likelihood be made to face additional charges in respect of his conduct on 1 August 2019 and 14 January 2020. With this in mind, I did not accord any weight to his conduct as a stand-alone aggravating factor to justify imposing a heavier sentence. As the Prosecution made clear, the purpose of referring to the accused's contemptuous conduct in its submissions was because such conduct could be validly taken into account in showing his utter lack of remorse.

107 There were no relevant mitigating factors in the present case. It is well-established that hardship caused to the accused's family as a result of his punishment is of little mitigatory value except in exceptional circumstances (see *Public Prosecutor v Tan Fook Sum* [1999] 1 SLR(R) 1022 at [31]). I was of the view that the circumstances of this case were not exceptional.

108 I agreed that the Prosecution had correctly identified the accused's offences as falling within the mid-region of Band 2 of both the *Terence Ng* and *Pram Nair* frameworks. I further accepted that it would be appropriate to consider a sentence of at least 15 years' imprisonment and 12 strokes of the cane for each of the accused's rape charges, and at least 12 years' imprisonment and eight strokes of the cane for each of the accused's sexual assault by penetration charges. I also agreed with the Prosecution that the global sentence ought to be at least 30 years' imprisonment and 24 strokes of the cane.[109]

[109] NE, 5 February 2020, 12/8-14

109 Given the offence-specific and offender-specific aggravating factors present and the complete absence of any mitigating factors, I decided to calibrate the sentence for the rape offences at 16 years' imprisonment, slightly above the sentence proposed by the Prosecution.

Conclusion

110 For the aforementioned reasons, I was satisfied that the Prosecution had proved the charges against the accused beyond a reasonable doubt. I sentenced the accused to 16 years' imprisonment and 12 strokes of the cane in respect of each of the Second, Third, Fourth and Sixth Charges. In respect of the First and Fifth Charges, I sentenced the accused to 12 years' imprisonment and eight strokes of the cane per charge.

111 I further ordered the sentences for the Second and Sixth Charges to run consecutively, resulting in a global sentence of 32 years' imprisonment, to be backdated to the date of the accused's arrest, 3 November 2017. Pursuant to s 328 of the CPC, caning was limited to the maximum of 24 strokes.

See Kee Oon
Judge

James Chew and Jane Lim (Attorney-General's Chambers) for the Prosecution;
Accused in person.
