IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2024] SGCA 59

Court of Appeal / Criminal Appeal No 4 of 2024

Between

Public Prosecutor

… *Appellant*

And

CPS

… *Respondent*

GROUNDS OF DECISION

[Criminal Law — Offences — Sexual offences]
[Criminal Procedure and Sentencing — Appeal]
[Criminal Procedure and Sentencing — Sentencing — Young offenders]

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v
CPS

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Court of Appeal — Criminal Appeal No 4 of 2024
Tay Yong Kwang JCA, Steven Chong JCA and Debbie Ong Siew Ling JAD
6 September, 5 December 2024

6 December 2024

Steven Chong JCA (delivering the grounds of decision of the court):

1 It is an intuitive observation that rehabilitative sentencing options such as probation and reformative training ("RT"), designed as they are for young people, ought to be made available in the justice system in sentencing young offenders. Where the challenging task of the court lies is in determining *which* young offenders ought to be able to avail of such sentencing options and which offenders should not. To this end, our courts have continually refined the analytical approach to be adopted for this task. From as early as 1965, Ambrose J in *Tan Kah Eng v Public Prosecutor* [1965] 2 MLJ 272 observed that as far as possible, first offenders under the age of 21 years should not be subject to a sentence of imprisonment "unless the offence is so serious that a sentence of imprisonment has to be imposed". This consideration of the seriousness of the offence was supplanted by Yong Pung How CJ in *Siauw Yin Hee v Public Prosecutor* [1994] 3 SLR(R) 1036 to include scrutiny of an

offender's response to rehabilitation: when considering the appropriateness of a rehabilitative sentence, the court should take into account not just an accused's expression of remorse but also evidence of the accused's previous response to attempts at rehabilitating him, such as past flouting of probation conditions (at [7]).

2 Yong CJ in *Public Prosecutor v Mok Ping Wuen Maurice* [1998] 3 SLR(R) 439 further developed this approach by framing the inquiry in terms of rehabilitation being the dominant sentencing consideration as long as an offender is 21 years of age and below. Beyond the seriousness of the offence and past responses to rehabilitation, he added that rehabilitation might be displaced as the dominant consideration particularly in situations where young people were "calculating" in their offences (at [21]), and that the entire assessment would need to strike a balance between public interest and the interest of the offender (at [25]). In *Lim Pei Ni Charissa v Public Prosecutor* [2006] 4 SLR(R) 31, Tay Yong Kwang J (as he then was) at [16]–[17] situated the considerations of the severity of the offence and an offender's recalcitrance as being guided by the ultimate principle of assessing an offender's likely receptiveness to rehabilitation, and that a serious offence or recalcitrant attitude *alone* would not rule out the possibility of rehabilitative sentencing options.

3 These strands of judicial judgment were tied together in what is now the seminal case of *Public Prosecutor v Mohammad Al-Ansari bin Basri* [2008] 1 SLR(R) 449 ("*Al-Ansari*"), which sets out the sentencing approach to young offenders involved in serious offences. This was endorsed by this court in *Public Prosecutor v ASR* [2019] 1 SLR 941 ("*ASR*") at [94]–[102] and in *See Li Quan Mendel v Public Prosecutor* [2020] 2 SLR 630 ("*Mendel See (CA)*") at [12]. There are two stages in the framework set out by V K Rajah JA in *Al-Ansari* at [77] and [78]:

> 77 Accordingly, in dealing with sentencing young offenders involved in serious offences, I propose the following analytical framework. **First, the court must ask itself whether rehabilitation can remain a predominant consideration**. If the offence was particularly heinous or the offender has a long history of offending, then reform and rehabilitation may not even be possible or relevant, notwithstanding the youth of the offender. In this case, the statutorily prescribed punishment (in most cases a term of imprisonment) will be appropriate.
>
> 78 However, if the principle of rehabilitation is considered to be relevant as a dominant sentencing consideration, the **next question is how to give effect to this**. In this respect, with young offenders, the courts may generally choose between probation and reformative training. The courts have to realise that each represents a different fulcrum in the balance between rehabilitation and deterrence. In seeking to achieve the proper balance, the courts could consider the factors I enumerated above [(at [67])], but must, above all, pay heed to the conceptual basis for rehabilitation and deterrence.
>
> [emphasis added in bold]

4 In relation to this first stage, Sundaresh Menon CJ observed in *Public Prosecutor v Koh Wen Jie Boaz* [2016] 1 SLR 334 ("*Boaz Koh*") at [30] that there were four illustrative circumstances where the focus on rehabilitation may be diminished or even eclipsed by considerations of deterrence or retribution. These would be where: (a) the offence is serious; (b) the harm caused is severe; (c) the offender is hardened and recalcitrant; or (d) the conditions do not exist to make rehabilitative sentencing options such as probation or RT viable.

5 The present case was a good opportunity to examine the application of these principles outlined in case law. It involved an appeal by the Public Prosecutor against the High Court's decision to impose a sentence of RT on the respondent, who had pleaded guilty to an offence of rape of a 14-year-old victim under s 375(1)(*a*) punishable under s 375(2) of the Penal Code (Cap 224, 2008 Rev Ed) ("the Penal Code"). The respondent was 16 years old at the time of his offence. We allowed the Prosecution's appeal and sentenced the respondent to

eight years' imprisonment and three strokes of the cane. We set out below the reasons for our decision.

Facts

6 As of 27 June 2020, the respondent, then 16 years old, was in a relationship with a female secondary school student. His girlfriend had a close friend and classmate ("the victim") who was 14 years old. The respondent was an acquaintance of the victim both through his girlfriend and because they had attended the same secondary school for a few years. At that time, the victim was romantically involved with a man ("CPT"), who was then 22 years old and more than seven years her senior.

7 On that day, the respondent watched an Instagram livestream of the victim, who was drinking alcohol with CPT around Admiralty Park. The respondent asked the victim if he could join the drinking session, and the victim and CPT agreed. The victim had consumed some whisky before the respondent's arrival, and continued to drink more alcohol after he arrived at CPT's instigation. After consuming the alcohol, she vomited and laid on the ground.

8 The respondent initially took tissues for the victim to clean herself, and then attempted to use his electric scooter to transport her to the toilet. However, she was unable to maintain her grip and fell off halfway. The victim had to be carried by the respondent and CPT to the handicap toilet, where she vomited again. The victim then heard the sound of the toilet's door being locked, as well as the respondent and CPT talking to each other.

9 Following this, the victim was digitally penetrated by CPT and then raped by the respondent. The sequence of events detailed in the Statement of Facts ("SOF") were as follows.

10 First, CPT removed the victim's jacket and t-shirt. While the victim was lying down face up, the respondent threw the victim's jacket over her face and held it there to obscure her vision. He then held her down by her shoulders, causing the victim to shout at the respondent to go away and not to touch her. CPT then pulled down the victim's jeans and underwear and digitally penetrated her, which she did not object to as he was her boyfriend.

11 The victim continued to struggle and managed to partially dislodge the jacket over her face. CPT signalled for the respondent to desist. The victim then scolded CPT for letting the respondent approach her, then fellated CPT hoping to avert any further assault.

12 The victim then laid down again on CPT's instructions, and the respondent again placed her jacket over her face. The victim struggled and cried out in protest. CPT then held the victim down as the respondent removed his shorts and underwear and inserted his penis into the victim's vagina without her consent. The respondent was aware that the victim did not consent as the victim was crying and he had heard her asking CPT why CPT had offered her to him.

13 The respondent ejaculated inside the victim after about five minutes. The victim washed herself up on CPT's instructions, crying as she did so. The respondent told CPT to console her and went outside the toilet to wait. CPT and the victim then quarrelled further before he sent her home.

The respondent's criminal proceedings

14 Prior to the respondent's commission of the offence detailed above, he had been charged for over 20 instances of theft, dishonest misappropriation of property, and mischief offences committed between 2017 and 2021. He was produced in court twice on 11 June 2020 and 22 June 2020 and was released on bail each time. On the latter occasion, the respondent's bail amount was increased and he was warned that bail would no longer be offered should he commit any fresh offences.

15 On 21 August 2020, the respondent pleaded guilty to eight charges of theft under s 379 of the Penal Code and gave his consent for an additional 19 charges to be taken into consideration for the purposes of sentencing. After a Reformative Training Suitability Report was called for ("the First RT Report"), the respondent was eventually sentenced on 2 October 2020 to undergo RT for a minimum of 12 months ("the first RT stint"). The respondent has since completed the first RT stint. The respondent was eventually charged for the present offence of rape on 13 October 2021.

Decision below

16 The Judge sentenced the respondent to RT for a minimum of 12 months. The reasons for his decision are outlined in *Public Prosecutor v CPS* [2024] SGHC 64 (the "GD"). We summarise the Judge's reasoning below.

17 At the first stage of the *Al-Ansari* framework, the Judge considered whether rehabilitation was displaced as the dominant sentencing consideration in relation to three factors: (a) the seriousness of the offence; (b) the severity of the harm caused; and (c) whether the respondent was hardened and recalcitrant.

18 The Judge considered (a) and (b) together. While acknowledging that rape was a serious offence, the Judge noted that rehabilitation could nevertheless be the dominant sentencing consideration even when such an offence had been committed. The Judge endorsed the District Court's observations in *Public Prosecutor v Loew Zi Xiang* [2016] SGDC 251 at [94] ("*Loew Zi Xiang*") that a sentence involving the principle of rehabilitation could still be considered in cases involving young offenders convicted of rape, and that the relevant question was whether the conduct of the respondent was "so heinous and … his potential for reform was so poor that the prescribed sentence would be the appropriate sentence". The Judge also distinguished the Prosecution's reliance on remarks in *Public Prosecutor v See Li Quan Mendel* [2019] SGHC 255 ("*Mendel See (HC)*") and *Mohd Noran v Public Prosecutor* [1991] 2 SLR(R) 867 ("*Mohd Noran*") to the effect that as a general rule, RT would not be suitable in cases of rape (the GD at [28]–[35]).

19 On the relevant aggravating factors, the Judge agreed with the Prosecution that the offence involved a vulnerable victim (by age and intoxication), a failure to use a condom, and some group element. The Judge disagreed that abuse of trust was relevant as the victim was a mere acquaintance of the respondent. The Judge also noted that there was no premeditation involved, that no violence or excessive force was used, that the offence was of a short duration, and that there was no evidence of physical harm or of emotional or psychological harm exceeding that normally sustained by a rape victim. Further, the presence of a group element should be viewed in light of CPT, who was much older than the respondent, instigating the respondent to commit the offence (the GD at [46]–[52]).

20 The Judge went on to examine the cases of *Public Prosecutor v Mohamed Noh Hafiz bin Osman* [2003] 4 SLR(R) 281 ("*Hafiz*"), *Public*

Prosecutor v CJH [2022] SGHC 303 ("*CJH*"), *Ng Jun Xian v Public Prosecutor* [2017] 3 SLR 933 ("*Ng Jun Xian*"), and *Public Prosecutor v GHW* [2023] SGDC 155, where rehabilitation had been displaced as the dominant consideration in cases where the offender had committed offences of rape or sexual assault by penetration. The Judge distinguished these cases as involving, *inter alia,* (a) multiple charges; (b) older accused persons; (c) a mandatory minimum sentence; (d) an element of premeditation; (e) use of violence or excessive force; or (f) serious harm to the victim. Conversely, the present case was more similar in severity to that of *Public Prosecutor v Ong Jack Hong* [2016] 5 SLR 166 ("*Ong Jack Hong*") and *Loew Zi Xiang*, where RT was imposed (the GD at [38]–[44] and [54]–[57]).

21 The Judge concluded that the respondent was not hardened and recalcitrant, despite committing the present offence while on bail, as (the GD at [58]–[70]):

(a) his antecedents were unrelated to the present offence of rape;

(b) the fact that the respondent had undergone RT previously should not be held against him because it was imposed after the respondent had committed the present offence;

(c) the areas of need identified in the Reformative Training Suitability Report called for by the Judge ("the Second RT Report") under the domains of family, education or employment, companions, and leisure/recreation could not be said to either render the respondent *ipso facto* unsuitable for RT, or to indicate that the first RT stint had little effect on the respondent given that the Judge had no sight of the First RT Report. Even if such a report had been provided, the respondent would have had the prospect of a lengthy prison term and caning after

release from RT hanging on his mind, and any perceived ineffectiveness of RT could not be attributed solely to recalcitrance on his part;

(d) there were other aspects of the Second RT Report which showed positive indication of his rehabilitative prospects, such as ceasing drug use; and

(e) the remarks by the respondent in the Second RT Report apparently minimising his responsibility for his actions were ambiguous and could have been recorded inaccurately by the report's author; it would not be fair to resolve this ambiguity to the respondent's detriment. Even if the respondent had displayed such an attitude, this would not be sufficient to classify the respondent as hardened and recalcitrant. Such an attitude would be exactly what RT was designed to address.

22 After the Judge's decision on sentence was pronounced on 22 January 2024, the Prosecution applied for a stay of execution of sentence pending appeal; this was granted by the Judge on 27 March 2024. By this time, the respondent had started serving the sentence of RT imposed in the High Court. The respondent was thereafter released on bail on 3 April 2024.

Cases on appeal

23 On appeal, the Prosecution maintained that rape is a serious offence carrying such severe harm that a finding that rehabilitation is the dominant sentencing consideration would only be reserved to cases where exceptional circumstances are strong, relying on *Mohd Noran* and *Mendel See (HC)*. The Prosecution submitted that the Judge gave insufficient weight to the group element of the sexual assault, and the harm that was caused to the victim on account of this element. The Prosecution also submitted that the Judge erred in

assessing the respondent as not being hardened or recalcitrant in spite of the numerous areas of need identified in the Second RT Report even after the respondent had completed the first RT stint. In addition, the respondent's explanation for the victim-blaming attitudes set out in the Second RT Report was inconsistent with a plain reading of the report. The Prosecution repeated its call below for a sentence of eight to ten years' imprisonment and six to eight strokes of the cane.

24 The respondent argued that the Judge correctly found that rehabilitation had not been displaced as the dominant sentencing consideration, and that he was not hardened or recalcitrant. The respondent predominantly relied on the reasoning of the Judge in this regard. Were rehabilitation to be displaced as the dominant sentencing consideration, the respondent submitted for no more than seven and a half years' imprisonment and four strokes of the cane to be imposed.

Issues to be determined

25 This appeal centred on the issue of whether RT ought to be the appropriate sentencing option. As set out above, there are two stages to this inquiry: whether rehabilitation remains the predominant consideration; and if so, how to give effect to this.

26 Given the applicable framework in *Al-Ansari*, the respondent accepted both in the proceedings below and on appeal that if rehabilitation was considered to be the predominant sentencing consideration, the most effective way to reflect this would be by way of RT rather than probation. Thus, this case essentially turned on the proper application of the first stage of the *Al-Ansari* framework – whether rehabilitation remained the predominant sentencing consideration.

27 As noted above at [4], Menon CJ observed in *Boaz Koh* at [30] that there were four illustrative circumstances where the focus on rehabilitation may be diminished or even eclipsed by considerations of deterrence or retribution: (a) where the offence is serious; (b) where the harm caused is severe; (c) where the offender is hardened and recalcitrant; or (d) where the conditions do not exist to make rehabilitative sentencing options such as probation or RT viable. As for (d), this court in *ASR* at [101] and [102] clarified that this factor would only be applicable to the first stage of the *Al-Ansari* framework involving a non-resident offender; this was not the case for the respondent. The issues in this appeal thus concerned: (a) the seriousness of the offence; (b) the extent of harm caused; and (c) whether the respondent was hardened and recalcitrant.

The seriousness of the offence

The applicability of RT as a sentencing option for offences of rape

28 At the first stage of the *Al-Ansari* framework, the focus is on which sentencing objective ought to have primacy in the sentencing calculus, with a starting presumption that rehabilitation is the predominant sentencing consideration.

29 As set out at [1] above, our courts have long since recognised that rehabilitation will be readily displaced as the predominant sentencing consideration in the case of serious offences. It is also clear that serious cases of rape, such as that in *Hafiz*, involve such outrageous offending behaviour that rehabilitation has to be subordinated to a more serious form of corrective punishment (*Al-Ansari* at [35]). What the current jurisprudence does not prescribe (rightly so, in our view) is a rigid rule for cases of rape which do not immediately fall in the uppermost category of severity. The court is instead called upon to undertake judgment on a case-by-case basis to determine whether

rehabilitation retains its primacy in the sentencing calculus, which involves close scrutiny of the specific circumstances of the offence and the offender. In doing so, a broad heuristic offered by this court in *Mohd Noran* is that as a general rule, neither probation nor RT is suitable in cases of rape (at [3]), and that where an offender is of mature age and understanding, a custodial sentence should be imposed in the absence of exceptional circumstances (at [2]).

30 The Judge, to which the respondent aligned with on appeal, reasoned that the decision in *Mohd Noran* should not be taken as holding that rape would in all instances be too grave an offence to merit a consideration of RT. We agree – this must invariably be a case-by-case assessment by the court. However, the Judge went on to further downplay the applicability of the remarks in *Mohd Noran* as a broad heuristic, preferring instead the approach of the District Judge in *Loew Zi Xiang*. The Judge did so on the basis that: (a) the charge before the court in *Mohd Noran* was for an offence of rape with hurt, not rape *simpliciter*; (b) the offender in *Mohd Noran* was older at the time of the offence than the respondent; and (c) the offender in *Mohd Noran* had engaged in more violent behaviour than the respondent.

31 We did not see how the differences in the specific facts of *Mohd Noran* compared to the present case necessarily diminished the applicability of the observations of Chan Sek Keong J (as he then was) at [2] and [3], framed as they were as general observations rather than determinations based on the specific facts before the court. In our view, the comments of the court in *Mohd Noran* are merely a logical continuation of the strands of jurisprudence outlined by the courts in the sentencing approach for young offenders involved in serious offences: if rehabilitation is more readily displaced as the predominant sentencing consideration the more serious the offence, then rape as the gravest of all sexual offences (*Public Prosecutor v NF* [2006] 4 SLR(R) 849 at [46] and

[47]) would usually (though not necessarily in all cases) involve the displacement of rehabilitation as the predominant sentencing objective save for exceptional circumstances.

32 In this regard, we would endorse the remarks of Valerie Thean J in *Mendel See (HC)* at [41] that where Parliament and the common law are consistent that certain offences are serious and carry severe harm, a finding that rehabilitation is the predominant sentencing consideration where those offences are committed would be reserved to cases where exceptional circumstances are strong. This is the logical corollary to the general rule expressed in *Mohd Noran*. In our view, such exceptional circumstances would generally be limited to situations where few or no aggravating factors apply to the offence, where the offender's involvement in the offence is extremely limited, *and* where the offender demonstrates good potential for reform. As this court noted in upholding Thean J's decision in *Mendel See (HC)*, the offence of rape would fulfil the *Boaz Koh* factors of gravity and harm which point towards displacing the presumptive focus on rehabilitation (*Mendel See (CA)* at [12]).

The seriousness of the present offence

33 Beyond the observation that rape is itself a serious offence, we agreed with the Prosecution that there were multiple aggravating factors applicable to the present case: the victim involved was vulnerable, there was a group element to the offence, and the respondent had failed to use a condom. This reinforced our view of the seriousness of the present offence.

The victim's vulnerability

34 First, the victim was vulnerable by virtue of her young age of 14 years and her state of intoxication at the time. The respondent attempted to downplay

the significance of the latter because it was CPT rather than him who had offered alcohol to the victim, and thus he "did not exploit her" unlike the case of *Public Prosecutor v Muhammad Shafie bin Ahmad Abdullah and others* [2011] 1 SLR 325. This did not bring the respondent's argument very far. The essence of a victim's vulnerability as an aggravating factor does not depend on whether the vulnerability was *caused* or *contributed* by the offender; it lies in the *exploitation* of that vulnerability (see, *eg*, *Public Prosecutor v BSR* [2020] 4 SLR 335 at [16]; *Public Prosecutor v Ong Soon Heng* [2018] SGHC 58 at [132]). An offender who rapes a mentally impaired victim, knowing her mental impairment precludes her capacity to consent to sexual activity, exploits the vulnerability of such a victim even though he had nothing to do with creating or causing her mental impairment. Here, the respondent clearly knew that the victim was intoxicated to the point of not being able to stay on his electric scooter at the time of the offence, and despite this went on to exploit her intoxicated state.

Group element

35 Second, there was a group element to the offence. In *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 ("*Terence Ng*"), the gravamen of the offence-specific factor of group rape was explained at [44(a)] as follows:

> It has long been held that offences which are committed by groups of persons, even if not the product of syndicated or planned action, are more serious (see *PP v Law Aik Meng* [2007] 2 SLR(R) 814 ("*Law Aik Meng*") at [25(b)]). The reason for this is that the alarm suffered by the victim is invariably enhanced and also because group offences pose a greater threat to social order. This applies with particular force to the offence of rape. When the offence is committed by multiple persons acting in concert, the trauma and sense of helplessness visited upon the victim as well as the degree of public disquiet generated increases exponentially.

36 Having regard to the facts and circumstances of the present case, we noted that the presence of two persons enabled one to cover the victim's face with her jacket (according to the respondent's own case, in order to muffle the loud sounds she was making) and to physically restrain her, while the other sexually assaulted her. This no doubt would have resulted in a greater likelihood of fear to the victim, and would have had the effect of encouraging as well as facilitating the commission of the offence (*Public Prosecutor v Ong Chee Heng* [2017] 5 SLR 876 at [34] and [36]). However, the weight of this aggravating factor should be examined in light of the fact that the group assault involved two persons which would be "on the very edges" of the meaning of the term "group assault" compared to an assault involving more persons (*Arumugam Selvaraj v Public Prosecutor* [2019] 5 SLR 881 at [14]).

37 The respondent argued that the weight of this factor should be further reduced because: (a) there was "no evidence that the victim had any issues with CPT or the respondent's presence from the start of the night up to the commission of the offence"; (b) the offence had been committed more through deception than brute force; and (c) the offence had only been committed after repeated instigation by CPT. The first argument was simply irrelevant since the focus of the inquiry of the group involvement as an aggravating factor rests on the *fear* that the victim would have felt *during* the offence, not before it. The second argument carried no weight not only because it was inconsistent with the SOF's depiction of the victim having to be held down by the respondent and CPT, but because even granting that there was deception involved, this deception was only possible because of the involvement of more than one person.

38 Finally, we did consider that the respondent had stated in the Second RT Report that he was "asked repeatedly by [CPT]" to rape the victim and that the

respondent "perceived that [CPT] was older and physically bigger than him and may hurt him if he didn't comply with his requests". We gave this some weight in showing that the respondent was unlikely to have initiated or instigated the assault on the victim. However, even acknowledging that there may have been some encouragement provided by CPT for the respondent to commit the offence, we did not accept that the respondent had done so out of fear of CPT. Having regard to the events of the SOF as a whole, it was clear that even before the respondent alleged that he was encouraged to rape the victim, he had participated with CPT in locking the toilet door to trap the victim with the two of them, and held the victim down despite her apparent struggle as she was digitally penetrated by CPT. This was not a case where the respondent was a reluctant bystander cajoled or coerced into his offending behaviour; he had actively participated in the exploitation of the victim's inebriated state from the very start despite knowing that the victim was in no position to offer her consent to sexual activity with him.

Failure to use a condom

39 Third, we agree with the Judge that the respondent's failure to use a condom was a relevant aggravating factor as this exposed the victim to the risk of pregnancy and sexually transmitted diseases. This was not contested by the respondent.

Comparison with precedents

40 The respondent placed emphasis in his submissions on the cases of *Ng Jun Xian*, *CJH*, *Public Prosecutor v JCS* [2024] 4 SLR 1615, and the High Court decision in *Mendel See (HC)*. These are cases where rehabilitation was found to have been displaced as the predominant sentencing consideration for sexual offences which, according to the respondent, were of much greater

severity than the facts of the present case. We did not find the respondent's reliance on these precedents to be particularly useful in arriving at the appropriate sentence. Although precedents may be useful to assist the court in arriving at the correct sentence, it may not always be helpful to compare with more serious cases. The mere fact that RT was not imposed in the more severe rape cases does not in and of itself mean that a comparatively less serious rape case should necessarily attract a sentence of RT. It remains necessary to determine on the facts of each case whether rehabilitation has been displaced or should be retained as the predominant sentencing consideration.

41 On the other side of the spectrum of severity, we found the present case to be significantly more aggravating than the precedents in which RT had been imposed for serious sexual offences, in particular *Ong Jack Hong*. In that case, the then-17-year-old offender had met the 14-year-old victim at a bar, chatted for a while, then approached her to hug and kiss her on the lips. The offender then carried the victim to a stairwell, closed the door, turned the victim to face the wall and then penetrated her without a condom while she was bending down. He was charged with one count of sexual penetration of a minor under s 376A(1)(*a*) of the Penal Code. Significantly, he was not charged with rape.

42 Both the respondent and the Judge sought to rely on the fact that the offender in *Ong Jack Hong* was "in control of the situation", which was contrasted with the respondent in the present case acting at the instigation of the then-22-year-old CPT. The respondent accepted, however, that the charges in *Ong Jack Hong* were less severe than in the present case, the significance of which we have highlighted above. The relevant punishment provision for the most serious charge in *Ong Jack Hong* carried a maximum of ten years' imprisonment, which is half of that for the offence of rape. Moreover, the extent

of physical force used in both cases also differed, in particular the involvement of a co-offender to hold down the victim during the respondent's offence.

43 For completeness, we note that we did not ascribe much weight to the decision of *Loew Zi Xiang* cited by the respondent even though the District Judge's decision to impose a sentence of RT for a charge of rape was upheld on appeal. No reasons were given for dismissal of the appeal. Bare reference to the outcome of this case was thus of limited utility (*Abdul Mutalib bin Aziman v Public Prosecutor and other appeals* [2021] 4 SLR 1220 at [99]). We also note that the facts of *Loew Zi Xiang* involved comparatively less aggravated offending than the present case. There, the offender had outraged the modesty of a first victim by kissing her before inviting a second female victim (then 17 years old) to his bedroom who he raped after they lay beside each other talking. The District Judge declined to find that any offence-specific aggravating factors applied, rejecting the Prosecution's submission that there was abuse of trust or premeditation by the offender. Unlike the present case, the victim there was less vulnerable by virtue of her age, she was not intoxicated, and there was no group element to the offence.

Whether the harm caused was severe

44 In relation to whether the harm caused was severe, we agreed with the respondent that there was no indication of any harm suffered by the victim beyond that suffered normally by victims of rape. All things being equal, although this level of harm would not in itself exclude the possibility of rehabilitation remaining the predominant sentencing consideration, it would be indicative of the baseline level of the offence's seriousness – for which as expressed in *Mohd Noran*, RT would not be suitable as a general rule.

Whether the respondent was hardened and recalcitrant

45 The respondent was assessed to have multiple areas of need in various domains in the Second RT Report, such as lacking effective parental supervision, prosocial influence, or showing problematic attitudes towards his employment and education. We agreed with the respondent's submission that the presence of these areas of need would not in itself preclude the possibility of rehabilitation remaining the predominant sentencing consideration. We also disagreed with the Prosecution that the fact that the respondent had shown no apparent "progress" in these areas of need between the time of his First and Second RT Reports should be held against him. This had to be seen in light of the fact that the respondent had been in remand throughout the time between both reports, and thus would have had limited opportunity to work on these areas of need, particularly in the family and social domains.

46 What was much more concerning, in our opinion, was the attitude demonstrated by the respondent in: (a) his track record of offending; and (b) his attitude towards his rape offence.

47 First, the respondent had an extensive list of previous offences committed between 2017 and 2021. Although these offences were of a different nature compared to the present offence, they nevertheless evinced an attitude of flagrant disregard for the law. We highlight that the respondent had on two occasions in June 2020 been produced in court for bail proceedings related to outstanding charges for these offences, and was specifically warned that bail would no longer be offered should he commit any fresh offences. That the respondent committed the present rape offence despite these warnings spoke to a hardening of his ways. Indeed, the respondent's offending behaviour escalated to the serious offence of rape.

48 Second, we found the respondent's attitude towards his present offence as outlined in the Second RT Report very troubling. The relevant psychologist had recorded the respondent as presenting with attitudes that minimised the responsibility of his actions and shifted the blame to the victim and his co-accused, in particular mentioning that the victim was dressed inappropriately on the day of the offence, making reference to the past conduct of the victim while together with him and his girlfriend, and claiming that the victim was moaning and looked like she enjoyed the sexual act. He also made reference to the victim being willing to go out with him and his girlfriend on several occasions even after the offence took place.

49 Counsel for the respondent, Mr Mato Kotwani, argued that the respondent had narrated this account from a "historical perspective" – that is, the respondent had told the psychologist what he was thinking *at the time of the offence*, as distinct from the attitude he held *at the time of the assessment*, which had since been reformed. Mr Kotwani also argued that the psychologist may not have accurately reflected what the respondent said or meant when being interviewed, and echoed the Judge's view that any lingering doubts over the interpretation of these remarks should not be resolved to the respondent's detriment.

50 We did not accept this explanation. In our view, there was no ambiguity at all that the respondent had been narrating his attitude towards his offending at the time of the interview, rather than the time of the offence. Throughout the Second RT Report, it was evident that the psychologist had taken pains to distinguish between past and present views held by the respondent; in the relevant section outlining the respondent's attitude towards his offence, she had clearly stated "*[d]uring the current assessment…*[the respondent] presented with attitudes that justified his actions" [emphasis added]. More strikingly, the

content of the Second RT Report flatly contradicted the respondent's explanation that he had been speaking about his attitude at the time of the offence – if this was true, it would not make sense that he would comment on the *post-offence* behaviour of the victim going out with him and his girlfriend. The respondent's explanation of his "historical perspective" thus could not be true, and in fact raised further questions about the respondent's attitude towards accepting responsibility for his actions.

51 Considering the above factors cumulatively, in particular the respondent's recalcitrance and attitude towards his offending, we were of the view that rehabilitation ought to be displaced by deterrence as the predominant sentencing consideration.

The appropriate sentence

52 Both parties did not dispute that if rehabilitation were displaced as the predominant sentencing consideration, an imprisonment sentence alongside caning would be the appropriate sentence to be imposed.

53 In terms of the application of the framework in *Terence Ng*, we considered the indicative starting sentence of the present offence to lie at the low end of Band 2 given the three aggravating factors identified above: the vulnerability of the victim, the group element involved, and the respondent's failure to use a condom. We considered the indicative starting point within this band to be 13 to 14 years' imprisonment and 12 strokes of the cane. We note that this was consistent with the respondent's submission on appeal that the offence fell within the upper end of Band 1 or the lower end of Band 2 of the *Terence Ng* framework.

54 The Prosecution submitted that it was an offender-specific aggravating factor that the respondent had committed the present offence while on court bail for other offences. We did not place much weight on this factor at this stage as due weight had already been placed on it in our assessment of whether rehabilitation had been displaced as the predominant sentencing consideration. Against this, we agreed with the respondent that the respondent's plea of guilt and youth at the material time were relevant and significant offender-specific mitigating factors. In the circumstances, we imposed a sentence of eight years' imprisonment and three strokes of the cane in lieu of the sentence of RT imposed below.

55 At the hearing of this appeal on 6 September 2024, we ordered that the period of the Respondent's imprisonment was to be backdated to 15 October 2021. This was, according to the Prosecution's submissions below and as accepted by the Judge, the date on which the respondent completed his first RT stint, after which he was placed in remand in connection with the present offence ("the Date of Completion"). On 17 October 2024, the Prosecution informed the court that the previous date it provided was erroneous and that the respondent had in fact completed his first RT stint on 14 October 2023. We invited the respondent to verify this and gave time for him and his counsel to do so. On 8 November 2024, Mr Kotwani informed us that he had independently contacted the Singapore Prison Service ("SPS") and received written confirmation from them that the respondent's Date of Completion was indeed on 14 October 2023. In view of the apparent discrepancy between the information provided by the Prosecution in the proceedings below and on appeal, and the impact that this would have on the respondent's sentence, we further directed the Prosecution to provide an explanation for the initial error as well as to furnish documentary evidence of the correct Date of Completion. On

21 November 2024, the Prosecution replied to state that it had erroneously stated the Date of Completion as 15 October 2021 in the proceedings below because it had incorrectly assumed that the sentence of RT imposed "for a minimum of 12 months with effect from 16 October 2020" was completed a year later on 15 October 2021. However, the Prosecution was subsequently informed by the SPS that this date was erroneous and that the respondent in fact only completed his first RT stint on 14 October 2023 instead. The Prosecution also furnished a letter from the SPS setting out a chronology of the respondent's incarceration status since 16 October 2020, together with supporting documents. This confirmed that the correct Date of Completion was 14 October 2023.

56 We convened a hearing on 5 December 2024 for parties to address us on the correct Date of Completion. Following the parties' submissions, it was clear to us that the 15 October 2021 date was erroneous simply because when the Warrant to Remand the respondent for the present rape charge was issued on 4 February 2022, the respondent was still incarcerated at the Reformative Training Centre. If the respondent had completed the first RT stint on 15 October 2021, he would have been released by then under a Supervision Order. However, the Supervision Order which denoted the end of the respondent's first RT stint was in fact only issued to take effect administratively on 14 October 2023.

57 Mr Kotwani confirmed during the hearing that he was not challenging the authenticity of the supporting documents tendered by the Prosecution and that he accepted their explanation for the error. He agreed that the correct Date of Completion was 14 October 2023. It followed that the respondent's sentence of imprisonment ought to be backdated to this date.

58 We thus exercise our inherent power of review in respect of the decision on sentence pronounced on 6 September 2024 and backdate the respondent's sentence of imprisonment to 14 October 2023, excluding the periods when the respondent was on bail in the interim, *ie,* 3 April 2024 to 26 September 2024.

Tay Yong Kwang
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Debbie Ong Siew Ling
Judge of the Appellate Division

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