IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2023] SGCA 30

Criminal Appeal No 34 of 2022

Between

Mustapah bin Abdullah

… *Appellant*

And

Public Prosecutor

… *Respondent*

In the matter of Criminal Case No 24 of 2022

Between

Public Prosecutor

And

Mustapah bin Abdullah

JUDGMENT

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

Mustapah bin Abdullah
v
Public Prosecutor

[2023] SGCA 30

Court of Appeal — Criminal Appeal No 34 of 2022
Judith Prakash JCA, Tay Yong Kwang JCA and Belinda Ang Saw Ean JCA
4 April 2023

3 October 2023

Judith Prakash JCA (delivering the judgment of the court):

Introduction

1 The present appeal primarily concerns the crime of sexual assault. The appellant herein was convicted on 17 August 2022, after a trial in the High Court, on three charges of sexual assault by oral-penile penetration involving three teenaged male victims. The charges were brought under s 376(1)(*a*) of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code") and we refer to them as "the SAP offences".

2 The charges in respect of the SAP offences read as follows:

> 1st charge
>
> between at or about 10.30 p.m. on 17 October 2018 and the early hours of the morning on 18 October 2018, at the playground located at [address], Singapore, did penetrate, with your penis, the mouth of one [V1], a male then aged 16 years old (D.O.B.: XX November 2001), without his consent, and you

> have thereby committed an offence under section 376(1)(*a*) and punishable under section 376(3) of the Penal Code (Cap 224, 2008 Rev Ed).
>
> 2nd charge
>
> between at or about 10.30 p.m. on 17 October 2018 and the early hours of the morning on 18 October 2018, at the playground located at [address], Singapore, did penetrate, with your penis, the mouth of one [V2], a male then aged 17 years old (D.O.B.: XX December 2000), without his consent, and you have thereby committed an offence under section 376(1)(*a*) and punishable under section 376(3) of the Penal Code (Cap 224, 2008 Rev Ed).
>
> 3rd charge
>
> between at or about 10.30 p.m. on 17 October 2018 and the early hours of the morning on 18 October 2018, at the playground located at [address], Singapore, did penetrate, with your penis, the mouth of one [V3], a male then aged 17 years old (D.O.B.: XX February 2001), without his consent, and you have thereby committed an offence under section 376(1)(*a*) and punishable under section 376(3) of the Penal Code (Cap 224, 2008 Rev Ed).

3 Subsequently, at the sentencing hearing on 12 September 2022, the appellant pleaded guilty to, and was convicted on, a charge for sexual penetration of a minor under 16 years of age (oral-penile penetration), which is an offence under s 376A(1)(*c*) of the Penal Code. This charge related to a fourth victim. We refer to this offence as "the SPOM offence". The appellant was then sentenced for the SAP offences and the SPOM offence. In the process, another five charges were taken into consideration (one of these charges related to a fifth victim).

4 In the event, after the individual sentences were determined, the High Court Judge ("the Judge") decided that three sentences had to run consecutively. This meant that the appellant had to serve a total of 23 years' imprisonment with an additional 12 months' imprisonment in lieu of caning. The penalty of caning

could not be imposed because the appellant was above 50 years old at the time of sentencing.

5 The appellant filed an appeal against both conviction and sentence in respect of the SAP offences and an appeal against sentence in respect of the SPOM offence. He appeared in person at the hearing of the appeal as he had at the trial.

The Factual Background

6 We now recount the facts leading to the SAP offences as they appear from the evidence adduced in the High Court. These offences involved three students enrolled in institutes of technical education. To protect their identities, these students are referred to as V1 (16 years old), V2 (17 years old) and V3 (17 years old) and collectively as "the Victims".

7 The appellant and the Victims resided in the same neighbourhood. The Victims often met at a hut ("the Hut") in their neighbourhood, together with another friend – the fourth victim ("V4") (15 years old). Around 2017, V4 introduced the appellant to the Victims and the appellant began to meet the Victims at the Hut. At these meetings, the appellant would drink beer and smoke cigarettes. Whenever they met up, the appellant was friendly with the Victims and he would often tell them about his past experiences and give them his views on various topics. The Victims alleged that the appellant also revealed his past as an ex-convict, a gang member and his involvement in rioting with a large group of people. The Victims viewed the appellant with respect, and saw him as a close friend and even thought of him as a "big brother".

8 Prior to 17 October 2018, V2, V3 and V4 were members of a gang. When they wanted to leave the gang, they asked the appellant to help them to

do so. The appellant testified that he had helped them to leave the gang by negotiating with the headman of the gang.

Meeting on 17 October 2018

9 Sometime before 17 October 2018, a rumour circulated amongst the Victims that the appellant had made a fifth victim suck his penis. Because of this, the Victims decided to avoid the appellant. V1 testified that he distanced himself from the appellant as he was worried that he would be made to perform a similar act on the appellant. The appellant was upset and angry when he found out that this rumour was being spread and he wanted to confront the Victims about it.

10 On 17 October 2018, just after midnight, the appellant called V1 and asked him to meet the appellant at the fitness corner near the Hut. During the call, the appellant spoke to V1 in a serious tone and threatened to "potong" (a Malay word meaning "cut") him if he did not go there. V1 complied immediately as he was afraid. Once V1 arrived at the fitness corner, the appellant scolded him in vulgar terms and questioned him as to who had spread the rumour. In court, the appellant admitted that he had also slapped V1's face to make him reveal who was spreading the rumour.

11 After V1 revealed that V2 and V3 also knew about the rumour, the appellant obtained V2's and V3's phone numbers from V1. At around 12.20am and 12.31am on 17 October 2018, the appellant sent V2 and V3 a series of WhatsApp messages with vulgarities directed at them. He demanded that V2 and V3 go to meet him.

12 Upon receiving these text messages from the appellant, V3 decided to go to meet the appellant. V3 asserted later that he complied with the appellant's

demand to meet as he was afraid that the appellant might threaten his family. V3 met the appellant at the Hut on 17 October 2018, and the appellant questioned him on whether he knew who had spread the rumour. The appellant admitted at trial that he had become angry and slapped V3 when V3 replied that he had forgotten how the rumour started. V3 testified that he felt afraid and had cried during the incident. V3 also claimed that the appellant had threatened to harm his family members if the appellant found out that V3 was defending the person who spread the rumour.

13 Dissatisfied with the first meeting, the appellant subsequently demanded a second meeting with the Victims so that he could confront them about the rumour once more.

Meeting on 17/18 October 2018

14 The appellant instructed V1 to arrange for the Victims to meet him on the night of 17 October 2018, and the second meeting took place at about 10.30pm at the Hut. When the appellant arrived, he questioned V2, V3 and V4 about who had started the rumour. Thereafter, the appellant kicked V2's back and also kicked V4. V2, V3 and V4 tried to explain to the appellant that they were not responsible for spreading the rumour, but the appellant refused to accept their explanations. The appellant told the boys angrily that previously he had been involved in gang fights and had beaten up others. He also threatened to "potong" the Victims' family members.

15 The appellant then told V2, V3 and V4 to go with him to the playground. V1 arrived there shortly thereafter. The appellant appeared to be angry and drunk at this point. The appellant slapped V3, causing the latter's spectacles to fall from his face, and also tried to scratch V3's eyes. As there were children at

the playground, the appellant told the Victims to meet him one by one at the top of the slide in the playground to "settle" the score, whilst the rest were to wait at the Hut for their turns. The appellant believed that the Victims would confess if they were confronted individually.

16 According to the Victims, the appellant adopted the same method of operation when dealing with each of them. In gist, when the appellant met each Victim at the top of the slide, he asked that victim whether he wanted to settle the problem caused by spreading the rumour and thereafter the appellant unzipped his pants to expose his penis to that victim.

17 V3 was the first person to meet the appellant at the top of the slide. The appellant exposed his penis to V3 and gave him two options – to either suck the appellant's penis or to walk away but get beaten up the next time the appellant saw him. The appellant uttered a Malay phrase to V3; the appellant said it was "*Takde kau hisap aku punya, boleh tak?*" ("the Malay phrase"). By this phrase, the appellant was alleged to have meant that if V3 wanted to settle the problem, he would have to "perform" and to "suck [the appellant's] penis". As V3 was unable to immediately decide on what to do, the appellant told V3 to go back to the Hut and send V2 to meet him instead.

18 V2 was the second person to meet the appellant at the top of the slide. The appellant was angry with V2 and the latter apologised to the appellant. The appellant asked V2 if he wanted to settle the problem. The appellant then unzipped his pants, exposed his penis and gave V2 the same option of either performing fellatio or walking away. He warned V2 that if V2 chose to walk away, the appellant would give him problems in public. V2 then bent down to comply with the appellant's demand to suck the appellant's penis. The act of fellatio lasted around two or three seconds before the appellant told him to stop.

The appellant did not ejaculate. V2 testified that he decided to perform fellatio on the appellant "out of fear" as he was afraid that if he did not do so, the appellant would beat up V2 or members of his family.

19 Next, V1 arrived to meet the appellant. The appellant unzipped his pants and told V1 in an angry tone that if he wanted to settle the problem, he had to suck the appellant's penis. V1 testified that he was pressured and felt he had no choice but to comply with the appellant's request as otherwise the appellant would carry out his threat. V1 then proceeded to fellate the appellant for a few seconds until the appellant told him to stop. In this instance too, the appellant did not ejaculate. Thereafter the appellant instructed V1 to tell V3 to go back to the top of the slide to meet the appellant.

20 V3 returned to the top of the slide as instructed. Again, the appellant unzipped his pants to expose his penis. The Malay phrase was uttered to V3, and this seemingly presented V3 the choice of whether to perform fellatio or to leave. V3 testified that he decided to perform fellatio on the appellant "for the sake of settling" and he was afraid that the appellant might attack him if he chose to walk away. Furthermore, V3 was aware of the appellant's past as a gangster and he thought that the appellant would carry out the threats. V3 then fellated the appellant. The appellant's penis was not erect and, after a few seconds, the appellant told V3 to stop.

21 After confronting the Victims individually, the appellant told them that the problem regarding the rumour was settled.

The discovery of the SAP offences

22 The day after the SAP offences were committed, V1's class advisor, one Mr AB, noted that V1's demeanour had changed, and he looked less cheerful

than usual. Mr AB asked V1 what had happened and V1 replied that he had done "something unusual" for his neighbour. Upon hearing this, Mr AB referred V1 to the school counsellor, one Mr CD. Mr CD testified that, during a counselling session on 22 October 2018, V1 revealed that he was coerced to "suck the dick" of his neighbour. V1 appeared to be fearful and anxious during the counselling session and told Mr CD that the appellant had also physically assaulted him and made threats against him. In accordance with school protocols, V1's educational institute lodged a police report on 24 October 2018.

23 Thereafter investigations were conducted by Assistant Superintendent of Police Chai Xi En Regina ("IO Chai"). These investigations resulted in the appellant being arrested and charged.

Evidence adduced at the trial

24 At this point, it is helpful to give a brief account of some of the evidence adduced at the appellant's trial.

The appellant's three long statements

25 The appellant was interviewed by the police and he gave them three long statements under s 22 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC") between 30 October 2018 and 31 October 2018. The appellant said in these statements that he had told the Victims that if they wanted to settle their issues with him, they would have to suck his penis, and that the Victims had put their mouths onto his penis for a few seconds after he unzipped his pants.

26 The relevant portions of the three long statements (appropriately redacted) are reproduced here:

(a) In relation to V2, the appellant stated that if V2 wanted to "settle the problem" then V2 "has to suck [his] penis". V2 then "put his mouth onto [the appellant's] penis" to settle the problem of spreading of the rumour. The appellant threatened to "do something" to V2 if he did not wish to settle the problem. The appellant also stated that he kicked V2 at the first meeting as he was angry, and he had threatened to use a beer bottle to hit V2's head:

When [redacted] came to the playground, I told him that I also do not know how to settle. If he wants to settle the problem, he has to suck my penis. If he does not wish to settle the problem, he can walk away. [redacted] then told me that he wants to settle the problem. I then unzipped my pants and [redacted] put his mouth onto my penis for about 2 second. There was no sucking of my penis. After that I told him that I am sorry and the problem has been settled and we will not talk about this problem anymore. After that day I have not seen [redacted].

…

Further to my statement, I was asked the following questions by IO Regina and my answer were as follow:

…

Q4: Did you threaten to do something to [redacted] if you see him outside if he does not wish to settle the problem by sucking your penis? Yes I did. I told him that if I see him outside I will do something to him..

A4: Yes I did. I told him that if I see him outside, I will say what I want to say about him and will do what I want to do to him. I want [redacted] to know that whatever he does, he should think it through properly rather than just anyhow talk. ~~NO. I did not tell him that~~. I told him that I can also go out to ~~skyt~~ spread rumours about him if he never settle the problem ~~by sucking my penis~~.

…

Q7: There is an allegation that you kicked [redacted] from the back when you confronted him about the rumours he had spread about you sucking [redacted]'s penis? Can you account for it?

A7: Yes. I did kick him from the side because I was angry. ~~That~~ happened ~~the first~~ time I met him on ~~that~~ night.

Q8: There is an allegation that you threaten to thrash [redacted]'s house and will do something to him if you see him outside. Can you account for it?

A8: Yes, I said it out of anger but I do not have any intention to do it.

Q9: There is an allegation that you drank beer from the bottle and you said to [redacted] that you might lose patience and use the bottle to knock [redacted]'s head. Can you account for it?
A9: Yes I did but it is a slang when I communicate with [redacted] I do not have any intention to do so.

(b) In relation to V1, the appellant stated that he told V1 that if he wanted to settle, V1 had to "suck [his] cock". V1 then "put his mouth onto [the appellant's] penis" to settle the problem of spreading of the rumour. The appellant also stated that he slapped V1's face and had threatened to use a beer bottle to hit V1's head:

When [redacted] came to the playground, he told me that he wants to settle the issue I then told him that if he wants to settle, he has to suck my cock and if he is ok with it. [redacted] said ok. I then unzipped my pants and [redacted] put his mouth onto my penis. After that I told him that I am sorry and that I did not want to do it and that we are friend. I also told him that he cannot spread rumours about me anymore. After that day I have never seen [redacted] anymore. I wish to say that I had initially wanted to slap them as a form of punishment. But eventually I decided to make them suck my penis because when I mention about sucking my penis, they agreed to it and hence I decided to use that as my form of settlement with them.

Further to my statement, I was asked the following questions by IO Regina and my answer were as follow:

Q1: Did you at any point choke or slap [redacted]'s face during your talk with him?
A1: Yes I slapped him on the right side of the mouth once during the first time I met him at the fitness corner. I also pushed his head once, telling him if he don't know what is happening, he should not be spreading rumours.

Q2: Did you at any point use your beer bottle to threaten [redacted]?
A2: Yes. I raised the beer bottle and told him that I will use the beer bottle to knock his head.

(c) In relation to V3, the appellant stated that V3 "put his mouth onto [the appellant's] penis" and V3's mouth "covered [the appellant's] penis". The appellant also stated that he pulled V3's hair and attempted to hit V3 on the right side of his head. The appellant had also threatened to use a beer bottle to knock V3's head and threatened to beat up the

Victims if they chose to walk away from the problem concerning the rumour:

> After [redacted] had sucked my penis, [redacted] came back to the playground and find me. I told [redacted] that I have already settled with both [redacted] and [redacted] already and I asked [redacted] how about him. [redacted] then said ok. I then unzip my pants and ~~put my penis into~~ [redacted] put his mouth into my penis ~~s~~ mouth. [redacted] mouth covered my penis for about 2 seconds and after that [redacted] moved away from my penis. I wish to say that there was no sucking of my penis. Just [redacted]'s mouth over my penis. After that I told him that I am sorry and the problem has been settled and we will not talk about this problem anymore. After that day I have not seen [redacted]. After that we walked back to the hut where [redacted], [redacted] and [redacted] were at and we smoked there and after that we left the hut.
>
> …
>
> Q1: Did you at any point cause any hurt to [redacted] during your talk with him at the hut?
> A1: Yes I did. I pulled his hair and asked him if he is stupid or what because I have no problems with him, but yet he went to spread rumours about me. I was about to hit him on his right side of the head when he blocked himself with his hands and hence I tap his hand instead.
>
> Q2: Did you at any point use your beer bottle to threaten [redacted]?
> A2: Yes, I raised my hand that was holding the beer bottle and said I will knock his head. But I had no intention to hit him with my beer bottle as there were still beer inside and I still want to drink it. I only said it out of anger.
>
> …
>
> Q5: Did you threaten to bash [redacted] and his friends if he chose to walk away from the problem instead of solving the problem by sucking your penis when you see them anytime?
> A5: Yes I did, however, I said it out of anger. If [redacted] had not solved the problem with me, I would have gone around to spread rumours about him. I have no intention to hurt anyone.

27 The appellant's statement recounted how he first referred to the Malay phrase, *ie*, "*Takde kau hisap aku punya, boleh tak?*":

> After that we talked about how to settle the problem with them spreading rumours about me sucking penis of [redacted]. I then raised my voice and told them that '*Takde kau hisap aku punya, boleh tak?* Which translate to 'if not you suck my one, can or not?' Suck my one means sucking my penis. The boys kept quiet. I do not have any idea how to solve the problem and hence I told them to suck my penis. I then walked to the playground together with [redacted] first followed by [redacted] and lastly it was [redacted].

28 These long statements were consistent with the Victims' accounts at trial of how the appellant had dealt with them. The appellant, however, alleged that the three long statements were inadmissible as they were recorded when he was in an unstable mental state and under immense stress due to harassment by unlicensed moneylenders (who kept calling his home and threatened to burn his home). IO Chai testified that the appellant did not raise any complaint before or during the recording of the statements. Similarly, the Malay interpreter, Maria binte Bazid ("Ms Maria"), who was assisting IO Chai during the statement-recording process, also stated during the trial that the appellant did not make any complaint. We deal with the admissibility of the three long statements below.

Institute of Mental Health report

29 Another key piece of evidence was the forensic psychiatric assessment and psychiatric report regarding the appellant dated 9 September 2020 that was prepared by Dr Yeo Chen Kuan Derrick ("Dr Yeo") from the Institute of Mental Health.

30 Dr Yeo interviewed the appellant on 26 and 31 August 2020. During these interviews, the appellant gave his account of the events that had occurred about two years earlier. The appellant stated that he had physically assaulted the Victims in various ways and had told them "jokingly in Malay" that they should "suck [his] cock" if they wanted to apologise. The appellant then met up with the Victims individually, unzipped his pants and took out his penis. Whilst there was contact between the Victims' mouths and the appellant's penis, this only lasted for a few seconds before the appellant pushed the Victims away. The appellant informed Dr Yeo that he decided to humiliate the Victims as he felt

that he had been wronged by them. We reproduce a redacted excerpt of Dr Yeo's report dated 9 September 2020:

> 15. The accused admitted to touching the three victims during the confrontation due his anger and irritability at that time against the three victims. He admitted to kicking [redacted] in the back, pulling [redacted]'s hair and pushing [redacted]'s head. He reported that he did hold [redacted]'s head and shake it but he could not recall if he had slapped [redacted] in the face. *"Yes, I kick [redacted] at the back, just to show my anger I just push [redacted] head only, pull his hair. I did shake [redacted]'s head, I don't remember slapping him. I was angry at the time, but I didn't demand that they apologize"*. The accused reported that when he told the trio to leave, they instead insisted on apologizing to him. The accused then reported that he told them jokingly in Malay, *"Can ah, if you want to apologize, suck my cock."* The accused admitted that he then arranged to meet up with them one at a time at the top of the slide at the nearby playground as he wanted to have a closer talk with each of them about how they had made him angry.
>
> 16. At the top of the slide, the accused met up with each of the victims consecutively. The accused admitted to unzipping his pants and taking out his penis but claimed that he did not expect the trio to take him seriously and suck his penis. He reported that he only did so with the intention to humiliate the trio and that he stopped the trio of victims within seconds of them putting his penis in their mouths. *"Their lips only touch the tip of the penis for one to two seconds, [redacted], [redacted], once touch, I push them away. [redacted] did two to three seconds or three to four seconds then I push."* The accused claimed that he was in a stressful situation and he decided to humiliate them as he felt that he had been wronged by them. The accused justified his behaviour as he reported that the trio were in a gang and outnumbered him three to one. He denied deliberately threatening the group and claimed that he had offered them a clear choice of performing fellatio on him or to just leave the meeting without any consequences. The accused

The Case for the Defence

31 The appellant filed his Case for the Defence ("CFD") on 20 August 2021. Therein, the appellant stated that his penis had contacted some of the Victims' mouths, even though the degree of intrusion had been minimised. In summary: (a) the appellant stated that V2 had placed one inch of the appellant's penis into his mouth for two seconds; (b) that V1's lips touched the appellant's fingers; and (c) that V3's lips touched the shaft of the appellant's penis. It appears that the CFD mixed up the references between V1 and V2, but nothing in this case turns on this.

Decision below

32 The decision of the Judge is found in *Public Prosecutor v Mustapah bin Abdullah* [2022] SGHC 262 ("GD"). On the issue of whether the Victims had fellated the appellant, the Judge found that there was clear evidence that established beyond a reasonable doubt that the appellant had penetrated the Victims' mouths with his penis (GD at [57]). The Victims had provided textured, coherent and internally consistent accounts of the material events that had happened, and these were mutually corroborative (GD at [58]). The Judge found that the Victims' evidence was also consistent with the appellant's own concessions made in his three long statements where he acknowledged using the Malay phrase, unzipping his pants and exposing his penis to the Victims (GD at [63]).

33 The Judge rejected the appellant's excuse that the Malay phrase uttered to the Victims was merely slang and that he did not expect the Victims to take his words literally (GD at [64]). The Judge disagreed with the appellant's suggestion that the Victims had conspired to backstab him and falsely implicate him as the Judge found that they had no reason to do so (GD at [67]). The manner in which the incident came to light was entirely fortuitous as V1's class advisor, Mr AB, was the one who approached V1 and uncovered the incident (GD at [68]).

34 The Judge further rejected the appellant's claim that his three long statements should be disregarded as they were recorded when he was in an unstable state of mind (GD at [73]). Neither IO Chai, nor the interpreter, Ms Maria, who was present when the statements were taken, were informed of the appellant's concerns about harassment by unlicensed moneylenders (GD at

[74]). The Judge also rejected the appellant's criticisms of Dr Yeo's psychiatric report as he found that it was based on contemporaneous notes (GD at [79]).

35 The Judge observed that it was not a defence to criminal liability for the SAP offences to argue that the penetration was brief or that the appellant's penis was not erect (GD at [72]). It was also immaterial that there was no "sucking" of the penis involved, so long as there was penetration.

36 The Judge found that the Victims did not truly consent to fellating the appellant and only did so out of fear after being threatened. The appellant had demonstrated his capacity to carry out his threats of violence when he assaulted the Victims (GD at [85]), and the Judge accepted the Victims' evidence that these acts of violence had occurred. Any notion of consent was vitiated since any apparent consent had been given under fear of injury to the victims or to their families. The appellant was thus found guilty of the SAP offences and was convicted accordingly.

37 On the issue of sentencing, apart from the SAP offences, there was also the SPOM offence (the charge for oral-penile penetration which concerned V4) being the offence of sexual penetration of a minor under 16 years of age under s 376A(1)(*c*) of the Penal Code. In addition, five other sexual offence charges were taken into consideration for the purposes of sentencing (two of those charges related to a fifth victim) (GD at [108]).

38 Beginning with the SAP offences against V1, V2 and V3, the Judge found that there were three offence-specific aggravating factors. First, the appellant was in a position of trust and authority over the Victims; secondly, the Victims were vulnerable teenagers; and thirdly, the appellant verbally intimidated and inflicted physical violence on the Victims (GD at [110]).

Following the sentencing framework set out in *Pram Nair v Public Prosecutor* [2017] 2 SLR 1015 ("*Pram Nair*"), the SAP offences fell within the lower end of Band 2 and the indicative starting point was an imprisonment term of ten years (GD at [112]). An uplift of six months' imprisonment was applied for each of the sentences for the SAP offences (GD at [116]). As the appellant was above 50 years old at the time of sentencing, no caning could be imposed and 12 months' imprisonment in lieu of caning was ordered (GD at [120]).

39 For the SPOM offence, the Judge found that there was an element of abuse of trust and thus the starting point was a term of imprisonment of three years. An uplift of six months' imprisonment was then added to this.

40 The custodial sentences for the first and second of the SAP offences and the SPOM offence were ordered to run consecutively as they reflected different incidents. Nevertheless, considering the issue of proportionality, the sentences for the SAP offences were calibrated downwards to 10 years' imprisonment per charge, and the SPOM offence to three years' imprisonment (GD at [121]). Thus, the global sentence was calibrated to 23 years and 12 months' imprisonment in lieu of caning.

The Appeal

The appellant's case

41 We deal first with the appellant's appeal against his conviction in respect of the SAP offences.

42 The appellant's main contention is that the Victims had concocted an unrealistic and irrational narrative to falsely implicate him, and that their evidence should not be given weight.

43 He argues that V1 had lied to Mr AB about the circumstances surrounding the SAP offences. V1's narrative at trial was also unreliable as V1 could not remember several details pertaining to the SAP offences. Regarding V2 and V3, the appellant claims that they were not credible witnesses either and had lied on the stand about various things such as whether the appellant had harmed them. V3's evidence was also lacking. In essence, the appellant's arguments regarding the Victims' accusations were that the Judge erred in placing weight on the Victims' false testimony and that the Victims had colluded to falsely implicate him.

44 The appellant also claims that there was no DNA or body fluid evidence adduced to prove the Victims' allegations, and that such evidence was necessary for proving the SAP offences. The appellant's penis was also not erect at the time, and this, the appellant argues, meant that there could be no penetration. In relation to the Malay phrase that was uttered to the Victims, the appellant asserts that this was merely "street lingo" or slang that was taken out of context and the appellant did not seriously intend for the Victims to fellate him. The interpreter, Ms Maria, had made a mistake in translating the Malay phrase literally without understanding the slang.

45 Regarding the three long statements taken by IO Chai, the appellant disputes the admissibility of these statements. He claims that he was in an unstable state of mind during the statement-recording process as he was being harassed by illegal moneylenders. Also, IO Chai had manipulated the appellant's words when recording the statements to incriminate him. The appellant argues that Dr Yeo had made multiple errors in his psychiatric report and did not accurately capture what the appellant had told him.

The respondent's case (The Prosecution)

46 In response, the Prosecution submits that the Judge had correctly found that the appellant had penetrated the Victims' mouths with his penis. The appellant had admitted to the physical act constituting the SAP offences in his three long statements, and the Victims had provided credible accounts detailing the incidents. The appellant's allegations that the long statements were improperly recorded by IO Chai should be rejected as there was no basis to impugn the reliability of those statements. The Prosecution also submits that the offence of sexual assault by penetration would be made out even if the appellant's penis was not erect, or the penetration was very brief.

47 In relation to the appellant's allegations that there was collusion amongst the Victims to falsely implicate the appellant, the Prosecution asserts that the Judge correctly found that there was no such collusion. There was no evidence of any possible motive on the part of the Victims to falsely implicate the appellant, especially considering that the offences came to light entirely fortuitously.

48 The Prosecution submits that the Judge correctly found that the Victims did not truly consent to fellate the appellant. Prior to settling the problem, the appellant had undertaken a systematic browbeating of the Victims, such that none of them dared to decline the appellant's demands. The Prosecution rebuts the appellant's argument that he did not expect the Victims to take his words seriously when he uttered the Malay phrase, by emphasising that the appellant had unzipped his pants and repeated his demands.

The issues raised in this appeal

49 On the appeal against conviction we have to determine the following issues:

(a) Whether the Victims colluded to falsely implicate the appellant.

(b) The credibility of the Victims.

(c) Whether the physical component of the SAP offences (*ie*, the penetration) had been made out.

(d) Whether the three long statements recorded by IO Chai were admissible as evidence and accurate.

(e) What the appellant meant the Victims to understand when he uttered the Malay phrase.

(f) Whether the Victims consented to fellate the appellant.

Whether the Victims colluded to falsely implicate the appellant

50 Crucial to the appellant's defence on appeal (and at the trial) was his claim that the Victims had colluded to falsely implicate him. It is uncontroversial that it is for an accused to *first establish* that a complainant had a plausible motive to falsely implicate the accused and this is an objective inquiry (*AOF v Public Prosecutor* [2012] 3 SLR 34 ("*AOF v PP*") at [215] and [217]). If the accused does not discharge this evidential burden, then the burden does not shift to the Prosecution to disprove the fact of collusion beyond a reasonable doubt (*Goh Han Heng v Public Prosecutor* [2003] 4 SLR(R) 374 at [33]; *AOF v PP* at [217]). There must be sufficient evidence of such a motive and general assertions without more would not ordinarily suffice (*Public Prosecutor v GCK and another matter* [2020] 1 SLR 486 at [102]).

51 In *XP v Public Prosecutor* [2008] 4 SLR(R) 686 ("*XP v PP*"), seven students had lodged complaints against the water polo teacher-in-charge for charges of outrage of modesty. The court found (at [23]–[26], and [78]) that because the students, who were close friends, resented the teacher's harsh and disciplinarian training methods which involved frequent reprimands and open confrontation, there was a plausible motive for collusion.

52 In contrast, there is nothing in the present case which suggests that the Victims had any motive to falsely implicate the appellant. The appellant's relationship with the Victims prior to the alleged SAP offences was a cordial one and the Victims respected the appellant. The Victims saw the appellant as a close friend and thought of him as a "big brother". We agree with the Judge's view (GD at [67]) that the Victims bore no animosity towards the appellant and had simply sought to avoid him after hearing of the rumour. Therefore, there was an absence of a unifying motive amongst the Victims to falsely implicate the appellant (see *Lee Kwang Peng v Public Prosecutor and another appeal* [1997] 2 SLR(R) 569 at [104]).

53 More importantly the incident came to light in a way that demonstrated the absence of collusion. It was sheer happenstance that V1's class advisor, Mr AB, was observant enough to notice V1's changed demeanour during class which led to V1 being referred for counselling and then to the revelation of the incident. During the session with the school counsellor, it was observed that V1 had an anxious and fearful demeanour. It was the school that eventually made the police report. Notably, the Victims themselves did not take the initiative to lodge any complaint. Given that the SAP offences came to light by chance rather than by action taken by any of the Victims, it is unlikely that there was collusion.

54 There was also little opportunity for the Victims to collude and concoct a narrative given the swiftness with which the incident was uncovered. The alleged SAP offences occurred between the night of 17 October 2018 and the early hours of 18 October 2018. On the very same day, 18 October 2018, Mr AB asked V1 what had happened and then referred him to Mr CD. The SAP offences were then discovered during the counselling session with Mr CD on 22 October 2018.

55 It also bears noting that the SAP offences were a traumatic event for the Victims. Indeed, V2 and V3 had testified that they had not intended to bring up the matter and wanted to keep it to themselves. The Judge also noted (GD at [92]) that despite the lapse of time since the SAP offences, V1 "still appeared to be affected by having to recall the details of the incident" and there was a "palpable sense of revulsion and lingering shame".

56 In all the circumstances, it is highly unlikely that the Victims had any reason to falsely implicate the accused. The Judge was justified in finding that there was no collusion involved.

The credibility of the Victims' testimony

57 We now address the consistency of the accounts provided by the Victims at trial. Before doing so, we reiterate the principle that an appellate court has a limited role in an appeal against conviction. Where the findings of fact hinge on the trial judge's assessment of the credibility and veracity of witnesses, the appellate court will interfere only where such findings can be shown to be plainly wrong or against the weight of the evidence (*ADF v Public Prosecutor and another appeal* [2010] 1 SLR 874 at [16]).

58 The appellant argues that the Victims' testimony should not be believed as the Victims could not remember everything and were inconsistent on certain details pertaining to the SAP offences, such as the description of the appellant's penis, the Malay phrase that was uttered and the appellant's gangster past.

59 The Judge, upon examining the testimony of the Victims, noted that there were "some inconsistencies" in the narration of the details by the Victims, but the Judge found these to be inconsequential as they related to minor or peripheral aspects (GD at [58]). Importantly, the Judge did not find any material gaps or discrepancies in the Victims' accounts regarding the fact of penetration. Overall, each Victim was generally able to provide a coherent and internally consistent account of the material events which had occurred. In particular, the Victims were agreed on these material aspects: (a) the sequence in which the respective Victims met the appellant at the top of the slide to settle the problem concerning the rumour, (b) that the appellant had unzipped his pants and exposed his penis and (c) that the appellant had given them the "option" of settling the problem by fellating him. In our view, the Judge was correct to accept the evidence of the Victims given their consistency on material aspects of the case.

60 It is indeed true that the Victims were unable to remember certain details relating to the appellant's penis and underwear. However, we are of the view that details such as where the appellant's penis was pointing and the colour of the appellant's underwear were inconsequential. These were peripheral details that were immaterial to the elements of the SAP offences. What mattered instead was that all three Victims confirmed at trial that they had fellated the appellant pursuant to his demands.

61 Likewise, the fact that the Victims were not able to provide further details on the appellant's gangster past such as the names of the members of the appellant's gang, was immaterial. It does not matter whether the appellant's gangster past was fictional, embellished or factual as long as the Victims believed that the appellant would carry out his physical threats if they did not fellate him. Further, the appellant's own evidence clearly established that he had acted violently towards V1 and V3 before the acts complained about and thus had given them reason to believe that his threats were not mere posturing.

62 The other inconsistency worth addressing concerns the usage of the Malay phrase. In the appellant's third long statement, the appellant claimed that this phrase was "*Takde kau hisap aku punya, boleh tak?*". At trial, V1 could not remember the exact phrase used by the appellant, and gave another version of the phrase instead:

> Q: And the words "I have to suck his penis", you say they were in Malay. Do you remember what was the phrase that he used?
>
> A: I could not remember.
>
> …
>
> Q: What did I say in Malay?
>
> A: What do you say in Malay? "*Ini cara jahat*", you say that.
>
> …
>
> Court: Which means?
>
> Interpreter: "This is the bad way or the wrong way."

63 V2 was likewise unable to recall the specific Malay phrase being used, and gave another iteration of the phrase:

> Q: When I unzipped to flash at you, at the same time I said a slang in Malay. Did you remember what was the slang I said?

A: I don't remember.

…

A: I mean I do remember you were saying something.

Witness: Which is---may I say in Malay?

Court: You can say it, but I will need the interpreter to translate it.

A: You were saying, "*Ini cara---ini salah satu cara untuk bagi mulut korang diam.*"

…

Interpreter: This is one of the ways to make you keep quiet.

64 However, we do not deem it material that V1 and V2 were unable to repeat and recall the Malay phrase that was used by the appellant word-for-word and to the letter. This is because the Malay phrase (*ie*, "*Takde kau hisap aku punya, boleh tak?*") was the appellant's *own recollection* of the phrase that was uttered, and was not found in the statements provided by V1 or V2. For example, V1 stated *generally* in his statement that: "[the appellant] opened up his pants and he told me in Malay, and in an angry tone of voice, 'if you want to settle the problem, you have to suck my penis'". But this was done *without specifying* the phrase used by the appellant in Malay. Indeed, during trial, the Prosecution had questioned the appellant's asking V1 to explain the meaning of the Malay phrase (*ie*, "*Takde kau hisap aku punya, boleh tak?*") by referring to the appellant's long statement (instead of V1's own statement), when this did phrase simply did not originate from V1's statement. The inconsistency in the precise phraseology of the Malay phrase is immaterial so long as the *substance* of the allegation is consistent – that the appellant had asked the Victims to fellate him to resolve the problem concerning the rumour.

65 Further, it must be remembered that at the time of the trial, *ie*, April 2022, the Victims were testifying as to facts that had taken place almost three

and a half years earlier in October 2018. Minor inconsistencies in the Victims' testimony were understandable given the passage of time (see *Tay Wee Kiat and another v Public Prosecutor and another appeal* [2018] 4 SLR 1315 ("*Tay Wee Kiat*") at [44]). In our view, therefore, these inconsistencies do not undermine the Judge's decision to prefer the evidence of the Victims at trial.

Whether penetration had been made out

66 Part of the appellant's case against his conviction rests on the assertion that his penis was not erect when the SAP offences occurred. The appellant had also asserted in his long statements that whilst the Victims' mouths had "covered" his penis for a few seconds, there was no actual "sucking" of the penis.

67 To address this issue, we begin by setting out the applicable law on the offence of sexual assault by penetration. The relevant provision is s 376(1)(*a*) of the Penal Code, which provides:

> **Sexual assault by penetration**
>
> 376.—(1) Any man (A) who —
>
> (a) penetrates, with A's penis, the anus or mouth of another person (B); …
>
> shall be guilty of an offence if B did not consent to the penetration.

Thus, the only elements required to be proven for an offence under s 376(1)(*a*) of the Penal Code in the present context are: (a) the assailant penetrated the victim's mouth with his penis; and (b) the victim did not consent to the penetration.

68 Accordingly, in deciding whether an offence has been committed, the meaning of "penetrates" is key. This is not a difficult exercise. In its normal

usage, "penetrates" means to enter or go into or go through. That s 376(1)(*a*) uses "penetrates" in this normal way is indicated by the definition of "penetration" in s 377C(3)(*a*) of the Penal Code as being a "continuing act from entry to withdrawal". This definition of the duration of an act of penetration reinforces the usual understanding that "penetrates" refers to something going into something else and that is all. Legal authority also confirms this understanding. Albeit in a different context, it has been stated that so long as there is "entry of the tip" of a foreign object into the anus of the victim, then this would constitute penetration (see *Public Prosecutor v Terence Leong Yew Wei* [2014] SGDC 86 at [22]).

69 We note that the appellant was careful to caveat in his three long statements that whilst the Victims had put their "mouth[s] onto [his] penis" for a few seconds, there was actually "no sucking of [the appellant's] penis". However, it is irrelevant that the Victims had not "sucked" the appellant's penis. All that was necessary to disclose the commission of the SAP offences was proof that the appellant's penis entered into and withdrew from the Victims' mouths, even if this was done briefly. We agree with the Judge's observation (GD at [71]) that the appellant was attempting to downplay the nature and severity of the sexual acts (perhaps due to the mistaken belief that there must be "sucking" involved for the offence to be made out), but this is no more than a matter of semantics once the appellant had admitted in his three long statements that his penis was in the Victims' mouths.

70 Indeed, given the definition of "penetration" in s 377C(3)(*a*) of the Penal Code, it also cannot be the case that just because the appellant's penis was not erect during the alleged SAP offences there could not have been penetration. A flaccid penis would be able to enter and withdraw from the Victims' mouths as well. Whilst there is no direct authority bearing on this point, the case of *Public*

Prosecutor v Iryan bin Abdul Karim and others [2010] 2 SLR 15 ("*PP v Iryan*") touches tangentially on this issue. There, in relation to one of the accused persons, the victim had fellated the accused person for a few minutes, but the accused person was "unable to get an erection" as the victim was "a guy" (*PP v Iryan* at [33]). Despite this, the court saw no reason to reject the accused person's acceptance that he had "penetrated" the victim's mouth with his penis (*PP v Iryan* at [120]). It comports with common sense that it is not necessary for the penis to be erect for there to be successful penetration of the Victims' mouths within meaning of s 377C(3)(*a*) of the Penal Code.

71 We thus agree with the Judge's view (GD at [72]) that it is not a defence to criminal liability under s 376(1)(*a*) of the Penal Code to contend that the offender's penis was not erect during the alleged SAP offences.

72 The appellant also argues that there was no DNA evidence or body fluid evidence adduced at trial to prove the Victims' allegations for the SAP offences. The appellant contends that the Victims had purposely delayed the reporting the SAP offences to the police and, as a result of the late reporting, there was a lack of such evidence. We reject this submission.

73 First, this argument is irrelevant as there was no allegation in this case that there was any exchange of bodily fluids. The Victims accepted that the appellant did not ejaculate in their mouths after they fellated him. Hence, no such evidence could ever have been adduced and earlier reporting of the incidents would have had no effect on the available evidence.

74 Secondly, whilst evidence of DNA or semen will assist in making out the Prosecution's case for sexual offence cases, production of this kind of evidence is not a mandatory requirement for an offence to be made out (see

Stanley Yeo, Neil Morgan and Chan Wing Cheong, *Criminal Law in Singapore* (LexisNexis, 2022) ("*Criminal Law in Singapore*") at para 12.53, citing *Public Prosecutor v Murugesan* [2005] SGHC 160). Rather, DNA evidence often serves as evidence that corroborates the testimony of the victims regarding the sexual offence in question (see, *eg*, *Public Prosecutor v BND* [2019] SGHC 49 at [76], and *Public Prosecutor v Tan En Jie Norvan* [2022] SGHC 166 at [98]).

75 Therefore, the absence of DNA or bodily fluid evidence does not create a reasonable doubt that the appellant had penetrated the Victims' mouths with his penis.

Whether the three long statements recorded by IO Chai were admissible and accurate

76 The most critical pieces of evidence against the appellant were the three long statements recorded by IO Chai under s 22 of the CPC between 30 October 2018 and 31 October 2018. In these statements, the appellant described the same *modus operandi* as having been adopted by him with each of the Victims to settle the problem regarding the rumour – the Victims were asked to meet him individually at the top of the slide and he then gave each of them the "option" of settling the problem by sucking his penis. The appellant also accepted in all three long statements that the Victims had put their mouths over his penis.

77 The three long statements were of great probative value as they were textured, coherent and included details that only the appellant would be aware of. In relation to V3, the appellant was quite specific on the duration of the fellatio incident in stating that V3 had only "put his mouth onto [the appellant's] penis" for "about 2 seconds". This cohered with V3's own account in his statement where he stated that he fellated the appellant for "a few seconds". This was also consonant with the account provided by the appellant in relation to V2

where he stated that the act of fellatio lasted for "about 2 second[s]", and V2 also mentioned in his statement that the appellant's penis was in his mouth "for a short while" only. The level of congruence between the appellant's own statements and those of the Victims cannot have been a mere coincidence.

78 Taken as truthful accounts, the three long statements (recorded less than two weeks after the alleged SAP offences occurred on 18 October 2022) unequivocally demonstrated that the appellant had penetrated the Victims' mouths with his penis and that the appellant's belated attempts at trial (many years after the incident) to resile from the incriminating portions of these statements should be rejected as mere afterthoughts. We agree with the Judge's view that these statements were materially self-incriminating (GD at [70]), as to the commission of the SAP offences.

79 Given the highly probative value of the three long statements, it is crucial to carefully examine whether there were any issues in the statement-recording process as alleged by the appellant.

Inaccurate recording of statements

80 The appellant alleges that IO Chai had improperly recorded the three long statements by inserting her own words and changing the appellant's words to incriminate him, such as amending the words from "perform the act" to "sucking of penis". This allegation is made despite the appellant accepting that IO Chai read back all three long statements to him with the assistance of the Malay interpreter, Ms Maria, and that he voluntarily signed all the statements. We cannot accept the appellants' allegations.

81 It is readily apparent from a perusal of the statements, that the appellant had initiated multiple amendments to ensure the accuracy of the statements. A

brief survey of the extracts from these statements shows that there were multiple substantive amendments scattered all over which contained details that only the appellant would have known. Some of these amendments were quite pedantic. For example, the appellant had changed the phrase "put my penis into [V3's] mouth" to "[V3] put his mouth onto my penis", perhaps as an attempt to downplay the severity of the offence by showing that he did not actively force his penis into V3's mouth.

82 At trial, IO Chai testified that it was the appellant who "initiated the amendments". The statements were read back to the appellant in Malay by the interpreter, Ms Maria, and during this process the appellant pointed out the portions which he wanted to amend. Thereafter, the appellant countersigned against the amendments made. Given the great care that the appellant took in amending his three long statements so that they reflected what he was comfortable with, it is highly doubtful that the completed statements were inaccurately recorded.

83 In our view, the appellant's bare allegations that the statements were inaccurately recorded constituted a feeble attempt by the appellant to resile from the admissions he had made in the three long statements once he realised these were detrimental to his case. He put forward no basis for alleging that IO Chai had inserted her own words into his long statements to incriminate him.

Dr Yeo's psychiatric report corroborates the admissions in the three long statements

84 Dr Yeo's psychiatric report also corroborates the appellant's three long statements and suggests that they were accurately recorded. Dr Yeo's report was based on contemporaneous notes taken during interviews at which he was also assisted by a Malay interpreter. In the account provided by the appellant to

Dr Yeo on 26 and 31 August 2020, the appellant informed Dr Yeo that he had unzipped his pants and taken out his penis. The appellant admitted to doing so with the intention of humiliating the Victims, and asserted that he had stopped the Victims within seconds of his penis making contact with the Victims' mouths.

85 There was a phrase in quotation marks within Dr Yeo's report which stated: "[t]heir lips only touch the tip of [the appellant's] penis for one to two seconds, [V3], [V2], once touch, [the appellant] push them away. [V1] did two to three seconds or three to four seconds then [the appellant] push". During the trial, Dr Yeo confirmed that the words in quotation were the words of the appellant. Dr Yeo also clarified that the phrase "[V1] did two to three seconds or three to four seconds then I push" referred to the duration that V1 had fellated the appellant. These admissions, whilst not having the same evidential weight as a long statement obtained under the CPC, were also highly incriminating.

86 Notably, by the time the psychiatric interviews were conducted in August 2020, two years had elapsed since the alleged SAP offences had taken place. Even then, the appellant's own account of the incident remained *consistent throughout*. It is especially significant that he admitted that his penis had made contact with the Victims' mouths. This is corroborative of his guilt (even though he tried to downplay the incident by stating that the Victims' lips only "touch[ed]" the tip of his penis).

87 We agree with the Judge that the appellant's criticisms of Dr Yeo's report should be given short shrift (GD at [79]). The appellant's claim was that Dr Yeo's report should be disregarded as it was inaccurate and parts of it were fabricated. However, it is clear that the psychiatric report reproduced the contents of the contemporaneous notes of the interviews with the appellant and

there was nothing to suggest otherwise. We see no reason or motive for Dr Yeo to falsely implicate the appellant and affirm the Judge's view that the psychiatric report was objective and accurate. Dr Yeo's report was thus corroborative of the fact that the appellant had penetrated the mouths of the Victims and that the contents of the three long statements had not been fabricated by the police.

Unstable mental condition

88 Regarding the appellant's other allegation in relation to the statements, it is clear from the appellant's arguments that he is not alleging that there was any threat, inducement or promise made by the police when he gave his long statements. Rather, the appellant's contention is that the police should have refrained from taking his statements as he was labouring under immense stress due to the harassment he was facing from unlicensed moneylenders. It appears that the appellant is arguing that the three long statements can be challenged on the grounds of oppression.

89 In order for oppression to affect the admissibility of a statement, the appellant must show that he was in such a state such that his will was "sapped" and that he could not resist making a statement which he would otherwise not have made (see Explanation 1 to s 258(3) of the CPC). The threshold to be met is a high one. In *Public Prosecutor v Tan Boon Tat* [1990] 1 SLR(R) 287, where the voluntariness of the statement was in question, the accused was not given any food or drink from 3.30pm one afternoon to 1.00am the following morning. He was therefore very tired and hungry and was in a state of confusion when the statement was given. It was also accepted that the accused was labouring "under great stress", having regard to the fact that he was in custody and confronted with a charge of trafficking in a substantial quantity of controlled drugs. However, the objection to the statement was rejected. The court held that

the fact that the statement was made by an accused who was tired and hungry and stressed did not necessarily mean that he had no will to resist making any statement which he did not wish to make (at [31]).

90 Even in cases where the court finds that when the statement was given the accused was suffering from "acute stress disorder" (after examining the expert medical evidence), the court may well arrive at the finding that this did not affect the voluntariness of the statements made (see *Tey Tsun Hang v Public Prosecutor* [2014] 2 SLR 1189 at [165]). Instead, the key question is whether the individual being questioned was still lucid, could understand questions and could respond to them appropriately.

91 In our view, the high threshold for oppression leading to involuntariness is not met in this case. As canvassed above, it is apparent that the appellant was able to provide a clear, coherent and detailed account of what happened during the SAP offences. The appellant's statements were replete with his own amendments which cancelled and replaced certain portions of the three long statements. The appellant thus demonstrated the ability to think and communicate rationally indicating that the stress of being harassed by moneylenders did not overwhelm him.

92 Whilst the appellant claims in this appeal that he had informed the police about the threats being made by the unlicensed moneylenders when his statements were being recorded, this was not borne out by other evidence. At trial, IO Chai stated that the appellant never raised this issue with her:

> Q: Okay, Ma'am. I was shocked, Ma'am, during the arrested and from the threat of illegal loan shark that I mentioned to you. You remember about that? That my mother was alone at home.
>
> A: No.

Q: I never inform you?

A: No.

Similarly, Ms Maria, the Malay interpreter assisting with statement taking, also testified that she did not remember the appellant raising such an issue.

93 We agree with the Judge's finding that the appellant's assertion of being harassed by moneylenders was not properly substantiated (GD at [74]). There was only one police report filed by the appellant in relation to harassment by unlicensed moneylenders. That report was lodged on 23 November 2017, which was nearly *a year before* his arrest on 25 October 2018. The appellant had also changed his home telephone number sometime between December 2017 and January 2018, and thereafter, he did not receive further threats from the unlicensed moneylenders. There was insufficient evidence to support the appellant's claim that he was still being harassed at the time the three long statements were recorded.

94 Thus, the Judge rightly found the appellant's claim of being under immense stress to be "plainly unmeritorious" (GD at [73]). The three incriminating long statements recorded by IO Chai were correctly found to be admissible in evidence.

The Malay phrase

95 The appellant submits that the Malay phrase ("*Takde kau hisap aku punya, boleh tak?*") was merely slang uttered to chastise the Victims and was not a serious demand for fellatio. Instead, the phrase simply meant "kiss my ass" and was intended to make the Victims walk away. The Malay translation provided by Ms Maria in the process of recording the long statements was inaccurate because she did not understand street slang.

96 To clarify, the appellant accepted that translated *literally* the Malay phrase would amount to asking the Victims to suck his penis:

> Accused: Yes, that---the meaning is, "*Takde kau hisap aku punya, boleh tak*." In English, we can said, "**If not, you suck my penis**." **It's that**. But, Sir, but this is a slang, the way we talk on the street. It's not to call you to perform the act which is, in English, "If you want to settle the problem, you have to suck my penis." If we translate---translate this---
>
> [emphasis added in bold]

But the appellant argues that the Malay phrase should not have been taken literally as it was slang. We do not think that there is merit to this argument.

97 First, the appellant accepts that he did not challenge the translation rendered by Ms Maria during the statement-recording process and he only sought to do so belatedly during the trial many years later. In the appellant's third long statement, the appellant explained that the Malay phrase, when used in the context of settling the problem regarding the rumour, "translate[d] to 'if not you suck my one, can or not'", and "[s]uck my one means sucking [the appellant's] penis".

98 Secondly, the appellant did not produce any evidence to show why his translation should be preferred. As against this bare claim, Dr Yeo's psychiatric report also recorded the appellant telling the Victims in Malay to fellate him in order to settle the dispute over the rumour: "Can ah, if you want to apologize, suck my cock". Dr Yeo was assisted by a different Malay interpreter, not Ms Maria, but a similar translation of the Malay phrase was given.

99 Thirdly, the utterance of the Malay phrase by the appellant must be taken in context of the appellant's actions on the day of the SAP offences. Taking the appellant's case at his highest, (*ie*, that he merely wanted to chastise the Victims

and make them go away), there was absolutely no need for the appellant to unzip his pants and expose his penis to each of the Victims whilst uttering the Malay phrase. In our view, the Judge was correct in dismissing this "entirely disingenuous" argument by the appellant (GD at [64]).

100 Further, even if we assume that V2 had mistakenly fellated the appellant even though the appellant did not truly intend for this to happen, there was no need for the appellant to repeat the Malay phrase two more times and allow both V1 and V3 to also fellate him. The fact that this happened *not once but thrice*, speaks to the seriousness of the appellant's demand that the Victims had to suck his penis to settle their dispute. The Malay phrase was thus a serious demand for fellatio and not merely slang. This conclusion is strengthened when we also consider that the appellant had "raised [his] voice" at the Victims and that the appellant had threatened and assaulted the Victims.

Whether the Victims consented to fellate the appellant

101 Another plank of the appellant's case is that the Victims had genuinely consented to fellating the appellant to resolve the dispute concerning the rumour. The appellant also claims that he did not threaten to physically harm the Victims.

102 In order for the SAP offences to be made out under s 376(1)(*a*) of the Penal Code, it must also be shown that the Victims "did not consent to the penetration". We begin by setting out the law on consent.

The applicable law on consent

103 In the context of sexual offences, the decision of *Pram Nair* (at [93], citing *PP v Iryan* at [123]; see also, *Public Prosecutor v Chong Chee Boon*

Kenneth and other appeals [2021] 5 SLR 1434 at [39]) has explained that whether or not there was consent is a question of fact, and that the concept of consent encompasses the following:

> (a) voluntary participation on the part of the person at the receiving end of the conduct, after having exercised his/her intelligence, based on the knowledge of the significance and moral quality of the act;
>
> (b) agreement to submission while in free and unconstrained possession of his/her physical and moral power to act in a manner he/she wants;
>
> (c) the exercise of a free and untrammelled right to forbid or withhold what is being consented to; and
>
> (d) voluntary and conscious acceptance of what is proposed to be done by a person and concurred in by the person at the receiving end of the conduct.

104 There is a vital difference between submission and consent. A person may *submit* to sexual contact in the sense that they offer no physical resistance to the offender carrying out the act, but this does not mean that they necessarily *consented* to the act (*Criminal Law in Singapore* at para 12.68, citing *Augustine Foong Boo Jang v Public Prosecutor* [1990] 1 MLJ 225).

105 The Penal Code does not provide a positive definition of "consent". It assumes that the meaning is clear and instead refers to circumstances in which consent is vitiated (*Criminal Law in Singapore* at para 12.69). Section 90(*a*) of the Penal Code provides as such:

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

106 Thus, in the case of a person who submits to sexual penetration under the threat of "fear or injury" under s 90(*a*)(i) of the Penal Code, the person's consent would have been vitiated by the threat imposed – or more accurately put, the person never *truly* consented in the first place. Section 90(*a*)(i) of the Penal Code also provides that there is no consent if an offender knew or had reason to believe that the consent was given under fear of injury. The phrase "reason to believe" invokes an objective imposition on the offender (*Criminal Law in Singapore* at para 19.21). Offenders will be denied the defence if the court determines that they ought to have known that the victim consented through fear of injury, *even if they did not actually know this* (see *PP v Iryan* at [125]).

107 In relation to the phrase "fear of injury", s 44 of the Penal Code states that "injury" denotes any harm whatever illegally caused to any person, in body, mind, reputation or property. This broad definition of "injury" is wide enough to cover non-physical threats as well (*PP v Iryan* at [125]). Notably, s 90(*a*)(i) of the Penal Code also covers circumstances where the victim feared injury to "some other person".

108 Having set out the applicable law, we now address the issue of whether the Victims had consented to fellating the appellant.

Whether the Victims gave real consent

109 The appellant's threats and violent acts before the alleged SAP offences occurred may be summarised as follows:

(a) During the first meeting on 17 October 2018, the appellant:

(i) Threatened to "potong" (a Malay word meaning "cut" in English) V1 if he did not come to meet the appellant.

(ii) Slapped V1's face to make him reveal who was spreading the rumour.

(iii) Sent V2 and V3 a series of WhatsApp messages with vulgarities directed towards them.

(iv) Slapped V3's face and threatened to harm V3's family members.

(b) At the second meeting on 18 October 2018, the appellant:

(i) Directed vulgarities at the Victims.

(ii) Threatened to hit the Victims' head with an empty beer bottle that the appellant was waving around.

(iii) Kicked V2 on his back as the appellant was angry.

(iv) Slapped V3, causing his spectacles to fall from his face, and attempted to scratch V3's eyes.

(v) Threatened the Victims by saying that if they did not settle the problem by sucking his penis the appellant would "do something" to them in public or trash their homes.

110 As may be observed, in the lead-up to the Victims settling the problem with the appellant by fellating him, the appellant had issued various threats and had displayed a propensity for violence by assaulting the Victims. The evidence showed that the Victims had given in to the appellant's demands to fellate him "under fear of injury" as set out in s 90(*a*)(i) of the Penal Code. The appellant was an aggressive individual, and the Victims had no reason to doubt that he was serious about his threats. V3 explained at trial that he was afraid of the appellant's threats: "walking away is not a good idea because what if [the appellant] really were to bash me outside or … ask [V2] or [V1] or [V4], either one of them for my house address. So, I think, okay, let's settle this problem …".

111 Even though the appellant asserts that he had given the Victims a "choice" to fellate him as a means of settlement, as rightly noted by the Judge, this was but a "Hobson's choice" (GD at [89]). The Victims only fellated the appellant out of fear and their desire for the physical assaults to stop. The present case has similarities with the case of *PP v Iryan* (at [127]–[128]). There, the victim was also presented with a "choice" to fellate the accused persons, after the accused persons had already inflicted physical harm on the victim and threatened to beat him further. The court held that a person who has been "effectively forced to choose by being presented with two alternatives not of his making and neither of which he is legally bound to do can hardly be said to have given his consent willingly" (*PP v Iryan* at [128]). In the present case, whilst the Victims may have submitted to fellating the accused in the sense of not

offering resistance to his demands, this was not an exercise of free will as they were coerced into doing so by the appellant's threats.

112 In this connection, the appellant argues that it is untrue that he had a gangster past, and thus there was no reason for the Victims to fear that he would carry out his threats. But, even if the appellant was not a gangster, his aggressive behaviour was sufficient to induce fear in the Victims.

113 Further, the appellant knew that the Victims were in fear of injury when they fellated him. The appellant recounted to Dr Yeo that he wanted to humiliate the victims as he felt that he had been wronged by them. The appellant also admitted unequivocally in his three long statements that he had intimidated, threatened and assaulted the three Victims out of anger. It seems that the appellant was driven by indignation and the desire to get revenge on the Victims for spreading the rumour. The appellant must have known that the Victims had only consented due to fear of injury. Thus, the appellant cannot in good faith rely on any defence of mistaken belief that the Victims had elected out of their own free will to perform fellatio on him.

114 Like the Judge, we are satisfied that the Victims did not give genuine consent to the acts of fellatio, and the legal elements required to prove an offence under s 376(1)(*a*) of the Penal Code are satisfied. The appellant's convictions for the SAP offences must be upheld.

The appropriate sentences

115 We now consider the issue of sentencing. The sentencing framework for offences of sexual assault by penetration was established in *Pram Nair* (at [159]), which was a case concerning digital-vaginal penetration. This framework was re-affirmed in *BPH v Public Prosecutor and another appeal*

[2019] 2 SLR 764 ("*BPH v PP*") at [55] and extended to cover all forms of sexual assault by penetration under s 376 of the Penal Code.

116 In applying this framework to the SAP offences, the court must first identify the number of offence-specific aggravating factors in the case. Next, based on the number and intensity of aggravating factors, the court determines which sentencing band the case falls under. Thereafter, the court must identify where within the sentencing band the case falls to derive the indicative starting sentence. Finally, the court adjusts the indicative sentence to reflect the presence of any offender-specific aggravating factors and mitigating factors.

117 The applicable sentencing bands are as follows (*BPH v PP* at [41]):

Band	**Aggravating factors**	**Indicative starting sentence**
1	Cases with no or limited offence-specific aggravating factors	Seven to 10 years' imprisonment and four strokes of the cane
2	Cases involving two or more offence-specific aggravating factors	10 to 15 years' imprisonment and eight strokes of the cane
3	The most serious cases by reason of the number and intensity of aggravating factors	15 to 20 years' imprisonment and 12 strokes of the cane

118 Some examples of offence-specific aggravating factors are: abuse of position and breach of trust, premeditation, violence, sexual assault of a vulnerable victim, severe harm to the victim, and deliberate infliction of special trauma (see *Pram Nair* at [120]).

119 The Judge found that there were three offence-specific aggravating factors which applied in this case (GD at [110]). The first aggravating factor was that the appellant abused his position of trust and authority over the Victims as the Victims looked up to the appellant as a "big brother" and respected him. Second, the Victims were young and vulnerable as they were teenagers aged between 16 and 17 years old at the time of the SAP offences. Third, the appellant verbally intimidated the Victims and inflicted physical violence on them.

120 We agree with the Judge that there was violence involved as it is evident the appellant assaulted the Victims multiple times. However, we disagree that there was an abuse of trust or authority by the appellant and that the Victims were vulnerable. As such, there was only one offence-specific aggravating factor at play in this case.

121 First, regarding the point on abuse of trust and authority, this factor encompasses a situation where the offender is in a position of responsibility in relation to the victim (*eg*, parents and their children, medical practitioners and patients, teachers and pupils), or where the offender is a person in whom the victim has placed her trust by virtue of the office of employment (*eg*, a policeman or social worker) (*Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 ("*Terence Ng*") at [44(b)]).

122 Whilst the Victims thought of the appellant as a "big brother" and sought his assistance in order to leave their gang, that did not mean that the appellant was necessarily in a position of responsibility in relation to the Victims. It was clear that the Victims respected the appellant, seeing him as an experienced adult who could help them leave the gang. But the relationship between the appellant and the Victims was different from that found in the familial context where a clear hierarchy exists between family members. Nor can it be said that

the appellant was standing in a quasi-parental position to the Victims (see, *eg*, *BPH v PP* at [67] at [92]). The Victims and the appellant shared a close friendship prior to the SAP offences but none of them had any responsibility towards the others. Hence, the offence-specific aggravating factor of abuse of trust and authority was not present in this case.

123 Second, on the issue of vulnerability of the Victims, as was held in *Terence Ng* (at [44(e)]), a victim may be vulnerable because of age, physical frailty, mental impairment or disorder, or learning disability. The key feature of this aggravating factor is that its existence makes it easier for the offender to commit the offence against the victim (see *Pram Nair* at [126]). In relation to age specifically, the younger the individual the more vulnerable he or she will likely be found to be (*AQW v Public Prosecutor* [2015] 4 SLR 150 ("*AQW v PP*") at [16]).

124 The Prosecution submits that the Victims were vulnerable by virtue of their ages, being between 16 and 17 years old at the time of the SAP offences. According to the Prosecution, the Victims' vulnerability was also demonstrated by how the Victims were quick to give in to the appellant's demands. On the other hand, the appellant argues that the Victims were not vulnerable as they regularly mixed with gangsters and caused trouble in their neighbourhood.

125 In our view, the Victims could not be considered as vulnerable persons. As observed in *AQW v PP* (at [27]) (albeit in the context of s 376A(2) of the Penal Code), the courts should be careful not to impose excessive punishments on offenders "in situations where the minor is not particularly vulnerable, as where he or she is *not far off from 16 years of age* and manifests no physical, psychological, intellectual or other sub-normality" [emphasis added]. The Victims here were not particularly young teenagers, being in their later teenaged

years, and none of them was subject to any disabilities that would render them more vulnerable.

126 Vulnerability must be assessed by considering personal circumstances such as whether the victims were helpless as they had run away from home (see *Public Prosecutor v Isham bin Kayubi* [2020] SGHC 44 at [103(a)]) or whether the victims had emotional problems (*AQW v PP* at [17]). There were no such issues confronting the Victims here. Also, given that the Victims had interacted with gangsters previously, they were not so innocent or naïve such that they were susceptible to exploitation by the appellant. The fact that the Victims were quick to comply with the appellant's demands did not necessarily demonstrate vulnerability. Instead, the Victims were afraid of the appellant and believed that he would carry out his threats. In other words, the Victims acted out of fear and not because they were especially vulnerable *per se*. Therefore, the offence-specific aggravating factor of vulnerability is not relevant here.

127 Given that there is only one offence-specific aggravating factor present in this case, the indicative starting sentence for the SAP offences fell into Band 1. We hold that the appropriate sentence for the SAP offences falls somewhere in the middle of this sentencing band, bearing in mind the seriousness of the offending acts and that violence was involved. This would be eight years' imprisonment and four strokes of the cane for each of the SAP offences.

128 Next, the court should have regard to the aggravating and mitigating factors which are personal to the offender to calibrate the appropriate sentence for that offender (*BPH v PP* at [40]).

129 The Judge was of the view that the conduct of the appellant at trial was an aggravating factor that warranted a further uplift from the indicative starting point (GD at [113]). The appellant had made sweeping personal attacks on the characters and credibility of the Victims after putting them through the ordeal of recounting the events at trial, and also alleged that the Prosecution witnesses, such as IO Chai, had falsely implicated him. We agree with the Judge. The appellant's attempts to raise such unfounded claims and scandalous allegations indicated a lack of remorse (*Tay Wee Kiat* at [73(g)]; *Terence Ng* at [64(c)]). Further, the appellant cannot be considered as a first-time offender as he had other sexual offence charges taken into consideration for sentencing and this also warranted the uplift (*Tay Wee Kiat* at [73(f)]).

130 The Judge correctly rejected the appellant's plea in mitigation that he was the sole breadwinner of the family and had to take care of his elderly mother (GD at [114]). Unfortunate as it is, the impact on livelihood and hardship to the family caused by the imposition of a sentence should be given little weight unless there are exceptional circumstances (*CCG v Public Prosecutor* [2022] SGCA 19 at [6]).

131 Therefore, we agree with the Judge that applying an uplift of six months' imprisonment for each of the SAP offences was justifiable (GD at [116]). This would result in a sentence of eight and a half years' imprisonment and four strokes of the cane for each of the SAP offences.

132 Given that the appellant was above the age of 50 years at the point of sentencing and could not be subjected to caning, it was also appropriate to impose two months' imprisonment in lieu of the four strokes of the cane under s 325(2) of the CPC for each of the SAP offences according to indicative guidelines (*Amin bin Abdullah v Public Prosecutor* [2017] 5 SLR 904 at [90]).

After taking this into account, the sentence for each of the SAP offences would be eight years and eight months' imprisonment.

133 We turn next to address the SPOM offence concerning V4, to which the appellant had pleaded guilty. The Judge found (GD at [117]) that there was also an element of abuse of trust involved here given the friendship that the appellant had with V4. The Judge then went on to apply the starting sentence of three years in *Public Prosecutor v BAB* [2017] 1 SLR 292 for cases involving an abuse of trust. As we have explained above, such a friendly relationship does not entail the appellant being in a position of responsibility over V4, and thus abuse of trust is not relevant. We therefore disagree with the Judge and would not take this factor into account.

134 Instead, the appropriate starting point under s 376A of the Penal Code is a sentence of between ten months and 12 months' imprisonment where there was no element of abuse of trust, where the sexual act was fellatio and where the minor is 14 years old and above (V4 was 15 years old at the relevant time), *etc* (see *AQW v PP* at [41]). Considering that there were five other charges taken into consideration, we hold that a sentence of 14 months' imprisonment would be appropriate given the appellant's propensity for sexual offences.

The one-transaction rule and the totality principle

135 Under s 307(1) of the CPC, where a person is sentenced to imprisonment for at least three distinct offences, the court must order the sentences for at least two of the offences to run consecutively. In *Mohamed Shouffee Bin Adam v Public Prosecutor* [2014] 2 SLR 998 ("*Shouffee v PP*") (at [45]), the court laid down the framework to arrive at an aggregate sentence for an offender who faced multiple charges. The court must first determine which sentences are to

run consecutively, taking into account the one-transaction rule (*ie*, offences that form part of a single transaction should not run consecutively). The question of whether the various offences form part of a single transaction depends on whether they entailed a single invasion of the same legally protected interest.

136 The SAP offences committed against V1, V2 and V3 violated different legally protected interests as they concerned the bodily integrity of three separate individuals. It is permissible to run all three of the sentences for the SAP offences consecutively, but this would likely be too crushing a sentence and would fall foul of the totality principle (see *Shouffee v PP* at [47]–[48] and [57]). Hence only two of the sentences for the SAP offences should be ordered to run consecutively (*ie*, TRC-900349-2018 and TRC-900544-2019). However, it is also appropriate to run the sentence for the SPOM offence (*ie*, TRC-900548-2019) consecutively since it involved an unrelated incident, a different victim (*ie,* V4) and a different factual matrix. We also find it adequate to order four months' imprisonment overall in lieu of the 12 strokes of caning and find this enhancement to be sufficiently deterrent given the length of imprisonment term carried by the offences.

137 Thus adjusted, the global sentence imposed on the appellant will total 18 years and 6 months' imprisonment. In our view, this is a sufficiently deterrent sentence corresponding to the overall criminality demonstrated by the appellant, and it is not disproportionate or crushing on the appellant.

Conclusion

138 For the foregoing reasons, whilst the appellant has not shown that his conviction on the SAP offences should be overturned, we hold that the global sentence imposed should be calibrated downwards to 18 years and 6 months'

imprisonment, backdated to commence from 25 October 2018. We therefore dismiss the appeal against conviction but allow the appeal against sentence to the extent stated.

Judith Prakash
Justice of the Court of Appeal

Tay Yong Kwang
Justice of the Court of Appeal

Belinda Ang Saw Ean
Justice of the Court of Appeal

The appellant (in person);
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