IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2019] SGCA 64

Criminal Appeal No 29 of 2018

Between

BPH

… *Appellant*

And

Public Prosecutor

… *Respondent*

Criminal Appeal No 19 of 2019

Between

BVZ

… *Appellant*

And

Public Prosecutor

… *Respondent*

In the matter of Criminal Case No 90 of 2017

Between

Public Prosecutor

And

BPH

In the matter of Criminal Case No 10 of 2019

Between

Public Prosecutor

And

BVZ

GROUNDS OF DECISION

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Sundaresh Menon CJ, Judith Prakash JA, Tay Yong Kwang JA, Steven Chong JA and Woo Bih Li J
4 July 2019

13 November 2019

Tay Yong Kwang JA (delivering the grounds of decision of the court):

Introduction

1 In *Pram Nair v Public Prosecutor* [2017] 2 SLR 1015 ("*Pram Nair*"), this Court set out the sentencing framework for sexual assault by way of digital-vaginal penetration, an offence under s 376 of the Penal Code (Cap 224, 2008 Rev Ed) ("the Penal Code"). However, we left open the question of whether the *Pram Nair* framework should apply to other forms of sexual penetration such as digital-anal penetration and fellatio. Several cases in the High Court have since discussed this issue. Some judges took the view that some forms of sexual penetration are more serious than others. This was the view taken by Pang Khang Chau JC (as he then was) ("the Judge in *BPH*") in *Public Prosecutor v BPH* (Criminal Case No 90 of 2017) ("*BPH*"), who adjusted the *Pram Nair* sentencing bands accordingly in his oral judgment. Other judges were of the

opinion that no meaningful distinction could be drawn among the various forms of sexual penetration and they applied the *Pram Nair* framework broadly to all forms of sexual penetration set out in s 376 of the Penal Code. This was the view taken by Hoo Sheau Peng J ("the Judge in *BVZ*") in *Public Prosecutor v BVZ* [2019] SGHC 83 ("*BVZ*").

2 The above two cases came up on appeal before us on the same day but were heard at different sittings. *BPH* was heard in the morning followed by *BVZ* in the afternoon. At the conclusion of the hearings, we dismissed the respective appeals against sentence. While the facts of both appeals were unrelated, they raised the same related questions of principle:

(1) whether the *Pram Nair* sentencing framework applies to all permutations of sexual penetration in s 376 of the Penal Code; and

(2) whether there is a hierarchy of severity for the various permutations of sexual penetration in s 376 of the Penal Code.

We decided to issue these joint grounds of decision for both appeals as both accused persons pleaded guilty to their respective charges and the facts in both cases were undisputed.

Background

BPH

3 BPH is a 65-year-old male Singaporean. At the time of the offences set out below, he was between 60 and 62 years old. He is the maternal grandfather of the victim, an 11-year-old boy, whom we shall refer to as "VB". VB was between seven and eight years old at the time of the offences. VB resided with

his maternal grandparents, his parents and a domestic helper in a three-bedroom flat. BPH and his wife occupied one bedroom which had an adjoining toilet. VB and his parents occupied the other two bedrooms.

4 Sometime in February or March 2015, VB was watching television when BPH asked him to follow him to BPH's bedroom. VB, who was seven years old then, complied. When they were in BPH's bedroom, both of them lay down on the bed, with VB on BPH's right. After a short chat, BPH pulled VB towards himself and kissed VB's face and neck before slipping his hand into VB's shorts and fondling VB's penis. VB did not consent to the touching. BPH then undressed VB completely and proceeded to undress himself completely as well. He put his thigh across VB such that it made contact with VB's penis. BPH then fondled VB's penis again. Finally, BPH positioned VB's body to cause VB's back to face him and he then grabbed VB's buttock. At this point in time, the domestic helper called for VB and BPH panicked. BPH dressed up quickly and told VB to put on his shorts. Before VB left the bedroom, BPH told VB not to tell anyone about this incident.

5 Between 1 December 2015 and 18 September 2016, BPH did not live in the flat because he was confined in the Drug Rehabilitation Centre. He was released on a temporary release scheme on 19 September 2016 and returned to live in the flat. In the afternoon of 28 September 2016, at about 3pm, only BPH and VB (now 8 years old) were in the flat. BPH asked VB to follow him into his bedroom and VB complied. They lay in bed together. BPH undressed VB and then himself. When they were both naked, BPH hugged VB and positioned VB so that he was on top of BPH's body and facing BPH. In this position, BPH inserted his right middle finger into VB's anus. VB did not consent to the act. As BPH did this, he whispered to VB, "Fuck you". Upon being digitally

penetrated by BPH, VB's body jerked in pain and he voiced his discomfort. However, BPH told VB to wait and he continued with the act. He only removed his finger from VB's anus when he felt faecal matter on his finger. BPH then hugged VB and instructed him not to tell anyone about the incident. VB remained on the bed while BPH went into the adjoining toilet to wash his finger. After leaving the bedroom briefly, BPH went back to the said toilet and masturbated, ejaculating into the toilet bowl.

6 The offences came to light on the night of 22 October 2016 when VB told his mother (BPH's daughter) that he did not want to be alone with BPH the next day because BPH had molested him. The mother was shocked and confronted BPH in her bedroom in the presence of BPH's wife. BPH admitted his wrongdoing and asked his daughter for forgiveness. VB overheard the conversation and started crying. VB's father heard the boy crying and went to find out what was happening. VB's mother informed VB's father that BPH had touched VB inappropriately. VB's father told his wife to make a police report. She did so the following afternoon.

7 BPH was eventually charged. He was represented by counsel in the High Court when he pleaded guilty to the following two charges:

(a) Sexual assault by penetration (digital-anal) of a person under 14 years of age punishable under s 376(2)(*a*) read with s 376(4)(*b*) of the Penal Code. This was in relation to the incident on 28 September 2016: see [5] above.

(b) Outrage of modesty of a person under 14 years of age punishable under s 354(1) read with s 354(2) of the Penal Code. This was in relation to the incident in February or March 2015: see [4] above.

8 The following three charges were admitted and taken into consideration ("TIC") for the purpose of sentencing:

(a) Two charges of exhibiting an obscene object (a pornographic video) to VB, offences punishable under s 293 of the Penal Code; and

(b) One charge of outrage of modesty (hugging, kissing VB's cheeks and neck and fondling VB's penis) of a person under 14 years of age punishable under s 354(1) read with s 354(2) of the Penal Code.

9 The Judge in *BPH* decided as follows:

(a) Digital-anal penetration is less serious than digital-vaginal penetration. Since this case involved the former, one year's imprisonment ought to be deducted from the *Pram Nair* sentencing bands to reflect the lower severity of the offence.

(b) The aggravating factors were abuse of trust, the young age of the victim and moral corruption.

(c) BPH's plea of guilt and lack of antecedents were mitigating factors.

(d) BPH's lack of premeditation, his heterosexuality and the assessment that he was not a paedophile were not mitigating factors.

(e) The appropriate sentence was 11 years' imprisonment for the sexual penetration charge and 30 months' imprisonment for the outrage of modesty charge.

(f) Nevertheless, the sentences should be reduced to ten years' imprisonment and two years' imprisonment respectively on account of the totality principle.

(g) Both sentences should run consecutively with effect from the date of remand on 1 June 2017, yielding an aggregate sentence of 12 years' imprisonment.

BVZ

10 BVZ, a Singaporean, is now 50 years old. He was 49 when we dismissed his appeal against sentence which included 16 strokes of the cane. At the dates of the offences against the four female victims, he was 47 years old. The four female victims, whom we shall refer to as "V1", "V2", "V3" and "V4" were all 14 years old at the time of the offences in 2016 and in 2017. V3 is BVZ's biological daughter. All four victims were friends from primary school and would often spend time in V3's home and sometimes would stay over for the night. BVZ lived with his wife and V3 in a flat. At the material times, his wife worked the night shift and would only return home in the morning.

Facts relating to the first sexual penetration charge (The first charge)

11 Sometime one night in September 2016, V1 went to V3's flat to get some instant noodles from her. V3 and her mother were not at home. Only BVZ was. BVZ opened the door of the flat for V1. V1 went inside to collect the instant noodles from the living room of the flat. As V1 was about to leave, BVZ told her there was "something" outside the flat and told her not to go home yet. V1 therefore waited a while in the flat.

12 After some time, V1 wanted to go home. BVZ went to open the door for her. As he approached the door, he pretended to be spiritually possessed suddenly by "acting strangely, performing 'silat' moves and speaking in a deep voice". BVZ removed his t-shirt and pulled down his jeans and told V1 that if she wanted him to "become normal" again, she had to give him a "blow job" (*ie*, fellatio).

13 V1 felt very afraid and sat on the floor against the wall with her eyes closed. BVZ proceeded to kneel in front of her. V1 opened her eyes and saw that BVZ was completely naked, with his penis erect. BVZ asked V1 to open her mouth but she refused. BVZ continued to ask her to open her mouth. Out of fear, V1 relented and opened her mouth. BVZ then put his penis in her mouth and instructed her to suck his penis as he moved his penis in and out of her mouth. This continued for a few minutes until BVZ ejaculated in her mouth. BVZ instructed V1 to swallow his semen, which she did.

14 BVZ then ran out of the flat. When he returned, he pretended that he was normal again and asked V1 what had happened. BVZ got dressed and gave V1 a cup of water and apologised to her. He also told her not to tell anyone what had happened. After some time, BVZ brought V1 back to her home which was one floor above his flat.

Facts relating to the outrage of modesty charge (The eighth charge)

15 Sometime in late September 2016, V4 ran away from her home and went to V3's flat. V4 told BVZ that she had run away from home and BVZ allowed her to stay in his flat. V4 stayed in the flat and slept in the bedroom with V3 at night. BVZ slept in the living room.

16 Sometime in the morning of 4 October 2016, V4 was asleep alone in the bedroom of the flat as V3 had left for school. BVZ entered the bedroom and woke V4 up. BVZ told her that he wanted her to satisfy him.

17 BVZ then touched V4's breast over her t-shirt. This formed the subject of the eighth charge. V4 quickly took a pillow to cover her chest. BVZ then told V4 that he wanted her to give him a "blow job", telling her that she was staying for free in his flat. V4 was frightened and began crying. Pretending that she needed to relieve herself, V4 quickly went to the toilet and there, she sent text messages to V2 to seek help. V2 in turn informed V3 about what had happened. V3 then approached one of her teachers for help.

18 Later that morning, two teachers from V3's secondary school arrived at BVZ's flat and escorted V4 away. V4 was then brought to her secondary school.

Facts relating to the second sexual penetration charge (The second charge)

19 After the incident that was the subject of the first sexual penetration charge, V1 only went to V3's home when she was with V3. On the night of 2 July 2017, V1 was in V3's bedroom watching movies with V3. V3 fell asleep. V1 left her room to use the toilet. She met BVZ. BVZ asked her about the location of the gaming shop which she and V3 frequented. V1 told him it was in Geylang. BVZ asked V1 to take him there. He also told her not to wake V3 up. They rode on his electronic bicycle to the gaming shop. When they arrived, V1 wanted to meet some friends but BVZ did not allow her to do so. Instead, he brought V1 to his friend's house at Chai Chee where V1 watched television while BVZ chatted with his friend. They left at about midnight.

20 On the way back to BVZ's flat, the battery of his electronic bicycle went flat. BVZ parked the bicycle at a petrol kiosk in the vicinity of Changi Road and brought V1 to the fourth floor of the multi-storey carpark of Joo Chiat Complex, a short walk away. It was then about 12.50am on 3 July 2017.

21 At the multi-storey carpark, BVZ asked V1 to give him a "blow job". V1 started crying and told BVZ she did not want to. BVZ told her this would be the last time and that he would not disturb her any more after this. V1 refused again. BVZ became angry and continued to ask V1 to give him a "blow job". V1 continued to refuse. BVZ then held her neck with his hand and threatened to punch her while making a gesture of punching her stomach. V1 kept quiet and continued crying, feeling helpless and afraid for her safety.

22 BVZ then unzipped his jeans and took out his penis. Out of fear, V1 complied with BVZ's demand and knelt down. BVZ then inserted his penis into her mouth and moved it in and out. After some time, BVZ ejaculated in V1's mouth. She spat the semen out.

23 BVZ then called for a private-hire car and they returned to BVZ's flat. BVZ told V1 to take care of V3 and went out. V1 did not consent to BVZ penetrating her mouth with his penis.

Facts relating to the offence of causing hurt by means of poison (The third charge)

24 On 16 August 2017, V1 and V2 were with V3 at V3's home. V3's parents were not at home. The three girls took BVZ's electronic bicycle and went out with their male friend. They returned to the flat sometime past 3am on 17 August 2017.

25 BVZ returned to the flat at about 5am on 17 August 2017. He became angry with V3 when he realised that V3 and her friends had used his electronic bicycle without his permission.

26 At about 6am, BVZ asked to speak to either V1 or V2 individually outside the flat at the staircase landing. Both of them refused to go. BVZ then brought his daughter V3 out to the staircase landing. He spoke to her for a while, then told her to ask either V1 or V2 to go to him at the staircase landing. V3 went back to her flat and told V2 that BVZ wanted to see her. V2 was reluctant to go as she was afraid but V3 assured her that she would seek help. V2 then went out to meet BVZ.

27 At the staircase landing, BVZ asked V2 to promise to take care of V3. V2 answered that she would. BVZ gave V2 four "Epam Nitrazepam BP 5mg" pills, which contained Nitrazepam. He asked her to consume the pills, with the intention of facilitating the commission of an offence of sexual penetration of a minor under s 376A(1)(*a*) of the Penal Code. BVZ told her that if she refused, he would hit V3. V2 then consumed the pills with some Coca-cola provided by BVZ. He then gave V2 a rolled up cigarette and asked her to smoke it. V2 did as she was told. V2 began to feel dizzy. BVZ then asked her to give him a "blow job".

28 V2 managed to walk away. She saw V1 who was waiting for her. She grabbed hold of V1 and both of them went up quickly to V1's flat where they locked themselves in until the police arrived. They then returned to V3's flat to meet the police officers.

29 Later that day, V2 was brought to the Kandang Kerbau Women's and Children's Hospital. She was found to have clinical symptoms of Nitrazepam overdose, including "drowsiness, slurred speech, slowness to response and unsteady gait". A report prepared by the Health Sciences Authority showed that 7-aminonitrazepam and Nitrazepam were detected in V2's blood and urine samples. Nitrazepam is a poison listed in the Schedule to the Poisons Act (Cap 234, 1999 Rev Ed). It is a prescription-only medication used to treat insomnia or convulsions.

30 BVZ, who was represented by counsel in the High Court, pleaded guilty and was convicted on four charges as follows:

(a) Two charges of sexual assault by penetration (fellatio) under s 376(1)(*a*) of the Penal Code (against V1);

(b) one charge of causing hurt by means of poison under s 328 of the Penal Code (against V2); and

(c) one charge of outrage of modesty under s 354(1) of the Penal Code (against V4).

31 Six other charges were taken into consideration for the purposes of sentencing:

(a) Two charges of attempting to procure the commission of an indecent act with a young person (against V2 and V4) punishable under s 7(*a*) of the Children and Young Persons Act (Cap 38, 2001 Rev Ed);

(b) one charge of voluntarily causing hurt (against V3) punishable under s 323 of the Penal Code;

(c) one charge of criminal intimidation (against V3) punishable under s 506 of the Penal Code;

(d) one charge of mischief (against V4) punishable under s 426 of the Penal Code; and

(e) one charge of theft from a store punishable under s 380 of the Penal Code. This offence was committed in July 2012 when BVZ was 42 years old.

32 The Judge in *BVZ* decided as follows:

(a) The six TIC charges were noted, as was the fact that BVZ was not traced for sexual offences.

(b) BVZ was a sexual predator who had preyed on vulnerable minors. Moreover, he had committed serious sexual offences. The principles of general deterrence and retribution therefore applied.

(c) The *Pram Nair* framework should be applied to the sentences for the sexual penetration charges.

(d) The charges each fell within Band 2 of the sentencing bands of the *Pram Nair* framework. There were five offence-specific factors: (1) the young age of the victim, V1; (2) BVZ standing in a quasi-parental relationship to V1 and therefore the abuse of trust; (3) the humiliating nature of BVZ's acts; (4) BVZ's premeditation in committing the offences; and (5) BVZ's use of force in respect of the second charge.

(e) BVZ's plea of guilt was a relevant mitigating factor because he spared the victims from having to relive the traumatic events by

recounting them at trial. Ten years' imprisonment and eight strokes of the cane were appropriate for each of the two sexual penetration charges.

(f) As for the offence of causing hurt by means of poison, a sentence of three years' imprisonment was appropriate.

(g) For the outrage of modesty charge, the offence fell within Band 2 of the sentencing bands set out in *Kunasekaran s/o Kalimuthu Somasundara v Public Prosecutor* [2018] 4 SLR 580 because of BVZ's intrusion into V4's private parts, abuse of trust and premeditation in the offence. The appropriate sentence, after accounting for BVZ's plea of guilt, was ten months' imprisonment.

(h) The imprisonment terms for the two most serious offences ought to run consecutively. Although the victim in both sexual penetration charges was V1, the offences took place ten months apart and were separate, distinct and unrelated. Running the sentences consecutively would ensure that BVZ received a distinct punishment for his second offence against V1; conversely, it would be unjust if BVZ effectively received no real punishment for sexually assaulting V1 again. The global sentence ordered was therefore 20 years' imprisonment and 16 strokes of the cane.

The applicable sentencing framework for sexual assault by penetration

33 Our analysis will address the question whether the Judge in *BPH* was correct to adjust the *Pram Nair* sentencing bands on the premise that digital-anal penetration is less serious than digital-vaginal penetration. We will also consider whether the Judge in *BVZ* was right to apply the *Pram Nair* framework to sexual penetration by way of fellatio.

Overview of the serious sexual offences

34 The offence of rape, which is generally regarded as the gravest of all the sexual offences, is set out in s 375 of the Penal Code. That provision defines rape as the penetration of the vagina of a woman with the offender's penis without the victim's consent or, when the victim is under 14 years of age, with or without her consent. We note that under the Criminal Law Reform Bill (No 6 of 2019), which was read a second time on 6 May 2019, the definition of rape is proposed to be broadened to include penile penetration of the anus or mouth. However, since this proposed amendment has not come into operation, we do not think it appropriate to consider its possible impact on the sentencing frameworks for rape and sexual penetration at this point in time.

35 In contrast to the definition of rape in s 375, the offence of sexual assault by penetration in s 376 is defined more broadly to include a multitude of acts:

> **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.
>
> (4) Whoever –
>
> (*a*) in order to commit or to facilitate the commission of an offence under subsection (1) or (2) –
>
> (i) voluntarily causes hurt to any person; or
>
> (ii) puts any person in fear of death or hurt to himself or any other person; or
>
> (*b*) commits an offence under subsection (1) or (2) against a person (B) who is under 14 years of age,
>
> shall be punished with imprisonment of a term of not less than 8 years and not more than 20 years and shall also be punished with caning with not less than 12 strokes.

36 It is apparent from the above provision that the offence has many permutations, depending on the instrument of penetration (penis, finger, other body part or object), the orifice being penetrated (mouth, vagina or anus), the genders of the perpetrator and the victim, who did the penetration or caused the penetration and who was penetrated.

Legislative history of s 376

37 The present offence of sexual assault by penetration under s 376 was introduced when the Penal Code was amended in 2007. The Bill which introduced the provision was the Penal Code (Amendment) Bill (No 38 of 2007), which later became the Penal Code (Amendment) Act 2007 (No 51 of 2007). The explanatory notes in the Bill are generally descriptive in nature and do not set out any hierarchy of severity, either explicitly or implicitly, of the

different types of sexual penetration offence contained in s 376. Similarly, the Parliamentary Debates at the second reading of the Bill shed no light on the question whether a hierarchy of offences in s 376 was intended: see *Singapore Parliamentary Debates*, Official Report (22 October 2007) vol 83 at cols 2187–2199.

The existing sentencing frameworks

38 Presently, there are two sentencing frameworks that apply to the sexual offences set out in ss 375 and 376 of the Penal Code which concern rape and sexual assault by penetration respectively.

39 In *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 ("*Terence Ng*"), we introduced a two-step sentencing framework for rape. At the first stage, the court should identify "which band the offence in question falls within, having regard to the factors which relate to the manner and mode by which the offence was committed as well as the harm caused to the victim [*ie*, offence-specific factors]". The court should then "determine precisely where within that range the present offence falls in order to derive an 'indicative starting point' which reflects the intrinsic seriousness of the *offending act*" [emphasis in original]: see *Terence Ng* at [39(a)]. The sentencing bands are as follows:

(a) Band 1: cases with no or limited offence-specific aggravating factors (10–13 years' imprisonment, 6 strokes of the cane);

(b) Band 2: cases with two or more offence-specific aggravating factors (13–17 years' imprisonment, 12 strokes of the cane);

(c) Band 3: extremely serious cases of rape owing to the number and intensity of offence-specific aggravating factors (17–20 years' imprisonment, 18 strokes of the cane).

40 At the second stage, the court "should have regard to the aggravating and mitigating factors which are *personal to the offender* to calibrate the appropriate sentence for that offender" [emphasis in original]. These "relate to the offender's particular personal circumstances" and are distinct from the factors considered in the first step of the sentencing framework: *Terence Ng* at [39(b)].

41 In *Pram Nair*, we adapted the *Terence Ng* framework for the offence of digital-vaginal penetration under s 376 of the Penal Code. The two-step approach was retained but the sentencing bands were adjusted. We took the view that "there is an intelligible and defensible difference to be drawn, in terms of offence severity, between rape and digital penetration": *Pram Nair* at [157]. Accordingly, the three sentencing bands laid down in *Terence Ng* were revised downwards for the offence of digital penetration:

(a) Band 1: 7–10 years' imprisonment and four strokes of the cane;

(b) Band 2: 10–15 years' imprisonment and eight strokes of the cane;

(c) Band 3: 15–20 years' imprisonment and 12 strokes of the cane.

42 We further held that where either of the two statutory aggravating factors under s 376(4)(*a*) or (*b*) was present, the case should fall within Band 2 or even Band 3: *Pram Nair* at [160]. As stated above, however, we expressly declined

to hold whether the three revised bands should similarly apply where the penetration of the vagina was done with something other than the finger, preferring to leave the issue to be decided on another occasion where a case on point should arise: *Pram Nair* at [159]. Such an occasion has arisen in these appeals. Although the charges in the two appeals here did not relate to penetration of the vagina, the different permutations of the offence of sexual assault by penetration in s 376 as stated in the charges allow us to consider whether this offence should be looked at as a generic offence or whether it should be broken down into specific categories using distinguishing factors such as the body part or the instrument of penetration and the orifice penetrated to gauge how serious each category of offence is.

Divergence in the authorities

43 As we have stated earlier, there is a diversity of views in the High Court as to whether the *Pram Nair* sentencing framework should be applied without distinction to the various forms of sexual penetration set out in s 376 or whether the section creates a hierarchy of offences to be ranked by severity of their nature and therefore severity in sentence.

Cases where no distinction was drawn between various forms of sexual penetration

44 We discuss the generic offence approach first. One of the post-*Pram Nair* decisions is *Public Prosecutor v Tan Meng Soon Bernard* [2018] SGHC 134 ("*Bernard Tan*"). In that case, the accused was convicted on five charges of sexual assault by penetration under s 376 of the Penal Code, with all five charges involving the accused committing fellatio on his young victims. The High Court Judge in that case acknowledged that the Court of Appeal in *Pram*

Nair clearly restricted the stated sentencing bands to the offence of digital sexual penetration. However, she agreed with the Prosecution that *Pram Nair* could be extended further. She noted that the offence under s 376 sets out one sentencing range for all the different forms of sexual penetration listed in that section. Apart from rape which is dealt with separately in s 375 of the Penal Code, the Penal Code "does not draw bright lines separating one form of sexual penetration, not amounting to rape, from another": *Bernard Tan* at [27]. The Judge also noted that the sentencing approaches taken by other jurisdictions did not draw any sharp distinction between the various types of penetration not amounting to rape, relying on New South Wales jurisprudence, the sentencing guidelines of the UK Sentencing Council and an Alberta Court of Appeal decision.

45 The Judge in *Bernard Tan* acknowledged that there were local decisions which had drawn distinctions in terms of severity among the different forms of sexual penetration. For example, the Court of Appeal in *Adam bin Darsin v Public Prosecutor* [2001] 1 SLR(R) 709, followed by the High Court in *Public Prosecutor v Yap Weng Wah* [2015] 3 SLR 297, took the approach that anal intercourse was more serious than fellatio. Similarly, the High Court in *Public Prosecutor v BMD* [2013] SGHC 235 ("*BMD*") considered that fellatio and penile-anal penetration were of the same severity and both were more serious than digital-anal penetration. The Judge in *Bernard Tan* distinguished these authorities as cases involving multiple forms of sexual acts occurring within the same factual setting. Therefore, imposing different sentences for the different types of sexual penetration was done to reflect the "relative gravity of each offending act" and also to ensure a "correct overall sentence that reflects the totality of the criminal conduct": *Bernard Tan* at [29].

46 *Bernard Tan* went on to opine that there was not the same need to identify a hierarchy of sexual acts when one compared across cases, because the facts and circumstances of each case were unique and the "precise nature of the sexual act itself is part of a wider context and factual setting". For example, an act of fellatio in one setting could cause much greater harm than digital penetration in another setting. It was therefore better to "weigh the aggravating and mitigating factors in each case, using *Pram Nair*, very broadly speaking, as a conceptual frame": at [30]. The case further opined that it would not be practical to have multiple frameworks for the different sexual penetration acts within s 376 as the applicable bands might overlap with one another: *Bernard Tan* at [31]. The Judge in *Bernard Tan* felt fortified in this view by two relatively recent authorities. The first was the Court of Appeal's decision in *Public Prosecutor v BAB* [2017] 1 SLR 292 which did not draw a distinction between the different types of sexual penetration when laying down starting points for s 376A(2) and (3). The second was *AQW v Public Prosecutor* [2015] 4 SLR 150, where the High Court did not draw a distinction between an accused who performed and an accused who received fellatio: *Bernard Tan* at [32]. *Bernard Tan* therefore concluded that the *Pram Nair* sentencing bands were useful in deciding the individual sentences for the five sexual penetration charges (involving fellatio): *Bernard Tan* at [36].

47 In the present appeals, the Judge in *BVZ* agreed with the High Court's reasoning in *Bernard Tan*. She therefore found it appropriate to adopt the *Pram Nair* bands for acts of fellatio and considered that the case before her ought to fall within Band 2: at [51]–[53].

48 Another case which adopted the *Pram Nair* bands for acts of fellatio is the decision of the High Court in *Public Prosecutor v BNO* [2018] SGHC 243

("*BNO*"). The sexual assault by penetration charge in *BNO* concerned the accused fellating his young victim. The Prosecution there submitted that fellatio ought to be considered a more serious offence than digital-vaginal penetration but less serious than rape. The High Court accepted the Prosecution's argument that "the sentencing benchmark set out in *Pram Nair* which concerns digital-vaginal penetration would be equally applicable to an offence of fellatio": *BNO* at [190]. In its view, applying the *Pram Nair* framework without modification would not prejudice the accused.

Cases where various forms of sexual penetration were ranked

49 We now look at the decisions which preferred a hierarchy of seriousness within the permutations of the sexual penetration offence in s 376. In the appeals before us, the Judge in *BPH* took the view that digital-anal penetration was less serious than digital-vaginal penetration. The Judge in *BPH* relied on *BMD* to arrive at his conclusion.

50 The accused in *BMD* claimed trial to six charges: two charges of rape and four sexual assault by penetration charges, comprising two charges of digital-anal penetration, one charge of penile-anal penetration and one charge of fellatio. The High Court in *BMD* made the following observations:

> 73 Although the maximum punishment provided for each offence is the same, I think penile-vaginal penetration is the most heinous among the four categories of offences listed in the six charges. Fellatio and penile-anal penetration would be next in severity although fellatio would probably be more disgusting as it involves the victim's mouth and semen could be ejaculated into the front end of the alimentary system. Digital-anal penetration would be the least severe of the penetration offences.

51 It can be seen that the High Court in *BMD* drew up a hierarchy of the different types of sexual penetration offences, placing fellatio and penile-anal penetration on the same level and digital-anal penetration at the lowest level on the facts there. This was also reflected in the sentences imposed by the High Court: two years' imprisonment and three strokes of the cane for the digital-anal penetration offences and seven years' imprisonment and six strokes of the cane for the penile-anal penetration and fellatio offences. These sentences were affirmed by the Court of Appeal on appeal: *BMD v Public Prosecutor* [2015] SGCA 70.

52 Another decision which adopted this line of reasoning is *Public Prosecutor v Koh Rong Guang* [2018] SGHC 117. The accused in that case used his penis to penetrate the mouth of the female victim. The Prosecution submitted that the *Pram Nair* framework applied but that there should be an uplift in the sentence generally because of the nature of the sexual act involved (forced fellatio) as it was more intrusive and degrading. The High Court agreed and expressed the view that "an act of forced fellatio is more intrusive and degrading than sexual penetration of a vagina using a finger": at [113].

Parties' submissions

53 In the present appeals, the Prosecution submitted that the *Pram Nair* framework should be applied to all forms of sexual penetration set out in s 376. It submitted that it would be inappropriate to draw "fundamental distinctions" between the various forms of penetration because the harm suffered by each victim would depend on the precise facts and circumstances of each case. In relation to the appeal in *BVZ*, the Prosecution went even further and suggested in oral arguments that having regard to the proposed amendments to the Penal

Code (where rape would be re-defined to include penile-oral penetration), the sentencing framework in *Terence Ng* for rape should be extended to include fellatio. However, as we indicated at the hearing, we do not think that it would be appropriate to consider the proposed statutory amendments at this juncture.

54 Counsel for BPH maintained his position that digital-anal penetration is less serious than digital-vaginal penetration. He submitted that the vagina, unlike the anus, is a private part. He illustrated this with the example of a woman who suffers psychological harm from losing her virginity in the course of a sexual assault. BVZ, who was unrepresented at the appeal before us, did not submit on this issue.

Our decision

55 We are satisfied that the sentencing framework set out in *Pram Nair* is applicable to all forms of sexual assault by penetration under s 376, notwithstanding that *Pram Nair* was a case concerning only digital-vaginal penetration. In our view, it would not be useful or practical to draw up a hierarchy of severity of the different types of sexual penetration which are within the scope of s 376. We arrive at this view for three main reasons.

56 First, there is a multitude of permutations for the offence of sexual penetration that can emerge from this section which makes benchmark sentences for each permutation impractical. Under s 376(1), four permutations are stated (in all cases, the victim does not consent to the penetration):

(a) Male accused's penis penetrates male or female victim's anus: s 376(1)(*a*);

(b) Male accused's penis penetrates male or female victim's mouth: s 376(1)(*a*);

(c) Male accused causes male victim's penis to penetrate male accused's anus: s 376(1)(*b*); and

(d) Male accused causes male victim's penis to penetrate male accused's mouth: s 376(1)(*b*).

57 Many more variations of sexual penetration are set out in s 376(2) (in all cases, the victim does not consent to the penetration):

(a) Male or female accused uses a part of his/her body (but not the penis) to penetrate female victim's vagina: s 376(2)(*a*);

(b) Male or female accused uses an object to penetrate female victim's vagina: s 376(2)(*a*);

(c) Male or female accused uses a part of his/her body (but not the penis) to penetrate male or female victim's anus: s 376(2)(*a*)

(d) Male or female accused uses an object to penetrate male or female victim's anus: s 376(2)(*a*);

(e) Male or female accused causes male victim's penis to penetrate a third and female person's vagina: s 376(2)(*b*);

(f) Male or female accused causes male victim's penis to penetrate a third and male or female person's anus: s 376(2)(*b*);

(g) Male or female accused causes male victim's penis to penetrate a third and male or female person's mouth: s 376(2)(*b*);

(h) Male or female accused causes male or female victim to use a part of victim's body (but not the penis) to penetrate a third and female person's vagina: s 376(2)(*c*);

(i) Female accused causes male or female victim to use a part of victim's body (but not the penis) to penetrate female accused's vagina: s 376(2)(*c*);

(j) Male or female accused causes female victim to use a part of female victim's body to penetrate female victim's vagina: s 376(2)(*c*);

(k) Male or female accused causes male or female victim to use a part of victim's body (but not the penis) to penetrate a third and male or female person's anus: s 376(2)(*c*);

(l) Male or female accused causes male or female victim to use a part of victim's body (but not the penis) to penetrate the male or female accused's anus: s 376(2)(*c*);

(m) Male or female accused causes male or female victim to use a part of victim's body (but not the penis) to penetrate the male or female victim's anus: s 376(2)(*c*);

(n) Male or female accused causes male or female victim to use an object to penetrate a third and female person's vagina: s 376(2)(*c*);

(o) Female accused causes male or female victim to use an object to penetrate female accused's vagina: s 376(2)(*c*);

(p) Male or female accused causes female victim to use an object to penetrate female victim's vagina: s 376(2)(*c*);

(q) Male or female accused causes male or female victim to use an object to penetrate a third and male or female person's anus: s 376(2)(*c*);

(r) Male or female accused causes male or female victim to use an object to penetrate the male or female accused's anus: s 376(2)(*c*);

(s) Male or female accused causes male or female victim to use an object to penetrate the male or female victim's anus: s 376(2)(*c*).

58 To draw up a hierarchy of severity for the myriad permutations of the sexual assault by penetration offence in s 376 may entail fine distinctions having to be made regarding the penetrator, the one being penetrated, the orifice in question and the body part or the object used for penetration. The complexity of the situation is compounded if we have to contend with offences under s 376A as well. This section concerns sexual penetration of a minor under 16 years of age and the permutations mirror those in s 376 except that the offence in s 376A is committed whether or not the victim consents to the penetration. In our view, therefore, it would be impractical to have a hierarchy of severity for the various permutations of criminal conduct in s 376.

59 Second, it is clear that the text of s 376 does not indicate in any way that the types of sexual assault by penetration are to be ranked in terms of severity. The offence-creating provisions in ss 376(1) and (2) merely describe the types of acts that are criminalised without stating that any one of them is a more or a less serious offence. Similarly, the punishment provision in ss 376(3) gives no such indication except that s 376(4) sets a mandatory minimum imprisonment

term of eight years and mandatory minimum caning of 12 strokes if hurt is caused or someone is put in fear of death or hurt or where the victim is under 14 years of age.

60 Third, we have seen that there is no unanimity of views as to whether one form of sexual penetration is inherently more serious or more detestable than another. There is reasonable consensus or there are at least good reasons to hold that rape (as presently defined) is the worst of the sexual penetration offences. Where rape is compared with digital penetration, this Court has said before that "there is an intelligible and defensible difference to be drawn, in terms of offence severity, between rape and digital penetration": *Pram Nair* at [157]. However, where sexual penetration other than rape is concerned, it appears to us that it may be much harder, perhaps impossible, to differentiate among the various permutations as set out above, even on the ground that some acts carry the risk of transmission of disease. Some people may be as appalled by forced penile-anal intercourse as by an object being thrust into the vagina. Similarly, the object used in the penetration may have to be differentiated in terms of size and length and capacity to cause physical injury or even to humiliate. The "disgust" factor is probably too personal for us to draw some meaningful and acceptable distinctions among the various permutations of the offence in s 376. We also bear in mind that some permutations of the offence may not even be for sexual gratification but could be motivated by a thirst for sadistic humiliation and pain.

61 We think that it would be more practical and sensible to weigh a range of factors in assessing the seriousness of a particular permutation of the offence. These would include the risk of sexually transmitted diseases and the degree of physical violation of the victim which can be factored in within the present

sentencing framework in *Pram Nair*. The *Pram Nair* framework (for digital-vaginal penetration) was adapted from the *Terence Ng* framework (for rape) and we stated in *Pram Nair* at [158] that many of the offence-specific aggravating factors listed in *Terence Ng* for rape are equally applicable to the offence of digital penetration. Similarly, these factors are equally relevant to other forms of sexual assault by penetration in s 376.

62 Our decision here does not detract from the distinction which we have drawn in *Pram Nair* between rape (*ie*, penile-vaginal penetration) and sexual assault by penetration under s 376. The *Terence Ng* framework will continue to apply to the offence of rape. The risk of an unwanted pregnancy is a factor which is unique to rape. Further, as we indicated above, rape has been recognised as the gravest of sexual offences.

Our decisions on sentence

63 Having decided that the *Pram Nair* framework applies to all forms of sexual penetration under s 376, we now consider the sentences imposed in the two decisions under appeal.

The BPH appeal

The sexual penetration charge

64 We agree with the Judge in *BPH* that there were at least two offence-specific factors here. They were the abuse of trust by a maternal grandfather and the vulnerability of the young victim.

65 At the hearing of the appeal, counsel for BPH submitted that less weight ought to be accorded to abuse of trust as an aggravating factor because the

potential for harm arising from that abuse of trust did not materialise. He argued that the evil underlying an abuse of trust is the potential for emotional or psychological harm to the victim whose trust has been abused and such harm did not appear to have manifested itself here.

66 We reject this submission. In *Terence Ng*, we explained at [44(b)] that this aggravating factor concerns cases where the offender is a position of responsibility towards the victim or where the offender is a person in whom the victim has placed trust. We also explained that when an offender commits a serious sexual offence in such circumstances, he has committed a dual wrong. Not only has he committed a serious crime, he has also violated the trust placed in him by society and by the victim. The focus is on the nature of the relationship between the offender and the victim, not the harm visited on the victim.

67 As we explained during the hearing, the recognition of abuse of trust as an aggravating factor is a reflection of the position that is occupied by members of a family. In this case, BPH is VB's maternal grandfather. In an Asian society like Singapore where there is typically a clear hierarchy between generations of members in the same family, a grandparent stands in a position of authority in relation to his or her grandchild. Society expects grandparents and parents to protect their young offspring from harm. When trust is abused, harm is occasioned not just to the victim but frequently also to institutions and to society. It is a tragic irony, as in most other cases of abuse of trust, that BPH's position of authority and trust in relation to VB afforded him the opportunity to offend more than once. That further shows why such abuse of trust is so abominable. The safe haven is turned into a danger zone. We therefore did not accept the submission that the lack of evidence of serious psychological harm rendered the abuse of trust less serious. Had there been evidence of such harm,

that would have been a further aggravating factor distinct from the abuse of trust.

68 The second offender-specific aggravating factor here was the vulnerability of the victim. As we held in *Terence Ng*, a victim may be vulnerable because of age, physical frailty, mental impairment or disorder or learning disability. Here, VB was especially vulnerable because of his age at the time of the offences against him (seven to eight years old). Indeed, this is a statutory aggravating factor under s 376(4)(*b*) of the Penal Code which was invoked in the first charge, as a result of which this case falls within Band 2: see [42] above.

69 Having regard to these offence-specific aggravating factors, it is clear that this case fell at least in the middle of Band 2 in the *Pram Nair* framework.

The outrage of modesty charge

70 We note that the Judge in *BPH*, in his sentencing remarks, applied the benchmark in *Public Prosecutor v BLV* [2017] SGHC 154 ("*BLV*") that "a 2-year imprisonment term with caning [is] the appropriate starting point for offences under s 354(2) of the [Penal Code] for aggravated outrage of modesty against a minor below the age of 14, where the victim's private parts or sexual organs had been intruded upon" (at [140]). At the appeal before us, both parties relied instead on *GBR v Public Prosecutor and another appeal* [2018] 3 SLR 1048 ("*GBR*"), where the High Court adapted the *Terence Ng* framework for the offence under s 354(2) of the Penal Code. We agree with the Judge in *GBR* where he stated that the *GBR* framework would achieve "some measure of consistency of punishment" among the various cases and "ensure that the full

sentencing spectrum, up to the statutory maximum penalty, is utilised" (*GBR* at [26]).

71 The three sentencing bands under the *GBR* framework are as follows:

(a) Band 1: less than one year's imprisonment;

(b) Band 2: one to three years' imprisonment; and

(c) Band 3: three to five years' imprisonment.

72 Band 1 comprises cases at the lowest end of the spectrum of seriousness. These include those which do not present any (or at most one) of the aggravating factors, for example, those that involve a fleeting touch or a touch over the clothes of the victim and do not involve the intrusion into the victim's private parts: *GBR* at [32]. Cases which involve two or more aggravating factors will almost invariably fall within Band 2 while Band 3 cases are those which, by reason of the number of the aggravating factors, present themselves as the most serious instances of aggravated outrage of modesty: *GBR* at [34] and [37].

73 Applying this framework, the aggravating factors discussed above in relation to the sexual penetration charge are relevant to this charge as well. In addition, the fact that there was skin-to-skin touching of VB's private part (see [4] above) places this case at the highest end of Band 2: *GBR* at [34].

The aggregate sentence

74 Some discount in sentence should be given for the fact that BPH pleaded guilty and also on account of the totality principle because the imprisonment sentences were ordered to run consecutively. However, this would be offset to

some degree by the charges that were taken into consideration for the purposes of sentencing.

75 In all the circumstances we think the aggregate sentence imposed was in fact lenient towards BPH. For the first charge, he would have received a minimum of eight years' imprisonment and 12 strokes of the cane under s 376(4)(*b*) because VB was under 14 years of age at the relevant times. He was sentenced to only ten years' imprisonment for this charge (after the Judge reduced it from 11 years) and there was no increase in the imprisonment term under s 325(2) of the Criminal Procedure Code (Cap 68, 2012 Revised Edition) on the basis that he could not be caned as he was more than 50 years old.

Other issues

76 Several other issues arose from the parties' written submissions and during the appeal hearing. We address them briefly here.

(1) Assessment that BPH was neither a homosexual nor a paedophile

77 Counsel for BPH submitted that the Judge in *BPH* failed to place sufficient weight on the fact that BPH was heterosexual and was assessed not to be a paedophile.[1] This showed that there was virtually no chance of him reoffending and therefore there was no heightened need for specific deterrence.

78 We make three points in relation to this submission. First, the fact that there was no heightened need for specific deterrence is not a mitigating factor. It is at best a neutral factor. Second, this submission does not detract from the

[1] BPH's skeletal arguments at para 22.

need for general deterrence. Unlike specific deterrence, which seeks to instil in a particular offender the fear of re-offending, general deterrence aims to educate and deter other like-minded members of the public by making an example of a particular offender: *PP v Law Aik Meng* [2007] 2 SLR(R) 814 at [23] and [24]. Third, the assessment that BPH is not a paedophile is doubtful because it was premised on his untrue statement to the psychiatrist that he offended on only one occasion. BPH has admitted to a second incident in which he sexually assaulted VB and to the TIC charges: see [8(a)] above.

(2) Reliance on precedents

79 Counsel for BPH cited a slew of precedents in his written submissions in the High Court and on appeal to justify his position that the sentence for the sexual penetration charge should be at or near the mandatory minimum of eight years' imprisonment. In particular, he argued that the intrusion was brief and involved one finger only. He pointed out there were many cases where the offenders were sentenced to terms of imprisonment at or near the statutory minimum even though the intrusion was more serious and protracted.

80 However, as we explained during the hearing, sexual offences occur in a vast array of circumstances and there is little point in comparing one case with another without appreciation of the underlying principles and facts. Each decision on sentence in such cases is invariably highly fact-sensitive. We illustrate with an authority which BPH relied on: *PP v Teo Boon Kang* [2018] SGDC 263 ("*Teo Boon Kang*"). The offender in that case was sentenced to the mandatory minimum of eight years' imprisonment even though he had tried twice to digitally penetrate the victim's anus. Counsel for BPH argued that, unlike the offender in *Teo Boon Kang*, he had only inserted his finger in VB's

anus briefly and did not do so for a second time. Further, BPH pleaded guilty and spared VB the trauma of testifying while the offender in *Teo Boon Kang* claimed trial.[2]

81 However, *Teo Boon Kang* is different from this case in two important aspects:

(a) First, the charges in *Teo Boon Kang* were for attempting to penetrate the victim's anus, while in the present case VB's anus was actually penetrated. Indeed, as the statement of facts showed, the penetration was not a brief one and BPH's finger went far enough into VB's anus to make contact with faecal matter.

(b) Second, the victim in *Teo Boon Kang* was 13 years old at the time of the offences, unlike VB, who was only seven and eight years old at the relevant times. VB was thus likely to have been less mature and more dependent on the protection of adults than the victim in *Teo Boon Kang* and therefore far more vulnerable.

Given these material differences, we did not find it useful to compare the facts of *Teo Boon Kang* with those of the BPH appeal.

82 While the penetration in this case could be said to be less lengthy in time than those in the authorities cited by counsel for BPH, it was clear that BPH's offences were grave. He abused his family position as VB's maternal grandfather and assaulted his very young grandson. These aggravating factors

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2 BPH's skeletal arguments at paras 17–18.

were not present in the authorities which counsel for BPH cited. Further, the offences took place in the family home.

83 In analysing the precedents, counsel for BPH focused on the sentences imposed in respect of particular charges without having regard to the aggregate sentence imposed in those cases. As we explained in *Public Prosecutor v BAB* [2017] 1 SLR 292 at [61], it must be borne in mind when looking at precedents which involved multiple charges that the sentence for each charge could have been calibrated downwards to ensure that the court arrived at a proportionate aggregate sentence. It would therefore not be appropriate to look at the sentences imposed for the individual charges without taking into account the resulting overall sentence.

(3) Lack of antecedents

84 In his sentencing remarks, the Judge in *BPH* considered BPH's lack of antecedents as a mitigating factor. We recognise that there are decisions in which this has been treated as a mitigating factor and other decisions where this has been treated as a neutral factor: *PP v BPK* [2018] 5 SLR 755 at [31], citing Benny Tan, "An Offender's Lack of Antecedents: A Closer Look at its Role in Sentencing", Singapore Law Gazette (May 2015).

85 We consider the absence of antecedents to be a neutral factor. The presence of related antecedents is an aggravating factor which would justify an enhanced sentence on the ground of specific deterrence. The lack of antecedents is no more than the absence of an aggravating factor, which is not mitigating but neutral in the sentencing process: *Edwin s/o Suse Nathen v PP* [2013] 4 SLR 1139 at [24].

(4) The distinction between s 376 and s 376A

86 In addressing BPH's reliance on cases where the offenders were convicted of the offence of sexual penetration of a minor under 16 under s 376A of the Penal Code, the Prosecution argued in its written submissions that a s 376A offence is "consent-neutral" and thus it is, as a starting point, less serious than a s 376 offence, which is by definition non-consensual.[3] At the hearing, we expressed our reservations about this argument because s 376A is meant to protect minors under 16. We note, however, that s 376A(2) provides for a maximum of 10 years' imprisonment or a fine or both while s 376(3) provides for imprisonment of up to 20 years and also a fine or caning. It is only when an offence under s 376A is committed against a person who is under 14 years of age that the punishments are the same as in s 376(3).

(5) Prospective overruling

87 In the proceedings in the High Court, counsel for BPH submitted that the *Pram Nair* sentencing framework should not be applied to BPH's offences as *Pram Nair* was decided after the dates of his offences.[4] For the same reason, he submitted that the Judge in *BPH* should not have relied on the High Court decision in *Raveen Balakrishnan v Public Prosecutor* [2018] 5 SLR 799 ("*Raveen Balakrishnan*") in ordering the sentences for both proceeded charges to run consecutively.[5] Counsel for BPH did not pursue these submissions at the hearing before us.

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3 Prosecution's skeletal arguments in *BPH* at para 32.

4 Record of Proceedings, Vol II, pp 144–145.

5 BPH's skeletal arguments at para 42.

88 In our view, the said submissions are without merit. When laying down the sentencing bands for rape in *Terence Ng*, we held that prospective overruling ought not to apply because the revised framework did not effect a radical change in the sentencing benchmarks. This observation applies with equal force to *Pram Nair*. Similarly, *Raveen Balakrishnan* did not represent an unforeseen and wholesale departure from an entrenched legal position which would have justified prospective overruling as the High Court relied on an earlier decision in *Public Prosecutor v AUB* [2015] SGHC 166 in coming to its decision.

Conclusion on the BPH appeal

89 For the foregoing reasons, we did not think that the arguments made on behalf of BPH had any merit. As we mentioned earlier, his aggregate sentence is in fact lenient in the circumstances. We therefore dismissed BPH's appeal against sentence.

The BVZ appeal

The sexual penetration charges

90 We applied the *Pram Nair* framework to the charges under s 376 for BVZ's appeal as well. In our view, the individual sentences of ten years' imprisonment and eight strokes of the cane for each of the two charges were actually rather lenient towards BVZ.

91 The Judge in *BVZ* correctly identified BVZ as a serial sexual predator. She listed five aggravating factors which applied in this case. The first aggravating factor concerned the age of the victim. The victim of both sexual assault by penetration charges, V1, was only 14 years old at the time the offences were committed. She was a young and vulnerable victim. The sexual

abuse of a vulnerable victim is a recognised aggravating factor: see *Terence Ng* at [44(e)].

92 The second aggravating factor, which was also common to both charges, was that BVZ is the father of V3 who was V1's close friend. Paragraph 7 of the statement of facts discloses that V1 and V3 were "close friends since childhood" and V1 would "often spend time at V3's flat and would stay-over there at times". It was reasonable to infer that V1 would have met BVZ often over the years and would have seen BVZ as a quasi-parental figure. BVZ therefore stood in a position of trust, which he abused by committing both sexual penetration offences.

93 The third aggravating factor was that the acts were of a humiliating nature. BVZ had forced V1 to fellate him in both instances, exposing her to the risk of contracting sexually transmitted diseases. Further, the forced fellatio on the first occasion in September 2016 took place over several minutes. The fact that BVZ told V1 to swallow his semen after ejaculation on that occasion was also demeaning and aggravated the offence.

94 The fourth aggravating factor was the premeditation in both offences. In respect of the first charge, BVZ put on an act of being spiritually processed and used that to trick V1 into fellating him. He manipulated V1 by telling her that "if she wanted him to become normal again, she had to give him a 'blow job'". In respect of the second charge, when BVZ brought V1 out of the flat that night, V1 had wanted to wake V3 up but BVZ told her not to. He then brought V1 to a place some distance away from his flat, arriving there after midnight. The inference to be drawn from this was that he did not want to be discovered

committing the second sexual penetration offence as his daughter V3 was sleeping in the flat at that time.

95 The fifth aggravating factor concerned the use of force and the threat of using more force on V1 in respect of the second sexual penetration offence. When V1 refused to give him a "blow job", BVZ "held her neck with his hand and threatened to punch her while making a gesture of punching her stomach".

96 BVZ was sentenced to ten years' imprisonment and eight strokes of the cane for each of the two sexual penetration charges. Given the number of aggravating factors present in this case, we think the offences should not have been treated as falling at the lower end of Band 2 of the *Pram Nair* sentencing bands. Instead, the aggravating factors placed each penetration offence at least in the middle or the upper half of Band 2 and each offence would have attracted a sentence of between 12 and 14 years' imprisonment. Further, the Prosecution did not invoke and the Judge in *BVZ* did not rely on s 376(4)(*a*)(ii) in the charge concerning the second incident of sexual penetration where V1 was put in fear of hurt to herself. Under s 376(4)(*a*)(ii), the sentence would be a minimum of 8 years' imprisonment and not less than 12 strokes of the cane.

The other charges

97 BVZ did not make any arguments against the individual sentences ordered for the offence of causing hurt by means of poison and for the outrage of modesty offence. They were not material to the aggregate sentence as the imprisonment terms for these two charges were ordered to run concurrently with the imprisonment terms for the two sexual penetration charges. In any case, we could see no reason to disagree with those sentences.

The aggregate sentence

98 BVZ's appeal was essentially against the decision that the imprisonment sentences for the two sexual assault by penetration charges run consecutively, giving an aggregate sentence of 20 years' imprisonment and 16 strokes of the cane. In our view, there was no error in the decision. Although V1 was the victim on both occasions, the two offences occurred about ten months apart and were therefore distinct offences. V1 was made to suffer the same invasion and indignity twice, after she had taken the precaution of not going to BVZ's flat unless V3 was with her. If the imprisonment terms for the two sexual penetration offences were ordered to run concurrently, BVZ would effectively escape the consequences for the second incident. There was therefore ample justification for both imprisonment sentences to run consecutively.

99 The only question left was whether the aggregate sentence ought to be moderated downwards on the basis of the totality principle. In our view, had the proper individual sentences for the sexual penetration offences been ordered, the aggregate sentence would have exceeded 24 years' imprisonment. Taking into account the totality of BVZ's criminal behaviour, his plea of guilt and the charges that were taken into consideration, the aggregate sentence of 20 years' imprisonment could hardly be described as manifestly excessive. We therefore dismissed BVZ's appeal.

Conclusions on the questions of law

100 Our conclusions on the two related questions of law set out at [2] above are:

(1) the *Pram Nair* sentencing framework applies to all permutations of sexual penetration in s 376 of the Penal Code; and

(2) there is no hierarchy of severity for the various permutations of sexual penetration in s 376 of the Penal Code.

Sundaresh Menon Chief Justice	Judith Prakash Judge of Appeal	Tay Yong Kwang Judge of Appeal

Steven Chong Judge of Appeal	Woo Bih Li Judge

Derek Kang Yu Hsien and Chu Weng Yan Kathy (Cairnhill Law LLC) for the appellant in Criminal Appeal No 29 of 2018;
The appellant in Criminal Appeal No 19 of 2019 in person;
Mohamed Faizal, Winston Man and Yvonne Poon for the respondent in Criminal Appeal No 29 of 2018;
Mohamed Faizal, James Chew and Selene Yap for the respondent in Criminal Appeal No 19 of 2019.