IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC 244

Magistrate's Appeal No 9019 of 2022/01

Between

ABC

… *Appellant*

And

Public Prosecutor

… *Respondent*

JUDGMENT

[Criminal Procedure and Sentencing — Sentencing — Principles]
[Criminal Law — Offences — Sexual offences]

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ABC
v
Public Prosecutor

[2022] SGHC 244

General Division of the High Court — Magistrate's Appeal No 9019 of 2022/01
Sundaresh Menon CJ
26 May 2022

29 September 2022 Judgment reserved.

Sundaresh Menon CJ:

Introduction

1 This is an appeal against the sentence imposed on the appellant in *Public Prosecutor v ABC* [2022] SGDC 40 (the "Judgment") after he pleaded guilty to and was convicted of the offence of sexual assault by penetration ("SAP") of a minor below the age of 14 pursuant to s 376(2)(*a*) and punishable under s 376(3) of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code"). The appellant consented to six other charges being taken into consideration ("TIC") for the purposes of sentencing. The TIC charges include one charge of sexual penetration of the victim when she was 14 years old, pursuant to s 376A(1)(*b*) of the Penal Code, three charges of committing an obscene act under s 7(*a*) of the Children and Young Persons Act (Cap 38, 2001 Rev Ed), one charge of production of child abuse material under s 377BG(1)(*a*) of the Penal Code, and

one charge of meeting the victim during the Circuit Breaker period, an offence under Regulation 6 of the COVID-19 (Temporary Measures) (Control Order) Regulations 2020.

2 The learned District Judge ("District Judge") applied the sentencing framework set out in *Pram Nair v Public Prosecutor* [2017] 2 SLR 1015 ("*Pram Nair*") and placed the case within Band 1 of *Pram Nair*, which prescribed a sentencing range between seven and ten years' imprisonment and four strokes of the cane. After considering the aggravating and mitigating factors, the Judge sentenced the appellant to six years' imprisonment and three strokes of the cane.

3 The apparent complexity in the present case arises in part from the fact that there had been certain legislative changes in 2019 that pertained to a number of sexual offences including SAP. The appellant contended that because of those legislative amendments in 2019 (the "2019 amendments") sentencing precedents that preceded those amendments, including *Pram Nair*, could not be applied without careful consideration of how the 2019 amendments might affect the law in this area. His contention was that *Pram Nair* was a precedent that applied only in cases where the victim had not consented to the SAP. Where there was such consent, even in the case of a minor, the position, according to him, was that *Pram Nair* did not apply. He maintained that this was not displaced by the 2019 amendments.

4 I will explain and address the effect of the 2019 amendments in detail later in this judgment. It suffices at this stage for me to outline some broad strokes of the argument:

(a) Prior to the 2019 amendments, s 376 dealt with SAP offences where there was no consent on the part of the victim. The offence did

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not depend on the age of the victim though if the victim was under the age of 14, a mandatory minimum sentence applied;

(b) As against this, s 376A at the time generally concerned SAP offences committed against minors including where there was consent;

(c) However, there were some overlapping situations where an offender could be charged under s 376 or s 376A if the victim were a minor and there was no consent. Depending on which section was invoked, the penalties could be quite different, with the latter (meaning s 376A) resulting in lower penalties;

(d) *Pram Nair* laid down a sentencing framework for SAP offences under s 376 but that case did not concern a minor;

(e) After the 2019 amendments, the overlap mentioned above appears to have been removed. Further, a case involving a minor may in certain circumstances be prosecuted under s 376 regardless of whether she consented or not.

5 The question that this raises in broad terms is whether the 2019 amendments resulted in a substantive change in the law and whether it affects the reliability of pre-2019 precedents such as *Pram Nair*.

6 Against the backdrop of the 2019 amendments, the appellant contended that the *Pram Nair* framework had generally not been applied in cases where the minor victim had consented. As a result, in such cases, offenders typically received much lower sentences than the appellant had in this case as result of the District Judge applying *Pram Nair*. He contended that the Prosecution's sentencing position, which the District Judge seemed to have accepted, was

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predicated on the mistaken notion that there had been a substantive change in the law and that this called for higher sentences to be imposed. The appellant contended that there was no substantive change to the offence of SAP, and because his was a case where the victim had consented, the *Pram Nair* sentencing framework should not apply or if it was applied, the sentencing bands should be lowered on account of the fact that the victim in this case had consented to the acts in question. In the alternative, he submitted that the doctrine of prospective overruling should apply in this case.

7 In reaching my decision, I had to consider the following:

(a) Did the 2019 amendments effect any substantive changes to the offence in question?

(b) Do the cases cited by the appellant show that *Pram Nair* has not been applied in cases involving offences where the victim consented?

(c) If the answer to (a) is "No" and the answer to (b) is "Yes", should I invoke the doctrine of prospective overruling?

8 Having carefully considered the parties' submissions and the above issues, I allow the appeal. In my judgment, the 2019 amendments did not effect any substantive changes that are material to the offences that are in question before me. However, the case law both before and after the 2019 amendments has drawn a distinction between cases where a minor victim had consented to the SAP, and those where there was no consent. This practice would *not* result in a sentence that was consistent with the framework developed in *Pram Nair*. In my judgment, the practice of drawing such a distinction is wrong in principle and it follows that those sentencing precedents were incorrectly decided. However, given that this appeared to be a settled position, while I do overrule

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those cases, I do not think it is fair to the appellant that I apply the corrected framework to the appellant. In the circumstances, I allow the appeal and sentence the appellant instead to a term of imprisonment of three years and six months, with no caning. My reasons are set out below.

9 For convenience, any reference to statutory provisions in this judgment will be in relation to the Penal Code, unless otherwise stated.

Facts

10 The appellant was 28 years old at the relevant time and volunteered as a facilitator for certain children's classes at a religious organisation. The victim and her family were members there and two of her siblings attended the class that was facilitated by the appellant.

11 The appellant first met the victim sometime in early 2020 when the victim picked her siblings up after their classes. The relationship between the appellant and the victim started to develop when the victim also started volunteering with the religious organisation. The two initially communicated with each other on a messaging platform.

12 Soon after this, in or around February 2020, the appellant and the victim started meeting and they developed a relationship. They kept this from others. They would meet a few times a week at a shopping centre and would then go to the staircase landing of a block of flats where they talked, kissed and hugged. By March 2020, the appellant began touching the victim's private parts in the course of these interactions. He first touched the victim's breasts over her clothes and then progressed to touching her breasts under her clothes on a subsequent occasion. On a third occasion, the appellant touched the victim's breasts under her clothes and touched her vagina over her clothes. He eventually

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progressed to digitally penetrating the victim, with one finger on the first occasion and with two fingers on the next occasion. The appellant was aware that the victim was between 13 and 14 years old at the relevant time.

13 The appellant also requested nude videos of the victim. The victim complied and between March and June 2020, she sent videos and photographs of herself in various states of undress and/or masturbating. The victim's mother checked the victim's phone sometime in June 2020 and then discovered the relationship between the appellant and the victim. She lodged a police report, and the appellant was arrested.

14 The proceeded charge was for penetrating the victim's vagina with two fingers when the victim was 13 years old. The appellant pleaded guilty to one charge of SAP of a minor below the age of 14 with the victim's consent pursuant to s 376(2)(*a*) and punishable under s 376(3), and agreed to have six other charges taken into consideration for the purposes of sentencing.

The District Judge's decision

15 The District Judge applied the *Pram Nair* framework which is applicable to all forms of SAP under s 376: see the Judgment at [12]; see also *BPH v Public Prosecutor and another appeal* [2019] 2 SLR 764 at [55]. The framework may be summarised as follows:

Band	Types of cases	Indicative range
1	Cases featuring no offence-specific aggravating factors or cases where these factors are only present to a very limited extent and therefore have a limited impact on sentence	Seven to ten years' imprisonment and four strokes of the cane

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2	Cases usually containing two or more offence-specific aggravating factors	Ten to 15 years' imprisonment and eight strokes of the cane
3	Extremely serious cases of sexual assault by penetration by reason of the number and intensity of the offence-specific aggravating factors	15 to 20 years' imprisonment and 12 strokes of the cane

16 The District Judge found that the case fell within Band 1 and considered the following aggravating factors:

(a) The appellant had acted in a "calculated manner", which was an offence-specific aggravating factor. The offence was not an isolated one and the severity of the sexual intrusions escalated overtime. Further, the location where they met was chosen because some physical intimacy was contemplated by the appellant, and the appellant wanted to avoid being spotted by others: see the Judgment at [40].

(b) In relation to offender-specific aggravating factors, the District Judge noted the number of TIC charges which were similar in nature to the proceeded charge: see the Judgment at [41].

17 The appellant cited three cases involving sexual penetration of a minor under s 376A(3) to the District Judge to illustrate the disparity in sentences that would result if the *Pram Nair* framework were applied in this case: see the Judgment at [24]. The imprisonment term in those cases ranged from 32 months to 4 years and 11 months. There was no caning imposed save in one case where the accused was a repeat offender. The District Judge, however, found (at [30]–[35]) the three cases to be of limited precedential value and made the following observations:

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(a) Two of the cases were decided prior to the 2019 amendments that amended s 376 of the Penal Code.

(b) In assessing the value of sentencing precedents based on an offence different from that for which the court is to pass sentence, the court must consider the extent to which the offences are analogous in terms of both policy and punishment (see *Keeping Mark John v Public Prosecutor* [2017] SLR 170 and *Luong Thi Trang Hoang Kathleen v Public Prosecutor* [2010] 1 SLR 707).

(c) The policy undergirding the enactment of the amended s 376 was to treat offences against minors under the age of 14 more severely than cases under s 376A(3). The difference in labelling ("sexual assault" for s 376 as opposed to "sexual penetration" for s 376A(3)) reflects the abhorrence that society has towards such crimes involving young victims. The legislative intent was to protect such victims, who would remain victims, irrespective of consent.

18 In the circumstances, the District Judge was satisfied that *Pram Nair* did apply. She also considered that in all the circumstances, the case should not be placed at the start of Band 1 but instead, it should be eight years' imprisonment and four strokes of the cane. However, the District Judge also took into account the appellant's plea of guilt and reduced the sentence to six years' imprisonment and three strokes of the cane.

Parties' cases on appeal

19 On appeal, the appellant submitted that the sentence of six years' imprisonment and three strokes of the cane was manifestly excessive. His key contention was that the *Pram Nair* framework, which applied to all forms of

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SAP under s 376, did not contemplate the situation of *consensual* penetrative sexual activity. *Pram Nair* was decided prior to the 2019 amendments and at that time, a charge under s 376 could only be brought if there was no consent. An accused person such as himself could therefore only have been charged under s 376A and punished under s 376A(3) for sexual penetration of a minor under the age of 14 *with consent*. The 2019 amendments made it possible for an accused person, such as himself, to be charged under either ss 376 or 376A(3) even where there was consent, and Parliament would have intended that the sentencing approaches for both provisions be consistent with each other if the underlying facts were the same.

20 The appellant submitted that the precedents concerning s 376A(3), which concerned SAP with consent, were more relevant to cases such as his. The *Pram Nair* framework was not generally applied in cases under s 376A(3), because *Pram Nair* dealt with an offence where there was no consent on the part of the victim, unlike cases under s 376A(3). This resulted in much lower sentences for s 376A(3) cases. In particular, the appellant highlighted the case of *Public Prosecutor v Ng Tuan Loo* SC-906028-2021 ("*Ng Tuan Loo*"), which was decided less than two weeks after the appellant was sentenced. The offender in *Ng Tuan Loo* pleaded guilty to two charges of sexual penetration of a minor under the age of 14 under s 376A(1)(*a*), punishable under s 376A(3) of the Penal Code, and one charge of sexual penetration of a minor under the age of 14 under s 376A(1)(*c*) punishable under s 376A(3) of the Penal Code. The appellant also highlighted that there was a commercial element involved in *Ng Tuan Loo* as the offender had paid the victim money for the sexual acts. Further, there was no genuine romantic relationship between the offender and the victim, unlike the present case. However, the offender there was only sentenced to 32 months' imprisonment despite the circumstances being more egregious in that case.

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21 The appellant contended that consent has generally been seen as a significant mitigating factor in s 376A(3) cases, which explained the much lower sentences imposed in those cases. The *Pram Nair* framework therefore ought to be modified or redeveloped altogether when dealing with SAP of a minor under the age of 14 *with consent* under s 376. Applying the modified framework to the present case would result in a sentence of three years' imprisonment with no caning imposed.

22 In the alternative, the appellant argued that the doctrine of prospective overruling ought to apply in the present case because the application of the *Pram Nair* framework to an offence of SAP of a minor under the age of 14 *with consent* would represent a significant change in the existing sentencing landscape given that *Pram Nair* has not generally been applied in such cases.

23 The appellant also argued that the District Judge erred in the application of the *Pram Nair* framework, which resulted in a manifestly excessive sentence. He argued that the District Judge placed insufficient weight on the fact that the victim's age was very close to the stipulated age ceiling and that the District Judge wrongly relied on the appellant's number of past girlfriends and his prior sexual experience as an aggravating factor. The appellant also argued that the District Judge wrongly concluded that there was premeditation and had also double counted the effect of the TIC charges. I do not think there was merit in these points and have not otherwise addressed them in this judgment.

24 The respondent, on the other hand, submitted that the Judge correctly applied the *Pram Nair* framework. It was also submitted that the Judge rightly declined to rely on s 376A(3) precedents. Parliament had through the 2019 amendments intended for SAP offences under s 376 to be punished more

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severely than they previously would have been following a conviction under s 376A(3) of the Penal Code.

Issues for determination

25 There are five broad issues that arise for determination:

(a) First, what was the effect of the 2019 amendments in relation to s 376 and s 376A of the Penal Code?

(b) Second, does *Pram Nair* apply in cases of SAP of a minor under the age of 14 where this is done with her consent, under s 376A(3)?

(c) Third, are past decisions under s 376A(3) relevant to sentencing in this case and if so, what do these show?

(d) Fourth, should the doctrine of prospective overruling apply here?

(e) Finally, what should the appropriate sentence be?

My decision

The effect of the 2019 amendments

26 Prior to the 2019 amendments, the relevant parts of ss 376 and 376A of the Penal Code read as follows:

> **Sexual assault by penetration**
>
> **376.—**
>
> …
>
> (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);

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…

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 for 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.

Sexual penetration of minor under 16

376A.— (1) Any person (A) who —

(a) penetrates, with A's penis, the vagina, anus or mouth, as the case may be, of a person under 16 years of age (B);

…

with or without B's consent, shall be guilty of an offence.

(2) Subject to subsection (3), a person who is guilty of an offence under this section shall be punished with imprisonment for a term which may extend to ten years, or with fine, or with both.

(3) Whoever commits an offence under this section against a person (B) who is under 14 years of age shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to fine or to caning.

…

27 After the 2019 amendments, the relevant parts of ss 376 and 376A of the Penal Code read as follows:

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Sexual assault involving penetration

376.—

…

(2) Any person (A) who —

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

…

shall be guilty of an offence if B did not consent to the penetration or if B is below 14 years of age, whether B did or 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.

…

Sexual penetration of minor under 16

376A.— (1) Any person (A) who —

> (*a*) penetrates, with A's penis, the vagina, anus or mouth, as the case may be, of a person under 16 years of age (B);

…

shall be guilty of an offence.

(1A) This section does not apply to an act of penetration mentioned in subsection (1) which would constitute an offence under section 375(1)(*a*), 375(1)(*b*) read with section 375(3), 375(1A)(*a*), 375(1A)(*b*) read with section 375(3), 376(1)(*a*), 376(1)(*b*) read with section 376(4), 376(2) (if the victim B is of or above 14 years of age) or 376(2) (if the victim B is below 14 years of age) read with section 376(4).

…

(2) Whoever commits an offence under this section against a person (B) who is of or above 14 years of age but below 16 years of age —

> (*a*) in a case where the offender is in a relationship that is exploitative of B, shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to fine or to caning; and

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> (*b*) in any other case, shall be punished with imprisonment for a term which may extend to ten years, or with fine, or with both.
>
> (3) Whoever commits an offence under this section against a person (B) who is under 14 years of age shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to fine or to caning.
>
> …

28 It is evident from the text of these provisions that prior to the 2019 amendments, s 376 dealt with SAP offences based on the *absence* of consent. It was not a specific age-limited provision, and a charge could be brought regardless of the age of the victim. However, if a minor under the age of 14 was involved, there was a *mandatory minimum punishment* provided for in s 376(4). However, the maximum punishment was essentially the same even if the offence involved a minor under the age of 14.

29 As against this, s 376A provided for the offence of SAP involving a minor under the age of 16. In this context, consent was *irrelevant* to liability under that provision. The punishment was a term of imprisonment of up to ten years with no caning, unless the victim was under the age of 14, in which case, the punishment was a term of imprisonment of up to 20 years with the possibility of caning. However, there was no mandatory minimum sentence. The statutory regime prior to the 2019 amendment, presented some problems and I illustrate this in relation to an offence of digital penetration of the vagina of the victim as follows.

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Statutory regime pre-amendment			
Age of victim	**Consent**	**Offence provision**	**Prescribed punishment provision**
Below 14	Yes	Section 376A(1)(*b*)	Section 376A(3): maximum 20 years' imprisonment, and liable to fine or to caning
	No	Section 376(2)(*a*)	Section 376(4): mandatory minimum sentence of 8 years' imprisonment up to 20 years' imprisonment, and 12 strokes of the cane
		Section 376A(1)(*b*)	Section 376A(3): maximum 20 years' imprisonment, and liable to fine or to caning
Between 14 and 16	Yes	Section 376A(1)(*b*)	Section 376A(2): maximum ten years' imprisonment or a fine or both, no caning
	No	Section 376(2)(*a*)	Section 376(3): maximum 20 years' imprisonment, and liable to fine or to caning
		Section 376A(1)(*b*)	Section 376A(2): maximum ten years' imprisonment, and liable to fine, no caning
Above 16	Yes	Not applicable	Not applicable
	No	Section 376(2)(*a*)	Section 376(3): maximum 20 years' imprisonment, and liable to fine or to caning

30 As can be seen from this table:

(a) In the case of victims who were below the age of 14 and who did not consent to the acts, an accused person could be charged under either

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s 376(2)(*a*) or s 376A(1)(*b*). This gave rise to a relatively minor anomaly in that there was mandatory minimum punishment if the charge was brought under the former provision, but not the latter. The maximum sentence of 20 years' imprisonment was the same for both categories. Where the victim consented, the accused person could only be charged under s 376A(1)(*b*), which carried a maximum punishment of 20 years' imprisonment and the possibility of a fine or caning.

(b) If the victim was over the age of 16, an offence would only arise if the act was done without the victim's consent. The accused person could only be charged under s 376(2)(*a*), which carried a maximum punishment of 20 years' imprisonment and the possibility of a fine or caning.

(c) In the case of victims between the ages of 14 and 16, there was a more serious anomaly. Where the victim consented to the acts in question, the accused person could only be charged under s 376A(1)(*b*). This carried a maximum punishment of ten years' imprisonment or a fine or both, with no caning. However, if there was no consent on the part of the victim, a charge could be brought under *either* s 376(2)(*a*), which carried a maximum punishment of 20 years' imprisonment and a possibility of fine or caning, or under s 376A(1)(*b*) which as noted above, carries a maximum punishment of ten years' imprisonment or a fine or both, but no caning. This was especially anomalous not only because of the substantial discrepancy, but even more because it might have been expected that the prescribed punishment under s 376A(2), which was a specific provision for the protection of a minor, *should* if anything have attracted a heavier punishment.

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31 Subject to the foregoing observations, it seems to me that the legislative policy on sentencing offenders in these situations generally reflected the following positions:

(a) A mandatory punishment of *at least* 8 years' imprisonment together with 12 strokes of the cane should apply to offenders who commit the offence of SAP against a victim under the age of 14 without her consent;

(b) A maximum punishment of ten years' imprisonment or a fine or both would apply if the victim was between the ages of 14 and 16, and consented to the acts;

(c) In all other cases, specifically, where the victim was under the age of 14 and consented, or the victim was over the age of 14 and did not consent, there was no mandatory minimum punishment but the maximum punishment was a term of 20 years imprisonment with the possibility of a fine and caning.

32 Following the 2019 amendments, the statutory regime may be summarised as follows:

Statutory regime post-amendment			
Age of victim	**Consent**	**Offence provision**	**Prescribed punishment provision**
Below 14	Yes	Section 376(2)(*a*)	Section 376(3): maximum 20 years' imprisonment, and liable to fine or to caning
		Section 376A(1)(*b*)	Section 376A(3): maximum 20 years' imprisonment, and liable to fine or to caning

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	No	Section 376(2)(*a*)	Section 376(4): mandatory minimum sentence of 8 years' imprisonment up to 20 years' imprisonment, and 12 strokes of the cane
		Section 376A(1)(*b*)	Not applicable pursuant to s 376A(1A)
Between 14 and 16	Yes	Section 376A(1)(*b*)	Section 376A(2)(*b*): maximum ten years' imprisonment or a fine or both, no caning
	No	Section 376(2)(*a*)	Section 376(3): maximum 20 years' imprisonment, and liable to fine or to caning
		Section 376A(1)(*b*)	Not applicable pursuant to s 376A(1A)
Above 16	Yes	Not applicable	Not applicable
	No	Section 376(2)(*a*)	Section 376(3): maximum 20 years' imprisonment, and liable to fine or to caning

33 It will be seen that the 2019 amendments removed the various anomalies I have identified and it did so by including s 376A(1A) which provides that s 376A would not apply if the act in question would constitute an offence under any of these provisions:

(a) Section 375(1)(*a*);

(b) Section 375(1)(*b*), read with s 375(3);

(c) Section 375(1A)(*a*);

(d) Section 375(1A)(*b*) read with s 375(3);

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(e) Section 376(1)(*a*);

(f) Section 376(1)(*b*) read with s 376(4);

(g) Section 376(2) (if the victim is 14 or above 14);

(h) Section 376(2) (if the victim is below 14) read with s 376(4).

Sections 375(3) and 376(4) concern cases where certain aggravating factors are present, such as hurt, exploitation of a victim below the age of 14, and the lack of consent of a victim below the age of 14, and provides for a mandatory minimum punishment.

34 It follows from this that:

(a) As far as victims below the age of 14 are concerned:

(i) consent is irrelevant for establishing liability under s 376(2)(*a*), although where there is no consent, the mandatory minimum punishment will apply. The absence of consent is therefore an aggravating factor. But the fact that such a victim under the age of 14 may have consented is otherwise irrelevant and it is not correct to see consent in this context as a mitigating factor.

(ii) An accused person may also be charged under s 376A(1)(*b*) where there is consent but as noted above, the mandatory minimum punishment will not apply and the punishment provision is otherwise the same.

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(iii) Where there is no consent, the charge cannot proceed under s 376A(1)(*b*) and so the minor anomaly I described at [30(a)] above has been removed.

(iv) Save as aforesaid, the regime for victims below the age of 14 is the same now as it was before. There was certainly no substantive change brought about by the amendments that is material to this case.

(b) As far as victims above the age of 16 are concerned, the 2019 amendments made no changes at all.

(c) As far as the victims between the ages of 14 and 16 are concerned:

(i) Where there is consent, the prescribed punishment under s 376A(2)(*b*) remains a maximum term of ten years' imprisonment or a fine or both, but not of caning.

(ii) However, if there is no consent, the offender can *only* be charged under s 376(2)(*a*) and punished under s 376(3), which carries a maximum punishment of 20 years' imprisonment, with the possibility of fine or caning. Hence, the anomaly identified at [30(c)] above has been done away with.

(iii) Again, although the 2019 amendments do have a substantive effect, this is not material to the present case.

I note in passing that there is also provision in s 376A(2)(*a*) for the enhanced punishment provision to apply to a victim between the age of 14 and 16, who consents to the SAP but in the context of an exploitative

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relationship. I do not say more on this here because it has not been suggested that it applies in the present context.

35 In my judgment, the 2019 amendments were enacted to address the anomalies I have noted, which applied to the overlapping provisions concerning minor victims who did not consent to the SAP. The substantive effect of the 2019 amendments was to clear away these anomalies, none of which are relevant to the present case because the victim here was below 14 years old and consented. After the 2019 amendments, where a victim under the age of 14 consents to the SAP, the accused person may be charged under either s 376(2)(*a*) *or* s 376A(1)(*b*), both of which carry the *same* maximum punishment of 20 years' imprisonment, with the possibility of a fine or caning pursuant to s 376(3) and s 376A(3) respectively. It is true that before the 2019 amendments, such an offender could only be charged under s 376A(1)(*a*) and punished under s 376A(3) but the punishment was precisely the same then as it is now. Hence, the 2019 amendments do not reflect any substantive change in policy affecting a case such as the present. Nor can any such change be inferred from the fact that the two sections are titled differently. During the hearing, the respondent accepted that this reflected the position. I therefore disagree with the District Judge's view that there was a policy change brought about by the 2019 amendments in relation to *victims under the age of 14* and specifically to enhance the penalties that are to apply in the present context.

36 I turn next to consider the applicability of *Pram Nair* and also the relevance of the precedents cited by the appellant in relation to s 376A(3).

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The applicability of Pram Nair and the relevance of precedents under s 376A(3)

37 As no substantive change in policy was effected by the 2019 amendments in relation to victims under the age of 14 who consented to acts of SAP, it follows that cases that were decided in respect of s 376A(3) would generally be relevant. However, their materiality to my decision in this case depends on the answers to two key questions. First, what should the correct sentencing framework for SAP offences be as a matter of law? Second, what has the sentencing practice for SAP offences been as matter of fact and practice and has that practice been consistent with the correct sentencing framework?

38 This is the first case concerning a victim below the age of 14 who consented to acts of SAP, that was prosecuted under s 376 after the 2019 amendments. It is therefore important to clarify the applicable sentencing framework. In my judgment, following the 2019 amendments, the same sentencing framework should apply to cases that are sentenced under s 376A(3) and those under s 376(3), but not to cases that are sentenced under s 376(4) or s 376A(2)(*b*).

39 To begin with, this follows from the fact that the following cases, which I term for convenience, "Category 1", and which covers:

(a) Cases of SAP where the victims are under the age of 14 but consent to the acts of SAP; and

(b) Cases where the victims are over the age of 14 (including adult victims) but who do not consent,

are now subject to a common punishment regime under s 376(3) for both classes of victims as well as under s 376A(3) for the first class of victims, namely a

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term of imprisonment of up to 20 years with the possibility of caning and a fine. This is strengthened by the fact that s 376(2), which is the offence-creating provision that applies to both classes of victims is framed in terms that equate the two classes: see [27] above. That sub-section provides that the person committing the act in question shall be guilty of an offence if the victim "did not consent to the penetration … or is below 14 years of age, whether the victim did or did not consent …".

40 As to the remaining cases:

(a) The cases which I term for convenience, "Category 2", are those which cover victims under the age of 14 who *do not* consent (or where other aggravating factors in s 376(4) are present), and these are subject to a mandatory *minimum* punishment under s 376(4) but are otherwise subject to the same maximum punishment as Category 1 cases.

(b) The remaining cases, which I term for convenience, "Category 3", are those which cover victims between the ages of 14 and 16 who consent to the acts of SAP. These are subject to a different punishment regime under s 376A(2)(*b*), namely imprisonment for a maximum term of ten years or a fine or both, but not of caning.

41 In substance, this is precisely in line with the legislative policy I identified at [31] save that the anomalies that existed at the time have been cleared.

42 The next question is this: should *Pram Nair* – which was developed in the context of a non-consenting adult victim – apply to all Category 1 cases, including a case like the present which involves a consenting minor under the

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age of 14? It would follow from what I have said at [39] above that the answer to this should be in the affirmative. But I proceed to examine this further.

43 *Pram Nair* was decided prior to the 2019 amendments. The offender there was convicted of one charge of rape under s 375(1)(*a*) and one charge for sexual assault by penetration under s 376(2)(*a*) for having penetrated the adult victim's vagina with his finger. The Court of Appeal considered the benchmark sentences for rape that had been established in *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 ("*Terence Ng*") and concluded that the benchmark sentences for rape and sexual assault by digital penetration should not be equated. The court reasoned that rape involves penile penetration which carries with it the risk of unwanted pregnancy and perhaps a greater risk of sexually transmitted disease, and is also a more grievous violation of the victim than is digital penetration: see *Pram Nair* at [150]. Indeed, rape is generally regarded as the gravest of all the sexual offences: see *Pram Nair* at [151]. The Court of Appeal therefore modified and adapted the *Terence Ng* framework to make it appropriate for the offence of digital-vaginal penetration, while recognising that many of the offence-specific aggravating factors for rape might also be present and pertinent in offences involving digital penetration: see *Pram Nair* at [158]–[160]. The sentencing bands were, however, lowered to reflect the lesser gravity of digital penetration in comparison to rape. I leave open the question whether *Pram Nair* applies to other offences relating to penile-vaginal penetration, though my provisional view is that it would not apply to penile-vaginal penetration which could be prosecuted under s 376A(1)(*a*) instead of rape; such offences should for sentencing purposes be dealt with by applying *Terence Ng*.

44 Significantly, the Court of Appeal observed (at [161]–[162]) of *Pram Nair* that the new sentencing bands could be relevant to s 376A because of the

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commonality and overlap between s 376 and s 376A. The Court of Appeal noted that in *Public Prosecutor v BAB* [2017] 1 SLR 292 ("*BAB*"), it was held that the starting point for cases under s 376A(3), where there is an element of *abuse of trust*, should be between ten and 12 years' imprisonment. This would apply in the context of victims under the age of 14 who consented to the act but in respect of whom, there had been some abuse of trust on the part of the offender. It should be noted that if such a victim is the subject of an exploitative relationship with the offender, then the offence would now *have to be* prosecuted under s 376(2) read with s 376(4) which would be subject to the mandatory minimum sentence prescribed for Category 2 cases. This is by reason of s 376A(1A). It was also observed (see *Pram Nair* at [164]) that the starting point in general for cases sentenced under s 376A(3), meaning cases where a victim under the age of 14 consented to SAP, might have to be reviewed in light of the newly set out framework in *Pram Nair*. The court, however, left the issue open for an appropriate case in the future.

45 Subsequently in *Public Prosecutor v Yue Roger Jr* [2019] 3 SLR 749 ("*Yue Roger*"), the High Court observed (at [116]) that the sentencing bands for s 376 set out in *Pram Nair* should generally apply to offences under s 376A(3). However, the court thought that the framework developed in *Pram Nair* would need to be modified to take into account the fact that there is no minimum imprisonment term and no mandatory caning prescribed in s 376A(3), unlike in s 376(4). The court thus observed (at [117]) that Band 2 of *Pram Nair*, which starts at ten years' imprisonment, may be lowered to eight or nine years when applied to a s 376A(3) offence. On appeal, however, the Court of Appeal left the issue of the appropriate sentencing approach for an offence of sexual penetration of a minor under the age of 14 years of age punishable under s 376A(3) open: see *Yue Roger Jr v Public Prosecutor* [2019] 1 SLR 829 at [9].

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46 While I do not disagree with some of the broad observations made by the High Court in *Yue Roger*, in my respectful view, the court there did not direct itself or consider the nuances of the provisions in question, as I have sought to do at [26]–[41] above. Having carefully considered the relevant provisions and the 2019 amendments in detail, in my judgment, the *Pram Nair* framework *should* apply to all offences that are to be sentenced under s 376(3) and also to those under s 376A(3), subject to the possible reservation that I have noted at the end of [43] above.

47 In the first place, as I have already noted at [39] above, the sentencing range for each of these two offences are identical. Second, while there will be some variance in the factual circumstances that apply, there will be very many common considerations to guide the sentencing judge in this context. Third, prior to the 2019 amendments, Parliament did not recognise the consent of a minor under the age of 14 as a mitigating factor under s 376A. Both s 376(3) and s 376A(3) prescribed the same punishment. The *lack of consent*, however, was an *aggravating* factor that would trigger the mandatory minimum punishment under s 376(4) (see above at [34(a)]). Parliament did not recognise consent as a factor that displaced the offence even in the case of victims between the ages of 14 and 16; but once they were within that age threshold, and consented, the punishment was significantly lower under s 376A(2) as compared to that prescribed under s 376A(3). And in this group, if there was no consent, then the more serious punishment provisions under s 376(3) would apply. As I have explained above (at [35]) the 2019 amendments addressed certain anomalies in these provisions but save as to these, the statutory regime in relation to minors under the age of 14 remained substantively the same. I reiterate that consent remains a *neutral* factor but its absence is an aggravating factor that triggers the mandatory minimum punishment.

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48 How does this bear on the applicability of *Pram Nair* to a case such as the present where the victim did consent? I agree to some degree that *Pram Nair* was formulated on the basis of there being no consent to the SAP on the part of the victim. But this is only part of the picture. *Pram Nair* was formulated in the context of an ***adult victim*** *who did not consent, and* what is clear is that Parliament equated the position of an adult victim who did not consent with that of a *minor under the age of 14 who did consent.* On the other hand, a case involving a minor who did not consent would give rise to a more serious minimum penalty. This is among the reasons why the consent of the minor cannot be regarded as a mitigating factor at all. The 2019 amendments make this explicit in s 376(2), which states that consent is *irrelevant* for establishing liability where the victim is a minor under the age of 14. The District Judge defended the applicability of *Pram Nair* and rejected the precedents on the basis of a *change* in policy. However, while the conclusion is correct, in my judgment the reason is not, for reasons explained above. Instead, *Pram Nair* should apply to offences sentenced under both ss 376(3) and 376A(3) because Parliament has equated these offences in terms of their gravity and because they have an identical sentencing provision. Parliament has also made it clear that in the case of a victim below the age of 14, consent is irrelevant, though the *lack* of consent in such a case will aggravate the offence.

49 The question then is whether this reflects the sentences that have been meted out for s 376A(3) cases. Based on a search of the Sentencing Information and Research Repository ("SIRR") as at the time of the hearing, of the 61 cases concerning s 376A(3) that have been prosecuted since 2001, 46 cases resulted in sentences of four years or less, and caning was imposed in only seven cases. Ten cases resulted in sentences of between four to eight years, and only five cases resulted in sentences of more than nine years. There were 49 such cases after *Pram Nair*, and the sentences imposed in 39 of these were terms of

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imprisonment of four years or less and caning was imposed in only three cases. I do not have the details to enable me to scrutinise the reasons underlying the more onerous sentences imposed in a minority of these cases, but it is clear that in general, the sentences fall *far short* of the framework set out in *Pram Nair*, which starts at seven to ten years' imprisonment and four strokes of the cane. This suggests that *Pram Nair* has not generally been applied in cases sentenced under s 376A(3) where a victim is under the age of 14 but consents. Alternatively, sentencing in these cases had proceeded on the basis that consent (as the appellant had argued) is regarded as a *significant* mitigating factor. On either footing, this reflects a mistaken approach to sentencing which has worked to the benefit of offenders. While there are limitations to the SIRR search, the results paint the clear picture that *Pram Nair* has not been correctly applied to s 376A(3) cases, if it has been applied at all.

50 Importantly, there are at least three High Court decisions which did not apply *Pram Nair* even though these were decided after *Pram Nair*: see Magistrate's Appeal No 9046 of 2017 ("MA 9046"), Magistrate's Appeal No 9060 of 2018-01 ("MA 9060") and *GCM v Public Prosecutor and another appeal* [2021] 4 SLR 1086 ("*GCM*").

51 MA 9046 was decided before the 2019 amendments and the charges were brought under s 376A(1) even though there was no consent. The offender was convicted of 13 charges after a trial, including two charges for the offence of sexual penetration of a minor below the age of 14 punishable under s 376A(3), and 11 charges for outrage of the modesty of a minor below the age of 14 punishable under s 354(2). The s 376A(1) charges involved penile-oral penetration and acts of fellatio, and there was no consent on the victim's part. The offender was sentenced to 7 years' imprisonment for each of the s 376A(3) offences. No caning was imposed because the offender was above the age of 50.

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The Prosecution appealed against the sentence and significantly, it cited *Pram Nair*, but only for the proposition that that case was concerned with *digital-vaginal penetration*. Accordingly, it was submitted that *BAB* should apply and the sentence should be increased to ten years' imprisonment. The judge in his brief grounds did not mention *BAB* or *Pram Nair*, but observed that the sentence was somewhat lenient and dismissed the appeal.

52 In MA 9060, the offender was sentenced to 18 months' imprisonment for two charges of sexual penetration of a minor under the age of 14 punishable under s 376A(3) each. He was also sentenced to 30 months' imprisonment for another charge of sexual penetration of a minor under the age of 14 punishable under s 376A(3) and six months' imprisonment for two charges of criminal intimidation each. The aggregate sentence was 36 months' imprisonment, and no caning was imposed. On appeal, the judge did not apply *Pram Nair* but instead applied the benchmarks set out in *Public Prosecutor v Yap Weng Wah* [2015] 3 SLR 297 ("*Yap Weng Wah*") and *Public Prosecutor v Goh Jun Guan* [2017] SGHC 2. Those cases established that for offences involving fellatio punishable under s 376A(3), the starting point would be five to seven years' imprisonment in the absence of aggravating or mitigating circumstances. The judge therefore allowed the appeal and increased the individual sentences for two of the s 376A(3) charges from 18 months to four years' imprisonment and two strokes of the cane each. The aggregate sentence was increased to four years and six months' imprisonment with four strokes of the cane.

53 I pause to note that the starting point of five to seven years' imprisonment in *Yap Weng Wah* was later rationalised in *BAB* (at [61]) on the basis of proportionality, because the aggregate sentence imposed in *Yap Weng Wah* was 30 years' imprisonment and 24 strokes of the cane.

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54 In *GCM*, the offender pleaded guilty to three proceeded charges under s 376A(3) for sexual penetration of a minor under the age of 14 with eight other charges taken into consideration. He was sentenced to an aggregate sentence of 24 months' imprisonment. Both the offender and the Prosecution appealed against the sentence imposed. The District Judge in *Public Prosecutor v GCM* [2020] SGDC 101 case applied the framework set out in *AQW v Public Prosecutor* [2015] 4 SLR 150 ("*AQW*"). *AQW*, however, was a case concerning an offence against a minor *above* the age of 14 and punishable under s 376A(2). As explained above at [32], s 376A(2) carries a maximum imprisonment term of only ten years with no caning. This is *half* the sentencing range that applies for the offence under s 376A(3) where the victim is *under* the age of 14. On appeal in *GCM*, the High Court noted that the higher maximum prescribed punishment in s 376A(3) meant that there should be an uplift, especially considering the victim's vulnerability due to her young age and familial circumstances and the existence of some pressure exerted by the appellant. The sentence was enhanced to 15 months' imprisonment for two charges under s 376A(3), and 18 months' imprisonment for the other charge under s 376A(3). The aggregate sentence imposed was 33 months' imprisonment with no caning. *Pram Nair* was not even mentioned.

55 It is clear that *Pram Nair* (as well as *Yap Weng Wah* and *BAB*) has not generally been applied to cases that were sentenced under s 376A(3). The sentences imposed in these cases are typically less than four years' imprisonment with no caning. It is true that the offence under s 376(2) is constituted regardless of the consent of the victim, where the victim is under the age of 14. It is also true that the Prosecution has chosen to prosecute this offence under s 376 even though it could have done so under s 376A because this was a case where the victim consented. But this ignores the fact that s 376(4) prescribes a separate punishment with a mandatory minimum where the victim

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has not consented. Where there is consent, the punishment provision under s 376(3) and s 376A(3) are now identical. I can see no justification for a higher sentence being applied in one case but not in the other and none has been suggested.

56 I am satisfied that the very low sentences meted out for offences that were sentenced under s 376A(3) even where the victims were under the age of 14 can be accounted for because it was not appreciated in those cases that:

(a) The legislative sentencing policy that underlies *Pram Nair* in SAP cases of non-consenting adult victims is the same as that which should apply to cases of consenting minors under the age of 14 whether the charge is brought under s 376 or s 376A; and/or

(b) For cases of SAP involving a minor victim under the age of 14, consent is *not* a mitigating factor; and/or

(c) Sentencing for Category 1 cases cannot be assessed by reference to the sentencing provision under s 376A(2)(*b*) for Category 3 cases because these contemplate very different punishments.

57 Because of this failure, there is a gross discrepancy between the sentences that have been imposed in cases under s 376A(3) and that of the appellant, with the starkest contrast being between the present case and *Ng Tuan Loo* (see above at [20]) and also *GCM* (see above at [54]).

58 The question that arises next is whether I should approach sentencing in this case applying the prevailing approach taken in cases under s 376A(3) even though I am satisfied that this approach is wrong in principle, or whether I

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should apply *Pram Nair*. This raises the question of prospective overruling to which I now turn.

Prospective overruling

59 In *Adri Anton Kalangie v Public Prosecutor* [2018] 2 SLR 557 ("*Adri Anton Kalangie*") at [33], the Court of Appeal set out the factors to consider in relation to prospective overruling as follows: (a) the extent to which the law or legal principle concerned is entrenched, (b) the extent of the change to the law, (c) the extent to which the change to the law is foreseeable, and (d) the extent of reliance on the law or legal principle concerned. The Court of Appeal in *Adri Anton Kalangie* also emphasised (at [39]–[42]) that the doctrine of prospective overruling should only be invoked in circumstances where a departure from the ordinary retroactivity of a judgment was necessary to avoid serious and demonstrable injustice to the parties or to the administration of justice.

60 Another consideration is that the appropriate court to pronounce on the prospectivity of a sentencing guideline judgment would ordinarily be the court that is establishing or clarifying the new sentencing framework or guideline: see *Adri Anton Kalangie* at [65].

61 In my judgment, it would be appropriate for me to invoke the doctrine of prospective overruling. First, insofar as I am pronouncing on the error that has affected the earlier cases dealing with this issue and overruling such of those cases as were decided in the State Courts, this is the court that should be pronouncing on the prospectivity of this judgment and its holdings as to the approach to sentencing under s 376(3) and s 376A(3).

62 Next, there would, in my judgment, be serious and demonstrable injustice if the sentence of six years' imprisonment and three strokes of the cane

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was maintained in this case. As I have explained, the overwhelming majority of the cases under s 376A(3) resulted in sentences below four years' imprisonment with no caning. *Ng Tuan Loo*, with more serious aggravating factors, drew a sentence of 32 months' imprisonment. The three Magistrate's Appeals mentioned above also did not apply *Pram Nair* despite being decided after *Pram Nair*. The entrenched legal position is therefore that *Pram Nair* has mistakenly not been applied to s 376A(3) cases and the sentences are consequently much lower than would be the case if *Pram Nair* were to apply.

63 Third, the difference between the position under *Pram Nair* and that which has applied to cases under s 376A(3) is very substantial. In light of the considerable disparity, the fair and just outcome would be to overrule the line of cases that have failed to apply *Pram Nair* to cases under either s 376A(3) or s 376(3), but to do so prospectively. Hence, my ruling on the law in this regard will not be applied to the present case.

The appropriate sentence

64 If *Pram Nair* were applied to the present case, there would be no merit in the appeal because on that footing, the sentence of six years' imprisonment and three strokes of the cane could not be said to be manifestly excessive.

65 However, having regard to the way the settled approach to sentencing in these cases appear to have been approached, a sentence of three years and six months' imprisonment with no caning would be appropriate.

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Conclusion

66 For these reasons, I allow the appeal and reduce the appellant's sentence to three years and six months' imprisonment with no caning. For the avoidance of doubt, future cases should be dealt with by applying *Pram Nair*.

Sundaresh Menon
Chief Justice

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