IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 74

Criminal Appeal No 32 of 2019

Between

Asep Ardiansyah

… *Appellant*

And

Public Prosecutor

… *Respondent*

In the matter of Criminal Case No 35 of 2016

Between

Public Prosecutor

And

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

GROUNDS OF DECISION

[Criminal law] — [Offences] — [Attempted rape]
[Criminal law] — [Offences] — [Sexual penetration]

Asep Ardiansyah
v
Public Prosecutor

[2020] SGCA 74

Court of Appeal — Criminal Appeal No 32 of 2019
Judith Prakash JA, Tay Yong Kwang JA and Belinda Ang Saw Ean J
17 June 2020

24 July 2020

Judith Prakash JA (delivering the grounds of decision of the court):

1 This was an appeal against the decision of the High Court judge ("the Judge") in *Public Prosecutor v Ridhaudin Ridhwan bin Bakri and others* [2019] SGHC 105 ("the Judgment"), convicting the appellant on a charge of sexual assault by penetration under s 376(1)(*a*) of the Penal Code (Cap 224, 2008 Rev Ed) ("the Penal Code"), which is punishable under s 376(3), and also on a charge of attempted rape under s 375(1)(*a*), punishable under s 375(2) read with s 511 of the Penal Code. There was no appeal against sentence.

2 Three main questions arose for determination in the appeal: first, whether the alleged victim ("the complainant") had the requisite capacity to consent to the sexual acts at the material time; second, whether the defence of mistake of fact applied; and third, whether the offence of attempted rape had been established. Having heard and considered the parties' submissions, we dismissed the appeal. We now provide fuller grounds for our decision.

Facts

3 On 25 January 2014, the complainant was invited to Mr Muhammad Elmi Ching bin Aman's ("Mr Elmi") birthday party which was being held at the Duxton Hotel ("the hotel"). She arrived at the hotel with Mr Mohamed Affandi bin Ibrahim ("Mr Affandi") on 26 January 2014 just after midnight. The appellant and other individuals were already in the hotel room that had been booked for the birthday party ("the hotel room"). At the time, the complainant was 18 years old. She had not previously met any of the persons present apart from Mr Affandi and one Mr Muhammad Fadly bin Abdull Wahab ("Mr Fadly") who had extended the invitation to her.

4 The hotel room contained two floors connected by a spiral staircase, with the bedroom and bathroom on the second floor. After arriving, the complainant sat next to Mr Fadly on a sofa on the first floor and had a number of alcoholic drinks, served by Mr Fadly and possibly the appellant. Mr Fadly testified that he had told another guest, Mr Muhammad Hazly bin Mohamad Halimi ("Mr Hazly"), earlier that night that he wanted to get the complainant drunk. It was not entirely clear how much alcohol the complainant consumed in the hotel room. The Judge described the witnesses' evidence on this as comprising "vague and inconsistent estimations": the Judgment at [141]. The complainant testified that she drank roughly three or four half-full cups of an unknown liquor mixed with an unknown soft drink before drinking another four three-quarter full cups of vodka mixed with Red Bull. While there was some variation in the other witnesses' evidence on the amount of alcohol she had consumed, they generally testified that she had drunk about three or four cups of an alcohol and soft drink mixture. Two of the witnesses, Mr Elmi and Mr Muhammad Faris bin Ramlee ("Mr Faris"), acknowledged that these

estimations were assumptions and that they did not in fact recall how much the complainant had drunk: the Judgment at [141(c)] and [141(f)].

5 At around 1.00am, some of the other attendees prepared to leave for the Zouk nightclub ("Zouk"). However, the complainant had difficulty standing up on her own. She collapsed on the ground of the first floor and some evidence suggested she also vomited there. Mr Fadly took the complainant up to the bathroom, where she vomited again. Mr Fadly and Mr Hazly stayed behind with the complainant while the others left for Zouk at 1.15am. The complainant testified that she could not recall the others talking about or leaving for Zouk.

6 After the others left, Mr Fadly and/or Mr Hazly took the complainant out of the bathroom and placed her on the bed on the second floor. There was some suggestion that the complainant had also vomited while she was lying on the bed at some point that morning. Mr Thangavelu, counsel for the appellant, appeared to accept this at the hearing before us. At about 1.52am, Mr Fadly and Mr Hazly took a photograph of themselves with the complainant partially undressed and her breasts exposed. She was unconscious at the time.

7 At around 2.20am, Mr Elmi returned to the hotel room to pick up his girlfriend's identification card. He testified that he saw the complainant fully dressed but in an unconscious state on the floor of the bedroom. Mr Elmi left the hotel room one or two minutes later. After Mr Elmi left, Mr Fadly and Mr Hazly raped the complainant. By the time of the appellant's trial, they had pleaded guilty to charges of rape and had been convicted and sentenced: the Judgment at [13].

8 The appellant returned to the hotel room alone at around 3.45am after an altercation at Zouk. He went into the bathroom and saw the complainant seated in the bathtub. As we explain in more detail below, his position as to the complainant's condition at this point, as indicated in the investigative statements recorded from him, differed from the account he gave at the trial. After checking whether he had sustained any injuries from the altercation, he left the bathroom, leaving the complainant inside it. He later went down to the hotel lobby to help another friend, Mr Ridhaudin Ridhwan bin Bakri ("Mr Ridhwan") enter the hotel. He returned to the hotel room with Mr Faris and Mr Ridhwan at around 3.57am.

9 At some point thereafter, Mr Faris went into the bathroom. The complainant was still in the bathroom and Mr Faris then had sexual intercourse with her there. The statement given by the appellant to the police on 16 October 2014 ("the second statement") recorded him as saying that he did not think the complainant could have consented to having sexual intercourse with Mr Faris at the material time. The Judge, in convicting Mr Faris of rape, found that the complainant had been severely intoxicated, "at least close to unconsciousness at the material time" and had not had the capacity to consent to sexual activity. He found that the complainant's physical condition and level of sedation meant that she could not have been, and was not, simply suffering from anterograde amnesia (the term anterograde amnesia is explained at [13] below). The Judge further stated that his view was that the complainant did not in fact consent, even if she could have: the Judgment at [165]. Mr Faris did not appeal against his conviction.

10 The appellant was waiting outside the bathroom while Mr Faris was inside and as soon as Mr Faris emerged alone, the appellant went in. It was

common ground that while the appellant was in the bathroom, his penis had been inserted into the complainant's mouth, and that he had *attempted* to insert his penis into her vagina, although he had not managed to do so as he could not sustain his erection. While the appellant and complainant were in the bathroom, Mr Elmi and his girlfriend returned to the hotel room and one of them pushed the bathroom door open. Mr Elmi testified that although the bathroom was dark, he saw the appellant's and complainant's reflections in the mirror. His evidence was that, at that time, they were standing near the sink about shoulder-width apart, and that both were topless. While he claimed that the complainant "looked drunk" at that time, judging from her face, Mr Elmi later agreed that he could not remember whether he could see her face. The appellant quickly pushed the door shut, and left the bathroom alone a few minutes later. Mr Elmi then asked Mr Fadly to help the complainant out of the bathroom. Mr Fadly took the complainant down to the first floor by placing the complainant's arm over his shoulder. Mr Elmi's impression was that she had been weak and drunk at that point. Thereafter the complainant went to sleep on the floor of the living room.

11 Mr Ridhwan and Mr Faris were accused of committing sexual offences against the complainant when she was lying in the living room: the Judgment at [2] and [3]. The appellant was jointly tried with both of them. Including the appellant, five men were alleged to have committed sexual offences against the complainant on 26 January 2014. The defence of the appellant was that the complainant had consented to the acts for which he was charged.

Expert evidence

12 Two psychiatrists, Dr Guo Song ("Dr Guo") and Dr Munidasa Winslow ("Dr Winslow"), gave evidence at the trial on behalf of the Prosecution and the

appellant respectively. Neither had examined the complainant at or around the time she was intoxicated. Dr Guo instead attempted to estimate the complainant's blood alcohol concentration ("BAC") levels at the material time by using the complainant's approximation of how much alcohol she had consumed. While Dr Winslow accepted that the figures were a "reasonable guesstimate", he noted that there was a fairly large variation between individuals' BAC levels as each individual processes alcohol differently.

13 The experts gave evidence on three conditions or responses to alcohol: (a) a "blackout" or anterograde amnesia; (b) confabulation; and (c) "sedation". We note that their evidence was not entirely clear, particularly since terms such as "sedation" and "intoxication" appeared to have been used interchangeably at various points. However, broadly speaking, the experts used the term "anterograde amnesia" to mean a state where the intoxicated person is able to perform complicated movements and consent to sexual intercourse, even if she might not have any memory of this subsequently. This could occur in a "fragmentary" way such that the individual may recall part of what happened.

14 The experts also testified, however, that a sedated person might, depending on the *degree* of sedation, have difficulty "moving or thinking". Dr Winslow agreed that if, when Mr Elmi returned to the hotel room at around 2.20am, the complainant did not wake up and remained unconscious despite the verbal stimuli and the physical rousing by Mr Fadly and Mr Hazly, the complainant would have been sedated to the point of unconsciousness. Dr Guo testified that if the complainant had felt nauseous and like her body was "heavy" as she had testified, and needed support to get to the living room, it would have been "almost impossible" for her to take another person's penis and put it into her own mouth, or to kneel down on the floor. Dr Winslow, on the other hand,

did not agree that it would have been impossible for a "heavily sedated person" to do such acts. He agreed, however, that if the complainant had been unable to balance herself, had been in a sleepy state and had difficulty keeping her eyes open, this would mean that she had been still "floating in and out of her stuporous alcoholic state" and her motor skills would have been impaired. It was common ground between the experts that a person may be sedated and have a blackout at the same time.

15 Lastly, the experts testified that an intoxicated person may unconsciously confabulate to fill in gaps in her memory, although Dr Winslow accepted that this would mainly be seen in alcoholics. Dr Guo went further in stating that confabulation was almost impossible in the present case.

Decision below

16 The second statement (see [9] above) formed part of the Prosecution's evidence at the trial. The appellant challenged the admissibility of this statement on two grounds: the Judgment at [94]. The Judge rejected this challenge for the reasons given in the Judgment at [98]–[101] and [103]–[108]. In gist, the Judge held that the second statement had been given voluntarily and that the allegations made by the appellant about the statement-taking process were either untrue or did not render the prejudicial effect of the statement greater than its probative value: the Judgment at [98] and [103]. The second statement was therefore admitted into evidence. On appeal, the appellant did not renew his challenge to the admissibility of the second statement.

17 In view of the defence put forward on behalf of the appellant, the Judge identified the main issues as being (a) whether the complainant had the requisite capacity to give consent at the material time; and (b) whether the complainant

in fact consented: the Judgment at [5]. The Judge found against the appellant on both issues.

18 In assessing the evidence, the Judge did not apply the "unusually convincing" standard. There was other evidence available for the offences which were allegedly committed in the bathroom, including those allegedly committed by the appellant. This was therefore not a case in which the court had to simply weigh the complainant's word against the accused person's: the Judgment at [115]. However, the Judge was careful to note that it remained incumbent on the court to carefully examine the evidence and determine if the Prosecution had established each element of the charge beyond a reasonable doubt: the Judgment at [117].

19 The Judge held that not much weight could be placed on the evidence of either party's expert in the present case in assessing the complainant's capacity to consent at the material time. First, the complainant's BAC levels could not be reliably calculated since there was no reliable evidence as to how much alcohol the complainant had consumed. Second, the expert opinions on whether the complainant would have been able to give consent were premised on facts which were in dispute: *eg*, Dr Winslow accepted that if the complainant had been unable to open her eyes or stay awake, she could not have behaved in the manner the accused persons claimed. Third, the experts' evidence was not entirely at odds and Dr Winslow accepted that if the complainant's state of unconsciousness had been as serious as Mr Faris and the appellant described in their investigative statements, it would have been difficult for her to perform the acts in question. Finally, the experts agreed that the most important factor in the assessment would have been the complainant's clinical manifestations.

The estimated BAC levels were therefore not probative: the Judgment at [141]–[145].

20 The Judge found that the complainant's account of what had occurred in the bathroom with the appellant, corroborated by the other evidence in the present case, provided some evidence that she did not have the capacity to consent to any sexual activity with the appellant at the material time: the Judgment at [172]. He found her to be a forthcoming witness, and observed that the text messages she sent to Mr Affandi after the incident buttressed her evidence that she had been severely intoxicated at the material time: the Judgment at [152], [153] and [172].

21 In contrast, the account the appellant gave in court was not credible as it contradicted other evidence, including his own statements. Instead, the statement recorded from the appellant on 30 January 2014 ("the first statement") and the second statement consistently depicted the complainant's severe state of intoxication, which negated her ability to give consent. In the second statement, the appellant had said that he was of the view that the complainant was not in a state to consent to having sex when Mr Faris entered the bathroom. Subsequently, *after* the appellant engaged in sexual activities with the complainant, the second statement described the complainant as having been so intoxicated that somebody needed to carry her out of the bathroom. It was incredible that the complainant would have been in a severely intoxicated state both before and after sexual activity with the appellant, but regain sobriety for the material period. The appellant's description of the complainant having been "drunk" and "very drunk" in his statements were assessed to be truthful observations of the complainant's condition: the Judgment at [174], [176]–[177]. The testimony of other witnesses, in particular, Mr Elmi, were credible

and probative, and buttressed the complainant's evidence. They materially contradicted the appellant's account of the complainant's condition: the Judgment at [178].

The appellant's case

22 The appellant's case before us was premised on four main submissions. First, that the Judge erred in finding that the unusually convincing standard did not apply. It remained applicable for a number of reasons. The appellant and the complainant had been alone in the bathroom at the time of the alleged offences, and no other witnesses could give evidence on the charges. In this regard, the Judge had also not placed much weight on the expert evidence of the complainant's capacity to consent at the material time: the Judgment at [145]. The Judge had wrongly considered whether any other evidence was available, rather than the narrower question of whether there had been corroboration. The complainant's testimony was not corroborated by any of the other witnesses' evidence, and the unusually convincing standard should have applied.

23 Second, Mr Thangavelu submitted that the Judge had failed to appreciate the experts' evidence on a number of points, including that (a) after vomiting, the complainant's BAC levels would be lower than estimated; (b) the possibility of the complainant suffering anterograde amnesia, even after falling asleep, especially as she had experienced anterograde amnesia before; and (c) that a person might be able to consent to sexual intercourse despite suffering from anterograde amnesia. The appellant contended that the expert evidence showed that the complainant could have been suffering from anterograde amnesia at the relevant time such that she could have consciously chosen to engage in sexual intercourse with the appellant even if she could not recall this later. Where the

court cannot decide with any degree of certainty between alternative case theories, the benefit of the doubt has to be given to the accused person: *Eu Lim Hoklai v Public Prosecutor* [2011] 3 SLR 167 at [64]. The Judge did not provide adequate reasons for rejecting the experts' evidence, or for explaining away the inconsistencies in Dr Guo's evidence.

24 Third, Mr Thangavelu sought to persuade us that the appellant's account, which showed that the complainant had consented to the sexual activity, was truthful and that it ought to be believed. In particular, the second statement had indicated that the complainant held the appellant's penis and placed it into her mouth, which would indicate that she had implicitly consented to fellating him. The Judge did not provide reasons for only taking into account the inculpatory, but not exculpatory, parts of the appellant's statements. Further, it was possible that the complainant could have sufficiently recovered in the three hours between the time the others left for Zouk, and the time the alleged offences occurred. He asserted that *nothing* in the complainant's testimony contradicted the appellant's evidence about their sexual encounter in the bathroom, since the complainant could only remember that the appellant had stood beside her at the sink. Mr Elmi had also testified that he saw the complainant "standing on her own" in the bathroom, and the Judge wrongly did not give this weight. While Mr Elmi claimed that the complainant had been topless, there was no evidence that she had been topless or naked when brought down the stairs. From this, the inference must be that she had been fully dressed at that point *and* that she had dressed herself, which would in turn show that she had not been as sedated as the Prosecution claimed. The Prosecution's case had not been proven beyond a reasonable doubt.

25 Finally, the appellant contended that he had mistakenly believed that the complainant had consented. In particular, in relation to the charge for attempted rape, under the framework for impossible attempts set out by this court in *Han Fang Guan v Public Prosecutor* [2020] 1 SLR 649 ("*Han Fang Guan*") at [108] and [116], the appellant contended that *even if* the complainant did not have the capacity to consent: (a) he did not have the intention to rape the complainant since he mistakenly believed in good faith that she had been capable of consenting; (b) he would not have acted in the manner he did "but for" his mistaken belief; and (c) even if he had had the intention to rape the complainant, he could not have done so as he did not have an erection. He was therefore unable to commit sufficient acts in furtherance of his intention to rape the complainant and had abandoned the attempt. The conviction on this charge should therefore be set aside.

Our decision

Preliminary issues

26 We begin by addressing three preliminary points. First, while the appellant did not expressly challenge the Judge's decision to order a joint trial, Mr Thangavelu argued that the Judge had "superimposed" his analysis of Mr Faris's evidence on his assessment of the charges against the appellant. He contended that this approach was not correct. With respect, we think this contention was misguided. The Judge had, in erring on the side of caution, stated that he would not take Mr Faris's investigative statements into account in assessing the appellant's guilt: the Judgment at [49]. However, this did not mean, and indeed could not have meant, that the complainant's state of intoxication during the time she was in the bathroom with Mr Faris was not relevant. The offences committed by the appellant took place shortly thereafter,

and the cases run by both accused persons were aligned in material respects. They both contended that the complainant had consented to the relevant sexual activity with them and sought to rely on the evidence given by the experts, in particular, Dr Winslow. As such, it was neither incorrect nor surprising that the Judge referred to his detailed analysis of the evidence given by the experts and other witnesses in relation to the charges faced by Mr Faris when he was considering the charges against the appellant. In any event, it was clear from the Judgment that the Judge had also carefully considered the appellant's various statements in convicting him. There was therefore no merit to Mr Thangavelu's suggestion.

27 Second, the appellant did not challenge the Judge's finding that the second statement was admissible. Indeed, Mr Thangavelu appeared to accept that the second statement was voluntarily given, seeking to bolster the appellant's credibility by arguing that he could have, but did not, deny the sexual activity that had taken place. Further, he did not seek to persuade us that the second statement had been inaccurately recorded. To be clear, we would not, in any event, have accepted contentions of involuntariness and inaccurate recording if they had been made as, in our view, they were not supported by the evidence.

28 Third, the appellant contended that there was no evidence which corroborated the complainant's testimony on her state of intoxication at the material time, and therefore that the Judge erred in failing to apply the unusually convincing standard. This contention was misguided. The other witnesses, including the appellant himself, had also given evidence on the extent of the complainant's intoxication both before and after the offences were said to have occurred. The primary finding made by the Judge was that the complainant did

not have the *capacity* to consent at the material time. This finding and the consequent conviction therefore did not rest on the complainant's uncorroborated evidence. In any event, the Judge was also correct to say that the unusually convincing standard is a cognitive aid that that does not alter the Prosecution's burden or standard of proof: the Judgment at [112] and [117]. As such, nothing turned on the appellant's submissions on whether the unusually convincing standard applied.

Whether the complainant had the capacity to consent

29 The key question in the appeal was whether the complainant had the requisite capacity to consent to sexual activity at the material time. In our view, the evidence assessed as a whole, amply supported the Judge's finding that she did not. The legal principles to be applied in the present case were not in dispute. As this court held in *Pram Nair v Public Prosecutor* [2017] 2 SLR 1015 ("*Pram Nair*") at [96]:

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

> awareness of what is happening, may have such impaired understanding or knowledge as to lack the ability to make any decisions, much less the particular decision whether to have sexual intercourse or engage in any sexual act.
>
> (e) In our view, expert evidence – such as that showing the complainant's blood alcohol level – may assist the court in determining whether the complainant had the capacity to consent.

30 We begin by addressing the expert evidence adduced by the parties at the trial. As we explained to Mr Thangavelu at the hearing, we shared the Judge's view that the expert evidence in the present case was not entirely helpful in assessing the complainant's capacity to consent at the material time: the Judgment at [171].

31 Neither of the experts examined the complainant while she was intoxicated and, indeed, Dr Winslow never interviewed the complainant at all. The estimated BAC levels, based as they were on various assumptions, *eg*, on the complainant's proportion of body water available for alcohol distribution, and, more significantly, the complainant's estimation as to how much alcohol had been in each cup she drank, were not reliable. The appellant did not contend that the estimated BAC levels were accurate, but instead that the "general state of the complainant" was relevant and that the expert evidence had been led for the court to consider "if the [c]omplainant could have suffered from anterograde amnesia at the material time" [emphasis in original omitted]. The appellant emphasised the possibility of anterograde amnesia because Dr Guo accepted that, while suffering from anterograde amnesia, an individual might be able to consent to sexual activity without any knowledge of it thereafter. The suggestion was therefore that the complainant could have consented to the sexual acts without remembering she had done so.

32 We fully accepted that the state the complainant had been in at the material time was a central consideration, and indeed, the key question to be determined in the present case. However, despite the appellant's submissions on the possibility of anterograde amnesia, we were satisfied that the evidence showed, beyond a reasonable doubt, that the complainant did not have the requisite capacity to consent to the sexual activity at the material time.

33 In our view, the experts' evidence in fact showed that the suggestion that the complainant's memories might have been confabulated was without basis. Dr Winslow testified that confabulation is mainly seen in alcoholics, and the complainant testified that she was not a heavy drinker. He also agreed that he was not in a position to comment on whether any confabulation had occurred as he did not speak to the complainant. Dr Guo, who *had* interviewed the complainant, testified that confabulation was almost impossible in the present case. This suggestion could therefore be readily dismissed.

34 As the Judge noted at [160] of the Judgment, both experts agreed that the most important assessor of the impact of alcoholic intoxication on an individual would be the clinical manifestations of his or her condition. The evidence indicated that the complainant had been heavily intoxicated such that she would have had limited awareness of her surroundings as well as impaired physical and mental capabilities at the material time. Dr Winslow accepted that, if when Mr Elmi returned to the hotel room at about 2.20am, the complainant had been passed out on the floor and unresponsive despite being tapped on her arm and having her name called, she would have been sedated to the point of unconsciousness. Further, the account the appellant had given in his investigative statements of the state the complainant had been in when he first entered the bathroom at about 3.45am, upon his return from Zouk, *also* indicated

a very severe state of intoxication. For instance, in his first statement, the appellant stated that the complainant had been lying in the bathtub, "very drunk", "gagging like she was still vomiting", and that there was some vomit both in the bathtub and on the complainant. The second statement, as recorded, was materially similar. While he later asserted in his oral evidence that the complainant was no longer vomiting at that point and instead had just been "resting" in the bathtub, this was difficult to believe. For one, there was no plausible reason why the appellant would have described the complainant as having been "very drunk" and "vomiting" in both the first and second statements if this had not been true. Further, there would have been no reason for the complainant to rest in a bathtub which the appellant never disputed contained vomit, unless she was severely intoxicated and unable to get out of the bathtub and leave the bathroom on her own. The inference that must be drawn from this is that the appellant was *correct* when he admitted, in his statements, that the complainant had been severely intoxicated at that point in time.

35 Subsequently, not long after the appellant left the bathroom, he headed down to the hotel lobby to meet Mr Faris and Mr Ridhwan, before they returned to the hotel room at about 3.57am. The second statement recorded the appellant as stating that he did not think that the complainant was in a state to consent to having sex when Mr Faris went into the bathroom because she was drunk and seemed tired. Again, this was a point he sought to disavow in his oral evidence, stating that the question had been wrongly recorded, and that he had instead said that he did not think Mr Faris would have been able to have sexual intercourse with the complainant *if* she had been drunk. As stated at [27] above, the appellant did not seek to persuade us that the second statement was inaccurately recorded. In any event, there was no basis for us to accept that the statement had

been wrongly recorded by Assistant Superintendent Arun Guruswamy. Nor was there any reason why the appellant would not have asked for the statement to be corrected if it had been inaccurate. The second statement therefore indicated that, even in the appellant's *own* opinion, the complainant had been so heavily intoxicated when Mr Faris entered the bathroom that she could not have consented to sexual activity. Given that the alleged offences committed by the appellant occurred not long thereafter, there was little basis on which to infer that there would have been a material change in the complainant's state of intoxication or ability to consent.

36 Similarly, the complainant's testimony, which we have accepted was not confabulated, made clear that the state of heavy sedation continued while the complainant was in the bathroom, including during the time the alleged offences occurred. Specifically, the complainant's testimony on the events that occurred in the bathroom also suggested that she had been heavily intoxicated, and indeed, close to unconsciousness, as the Judge found: the Judgment at [165] and [185]. She testified that she could only remember flashes of the events that transpired as she had not been fully awake and kept falling asleep. Of the events in the bathroom, she could only remember that:

(a) She had been lying down beside the toilet bowl because she was too drunk, her body felt heavy, and she had been unable to balance herself. Mr Faris, who had not been wearing any pants, was standing in front of her. She identified Mr Faris by the circular tattoo on his arm.

(b) While she remembered that somebody had kissed her on the lips while she was standing up, she could not remember who had done so. This had made her uncomfortable but she had not been able do anything about it as she had been too drunk, kept falling asleep and had been

unable to balance herself. The parties did not suggest that this person was the appellant.

(c) She had been standing in front of the sink while the appellant was beside her. She had felt like vomiting at that point and assumed that he had been helping her as she vomited.

37 The complainant could not recall the sequence in which these events took place. It was apparent from what she *could* remember that she had been physically very weak, nauseous and had been falling in and out of sleep while in the bathroom. Dr Guo testified that the complainant's account suggested to him that she had been in a state of heavy sedation in which she could have been awoken by sexual contact but would most likely have been unable to resist going back to sleep. This would seem to suggest that the gaps in the complainant's memory were caused by her having been asleep or unconscious or, at the very least, that in those moments she had been similarly in an impaired state.

38 The appellant placed weight on the fact that, even on the complainant's and Mr Elmi's testimony, the complainant had been able to stand up, with Mr Elmi specifying that he had seen her standing on her own. We noted that, at one point, Dr Guo's testimony appeared to be that it would be "almost impossible" for a person "going through a … blackout and suffering from severe intoxication" to stand up on her own *despite the fact that he also agreed it was possible that a person in the same situation could consent to sexual intercourse*. Put simply, his evidence appeared to be that an individual incapable of standing up on her own *might* still be capable of consenting to sexual intercourse. However, we did not take this to mean that the complainant's physical state was not an indicator of whether she had the capacity to consent. Dr Guo's evidence

on possibilities had to be seen in context. Theoretically, many possibilities cannot be ruled out by experts. However, when it comes to any particular case, the court has to have regard to the totality of the evidence before it to ascertain whether the possibility put forward was a real one that was capable of raising a reasonable doubt.

39 In *Pram Nair* ([29] *supra*) at [96(c)], this court held that a complainant may cross the line into incapacity well before becoming unconscious, and that whether that had been the case is a fact-sensitive inquiry. In the present case, we were satisfied that the evidence showed that the complainant had been, as the Judge found, close to a state of unconsciousness and that this meant she did not have the requisite capacity to consent. She testified that she had been drifting in and out of sleep while in the bathroom, and, at one point, had been lying on the floor. While she testified that she had been standing up at two points, she *also* said that she had been unable to balance herself, too drunk to stop somebody from kissing her, and that, at another point, she had felt like vomiting. The complainant's testimony of what she remembered of the events that later took place in the living room *again* showed that she had been close to a state of unconsciousness: she testified that she kept falling asleep, had difficulties opening her eyes and, even in her waking moments, had been unable to stop Mr Faris and Mr Ridhwan from doing various things to her. In the circumstances, the complainant's awareness of her surroundings would have been severely limited at best. We noted that Dr Winslow appeared to accept that, if the complainant had been in a state of sedation, she would not have been mentally active. In the circumstances, we could not see how the complainant could have been able to voluntarily and consciously agree to the relevant sexual acts.

40 Finally, we noted that the appellant had left the bathroom on his own after the sexual acts occurred. We considered that the fact that the complainant remained in the small and dark bathroom, where she had vomited not too long before, even after the appellant had left, was further indication that she remained in a deeply intoxicated state. Indeed, the evidence showed that the complainant did not leave the bathroom for quite a few minutes thereafter and it was only when Mr Elmi, prodded by his girlfriend, asked Mr Fadly to help her leave it that she finally exited the bathroom. It was significant to the Judge and to us that she needed Mr Fadly's support to come out of the bathroom, and go down the stairs thereafter. To an extent, this was reflected in the second statement which suggested that the appellant too had thought that there might have been a need to "carry" the complainant down to the first floor of the hotel room because she was "drunk". In this regard, we noted also that Mr Elmi's impression of the complainant at that time was that she was drunk and weak. We were therefore fortified in our conclusion that the finding by the Judge that the complainant could not have consented to the relevant sexual acts with the appellant was not against the weight of the evidence.

41 Contrary to Mr Thangavelu's attempts to argue otherwise, the appellant's account of how he had obtained the complainant's consent was incredible and did not give rise to any reasonable doubt. In his oral evidence, he claimed that:

(a) When he entered the bathroom after Mr Faris left, he had first asked the complainant whether he could urinate. She did not respond verbally, and instead nodded her head.

(b) After urinating, the appellant asked the complainant if she wanted to fellate him, and she again nodded silently before kneeling or

squatting and placing his penis into her mouth. The complainant then licked and sucked on his penis for one to two minutes.

(c) Thereafter, the appellant asked if she wanted to have sexual intercourse in the "doggy" position. The appellant claimed that she *again* did not respond verbally, and instead stood up and bent herself forward. The appellant tried to penetrate the complainant's vagina with his penis but was unable to do so as his penis was no longer erect.

(d) Finally, he asked the complainant if he could lick her vagina, and she nodded before placing her right leg onto the bathtub. Before he could do so, Mr Elmi opened the bathroom door.

42 The complainant's silence throughout the encounter, even on the appellant's evidence, was suggestive of her weakened state. We noted that the account the appellant gave orally differed from that recorded in the second statement in a number of significant ways: for instance, the second statement had recorded him as saying that he had "immediately" asked the complainant if they could engage in penile-oral intercourse upon entering the bathroom for the second time. It would have been even more implausible that the complainant, who had been severely intoxicated at that time, would have so readily agreed to his request, particularly without any preamble. This is especially since, as we noted above, the complainant's evidence also indicated that she had been nauseous and had limited physical and mental capabilities while Mr Faris was in the bathroom. Further, the second statement did *not* indicate that the appellant had asked the complainant about having intercourse in the "doggy" position, and instead simply stated that he had "helped" the complainant move into position.

43 That said, *even* on the appellant's oral evidence, his account was not a credible one. The evidence we outlined above clearly showed that the complainant had been very ill and weak. She therefore could not have acted in the manner described by the appellant. It was also implausible that, *even if* she could have consented at the material time, she would have agreed not only to him urinating in her presence, but also to fellating him immediately thereafter, and to having sexual intercourse with him, despite her state of intoxication and the fact that she had just had sexual intercourse with Mr Faris. It is worthwhile pointing out that, even on his own case, the appellant had never met the complainant before the party and had not spoken to her during it before he found her in the bathroom. They were not even acquaintances, much less friends.

44 For the reasons we have given above, the evidence showed that the complainant could not have had the requisite capacity to consent to the relevant sexual acts at the material time. In any event, like the Judge, we were also satisfied that, *even if* she had had such capacity, she did not in fact consent.

Whether the defence of mistake of fact applied

45 We noted that the appellant had asserted, before the Judge, that the defence of mistake of fact applied. In the appeal, the appellant argued that he had mistakenly believed that the complainant had consented to sexual intercourse, and the intended act of "rape" should therefore not be regarded as a criminal offence. This did not appear to be a submission that the defence of mistake of fact under s 79 of the Penal Code applied. Nevertheless, we state for completeness that it was in any event clear to us that the defence did not apply to the present case. The burden would have been on the appellant to show, on a balance of probabilities, that "by reason of a mistake of fact", he had, "in good

faith" believed that the complainant had consented to the relevant sexual acts: see *Pram Nair* ([29] *supra*) at [110], citing *Public Prosecutor v Teo Eng Chan and others* [1987] SLR(R) 567 at [26]. The appellant's account of how he had sought and obtained the complainant's consent was rejected on the basis that it was inherently incredible. We also rejected his claim that the complainant had actively participated and consented to the sexual acts. Further, as we indicated above, the statements recorded from the appellant showed that he had *known* that the complainant was heavily intoxicated both before and after the material time and had also opined that the complainant would not have been able to consent to sexual activity with Mr Faris slightly earlier. There was therefore no basis for any finding that the appellant had mistakenly believed that the complainant was capable of consenting and had in fact consented to the sexual activity with him in the bathroom, much less that any such belief was held in good faith.

Whether the charge for attempted rape had been established

46 On the attempted rape charge, the appellant submitted that both stages under the two-stage framework in *Han Fang Guan* ([25] *supra*) at [108] for impossible attempts were not satisfied. In relation to the first stage, there was no specific intention to commit a criminal act as the appellant had been of the opinion that the complainant had by her conduct consented to sex. As such, it was "unsafe" to convict the appellant of the attempted rape charge. In any event, the appellant submitted, the second stage of the framework was not satisfied, since he could not have raped the complainant as his penis had not been erect. The appellant was thus unable to commit further and/or sufficient acts in furtherance of the specific intention to commit the criminal act, and had abandoned the attempt.

47 We did not accept the appellant's submissions. If the *Han Fang Guan* framework were applied, as the appellant contended it should, it would follow, at the first stage, from the Judge's finding (which we have upheld) that the appellant *knew* the complainant did not have capacity to consent, that he *intended* to engage in sexual activities with a person he knew could not consent. At the second stage of the analysis, the question would then be whether there were sufficient acts by the appellant committed in furtherance of the specific intention to commit the criminal act. The court in *Han Fang Guan* at [108(b)] clarified that the inquiry is "directed at whether there were sufficient acts to reasonably corroborate the presence of that intention and demonstrate substantial movement towards its fulfilment". In the present case, the appellant had tried to insert his penis into the complainant's vagina, which corroborated his intention to have sexual intercourse with her at that time and constituted more than substantial movement towards its fulfilment.

48 Finally, for completeness, we observe that this was not a case in which the appellant had not completed the primary offence because of a change of heart: even on the appellant's own case, the "abandonment" was a result of the fact that he realised, upon trying to do so, that he was unable to penetrate the complainant's vagina with his penis because he had lost his erection. We therefore do not, in this judgment, go on to consider the situation which had been expressly left open by this court in *Han Fang Guan* at [106], namely, that involving an accused person who resiles from his original intention and does not carry it out because of a change of heart.

49 For the reasons above, we were satisfied that the offence of attempted rape had been established beyond a reasonable doubt.

Conclusion

50 For the reasons we have given above, we dismissed the appeal against conviction in respect of both charges. As no appeal was filed against sentence, the sentence imposed by the Judge of 9 years, 11 months and 28 days' imprisonment and eight strokes of the cane remained.

Judith Prakash Judge of Appeal	Tay Yong Kwang Judge of Appeal	Belinda Ang Saw Ean Judge

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