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

[2023] SGHC 313

Criminal Case No 52 of 2022

Between

Public Prosecutor

… *Prosecution*

And

Jeffrey Pe

… *Defendant*

GROUNDS OF DECISION

[Criminal Procedure and Sentencing — Statements — Voluntariness]
[Criminal Law — Offences — Sexual offences]

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Public Prosecutor
v
Jeffrey Pe

[2023] SGHC 313

General Division of the High Court — Criminal Case No 52 of 2022
Mavis Chionh Sze Chyi J
21–23, 27–30 September, 28–29 November 2022, 18 April, 3 July 2023

31 October 2023

Mavis Chionh Sze Chyi J:

Introduction

1 The accused, Jeffrey Pe ("the Accused"), claimed trial to the following two (2) charges of sexual assault by penetration under s 376(1)(*b*) of the Penal Code (Cap 224, 2008 Rev Ed) ("PC"), and one (1) charge of sexual assault by penetration under s 376(2)(*a*) of the PC.

> 1st charge
>
> That you, JEFFREY PE, on 9 August 2017, sometime between 4.02 a.m. and 5.43 a.m. (on the first occasion), at 27 Jalan Jintan #07-29, Singapore, did cause [the Complainant], a male then aged 20 years old, to penetrate your mouth with his penis without his consent and you have thereby committed an offence under section 376(1)(*b*) punishable under section 376(3) of the Penal Code (Cap 224, 2008 Rev Ed).
>
> 2nd charge

> That you, JEFFREY PE, on 9 August 2017, sometime between 4.02 a.m. and 5.43 a.m., at 27 Jalan Jintan #07-29, Singapore, did penetrate with your finger the anus of [the Complainant], a male then aged 20 years old, without his consent and you have thereby committed an offence under section 376(2)(*a*) punishable under section 376(3) of the Penal Code (Cap 224, 2008 Rev Ed). ("2nd Charge")
>
> 3rd charge
>
> That you, JEFFREY PE, on 9 August 2017, sometime between 4.02 a.m. and 5.43 a.m. (on the second occasion), at 27 Jalan Jintan #07-29, Singapore, did cause [the Complainant], a male then aged 20 years old, to penetrate your mouth with his penis without his consent and you have thereby committed an offence under section 376(1)(*b*) punishable under section 376(3) of the Penal Code (Cap 224, 2008 Rev Ed). ("3rd Charge")

2 In respect of all three charges, the alleged victim was "S" ("the Complainant"), a male youth who was 20 years of age at the time of the alleged offences.

3 The Prosecution's case was that the Complainant had never consented to any sexual activity with the Accused; and that in any event, any purported consent would have been vitiated, pursuant to s 90(*b*) of the PC, by reason of the Complainant's state of intoxication at the material time. Further, contrary to the Accused's contention, the Complainant had never represented to the Accused that he was interested in "exploring his sexuality" or that he was sexually interested in the Accused; and there was therefore also no room for the Accused to make any claim of mistake as to the Complainant's consent under s 79 of the PC.

4 The Accused's case, on the other hand, was that the Complainant had spoken about wishing to "explore his sexuality"; that the Complainant had shown romantic – or at least sexual – interest in him (the Accused); that he had reciprocated the Complainant's interest; and that the sexual acts referred to in

the three charges had all been performed by him on the Complainant with the latter's consent.

5 Following a nine-day trial, I convicted the Accused of the two charges of sexual assault by penetration under s 376(1)(*b*) of the PC and one charge of sexual assault by penetration under s 376(2)(*a*) of the PC. The Accused was sentenced to a global sentence of ten years' imprisonment and 12 strokes of the cane. As he has appealed against both the conviction and the sentence, I set out below the reasons for my decision.

The undisputed facts

6 The following facts were not in dispute.

The parties

7 The Accused is Jeffrey Pe, a 45-year-old man. He was born in the Philippines and moved to Singapore sometime in 2008. He has been living and working in Singapore since then.

8 The Complainant, "S", is a citizen of the United Kingdom ("UK") and a permanent resident of Singapore. He was living with his father in Singapore and had just completed his National Service at the time of the alleged offences.

Background

9 On 23 July 2017, when the then 20-year-old Complainant was out at a pub called "Hero's" in the Boat Quay area, he met the Accused by chance. They chatted with each other and with some other persons who were then also at Hero's pub, including a young woman known as "Francesca". The Accused invited the Complainant and Francesca to his birthday party, which was

scheduled for the night of 29 July 2017. The Accused and the Complainant exchanged telephone numbers in order for the former to send the latter the online link for the invitation to the birthday party. After the Accused sent the link via WhatsApp, he and the Complainant also exchanged a number of WhatsApp and Snapchat messages between 23 July 2017 and 29 July 2017, in which they chatted *inter alia* about their social activities and about the Accused's upcoming birthday party.[1]

10 The Accused's birthday party was held at three separate, successive locations: first, at a restaurant called The Mustard Incident on the evening of 29 July 2017; second, at a bar called Drinks & Co later in the evening of 29 July 2017; and finally at a different bar called the Skyline Club in the early hours of 30 July 2017.[2] On 29 July 2017, the Complainant attended the party then taking place at Drinks & Co before leaving to meet his own friends [3]. Shortly after midnight on 30 July 2017, the Complainant texted the Accused to ask if he could bring two or three friends along with him to the Skyline Club.[4] Upon the Accused agreeing to his request, the Complainant turned up at the Skyline Club with three of his friends. The Complainant bought the Accused a drink at the Skyline Club and wished him a happy birthday.[5]

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1 Agreed Statement of Facts ("ASOF") at para 6; Exhibit P45 and P46.

2 Exhibit P47.

3 Transcript of 21 September 2022 at p 33 ln 18 to p 34 ln 30.

4 Exhibit P46-7; Transcript of 21 September 2022 at p 37 ln 1 to ln 24.

5 ASOF at para 7; Transcript of 21 September 2022 at p 40 ln 23 to p 41 ln 5.

11 Between 30 July 2017 and 5 August 2017, the Accused and the Complainant chatted about their social activities via WhatsApp and Snapchat from time to time.[6]

12 On 6 August 2017, the Complainant accepted the Accused's invitation to have drinks at his home. However, no meeting materialised that night as the Accused fell asleep before the Complainant's arrival. The Complainant and the Accused later agreed to catch up for drinks on 8 August 2017.[7]

Night of the incident

13 On 8 August 2017, the Complainant met up with the Accused at about 10.00pm at Chinatown MRT station, after which they proceeded to have alcoholic drinks at various pubs and bars.[8] On 9 August 2017, at around 3.00am, the Complainant and the Accused took a taxi to the Condominium. On arrival, they went up to the Accused's apartment within the Condominium (the "Accused's Apartment"). The Accused made the Complainant an alcoholic drink consisting of Whiskey and Coke, which the Complainant consumed while sitting down on the floor in the Accused's room.[9]

The sexual acts

14 At trial, the precise content of the sexual activity which subsequently occurred, as well as the Complainant's state of consciousness at the material time, were matters of dispute between the Prosecution and the Defence. What

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6 Exhibit P46-7 to P46-8; Exhibit P45-1.

7 Exhibit P45-1 to P45-2; Exhibit P46-6 to P46-17.

8 ASOF at para 9.

9 ASOF at para 10; Transcript of 21 September 2022 at p 79 ln 1 to p 81 ln 21, p 86 ln 13 to ln 28.

was not disputed was that sometime between 4.02am and 5.43am, the Accused fellated the Complainant. While the Accused was fellating the Complainant, the Complainant got up and went to the toilet next to the Accused's room. The Complainant then left the Accused's Apartment and used his mobile phone to call his friend Tan Sian Sou Zen ("Zen"). The Complainant subsequently called the Police.[10]

First Information Report and the Accused's arrest

15 The Complainant's phone call to the Police on 9 August 2017 at about 5.47am constituted the first information report. In that phone call, the Complainant stated *inter alia*: "A guy just tried to rape me. I have known him for a few weeks, he was very intoxicated. He is at home right now". He stated at first that he was on "Nutmeg Road" but eventually gave the Police the address as 27 Jalan Jintan, Kim Sia Court.[11]

16 On 9 August 2017 at about 10.30am, the Accused was arrested in the Accused's Apartment for the offence of Sexual Assault by Penetration.[12]

The evidence adduced

17 I outline below the major pieces of evidence adduced at trial by both sides.

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10 ASOF at para 11.

11 ASOF at para 5; Exhibit P13-1A.

12 ASOF at para 12.

Key witnesses called by the Prosecution

S ("Complainant")

(1) First meeting with Accused on 23 July 2017 ("First Meeting")

18 The Complainant testified that he first met the Accused at Hero's pub on 23 July 2017. On that night, the Complainant had been chatting and dancing with Francesca, whom he had just met and whom he was interested in getting to know better. Francesca was subsequently approached by a group of three men, including the Accused who invited both the Complainant and Francesca to his birthday party after chatting with them.[13]

19 The Complainant recalled having a conversation with the Accused at Hero's Pub which lasted for about 15 minutes[14]. The Complainant and the Accused both got Francesca's telephone number that night[15] and also exchanged telephone numbers with each other.[16] While the Complainant could not remember the details of his conversation with the Accused, he was able to say that they had talked about how it was "nice connecting to new people and how it's nice to meet people on a night out". He also recalled telling the Accused that it was "quite refreshing to meet these new connections and interact with new people as this is a good way to get to know people and potentially get a job one day with these connections".[17] At that point in time, the Complainant was about to complete his National Service and intended to take up a course of study at a university in the UK.

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13 Transcript of 21 September 2022 p 15 ln 8 to p16 ln 3.

14 Transcript of 21 September 2022 p 18 ln 4 to ln 17.

15 Transcript of 21 September 2022 p 18 ln 18 to ln 25.

16 Transcript of 21 September 2022 p 18 ln 1 to ln 3.

17 Transcript of 21 September 2022 p 18 ln 4 to ln 12.

(2) WhatsApp messages between the Complainant and the Accused between the First Meeting and the second meeting at the Accused's birthday party ("Second Meeting")

20 Evidence was led from the Complainant as to the contents of his subsequent communications with the Accused via WhatsApp. By way of explanation, the Complainant testified that he had used an iOS software called "Amazing" to obtain a record of his WhatsApp conversation history with the Accused. Although the Complainant no longer had an iPhone, he still retained his iPhone backups and was able to view them on the "Amazing" software. The Complainant obtained the screenshots of the messages a "couple of weeks" before the trial.[18]

21 A perusal of the WhatsApp conversation history between 23 July 2017 and 29 July 2017 showed that the Complainant and the Accused had a total of five WhatsApp conversations during this period. These conversations generally related to their respective social activities, the Accused's plans for his birthday celebrations on 29 July 2017, and the Complainant's efforts to try to get to know Francesca better.[19] On 23 July 2017, the Accused shared a photo of himself embracing a female "friend of a friend" and talked about how he had been "so smashed" the night before, among other things.[20] On 29 July 2017, the Accused reminded the Complainant about his birthday party; the Complainant replied that he would stop by Drinks & Co, but did not think he would be able to make it to the third stop for the birthday party (*ie*, Skyline Bar).[21]

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18 Transcript of 21 September 2022 p 19 ln 12 to ln 29; Exhibit P46.

19 Transcript of 21 September 2022 p 22 ln 11 to p 27 ln 9; Exhibit P46-1 to P46-6.

20 Exhibit P 46-4.

21 Transcript of 21 September 2022 p 31 ln 22 to p 33 ln 11; Exhibit P46-6.

(3) Second Meeting

22 On the night of 29 July 2017, the Complainant attended the Accused's birthday celebrations at Drinks & Co where he stayed for about half an hour before leaving to meet his own friends at Hero's pub for more drinks.[22]

23 At 12.48am on 30 July 2017, the Complainant messaged the Accused to ask if he could bring two to three friends to the Skyline Club. The Complainant did so as he was aware that there would be free entry to the club as part of the Accused's birthday celebrations there; and the Complainant thought that it would make for a good night out with his friends.[23] At Skyline Club, the Complainant bought the Accused a drink and wished him a happy birthday. Subsequently, the Accused's friends left in order to escort a drunk friend home. The Complainant became upset after seeing his former girlfriend at Skyline Club and having a conversation with her. He then left the club and made his way home on foot.[24]

(4) Interaction between the Complainant and the Accused between the Second Meeting and the night of 8 August 2017 ("Third Meeting")

24 Between 30 July 2017 and 8 August 2017, the Complainant and the Accused continued to chat from time to time via both WhatsApp and Snapchat, about topics such as the Accused's birthday party and their respective social activities. The Complainant explained that the Snapchat application allowed the taking and sending of photos and videos which would subsequently disappear. The Snapchat messages themselves had remained in the chat because the

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22 Transcript of 21 September 2022 p 36 ln 22 to p 37 ln 2.

23 Transcript of 21 September 2022 at p 37 ln 1 to ln 15.

24 Transcript of 21 September 2022 p 38 ln 17 to p 41 ln 5.

Complainant saved all his messages and communications on Snapchat. According to the Complainant, the images of his Snapchat conversations with the Accused were taken from a backup copy that he had retrieved: the photos of these Snapchat conversations which were exhibited in court had been taken by him using another phone.[25]

25 In respect of the events of 6 August 2017, the Complainant testified that prior to messaging the Accused, he had been out drinking with some friends. As he wanted to continue drinking when his friends went home, he texted the Accused to ask if the latter was out. The Accused replied saying that he had just gotten home, and invited the Complainant to come over to his home for drinks.[26] The Accused, who was then staying at 27 Jalan Jintan (the "Condominium"), sent the Complainant the address via WhatsApp.[27] The Complainant also clarified that shortly after accepting the invitation, he had messaged the Accused to say he was feeling "down" and did not want to go to the Accused's house to drink – but as he managed to get a taxi at the same time, he deleted those messages and instead sent a message to say he was coming over.[28]

26 The Complainant went to the Condominium sometime after 2.00am on 6 August 2017, but did not manage to meet the Accused, who had fallen asleep before his arrival.[29] Shortly thereafter, the Accused texted the Complainant on the early morning of 6 August 2017 to apologise. Sometime later in the same WhatsApp thread on 6 August 2017, the Accused also stated that he wanted to

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25 Transcript of 21 September 2022 p 42 ln 2 to p 43 ln 24.

26 Exhibit P45-1 to P 45-2.

27 Exhibit P46-8 to P46-10.

28 Transcript of 21 September 2022 p 49 ln 17 to p 49 ln 28.

29 Transcript of 21 September 2022 at p 52 ln 18 to p 53 ln 22.

"make it up to" the Complainant and sought to invite the latter to drinks at his place that day. The Complainant declined the invitation, and they chatted about their sporting activities before making tentative plans to catch up for drinks on 8 August 2017.[30] In a Snapchat message sent to the Complainant on 7 August 2017, the Accused suggested that they should "do clubbing" first, "then… finish off getting wasted [*ie* drunk] at [his] place".[31]

(5) Third Meeting

27 On 8 August 2017, the Complainant met up with the Accused at Chinatown MRT at about 10.00pm, following which they visited a number of pubs and bars – Lime Bar, HQ, 1-Altitude, Café Iguana and Sticky Fingers – to imbibe alcoholic drinks. The Complainant testified that along the way, they chatted about various topics such as their respective families; he himself also talked about his former girlfriend. At Sticky Fingers, they met up with his friends from school, and he chatted with these friends about the army as they were two years younger than him and had not yet completed National Service.[32]

28 The last nightspot which the Complainant and the Accused visited in the early hours of 9 August 2017 was Hero's pub. After leaving Hero's pub, the Complainant and the Accused took a Grab taxi back to the Accused's home at the Condominium, to continue drinking. According to the Complainant, he was "very drunk" by then; and he only realised later that they had taken a Grab taxi when he found the Grab receipt on his phone. He did recall that it was in the taxi on the way to the Condominium that they spoke about him "crashing" at

30 Exhibit P46-15 to P46-17.

31 Exhibit P45-2 to P45-4.

32 Transcript of 21 September 2022 at p 68 ln 28 to p 70 ln 7.

the Accused's home "because the plan was to continue drinking and it was quite far away" from his own home.[33]

29 At the Condominium, the Complainant did not remember how he got to the Accused's apartment: he could only remember following the latter into the lift. The next thing he then remembered was going into the Accused's "very small, very compact" room[34] and sitting on the floor.[35]

30 While they were in the room, the Accused gave the Complainant an alcoholic drink which he had made. The Complainant found the drink "quite strong", "stronger than what [he was] used to", and thought that it "might have been whiskey or something similar".[36] Thereafter, the Complainant remembered lying flat on his back on the floor and saying that he was going to sleep there. According to the Complainant, this was in line with the initial plan for him to sleep over, since his home in Upper Bukit Timah was "quite far away", and he often stayed over at the homes of friends who lived closer to town.[37]

31 The Complainant remembered that the Accused kept asking him if he wanted to change into some pyjamas. The Complainant declined and remarked that he was going to "just wear [his] own clothes" and "just going to sleep… just going to sleep here". He remembered "just feeling quite tired and then eventually falling asleep". At this point in time, he was wearing a shirt and "skinny" jeans with a belt and a pair of briefs beneath his jeans.[38]

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33 Transcript of 22 September 2022 at p 24 ln 30 to p 25 ln 3.

34 Transcript of 21 September 2022 p 78 ln 26 to p 81 ln 13.

35 Transcript of 21 September 2022 p 81 ln 14 to p 82 ln 5.

36 Transcript of 21 September 2022 p 88 ln 4 to ln 16.

37 Transcript of 21 September 2022 p 88 ln 16 to p 88 ln 21.

38 Transcript of 21 September 2022 at p 88 ln 16 to ln 31.

32 The next thing the Complainant remembered was being woken up by "some movement". In his own words, this was what happened[39]:

> I just remember being woken up by some movement. JP [the Accused] was sucking my penis and I was shocked… I was just like paralysed, similar to like when you are dreaming and you have like sleep paralysis and you feel like you want to move, you want to get out but you can't. I was just paralysed with fear. I just – I remember falling in and out of consciousness. I don't remember chronologically the acts that happened but I know that he – I woke up by him sucking my penis and he also tried to stick his fingers in my anus. And he tried to put his tongue in my mouth and yah, I was really shocked. I also remember him trying to put my hand on his penis and then it would just drop. I just felt floppy. I just -- I couldn't move and then – so like I said, I don't remember sequentially how did that happen but I was woken up by him sucking my penis and I just eventually managed to do something, managed to gain the strength to get up and I pushed him away and not violently, just brushed him away. And then I just wanted to get out… I just wanted to get out. So I tried to leave as soon as possible…

33 In his evidence-in-chief, the Complainant clarified that the "movement" which he had been woken up by involved his "legs being moved". At the point he was woken up, his legs "would have been spread out with [his] knees pointing outwards; and the Accused was in front of him and "kneeling between [his] legs", "sort of kneeling, just crouching over" him. He was able to recollect that the Accused "was in more than one position" in the course of the alleged sexual assault.[40]

34 In respect of the sequence of events, the Complainant testified that he recalled two instances of fellatio by the Accused: once when he first woke up and again just before he left. He could also recall three other acts by the Accused in between the two instances of fellatio. He could not recall strictly the sequence

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39 Transcript of 21 September 2022 p 90 ln 9 to ln 30.

40 Transcript of 21 September 2022 at p 91 ln 1 to p 92 ln 2.

in which these three other acts were committed as he was at that juncture "falling in and out of consciousness", but he could recall that one of the acts involved the Accused sticking his fingers into his (the Complainant's) anus. He knew it was more than one finger because he "felt fingers" and "it felt painful". Another act involved the Accused lifting his hand and putting it on the Accused's penis. He recalled that the Accused was on his left side by then and "kept lifting…up" his left hand to put it on the Accused's penis. At that point, the Accused was wearing "something on top but nothing on the bottom". The third act involved the Accused "trying to put his tongue in [the Complainant's] mouth, trying to kiss [him]": he could remember "feeling [the Accused's] tongue in [his] mouth as [he] was sleeping" as well as "opening [his] eyes and seeing [the Accused's] face there" and then closing his eyes again because he "was scared" of what the latter was doing.[41] There was no conversation between the Accused and the Complainant from the time when the Complainant saw the Accused sucking his penis to the time he pushed the Accused off.[42]

35 The Complainant also testified that it was only when he managed to "gain the strength"[43] to get up that he realised that his trousers and belt were around his ankles.[44] He had a "vague recollection" of going to wash himself in the toilet next to the Accused's room because he was "feeling quite disgusted" and also "scared of STDs".[45] He then tried to get out of the apartment as soon as possible. He recalled that he had some difficulty ("struggle") trying to get out

41 Transcript of 21 September 2022 at p 92 ln 8 to p 94 ln 18.

42 Transcript of 21 September 2022 p 95 ln 16 to p 95 ln 19.

43 Transcript of 21 September 2022 at p 95 ln 11 to ln 15.

44 Transcript of 21 September 2022 at p 91 ln 9 to ln 20.

45 Transcript of 21 September 2022 at p 96 ln 5 to ln 20.

of the door[46] and vaguely recalled that the Accused might have helped him, but could not be sure.[47] He remembered getting into the lift but could not recall the floor he was on. At this juncture he felt "quite emotional" and "very upset": he was crying, but because there was a lady in the lift who started laughing at him, he tried to hide the fact that he was crying.[48]

36 After exiting the lift, he could not remember how to get out of the Condominium and was unable to find the main road. Eventually, he "calmed down a bit" when he managed to get "away from the situation". He then called his friend Zen. He was feeling "really upset, really ashamed" about the incident and found it "really hard" to "talk about it", but he told Zen what had happened and asked Zen for his advice as the latter was then doing his national service in the police force. As Zen told him to call the police, he called "995" and then "999". In all, he called the police three or four times, as the police took some time to arrive. By this point, he was "next to the road, just on the pavement".[49]

37 At trial, the audio recording of the Complainant's "999" call was played back in court during his evidence-in-chief. The Complainant identified his own voice on the audio recording voice. He testified that he had been crying and feeling "emotionally exhausted" at the time of the call, which was why his voice had sounded very nasal.[50] It took an hour or so after his phone calls for the police to arrive. The Complainant recalled having to speak to "a few people" and then being taken to Singapore General Hospital ("SGH") for assessment, blood tests

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46 Transcript of 22 September 2022 at p 66 ln 23 to p 68 ln 4.

47 Transcript of 21 September 2022 at p 96 ln 21 to ln 31.

48 Transcript of 21 September 2022 at p 97 ln 1 to ln 6, P 99 ln 19 to ln 30.

49 Transcript of 21 September 2022 at p 100 ln 1 to p 101 ln 7.

50 Transcript of 21 September 2022 at p 101 ln 18 to p 102 ln 25.

and urine tests. He called his former girlfriend and his father to tell them what had happened. He was initially reluctant to tell his father as he felt "ashamed", "embarrassed" and "upset", but was told by the investigating officer ("IO") that he needed to have his guardian or parent with him as he was below 21 years of age. His father came to meet him at SGH, and later, so did Zen.[51]

38 The Complainant testified that at no time had he given the Accused any consent to perform the various sexual acts on him.[52] In cross-examination, he agreed that he was generally a "very open" person, and that in chatting with the Accused at Hero's pub on 23 July 2017, he had mentioned his "toxic" relationship with his former girlfriend. However, he denied that he had told the Accused in the same conversation that he was "exploring [his] sexuality".[53] He also denied having told the Accused several times during the birthday celebrations on 30 July 2017 that he "really likes him [the Accused]".[54]

Tan Tian Sou Zen ("Zen")

39 Zen gave evidence that on 9 August 2017, he was woken up between 4.00am and 5.00am by a telephone call from the Complainant. When he answered the phone, the Complainant was "mumbling" and "sounded like he was panicking and really scared".[55] The first thing the Complainant said to Zen was that "J.P. raped me". Zen did not understand the Complainant and had to ask him to repeat himself. The Complainant was "mumbling little bits of words and breathing heavily", sounding "drunk but scared at the same time". Through

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51 Transcript of 21 September 2022 at p 104 ln 1 to p 105 ln 28.

52 Transcript of 21 September 2022 p 106 ln 23 to 27.

53 Transcript of 22 September 2022 at p 5 ln 27 to p 7 ln 7.

54 Transcript of 22 September 2022 at p 12 ln 19 to ln 30.

55 Statement of Tan Tian Sou Zen at AB p 107.

talking with the Complainant, Zen "understood from him that J.P. had touched his penis".[56]

40 After calming the Complainant down, Zen advised him to call the police. Zen again received a call from the Complainant about 10 minutes after the first call, with the Complainant stating that the police had not yet arrived, and that he did not know what to do. The Complainant then called Zen a third time to inform him that the police were already at the scene and to ask Zen to "go down and see him". Zen subsequently went to SGH to meet the Complainant.[57]

41 At SGH, the Complainant related to Zen the events of 9 August 2017. According to the Complainant, he had been invited by the Accused (referred to as "J.P.") to "chill" at the latter's house after clubbing; and while at the house, the Accused had given the Complainant an alcoholic beverage, which was very strong and which "hit [the Complainant] really hard". The Accused had then "touched [the Complainant] inappropriately… around [his] penis". The Complainant told Zen that he had "managed to push J.P. away, zipped up his own pants, and ran out of J.P.'s house to the ground floor of the block".[58]

Dr Irfan Abdulrahman Sheth ("Dr Irfan")

42 Dr Irfan of the Department of Emergency Medicine at SGH gave evidence that he conducted an examination of the Complainant on 9 August 2017 at about 11.18am. Upon learning that the Complainant was an alleged victim of sexual assault, he referred the case to Dr Lew Pei Shi ("Dr Lew"), the Doctor-On-Call, for a sexual assault medical examination. The examination by

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56 Statement of Tan Tian Sou Zen at AB p 107.

57 Statement of Tan Tian Sou Zen at AB p 107.

58 Statement of Tan Tian Sou Zen at AB p 107.

Dr Lew included "a penile swab, low anal and high anal swabs" being taken "with routine bloods for full blood count, renal and liver panels".[59] On 10 August 2017, Dr Irfan again examined the Complainant regarding his blood test results. Dr Irfan subsequently prepared and produced a medical report dated 17 August 2021.[60] It should be noted that in preparing this medical report, Dr Irfan incorporated observations recorded in his own notes as well as observations recorded in Dr Lew's notes.[61]

43 In the report dated 17 August 2021, Dr Irfan set out the history taken by him from the Complainant at the Department of Emergency Medicine on 9 August 2017, at 11.18am. *Per* Dr Irfan's report, the Complainant had recounted that "he was out drinking with the [A]ccused the night before, and then decided to stay overnight at the [A]ccused house". According to the Complainant, "the [A]ccused made him a drink which made him very giddy, after which he fell asleep". The Complainant said that when he "woke up at around 0530 hours on 09 Aug 2017", he claimed that "the Accused was performing oral sex on him and penetrating his anus with his fingers". The Complainant also said that he "subsequently pushed the [A]ccused away, walked out and called the police".[62]

44 Dr Irfan also gave some evidence explaining the Complainant's blood test results and the reasons why a repeat blood test was conducted. It is not necessary to reproduce this part of Dr Irfan's evidence in these written grounds, as the evidence was not germane to either side's case in respect of the alleged offences.

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59 Statement of Dr Lew Pei Shi at PS 26.

60 Statement of Dr Irfan Abdulrahman Sheth at PS 27.

61 Transcript of 23 September 2022 at p 14 ln 2 to ln 24.

62 Dr Irfan Abdulrahman Sheth's Report dated 17 August 2021, at P 42.

Dr Lew Pei Shi ("Dr Lew")

45 Dr Lew of the Department of General Surgery at SGH conducted a sexual assault medical examination of the Complainant on 9 August 2017, at about 12.25pm. As part of the examination, Dr Lew took a sample of blood from the Complainant, along with anal and penile swabs. Dr Lew concluded her medical examination at about 1.00pm.[63] Dr Lew subsequently reviewed the medical report prepared by Dr Irfan (P42) and confirmed that the contents of the said report were consistent with her findings in the assessment of the Complainant.[64]

46 In cross-examination, Dr Lew testified that during her examination of the Complainant, he had given her an account of events similar to the account set out in the opening paragraph of Dr Irfan's report.[65]

Dr Lambert Low ("Dr Low")

47 Dr Low of the National Addictions Management Service at the Institute of Mental Health ("IMH") was called as an expert witness. He was asked by the Prosecution to address three questions in his expert report of 7 August 2018:[66]

(a) the Complainant's blood alcohol concentration ("BAC") between 4.15am and 5.30am on 9 August 2017;

(b) the Complainant's mental state at that time and whether his judgment was impaired;

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63 Statement of Dr Lew Pei Shi at PS 26.

64 Statement of Dr Lew Pei Shi at PS 26.

65 Transcript of 23 September 2022 at p 9 ln 3 to ln 16.

66 Exhibit P6 at AB 84.

(c) the Complainant's ability to consent to sexual acts committed against him at that time.

48 Prior to preparing his report, Dr Low interviewed the Complainant on 24 July 2018 and 7 August 2018. He also read the summary of facts provided to him by the police and spoke to the Complainant's father on 7 August 2018 for corroborative history.[67]

49 In his report, Dr Low noted the history provided to him by the Complainant. In gist, the Complainant reported having been "quite intoxicated" by the time he reached the Accused's home on 9 August 2017, and then having "completely lost consciousness" after a "subsequent drink offered to him by the [A]ccused at his home". According to the Complainant, upon awakening, he had still been "drifting in and out of consciousness" and "couldn't recognise his surroundings". He "noticed that the [A]ccused was performing fellatio on him"; that the Accused had used "his limp hand to touch the [A]ccused's penis"[68]; and that "the [A]ccused had also performed digital penetration of his anus".[69] After "some struggle", the Complainant "managed to push off the [A]ccused and staggered to the bathroom outside to wash himself", following which "he staggered out of the flat and headed for the lift outside". The Complainant reported having felt disoriented and having to ask "a Chinese lady whom he met in the lift what floor he gotten on [*sic*] as he was too disoriented to even notice". He also reported having been "too disoriented to figure out how to exit the premises of the condominium": "[a]fter some trying, he managed to leave the compound briefly for twenty metres but thereafter proceeded to walk back in

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67 Dr Lambert Low's Report dated 7 August 2018 at AB p 84.

68 Dr Lambert Low's Report dated 7 August 2018 at AB p 84.

69 Dr Lambert Low's Report dated 7 August 2018 at AB p 85.

after failing to find the main road and waited for the police to arrive after calling them".[70]

50 Dr Low also noted the Complainant's drinking pattern. The Complainant "tended to drink once per week, each time drinking 3 pints of beer on average", with beer being "his preferred beverage". According to the Complainant, at these levels of alcohol consumption, he would "not get intoxicated", "but would feel tipsy and somewhat 'happy'", and "thereafter he would stop drinking". The Complainant also informed Dr Low that "on the day of the alleged sexual assault, he estimated that he had drunk 2 times his usual amount" and had not consumed "more food to go along with his alcohol at night" after having had "dinner at around 6-7pm".[71] In his evidence-in-chief at trial, Dr Low explained that he had recorded this piece of information because food tended to "slow down the absorption of alcohol", and "the presence of additional food in the stomach would therefore delay gastric emptying and possibly slow down the absorption if he had had any food to go along with the alcohol".[72]

51 In arriving at the conclusions stated in the final paragraph of his report, Dr Low first highlighted that it would be "difficult to quantify the exact amount" that the Complainant had drunk on the night of the alleged offences, "due to issues of alcohol dilution with mixers and difficulties with recall". However, "based on the pattern of [the Complainant's] drinking", Dr Low opined that he was "a moderate drinker with an estimated alcohol clearance rate of 15mg/100ml to 20mg/100ml of blood per hour". Dr Low also noted that the

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70 Dr Lambert Low's Report dated 7 August 2018 at AB p 85.

71 Dr Lambert Low's Report dated 7 August 2018 at AB p 85.

72 Transcript of 27 September 2022 at p 23 ln 14 to ln 20.

Complainant's blood ethanol concentration – taken at 1.00pm on 9 August 2017 – was 40mg/100ml. Based on Dr Low's calculations, "this would imply that at 4.15am, [the Complainant's] BAC level was between 171.25mg/100ml and 215mg/100ml." At 5.30am, "[the Complainant's] BAC level was between 152.5mg/100ml and 190mg/100ml".[73]

52 Based on such BAC levels and on the Complainant's description of the events surrounding his awakening, Dr Low opined that it was "not hard to conclude that [the Complainant] was likely to still be intoxicated between 4.15am and 5.30am and therefore unable to consent to the sexual acts committed against him".[74]

53 In his evidence-in-chief at trial, Dr Low explained that his calculations of the Complainant's BAC levels between 4.15am and 5.30am on 9 August 2017 was based on "a retrograde extrapolation" using the blood ethanol concentration of 40mg/100ml measured at 1.00pm on 9 August 2017 – a method which, according to Dr Low, was more accurate than a forward calculation based on the number of drinks which the Complainant recalled consuming. Dr Low also explained that his statement that "a moderate drinker" would have "an estimated alcohol clearance rate of 15mg/100ml to 20mg/100ml of blood per hour" was based on Western research literature, in which "experts would agree that 15 milligrams per decilitre… of alcohol clearance per hour is the general standard for an average person"; and that he had given a range of 15 to 20mg per decilitre in order to "give leeway for an experienced drinker, experienced meaning that somebody who is…used to regular drinking, like [the Complainant], who possibly could have a slightly higher than the average rate

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73 Dr Lambert Low's Report dated 7 August 2018 at AB p 85.

74 Dr Lambert Low's Report dated 7 August 2018 at AB p 85.

of clearance of alcohol because he is used to drinking three to four pints of beer on average per week".[75]

54 Dr Low also explained the different stages of alcohol intoxication based on BAC levels as follows. Generally speaking, a person would first experience the effects of alcohol on the system at "levels above 50 milligrams per decilitre": at BAC levels above 50mg/100ml, such a person would "start experiencing effects of alcohol on his psychomotor functions, so he could be a bit clumsy, a bit more…impaired in his coordination".[76] At BAC levels above 100mg/100ml, "more cognitive effects start to come in, in which the person becomes a little bit more dizzy, more elated, more talkative". Thereafter, at BAC levels above 150mg/100ml, the cognition or mental state of the person would "start to become even more affected", in terms of his "awareness of the surroundings…his responses to his surroundings, his ability to take in information and process information, his ability to understand and weigh decisions, his ability to…make sense of things around him": "his conscious level drops".[77] In Dr Low's opinion, generally, at BAC levels above 150mg/100ml, "a person's mental state becomes impaired, he tends to make reckless behaviour, tends to be…less aware of his surroundings…more and more confused". At the even higher BAC levels of 250 to 300mg/100ml, the person would experience stupor and be unable to move very much; his muscles would become very weak; he would become "very lethargic and very much unable to respond to the external circumstances". Finally, at above 300mg/100ml, the person would become comatose.[78]

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75 Transcript of 27 September 2022 at p 24 ln 1 to p 25 ln 4.

76 Transcript of 27 September 2022 at p 25 ln 5 to ln 25.

77 Transcript of 27 September 2022 at p 25 ln 25 to p 26 ln 22.

78 Transcript of 27 September 2022 at p 26 ln 23 to ln 30.

55 As for the physical state of the intoxicated person, Dr Low opined that "the physical state would depend very much…on his surroundings": for example, an intoxicated person who was in a familiar environment would be more likely to be able to find his way around and to move more effortlessly, compared to someone who was in a "foreign environment" where he might "end up tripping, falling over or…having a bit of a staggered gait…because he's not familiar with the environment".[79]

56 As to his opinion that the Complainant was likely to still have been "intoxicated between 4.15am and 5.30am [on 9 August 2017] and therefore unable to consent to the sexual acts committed against him". Dr Low provided the following explanation:[80]

> [U]sing a threshold of about 150 milligrams per decilitre to reach a confused state and taking into account the…gravity of the act which is a sexual act which is something very intimate, and ability to weigh the information with regards to consent to a sexual act which is something that is very personal, something that you're giving away…your own personal body, being able to reach such a difficult decision at a blood alcohol level of 150 when you are…confused is going to be very hard…to explain, yah. So…if proper consent was to be taken at that blood alcohol level, it is very hard to say that the person is being able to give that consent in such a confused state for something [so] personal and important…

57 In his evidence-in-chief, Dr Low also testified that he had been informed of the account given by the Complainant of the events which had taken place inside the Accused's room from the time he was woken up until the time he left the apartment. In respect of the first instance of fellatio and the three other acts following it (the Accused using his fingers to penetrate the

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79 Transcript of 27 September 2022 at p 27 ln 16 to ln 31.

80 Transcript of 27 September 2022 at p 29 ln 3 to ln 17.

Complainant's anus, the Accused using the Complainant's limp left hand to touch his penis, the Accused trying to insert his tongue into the Complainant's mouth), Dr Low was asked whether he could explain why the Complainant had "seemed to be registering what was happening to him, but he was unable to move".[81] Dr Low opined that the "most likely case" was that the Complainant had been in "a state of shock", "a dreamlike state in which he was kind of drifting in and out of consciousness", had a "partial awareness" of what was going on around him", and was "trying to make sense of what [was] going on around him, and possibly…then falling back to sleep thereafter and waking up again". In Dr Low's opinion, in this state, the Complainant would not have really reacted because he would still have been "really trying to appreciate the nature and the circumstances" of what was happening around him.[82] By the time of the second instance of fellatio, however, the Complainant would probably have "gained a better understanding and awareness of his scenario, realising that it's actually happening and it's no longer a dream that he's experiencing". At this stage, the Complainant, "being a big-sized individual, would then summon…the rest of his faculties to then push off" the Accused.[83]

58 At trial, Dr Low was also shown the CCTV video footage of the Accused and the Complainant arriving at the lobby of the Condominium, as well as the video footage of the Complainant later exiting the lift and leaving the lobby. Asked to explain why the video footage appeared to show the Complainant having been able to walk unsupported instead of staggering, Dr Low testified that an intoxicated person could "potentially still do an act properly if it's a simple one, as long as [such person] focus[ed] all [his] mental faculties on doing

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81 Transcript of 27 September 2022 at p 31 ln 26 to 30.

82 Transcript of 27 September 2022 at p 31 ln 31 to p 32 ln 9.

83 Transcript of 27 September 2022 at p 32 ln 10 to ln 18.

it properly": in his words, "you may be just walking and talking nonsense. That's okay, because your primary focus at that point in time is to walk… to make sure you don't fall down". Dr Low also caveated that the distances which the Complainant was shown walking in the video footage were "very short" distances; and it would be "very hard to conclude" whether the Complainant would have been able to continue walking straight without staggering over a "more protracted, more prolonged" distance. [84]

59 In cross-examination, Dr Low stated that he could not comment much on the Complainant's *cognitive* abilities at the times shown in the video footage because the distances involved were short, and he could not hear what the Complainant might have been saying: all that he could say was that the Complainant appeared not to be staggering, which could have been due to his "just focusing squarely on" walking.[85] As for the audio-recording of the Complainant's first phone call to the police, which the defence claimed showed the Complainant to have had "his cognitive abilities about him", Dr Low's evidence was that it showed that the Complainant had "limited mental faculties, in the sense that he's able to recall certain information about himself, for instance, his own phone number, his name"; and that he had "limited awareness of surroundings. He knows he's on Nutmeg Road". Dr Low caveated that the Complainant's phone call to the police was a "very simple conversation"; and while he was able to say that the Complainant had been able to provide the information required by the operator who answered his call, he was unable to tell very much more.[86]

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84 Transcript of 27 September 2022 at p 33 ln 14 to p 34 ln 9.

85 Transcript of 27 September 2022 at p 42 ln 7 to ln 30.

86 Transcript of 27 September 2022 at p 48 ln 1 to ln 18.

60 Overall, Dr Low disagreed with the assertion by the Defence that the Complainant's "cognitive abilities were not impaired".[87] Dr Low also stated that he highly doubted the assertion by the Defence that the Complainant's BAC level could have been below 150mg/100ml at 4.01am, "[g]iven the fact that he [was walking straight into the lift and… an experienced drinker". Dr Low further explained the opinion expressed in his report as to the Complainant's BAC levels at 4.15am and at 5.30am on 9 August 2017:[88]

> [A]t 4.15, I give a range of values, 171.25 to 215 milligrams per 100ml. In fact, if [the Complainant] had been a very experienced drinker, his blood alcohol levels would have been even higher… [T]he more experienced you are, the faster – the faster you metabolise alcohol and therefore the reference values would then creep up and not creep down. So if anything, the 171.25 would probably be an underestimate. I've given you a range of values which I'm more or less sure that that is where his blood alcohol level is at that point in time, but it's probably closer towards the 215 at 4.15. It's probably closer towards there because [the Complainant] being an experienced drinker would push towards the higher value because he metabolises alcohol faster.

Dr Cornelia Chee ("Dr Chee")

61 Dr Chee of the Department of Psychological Medicine of National University Hospital ("NUH") conducted a psychiatric assessment of the Complainant on 30 July 2018 and 6 August 2018. At the time of the psychiatric assessment, the Complainant was a first-year undergraduate student in London who had returned to Singapore during his holiday to assist with police investigations in his case. In her report dated 22 January 2019, Dr Chee noted that the Complainant had recounted to her the following events: on 8 August 2017, he "had finished his last day of National Service", "had gone drinking, and had gone to a friend's house to sleep". However, he woke up to find that

87 Transcript of 27 September 2022 at p 52 ln 7 to ln 10.

88 Transcript of 27 September 2022 at p 41 ln 12 to ln 26.

this friend (an older man) was "performing oral sex on him, and was attempting to digitally penetrate him". He "managed to break free and run out of the house".[89]

62 The Complainant reported that after the above incident, he had experienced "shame, anger, hyperarousal symptoms such as being easily startled i[f] anyone touched him, poor sleep, intrusive memories of the incident and avoidance of reminders of the incident"; and that while "these symptoms had reduced by the time he went to London to further his studies", he was "re-experiencing some of the unwanted memories and symptoms again" after undergoing questioning at CID in July and August 2018. Dr Chee noted that this was not uncommon.[90]

63 In her report, Dr Chee noted that the Complainant had given "a history of brief episodes of low mood lasting a few days, starting from before he was 18-years old", and that these episodes did not seem to be connected to the above symptoms. She diagnosed the Complainant as suffering "Generalized Anxiety Disorder with possible Post-traumatic stress symptoms". He was started on antidepressant medications for anxiety disorders (Venlafaxine with a dosage of 75mg/d).[91] On his follow-up visit on 6 August 2018, prior to his return to London, the dosage of Venlafaxine was increased to 150mg/d. Another follow-up visit was planned for the period of his December 2018 holidays, but he defaulted on this follow-up appointment and subsequently informed that he was "not keen for further follow-up".[92]

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89 Dr Cornelia Chee's Report dated 22 January 2019 at Agreed Bundle ("AB") p 82.

90 Dr Cornelia Chee's Report dated 22 January 2019 at AB p 82.

91 Dr Cornelia Chee's Report dated 22 January 2019 at AB p 82.

92 Dr Cornelia Chee's Report dated 22 January 2019 at AB p 82.

Thermizi Tho ("Mr Tho")

64 Mr Tho was the original investigating officer ("IO") for this case. At the time of the investigations in 2017, he was an Assistant Superintendent of Police ("ASP"), attached to the Serious Sexual Crime Branch ("SSCB") of the Criminal Investigation Department ("CID"). He resigned from the Singapore Police Force on 7 May 2018.[93]

65 Mr Tho was part of the arresting team that arrived at the Accused's residence at about 10.20am on 9 August 2017. He recalled that when he first knocked at the door of the Accused's apartment, there was no response; the police proceeded to activate a locksmith to come down to the apartment. However, before the locksmith could actually try to open the door, it was opened by the Accused himself.[94]

66 Mr Tho testified that he asked the Accused questions in relation to the Complainant's allegation of sexual assault, and that the Accused "mentioned something about they were having drinks in his room" and "claimed that the sexual thing was consensual".[95] At about 10.30am, together with ASP Tai Yian Peng Christine, Mr Toh arrested the Accused on suspicion of committing an offence of sexual assault by penetration under s 376(1)(*b*) punishable under s 376(3) of the PC.[96]

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93 Statement of Mr Thermizi Tho at AB p 124.

94 Transcript of 23 September 2022 at p 40 ln 22 to p 41 ln 12.

95 Transcript of 23 September 2022 at p 41 ln 31 to p 42 ln 8.

96 Statement of Mr Thermizi Tho at AB p 124.

Dr Arnab Kumar Ghosh ("Dr Ghosh")

67 Dr Ghosh of the South Region of the IMH conducted a forensic psychiatric assessment of the Accused on 18 September 2017 and 20 September 2017, for the purposes of his psychiatric report dated 26 September 2017. Before issuing his report, Dr Ghosh also perused the statement of facts.[97] In gist, Dr Ghosh was of the opinion that the Accused did not suffer from any mental illness, he was not of unsound mind at the time of the alleged offence, he "had alcohol intoxication before the alleged offence", and he was fit to stand trial.[98]

68 In his report, Dr Ghosh also set out the Accused's background as well as his account of the events of 8 August and 9 August 2017. *Inter alia*, Dr Ghosh recorded the Accused's account of the clubs and bars he and the Complainant had visited that night and the drinks they had consumed.

69 In respect of the events in the Accused's room in the early hours of 9 August 2017, Dr Ghosh noted that the Accused's version was as follows. According to the Accused, upon reaching his place, the "[C]omplainant had taken out his ring and sat comfortably in his room". The Accused changed his clothes in front of the Complainant before "they started sipping whisky and coke, which the [Accused] had prepared there, while sitting beside each other". The Accused claimed that the Complainant had "started playing guitar" and that "their arms were rubbing against each other". As to the sexual acts, the Accused claimed that "the Complainant was awake when he started touching his thigh"; and that "when he tried to open the [C]omplainant's pant[s] the Complainant cooperated": according to the Accused, "after finding the [C]omplainant's penis

97 Dr Arnab Kumar Ghosh's Report dated 26 September 2017 at AB p 86.

98 Dr Arnab Kumar Ghosh's Report dated 26 September 2017 at AB p 90.

erect, [he] tried to pull down his pant[s] to fully expose the penis", whereupon the Complainant had "raised his body to allow the [Accused] to pull down his pant[s]". The Accused then started performing fellatio on the Complainant and also kissed his mouth and nipples. He claimed that he did so for about 10 minutes. However, he denied "putting his fingers into the Complainant's anus even though he admitted to having touched his buttocks".[99]

70 Dr Ghosh further documented that *per* the Accused's version of events, the Complainant "had not protested or resisted [his] actions at any point of time despite being awake and aware of what was going on". Subsequently, "the [C]omplainant had then stood up and gone to toilet for few minutes". The Accused was "waiting in the room but then the [C]omplainant left the house without informing him". The Accused "assumed that the [C]omplainant was done with the one-night stand and did not attempt to stop him".[100]

Close of the Prosecution's case

71 At the close of the Prosecution's case, the Defence did not make a submission of no case to answer. As I was satisfied that the Prosecution had made out a *prima facie* case against the Accused on the two charges of penile-oral penetration under s 376(1)(*b*) PC and the charge of digital-anal penetration under s 376(2)(*a*) PC, I called on the Accused for his defence to these charges. The Accused elected to give evidence.

72 I outline below the Accused's version of events and the key evidence he relied on.

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99 Dr Arnab Kumar Ghosh's Report dated 26 September 2017 at AB p 89 para 12.

100 Dr Arnab Kumar Ghosh's Report dated 26 September 2017 at AB p 89.

The evidence led by the Defence

The Accused's evidence

73 The Accused described himself as a friendly person. According to him, he was bisexual and had realised that he was bisexual since 2015.[101]

(1) First Meeting

74 The Accused agreed with the Prosecution that he first met the Complainant at Hero's pub on the night of 23 July 2017, when the latter was together with Francesca. His version of the first meeting at Hero's pub differed from the Prosecution's chiefly in terms of the contents of his conversation with the Complainant on that night. The Accused claimed that while he was chatting with the Complainant that night, the latter revealed that he had "gone through a toxic relationship with his ex-girlfriend and [that] he was exploring his sexuality".[102] Upon hearing this, the Accused replied that "it's okay because I'm bisexual".[103] This was because he wanted the Complainant to be "comfortable" and "just to be authentic".

75 Although the conversation between the Accused and the Complainant lasted only about 20 to 30 minutes, the Accused asserted that he was able to feel a "connection" and "chemistry" with the Complainant even when they spoke for the first time. He ended up inviting the Complainant to his birthday celebrations on 29 July 2017. This invitation was sent to the Complainant via

101 Transcript of 28 September 2022 p 3 ln 16 to ln 28.

102 Transcript of 28 September 2022 p 5 ln 23 to p 7 ln 12.

103 Transcript of 28 September 2022 p 7 ln 13 to p 9 ln 22.

WhatsApp on the mobile phone number that the Accused obtained from him. The Accused also invited Francesca to his birthday celebrations.[104]

76 Following the First Meeting, the Accused and the Complainant exchanged some messages on the WhatsApp and Snapchat platforms. These were the same messages which the Complainant had referred to in his testimony (Exhibits 45 and 46). For his part, the Accused sought to highlight that the Complainant had signed off on one of his messages using the "xo" emoji. According to the Accused, "xo" was "universal slang" for "hugs and kisses".[105] The Accused also claimed that his remark in one of his messages to the Complainant – "it's going to be refreshing for you" – was a reference to the Complainant's statement at Hero's pub about wanting to explore his sexuality: by using the word "refreshing", the Accused meant that the Complainant would get to meet "new people", "new guys".[106]

77 At trial, the Accused alleged that there were Snapchat messages between 25 July 2017 and 31 July 2017 which were missing from the messages exhibited in court by the Prosecution. He said that these would have been daily conversations about "family and friends", although he was "not 100% certain". When asked if these missing messages could be found on his own phone, he said that he could not find them[107].

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104 Transcript of 28 September 2022 at p 7 ln 22 to p 9 ln 10.

105 Transcript of 28 September 2022 at p 12 ln 11 to p 13 ln 2.

106 Transcript of 28 September 2022 at p 13 ln 13 to ln 21.

107 Transcript of 28 September 2022 p 21 ln 6 to p 22 ln 29.

(2) Second Meeting

78 As *per* the Complainant's account, the second meeting between him and the Accused took place on the occasion of the latter's birthday celebrations on 29 and 30 July 2017. The Complainant attended the celebrations at Drinks & Co. and later at the Skyline Bar. The Accused, for his part, sought to emphasise in his testimony that when the Complainant came to Drinks & Co., he gave the Accused a "tight hug" when wishing him a happy birthday, and another "tight hug" before leaving. [108]

79 Subsequently, when the Complainant turned up at the Skyline Bar with his friends, he again gave the Accused a "tight hug" when offering him birthday greetings a second time.[109] According to the Accused, in the course of the night, the Complainant bought him a drink as a birthday present, placed his arms around the Accused's shoulders, and stated that he "really likes" the Accused.[110] The Accused claimed that he reciprocated by telling the Complainant "I do like you", and that before the Complainant left the Skyline Bar, he gave the Accused another "tight hug".[111]

80 As to the abortive meeting at his apartment on 6 August 2017, the Accused said that it was the Complainant who had been feeling "low" and who wanted to see the Accused for "support".[112] The Accused felt sorry about having missed the meeting after falling asleep at home. He therefore suggested to the

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108 Transcript of 28 September 2022 p 18 ln 9 to p 18 ln 20.

109 Transcript of 28 September 2022 at p 19 ln 3 to ln 12.

110 Transcript of 28 September 2022 at p 19 ln 27 to p 20 ln 10.

111 Transcript of 28 September 2022 p 20 ln 8 to p 20 ln 32.

112 Transcript of 28 September 2022 p 24 ln 19 to p 27 ln 19.

Complainant that they should meet again in order to catch up.[113] They eventually agreed to meet up for drinks on 8 August 2017.

(3) Third meeting

81 As to the events of 8 August 2017, the Accused did not dispute the Complainant's testimony about the clubs and bars they visited that night. The Accused claimed, however, that he had specifically informed the Complainant that the event at the 1-Altitude bar was "a gay night" and that the Complainant had replied that he was "okay with that". The Accused also claimed that when told 1-Altitude was "quite strict on their age limit", the Complainant had said "he was 25 years old".[114]

82 According to the Accused, in the course of the night, he and the Complainant chatted about personal matters such as "family matters" and the MBA degree programme which the Accused was pursuing. The Accused also gave evidence about various alleged instances of physical contact between the two of them over the course of the night. According to the Accused, at "HQ" bar, their "arms actually brushed each other" when they went to the toilet, and they "felt comfortable with each other".[115] At Hero's pub, they danced while standing next to each other, with their arms around each other's shoulders.[116]

83 The Accused further testified that in the course of the night, he had "asked [the Complainant] three times" to "sleep over" at his (the Accused's) place: first, when they were on their way to Lime Bar at the start of the evening;

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113 Transcript of 28 September 2022 p 27 ln 27 to p 30 ln 13.

114 Transcript of 28 September 2022 p 33 ln 1 to p 33 ln 23.

115 Transcript of 28 September 2022 p 33 ln 24 to p 34 ln 18.

116 Transcript of 28 September 2022 at p 41 ln 15 to ln 21.

a second time when they were making their way to Café Iguana; and finally, while they were at Hero's pub.[117] Each time he was asked if he wanted to "sleep over", the Complainant agreed to the suggestion. In cross-examination, the Accused claimed that *per* his own understanding, the term "sleep over" could refer either to "sleeping" *or* to "actually having sex". He claimed that this understanding was based on his own "experience", because an invitation from someone to "go home to their place after a club night" would "usually" lead to sex; and that he therefore understood the Complainant to be communicating that they could end up having sex at his apartment, although the Complainant did not actually state expressly that they might have sex.[118]

84 To get to the Accused's apartment from Hero's pub, the Accused and the Complainant took a Grab taxi. The Accused testified that the Complainant was the one who booked the taxi; that the Complainant "definitely knows what's going on around him" and was "fully in control of himself"; and that he was "not intoxicated at that time".[119]

(4) Events upon reaching the Condominium

85 The Accused further testified that upon reaching the Condominium, the Complainant was able to walk steadily on his own without any signs of staggering.[120] Once inside the apartment, the Accused made drinks for both of them. He recalled the Complainant sitting on the floor next to the wall in his room. He also recalled changing his clothes in front of the Complainant and offering the latter a change of clothes (which was refused). While consuming

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117 Transcript of 28 September 2022 at p 40 ln 28 to p 41 ln 9.

118 Transcript of 29 September 2022 at p 84 ln 23 to p 86 ln 10.

119 Transcript of 28 September 2022 p 43 ln 1 to ln 23.

120 Transcript of 28 September 2022 p 45 ln 1 to ln 15.

their drinks, they continued chatting; at some point, the Complainant also sang while strumming on a guitar which the Accused had in his room.[121] The Accused alleged that in the course of their conversation, the Complainant said that the Accused was "really cool" and that he "really likes" the Accused. The Accused then reciprocated by telling the Complainant: "Cool, as I really like you".[122]

86 Subsequently, the Complainant said that "he wanted to sleep". The Accused responded by telling the Complainant "no, let's chat more" because they were "having a good conversation". The Complainant replied "no, let's chat tomorrow morning over breakfast" to which the Accused replied "okay. But then let's chat more. Let's have breakfast, but then let's chat more".[123] At this point, the Complainant "leaned his arm against the wall because he was already seated next to the wall".[124]

87 According to the Accused, the following sequence of events then took place. First, he touched the Complainant's left thigh using his right hand. He claimed that this was done with consent because the Complainant "did not push [him] away or brush [him] away": the Complainant's eyes were "still opened that time" and he maintained "eye contact" with the Accused. Thereafter, the Accused tried "to insert [his] hand inside [the Complainant's] pants"; and when he found that he could not do so "because it was really tight", the Complainant "shifted his body towards the ceiling" "so that [the Accused] could actually reach and unbutton his pants, unbuckle his belt and unzip him". In fact, according to the Accused, the Complainant shifted his buttocks so that the

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121 Transcript of 28 September 2022 p 53 ln 24 to p 57 ln 13.

122 Transcript of 28 September 2022 at p 54 ln 12 to ln 20.

123 Transcript of 28 September 2022 at p 57 ln 26 to p 58 ln 2.

124 Transcript of 28 September 2022 p 57 ln 9 to p 58 ln 14.

Accused "could pull down his pants and underwear towards his mid-thigh". The Accused claimed that all this while, the Complainant remained "conscious" and "awake", and he "did not push away [the Accused's] hands". Thereafter, as the Accused noticed that the Complainant was slowly getting an erection, he started to masturbate the Complainant; and then, when the latter's penis "was hard", he proceeded to suck his penis.[125]

88 At this point, *per* the Accused's testimony, the Complainant "was still awake, conscious and he did not push [the Accused's] hands away or brush [the Accused's] hands away". The Accused also claimed that while he was sucking on the Complainant's penis, the expression on the Complainant's face showed that "he was actually having an arousal because of his eyes [*sic*] were half-closed". The Accused looked at the Complainant while fellating him and then kissed him before continuing to fellate him. He also unbuttoned the Complainant's shirt while fellating him. In his evidence-in-chief, the Accused tendered a sketch plan to show his and the Complainant's alleged positions at the material time[126]: according to the Accused, he remained on the Complainant's left side as the room was "really tiny" and there was "no space to manoeuvre anything at all".[127]

89 In the second half of his evidence-in-chief, the Accused added a number of other details in relation to his account of the alleged sexual encounter. According to the Accused, it was during this second round of oral sex that the Complainant touched the Accused's penis (from outside his shorts); and the Accused responded to the touch by removing his shorts while continuing to

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125 Transcript of 28 September 2022 p 58 ln 11 to p 62 ln 1.

126 Exhibit D1 at p 9.

127 Transcript of 28 September 2022 at p 62 ln 13 to p 63 ln 14.

fellate the Complainant.[128] The Accused also testified that while he was pulling the Complainant's jeans and briefs down to mid-thigh, his hands "brushed" the cheeks of the Complainant's buttocks.[129]

90 After about 10 minutes, while the Accused was still fellating the Complainant, the latter "suddenly" stood up "out of the blue", pulled on his pants and underwear (which were then at mid-thigh), and left the room. The Accused heard the sliding door of the toilet next to his room being opened and closed. He believed that the Complainant was masturbating in the toilet because he "was fully erected when he actually stood up"; he stayed in the toilet "for some time, without "any water spraying or anything like that in the toilet".[130] Thereafter, the Accused heard the main door of the apartment shut with "a bang"; and he assumed that it meant the Complainant had left. The Accused said he believed that the Complainant left because he knew he would otherwise "need" to "have sex" with the Accused, and "he changed his mind".[131]

91 Following the Complainant's departure, the Accused went back to sleep. He was woken up sometime later in the morning of 9 August 2017 by the police calling him on his mobile phone and telling him that the Complainant had made a police report against him. He then opened the main door, whereupon "a battalion" of police officers – who included Mr Tho – entered the apartment. The Accused recalled feeling "really, really frightened" because in the Philippines where he had grown up, the police "is not really on the good side" and did "bad things to people" such as torturing them, beating them and

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128 Transcript of 28 September 2022 p 69 ln 2 to p 71 ln 32.

129 Transcript of 28 September 2022 at p 71 ln 24 to p 72 ln 4.

130 Transcript of 28 September 2022 p 63 ln 13 to p 64 ln 20.

131 Transcript of 28 September 2022 p 64 ln 22 to p 65 ln 9.

subjecting them to verbal abuse.[132] The Accused claimed that he was so frightened that he "was really shivering", and this led Mr Tho to remark that he "must have done something wrong".[133]

92 The Accused was subsequently escorted to Police Cantonment Complex; and on 10 August 2017 at about 3.25 PM, Mr Tho recorded a statement from the Accused. This was tendered as a defence exhibit at trial.[134] It should be noted that although it was the Accused who adduced this statement in support of his defence and although he agreed in evidence-in-chief that the statement was "voluntarily given", he also claimed that it was "not recorded accurately".[135] In the course of his testimony, it also transpired that what he was seeking to do was to disavow certain portions of the statement on the ground that he had not actually said the things recorded in those portions and/or that he had phrased certain things in a different manner from that recorded; further, that the IO Mr Tho had either told him "[i]t's ok" or had declined to amend the alleged inaccuracies when the Accused tried to point them out; and that he had acquiesced to these inaccuracies remaining in his statement out of fear.

93 In their reply submissions, the Defence produced a table summarising the Accused's evidence on the inaccuracies in the statement of 10 August 2017.[136] This table is substantially reproduced below:

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132 Transcript of 28 September 2022 p 72 ln 5 to p 75 ln 6.

133 Transcript of 28 September 2022 at p 74 ln 22 to ln 26.

134 Exhibit D2.

135 Transcript of 28 September 2022 at p 76 ln 11 to ln 23.

136 Defence Reply Submissions at para 15.

What was recorded in D2	***What the Accused meant***	***What Mr Tho said to the Accused***
"I was <u>almost gone</u> by then…"[137]	I was a little bit tipsy, a little bit drunk.[138]	"It's okay".[139]
"I was drunk and <u>high</u>".[140]	I was drunk and tipsy.[141]	"It's okay. Just leave it."[142]
"He was <u>almost lying flat</u>…"[143]	He was, like, sitting.[144]	"Impossible".[145]
"I <u>think</u> he was conscious…"[146]	I know he was conscious that time because we were just talking.[147]	"Leave it".[148]

137 Exhibit D2 at para 10.

138 Transcript of 28 September 2022 p 83 ln 15.

139 Transcript of 28 September 2022 p 119 ln 16.

140 Exhibit D2 at para 11.

141 Transcript of 28 September 2022 p 86 ln 23.

142 Transcript of 28 September 2022 p 121 ln 13.

143 Exhibit D2 at para 14.

144 Transcript of 28 September 2022 p 89 ln 17.

145 Transcript of 28 September 2022 p 89 ln 17.

146 Exhibit D2 at para 14.

147 Transcript of 28 September 2022 p 94 ln 25 to ln 26.

148 Transcript of 28 September 2022 p 122 ln 2.

"However, I did use my left fingers to touch his anus…"[149]	"ănus"[150] with a short 'a' which in the Philippines, refers to the butt cheek.	"Leave it, it's okay. I understand what you mean."[151]
"I could not recall whether I inserted my fingers into his anus".[152]	I did not actually insert my fingers in the anus.[153]	"It's okay, I understand what you mean."[154]
"…and I was arrested".[155]	I was taken by the police.[156]	-
"We were both quite high on alcohol."[157]	We were both moderately high on alcohol.[158]	-

149 Exhibit D2 at para 15.

150 Transcript of 28 September 2022 p 96 ln 22.

151 Transcript of 28 September 2022 p 96 ln 6 to ln 7.

152 Exhibit D2 at para 15.

153 Transcript of 28 September 2022 p 97 ln 2 to ln 4.

154 Transcript of 28 September 2022 p 97 ln 31.

155 Exhibit D2 at para 17.

156 Transcript of 28 September 2022 p 99 ln 1 to ln 3.

157 Exhibit D2 at para 18.

158 Transcript of 28 September 2022 p 99 ln 13.

"…and touched his anus".[159]	"ănus"[160] with a short 'a', which in the Philippines refers to the butt cheek.[161]	-
"I really don't know whether I put my fingers into his anus or not".[162]	The Accused wanted to remove this from his statement.[163]	"Leave it. It's okay".[164]

94 The Accused gave evidence that the fear which led him to acquiesce to the alleged inaccuracies remaining in his statement came about because of the following reasons. First, according to the Accused, prior to Mr Tho recording his statement, he was verbally "interrogated" by another officer (later identified as one ASP Vimala Raj ("ASP Raj") without anyone else being present in the interview room. The Accused claimed that ASP Raj questioned him about how he had pulled down the Complainant's pants as well as the Complainant's position at the relevant time. The Accused also claimed that ASP Raj told him that the Complainant's family was "wealthy", and that the Complainant's father was "loaded, super loaded". This made the Accused "really more scared" because police officers "back in [his] hometown" were "really corrupt"; and he

159 Exhibit D2 at para 18.

160 Transcript of 28 September 2022 p 96 ln 22.

161 Transcript of 28 September 2022 p 100 ln 4.

162 Exhibit D2 at para 18.

163 Transcript of 28 September 2022 p 101 ln 27 to ln 31.

164 Transcript of 28 September 2022 p 102 ln 1.

had the thought "that this police officer…might do something to [him] and because of the power of the wealth, then [he] can't do anything anymore to protect [himself]".[165]

95 In cross-examination, the Accused added two other allegations against ASP Raj. He said that ASP Raj had also told him he "likes President Duterte", and that he felt "more scared" upon hearing this, because "at that time, President Duterte was killing people", and "a lot of things were going inside [his] mind" about who would take care of his parents if he "was going to die here".[166] Further, the Accused claimed that when he told ASP Raj "I thought he was willing" (referring to the Complainant being willing to engage in sexual activity), ASP Raj "was angry" and repeated the words "you thought" several times in a "raised" voice. This again made the Accused "scared" and caused the words "*I thought* he was willing" to be "stuck in [his] mind", such that he subsequently repeated the words "*I thought* he was willing" to Mr Tho when he had actually intended only to say "He was willing".[167]

96 According to the Accused, after the "interrogation" by ASP Raj, he was so "scared that he "could not really focus anymore" during the recording of his statement, and he "was just almost agreeing to everything that [Mr Tho] was telling [him]".[168] Additionally, the Accused said he was "really, really scared" during the recording of his statement because Mr Tho spoke to him in a raised voice and an "angry tone".[169] He felt that Mr Tho was "trying to coach [him],

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165 Transcript of 28 September 2022 at p 92 ln 18 to p 93 ln 24.

166 Transcript of 30 September 2022 at p 9 ln 8 to p 10 ln 2.

167 Transcript of 30 September 2022 at p 18 ln 26 to p 20 ln 22.

168 Transcript of 28 September 2022 at p 95 ln 16 to ln 23.

169 Transcript of 28 September 2022 at p 87 ln 28 to p 88 ln 9.

trying to tell [him] the words to say and [he] just said 'Yes, okay'"[170] because he was "really, really scared"; he "had nobody";[171] he was "just thinking that [he did] not want to be beaten up"; and he was "shivering" with fear "whenever [Mr Tho] was in front of [him]".[172] Thus, for example, although he had initially told Mr Tho that the Complainant was in a "sitting" position when he took off the Complainant's pants, he did not try to correct Mr Tho when the latter first remarked that this was "impossible" and then told him that the Complainant had said he was "lying down flat".[173]

97 In respect of paragraph 15 of his statement, where he had stated that he "could not recall whether [he] inserted [his] fingers into [the Complainant's] anus" but that he "did use [his] left fingers to touch [the Complainant's] anus while sucking his penis", the Accused asserted that as far as he was concerned, the word "anus" – as used in his statement – bore two different meanings. According to the Accused, when he was "growing up", the word "anus" was used to refer to the "whole butt".[174] When he told Mr Tho that he "could not recall whether [he] inserted [his] fingers into [the Complainant's] anus", he had used the word "anus" to mean "the hole, the anus with the hole". However, when he told Mr Tho that he "did use [his] left fingers to touch [the Complainant's] anus while sucking his penis", he had used the word "anus" to mean the cheeks of the buttocks. The Accused claimed that after having told Mr Tho that he "did use [his] left fingers to touch [the Complainant's] anus while sucking his penis", he asked Mr Tho to change the word "anus" in that sentence to "cheeks of the

170 Transcript of 28 September 2022 at p 88 ln 23 to ln 26.

171 Transcript of 28 September 2022 at p 90 ln 24 to ln 26.

172 Transcript of 28 September 2022 at p 119 ln 30 to p 120 ln 2.

173 Transcript of 28 September 2022 at p 89 ln 14 to p 90 ln 23.

174 Transcript of 28 September 2022 at p 96 ln 12 to ln 26.

buttocks", but his request was denied by the latter who said "Leave it, it's okay, I understand what you mean".[175] In cross-examination, the Accused agreed that he had not explained to Mr Tho that as far as he was concerned, there were two different meanings which could be ascribed to the word "anus". He said this was because at that moment, he had been "really, really scared, and....was not really thinking straight anymore".[176]

98 In cross-examination, the Accused also alleged that before he signed his statement on 10 August 2017, Mr Tho had informed him that if he did not sign the statement, he "won't be released from the lock-up".[177]

99 As the Accused's allegations against Mr Tho and ASP Raj were disclosed only during his testimony, the Prosecution applied for leave to recall Mr Tho and to call ASP Raj as rebuttal witnesses. The Defence did not object; and I granted the application. I summarise these two witnesses' rebuttal evidence below at [111] to [117].

Dr Lim Yun Chin ("Dr Lim")

100 Dr Lim of Raffles Hospital Psychiatric Department was disclosed as a defence witness only on 27 September 2022.[178] The Defence informed that they were calling Dr Lim as an expert witness; and his report dated 4 October 2022 was served shortly before the second tranche of the trial.[179]

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175 Transcript of 28 September 2022 at p 95 ln 26 to p 97 ln 31.

176 Transcript of 28 September 2022 at p 124 ln 30 to p 125 ln 10.

177 Transcript of 28 September 2022 at p 133 ln 3 to ln 13.

178 Transcript of 27 September 2022 at p 55 ln 7 to p 56 ln 31.

179 Exhibit D3.

101 Although in his report Dr Lim stated that he had conducted a mental state evaluation of the Accused on four separate occasions and although he set out the Accused's personal history and version of events, defence counsel's examination-in-chief of Dr Lim revealed that the real purpose of calling Dr Lim was to adduce his opinion on Dr Lambert Low's report about the Complainant's state of intoxication between 4.15am and 5.30am on 9 August 2017. It is this evidence that I outline below. In this connection, in preparing his report, Dr Lim had regard to the following (*inter alia*):[180]

(a) A screenshot of the Grab receipt for the ride from Hero's pub to the Accused's home, dated 9 August 2017;

(b) CCTV video footage of the Accused's lift lobby on the ground floor timestamped as 04:01:44 on 9 August 2017;

(c) Video footage of the Accused's lift lobby on ground floor timestamped as 05:39:46 on 9 August 2017;

(d) An audio recording of telephone call made by Complainant to the police and the transcript of the recording;

(e) Dr Lambert Low's report dated 7 August 2018; and

(f) Dr Cornelia Chee's report dated 22 January 2019.

102 In his evidence-in-chief, Dr Lim confirmed he had "no difficulty in accepting" Dr Low's calculation of the Complainant's estimated BAC level at the time of the incident, because there was "only one formula" that would be

[180] Dr Lim Yun Chin's Report dated 4 October 2022 Exhibit D3 at p 2.

used by "all" experts.[181] In Dr Lim's report, he referred to a table which set out nine different levels of "BAC percent" and stated that based on the BAC level calculated by Dr Low (between 171.25mg/100ml and 215mg/100ml at 4.15am and between 152.5mg/100ml and 190mg/100ml at 5.30am), the Complainant would have been within the range of 0.16 to 0.20 BAC percent shown in the table.[182] This table also purported to describe the "[e]ffects of increased BAC levels on a typical person" for each level of "BAC percent". According to this table, the effects of 0.16 to 0.20 BAC percent on a "typical person" would include the following: "Dysphoria predominates, nausea may appear, drinker has the appearance of 'sloppy drunk'.[183]

103 When asked to clarify the source of the table in his report, Dr Lim said that he had downloaded it from the Internet – apparently from the website of an "educational institution" in the United States. However, he was unable to say which particular educational institution it was.[184]

104 In his report, Dr Lim also stated that there were "four cardinal features associated with acute alcohol intoxication". In his opinion, the "sloppy drunk" behaviour associated with a "BAC percent" of 0.16 to 0.20 "would conceivably manifest varying combination of facets of these four cardinal features".[185] First, there would be "signs of intoxicated speech", which might "include slurred words, rambling or unintelligible conversation, incoherent or muddled speech, loss of train of thought, inability or failure to understand normal conversation,

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181 Transcript of 28 November 2022 p 11 ln 20 to ln 32.

182 Dr Lim Yun Chin's Report dated 4 October 2022 Exhibit D3 at p 7.

183 Dr Lim Yun Chin's Report dated 4 October 2022 Exhibit D3 at p 6.

184 Transcript of 28 November 2022 p 10 ln 22 to p 11 ln 16.

185 Dr Lim Yun Chin's Report dated 4 October 2022 Exhibit D3 at p 7.

and difficulty with focusing or paying attention". Second, there would be "signs of intoxication relating to balance", which might include "a person being unsteady on their feet, swaying uncontrollably, staggering, having difficulty walking, having trouble standing or staying upright and stumbling over furniture or people". Third, there would be "lack of coordination" which might manifest as "spilling or dropping drinks, having trouble opening or closing doors, etc". Fourth, there would be "intoxicating [*sic*] behaviour" which could manifest as "aggressive, belligerent, or…argumentative" behaviour and/or might include offensive or inappropriate language.

105 *Per* Dr Lim's report, the above categories "are neither exhaustive nor conclusive, in and of themselves, but combined may provide a reasonable indication that a person may be intoxicated".[186] Dr Lim's stated opinion was that based on the video recordings he had seen of the Complainant's arrival at and departure from the lift lobby as well as the audio recording of his phone call to the police, "there was no evidence of components of the above four features" of "acute alcohol intoxication".[187]

106 Dr Lim concluded his report by suggesting that a "legitimate question" could be raised as to the "visible absence of an 'overt sloppy drunken behaviour'" on the part of the Complainant (in so far as such behaviour could be observed from the video-recordings and audio-recording). It was Dr Lim's opinion that "a variety of factors" could have "existed to vary the BAC as well as changing the manifestation of alcohol intoxication". I reproduce below the factors suggested by Dr Lim:

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186 Dr Lim Yun Chin's Report dated 4 October 2022 Exhibit D3 at p 7.

187 Dr Lim Yun Chin's Report dated 4 October 2022 Exhibit D3 at p 7.

(a) Body mass: Healthy "larger built" people tended to better tolerate the intoxicating effect and they have lower BAC;

(b) Gender: For the same amount of alcohol consumed by both males and females, males tolerate intoxication better and also have a lower BAC than females;

(c) Age: Young people (<24) are less sensitive to the intoxicating effects of alcohol such as sedation and motor coordination;

(d) Tolerance: A person who drinks regularly even moderately is less sensitive to the effect of intoxication and would possibly have a lower BAC;

(e) Metabolism: Drinkers with an "active lifestyle" are often associated with lower alcohol degradation rate resulting in lower BAC and they tolerate better the intoxicating effect of alcohol;

(f) Genetics: Different forms of the same gene can lead to different degrees of alcohol metabolism. In general, Caucasians tolerate elevated alcohol levels better than Orientals because the atypical enzyme in Orientals makes it difficult for the latter to tolerate higher levels of alcohol.[188]

107 Both in his evidence-in-chief and in cross-examination, Dr Lim stated that "intoxication is a spectrum" and that "individuals may differ in their reactions" to alcohol.[189] In cross-examination, Dr Lim said that he did not disagree with the alcohol clearance rate of 15mg/100ml to 20mg/100ml of blood

188 Dr Lim Yun Chin's Report dated 4 October 2022 Exhibit D3 at p 7-8.

189 Transcript of 28 November 2022 at p 19 ln 28 to p 20 ln 12; p 70 ln 29 to p 71 ln 11.

per hour which Dr Low had used in his calculations,[190] but whereas Dr Low had stated in his report that this was the estimated alcohol clearance rate for a "moderate drinker", Dr Lim claimed that this alcohol clearance rate would apply to "non-drinkers", "moderate drinkers" and "chronic drinkers". According to Dr Lim, all these drinkers would have the same alcohol clearance rate of 15mg/100ml to 20mg/100ml of blood per hour.[191]

108 In elaborating on his opinion on the Complainant's state of intoxication in the early morning of 9 August 2017, Dr Lim stated in cross-examination that based on his review of the CCTV video-recording of the Accused's and the Complainant's arrival at the lift lobby of the Condominium, it appeared to him that the Complainant was "not staggering at all". The Complainant also looked "oriented" to time and place in that he 'was following the accused behind, when he opened the [lift] door" and thus showed "an awareness of his surrounding".[192] As for the video-recording of the Complainant's subsequent exit from the lift lobby, Dr Lim opined that this also showed the Complainant exhibiting "very normal behaviour" in that he appeared to be "trying to orientate himself" as he came down into the lift lobby. Dr Lim agreed, however, that based on the video-recordings alone, he was unable to tell whether or not at an earlier point of time inside the apartment, the Complainant would have been "in a state capable of giving informed consent to sexual activity".[193]

109 As for the audio-recording of the Complainant's phone call to the police, Dr Lim opined that while he appeared to be "definitely under the influence of

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190 Dr Lambert's Low Report dated 7 August 2018 Exhibit P6-2, AB at p 85.

191 Transcript of 28 November 2022 at p 58 ln 1 to ln 12.

192 Transcript of 28 November 2022 at p 41 ln 20 to p 43 ln 28.

193 Transcript of 28 November 2022 at p 44 ln 23 to ln 27.

alcohol", he was "orientated to time and place" in that he was able to give the police information on his location, even if he "[did] not give information very easily". Dr Lim also claimed that from the audio recording, he could hear that the Complainant's speech was "slow but not slurred".[194]

110 As Dr Lim's report was provided to the Prosecution only shortly before the second tranche of the trial and after Dr Lambert Low had already given evidence, the Prosecution was given leave to recall Dr Low as a rebuttal witness.

Rebuttal evidence

Witnesses called by the Prosecution to rebut the Accused's allegations regarding the recording of his statement of 10 August 2017

ASP Vimala Raj ("ASP Raj")

111 ASP Raj was identified by the Accused as the officer who had "interrogated" him verbally before the recording of his statement by Mr Tho on 10 August 2017. ASP Raj was re-called as a rebuttal witness because the allegations against him only surfaced during the Accused's examination-in-chief. ASP Raj testified that he did not recognise the Accused in court.[195] However, based on the checks he had done on the bail bond records, he was the officer who had extended bail for the Accused on two occasions subsequent to 10 August 2017; and he would therefore have met the Accused on those two occasions.[196]

194 Transcript of 28 November 2022 at p 35 ln 7 to p 37 ln 30.

195 Transcript of 29 November 2022 p 55 ln 21 to ln 26.

196 Transcript of 29 November 2022 at p 57 ln 21 to ln 28.

112 ASP Raj testified that he did not meet with any arrested persons at Police Cantonment Complex ("PCC") on 10 August, nor did he assist his colleagues in the investigations of the present case[197]. Having checked his field diary, ASP Raj recalled that on the morning of 10 August 2017, he had in fact been in the High Court assisting Deputy Public Prosecutors ("DPPs") with the trial of a gang rape case in which he had been the IO. Halfway through that trial, the accused persons in that case decided to plead guilty, and the matter was fixed for hearing on another day. ASP Raj returned to PCC around 12.30pm and spent his time doing paperwork and sending out emails at his workstation until about 2.30pm. He could not remember exactly what he did after that, but stated that he would probably have been in the office handling paperwork, as it was usual to put up case updates to management after a trial.[198] He denied having questioned or spoken to the Accused at all on the afternoon of 10 August 2017.

113 ASP Raj further testified that bail bond extensions would generally be done by the IO in charge of the case, but that the IO might not always be available in his office, in which case his "team-mates or anyone else in the branch itself" would be asked to help. When the Accused attended at PCC for the extension of his bail bond, he would have come in with his bailor. There would have been two copies of the bail bond form: one for the Accused and one for his bailor. The officer conducting the extension of the bail bond would endorse both copies by "stamping the next date of reporting" and signing off on the Accused's copy of the form. The Accused and his bailor would also be asked to indicate their acknowledgement on the form. The process for the extension of the bail bond would "take probably less than 2 minutes" and consisted of a "brief moment when" ASP Raj would see the Accused, confirm his identity, and

197 Transcript of 29 November 2022 at p 57 ln 16 to ln 20.

198 Transcript of 29 November 2022 p 55 ln 27 to p 57 ln 29.

get him to acknowledge the bail bond extension. ASP Raj would not have any knowledge of what the IO in charge might want from the Accused as he was not the IO for the case.[199]

Mr Thermizi Tho

114 Mr Tho was the officer who recorded the Accused's statement on 10 August 2017. The allegations against him only surfaced during the Accused's examination-in-chief.

115 Mr Tho testified that during the recording of the statement, only he and the Accused were in the room. He would ask the Accused questions and record his account of events. He did not record everything verbatim as he would summarise or rephrase. From time to time, he would ask follow-up questions and use "prompters" such as "carry on" and "next" so that the Accused could continue with his account.[200]

116 Mr Tho testified that once the statement was completed, he would have printed a copy, given it to the Accused, and told the Accused that he could "make any correction, deletion or amendment to the statement as he read through the statement". Mr Tho also read and explained the statement to the Accused. The Accused was given a pen so that he himself could manually make any amendment, deletion, or addition he wanted. Looking at the statement, the Accused had made handwritten amendments to at paragraphs 4, 6 and 7. After the Accused confirmed that there were no further amendments he wished to make, both he and Mr Tho appended their signatures at the bottom of each page

199 Transcript of 29 November 2022 p 57 ln 31 to p 61 ln 18.

200 Transcript of 29 November 2022 p 40 ln 8 to p 42 ln 5.

of the statement. The entire statement-recording process was completed at around 5.15pm.[201]

117 Mr Tho testified that he did not make any threats, inducement or promises to the Accused in relation to the making of the statement.[202] He denied having raised his voice at the Accused and/or having spoken to the Accused in an "angry tone". He also denied having said things like "it's okay, leave it" when the Accused wanted to make amendments, and/or having made remarks such as "impossible" and "how, how" in response to statements made by the Accused, and/or having tried to "coach" the Accused on what to say. Finally, Mr Tho also denied that he told the Accused that he would not be released from the lock-up if he refused to sign the statement.[203]

Witness recalled by the Prosecution to rebut Dr Lim Yun Chin's evidence

Dr Lambert Low ("Dr Low")

118 Dr Low was recalled as a rebuttal witness to address the issues brought up by Dr Lim in his report and his testimony.

119 In respect of the table of "BAC percentages" at page 6 of Dr Lim's report, Dr Low stated that he found the nine reference ranges in this table too narrow to be very meaningful. Instead, in his opinion, the literature in this subject area showed that there were "five or six" stages of alcohol intoxication. Dr Low listed and described them as follows:[204]

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201 Transcript of 29 November 2022 at p 42 ln 11 to p 43 ln 30.

202 Transcript of 29 November 2022 p 43 ln 31 to p 44 ln 11.

203 Transcript of 29 November 2022 at p 45 ln 24 to p 52 ln 14.

204 Transcript of 28 November 2022 at p 78 ln 25 to p 80 ln 13.

> So less than 50 milligrams per decilitre would imply a state of euphoria or what people would commonly call sub-clinical intoxication in a sense that people can be more talkative, may not display overt sins of being drunk… And thereafter you have what we call the excited stage where it becomes more apparent and that is a level that usually corresponds to 50 to 150 milligrams per decilitre. In this state, the person most commonly exhibits an elation and altered mood, being happy talking a bit more than usual, having impaired concentration and judgement and to a certain extent a degree of sexual disinhibition. And progressed further to the confused stage which is between 150 to 250 milligrams per decilitre. That's when you start developing things like slurred speech, unsteady walking which some people call staggering…or different types of gait disturbances, nausea, drowsiness, anti-social kind of behaviour, getting into fights. So that is the next stage, the confused stage. At 300 milligrams per decilitre, that's when we have what we call the confusion stage, which is what Dr Lim mentioned when he talked about disorientation to time, place and person… So towards the later stages of confusion, a person would then also be disoriented to time, place and person, and by the time he reaches the stupor…stage which is the 300 milligrams per decilitre, he then becomes extremely drowsy, speech becomes even more incoherent and he would…exhibit more signs of confusion …as compared to the confused stage. And finally when you hit about 400 milligrams per decilitre, that's when you have very laboured breathing, you…start developing signs of alcohol poisoning and leading towards a…comatose state and even death… [T]his is very individual dependent and would really depend on a person's tolerance to alcohol. A person who is less tolerant to alcohol, a non-seasoned drinker may even develop alcohol poisoning and death even at 300 milligrams per decilitre.

120 On the issue of alcohol clearance rate, Dr Low disagreed with Dr Lim's assertion that "all" drinkers – whether "non-drinkers", "moderate drinkers" or "chronic drinkers" – would have the same alcohol clearance rate of 15 to 20mg per 100ml of blood per hour. Instead, a seasoned drinker would have a higher alcohol clearance rate which could even go up to 25mg/100ml, whereas someone who was a non-drinker or social drinker in the context of a "Western population" would probably have an alcohol clearance rate of around 15mg/100ml. The Complainant, who drank three to four pints of alcohol weekly, would be considered a "moderate drinker". and his alcohol clearance

rate would probably "veer more towards" 20mg/100ml. In Dr Low's opinion, the most important determinant of an individual's alcohol clearance rate would be the regularity with which that individual drank alcohol. All other things being equal, a seasoned drinker would have a higher alcohol clearance rate; and a higher alcohol clearance rate, when factored into the retrograde extrapolation from the BAC level of 40mg/100ml measured at 1 PM on 9 August 2017, would lead to a higher BAC figure at 4.15am on 9 August 2017.[205]

121 As to Dr Lim's opinion on the Complainant's state of intoxication based on the video recordings and audio recordings, Dr Low agreed that one could not really say that the Complainant was staggering in the video footage. In his view, however, the audio recordings *did* demonstrate that the Complainant's speech was slurred at the material time. More importantly, insofar as Dr Lim had asserted that the Complainant appeared in the video footage to be oriented to time and place Dr Low disagreed that a lack of orientation to time, place and/or person would be the earliest sign of intoxication. In Dr Low's view:[206]

> [I]f a person reaches a state where he cannot tell time, place or person, that would have probably been quite a late stage of drunkenness. Probably even more so than being able to provide consent for sexual intercourse because being able to provide consent for sexual intercourse requires a dialogue, requires some kind of signalling, requires some kind of ample communications. If you are able to provide that, definitely you are not…disoriented. But if you were to go beyond that and not even be able to identify the place, the person or even the time, then that would be a later stage of intoxication from beyond providing consent.

122 Dr Low also opined that consent was a "multivariable question" which depended on various elements such as "understanding, weighing…the benefits

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205 Transcript of 28 November 2022 at p 81 ln 25 to p 89 ln 32.

206 Transcript of 28 November 2022 at p 95 ln 11 to p 96 ln 5.

and the cons of an activity, being able to communicate it subsequently". In the case of an intoxicated individual, Dr Low explained that alcohol would tend first to affect the frontal lobe, which controlled personality, executive function and cognition, before affecting the other centres which were important for psychomotor control (balance, posture and coordination), and finally the "involuntary centres" which controlled breathing and circulation.[207] In other words, alcohol would tend first to affect the area of the brain on which an individual would depend for decision-making and communication. In his view, therefore, the ability of an intoxicated person to give informed consent to sexual activity would probably be impaired before the individual's orientation to time, place and person was impaired.[208]

The issues in dispute

123 At the close of the trial, it was not disputed that the Prosecution bore the burden of proving that the act of penetration alleged in each of the three charges had occurred and that the Complainant had not consented to the penetration: see *Pram Nair v Public Prosecutor* [2017] 2 SLR 1015 ("*Pram Nair*") at [45].

124 In respect of the two charges under s 376(1)(*b*) of the PC (*ie* the charges of penile-oral penetration), the Accused did not deny the two acts of fellatio, but asserted that they were carried out with the Complainant's consent. In respect of the charge under s 376(2)(*a*) PC (*ie* the charge of digital-anal penetration), the Accused denied inserting his fingers into the Complainant's anus. He also asserted that the entire sexual encounter was a consensual one.

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207 Transcript of 29 November 2022 at p 9 ln 24 to p 10 ln 21; Exhibit P49.

208 Transcript of 28 November 2022 at p 96 ln 26 to p 97 ln 28.

125 Before I deal with my findings on these disputed issues, it will be expedient for me to address first the Accused's allegations in respect of his statement of 10 August 2017. This is because the Defence sought to argue that the statement was largely corroborative of the version of events provided by the Accused at trial, and that in respect of those portions which appeared to be inconsistent with his testimony or at least ambiguous, they had either been inserted by Mr Tho, with the Accused having been too "scared" to object, or Mr Tho had refused to let him amend or clarify certain words and phrases. The Prosecution, on the other hand, sought to argue that in making the statement, the Accused failed to deny the offence of digital-anal penetration under s 376(2)(a) PC; the statement should therefore be given "full weight" by the court in finding that the Accused had in fact penetrated the Complainant's anus with his fingers.

Accused's statement dated 10 August 2017

Parties' positions

126 I have set out at [93] the specific portions of the Accused's statement which he either disavowed or qualified at trial. At the outset, it should be noted that although the Accused took the position that he had been too "scared" to object to the inclusion of the disputed words or sentences in his statement, the closing submissions filed on his behalf made no reference at all to the issue of voluntariness. Notwithstanding this omission, the claims put forward in the closing submissions clearly showed the Accused to be taking the position that the inclusion of these disputed words and sentences in his statement was involuntary on his part – even if the word "involuntary" was not used: in gist, the Accused claimed to have been subject to some form of threat of harm in the course of giving his statement. For example, defence counsel submitted that

ASP Raj's alleged interview with the Accused left the latter feeling "even more frightened and believe[ing] that he should agree with whatever the police officers were telling him for the sake of his safety".[209] As another example, it was submitted that "(w)hen the Accused tried to correct Mr Tho, he would raise his voice and speak in an angry tone, causing the Accused to comply and agree with Mr Tho out of fear for his safety".[210] In short, according to the Defence, the Accused was so "scared" by both ASP Raj and Mr Tho that he ended up agreeing to whatever Mr Tho wanted to put in his statement and did not dare to insist on correcting Mr Tho or amending the statement before he signed it.

127 In the circumstances, I found it necessary first to consider whether the disputed portions of the Accused's statement were provided voluntarily by him, pursuant to s 258(3) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC"). In this connection, I should add that I proceeded on the basis that the Prosecution bore the burden of proving the voluntariness of these disputed passages beyond reasonable doubt (see: *Panya Martmontree and others v PP* [1995] 2 SLR(R) 806 at [26] and *Muhammad bin Kadar v PP* [2011] 3 SLR 1205 at [177]), since the Prosecution also sought to rely on the statement (albeit for a different purpose from the Defence's).

The law relating to voluntariness of an accused's statement

128 The test for voluntariness is a factual inquiry, which comprises both an objective and a subjective limb, *per* the Court of Appeal ("CA") in *Chai Chien Wei Kelvin v Public Prosecutor* [1998] 3 SLR(R) 619 ("*Kelvin Chai*") at [53]:

209 Defence Closing Submissions at para 177.

210 Defence Closing Submissions at para 179.

> …The objective limb is satisfied if there is a threat, inducement or promise, and the subjective limb when the threat, inducement or promise operates on the mind of the particular accused through hope of escape or fear of punishment connected with the charge: *Dato Mohktar bin Hashim v PP* [1983] 2 MLJ 232 and *Md Desa bin Hashim bin PP* [1995] 3 MLJ 350…

129 In *Lim Thian Lai v PP* [2006] 1 SLR(R) 319 ("*Lim Thian Lai (CA)*"), the CA noted (at [14]) that the objective component of the test related to determining whether the threat, inducement or promise was made, whereas the subjective component related to determining whether the threat, inducement or promise, if made, would operate on the accused's mind. Both components must be present before a statement made by the accused should be excluded on the ground that it was not voluntarily made.

130 A threat, inducement or promise need not be explicitly articulated. In *Neo Ah Soi v PP* [1996] 1 SLR(R) 199, for example, Yong Pung How CJ (at [24]) held that the actions of the investigating officer – in preferring a charge under s 414 of the PC against the appellant purely for the purpose of getting custody, when there was no basis for suspecting the appellant – "could conceivably be argued" to amount to "an implied threat or inducement".

My findings on the voluntariness of the Accused's statement

131 Having considered the evidence adduced and both sides' submissions, I was satisfied that the Prosecution had proven beyond reasonable doubt the voluntariness of the disputed passages in the Accused's 10 August 2017 statement.

The objective limb

132 In respect of the objective limb of the test for voluntariness, I found that neither ASP Raj nor Mr Tho made any of the threats alleged by the Accused.

(1) The objective limb: Allegations against ASP Raj

133 In respect of ASP Raj, I accepted that he did not interview – and indeed, did not even see – the Accused on 10 August 2017. ASP Raj testified that he was not involved at all in the investigations in the Accused's case. In fact, on 10 August 2017, he had been involved in the High Court trial of a case in which he had been the IO; and his evidence was that on returning to the office on the afternoon of that day, he would have been occupied with sending out emails and handling paperwork. ASP Raj knew nothing about the facts of Accused's case: he did not even know who the alleged victim was.[211] It was not put to Mr Tho that he (or any member of his investigative team) must have told ASP Raj about the allegations made by the Complainant. There was thus no reason for ASP Raj to have gone out of his way to interview the Accused alone, and no way in which he could have been in a position to "interrogate" the Accused about details such as how he "pushed down the pants of the victim" and "whether the victim was lying down".[212]

134 Even taking the Defence's case at its highest, what ASP Raj was alleged to have done really comprised the following: he repeated the words "you thought" to the Accused in an "angry" voice; he stated that the Complainant's family was wealthy and that the father was "super loaded"; and he said that he liked President Duterte. On the basis of these alleged acts, the Accused claimed to have feared for his life because – according to him – he knew that the police

211 Transcript of 29 November 2022 at p 63 ln 22 to ln 23.

212 Transcript of 29 November 2022 at p 63 ln 6 to ln 18.

back in his own hometown were corrupt and that they abused or even killed people. In other words, the Accused claimed that ASP Raj and/or other police officers would inflict physical harm on the Accused and perhaps even kill him. In the Accused's words, he feared that he was "going to die here".[213]

135 In considering the Accused's claims about the alleged threat constituted by ASP Raj's various statements to him, I found the judgment of VK Rajah J (as he then was) in *PP v Lim Thian Lai* [2005] SGHC 122 ("*Lim Thian Lai (HC)*") instructive. In *Lim Thian Lai (HC)*, the accused challenged the voluntariness of a statement he had given the police, alleging *inter alia* that one of the police officers – "SI Roy" – had reiterated a number of times that they were on the 18th floor of the Police Cantonment Complex. The accused took this to imply that SI Roy would throw him from the 18th floor of the Police Cantonment Complex if he did not admit the offence. In cross-examination, the accused admitted, albeit reluctantly, that the alleged threat to throw him off the 18th floor of the building was pure speculation on his part (at [37]). VK Rajah J rejected the accused's claims about the threat. *Inter alia*, Rajah J held that the allegation against SI Roy was "without substance, both in law and in fact". First, it was settled law that a self-perceived threat without a reasonable basis would not amount to a threat within the rubric of s 122(5) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) (then the relevant CPC provision on the admissibility of accused persons' investigative statements). Second, Rajah J was not persuaded that there was any legitimate basis for the "rather fanciful flight of imagination even if the accused's version of events was correct". Third, and most importantly, Rajah J was inclined to accept the contrary testimony proffered by the police officers.

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213 Transcript of 30 September 2022 at p 9 ln 22 to ln 29.

136 In similar vein, in the present case, the Accused's claims about the alleged threat by ASP Raj against his safety and his life amounted in my view to pure speculation on his part. Even assuming ASP Raj had repeated the words "you thought" in an "angry" tone and stated that the Complainant's father was "super loaded" and that he (ASP Raj) liked President Duterte, these statements did not amount to an objective threat of physical harm – much less an objective threat of murder. To borrow VK Rajah J's words, this was a case of "a self-perceived threat without a reasonable basis".

(2) The objective limb: Allegations against Mr Tho

137 In respect of Mr Tho, the Accused's alleged reasons for feeling "scared" were more vague. In sum, the Accused's case appeared to be that he had felt "really scared" during the recording of his statement, not just because of the things said by ASP Raj to him prior to the statement-recording by Mr Tho, but also because Mr Tho himself spoke in an "angry tone".[214] The Accused claimed that this caused him to "shiver" with fear whenever Mr Tho was in front of him, and to "[think] that [he did] not want to be beaten up". At the same time, the Accused felt that Mr Tho was trying to "coach" him by putting various statements to him, apparently for him to agree to. As a result of his fear, the Accused decided to say 'Yes, okay'" to whatever Mr Tho was "trying to tell" him.[215]

138 I accepted Mr Tho's evidence that he did not speak to the Accused in an "angry tone", nor did he try to "coach" the Accused on what to say. In the first place, there was no reason why Mr Tho should have done these things. The

214 Transcript of 28 September 2022 at p 87 ln 28 to p 88 ln 7.

215 Transcript of 28 September 2022 at p 88 ln 22 to p 90 ln 23.

Accused conceded in cross-examination that he was given a pen to make whatever amendments he wished after reading through the printed statement; and the Accused did in fact make several amendments using the pen. This indicated that Mr Tho was conscious of the need to be fair to the Accused and that he was prepared to let the Accused amend the statement as he wished before signing. This being the case, there was no reason for him to get "angry" at the Accused, or to put various statements to the Accused for him to agree to, or to substitute his own words for the Accused's, or to rephrase the Accused's statements in some other way.

139 I should add that the Accused claimed he had to ask Mr Tho for permission each time he wanted to make an amendment and that there were multiple instances in which Mr Tho refused to let him make amendments and instead told him to "leave it" (*per* the table at [93] above). However, I did not find this claim at all believable. If Mr Tho had really been so anxious about dictating and controlling the contents of the statement, he would not have told the Accused he could make whatever amendments he wanted – much less given him a pen to make the amendments himself.

140 Even if I were to take the Defence's case at its highest and to assume the allegations against Mr Tho to be proven, the conduct alleged – *ie* speaking in an angry voice and putting certain statements to the Accused for the latter to agree to – did not amount to an objective threat to "beat up" the Accused or to cause him physical harm. Again, this was a case where the so-called threat was entirely self-perceived, without any reasonable basis. For the avoidance of doubt, I should reiterate that I was satisfied that Mr Tho did not in fact try to "coach" the Accused by putting certain statements to him and/or rephrasing the Accused's statements.

141 As for the Accused's rather belated allegation that Mr Tho had warned him he would not be released from the lock-up if he failed to sign the statement, I accepted Mr Tho's evidence that he never said any such thing. There was simply no reason for Mr Tho to make such a threat. As he pointed out in his testimony on rebuttal, if the Accused had refused to sign the statement, he (Mr Tho) would simply have recorded the fact that the Accused had refused to sign; and the latter would then either have been released on bail or charged in court.[216] In other words, Mr Tho would have achieved nothing in threatening not to release the Accused from the lock-up if he failed to sign the statement.

(3) My decision on the voluntariness of the disputed portions of the Accused's statement

142 To sum up, therefore, in respect of the objective limb of the test for voluntariness, I was satisfied that no threats were made against the Accused by ASP Raj and Mr Tho on 10 August 2017. Having made this finding, it was not necessary for me to consider the subjective limb of the test.

143 As there were no threats made against the Accused on 10 August 2017, there was no reason at all to doubt the voluntariness of the disputed portions of the statement recorded from him on that date.

The Accused's allegations concerning the accuracy of his statement

144 Apart from the allegations against ASP Raj and Mr Tho which concerned the voluntariness of the disputed passages in his 10 August 2017 statement, the Accused also alleged that there were inaccuracies in his statement. Insofar as the Accused alleged that these were inaccuracies which

[216] Transcript of 29 November 2022 at p 53 ln 29 to p 54 ln 10.

arose from his having fearfully agreed to statements put to him by Mr Tho (*eg* the statement that the Complainant was "lying down flat" at the point the Accused took off his pants) and/or the latter having refused him permission to make certain amendments (*eg* to amend the sentence "I think he was conscious" to "I know he was conscious that time because we were just talking"), I have dealt with these allegations above at [131] to [142].

145 However, there was one significant point of inaccuracy which the Accused claimed arose from his choice of words and Mr Tho's misunderstanding of those words. This related to paragraphs 15 and 18 of the 10 August 2017 statement, which recorded the Accused as saying that he could not recall whether he had inserted or put his fingers into the Complainant's anus but that he had touched the latter's anus with his "left fingers". According to the Accused, in these paragraphs, he had actually used the word "anus" in two different senses – the buttock cheeks *and* also the anus "hole". To recap, the Accused said he had grown up in an environment where the word "anus" had a double meaning. His evidence was that when he told Mr Tho he "could not recall whether [he] inserted [his] fingers into [the Complainant's] anus", he had used the word "anus" to mean "the anus with the hole". However, when he told Mr Tho that he "did use [his] left fingers to touch [the Complainant's] anus while sucking his penis", he had used the word "anus" to mean the buttock cheeks. The Accused alleged that after having told Mr Tho that he "did use [his] left fingers to touch [the Complainant's] anus while sucking his penis", he asked Mr Tho to change the word "anus" in that sentence to "cheeks of the buttocks", but Mr Tho had claimed to "understand what [he] meant" and had told him to "leave it".

146 I rejected the above allegations. First, apart from his bare assertion that the word "anus" was used when he was growing up in the Philippines to mean

both the "cheeks of the buttocks" and the "anus hole", the Accused did not adduce any other evidence of the purported "double meaning" with which the word "anus" was used in his native language and culture.[217] If the word "anus" really did hold a "double meaning" in the Accused's native language and culture, it should not have been difficult for him to adduce evidence of this, especially since the Defence already had a copy of the statement sometime before the trial, and it was the Defence that elected to put the statement into evidence at trial.

147 Second, I observed that in his evidence-in-chief, the Accused consciously chose to use the words "buttocks" and "cheeks" – instead of "anus" – when referring to the Complainant's buttock cheeks. For example, the Accused testified that he had brushed the cheeks of the Complainant's buttocks.[218] At no point did the Accused use the word "anus" to refer to the Complainant's buttock cheeks. In other words, the Accused was clear about the appropriate terminology to be used when referring to the buttock cheeks.

148 Third, on reviewing the disputed portions of the Accused's statement in context, it was clear to me that the Accused was using the word "anus" to refer to the same body part. I have reproduced below the relevant portions of the Accused's statement for ease of analysis. Paragraph 15 of the Accused's statement read as follows:[219]

> …I then went back to suck his penis. I could not recall whether I inserted my fingers into his anus. However, I did use my left fingers to touch his anus while sucking his penis…

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217 Transcript of 28 September 2022 at p 99 ln 32 to p 101 ln 8.

218 Transcript of 28 September 2022 at p 71 ln 27 to p 72 ln 4.

219 Exhibit D2 at para 15.

149 Paragraph 18 of the Accused's statement read as follows:[220]

> …I did not ask him outright whether I could touch him, kiss him and suck his penis but he did not reject me when I started to touch him. I then sucked his penis and kissed him and touched his anus. I really don't know whether I put my fingers into his anus or not.

150 Looking at both portions of the statement where the word "anus" was repeated, it will be seen that the word "anus" was used in several instances in rapid succession, each instance of use being in close conjunction with the others. In both the above passages, the Accused essentially stated that he had touched the Complainant's anus, while clarifying that he could not recall whether he had actually inserted or put his fingers into the Complainant's anus. Logically, the Accused must have been referring to the same body part, and that body part must have been the anus "hole": it would not have made sense otherwise to use the word "anus" several times in succession in the same passage and/or to talk about the insertion of fingers into the anus in the same passage.

151 Having regard to the reasons set out above, I concluded that what the Accused was really saying in the disputed passages was that he could not recall whether he had penetrated the Complainant's anus (*i.e.* "the hole") with his fingers but that he did recall touching the latter's anus (*i.e.* "the hole") with his fingers.

152 I next address the disputed issue as to whether the Accused did in fact commit the *actus reus* of the charge under s 376(2)(*a*), *i.e.* whether he did in fact penetrate the Complainant's anus with his fingers.

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220 Exhibit D2 at para 18.

The actus reus of the s 376(2)(a) PC charge

153 At the outset, I should make it clear that in my view, both the medical report by Dr Lew and the report by the Health Sciences Authority ("HSA") were neutral factors insofar as proving the act of digital-anal penetration by the Accused was concerned.

Dr Lew's report

154 In respect of Dr Lew's report, it will be recalled that her evidence was that having performed a physical examination of the Complainant's anal area, there were no "obvious trauma, tears, scratches" that she could see.[221] In cross-examination, Dr Lew explained that "a lot of times", whether or not there were "obvious injuries" resulting from an act of digital-anal penetration would depend on the "situation, size of object, how vigorous it was done or whether lubricants are used". Therefore, having found no "obvious injuries" in the Complainant's anal area in the present case, she could not confirm that his anus had been digitally penetrated, but she also could not rule out the possibility of digital-anal penetration either.[222]

The HSA report

155 In respect of the HSA report, this showed that the only DNA found on the Complainant from the high and low anal swabs done was the Complainant's own DNA.[223] The Defence argued that given the Complainant's testimony about the Accused having inserted at least two fingers in his anus and the Accused's nails having been "quite sharp", the absence of the Accused's DNA in the

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221 Transcript of 23 September 2022 at p 7 ln 26 to ln 31.

222 Transcript of 23 September 2022 at p 9 ln 29 to p 10 ln 11.

223 Exhibit P12-4 at AB p 106.

Complainant's anus raised a reasonable doubt as to whether digital-anal penetration had actually occurred.[224] However, the premise of this argument – that digital-anal penetration in the manner described would necessarily have led to the Accused's DNA being found in the Complainant's anal region – was never put to the HSA witness because the Defence elected to dispense with the attendance of the HSA witness. For that matter, the Defence also omitted to put any questions to Dr Lew about the conclusion – if any – to be drawn from the absence of the Accused's DNA in the Complainant's anus. Given that the Defence's case theory included the specific proposition that "if any penetration had occurred, it should have left some form of scratches or marks, and the Accused DNA should have transferred onto [the Complainant's] anus/anal region"[225], the omission by the Defence to put any questions to the relevant prosecution witnesses on this issue had to have been a considered decision. As a result, however, their argument about the conclusion to be drawn from the absence of the Accused's DNA in the Complainant's anus was wholly unsupported by any evidence.

The Accused's statement dated 10 August 2017

156 As I noted earlier, the Prosecution also sought to argue that the Accused failed to deny the offence of digital-anal penetration in his 10 August 2017 statement, and that the statement should consequently be given "full weight" by the court in finding that there was in fact such penetration.

157 Having perused the Accused's statement, I did not think it was fair to say that the statement showed a *failure* by the Accused to deny the offence of

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224 Defence's Reply Submissions at para 64-66.

225 Defence's Reply Submissions at para 65.

digital-anal penetration. I have reproduced at [148] and [149] above the relevant paragraphs from the statement. What the Accused said was that he could not recall and did not really know whether he did insert his fingers into the Complainant's anus. In the circumstances, I took the view that the Accused's statement was evidentially neutral insofar as proving the *actus reus* of the digital-anal penetration charge was concerned.

The Complainant's account

158 Given the neutral nature of the above pieces of evidence, the question in the end was whether the Complainant's evidence was sufficient for the purpose of proving the *actus reus* of the digital-anal penetration charge; and given that the Prosecution's case turned on the Complainant's evidence, it was necessary for me to decide whether the Complainant's testimony was unusually convincing.

(1) The legal principles governing the application of the "unusually convincing" test

159 In *AOF v PP* [2012] 3 SLR 34 ("*AOF*"), the CA noted (at [111]) that it was "well-established that in a case where no other evidence is available, a complainant's testimony can constitute proof beyond reasonable doubt… but only when it is so 'unusually convincing' as to overcome any doubts that might arise from the lack of corroboration". The CA (at [113]) cited with approval VK Rajah JA's observation in *XP v PP* [2008] 4 SLR(R) 686 ("*XP*", at [31]) that the requirement the alleged victim's evidence ought to be unusually convincing -

> … does nothing, however, to change the ultimate rule that the Prosecution must prove its case beyond a reasonable doubt, but it does suggest how the evidential Gordian know may be untied

> if proof is to be found solely from the complainant's testimony against the [accused].

160 The CA also adopted (at [114] of *AOF*) Rajah JA's propositions in *XP* as to what "unusually convincing" entailed:

> (a) First, subsequent repeated complaints by the complainant cannot, in and of themselves, constitute corroborative evidence so as to dispense with the requirement for "unusually convincing" testimony. As Yong Pung How CJ noted in the Singapore High Court decision of *Khoo Kwoon Hain v PP* [1995] 2 SLR(R) 591 ("Khoo Kwoon Hain") at [51]:
>
> If the complainant's evidence is not 'unusually convincing', I cannot see how the fact that she repeated it several times can add much to its weight.
>
> (b) Secondly, the "unusually convincing" reminder should not be confined to categories of witnesses who are supposedly accomplices, young children or sexual offence complainants.
>
> (c) Thirdly, a conviction will only be set aside where a reasonable doubt exists and not simply because the judge did not remind himself of the "unusually convincing" standard.
>
> (d) Fourthly, an "unusually convincing" testimony does not overcome even materially and/or inherently contradictory evidence to prove guilt beyond a reasonable doubt. The phrase "unusually convincing" is not a term of art; it does not automatically entail a guilty verdict and surely cannot dispense with the need to consider the other evidence and the factual circumstances peculiar to each case. Nor does it dispense with having to assess the complainant's testimony against that of the accused, where the case turns on one person's word against the other's.
>
> (e) Fifthly, even where there is corroboration, there may still not be enough evidence to convict.

At [115] of *AOF*, the Court of Appeal further explained:

> Moving from the level of scrutiny to the elements of what an unusually convincing testimony consists of, it is clear that a witness's testimony may only be found to be "unusually *convincing*" by weighing the *demeanour* of the witness alongside both the *internal and external consistencies* found in the witness' testimony. Given the inherent epistemic constraints of an appellate court as a finder of fact, this inquiry will *necessarily* be focussed on the internal and external

> consistency of the witness's testimony. However, this is *not* to say that a witness's credibility is *necessarily* determined *solely* in terms of his or her demeanour…
>
> [Emphasis in original]

161 Further, in assessing whether a complainant's testimony is "unusually convincing", the court must also assess the complainant's testimony against that of the accused – such that the complainant's testimony is found to be "unusually convincing" to the extent that "the court can safely say his account is to be unreservedly preferred over that of another": see *XP* at [34]; *Kunasekaran s/o Kalimuthu Somasundara v PP* [2018] 4 SLR 580 ("*Kunasekaran* at [27]).

162 Lastly, the CA has also held that where the complainant's evidence was not unusually convincing, the accused's conviction would be unsafe unless there was some corroboration of the complainant's story (*AOF* at [173]; *Haliffie bin Mamat v PP* [2016] 5 SLR 636 ("*Haliffie*", at [30]). In *Haliffie*, the CA – after referencing its earlier judgement in *PP v Mohammed Liton Mohammed Syeed Mallik* [2008] 1 SLR(R) 601 ("*Liton*") at [42]-[43] – noted that the "more 'liberal approach' to corroboration" seen in cases such as *Tang Kin Seng v PP* [1996] 3 SLR(R) 444 "treats subsequent complaints made by the complainant herself as corroboration provided that 'the statement [implicating] the [accused] was made at the first reasonable opportunity after the commission of the offence" (*PP v Mardai* [1950] MLJ 33 at 33, cited in *AOF* at [173])".

163 In *Haliffie*, the CA noted that the alleged rape victim's claims that she had been raped were "clearly made immediately after the incident": "(r)ight after the alleged rape", the alleged victim had consistently told several third parties that she had been raped; and she was observed by two of these third parties to have been "very emotional, 'crying and mumbling' throughout". The CA found that the alleged victim's distress appeared to have been genuine and

that the evidence of the witnesses who saw her right after the incident was corroborative evidence under the more "liberal approach" to corroboration (at [64] to [66] of *Haliffie*).

164 In *GDC v PP* [2020] 5 SLR 1130 ("*GDC*"), in finding that the testimony of the alleged victim of an offence of aggravated outrage of modesty met the "unusually convincing" threshold, Sundaresh Menon CJ held that her testimony was *inter alia* "substantially corroborated" by a report which she had written in her school counsellor's office on the same day on which the alleged offence was committed and prior to making the police report. Menon CJ also noted that the victim's school counsellor had testified as to the victim's demeanour on the day of the incident and how she "plainly seemed to have been affected by what had allegedly occurred earlier". These factors added weight to the victim's testimony because it was "implausible that she not only lied about the encounter [with the accused], but also knew months ahead of a court appearance that she should conduct herself in a particular way before third parties in order to create an appearance of credibility" (at [14] of *GDC*).

(2) The Complainant's testimony was unusually convincing

165 I found that the Complainant's testimony in respect of the incident of digital-anal penetration met the "unusually convincing" threshold. My reasons were as follows.

166 First, having had the opportunity to observe the Complainant in the witness stand, I found his evidence on the incident of digital-anal penetration to be candid and straightforward. He gave a clear and measured account of the events which occurred in the Accused's room on 9 August 2017, but did not attempt to embellish or exaggerate his account of events and readily admitted

that there were certain things which he could not recall or which he was unsure of. For example, he readily admitted that he could not remember the sequence of the sexual acts committed by the Accused, although he remembered that there were several distinct acts – including the act of digital-anal penetration. He also explained that this was because at the material time, he was still intoxicated and "falling in and out of consciousness".[226]

167 Second, I found that the Complainant's evidence as to the incident was internally consistent. The Complainant was able to provide a vivid and detailed account of the act of digital-anal penetration. He testified clearly that he "felt fingers" in his anus.[227] He could remember that the Accused was positioned in between his legs at that juncture.[228] Although he did not actually see the Accused's fingers penetrate his anus, he was certain that he had "felt fingers" in his anus because he remembered it "being painful and sharp", and that was how he knew "that it was more than [one] finger… because it felt painful".[229]

168 Additionally, the Complainant was able to give a coherent explanation for his apparent lack of reaction at the moment of digital-anal penetration: he testified that he had consumed "a lot of alcohol" beforehand, and that he was still "falling in and out of consciousness". In his words, he "was… sleep [*sic*], intoxicated".[230]

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226 Transcript of 21 September 2022 at p 92 ln 3 to ln 16.

227 Transcript of 21 September 2022 at p 92 ln 17 to ln 19.

228 Transcript of 21 September 2022 at p 92 ln 1 to ln 3.

229 Transcript of 21 September 2022 at p 92 ln 14 to ln 31.

230 Transcript of 21 September 2022 at p 92 ln 8 to ln 12.

169 Third, the Complainant's evidence as to the incident of digital-anal penetration was also externally consistent. When examined by Dr Irfan and Dr Lew at SGH on the same day (9 August 2017), hours after the alleged incident, the Complainant informed both doctors that the Accused had penetrated his anus with his (the Accused's) fingers. Dr Irfan, who was the first doctor to examine the Complainant, also testified that when he took the Complainant's history, the latter had "complained of "mild discomfort over the anal area", as seen from his notes – which were written as part of Dr Irfan's "taking history" of the Complainant[231], whose complaint was duly documented in the medical report dated 17 August 2021.[232] Having seen the Complainant, the doctors at SGH saw fit to send him for "low anal and high anal swabs" as part of the various assessments he was required to undergo at the hospital.

170 As is apparent from the earlier summary of the Complainant's account of events at trial, his testimony about the incident of digital anal penetration was consistent with the complaint he made to the SGH doctors on 9 August 2017 about the Accused having penetrated his anus with his (the Accused's) fingers.

171 Fourth, I did not find that the Accused's evidence on the allegation of digital-anal penetration was sufficient to cast any reasonable doubt on the finding that the Complainant's evidence was unusually convincing. I found the Accused's testimony to be glib and also inconsistent with his own statement to the police. In his evidence-in-chief, the Accused claimed that he had merely *"brushed" the cheeks of the Complainant's buttocks while pulling down the latter's jeans and briefs*.[233] The impression he was clearly trying to give was

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231 Transcript of 23 September 2022 at p 14 ln 2 to ln 6.

232 Exhibit P42.

233 Transcript of 28 September 2022 at p 71 ln 24 to p 72 ln 4.

that the "brush" against the Complainant's buttock cheeks had happened only because he was at that point trying to pull the Complainant's jeans and briefs down to mid-thigh, and that it was not an intentional act of touching. However, this account was starkly at odds with the account given in the Accused's statement of 10 August 2017, in which he stated that he had "use[d] his left fingers to touch [the Complainant's] anus while sucking his penis",[234] and that he "could not recall whether [he] inserted [his] fingers into [the Complainant's] anus". I found the inconsistency between the account given by the Accused at trial and his account in his investigative statement to be material and telling. I have already explained in [144] to [152] my reasons for rejecting the Accused's attempt to attribute a double meaning to the use of the word "anus" in his statement; and leaving aside his claims of linguistic confusion, no coherent explanation was proffered by the Accused for the inconsistency between his testimony and his statement. I concluded that no weight should be given to the Accused's testimony about having merely "brushed" the Complainant's buttock cheeks with his hands when pulling down the latter's jeans and briefs.

172 In the circumstances, I was satisfied that the Complainant's evidence as to the incident of digital-anal penetration was unusually convincing. His evidence was further corroborated by his contemporaneous account of the said incident to Dr Irfan and Dr Lew. A subsequent complaint by a complainant is corroboration if the complaint implicating the offender "was made at the first reasonable opportunity after the commission of the offence" (*AOF* at [173]; *PP v Tan Chee Beng and another appeal* [2023] SGHC 93 ("*Tan Chee Beng*") at [63]-[66]). In the present case, there was no material delay between the incident of digital-anal penetration and the Complainant's complaint to the examining

234 Exhibit D2 at para 15.

doctors: the Complainant called his friend Zen and the police immediately upon leaving the Condominium; and when the police arrived, he was taken to the hospital where he was seen by Dr Irfan and Dr Lew on the same day.[235]

173 For the reasons set out in [165] to [172] above, I found that the Prosecution was able to prove the *actus reus* of the charge under s 376(2)(*a*) beyond a reasonable doubt.

174 As for the two charges under s 376(1)(*b*) of the PC (*ie* the charges of penile-oral penetration), it will be recalled that the Accused admitted to carrying out the two acts of fellatio, but asserted that they were carried out with the Complainant's consent. I next address the issue of consent.

The victim's consent in relation to the s 376(1)(b) PC charges and the s 376(2)(a) PC charge

175 In respect of the second element of the s 376(1)(*b*) PC charges and the s 376(2)(*a*) PC charge, the Prosecution bore the burden of proving that the Complainant did not consent to the acts of penetration. I considered, firstly, whether the Complainant had the capacity to consent to the sexual acts at the material time; and secondly, whether the Complainant did in fact give consent to the sexual acts at the material time.

176 The Prosecution's case was that the Complainant did not have the capacity to consent to sexual activity with the Accused at the material time

235 Transcript of 21 September 2022 at p 104 at ln 1 to p 105 ln 20.

because of his intoxicated state;[236] further, that he did not in fact consent to any form of sexual activity with the Accused.[237]

177 As for the Defence, quite apart from denying the act of digital-anal penetration, the Accused contended that the entire sexual encounter was consensual, and that the Complainant had the capacity to give such consent as he was conscious and awake throughout.[238]

178 In this connection, I noted that in *Pram Nair*, the CA highlighted that in approaching the element of consent in sexual assault cases, the "more logical approach" would be first to consider whether the alleged victim was capable of giving consent, and then to consider whether consent was in fact given. As the CA explained (at [62]):

> …Where the absence of consent is an element of an offence, and it is shown that the alleged victim was incapable of giving consent, then it would not matter whether she ostensibly did since such a consent would not be valid. That is the effect of s 90(*b*) of the Penal Code. If, however, the victim was not intoxicated to such a degree as to negate any ostensible consent she gave, the PP can still make out the offence by proving that, although capable of giving consent (in that the victim was intoxicated but still able to understand the nature and consequence of her acts), the victim did not in fact do so.

179 I address first, therefore, the issue of whether the Complainant had capacity to consent at the material time.

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236 Prosecution's Closing Submissions at para 55.

237 Prosecution's Closing Submissions at paras 45-47.

238 Defence's Closing Submissions at paras 95, 99, 129, 134 and 188-192.

Whether the Complainant had capacity to consent to the sexual acts alleged

(1) The applicable legal principles

180 *Per* s 90(*b*) of the PC:

> A consent is not such a consent as is intended by any section of this Code –
>
> (b) if the consent is given by a person who, from unsoundness of mind, mental incapacity, intoxication, or the influence of any drug or other substance, is unable to understand the nature and consequences of that to which he gives his consent

181 The general principles relating to capacity to consent have been set out by the Court of Appeal in *Pram Nair* (at [96]) and *Asep Ardiansyah v Public Prosecutor* [2020] SGCA 74 ("*Asep Ardiansyah*", at [29]). The relevant general principles are:

> (a) Under s 90(b), 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.
>
> [emphasis added in bold]

182 In assessing the Complainant's capacity to consent at the time of the alleged offences on 9 August 2017, I considered (a) expert evidence as to the Complainant's BAC level at the material time, (b) the Complainant's testimony, and (c) the Accused's testimony and his statement to the police.

(2) The expert evidence

183 In putting forward their submissions on the issue of the Complainant's capacity to consent to sexual activity, both the Prosecution and the Defence placed heavy reliance on the evidence of their expert witnesses, Dr Lambert Low and Dr Lim Yun Chin respectively. It must be remembered, however, that the "question of whether a particular complainant is able or unable to consent is one of fact" (*Pram Nair* at [93]). In approaching this factual inquiry, as with all other factual inquiries that arise in the course of a trial, the court's fact-finding function cannot be arrogated to the expert: it remains the function of the trial judge to make findings of fact (*Eu Lim Hoklai v PP* [2011] 3 SLR 167 at [44]). Expert evidence is one of the factors that the trial judge considers in this fact-finding exercise. As CJ Menon noted in *Anita Damu v PP* [2020] 3 SLR 825 (at [36]), "even where an expert has expressed an opinion on how she thinks the ultimate issue is to be resolved", the court must nonetheless arrive at a final finding of fact by "sifting, weighing and evaluating the objective facts within their circumstantial matrix and context".

184 In the present case, while Dr Low's and Dr Lim's expert evidence was relevant in establishing the Complainant's BAC level at the time of the alleged offences and in elucidating the effects generally associated with such BAC

level, it was not for Dr Low or Dr Lim to say whether as a matter of fact, the Complainant was capable of giving his consent at the material time.

185 As to the Complainant's BAC level, Dr Low's evidence was that the Complainant's BAC level would have been between 171.25mg/100ml and 215mg/100ml as at 4.15am – and between 152.5mg/100ml and 190mg/100ml as at 5.30am.[239] Dr Low explained that he had used a retrograde extrapolation method to compute these BAC levels. This involved using the Complainant's BAC at 1.00 PM on 9 August 2017, which had been measured at 40mg/100ml. In gist, this entailed Dr Low doing a "backward" calculation of the Complainant's BAC levels using an objectively obtained baseline measurement of the Complainant's BAC as well as an estimated alcohol clearance rate (*ie* the rate at which the Complainant's body would clear or metabolise the alcohol). Dr Low explained that the retrograde extrapolation method of BAC calculation was a more accurate method, compared to estimating the Complainant's BAC levels based on the amount of alcohol he was able to recall drinking.[240]

186 As seen from my earlier summary of his testimony (at [47] to [60]), Dr Low's evidence was that while a person would generally start experiencing the effects of alcohol on his psychomotor functions and coordination at BAC levels above 50mg/100ml and "more cognitive effects" at 100mg/100ml, it would generally be at BAC levels above 150mg/100ml that a person's mental state "starts to become even more affected":[241]

> His awareness of the surroundings…his responses to his surroundings, his ability to take in information and process

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239 Dr Lambert Low's Report dated 7 August 2018 at AB p 85.

240 Transcript of 27 September 2022 at p24 ln 1 to p 25 ln 4.

241 Transcript of 27 September 2022 at p 25 ln 20 to p 26 ln 30.

> information, his ability to understand and weigh decisions, his ability to…make sense of things around him… So generally, above 150 milligrams per decilitre, I would say that a person's mental state becomes impaired, he tends to make reckless behaviour, tends to be…less aware of his surroundings… [H]e becomes more and more confused above 150 milligrams per decilitre.

187 Dr Low also gave evidence that based on the Complainant's estimated BAC levels at the time of the alleged offences (as calculated by Dr Low) and the Complainant's account of the events inside the Accused's room, his opinion was that it was "not hard to conclude that he was likely to still be intoxicated between 4.15am and 5.30am and therefore unable to consent to the sexual acts committed against him".[242] In his evidence-in-chief, Dr Low explained the reasons for his opinion as follows:[243]

> [U]sing a threshold of about 150 milligrams per decilitre to reach a confused state and taking into account…the gravity of the act which is a sexual act which is something very intimate, and ability to weigh the information with regards to consent to a sexual act which is something that is very personal, something that you're giving away…your own personal body, being able to reach such a difficult decision at a blood alcohol level of 150 when…you are confused is going to be very hard… [I]f proper consent was to be taken at that blood alcohol level, it is very hard to say that the person is being able to give that consent in such a confused state for something...personal and important…to somebody.

188 I should add that in the course of the trial, the Prosecution confirmed that it was not their case that in every instance where an individual had a BAC level above 150mg/100ml, he or she would automatically and necessarily lose the capacity to consent to sexual activity. Rather, it was the Prosecution's case – based on Dr Low's evidence – that *generally*, at BAC levels of 150mg/100ml, an individual's ability to "process information", "understand and weigh

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242 Dr Lambert Low's Report dated 7 August 2018 at AB p 85.

243 Transcript of 27 September 2022 at p 29 ln 3 to ln 17.

decisions" and "make sense of things around him" would be impaired, which would in turn mean the impairment of the individual's capacity to consent to sexual activity. In the case of the present Complainant, the Prosecution's case was that his account of the events inside the Accused's room, coupled with certain admissions in the Accused's 10 August 2017 statement, demonstrated that he (the Complainant) was in fact incapable of consenting to sexual activity at the material time.

189 Crucially, the defence expert Dr Lim testified that he had no difficulty in accepting the BAC figures derived by Dr Low using the retrograde calculation method (i.e. between 171.25mg/100ml and 215mg/100ml as at 4.15am and between 152.5mg/100ml and 190mg/100ml as at 5.30am). Indeed, Dr Lim acknowledged that in using this method, there was only one formula which was "used by all of the doctors".[244] Dr Lim also confirmed that he "would accept" that at BAC levels of 150mg/100ml, a person would "generally experience impaired judgement and sexual disinhibition"[245].

190 There were two major points, however, on which Dr Lim's opinion appeared to diverge from Dr Low's. The first concerned the issue of alcohol clearance rate. As I alluded to earlier, in using the retrograde extrapolation method to calculate the Complainant's BAC levels at the time of the alleged offences, Dr Low assessed that the Complainant would be regarded as a "moderate drinker", based on the latter's account of his drinking pattern. Dr Low opined that based on the available literature, the alcohol clearance rate of a moderate drinker would be in the range of 15mg/100ml to 20mg/100ml.[246]

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244 Transcript of 28 November 2022 at p 11 ln 20 to p 11 ln 32.

245 Transcript of 28 November 2022 at p 32 ln 6 to p 32 ln 27.

246 Transcript of 28 November 2022 at p 81 ln 25 to p 83 ln 16.

191 Dr Lim, in cross-examination, stated that he did not disagree with the alcohol clearance rate of 15mg/100ml to 20mg/100ml employed by Dr Low in his report. However, somewhat confoundingly, Dr Lim said that in his view, *all drinkers* – whether "non-drinkers", "moderate drinkers", or "chronic drinkers" – would have the *same* alcohol clearance rate of 15mg/100ml to 20mg/100ml.[247] Dr Lim also said that the range of alcohol clearance rate which applied to *all drinkers* could run from 15mg/100ml to 20mg/100ml, or 12mg/100ml to 20mg/100ml, or 15mg/100ml to 25mg/100ml.[248]

192 I found Dr Lim's evidence in this respect to be unhelpful and somewhat illogical. First, as Dr Low pointed out in rebuttal, while it is true that there is a range of alcohol clearance rates "for any person", it is not possible to disregard the difference between "a non-drinker versus an occasional drinker versus a chronic drinker". Dr Low explained that the most important factor in determining an individual's alcohol clearance rate would be the regularity of drinking: a seasoned drinker would generally have a higher alcohol clearance rate.[249] If one were to use a range of 12mg/100ml to 18mg/100ml, an alcohol clearance rate of 12mg/100ml would apply to a "very novice drinker", whereas more experienced drinkers would "[tend] to move to the upwards of the spectrum", such that it would simply be "quite hard to use" the same alcohol clearance rate of 12mg/100ml for someone like the Complainant who "clearly had regular drinks". In fact, in Dr Low's opinion, an alcohol clearance rate of 15mg/100ml would be at the lower end of the spectrum for an individual with the Complainant's reported drinking pattern. This would mean that the Complainant's BAC level as at 4.15am should actually be at the higher end of

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247 Transcript of 28 November 2022 at p 57 ln 10 to p 58 ln 12.

248 Transcript of 28 November 2022 at p 51 ln 21 to p 52 ln 12.

249 Transcript of 28 November 2022 at p 81 ln 25 to p 83 ln 32, p 88 ln 1 to ln 31.

the range of 171.25mg/100ml and 215mg/100ml calculated by Dr Low, because a higher alcohol clearance rate – when factored into a retrograde extrapolation – would lead to a higher BAC value as at 4.15am on 9 August 2017.[250] In this connection, I note that the Defence did not at any stage challenge the Complainant's account of his drinking habits (as recorded by Dr Low in his report).

193 Second, and more fundamentally, Dr Lim's assertion that the alcohol clearance rate of 15mg/100ml to 20mg/100ml used by Dr Low was one applicable to all drinkers made no substantive difference at the end of the day because Dr Lim himself affirmed in cross-examination that he "accept[ed] Dr Low's result".[251]

194 Having affirmed more than once that he accepted the BAC levels calculated by Dr Low in his report, however, Dr Lim sought to show that the Complainant "didn't display the behaviour associated" with these BAC levels. This was the second point on which Dr Lim's opinion appeared to diverge from Dr Low's. Dr Lim's main reason for claiming that the Complainant's behaviour was uncharacteristic of these BAC levels was his observation, firstly, that the Complainant appeared able to walk without staggering or requiring support in the CCTV footage of the Accused's lift lobby; and secondly, that the Complainant was able to give the address of the Condominium in his phone call to the police and was generally able to make himself understood during the phone conversation. The whole point of Dr Lim's evidence in this respect appeared to be to suggest that the Complainant must therefore have had a lower

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250 Transcript of 28 November 2022 at p 89 ln 1 to p 91 ln 23; Transcript of 29 November 2022 at p 18 ln 4 to p 21 ln 29.

251 Transcript of 28 November 2022 at p 57 ln 13.

BAC level at the time of the alleged offence than those calculated by Dr Low – since Dr Lim also suggested in his report various factors such as "body mass" and "genetics" which could "lead to different degrees of alcohol metabolism" and thus different BAC values.[252] I say this "appeared to be" the point of Dr Lim's evidence because regrettably, Dr Lim was not at all clear about the point he was making: this seemed the only rational explanation as to what Dr Lim was seeking to convey.

195 Again, I found Dr Lim's evidence in this respect unhelpful and illogical. In the first place, he had already accepted the BAC values calculated by Dr Low based on the undisputed BAC figure of 40mg/100ml measured at 1.00pm on 9 August 2017 and using the retrograde extrapolation method. In subsequently suggesting (or seeming to suggest) that the Complainant might have had a lower BAC level than the values calculated by Dr Low, Dr Lim failed to put forward any alternative calculations, much less any alternative BAC value. This was unconstructive, to say the least.

196 Second, it appeared to me that any attempt by the Defence to suggest a lower BAC level on the Complainant's part based on behaviour purportedly observed from the video and audio recordings was misconceived. As Dr Low pointed out in rebuttal, any attempt to "push down a calculated blood alcohol concentration just because the apparentness of it cannot be seen" would be a scientifically incorrect approach, since it would essentially conflate the notion of an individual's "tolerance" of alcohol (in the sense of being able "to withstand the effects of alcohol without manifesting it") with the individual's BAC level. As Dr Low explained:[253]

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252 Exhibit D3 at p 7-8.

253 Transcript of 29 November 2022 at p 26 ln 19 to p 29 ln 12.

> [F]rom what I understand in his report, [Dr Lim] is trying to say that because [the Complainant] is of such characteristics, therefore he should have a lower blood alcohol concentration than what I have stated. And because he has observed the footage, he had heard the audio, it doesn't seem like someone who is in this range of blood alcohol concentration. But on the other hand, he has agreed with me that this is probably…the range of blood alcohol concentration that [the Complainant] has in his system. It's just that he's not showing it. And it doesn't look like the apparent blood alcohol concentration and therefore, he said that there is therefore a lower blood alcohol concentration. There is some contradiction here because he has agreed with me on one hand, on the calculation, but the apparent blood alcohol concentration he disagrees based on what he has seen. And…he then pushes down the…blood alcohol concentration. That is not correct. We cannot push down a calculated blood alcohol concentration just because the apparentness of it cannot be seen. What we can ask ourselves then is, how is he manifesting such ability to tolerate the blood alcohol concentration? And that comes to the term "tolerance" and not metabolism and not blood alcohol concentration, because that is already fixed, that is already calculated. What you can then ask…is that, how is a person not manifesting the effects of alcohol at such levels? And that's when you come to…the apparentness of his tolerance to alcohol, his ability to withstand or mask the symptoms and not harp upon a lower BAC because that cannot be in dispute anymore because he has agreed with me.

197 Third, as I have noted, Dr Lim's observations as to the Complainant's purportedly uncharacteristic behaviour were based on the CCTV footage of the latter's arrival at and subsequent exit from the lift lobby and on the audio recording of his phone call to the police. As to the CCTV footage, the video-recording of the Complainant's arrival at the lift lobby lasted no more than 16 seconds,[254] while the recording of his subsequent exit lasted 7 seconds.[255] The distance for which the Complainant could actually be seen walking in both video-recordings was extremely short. Moreover, in the first video-recording, the Complainant was seen simply following the Accused into the lift – which

254 Transcript of 28 November 2022 at p 39 ln 4 to ln 18.

255 Transcript of 28 November 2022 at p 47 ln 1 to ln 6.

suggested that there would not have been any real effort required on his part to orientate himself to his surroundings. In the second video-recording, it could be seen that he initially went in the wrong direction in his attempt to exit the Condominium before retracing his steps to get back to the correct path – which suggested some degree of confusion in his cognition. In the circumstances, the observation that he could not be seen visibly staggering or requiring support during these two short snippets could not in my view be sufficient basis for suggesting that his behaviour was uncharacteristic of someone with the BAC levels calculated by Dr Low – much less, that he must therefore have had a lower BAC level at the material time.

198 As for the audio-recording of the Complainant's phone call, having listened to it multiple times, it appeared to me that the Complainant was not merely mumbling but also slurring his words at certain intervals during the phone call – a fact Dr Low also remarked upon.[256] The fact that he appeared to know he was talking to the police and was able to tell them where he was did not in my view warrant the conclusion that this behaviour was uncharacteristic of someone with the BAC levels calculated by Dr Low – much less, that he must therefore have had a lower BAC level at the material time (see [121] above).

199 At the end of the day, therefore, having reviewed Dr Lim's evidence in totality versus Dr Low's, I was satisfied that there was no merit in the Accused's suggestion that the Complainant's behaviour was uncharacteristic of someone with the BAC levels calculated by Dr Low and/or that the Complainant must have had a lower BAC than those calculated by Dr Low. I accepted Dr Low's evidence as to the Complainant's BAC levels as between 4.15am and 5.30am on 9 August 2017. I also accepted Dr Low's evidence that at the BAC levels

256 Transcript of 28 November 2022 at p 98 ln 9 to p 99 ln 4.

calculated by him, generally the ability of the individual to consent to sexual activity would be impaired, because the individual's ability to understand and to weigh the "benefits and cons" of sexual activity, to make an informed decision and to communicate that decision would be impaired.

200 Dr Low's evidence was a helpful and integral part of my consideration of the question as to whether the Complainant in fact had the capacity to consent to the sexual acts by the Accused at the material time. Dr Low's evidence established the Complainant's BAC levels at the material time, the effects of intoxication generally associated with such BAC levels in an individual, and the fact that these effects would generally include impairment of the individual's ability to consent to sexual ability.

201 On the question of whether the Complainant *in fact* possessed the capacity to consent to the sexual acts by the Accused, having reviewed his testimony and the Accused's against the backdrop of the expert evidence, I accepted the Prosecution's submission that the Complainant did not in fact have such capacity at the material time.

(3) The Complainant's and the Accused's evidence

(A) THE COMPLAINANT'S ACCOUNT OF EVENTS

202 The Complainant's account of events is summarised at [28] to [38] above. To recap, in gist, the Complainant testified that he had fallen asleep after telling the Accused that he wanted to sleep and that he had woken up to find the Accused fellating him.[257] The Complainant said that he was still intoxicated at the point he woke up; he recounted being "like paralyzed similar to

[257] Transcript of 21 September 2022 at p 88 ln 16 to p 90 ln 10.

[when]…dreaming", feeling "paralyzed with fear", wanting to "get out" but not being able to, and experiencing a feeling similar to what he called "sleep paralysis". While he was in this state, the Accused carried out various sexual acts which included kissing him, digitally penetrating his anus and fellating him a second time. The Complainant described himself as falling in and out of consciousness as these acts were performed by the Accused. Finally, at some point, he managed to gather the strength to get up and to push or brush the Accused away before leaving the room.[258]

203 Based on his testimony, the Complainant was still asleep and unconscious at the point the Accused first started fellating him, and did not as such have the capacity to consent to any sexual activity. Upon waking up, he continued to experience the effects of intoxication in that he was falling in and out of consciousness and felt as though he were paralysed "like when…dreaming". Based on his account, again, his mental state upon awakening was such that he did not have the capacity to consent to any sexual activity. The question, then, would be whether the Complainant's testimony was "unusually convincing".

204 I found the Complainant's testimony about what happened inside the room and the state that he was in at the material time to be unusually convincing. My reasons were as follows.

205 First, the Complainant was able to provide a clear account of the events inside the Accused's room. He was able to recall that prior to the alleged incident of sexual assault, he had been sitting on the floor of the room, that the Accused had given him an alcoholic drink which he had consumed, that he had

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258 Transcript of 21 September 2022 at p 90 ln 8 to ln 30.

refused the Accused's offer of a change of clothing (specifically, pyjamas), that he had told the Accused he was going to sleep, and that he had then gone to sleep lying flat on the floor.[259] He next recalled being woken up by some movement and finding that the Accused was sucking his penis. He was able to recall how he was "half asleep" and "pulling in and out of consciousness" as the Accused tried to put his tongue into his (the Complainant's) mouth and to lift his (the Complainant's) hand to put it on the Accused's penis: *inter alia*, he described how his hand was "floppy" and would "just drop" even as the Accused tried to place it on his penis. He also recalled the Accused inserting his fingers into his anus because he remembered it feeling "painful" and "sharp". Finally, he recalled managing to "gain the strength" to get up, pushing or brushing the Accused away (though "not violently"), and realising at that point that his belt had come undone and that his trousers and briefs were around his ankles. He had some "vague" recollection of going to the toilet, feeling "disgusted" and trying to wash his penis because of his fear of "getting any STD".[260] In all, I found the Complainant's account of what he could remember to be a vivid and textured one. He was also able to explain why and how his mental state upon awakening prevented him from resisting the sexual acts carried out by the Accused.

206 At the same time, I observed that the Complainant did not attempt to embellish or exaggerate his evidence. When he was unsure of something, he said so: for example, although he did recall feeling "disgusted" and fearful of "getting any STD", he admitted that he could not be "100%" certain that he had in fact gone to the toilet and tried to wash his penis. He was also candid in admitting the things he could not remember – for example, the exact sequence

259 Transcript of 21 September 2022 at p 81 ln 21 to p 88 ln 18.

260 Transcript of 21 September 2022 at p 90 ln 8 to p 90 ln 30.

of the sexual acts carried out by the Accused in between the two acts of fellatio,[261] how exactly he got out of the apartment, and whether the Accused helped him to get out of the apartment.

207 For the reasons set out above, I found that the Complainant's account of the incident of alleged sexual assault and of the state he was in at the material time to be internally consistent.

208 I also found the Complainant's account to be externally consistent. First, the Complainant's testimony was consistent with Dr Low's expert evidence about his likely BAC levels at the time of the alleged offences and about the effects of intoxication generally associated with an individual at such BAC levels. In particular, the Complainant's description of how he had felt "paralyzed similar to when…dreaming" and how he had fallen "in and out of consciousness" corresponded with Dr Low's evidence of the mental state generally associated with BAC levels above 150mg/100ml: namely, that at such BAC levels, the individual would be in a "confused state", where "his conscious level drops"; and his ability to "process information", to "understand and weigh decisions", to "make sense of things around him", and to formulate and communicate consent would be impaired.

209 Second, the Complainant's testimony was also consistent with the account he provided to the examining doctors at SGH hours after the alleged offences. As documented by Dr Irfan in his report of 17 August 2017,[262] the Complainant had recounted how he fell asleep after consuming a drink provided by the Accused, how he woke up to find the latter "performing oral sex on him

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261 Transcript of 21 September 2022 at p 92 ln 3 to ln 13.

262 Exhibit P42.

and penetrating his anus with his finger", and how he "subsequently pushed the accused away, walked out and called the police".

210 I note that in closing submissions, the Defence argued that the Complainant's testimony about the alleged sexual assault was externally inconsistent in that it was inconsistent with the account he provided to the various medical and expert witnesses: according to the Defence, the Complainant had given differing descriptions in each of these accounts as to how he managed to get away from the Accused. In respect of the accounts provided to medical and expert witnesses, the Defence pointed to the following extracts:[263]

> NUH Medical report dated 22 Jan 2019 by Dr Cornelia Chee:
>
> "He managed to break free and run out of the house"
>
> IMH report dated 7 August 2017 by Dr Lambert Low:
>
> "After some struggle, he managed to push off the accused and staggered to the bathroom outside to wash himself"
>
> SGH report dated 17 August 2021 by Dr Irfan Abdul Rahman Sheth:
>
> "The patient said he subsequently pushed the accused away, walked out and called the police"

211 For ease of reference, I also reproduce below the relevant portion of the Complainant's testimony:[264]

> "…I was woken up by him sucking my penis and I just eventually managed to do something managed to gain the strength to get up and I pushed him away and not violently, just brushed him away. And then I just wanted to get out. I---

263 Defence's Closing Submissions at para 43.

264 Transcript of 21 September 2021 at p 90 ln 21 to p 90 ln 30.

> I---have anything else from my mind, I just wanted to get out. So I tried to leave as soon as possible. I---I vaguely remember that I went to the toilet… I don't remember for certain but I have a vague recollection. I tried to wash my penis. I was disgusted. I---I---you know, of getting any STD, so anything like that. So I just---just tried to leave as soon as I could."

212 Having reviewed the above evidence, I was satisfied that the Complainant's account of how he managed to get away from the Accused remained in substance the same throughout his testimony and the various accounts he gave to Dr Irfan, Dr Low and Dr Chee. The Complainant's evidence, in gist, was simply that he managed to get free of the Accused and to leave the apartment as soon as he could. The fact that the Complainant might have used slightly different terminology in recounting the events in court and to the medical and expert witnesses ("break free", "some struggle", "pushed", "pushed him away") did not in any way alter the substance of the Complainant's account.

213 For the reasons set out above, I rejected the Defence's argument that the Complainant's evidence about the alleged sexual assault was externally inconsistent.

(B) THE ACCUSED'S ACCOUNT OF EVENTS

214 Additionally, having assessed the Complainant's testimony against the Accused's, I was satisfied that the Complainant's testimony was to be unreservedly preferred over the Accused's. In contrast with the Complainant's account of the alleged sexual assault and the state he was in at the material time (which account I found internally and externally consistent), I found the Accused's testimony to be materially inconsistent with his statement of 10 August 2017.

215 First, in the Accused's testimony to court, he claimed that throughout the entire time the sexual acts were being carried out on the Complainant, the latter was in a seated position.[265] This emphasis on the Complainant's seated position appeared to me to be an attempt to drive home the point that the Complainant was – according to the Accused – not asleep at the material time. However, in the 10 August 2017 statement, the Accused's evidence was that the Complainant "was almost lying flat on the floor and only his head was against the drawer": in fact, the Accused added that the Complainant "was lying straight" and that it was "easier for [him] to remove [the Complainant's] jeans".[266]

216 Secondly, in his testimony at trial, the Accused insisted that throughout the entire time the sexual acts were being carried out on the Complainant, the latter "was still awake, conscious and… did not push [the Accused's] hands away or brush [the Accused's] hands away.[267] In contrast, in the 10 August 2017 statement, the Accused gave a much more tentative and ambiguous account:[268]

> …**He was lying straight** and it was easier for me to remove his jeans. I looked at him and **I saw that his eyes were half opened. I think he was conscious because we were talking just a moment ago. He did not say anything and I also did not ask him anything** but I continued to open his belt, his zip and pulled down his jeans together with his underwear…
>
> [emphasis added]

217 There were no other references to the Complainant being awake or conscious in the Accused's statement. *Per* his statement to the police, therefore,

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265 Transcript of 28 September 2022 at p 57 ln 19 to p 63 ln 18.

266 Exhibit D2 at para 14.

267 Transcript of 28 September 2022 at p 60 ln 15 to p 63 ln 17.

268 Exhibit D2 at para 14.

the Accused's position was that he had merely thought the Complainant was conscious because the latter's eyes were "half opened" and they were "talking just a moment ago". This contrasted sharply with his emphatic assertion at trial about the Complainant having been awake and conscious throughout the incident.

218 For the reasons set out above, I did not find the Accused's evidence sufficient to cast any reasonable doubt on the finding that the Complainant's account of the alleged sexual assault and the state he was in was unusually convincing.

(4) Capacity to consent: Conclusion

219 On the basis of the evidence adduced, I was satisfied that the Complainant was asleep and unconscious at the point when the Accused first started fellating him; and that he did not have the capacity, therefore, to consent to the first act of fellatio at that point. I was also satisfied that upon being awakened, the Complainant's mental state – and in particular, his ability to consent to sexual activity – continued to be impaired by the effects of intoxication at the BAC levels calculated by Dr Low, such that he did not have the capacity to consent to the continuation of the fellatio by the Accused and/or to the other sexual acts carried out by the Accused.

Whether the Complainant in fact consented to the sexual acts

220 Given my finding that the Complainant had no capacity to consent to the sexual acts alleged, it was strictly unnecessary for me to consider whether he did in fact consent. Nevertheless, in the interests of completeness, I also proceeded to consider in the alternative whether – assuming the Complainant had capacity to consent to the sexual acts, he did in fact consent.

221 The Prosecution's case was that the Complainant never gave any implicit or explicit consent to sexual activity with the Accused. The Prosecution also took the position that the Complainant was at all times only interested in pursuing sexual relationships with women, not with men[269], and that he never told the Accused he was interested in "exploring his sexuality".

222 The Defence, on the other hand, alleged that the Complainant's actions in the course of the alleged sexual encounter demonstrated his consent to the sexual acts carried out by the Accused. Specifically, the Complainant was alleged to have "tilted his body and angled his upper body to face the ceiling", thereby making it easier for the Accused to remove his clothes. The Complainant was also said to have "had an expression of arousal on his face" while the Accused was fellating him.[270] Further, the Defence claimed that the Accused had harboured romantic feelings towards the Complainant and that the latter had behaved flirtatiously and seductively such that the Accused had strongly believed that his romantic feelings were reciprocated.[271]

Whether the Complainant had in fact consented to the sexual acts alleged

223 I go on to consider whether, even if the Complainant had the capacity to consent to the alleged sexual acts at the material time, he had in fact consented to such acts.

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269 Prosecution's Closing Submissions at paras 44-45.

270 Defence's Closing Submissions at paras 168-171.

271 Defence's Closing Submissions at paras 153-154.

(1) The law on consent

224 In *Pram Nair*, the CA cited (at [93]) with approval the following passage from Ratanlal & Dhirajlal's Law of Crimes: A Commentary on the Indian Penal Code 1860 vol 2 (C K Thakker & M C Thakker eds) (Bharat Law House, 26th Ed, 2007) at p 2061 (see Ratanlal & Dhirajlal's The Indian Penal Code (Act XLV of 1860) (Y V Chandrachud & V R Manohar eds) (Wadhaw and Company Nagpur, 31st Ed, 2006) at pp 1921–1922 and Sri Hari Singh Gour's The Penal Law of India (Law Publishers (India) Pvt Ltd, 11th Ed, 2000) vol 4 at pp 3611–3614 for similar points) which discussed the element of "consent" in the offence of rape under the Indian equivalent of the now amended s 375 of the Penal Code (Cap 224, 1985 Rev Ed):

> … Consent on the part of a woman, as a defence to an allegation of rape, requires voluntary participation, not only after the exercise of intelligence, based on the knowledge of the significance and the moral quality of the act, but after having freely exercised a choice between resistance and assent … A woman is said to consent only when she freely agrees to submit herself, while in free and unconstrained possession of her physical and moral power to act in a power she wanted. Consent implies the exercise of free and untrammeled right to forbid or withhold what is being consented to; it is always a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former.

225 The CA in *Pram Nair* accepted that this definition of consent should be similarly applicable to the offence of sexual assault by penetration and rape (at [94] of *Pram Nair*).

(2) The Complainant's account of events

226 In the present case, the question of whether there was in fact consent by the Complainant to the sexual acts by the Accused turned on the former's testimony. I have earlier explained (at [204]-[213] above) why I found the

Complainant's account of the incident unusually convincing. I add the following observations.

227 First, the Complainant's assertion that he never consented to any sexual activity with the Accused was substantially corroborated by the evidence of his phone call to his friend Zen immediately upon leaving the Condominium. Zen gave evidence that when he was woken up by the Complainant's phone call sometime between 4.00am and 5.00am on 9 August 2017, the first thing that the Complainant told him was "J.P [the Accused] raped me". Zen's recollection was that the Complainant "sounded like he was panicking and really scared", "was mumbling little bits of words and breathing heavily", and had to be calmed down by Zen.[272] Zen advised the Complainant to call the police; and such was the latter's apparent distress and anxiety that he called Zen again about ten minutes later to say that "the Police had not arrived yet, and…he did not know what to do".[273] Zen's evidence about the Complainant's immediate complaint of rape and his distress added weight to the latter's testimony because – to borrow Menon CJ's words in *GDR* (at [14]) – it was implausible that the Complainant not only lied about the sexual encounter, but also knew *years* ahead of a court appearance that he should conduct himself in a particular way before third parties in order to create an appearance of credibility.

228 Second, in calling the police after his conversation with Zen, the Complainant repeated the same complaint of rape. Further, having listened to the audio recording of the Complainant's phone call to the police multiple times, I found that his distress was very much apparent during the phone call: quite

272 Statement of Tan Tian Sou Zen at AB p 107 paras 4-5.

273 Statement of Tan Tian Sou Zen at AB p 107 para 5.

apart from appearing to slur some of his words, his voice was shaky and soft, such that the phone operator had to say "I can't really hear you".[274]

229 Third, as documented in Dr Irfan's report of 17 August 2017, the Complainant repeated the same complaint of sexual assault to the examining doctors at SGH, hours after the incident on 9 August 2017.[275]

230 I add that in this case, the Defence did not raise any evidence of a motive on the Complainant's part to fabricate the allegations of sexual assault. As such, the burden on the Prosecution to prove absence of motive to fabricate did not arise (see *PP v Yue Roger Jr* [2019] 3 SLR 749 ("*Roger Yue (HC)*") at [48]). For the avoidance of doubt, I should make it clear that in my view, the evidence clearly showed the Complainant to have had no reason to fabricate the allegations of sexual assault. Indeed, according to the Accused's version of events, all that had happened to the Complainant on 9 August 2017 was that he had willingly participated in the sexual encounter and had left the Condominium after appearing to change his mind about having sexual intercourse with the Accused. In other words, if the Accused were to be believed, the Complainant had no reason at all to call the police immediately after leaving the Condominium and/or to complain of sexual assault.

(3) The Accused's account of events

231 Finally, having reviewed the Accused's evidence about the alleged consensual nature of the sexual encounter, I did not find the Accused's evidence sufficient to cast any reasonable doubt on the finding that the Complainant's account of the incident was unusually convincing. In the first place, the

274 Exhibit P13-1A at p 1.

275 Exhibit P42 at para 1.

Accused's 10 August 2017 statement actually corroborated crucial portions of the Complainant's testimony. The Accused recounted in his statement that the Complainant was lying down flat on the ground while the sexual acts were being carried out on him.[276] This was in line with the Complainant's testimony that he was lying down at the material time.[277] The Accused also recounted in his statement how he "managed to kiss [the Complainant] on his lips and tried to put [his] tongue into [the Complainant's] mouth but he did not open his mouth".[278] This was in line with the Complainant's testimony that "[the Accused] tried to put his tongue in my mouth".[279] The Accused also acknowledged in his statement[280] that prior to his starting to perform the various sexual acts on the Complainant, the latter had expressly stated that he wanted to sleep. This was in line with the Complainant's testimony that he told the Accused "I'm just going to sleep, I'm just going to sleep here" prior to falling asleep.[281]

232 Further, from the Accused's own account in his 10 August 2017 statement, it was plain that not only had the Complainant expressly told the Accused more than once that he wanted to sleep, there was no verbal communication between the Complainant and the Accused from the point when the latter started carrying out the various sexual acts. As the Accused himself admitted in his statement, "He did not say anything and I also did not ask him

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276 Exhibit D2 at para 14.

277 Transcript of 21 September 2021 at p 88 ln 4 to p 88 ln 26.

278 Exhibit D2 at para 15.

279 Transcript of 21 September 2022 at p 90 ln 17; Transcript of 21 September 2022 at p 93 ln 20 to p 93 ln 30.

280 Exhibit D2 at para 14.

281 Transcript of 21 September 2022 at p 88 ln 16 to p 88 ln 26.

anything".[282] The Accused contended that the Complainant was awake and conscious throughout the sexual encounter, but the factual premise for this contention was extremely flimsy: it was primarily based on the tentative allegation that they had been "talking a moment" before the Accused started performing the various sexual acts, and on his observation that the Complainant's eyes were "half-opened". The Accused also contended that the Complainant made adjustments to the position of his body so as to facilitate the Accused's removal of his jeans and briefs. However, this account appeared to me to be highly contrived and unbelievable. The Complainant was at that point wearing jeans, briefs and a belt (as well as a shirt). If he had in fact been awake, conscious and ready to engage in sexual activity with the Accused, there was no reason why he would not have removed his own clothing: it would certainly have been much simpler for him to do so than for him to lie flat on the floor while trying to "lift" his body to allow the Accused to pull down his jeans and briefs.

(4) Whether the Complainant did in fact consent to the sexual acts: Conclusion

233 For the reasons set out at [226] to [232], I was satisfied that even if the Complainant had the capacity to consent at the material time, he did not in fact consent to the sexual acts carried out by the Accused.

(5) Whether the Complainant's alleged *prior* behaviour indicated consent to the sexual acts carried out by the Accused on 9 August 2017

234 I should make it clear that in finding that the Complainant did not consent to the sexual acts carried out by the Accused, I rejected the Defence's

[282] Exhibit D2 at para 14.

contention that the Complainant's alleged *prior* behaviour towards the Accused indicated his consent to the subsequent sexual acts.

235 In *Pram Nair*, the CA held that just because the victim was sociable or friendly with the appellant, this could not mean that the victim had consented to sexual activity with the accused. That conclusion would not change even if the court were to assume in the appellant's favour that the victim had gone beyond being friendly and had flirted with him (at [67] of *Pram Nair*).

236 In the present case, taking the Accused's case at its highest, the Complainant was said to have used the expression "xo" in his text message which the Accused understood to mean "hugs and kisses"; the Complainant had given the Accused several "tight hugs" when wishing him happy birthday on the occasion of his birthday celebrations and had on the same occasion stated that he "liked" the Accused; the Complainant and the Accused had danced with their arms around each other's shoulders at Hero's pub on the night of 8 August 2017; and the Complainant had agreed to "sleep over" at the Accused's apartment after their night out drinking. Even if I were to accept all these allegations, they still did not in any way demonstrate the Complainant's consent to any sort of sexual activity with the Accused at his apartment on 9 August 2017.

237 In respect of the expression "xo" used in the text message, even accepting the Accused's assertion that it was a term commonly meant to convey "hugs and kisses", this was really neither here nor there. A perusal of the WhatsApp and Snapchat messages between the Accused and the Complainant showed that their communications in between the two-odd weeks prior to 9 August 2017 consisted of mundane chit-chat about their social and sporting activities. Moreover, throughout all the conversations on WhatsApp and

Snapchat, the Complainant consistently referred to the Accused as "buddy", "bud" or "mate", just as he referred to his other friends as "mates".[283] From these messages, therefore, it was obvious that the Complainant simply saw the Accused as a friend: there was simply no hint of any romantic interest on his part vis-à-vis the Accused, much less any desire or intention to engage in sexual activity with the Accused.

238 In respect of the Complainant's alleged behaviour during the Accused's birthday celebration, even assuming he had hugged the Accused and stated that he liked him, the most that could be said was that the Complainant had thereby shown friendly affection towards the Accused which was in keeping with the nature of the occasion: it was after all the Accused's birthday; the Accused had invited the Complainant to his birthday party; the Accused had even agreed to let him bring his friends along; and it was not disputed that the Complainant had consumed a number of drinks in the course of that night. Even if I were to assume in the Accused's favour that the Complainant's behaviour went beyond being friendly and constituted some sort of flirtation, it was simply not possible to characterise this behaviour as being indicative of consent to sexual activity with the Accused. The same observation must be made as well in respect of the allegation of the dancing at Hero's pub on the night of 8 August 2017.

239 In respect of the Complainant's agreement to "sleep over" at the Condominium after their night out drinking, it was telling that even though the Accused claimed the Complainant's agreement to "sleep over" implied an agreement to engage in sexual activity, he conceded that this was his own understanding, based on his own experience, which he did not verbalise to the

283 Exhibit P46-7, P46-8, P46-9 and P46-10.

Complainant.[284] Indeed, it was plain from the Accused's own evidence that no discussion about the possibility of sexual activity ever took place between them; and the last thing the Complainant said to the Accused prior to the latter carrying out the various sexual acts was that he wanted to go to sleep.

240 For the avoidance of doubt, I rejected the Accused's allegation that the Complainant had spoken about wanting to "explore his sexuality" at their very first meeting on 23 July 2017. I did not find it believable that the Complainant would have made such a statement to a man he was meeting for the first time, especially when he was indisputably trying to impress Francesca and win her favour that night. There was also no mention at all of the Complainant exploring his sexuality in the subsequent communications between him and the Accused on WhatsApp and Snapchat; nor did the Accused himself allude in his testimony to any further conversations about this topic.

241 For the reasons set out above, I found the Defence's submissions on the "consent" implied in the Complainant's alleged prior acts to be devoid of merit.

Whether the defence of mistake was available to the Accused

242 I note that in the present case, no submissions were made in the Defence's closing submissions on the defence of mistake under s 79 of the PC; nor did the Accused make any express reference to the defence of mistake during his testimony. However, since the Prosecution addressed the applicability of the defence of mistake in some detail in their closing submissions,[285] I should make it clear that I did consider this issue for

284 Transcript of 29 September 2022 at p 84 ln 23 to p 86 ln 10.

285 Prosecution's Closing Statement at paras 56-58.

completeness, and I agreed with the Prosecution that such a defence would not be available to the Accused on the present facts.

(1) The law on the defence of mistake

243 *Per* s 79 PC:

> Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law, in doing it.

244 *Per* s 52 PC:

> Nothing is said to be done or believed in good faith which is done or believed without due care and attention.

245 In both *Pram Nair* and *Asep Ardiansyah* , the Court of Appeal has held that to make out the defence under s 79 PC, the burden lies on the accused person to establish the defence on a balance of probabilities. Specifically, this involves establishing that "by reason of a mistake of fact", the accused "in good faith" believed himself to be justified by law in doing what he did to the victim. In the context of sexual assault cases, therefore, the accused must have in good faith believed that the victim consented to the sexual acts forming the basis of the charge(s). Further, pursuant to s 52 PC, nothing is believed "in good faith" if it is believed "without due care and attention" (*Pram Nair* at [110]-[111]; *Asep Ardiansyah* at [45]).

(2) Whether the defence of mistake of fact applied on the present facts

246 In the present case, I accepted the Prosecution's submission that there was no basis for the Accused to argue that he had, in good faith, believed the Complainant to have consented to sexual activity with him. As I noted earlier, it was not disputed that the last thing the Complainant said to the Accused was

that he wanted to go to sleep. Thereafter, the Accused began carrying out the various sexual acts on the Complainant, without ever asking the latter if he consented to these sexual acts or even confirming that he was fully awake and conscious. In his statement to the police, the Accused was only able to say tentatively and vaguely, "I *think* he was conscious because we were talking just a moment ago". On the Accused's own evidence, there was no conversation between them for the entire duration of the sexual encounter.

247 In the circumstances, it was clear that the defence of mistake was not available to the Accused because he did not exercise due care and attention in arriving at the belief that the Complainant had consented to the various sexual acts.

Conviction: Conclusion

248 At the conclusion of the trial, I found that the Prosecution had successfully proven all the elements of the two charges under s 376(1)(*b*) PC and the charge under s 376(2)(*a*) PC. The Accused was accordingly convicted of all three charges.

249 I next address the reasons for the sentence imposed on the Accused.

Sentencing

Prosecution's case

250 The Prosecution sought a global sentence of 12–16 years' imprisonment with 12 strokes of the cane.[286]

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286 Prosecution's Sentencing Submissions at para 18.

251 In gist, the Prosecution applied the *Pram Nair* sentencing framework, which the CA in *BPH v PP* [2019] 2 SLR 764 ("*BPH*") has affirmed to be applicable to other forms of sexual assault by penetration.[287] According to the Prosecution, the present case would fall within the higher end of Band 1 of the framework by virtue of the Complainant's vulnerability from his intoxication, the Accused's alleged breach of the trust reposed in him by the Complainant, and the psychological harm suffered by the Complainant.[288] *Per* the Prosecution's submissions, the indicative starting sentences for each of the sexual assault by penetration charges would be eight to nine years' imprisonment and four strokes of the cane.[289]

252 Next, the Prosecution highlighted that there were no offender-specific mitigating factors. The Accused's decision to claim trial and his lack of antecedents constituted neutral factors.[290] On the other hand, the Prosecution highlighted the following aggravating factors:

(a) the Accused was voluntarily intoxicated prior to the commission of the offences;[291]

(b) the Accused allegedly engaged in victim-blaming at trial;[292] and

(c) the Accused raised serious allegations against the police at trial which were found to be baseless.[293]

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287 Prosecution's Sentencing Submissions at para 3.

288 Prosecution's Sentencing Submissions at para 4.

289 Prosecution's Sentencing Submissions at para 9.

290 Prosecution's Sentencing Submissions at para 10.

291 Prosecution's Sentencing Submissions at para 11.

292 Prosecution's Sentencing Submissions at para 12.

293 Prosecution's Sentencing Submissions at paras 13-14.

In light of these aggravating factors, the Prosecution submitted that the indicative sentences should be adjusted upwards to nine to ten years' imprisonment with at least four strokes of the cane for each of the offences.[294]

253 Bearing in mind the requirement in s 307(1) CPC for at least two of the sentences to run consecutively,[295] the totality principle would then apply to ensure that the aggregate sentence was sufficient and proportionate to the Accused's overall criminality. Given that all three offences of sexual assault by penetration were all committed within a relatively short timeframe, the Prosecution submitted that only the sentences for two charges should run consecutively[296], and that the global sentence should not be crushing to the Accused. In this connection the Prosecution acknowledged that a global sentence of 18–20 years' imprisonment would be crushing; and that a downward moderation of the global sentence to 12–16 years' imprisonment and 12 strokes of the cane would be appropriate.[297]

254 For completeness, the Prosecution also cited past cases involving offenders who were convicted after a trial of similar sexual assault by penetration offences committed against intoxicated victims: *PP v Ridhaudin Ridhwan bin Bakri and others* [2020] 4 SLR 790 ("*Ridhwan*") and *PP v Tan En Jie Norvan* [2022] SGHC 166 ("*Norvan Tan*"). It was submitted that the proposed sentences were in line with these sentencing precedents.[298]

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294 Prosecution's Sentencing Submissions at para 15.

295 Prosecution's Sentencing Submissions at para 16.

296 Prosecution's Sentencing Submissions at para 18.

297 Prosecution's Sentencing Submissions at para 18.

298 Prosecution's Sentencing Submissions at paras 19-20.

Defence's case

255 The Defence, for their part, made two broad points in their written submissions. First, the Defence submitted that the following mitigating factors applied in the present case:[299]

(a) no prior convictions;[300]

(b) full cooperation;[301]

(c) good character; and[302]

(d) circumstances surrounding the offences.[303]

256 Second, the Defence agreed with the Prosecution that the applicable sentencing framework was the *Pram Nair* framework (*BPH* at [55]). In applying the sentencing framework, the Defence highlighted *inter alia* the short duration of the sexual acts and the need to ensure that the total sentence at the end of the day did not have a crushing effect on the Accused, considering his age (45 years) and future prospects.[304]

257 The Defence did not make any submissions on the appropriate global sentence.

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299 Defence's Sentencing Submissions at para 12.

300 Defence's Sentencing Submissions at para 13.

301 Defence's Sentencing Submissions at para 14.

302 Defence's Sentencing Submissions at paras 15-22.

303 Defence's Sentencing Submissions at para 23.

304 Defence's Sentencing Submissions at para 32.

My Decision

Sentencing framework and indicative starting sentence

258 As a starting point, I agreed with both the Prosecution and the Defence that the appropriate sentencing framework to be applied for all three charges was the *Pram Nair* framework (at [158]–[160]). As both sides pointed out, the CA in *BPH* has held that the *Pram Nair* sentencing framework should be applied to "all forms of sexual assault by penetration under s 376, notwithstanding that *Pram Nair* was a case concerning only digital-vaginal penetration" (at [55]).

259 It was also not disputed that the application of the *Pram Nair* sentencing framework would require the court to:

(a) identify the number of offence-specific aggravating factors in a case;

(b) determine, based on the number and intensity of the aggravating factors, which of the three sentencing bands the case fell under;

(c) identify where precisely within the sentencing band the case fell under to derive an indicative starting sentence; and

(d) adjust that indicative sentence to reflect the presence of any offender-specific aggravating and mitigating factors.

260 According to *Pram Nair*, the sentencing bands are as follows (*Pram Nair* at [122] and [159]; *BPH* at [39], [41]-[42] and [55]):

Band	Description of offences falling within Band	Sentencing range
1	No offence-specific aggravating factors or where the factor(s) are only present to a very limited extent and therefore should have a limited impact on the sentence	Seven to ten years' imprisonment and four strokes of the cane
2	Two or more offence-specific aggravating factors	Ten to 15 years' imprisonment and eight strokes of the cane
3	Number and intensity of the aggravating factors present an extremely serious case of rape	15 to 20 years' imprisonment and 12 strokes of the cane

Offence-specific aggravating factors

261 As to the offence-specific aggravating factors in the present case, I accepted the Prosecution's submission that the Complainant's vulnerability by virtue of his intoxication formed the dominant offence-specific aggravating factor. It is trite that the exploitation of the vulnerability of an intoxicated victim constitutes an aggravating factor for the purposes of sentencing in sexual offences (*Pram Nair* at [172]–[173]; *Ridhwan* at [27]–[28]). On the present facts, it was not disputed that the Complainant and Accused had consumed large amounts of alcohol prior to returning to the Condominium, and that they had consumed more alcohol in the Accused's room. I have explained earlier my reasons for finding that the Complainant was asleep when the Accused began performing the sexual acts on him, and that even upon awakening, the Complainant was falling in and out of consciousness, feeling "paralysed", and

had no capacity to consent to sexual activity. It was in this vulnerable state that the Complainant was taken advantage of by the Accused.

262 Next, I agreed with the Prosecution that the Complainant clearly suffered psychiatric harm as a result of the sexual assaults. Dr Chee, the psychiatrist who treated the Complainant on 30 July 2018, diagnosed the Complainant as suffering from "Generalized Anxiety Disorder with possible Post-traumatic stress symptoms", and started him on antidepressant medications for anxiety disorders – being Venlafaxine with a dosage of 75mg/d.[305] When the Complainant went for a follow-up visit on 6 August 2018 prior to leaving for his overseas studies, the dosage for this antidepressant medication dosage was increased to 150mg/d.[306]

263 In this connection, I rejected the Defence's argument that no or very little psychological harm was done to the Complainant.[307] Despite making such a claim, the Defence failed to put forward any reasons for their position. Defence counsel also did not challenge Dr Chee's diagnosis of "Generalized Anxiety Disorder with possible Post-traumatic stress symptoms".

264 I was unable to accept, however, the Prosecution's submission that there was a third offence-specific aggravating factor in the form of a breach of the Complainant's trust by the Accused. In gist, the Prosecution contended that the Complainant had regarded and trusted the Accused as a friend to the extent that he had felt comfortable enough to "sleep over" at the Accused's apartment when intoxicated. Additionally, the Complainant had described the Accused as

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305 Dr Cornelia Chee's Report dated 22 January 2019 at AB p 82; Prosecution's Sentencing Submissions at para 6(b).

306 Dr Cornelia Chee's Report dated 22 January 2019 at AB p 82.

307 Defence's Sentencing Submissions at para 23.

"someone whom I thought was my friend"[308] in his first phone call to the police. According to the Prosecution, this showed that there was a "betrayal" by the Accused of the trust reposed in him as a friend.

265 In my view, it would be wholly inappropriate to find a breach of trust on the present facts. In *Terence Ng*, when the CA alluded to a "breach of trust" as an aggravating factor for sentencing purposes, the CA expressly referred to cases where there was a pre-existing relationship of responsibility between the offender and the victim, or where the offender was a person in whom the victim had placed her trust by virtue of his (the offender's) office of employment (at [44(b)] of *Terence Ng*). Obviously, the second limb of that formulation did not apply in the present case. As for the first limb, I did not find it possible to agree that there was some sort of pre-existing relationship of responsibility between the Accused and the Complainant. At best, they were simply friends who had known each other for a few weeks and who had met on three different occasions. As Aedit Abdullah J pointed out in *PP v Ong Soon Heng* [2018] SGHC 58 ("*Ong Soon Heng*") (at [134]), there can be no abuse of position in a situation "where the perpetrator and the victim were merely friends as that would result in too broad a scope for the aggravating factor of abuse of position".

266 For completeness, I should also make it clear that this was not a case of an offender who could be said to have exploited the trust placed in him by third parties who entrusted the victim to him – a factor which has been considered an offence-specific aggravating factor in *Ong Soon Heng* (at [143])

267 Having regard to the Accused's exploitation of the Complainant's vulnerability while he was intoxicated as well as the psychiatric harm suffered

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308 Exhibit P13-1A at p 4.

by the Complainant, I was of the view that the present offences would fall within the middle to higher end of Band 1 of the *Pram Nair* sentencing framework. I agreed with the Prosecution that the indicative starting sentence per charge should be eight years' imprisonment and four strokes of the cane.

Adjustment of indicative sentence based on offender-specific aggravating/mitigating factors

268 The next step would be to adjust the indicative sentence of eight years' imprisonment and four strokes of the cane to reflect the presence of any offender-specific aggravating and mitigating factors.

269 As I noted earlier, the Prosecution submitted that the following were offender-specific aggravating factors: the Accused's voluntary intoxication prior to the commission of the offences, his alleged victim-blaming, and his behaviour in making serious allegations against the police which were found to be baseless.[309] The Prosecution also took the position that there were no mitigating factors applicable in the present case.[310]

270 The bulk of the Defence's submissions focused on the Accused's good character. Various testimonials and character references from the Accused's friends and colleagues were used to support this claim. In the Defence's submissions, three broad points about the Accused were highlighted:[311]

(a) The Accused has volunteered a lot and participated in many charitable works;

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309 Prosecution's Sentencing Submissions at paras 11-14.

310 Prosecution's Sentencing Submissions at para 10.

311 Defence's Sentencing Submissions at paras 15-22.

(b) The Accused has been an excellent professional who has contributed to Singapore through his work; and

(c) The Accused takes great care of and shows kindness to his family in the Philippines and to people around him in Singapore.

Aggravating factors

271 In his 10 August 2017 statement, the Accused admitted to having consumed multiple drinks during the night out with the Complainant and described himself as having been "drunk".[312] I agreed with the Prosecution that the Accused's state of voluntary intoxication constituted an offender-specific aggravating factor.[313] There is ample authority for the proposition that voluntary intoxication worsens rather than mitigates the offence (*PP v Satesh s/o Navarlan* [2019] SGHC 119 at [23]; *Chung Wan v PP* [2019] 5 SLR 858 at [57]; *Wong Hoi Len v PP* [2009] 1 SLR(R) 115 at [44]–[48]; *PP v Lim Chee Yin Jordon* [2018] 4 SLR 1294 at [56]).

272 However, I disagreed with the Prosecution that the Defence's treatment of the Complainant in the present case amounted to an aggravating factor that should be held against the Accused. The Prosecution's argument that the Accused had engaged in victim-blaming was based on the following three factors: first, the Accused had put the Complainant through a trial and suggested that the Complainant had desired to engage in sexual activity with the Accused; second, the Accused had baselessly accused the Complainant of tampering with evidence by deleting and / or manipulating WhatsApp messages and failing to furnish a complete set of their Snapchat conversations; third, the Complainant

312 Exhibit D2 at paras 8-12.

313 Prosecution's Sentencing Submissions at para 10.

had been confronted with the scandalous suggestion that after leaving the Accused's room mid-way through the second act of fellatio, he had gone into the toilet to masturbate.[314]

273 As to the first factor, it must be remembered that in cases of alleged sexual assault where the main issue in contention is the presence or absence of consent by the victim, the accused and the victim will almost invariably have diametrically opposed versions of the relevant events. The victim's position will usually be that no consent was given and / or that the victim lacked the capacity to consent to sexual activity. On the other hand, the accused would usually take the position that the victim had capacity to consent and had in fact consented to sexual activity. In putting forward such a defence, the accused does not of course have license to make all sorts of scandalous allegations against the victim. At the same time, however, the accused who relies on such a defence should not be unduly penalised at the sentencing stage for putting uncomfortable questions and suggestions to the victim, so long as this is done in a reasonable manner and the questions or suggestions are necessary for the proper ventilation of the defence. Ultimately, whether or not an accused in a particular case has crossed the line into "victim-blaming" would depend on the specific facts and circumstances of that case.

274 In *GCM v PP and another appeal* [2021] 4 SLR 1086 ("*GCM*"), for example, the accused ("U") was a 22-year-old university student, and the victim ("S") was a 13-year-old secondary school student. U pleaded guilty to three charges of sexual penetration of a minor under 14 years of age. On appeal, Abdullah J criticised the conduct of U's counsel in the proceedings below. He observed (at [91]) that the counsel had, in the proceedings below, made

314 Prosecution's Sentencing Submissions at para 12.

assertions that "essentially blamed the victim, alluded to her supposed promiscuity and ill repute, and being the initiator of intimacy". Counsel had even included "photographs which seemed to be intended to show the sexual maturity of the victim". Abdullah J held (at [93]) that cumulatively, counsel's submissions constituted a "blatant and unapologetic attempt to foist responsibility and blame on the victim", and that such character assassination served no purpose. In Abdullah J's view (at [96]):

> …What counsel should properly do is to carefully consider their submissions to determine whether or not they are relevant to the offence, and whether they are at all indicative of their clients' culpability. If an argument is scurrilous or scandalising, and/or casts aspersions about a victim without any real relevance to the accused's wrongdoing, counsel should not make any such submission.

Abdullah J also noted (at [100]) that in cases where such scurrilous or scandalising submissions were made, it would be "appropriate for the court to impose an uplift to any sentence imposed to reflect a clear absence of remorse in attacking the victim in a scurrilous way".

275 In *Law Society of Singapore v Wong Sin Yee* [2018] 5 SLR 1261, the respondent counsel ("W") faced a complaint regarding his conduct when he had acted on behalf of a client charged with outraging the modesty of a woman. In the course of his cross-examination of the victim ("V") at trial, W had questioned V on whether she was attractive, had suggested that she was, and had required her to stand up in court so as to subject her to physical scrutiny. The Court of Three Judges found (at [39]-[41]) that W's cross-examination of V "was both irrelevant and wholly impermissible". W's cross-examination "did not relate to facts in issue or matters necessary to determining if the facts in issue existed", and "the inquiry into the correlation between the victim's attractiveness and the 'temptation' or 'motive' to molest was misguided", with

"no evidence to support a contention that there was such a correlation". The Court of Three Judges also stated (at [40]) that getting the victim to stand up "was tantamount to asking her to parade her physique and appearance for public scrutiny, to the point that she understandably felt uncomfortable and offended". Finally, the Court of Three Judges observed (at [41]) that:

> Third, it was cruel and humiliating to suggest to the victim that she was attractive, and to physically scrutinise her to the point that she felt uncomfortable and offended, only to then suggest that she was so unattractive that her testimony that she was deliberately molested could not be believed. This was a clear abuse of the power the Respondent had in relation to the victim in his role as counsel.

276 In the present case, based on counsel's cross-examination of the Complainant, I did not find that there was any victim-blaming by the Accused. While counsel did suggest that the Complainant had been desirous of engaging in sexual activity with the Accused,[315] this suggestion was relevant to the Accused's defence of consent. The same was true of the Accused's allegation of a mutual romantic attraction between the Complainant and him. Moreover, the allegations of romantic interest and desire which were put forward to the Accused were couched in moderate terms and could not by any stretch of the imagination be said to constitute accusations of a scurrilous or scandalising nature.

277 In similar vein, the question posed to the Complainant about his alleged act of masturbation in the toilet was relevant to the Accused's case that the Complainant had consented to the sexual encounter in his room and that he had been visibly aroused in the process. In any event, counsel did not dwell on the

315 Transcript of 22 September 2022 at p 69 ln 19 to ln 28.

subject after putting the Accused's case to the Complainant:[316] there was no prolonged questioning, nor any inappropriate comments or suggestions made by counsel.

278 As to the Accused's allegations about missing or incomplete WhatsApp and Snapchat messages, I also did not agree that these allegations amounted to victim-blaming. As far as I could see, the Defence was simply challenging the accuracy and completeness of the messages adduced in evidence. If an accused takes the position that the victim has adduced incomplete or inaccurate documentary evidence, the accused should as a matter of principle put his position for the victim. In any event, counsel in this case clearly did not engage in any inappropriate or scurrilous or scandalous remarks when putting forward the Accused's position on the messages.

279 For the avoidance of doubt, I should add that I did not find that there was any reason to doubt the accuracy and completeness of the messages adduced by the Complainant. The Accused admitted that he could not find the allegedly missing messages on his own phone; and from what little he could recall of their purported contents, it was evident that nothing significant turned on these messages (even assuming they existed).

280 I should also add that in sentencing the Accused, I did not consider his decision to claim trial to be an aggravating factor. Electing to claim trial simply meant that upon conviction, the Accused would not benefit – at the sentencing stage – from the mitigatory weight of a plea of guilt. I did not think the Prosecution was in disagreement with this established principle.

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316 Transcript of 22 September 2022 at p 70 ln 2 to ln 3.

281 Although I did not agree that the Accused had engaged in victim-blaming, I did agree on the other hand that his conduct in making grave – and ultimately baseless – allegations against the police constituted an aggravating factor for sentencing purposes (*per* Chan Sek Keong CJ in *PP v Amir Hamzah Bin Mohammad* [2012] SGHC 165 at [19]). To be clear, I did not think the Accused should be penalised for testifying about his experience of the police in his "home town" and his consequent fear of the police *in general*. However, the Accused went further than simply testifying about his general fear of the police: he made various allegations about the manner in which ASP Raj and Mr Tho had conducted themselves. ASP Raj was alleged to have "interrogated" the Accused alone even before the formal statement-recording and to have taken the opportunity to make insinuating remarks about the Complainant's father being "super loaded". Mr Tho was alleged to have attempted to "coach" the Accused on what to say in his statement and to have refused to let him make amendments. Mr Tho was even alleged to have told the Accused that he would not be released from the lock-up if he failed to sign the statement. The upshot of the Accused's allegations about the two officers was that they had successfully intimidated him into accepting various inaccuracies in his statement. It should also be noted that despite the seriousness of the Accused's allegations against ASP Raj and Mr Tho, the Defence chose to raise these allegations for the first time at trial *after* the Prosecution had closed its case. This necessitated the recall of Mr Tho and the calling of ASP Raj to respond to the allegations, thereby causing wastage (or at the very least, highly inefficient usage) of resources. No explanation was proffered by the Defence for their omission to bring up these allegations earlier. Eventually, as seen from [131] to [151] above, I found the Accused's allegations against the two officers to be completely unfounded.

282 The Accused's baseless (and belated) allegations against the police showed a lack of remorse on his part and constituted an aggravating factor for sentencing purposes.

Mitigating factors

283 As to the offender-specific mitigating factors, following the CA's decision in *BPH* (at [84]–[85]), the absence of antecedents on the Accused's part would be a neutral factor and not a mitigating factor.

284 I also disagreed with the Defence that the Accused had been "cooperative" with the relevant authorities and/or that he had rendered such assistance throughout the investigations that this should count as a mitigating factor. Apart from making a bare assertion, the Defence did not provide any details of the Accused's alleged cooperation with the authorities and the assistance he allegedly rendered. As the Prosecution pointed out, even taking the Accused's case at its very highest, his act of opening the door for the police on the day of his arrest, and his conduct in reporting for bail as scheduled, could not amount to conduct that should be afforded mitigating weight.[317]

285 Next, although the Defence has placed great emphasis on the Accused's good character, charitable works and numerous character testimonials, it must be pointed out that as a matter of principle, these matters would generally be accorded *modest and limited* mitigatory weight at best. In *Stansilas Fabian Kester v Public Prosecutor* [2017] 5 SLR 755 ("*Stansilas*"), Menon CJ explained the circumstances in which a court would be justified in admitting

317 Prosecution's Sentencing Reply Submissions at para 5.

evidence of positive contributions and good character in the sentencing process (at [102]):

> 102 The following principles may be extracted from the foregoing analysis:
>
> (a) Any evidence concerning the offender's public service and contributions must be targeted at showing that *specific sentencing objectives will be satisfied* were a lighter sentence to be imposed on the offender.
>
> (b) The fact that an offender has made past contributions to society might be a relevant mitigating factor not because it somehow reduces his culpability in relation to the present offence committed, but because it is indicative of his capacity to reform and it tempers the concern over the specific deterrence of the offender.
>
> (c) This, however, would carry modest weight and can be displaced where other sentencing objectives assume greater importance.
>
> (d) Any offender who urges the court that his past record bears well on his potential for rehabilitation will have to demonstrate the connection between his record and his capacity and willingness for reform, if this is to have any bearing.
>
> [emphasis in original]

286 In practice, this translates to the general proposition that "alleged charitable or other good works" – and by extension good character – "cannot be regarded as mitigating on some form of social accounting that balances the past good works of the offender with his/or offences". The only basis where *limited weight* might be given to such works (and good character) is if they were "sufficient to demonstrate that the offence in question is a one-off aberration, which might then displace the need for specific deterrence" (*PP v Song Hauming Oskar and another appeal* [2021] 5 SLR 965 at [129]-[130] citing *PP v Lim Cheng Ji Alvin* [2017] 5 SLR 671 at [23]; *Ang Peng Tiam v Singapore Medical Council and another matter* [2017] 5 SLR 356 ("*Ang Peng Tiam*") at [100]-[102]; and *Stansilas* [102]). In particular, the three-judge High Court in

Ang Peng Tiam (at [101]) expressly rejected the view that "an offender's general good character or his past contributions to society (such as volunteer work and contributions to charities) can be regarded as a mitigating factor in so far as this rests on the notion that it reflects the moral worth of the offender".

287 Applying the above principles to the present case, neither the Accused's alleged good character nor his charitable contributions could be considered a mitigating factor insofar as this was premised on the notion that they reflected his moral worth.

288 Moreover, this was a case of serious sexual assault of a vulnerable victim. Even if I were to assume that the Accused's good character argued for this being a one-off aberration, there remained a need for the sentences to reflect the importance of *general* deterrence of such crimes. General deterrence aims to educate and deter other like-minded members of the general public by making an example of a particular offender (*Public Prosecutor v Law Aik Meng* [2007] 2 SLR(R) 814 at [24]). In the present case, the need for such general deterrence would displace what moderate mitigatory weight could be ascribed to the Accused's alleged good character.

289 Finally, I did not accept the Defence's submissions that the following factors were of mitigating value:

(a) no use of force;

(b) no abuse of trust;

(c) no injuries on the Complainant;

(d) no restraining or confining of the Complainant; and

(e) no or low psychological harm.

These would be more accurately classified as neutral factors, in that the Accused should not be credited for the absence of actions such as the use of force and the abuse of trust – but would be penalised if such aggravating conduct were present. This is in line with the principle that the absence of aggravating factors cannot be construed as a mitigating factor (*Mohammed Ibrahim s/o Hamzah v PP* [2015] 1 SLR 1081 at [41]; *Edwin s/o Suse Nathen v PP* [2013] SGHC 194 at [25]; *PP v Chow Yee Sze* [2011] 1 SLR 481 at [14]; *Public Prosecutor v AOM* [2011] 2 SLR 1057 at [37]).

290 For the reasons set out at [283] to [289], I agreed with the Prosecution that there were no offender-specific mitigating factors in the present case.

Adjustment to indicative sentence

291 Taking into account the offender-specific aggravating factors, I agreed with the Prosecution that there should be an upward adjustment of the indicative sentence.[318] In my view, it would be appropriate to adjust the indicative sentence of eight years' imprisonment and four strokes of the cane for each charge to a sentence of nine years' imprisonment and four strokes of the cane per charge.

Totality principle and the appropriate global sentence

292 As to the appropriate global sentence to be imposed, s 307(1) CPC required at least two of the three sentences to run consecutively.[319] Running two of the sentences consecutively and the remaining sentence concurrently would

318 Prosecution's Sentencing Submissions at para 15.

319 Prosecution's Sentencing Submissions at para 16.

mean a global sentence of 18 years' imprisonment and 12 strokes of the cane. Caning cannot be ordered to run concurrently (*PP v Yap Pow Foo* [2023] SGHC 79 at [117] citing *PP v Chan Chuan and another* [1991] 1 SLR(R) 14 at [39] and *Yuen Ye Ming v PP* [2020] 2 SLR 970 at [26]).

293 At this stage of the sentencing process, I bore in mind the totality principle. As Menon CJ has explained in *Mohamed Shouffee bin Adam v PP* [2014] 2 SLR 998 ("*Shouffee*") (at [58]-[59]), the totality principle requires the court to take a last look at the facts and circumstances to assess "whether the sentence looks wrong". If so, "consideration ought to be given to whether the aggregate sentence should be reduced" and this could be done by re-assessing "which of the appropriate sentences ought to run consecutively" and also by "re-calibrating the individual sentences so as to arrive at an appropriate aggregate sentence". The two limbs of the totality principle are as follows (at [47] and [53]):

(a) Whether the aggregate sentence is substantially above the normal level of sentences for the most serious of the individual offences involved; and

(b) Whether its effect is to impose on the offender a crushing sentence not in keeping with his records and prospects.

294 There are also three ancillary principles that go with the application of the totality principle (at [75]-[80] of *Shouffee*):

(a) First, the totality principle may not be applied in such a way as to undermine s 307(1) CPC. This means that the total term of imprisonment for the sentences to be run consecutively has to exceed the term of imprisonment imposed for the highest individual sentence;

(b) Second, care should be taken to ensure that the aggravating factors are not counted against the accused twice over; and

(c) Third, under the right circumstances, the totality principle does not preclude more than two sentences being run consecutively.

295 In *PP v Raveen Balakrishnan* [2018] 5 SLR 799 ("*Raveen*") (at [77]–[78]), Menon CJ explained that the application of the totality principle to mitigate the aggregate sentence of a multiple offender was not to be justified as a bulk discount on account of multiple offending. Rather, the totality principle is a recognition of the fact that "*an aggregation resulting in a longer sentence is going to carry a compounding effect that bears more than a linear relation to the cumulative and overall criminality of the case*". Additionally, an extremely long aggregate sentence could also induce a feeling of hopelessness that destroys all prospects of an offender's rehabilitation and reintegration. At the end of the day, the court has to consider all the facts and circumstances of the case to ensure that the aggregate sentence is *sufficient and proportionate to the offender's overall criminality* (at [98(c)] of *Raveen*).

296 In the present case, the Prosecution acknowledged that in light of the totality principle, the Accused's global sentence ought to be moderated downwards to reflect a generous sentencing discount.[320] This was because the global sentence of 18 years' imprisonment and 12 strokes of the cane that comes from running two of the sentences consecutively would substantially exceed the normal level of sentences for the most serious of the individual offences involved (*ie*, nine years' imprisonment and four strokes of the cane). As the

320 Prosecution's Sentencing Submissions at para 18.

Prosecution also acknowledged, such a heavy global sentence would be crushing vis-à-vis this Accused.[321]

297 In proposing a significant downward adjustment of the global sentence, the Prosecution noted that all three offences in this case were committed within a relatively short timeframe.[322] In essence, the Accused's *overall criminality* in the present case involved *a single instance* of sexual assault in which there were two instances of fellatio and one instance of digital-anal penetration. As such, although the Accused was convicted of *three charges* of sexual assault by penetration, his *overall criminality* should be considered *significantly lower* than that of an offender convicted of *three charges* of sexual assault by penetration committed against more than one victim – or where those offences were committed against the same victim *on multiple instances*.

298 I accepted the above submissions by the Prosecution. In light of the Accused's *overall criminality*, the global sentence of 18 years' imprisonment and 12 strokes of the cane would be substantially above the normal level of sentences for the most serious of the individual offences involved; and such a heavy global sentence would be crushing to the Accused, bearing in mind *inter alia* his age and future prospects. In my view, the appropriate global sentence would be achieved by adjusting each of the individual sentences to five years' imprisonment and four strokes of the cane per charge (down from nine years' imprisonment and four strokes of the cane per charge).

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321 Prosecution's Sentencing Submissions at para 18.

322 Prosecution's Sentencing Submissions at para 18.

Conclusion

299 I therefore sentenced the Accused to five years' imprisonment and four strokes of the cane on each of the three charges. Further, I ordered that the sentences for the first two charges under s 376(1)(*b*) PC (for penile-oral penetration) run concurrently and the sentence for the s 376(2)(*a*) PC charge (for digital-anal penetration) run consecutively, thereby making for a global sentence of ten years' imprisonment and 12 strokes of the cane.

Mavis Chionh Sze Chyi
Judge of the High Court

David Khoo Kim Leng and Tay Jia En (Attorney-General's Chambers) for the Prosecution;
Amarjit Singh s/o Hari Singh (Amarjit Sidhu Law Corporation) for the accused.