Public Prosecutor v Mohammed Liton Mohammed Syeed Mallik
[2007] SGCA 48

Case Number : Cr App 6/2007

Decision Date : 31 October 2007

Tribunal/Court : Court of Appeal

Coram : Kan Ting Chiu J; Andrew Phang Boon Leong JA; Tay Yong Kwang J

Counsel Name(s) : Jaswant Singh and Ong Siu Jin (Attorney-General's Chambers) for the appellant; S K Kumar (S K Kumar & Associates) for the respondent

Parties : Public Prosecutor — Mohammed Liton Mohammed Syeed Mallik

Criminal Law – Offences – Criminal intimidation – Elements of criminal intimidation – Whether evidence establishing that accused committed offences of criminal intimidation – Sentencing principles for criminal intimidation – Appropriate sentence to be imposed on facts of present case

Criminal Law – Offences – Insulting modesty of woman – Sentencing principles for insulting modesty of woman – Appropriate sentence to be imposed on facts of present case

Criminal Law – Offences – Property – Theft – Elements of theft – Whether evidence establishing that accused committed theft

Criminal Law – Offences – Rape – Elements of aggravated rape – Whether evidence establishing that offender committed second instance of rape – Whether evidence establishing that offender committed aggravated rape – Sentencing principles for rape – Appropriate sentence to be imposed for rape where there was prior relationship between parties

Criminal Law – Offences – Unnatural offences – Carnal intercourse against order of nature – Whether evidence establishing that offender committed second instance of sodomy – Sentencing principles for sodomy – Appropriate sentence to be imposed for sodomy where victim was non-consenting

Criminal Procedure and Sentencing – Appeal – Acquittal – Principles governing appellate interference with trial judge's conclusions based on findings of fact

Criminal Procedure and Sentencing – Sentencing – Appeals – Principles governing appellate interference with trial judge's sentence imposed

Criminal Procedure and Sentencing – Sentencing – Concurrent or consecutive sentences – Principles governing imposition of concurrent or consecutive sentences when offender convicted and sentenced to imprisonment for at least three distinct offences

Evidence – Witnesses – Corroboration – Whether corroboration required for cases involving sexual offences – Principles governing identification of corroborative evidence where corroboration was required

31 October 2007

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

Introduction

1 This was an appeal by the Public Prosecutor ("the appellant") against both the acquittal and sentence of Mohammed Liton Mohammed Syeed Mallik ("the respondent") in respect of eight charges which he faced in the High Court. The charges were as follows:

(a) The first charge was for aggravated rape under s 376(2)(*b*) of the Penal Code (Cap 224, 1985 Rev Ed) ("the first charge").

(b) The second charge was for criminal intimidation (in pointing a knife at the complainant with the intention to cause her alarm) under s 506 of the Penal Code ("the second charge").

(c) The third charge was for committing carnal intercourse against the order of nature (in the form of sodomy) under s 377 of the Penal Code ("the third charge").

(d) The fourth charge was for insulting the complainant's modesty under s 509 of the Penal Code by taking four photographs of her in the nude ("the fourth charge").

(e) The fifth charge was for criminal intimidation (in threatening to distribute the above photographs ("the nude photographs")) under s 506 of the Penal Code ("the fifth charge").

(f) The sixth charge was for rape under s 376(1) of the Penal Code ("the sixth charge").

(g) The seventh charge was for committing carnal intercourse against the order of nature (likewise in the form of sodomy) under s 377 of the Penal Code ("the seventh charge").

(h) The eighth charge was for theft (of the complainant's identity card, bank card, and a pair of gold earring studs) under s 379 of the Penal Code ("the eighth charge").

2 At the end of the proceedings in the High Court, the trial judge found the respondent guilty of the fourth, sixth and seventh charges and acquitted him of the first, second, third, fifth and eighth charges ("the acquitted charges"). The respondent was then sentenced to three months' imprisonment on the fourth charge, 18 months' imprisonment on the sixth charge and two years' imprisonment on the seventh charge. The sentences imposed on the sixth and seventh charges were ordered to run concurrently so that the total sentence imposed was two years and three months' imprisonment with effect from 27 December 2005. As mentioned above (at [1]), these orders were appealed against by the appellant.

3 At the end of the hearing before us, we unanimously allowed the appeal in part. Specifically, in so far as the appeal against acquittal was concerned, we dismissed the appeal in relation to the first, third and eighth charges. However, we allowed the appeal against the second and fifth charges, and sentenced the respondent to two months' imprisonment on each of these charges. In so far as the appeal against sentence was concerned, we dismissed the appeal in relation to the fourth charge. However, the appeal in relation to the sixth and seventh charges was allowed. We sentenced the respondent to six years' imprisonment and four strokes of the cane on the sixth charge and five years' imprisonment on the seventh charge. We ordered the sentences for the fourth and sixth charges to run consecutively, with the rest of the sentences to run concurrently with these two sentences, all with effect from 27 December 2005. The total sentence imposed on the respondent was therefore six years and three months' imprisonment and four strokes of the cane. We now give the detailed grounds for our decision.

Background to the proceedings

4 The background to the proceedings before us was rather long-drawn and, hence, some elaboration is both appropriate and necessary. There were, in fact, two trials, the first of which ("the first trial") was heard in September and October 2006. The trial judge had, with respect, in his

judgment for the first trial ably and completely summarised the events which occurred before and on the day of the alleged offences (see *PP v Mohammed Liton Mohammed Syeed Mallik* [2006] SGHC 191("*Mohammed Liton (No 1)*") at [4]–[28]), and we therefore gratefully adopt his version of the facts as follows.

Dramatis personae

5 The respondent is a 29-year-old Bangladeshi national. He first came to Singapore on 15 February 2004 and worked as a cleaner. Sometime in May 2005, the respondent started work as a cleaner at the Bedok branch of Giant Hypermarket ("Giant"). The complainant is 31 years old. She is currently a housewife, but she previously worked at Giant. She has three children, currently aged nine, six and two.

Events that occurred before the day of the alleged offences

6 It was alleged that the offences which led to the eight charges against the respondent took place on the afternoon of 23 December 2005 at the respondent's flat at 174B Joo Chiat Place ("the flat"). The respondent and the complainant were colleagues at Giant and became acquainted in May or June 2005. Sometime in June 2005, the respondent and the complainant went to Mustafa Centre together. This eventually led to sexual intercourse at a hotel nearby. After this incident, they went to the same hotel almost every week to have sexual intercourse. They usually did so after the complainant finished work at Giant.

7 In August 2005, the complainant initiated divorce proceedings against her husband, and the respondent and the complainant made plans to marry once her divorce had been finalised. According to the complainant, her relationship with the respondent had nothing to do with her decision to divorce her husband. Instead, at the first trial, the complainant testified that she had decided thus because her husband did not have a proper job and was avoiding his responsibility as breadwinner of the family.

8 In October 2005, the respondent's work permit in Singapore expired. He returned to Bangladesh on 12 October 2005. Both the respondent and the complainant confirmed that on the morning of 12 October 2005, before the respondent flew back to Bangladesh, the complainant visited him at the flat and they had sexual intercourse there. According to the complainant, that was the last time that they had sexual intercourse, although the respondent testified at the first trial that they had sexual intercourse again on 6 December 2005. While the respondent was in Bangladesh, he and the complainant kept in touch regularly by telephone and text messages.

9 The complainant could not leave for Bangladesh with the respondent on 12 October 2005 because her divorce proceedings were still ongoing. However, before the respondent left for Bangladesh, he purchased a return air ticket for the complainant so that she could join him there. The complainant also applied for the requisite Bangladeshi visa so that she could travel to the country. The departure date, as stated on the air ticket, was 18 November 2005, and the return date was 25 November 2005.

10 In the event, the complainant never made the trip. The complainant testified that she told her mother of her intention to travel to Bangladesh to meet a friend. Her mother did not like the idea and threatened to prevent the complainant from ever seeing her children again if she went. At about the same time, on 14 November 2005, the complainant attended a marital counselling session with her husband. During this session, the complainant's husband pleaded with her to give him a second chance. She agreed to do so, and resolved from that point on to put an end to her relationship with

the respondent. The complainant made a long-distance call to the respondent to tell him of her decision. According to her, the respondent was angry and told her that she should not change her mind about marrying him. This account was denied by the respondent at the first trial, who maintained that their relationship was still ongoing when he returned to Singapore.

11 According to the complainant, despite her resolution to end her relationship with the respondent, she still helped him to get a visa to return to Singapore in order to fulfil the promise that she had made to him before he left for Bangladesh. Consequently, the respondent returned to Singapore on 12 December 2005. The complainant arrived at Changi Airport at 6.00am to pick him up, and then dropped him off at the hotel where they used to have sexual intercourse. After that, she went to work, arriving at Giant at 8.10am. However, according to the respondent, he returned to Singapore on 6 December 2005 because the complainant had asked him to come back to marry her. She had also asked him to bring money for the marriage, upon which he sold his cultivatable land in Bangladesh for $5,000. By the respondent's version of events, the complainant picked him up from the airport on 6 December 2005 and then went with him to their regular hotel. He and the complainant had consensual sexual intercourse there before she left to go to work.

12 During the period from 12 December 2005 to 23 December 2005, the respondent visited the workplace of the complainant almost every day, mostly during her lunch time. The complainant testified at the first trial that she was not happy about his doing so because she did not want her colleagues to know that he was visiting her. The respondent also followed the complainant home after work. However, according to the respondent, the complainant never told him not to look for her at Giant. According to the complainant, the respondent was pestering her because he wanted her to cancel the Bangladeshi visa that she had applied for. The respondent was of the view that he would be penalised if the complainant did not do so. However, the complainant did not have her passport with her because her mother had hidden it. The complainant also testified that the respondent wanted her to sign some documents that would enable him to obtain employment in Singapore.

13 At the first trial, the complainant confirmed that on the occasions when the respondent visited her at Giant during her lunch time, they went to a nearby block of flats to chat. They hugged and kissed during these sessions, but did not have sex. However, the complainant testified that there was one occasion on or around 19 December 2005 when they went to a park near the Bedok bus interchange, where she masturbated the respondent. This was confirmed by the respondent, who said that the complainant was happy and that, in addition to masturbating him, she had performed fellatio on him.

14 The complainant also testified that on 14 or 15 December 2005, she went with the respondent to a neighbourhood police post to ask whether a police report needed to be made before she could apply for a new passport. The police officer informed them that a police report need not be made and gave the complainant an application form to fill in. The complainant then submitted the form to the Immigration and Checkpoints Authority ("ICA"). A few days after the form was submitted (the respondent testified that this incident occurred on 20 December 2005, but the complainant could not remember the exact date), the complainant and the respondent went to the ICA in order to collect the complainant's new passport. There, the complainant was informed that she needed to pay a sum of $100 because she had not made a police report. She had only expected to pay $50 for the new passport. As a result, the complainant did not collect her new passport. The respondent quarrelled with her over the incident, which ended with a scuffle at the Lavender MRT station.

15 The complainant testified that the respondent contacted her on 22 December 2005 and asked her to go to the flat to meet his prospective employer in order to sign some forms. The complainant said that she would try to make the trip during her lunch hour, but, in the end, she was

unable to do so on that day and went the next day instead. However, according to the respondent, it was the complainant who had called him on the evening of 22 December 2005 to inform him that she would go to the flat the next day to fill up visa forms and have sexual intercourse with him.

Events on 23 December 2005

16 On 23 December 2005, the complainant left Giant for the flat at around 1.00pm, and arrived at around 1.40pm. On that day, the complainant was wearing a brown blouse with a polo T-shirt from Giant ("the Giant T-shirt") over it. She was wearing a black jacket over the Giant T-shirt, as well as a pair of pants, socks and shoes.

17 The respondent met the complainant at the ground floor of the apartment block in which the flat was located. When she asked him where his potential employer was, he pointed towards the flat. The complainant then followed the respondent up the stairs. When they arrived at the flat, the respondent informed the complainant that his potential employer could not wait for her and had left. The complainant sat on the floor and started filling in the forms that the respondent produced. As the complainant was in a hurry, she tried to fill in the forms as quickly as possible. The respondent was not satisfied with her signature and became angry. This led to a quarrel between them. At around this point, the respondent took the complainant's mobile telephone and wallet (containing her identity card and bank card) and threw it aside. What happened subsequently was the subject of differing accounts by the respondent and the complainant, respectively.

The complainant's version of events

18 According to the complainant, the respondent then pulled out a knife, and said, "You think I Bangla man, I come empty hand?" The complainant was scared, and went towards the main door of the flat after filling up the forms. The respondent ran after her, grabbed her, pushed her back into the room and forced her to sit on the floor. At some point during this altercation, the complainant tried to take the knife, but was unable to do so. The respondent then tied the complainant's hands behind her back with a piece of red cloth, and used another piece of cloth to gag her. After tying up the complainant, the respondent asked the complainant to lie on her back and proceeded to remove her pants, shoes and socks. He then raped her, while telling her that he wanted to ejaculate within her so that she would become pregnant and her husband would reject her. However, the complainant managed to move her leg so that the respondent ejaculated on her stomach instead. At around this time, the respondent told her, "Today, you and I finish" and asked her to chant an Arabic phrase that is usually used when someone has passed away. The complainant was frightened as she believed that the respondent wanted to kill her. The respondent also tried to kiss the complainant at some point during the rape, but was unable to do so as the complainant was gagged. He thus removed the gag, and she let him kiss her. The complainant then heard the respondent saying "backside". He turned her around and sodomised her. According to the complainant, she had never had anal sex with the respondent before, although he had requested it. The complainant stated that she felt a sharp pain and the sodomy continued for about a minute. The respondent ejaculated on the complainant's body, after which he used a piece of tissue to wipe off his semen and clean her anus. The complainant observed that there was blood on the tissue.

19 Having raped and sodomised the complainant, the respondent then took a knife to make a cut in her brown blouse, which he accessed from the top of the Giant T-shirt. He tore open the brown blouse, but there was no damage to the Giant T-shirt. He also made cuts in the complainant's bra. The respondent removed the cloth that was being used to tie up the complainant's hands, and then removed all her clothes in order to take pictures of her using the camera in his mobile telephone. The respondent told the complainant that he wanted to take photographs of her so that he could show

them to all the Malay men at her workplace.

20 Although the complainant's hands were free, she was still scared, and thus complied when the respondent made her lie down and put his hands on her throat so that she could not talk. The respondent raped the complainant a second time, and then sodomised her once again. At some point, the respondent asked the complainant why the sex was not as good as usual. The complainant testified that her answer to him was, "maybe because I [am] scared and [you are] angry". The complainant also revealed for the first time in cross-examination that she had *consensual* sex with the respondent after the two incidents of rape and the two incidents of sodomy. She did so because she thought that if she gave him sexual intercourse willingly, he would let her go. He also pulled her hair to indicate that he wanted her to perform fellatio on him, which she duly did.

21 Following the episodes of rape and sodomy, the respondent watched a pornographic video on the television, and then took the complainant's gold earring studs from her. He told the complainant that if his sister, who lived in Bangladesh, could not use gold, she too could not use gold. The respondent also told her that she could not think of going back to work. At around this time, the complainant began to feel nauseous. The respondent went to the kitchen in the flat to prepare some food, which he tried to feed the complainant. The complainant could not eat, and spat the food out. The respondent then asked her if she wanted to make a telephone call to anybody because he was going to kill her. When the complainant turned on her mobile telephone, she received calls and text messages from her colleagues, including a message from one P P Jayaprabu a/l Palakastin ("Jayaprabu"). The respondent asked the complainant to inform Jayaprabu that she would not be returning to work. However, the complainant sent Jayaprabu the following text message in the Malay language instead:

> Tolong aku Jaya. Suruh tukang sapu panggil sembilan sembilan dtg umah tukang sapu. Aku kene culik. Tolon.

According to the complainant, "Tolong aku Jaya" could be translated into "Help me, Jaya", while "suruh tukang sapu" meant "the cleaner to call police to come to the cleaner's house". "Aku kene culik" meant "I was taken hostage", while the last word "Tolon" meant "help". Jayaprabu confirmed in court at the first trial that he had received this text message, which was also retrieved from his mobile telephone. Forensic examination revealed that Jayaprabu had received the message at 6.05pm on 23 December 2005. The complainant testified that Jayaprabu had sent her a text message to confirm that she had been referring to the cleaner's house. Jayaprabu confirmed in court that he had sent a text message to the complainant with the following Malay text:

> Panggil 77 to panggil polis kepeda 77 house

This can be translated into "call 77 to call police to 77 house". The victim replied with the word "ye", which Jayaprabu understood to mean "yes".

22 The respondent saw the text message sent by Jayaprabu, and realised that the complainant had called for help. He asked her to get dressed, telling her that he wanted to take her to Boon Lay. She complied, putting on her panties, black jacket and pants. Although the complainant had her mobile telephone with her, she could not find her wallet and gold earring studs. The respondent threw the torn blouse and bra into the rubbish bin in the kitchen, and he had the Giant T-shirt in his hand. They left the flat together. The complainant had the impression that it was about 4.00 or 5.00pm by then, as it was already getting dark. Upon reaching the ground level, the complainant ran away from the respondent and sought help from passers-by. The passers-by offered to bring her to the nearest police station, but she chose to wait for Jayaprabu instead. By this time, the respondent had fled.

Subsequently, the complainant's colleagues arrived, as did the police. The complainant was then taken to a hospital for a medical checkup.

23 While the complainant was being interviewed by the police, the respondent contacted her to tell her not to cancel his visa so that he could return to Bangladesh. The complainant told the respondent that she needed her identity card and bank card. She informed the investigation officer, Amos Tang ("IO Tang"), who then instructed her to arrange a meeting with the respondent on the pretext of getting her identity card and bank card back from him. This meeting was arranged to take place on 25 December 2005 at Mustafa Centre. On the morning of 25 December 2005, before the meeting at Mustafa Centre, the complainant received several text messages from the respondent asking for forgiveness and pleading with her not to go to the police. Later on the same day, the respondent was arrested when he arrived at the appointed place and time.

Therespondent's version of events

24 According to the respondent, when the complainant arrived at the flat on 23 December 2005, she gave him her identity card, bank card and her earring studs. He kept these items in his wallet. The complainant was feeling very hot inside the flat, and therefore took off her jacket and the Giant T-shirt. She placed these articles of clothing on the bed. She then sat cross-legged on the floor, and the respondent took out the visa application forms from his bag and gave them to her. At that time, the complainant had her mobile telephone with her, but it was switched off. While the complainant was filling up the application forms, the pair had an argument. The respondent asked the complainant if she was really going to Bangladesh with him. He wanted to make sure that she would make the trip this time. Upon hearing this, the complainant slapped the respondent on his face, and told him that she had not cheated or lied to him. It was her mother who had taken her passport away. The respondent then told her:

> You don't know my problem because last time, you know my problem, now you don't know problem because your heart inside rubbish jam already.

The complainant replied that it was the respondent who did not understand her problems, and that his heart was also full of "rubbish jam". She said that he should wash his heart. She then grabbed a knife which was nearby and attempted to cut the shirt that he was wearing. The respondent did not allow her to do so, and snatched the knife away from her. The respondent then cut open the complainant's brown blouse so that she could wash her heart. He made the cut from top to bottom, and accidentally cut her bra in the process.

25 According to the respondent, the complainant then tried to take the knife from him. He resisted by grabbing her hands with his, and then tying her hands behind her back. When the complainant agreed that she would not take the knife, the respondent untied her. After this incident, the complainant watched some television. She told the respondent, "I got to go home early. It is late. So please come and have our intercourse." The respondent and the complainant then had sexual intercourse on the carpeted floor, with him on top, and he ejaculated on her belly, as had been their practice. The complainant complained that the carpet surface was very rough. The respondent laid a towel on the floor, and the pair had sexual intercourse two further times that afternoon. The complainant also performed fellatio on the respondent. The respondent testified that the entire sexual encounter lasted for about two hours.

26 The complainant then wanted to leave the flat, and put on her jacket, pants, socks and shoes. She threw the cut blouse and bra into the rubbish bin in the kitchen of the flat and carried the Giant T-shirt in her hand. The respondent and the complainant left the flat together. When they

reached the ground floor, the complainant told the respondent that she had to leave quickly. The respondent thus left the complainant and hailed a taxi from the nearby coffee shop as he wanted to go to Mustafa Centre. The respondent testified that on 25 December 2005, he went to meet the complainant at Mustafa Centre because the latter wanted her identity card, bank card and earring studs to be returned to her. He was arrested there. He also testified in cross-examination at the first trial that he had been informed by his friend on the night of 23 December 2005 that the complainant had made a police report against him and that the police had gone to the flat.

27 Other than the complainant and the respondent, the only other material witness at the first trial was Jayaprabu, who worked as a cashier at Giant and was the complainant's colleague. In addition to the evidence from Jayaprabu already noted above (at [21]), Jayaprabu also testified that upon receiving the complainant's text message asking for help, he went to his store manager, Tan Wee Boon, to discuss the matter. Jayaprabu, Tan Wee Boon and two other colleagues then took a taxi to the flat. Jayaprabu testified that when they arrived, the complainant was crying and looked very lost.

The first trial

28 As mentioned earlier (at [4]), the first trial took place in September and October 2006. In the midst of the first trial, the respondent challenged the admissibility of a statement marked as "P73" which he had made to the police under s 121 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("the CPC") on 25 December 2005. The respondent claimed that the statement was involuntary as it had been made under threat of physical harm. Accordingly, the trial judge conducted a trial-within-a-trial to determine the admissibility of P73. By the end of the *voir dire*, the trial judge was not satisfied that the Prosecution (*ie*, the appellant) had proved beyond reasonable doubt that the statement was a voluntary one and accordingly excluded P73 from the evidence admitted (see *Mohammed Liton (No 1)* ([4] *supra*) at [32]). Following this decision, the trial judge proceeded with the main trial and subsequently made the orders which were the subject of the present appeal before us (see [2] above). As already mentioned, the trial judge's decision in the first trial can be found at *Mohammed Liton (No 1)* ([4] *supra)*.

Appeal from the first trial

29 The Public Prosecutor then appealed against the trial judge's decision on both acquittal and sentence to this court in Criminal Appeal No 10 of 2006. We heard this appeal in February 2007 and decided that P73 had been wrongly excluded by the trial judge as, on the evidence, it had in fact been made voluntarily. We then remitted the case to the trial judge for reconsideration of his decision made in the first trial, taking P73 into account.

The second trial

30 The trial judge heard the case again in March 2007 ("the second trial"), with P73 admitted into the evidence. By the end of the second trial, he was not persuaded by P73 that "the complainant's evidence had been bolstered to merit a change of view" (see *PP v Mohammed Liton Mohammed Syeed Mallik* [2007] SGHC 47 ("*Mohammed Liton (No 2)*") at [1]), and upheld his orders made in the first trial. The appellant thereafter appealed against the trial judge's decision, leading to the present appeal before us. We will now deal with the broad issues of acquittal and sentence separately.

The appeal against acquittal

31 Before we deal with the specific charges being appealed against in respect of the broad issue of acquittal, it would be useful to first set out the general legal principles that are applicable.

Applicable legal principles

Principles of reappraisal

32 First, it is established law that an appellate court will not disturb the findings of fact of the trial judge unless they are clearly arrived at against the weight of the evidence. In *Jagatheesan s/o Krishnasamy v PP* [2006] 4 SLR 45 ("*Jagatheesan*") at [34]–[38], V K Rajah J (as he then was) summarised the position thus:

> 34 … In *Yap Giau Beng Terence v PP* [1998] 3 SLR 656 ("*Terence Yap*") Yong Pung How CJ noted at [24]:
>
> > It is trite law that *an appellate court should be slow to overturn the trial judge's findings of fact, especially where they hinge on the trial judge's assessment of credibility and veracity of witnesses, unless they can be shown to be plainly wrong or against the weight of the evidence*. [emphasis added]
>
> …
>
> 37 That said, it must be noted that the position apropos the proper inferences to be drawn from findings of fact is quite different. Yong Pung How CJ in *Terence Yap* observed in this context (at [24]):
>
> > [W]hen it comes to inferences of facts to be drawn from the actual findings which have been ascertained, a different approach will be taken. In such cases, it is again trite law that an appellate judge is as competent as any trial judge to draw any necessary inferences of fact from the circumstances of the case.
>
> 38 ***In short, intervention by an appellate court is justified when the inferences drawn by a trial district judge are not supported by the primary or objective evidence on record*** …
>
> [original emphasis in italics; emphasis added in bold italics]

This was most recently reiterated by V K Rajah JA in *Sakthivel Punithavathi v PP* [2007] 2 SLR 983 ("*Sakthivel Punithavathi*").

33 Given that the acquittals in this case by the trial judge were based largely on findings of fact as opposed to questions of law, this court should be slow to disturb the trial judge's conclusions. It needs only to be clarified that these principles apply equally to an appeal from an acquittal as they do to an appeal from a conviction: see *Sheo Swarup v King-Emperor* (1934) LR 61 IA 398, a decision of the Privy Council. In both instances alike, the appellate court, exercising the same powers, may reverse an order of acquittal or conviction (as the case may be) based on factual findings if these findings are against the weight of evidence or if the trial judge misdirected himself as to the law: see, for example, *Public Prosecutor v Selvarajoo a/l Ramachandran* [2005] 5 MLJ 282 at [23]. The only possible difference, as Prof Tan Yock Lin notes in *Criminal Procedure* (LexisNexis, 2007) (at p XIX–151), is that in the former scenario, the appellate court should bear in mind that the accused does not, in so far as the essential elements of the offence are concerned, bear any burden of proof for

the purpose of determining whether or not the acquittal is against the weight of the evidence.

Burden and standard of proof

34 Secondly, in relation to the requisite burden of proof, it needs no reminding that the burden lies squarely with the Prosecution to prove the accused person's guilt beyond a reasonable doubt. As Rajah JA said in *Sakthivel Punithavathi* ([32] *supra* at [78]):

> Whatever is thought about the myriad objectives of criminal punishment, one fundamental principle has been hailed as a cornerstone both at common law and in the Evidence Act (Cap 97, 1997 Rev Ed): before an accused person can be convicted of a crime, his guilt must be proved beyond a reasonable doubt. This bedrock principle is sacrosanct in our criminal justice system and constitutes a fundamental right that the courts in Singapore have consistently emphasised and upheld as a necessary prerequisite for any legitimate and sustainable conviction: see, for example, *Jagatheesan* [[32] *supra*]; *Took Leng How v PP* [2006] 2 SLR 70.

Indeed, the trial judge also alluded to this important principle in his judgment in respect of the second trial (see *Mohammed Liton (No 2)* ([30] *supra*)). At [4] of that judgment, he stated that:

> Unlike civil cases, where the court may choose between two competing stories and accept the one on a balance of probabilities, that is to say, accepting that version because it seemed more plausible than the other, in a criminal case, there is an important norm to be taken into account at all times – that where there is a reasonable doubt, that doubt must be resolved in favour of the accused. *It is inherent [in] the requirement that the prosecution proves its case beyond reasonable doubt.* [emphasis added]

35 As to what proof "beyond a reasonable doubt" (*per* Rajah JA in *Sakthivel Punithavathi* ([32] *supra*) at [78]) means, we would also endorse the definition accepted by him in *Jagatheesan* ([32] *supra* at [55]), *viz*, the description of "reasonable doubt" as "*reasoned* doubt" [emphasis in original] – which in turn mandates that all doubt, for which there is a reason relatable to and supported by the evidence presented, be taken into account in favour of the accused. Reasonable doubt might also arise by virtue of the lack of evidence submitted, if such evidence is necessary to support the Prosecution's theory of guilt: see *Jagatheesan* at [61]. Indeed, the trial judge also similarly referred to such a meaning of the standard of "beyond a reasonable doubt" in his judgment in respect of the second trial (see *Mohammed Liton (No 2)* ([30] *supra* at [4])):

> What this means is that unlike a civil case, the court's verdict might not merely be determined on the basis that as between the two competing stories, which version was the more plausible one. In a criminal case, the court may find ... the complainant's story to be more probable than that of the accused person's version, and yet, be convinced that there is a reasonable possibility that the accused person's story could be true. If that were the case, the court's duty is to acquit. Unlike a civil case, the court need not make a decision by concentrating on which of the two versions was more probable. In the criminal trial the court must remind itself to break from any habitual inclination to contemplate the question of the burden of proof on the basis of a civil case, and instead, ask itself whether there was a reasonable possibility that the accused person's version was true.

36 On this basis, and since this was essentially a case concerning sexual offences in which the complainant's word was pitted against the respondent's word, it remains to be considered whether corroborative evidence was required and, if so, whether this requirement was fulfilled by the evidence adduced by the appellant to prove the respondent's guilt in respect of each of the acquitted charges

beyond a reasonable doubt. Again, before we turn to the specific charges, it would be useful to first state the applicable principles in relation to corroboration.

Corroboration

(1) Whether corroboration was required

37 The rule as to corroboration in so far as sexual offences are concerned was laid down in the local context in the Singapore High Court decision of *Khoo Kwoon Hain v PP* [1995] 2 SLR 767("*Khoo Kwoon Hain*"), where Yong Pung How CJ held that while there was no rule of law in this country that in sexual offences, the evidence of the complainant must be corroborated, it was nonetheless unsafe to convict in cases of this kind unless the evidence of the complainant was "unusually convincing" (*Khoo Kwoon Hain* at 777, [50]; see also *Tang Kin Seng v PP* [1997] 1 SLR 46 ("*Tang Kin Seng*") at [43] (where the phrase "unusually compelling" was used); *Soh Yang Tick v PP* [1998] 2 SLR 42 ("*Soh Yang Tick*") at [33]; *Kwan Peng Hong v PP* [2000] 4 SLR 96 ("*Kwan Peng Hong*") at [33] (where the phrase "unusually compelling or convincing" was used); and *Chng Yew Chin v PP* [2006] 4 SLR 124 ("*Chng Yew Chin*") at [33]). Further, in *Tang Kin Seng*, Yong CJ clarified (at [43]) that this did not amount to a legal requirement for a judge to warn himself *expressly* of the danger of convicting on the uncorroborated evidence of a complainant in a case involving a sexual offence (see also *Kwan Peng Hong* at [33]).

38 As to what "unusually convincing" means, Yong CJ, in *Teo Keng Pong v PP* [1996] 3 SLR 329, clarified (at 340, [73]) that this simply meant that the witness's testimony must be "so convincing that the prosecution's case was proven beyond reasonable doubt, solely on the basis of the evidence" (see also *Lee Kwang Peng v PP* [1997] 3 SLR 278 ("*Lee Kwang Peng*") at [69]–[70] and *Kwan Peng Hong* ([37] *supra*) at [33]). Rajah J in *Chng Yew Chin* ([37] *supra*) also adopted this meaning, holding thus (at [33]):

> In this context, *dicta* in case law abound cautioning judges to scrutinise the evidence before them with a fine-tooth comb, given both the ease with which allegations of sexual assault may be fabricated and the concomitant difficulty of rebutting such allegations: *Ng Kwee Piow v Regina* [1960] MLJ 278. Therefore, it is necessary that the testimony of such complainants be "unusually convincing", which is to say, *it must be sufficient to establish guilt beyond reasonable doubt*: *Teo Keng Pong v PP* [1996] 3 SLR 329 at 340, [73]. [emphasis added]

39 Given that the standard of proof required in a criminal case is already that of "beyond a reasonable doubt" (see [34]–[35] above), the expression "unusually compelling" must mean something more than a mere restatement of the requisite standard of proof. Indeed, Prof Michael Hor notes, in "Corroboration: Rules and Discretion in the Search for Truth" [2000] SJLS 509 at 531, that the expression must clearly mean something apart from the standard of proof. If, in fact, one scrutinises closely the observations of Rajah J in *Chng Yew Chin* ([37] *supra*) quoted in the preceding paragraph, it will be seen that the true emphasis is not on the standard of proof in the abstract, but, rather, on the *sufficiency* of the complainant's testimony. By its very nature, the inquiry is a *factual* one. It is also a question of *judgment* on the part of the trial judge that is *inextricably linked* to the *high* standard of proof, *ie*, "beyond a reasonable doubt". In our view, therefore, the "extra something" implied by the word "unusually" must refer to the need for the trial judge to be aware of the dangers of convicting solely on the complainant's testimony as well as of the importance of convicting only on testimony that, when weighed against the overall backdrop of the available facts and circumstances, contains that ring of truth which leaves the court satisfied that no reasonable doubt exists in favour of the accused. Since a mandatory warning from the judge to himself is not required, the implication is that the appellate courts will scrutinise the trial judge's grounds of decision to see whether the trial

judge was indeed aware of the danger of convicting on the bare word of the complainant as well as whether the quality of the testimony itself was consistent with the high standard of proof beyond a reasonable doubt.

40 In the present case, a definitive ruling on the meaning of the expression "unusually compelling" is not strictly necessary since the trial judge implicitly found that corroboration was required. In *Mohammed Liton (No 1)* ([4] *supra*), the trial judge held (at [36]) that:

> However, from the testimonies, and given the *small measure of corroboration* in the cautioned statements of the accused, I am satisfied that, in so far as the sexual offences were concerned, the Prosecution has proved that the accused had raped the complainant and also sodomised her. [emphasis added]

In our view, this was an implicit finding by the trial judge that corroboration was necessary, presumably because the complainant's evidence was not "unusually compelling". In this respect, the Singapore High Court has held that an appellate court will not readily overturn a trial court's finding that corroboration was *not* required: see *Chen Jian Wei v PP* [2002] 2 SLR 255 at [34], where Yong CJ observed that a trial judge who had had the benefit of observing the demeanour and conduct of a child witness would be in a far better position than an appellate court to decide if corroboration was required in the circumstances of the case (although he decided, based on the actual facts of that particular case, that the trial judge erred in not requiring corroboration of the child witness's testimony). The same considerations must apply when the trial judge has found that corroboration *was* required. Accordingly, we were of the view that, in this case, corroboration was required in respect of the complainant's evidence before conviction of the respondent in respect of the acquitted charges could be secured. Indeed, both the appellant and the respondent proceeded in their submissions on the basis that corroboration was required.

(2) The approach in identifying corroborative evidence

41 *Tang Kin Seng* ([37] *supra*) lays down the approach in identifying the requisite corroborative evidence (see also *Kwang Peng Hong* ([37] *supra*)). Under this approach, the trial judge should first identify the aspect of the evidence which is not so convincing. The trial judge should then look for supporting evidence and ask whether, in taking the weak evidence together with the supporting evidence, he is convinced that the Prosecution's case is proved beyond reasonable doubt.

42 As to what can amount to corroborative evidence, the Evidence Act (Cap 97, 1997 Rev Ed) did not, at its inception, provide a definition of corroboration and still does not do so. However, by virtue of s 2(2), the common law is imported into the Evidence Act unless it is inconsistent with the Act's tenor and provisions. There is thus legal justification for the judicial adoption of the common law definition of corroboration laid down in the oft-cited English decision of *R v Baskerville* [1916] 2 KB 658 at 667, *ie*, independent evidence implicating the accused in a material particular.

43 However, it is clear that the *Baskerville* standard (as set out in the preceding paragraph) does not apply in its strict form in Singapore since Yong CJ, in *Tang Kin Seng* ([37] *supra*), advocated a liberal approach in determining whether a particular piece of evidence can amount to corroboration. This is so, notwithstanding Yong CJ's *apparent* allusion to the whole or part of the *Baskerville* standard in *B v PP* [2003] 1 SLR 400 (at [27]); *Lee Kwang Peng* ([38] *supra*) at [71]; and *Kwan Peng Hong* ([37] *supra*) at [37] as being "essential" in nature. In our view, to adopt a stringent definition of what constitutes corroborative evidence goes against the liberal approach which Yong CJ himself alluded to as a broad *principle of law* in the other cases. In *Kwan Peng Hong* (at [36]), Yong CJ held that our courts "have left behind a technical and inflexible approach to corroboration and its

definition", and alluded to similar pronouncements in *Tang Kin Seng* (at [53]–[68]) and *Soh Yang Tick* ([37] *supra* at [43]). The principle of law which emerges from these cases is that the *local* approach to locating corroborative evidence is *liberal*, thus ensuring that the trial judge has the necessary flexibility to treat relevant evidence as corroborative. What is important is the substance as well as the relevance of the evidence, and whether it is supportive or confirmative of the weak evidence which it is meant to corroborate.

44 With these general legal principles in mind, we now consider the specific appeals against each of the acquitted charges *seriatim*.

The first charge (aggravated rape)

Elements of the offence

45 With respect to the first charge of aggravated rape, the elements of the offence are provided in s 376(2)(*b*) of the Penal Code:

> **Punishment for rape**
>
> **376.**
>
> ...
>
> (2) Whoever, in order to commit or to facilitate the commission of an offence of rape against any woman —
>
> …
>
> (*b*) *puts her in fear of death or hurt to herself or any other person*,
>
> and whoever commits rape by having sexual intercourse with a woman under 14 years of age without her consent, shall be punished with imprisonment for a term of not less than 8 years and not more than 20 years and shall also be punished with caning with not less than 12 strokes.
>
> [emphasis added]

A helpful interpretation of s 376(2)(*b*) was provided by Tay Yong Kwang JC (as he then was) in *PP v MU* [1999] SGHC 107 ("*MU*"), where he stated (at [125]) that the elements which the Prosecution had to prove under this subsection were as follows:

> (a) Sexual intercourse took place between the accused and the complainant.
>
> (b) The complainant did not consent.
>
> (c) In order to facilitate the commission of the offence, the accused put the complainant in fear of hurt to herself.

46 Since the trial judge had already convicted the respondent of a *separate* charge of rape *simpliciter* under s 376(1) of the Penal Code (*ie*, the sixth charge), a subsequent conviction of the respondent under the first charge of aggravated rape would imply the occurrence of a *second* instance of rape. As such, it was necessary for us to consider whether the evidence supported the allegation of a *second* instance of rape. If it did not, it meant either that the respondent should be

acquitted of the first charge (as the trial judge held) *or*, if the only instance of rape as revealed by the evidence was shown to be aggravated in nature, that he be acquitted of the first charge and the sixth charge (of which he has already been convicted) amended to reflect a charge of aggravated rape as opposed to rape *simpliciter*. Only after this preliminary question was decided could we turn our attention to the *nature* of the alleged incident of rape, *viz*, whether it was aggravated or not.

Whether there was a second instance of rape

47 In our view, the evidence did *not* support the allegation of a *second* instance of rape as the complainant's *own evidence* in respect of this second instance of rape was inconsistent, to say the least. In the complainant's evidence-in-chief at the first trial, she testified that the respondent had raped and sodomised her "a second time" (see the certified transcript of the notes of evidence ("*Official Transcript*") for 11 September 2006 at p 418). In cross-examination, the complainant, for the first time, testified that after the *two* alleged instances of rape and sodomy, she "went on top" of the respondent and had sex with him in that position *willingly*, thinking that if she gave in to him willingly, he would let her go (*Official Transcript* for 12 September 2006 at p 537). However, later in the cross-examination, the complainant testified that the consensual sex had taken place just after the *first* episode of rape and sodomy. She said that after she went on top of him to have sex, the respondent wanted to "[go] on top of [her]". She told him that the floor was very rough, and this was when the respondent took out a yellow towel, on which the complainant laid, and they had sex again. This, according to the complainant, was the *second* rape (*Official Transcript* for 12 September 2006 at p 539). As would be appreciated, the sequence of events between these two accounts in the *same* cross-examination was wholly inconsistent: in the earlier account, the alleged second instance of rape took place *before* the instance of consensual sex between the complainant and the respondent, whereas, in the later account, the alleged second instance of rape took place *after* the said consensual sex.

48 These were not the only inconsistencies in the complainant's testimony. When the complainant was interviewed by Staff Sergeant Lee Chen Hooi ("PW14") at about 8.35pm on 23 December 2005, she told him that she had been raped and sodomised "two times". During cross-examination, PW14 clarified that the complainant meant that she had been raped *once and then* sodomised *once* (*Official Transcript* for 4 September 2006 at p 78). This account, which was taken soon after the alleged offences, clearly made no mention whatsoever of a *second* instance of rape.

49 In our view, these inconsistencies meant that the complainant's evidence in respect of the alleged second instance of rape could not, without the requisite corroborative evidence, secure a conviction against the respondent in respect of such an offence, whether aggravated or not. Indeed, we could not find any corroborative evidence. Reasonable doubts still existed due to the complainant's own inconsistent accounts of the material events. While immaterial inconsistencies will not harm the strength of the complainant's evidence (see, for example, *Chng Yew Chin* ([37] *supra* at [34])), the inconsistencies with respect to the alleged second instance of rape were material since they related to the very ingredients of the charge itself. Accordingly, we were of the view that the evidence did not support a second charge of rape under s 376(1) of the Penal Code *beyond a reasonable doubt*, a threshold which the appellant had to cross (but failed to do).

Whether the single instance of rape was aggravated rape

50 Although the evidence clearly revealed only *one* instance of rape, this was still inadequate to dispose of the appeal in relation of the first charge. As alluded to earlier (at [46]), we still had to decide whether that single instance of rape was aggravated in view of the possibility of acquitting the respondent of the first charge but amending the sixth charge (of which the respondent has already

been convicted) to reflect a charge of aggravated rape as opposed to rape *simpliciter*, if the evidence revealed the commission of *aggravated* rape.

51 Of the three elements of an offence of aggravated rape listed by Tay JC in *MU* ([45] *supra*), the one which necessitated consideration in the present case was element (c), *viz*, whether, in order to facilitate the commission of the offence, the respondent put the complainant in fear of hurt to herself. In particular, this requirement implies that there must be a sufficient nexus between the act which put the complainant in fear and the rape itself. The evidence revealed that the respondent, among other things, pointed a knife at the complainant before tying and gagging her. This was clear from a perusal of P73, read with a further statement given by the respondent (marked as "P80") under s 121 of the CPC on 29 December 2005, which was a continuation of P73. It would be useful to set out the relevant parts of P73 at this juncture:

> 11 On 23rd December 2005, [the complainant] arrived at my house at about 1.30 pm, she asked me where my boss was and I told her that my boss ha[d] not come yet. I then asked her to follow me to another friend['s] room which was not locked to sign the guarantor form[,] which she complied [with]. Inside the room, we sat on the floor and [the complainant] started to fill in the form. She told me that she was rushing for time and I got very angry as I found her to be very rude towards me. She was not like that previously. *I took a knife which I saw beside me and pointed at her. [The complainant] then continued to write [on] the form and I put the knife beside me.* When [the complainant] finished writing [on] the form, she threw the form and walk[ed] out of the room. *When she was trying to open the main door, I held her arms and pushed her back to the room. Inside the room I pushed her onto the floor. She then grabbed the knife and I managed to grab it back from her.* She then started screaming. I told her to talk nicely and do not [*sic*] scream but she refuse[d] to listen to me. I was worried that someone might hear her scream so I took a red-colour [*sic*] which was hanging on the side of the bed and gagged her mouth. After I gagged her mouth I also used another red cloth to tie her hands behind her back. I then laid her on the floor and removed her pants and panty. *I then removed my Sarong and went to have sex with her with her hand[s] still being tied behind her back.* I told her that I want to ejaculate inside her and make her pregnant so that her husband will leave her and she will be together with me. She [shook] her head and I [understood] that she did not want me to shoot my sperms inside. I moved my penis in and out of [her] vagina and ejaculated on her stomach. After I ejaculated, I used some tissue paper to clean it off. I then pull[ed] down the cloth that was tied to her mouth and started to kiss her and she tried to move her face away. She did not kiss me back.
>
> …
>
> 13 I rested for a while more before I approached [the complainant] again. I reached my hand into her shirt from the collar opening; *I cut a bit of the shirt and [tore] it apart. I then pulled [the] bra ... away from her breast and cut it into two pieces*. I then tried to removed [*sic*] her clothing but I could not because her hand[s] [were] still ... tied behind. I then removed the cloth that was tied [around] her hand[s] and removed all her clothing until she became totally naked. I then went to take my handphone which was placed just beside the television and started to take nude photograph[s] of her.
>
> …
>
> [Questions by IO Tang to the respondent]
>
> Q12 After the anal sex, did you take the knife again and threaten to cut her so that her husband

will not want her back?

Ans: Yes, but I was only trying to force her to be with me[.] *I have no intention to cut her*.

Q13 Did you take the knife and cut [the complainant] back?

Ans: It was during the first time when we were struggling. I do not know how it happened accidentally[.] I [swung] the knife and it cut her back.

[emphasis added]

And from P80:

...

[Questions by IO Tang to the respondent]

Q69 On 23rd December 2005, [was] there any time in your house at 174B Joo Chiat Place, [the complainant] slapped you?

Ans: Yes. She kicked me on my chest and also slapped me.

Q70 Why did [the complainant] want to [kick] and [slap] you?

Ans: I forcefully asked her to stay in and finish filling in the form. She got angry, she kicked and slapped me.

Q71 On 23rd December 2005, [was] there any time in your house at 174B Joo Chiat Place, you slapped [the complainant]?

Ans: When she [kept] slapping me and kicking me[,] I got angry, I slapped and kicked her back.

Q72 Where did you kick her?

Ans: I kicked her at her buttock.

Q73 At which stage you kicked [*sic*] and slapped [the complainant]?

Ans: When we were quarrelling. It was before the sex.

52 In our view, the combined effect of P73 and P80 was to provide corroborative evidence that the respondent had done the acts which put the complainant in fear of hurt to herself, including pulling out a knife, slapping and kicking the complainant just before he raped her, and gagging and tying her up. All of these acts *combined* put the complainant in fear of hurt to herself, as she testified at the first trial. However, this was not enough for a conviction. The next issue we considered was whether those acts were done by the respondent *in order to commit or facilitate the commission of an offence of rape*. This is where the evidence was unclear. It may be that the acts above were wholly separate from the actual rape, *ie*, that when the respondent did the acts, he did not intend them to *facilitate the commission of the subsequent rape*. Indeed, reading P73 on its own, it appeared that the acts of gagging and tying the complainant up were done because she started screaming after the quarrel between the parties. As such, it would appear that when the respondent

did the acts in question, he only wanted to put an end to the quarrel; he had not, *at that time*, formed the intention to commit rape and, hence, could *not* have done the acts to *facilitate the commission* of the same. Similarly, although the respondent kicked and slapped the complainant, it appeared from P80 that these acts were in retaliation to the complainant's initial slaps and kicks, rather than acts to facilitate the commission of the rape.

53 The appellant submitted that the complainant's evidence of aggravated rape was independently corroborated by the cut-up clothing, the nude photographs recovered from the respondent's mobile telephone, the text messages that the respondent sent to the complainant via short message-service asking for her forgiveness as well as various statements from the respondent admitting to the aggravated rape, especially P73 and P80. However, adopting the approach mentioned earlier (at [41]), in searching for corroborative evidence, we were not satisfied that these pieces of evidence corroborated the complainant's evidence so as to prove the respondent's guilt beyond a reasonable doubt. The evidence shed little or no light on the essential ingredient of aggravated rape, which was that the respondent had intended, by the acts which put the complainant in fear of hurt to herself, to *facilitate the commission of rape*. Indeed, as we mentioned earlier (at [52]), there was, in our view, another reasonable explanation for the respondent's acts, which was that he had committed those acts due to the quarrel which had ensued between him and the complainant. We were not convinced that there was an intention on the part of the respondent to facilitate the commission of the rape at the time he did the said acts. In the result, it could not be said that the trial judge's decision to acquit the respondent of the first charge was against the weight of evidence or that the trial judge misdirected himself as to the law (see [33] above). It bears repeating that we were also not convinced that there was a second instance of rape, aggravated or otherwise, and, hence, we saw no need to disturb the existing conviction of the respondent for rape *simpliciter* under the sixth charge. Accordingly, we dismissed the appeal in respect of the acquittal of the respondent of the first charge.

The third charge (carnal intercourse against the order of nature)

54 In relation to the appeal against the acquittal of the respondent of the third charge, it must first be stated that the respondent has already been convicted of a separate instance of carnal intercourse against the order of nature (*viz*, the seventh charge). As with the first charge in respect of rape, the third charge implied a *second* instance of carnal intercourse against the order of nature (in this case, sodomy). Therefore, we had to consider if the evidence supported the allegation of such a *second* instance of sodomy.

55 Before us, the appellant conceded that there was only some evidence in relation to the third charge. In our view, this concession was wholly justified in view of the evidence presented by the appellant, which consisted, in the main, of the complainant's own evidence. However, as will be seen, the complainant's evidence in relation to a second instance of sodomy was internally inconsistent, and we were not convinced that a second instance of sodomy had taken place.

56 The complainant's evidence-in-chief was that the respondent had sodomised her a second time after having raped her a second time. However, as mentioned earlier (at [48]), the complainant had told PW14 on 23 December 2005 at about 8.35pm that she had been raped and sodomised "two times", and PW14 clarified that this meant that the complainant had been raped *once and then* sodomised *once* (*Official Transcript* for 4 September 2006 at p 78). Further, the doctor who examined the complainant in the early morning after the rape testified at the first trial that the complainant had told her that the respondent first penetrated her vaginally, ejaculated outside of her, then sodomised her and then subsequently penetrated her vaginally again. *That was all, and there was no mention of a second instance of sodomy* (*Official Transcript* for 8 September 2006 at p 334).

57 It must further be noted that the respondent never confessed to a second instance of sodomy. His account in P73 at para 14 suggested that while he tried to sodomise the complainant a *second* time, there was no penetration:

> [After the first instance of sexual intercourse (rape), the first instance of sodomy and the second instance of sexual intercourse]
>
> … I cannot ejaculate, so I took put my penis and tried to put it inside her anus again. My penis did not go into her anus because she moved her body away. I did not go back and have sex with her …

In P80, the respondent unequivocally maintained that he had *not* sodomised the complainant a second time (see the record of proceedings ("*Record of Proceedings*") vol 6 at p 79):

Q93 On 23rd December 2005, in your house at 174B Joo Chiat Place, how many times did you insert your penis into [the complainant]'s anus?

Ans: One time only.

Q94 After you performed anal sex to [*sic*] [the complainant], did you tried [*sic*] to put your penis into her anus again?

Ans: I did not.

Finally, when IO Tang recorded a statement from the respondent under s 122(6) of the CPC in connection with the seventh charge (as amended) on 19 April 2006, the respondent refused to sign on the charge and said, "I only insert [*sic*] my penis into her anus once, and bring [*sic*] it out. I did not put my penis inside her anus twice ..." (see *Record of Proceedings* vol 6 at p 130).

58 In view of the material inconsistencies in the complainant's account *vis-à-vis* the *second* instance of sodomy (for which no corroborative evidence could be found elsewhere) and the respondent's consistent denial of a second instance of sodomy, we were of the view that the *third charge* of carnal intercourse against the order of nature (in effect, a *second* instance of sodomy) was not proved beyond a reasonable doubt, and we therefore saw no need to disturb the trial judge's acquittal of the respondent in respect of that charge. Accordingly, the appeal in relation to the acquittal of the respondent in respect of the third charge was dismissed.

The eighth charge (theft)

59 In respect of the eighth charge of theft, s 378 of the Penal Code provides as follows:

> **Theft**
>
> **378.** Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.

The learned authors of *Ratanlal & Dhirajlal's The Indian Penal Code* (Wadhwa and Company Nagpur, 31st Enlarged Ed, 2006) ("*The Indian Penal Code*") note (at p 2002) that intention is the gist of the offence of theft. The intention to take dishonestly exists when the taker intends to cause wrongful gain to one person or wrongful loss to another person.

60 In our view, the evidence showing the dishonest intention of the respondent was severely lacking in this case. The appellant's only evidence in this respect was the complainant's testimony that the respondent had taken her gold earring studs, identification card and bank card. There was no evidence adduced or submission made in respect of the *mens rea* required for this offence. As the trial judge held in *Mohammed Liton (No 1)* ([4] *supra* at [39]):

> Finally, there is the charge for theft. The items consisted of the complainant's identity card and bank card, and a pair of earrings. They were not items of any great value, with the exception of the bank card, but it was not known how much the complainant had in that account or whether the accused knew her personal identification and user identification numbers [so as] to withdraw money with that card. It was not disputed that the accused immediately agreed to return the items to the complainant when she asked for them. The complainant testified that when she asked for them she had not told him that she had gone to the police. The accused's evidence was that the complainant left the items in the room and forgot to take them when she left. Theft is an offence committed with the intention of depriving the owner of the property. *I do not think that that intention was satisfactorily proved in this case*. The accused might have been liable for trespass, conversion or detinue under the law of tort, but that was not in issue before this court. [emphasis added]

Accordingly, we were of the view that the trial judge was correct to acquit the respondent of the eighth charge as the appellant had not proved this charge beyond a reasonable doubt. As such, we dismissed the appeal in relation to the acquittal of the respondent in respect of the eighth charge.

The second and fifth charges (criminal intimidation)

61 The appellant proceeded on two charges of criminal intimation against the respondent before the trial judge. The second charge was for criminal intimidation through the use of a knife, whilst the fifth charge was for criminal intimidation in threatening to distribute the nude photographs (see [1] above). As mentioned earlier (at [2]), the trial judge acquitted the respondent of both of these charges.

Elements of the offence of criminal intimidation

62 It would be appropriate, first, to consider the elements of the offence of criminal intimidation. In this regard, s 503 of the Penal Code provides as follows:

> **Criminal intimidation**
>
> **503.** Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.

The elements of the offence of criminal intimidation were set out in the Singapore High Court decision of *Chua Siew Lin v PP* [2004] 4 SLR 497 ("*Chua Siew Lin*"). In that case, Yong CJ cited (at [42]), with apparent approval, the district judge's adoption of a two-stage test that the Prosecution had to satisfy before a conviction for an offence committed under s 503 of the Penal Code could be made out: first, the accused must have threatened the victim with injury to his or her person; and, second, the threat must have been intended to cause alarm to the victim. However, it must be clarified that this test is not exhaustive of all the instances in which an offence under s 503 may be made out. It

may conduce towards clarity in approach and (especially) application to state that there are two general elements to this particular offence, and that these general elements may be specifically satisfied by any of the grounds listed under the section itself. This may be illustrated as follows:

(a) A person is threatened with any injury (the first general element) –

(i) to his person, reputation or property; or

(ii) to the person or reputation of any one in whom he (*ie*, the person threatened) is interested.

(b) The threat is made with intent (the second general element) –

(i) to cause alarm to the person threatened;

(ii) to cause that person to do any act which he is not legally bound to do as the means of avoiding the execution of such threat; or

(iii) to cause that person to omit to do any act which he is legally entitled to do as the means of avoiding the execution of such threat.

Both (a) *and* (b) above must be satisfied in order for an offence under s 503 of the Penal Code to be made out, with (a) representing the *actus reus* and (b) representing the *mens rea*.

63 We should also point out that there is no further necessity to show, as a matter of fact, that anyone was actually threatened. This issue was considered by the Singapore High Court in the cases of *Ramanathan Yogendran v PP* [1995] 2 SLR 563 ("*Ramanathan Yogendran*") and *Ameer Akbar v Abdul Hamid* [1997] 1 SLR 113 ("*Ameer Akbar*"). In *Ramanathan Yogendran*, which was an appeal against the decision of the District Court, the district judge held, relying on the Malaysian case of *Lee Yoke Choong v Public Prosecutor* [1964] MLJ 138 ("*Lee Yoke Choong*"), that the effect of the threat on the victim was not relevant for the purpose of the offence of criminal intimidation as defined in s 503 of the Penal Code. In *Lee Yoke Choong*, it was argued in mitigation of sentence that the victim had not been alarmed by the accused's threat to throw acid on his face and that the accused had not threatened to carry out the attack personally. Ong J held that the offence of criminal intimidation lay in the intent, and not the effect, behind the threat.

64 On appeal in *Ramanathan Yogendran* ([63] *supr*a), Yong CJ apparently disagreed with the district judge's view that there was no necessity to show that the threat had an effect on the intended victim. Indeed, on a plain reading of the relevant passages, it appears as if Yong CJ had, on the one hand, said that there was no need for the threat to have an effect on the victim, but, on the other hand, stated that there was nonetheless some kind of relationship between these two factors (*ie*, the threat and its intended effect on the victim) which fortified the conclusion that the offence of criminal intimidation had been made out in that case. The relevant passages are as follows (*Ramanathan Yogendran* at 589–560, [110]–[112]):

> With respect, the statement of Ong J in *Lee Yoke Choong* which was approved by the trial judge may perhaps have been too sweeping in its terms and effect. Taken to its logical conclusion, a charge of criminal intimidation could succeed even if the person making the threat is obviously in no position to carry it out. Such was the scenario before the court in *Jogendra Kumar v Hem Chandra.* The accused was an old and sick man aged 74 years. While talking to four or five persons in his house, he threatened to kill and bury the complainant. The evidence disclosed that

none of the persons present actually got alarmed, and it was held that the accused had not committed criminal intimidation. Perhaps this case may be seen as an application of the de minimis principle to the offence of criminal intimidation.

Section 503 of Penal Code, which defines criminal intimidation, does not contain any reference to the actual effect of the threat on the victim, nor to the capacity of the maker to carry out the threat. The essential considerations are the intention of the maker and the nature of the threat. It suffices that the maker intends to cause alarm *but it must also be relevant to consider the fact that an accused is clearly incapable of carrying out the threat*. Where there is such evidence, the approach in *Jogendra Kumar* accords with good sense and reason. In line with this reasoning, the Indian case of *Habibullah v State* suggests that the complainant must feel as a reasonable man that the accused was going to convert his words into action. *In considering whether the offence of criminal intimidation has been established, it should be shown that the victim had some objective basis to apprehend alarm, even if he was never actually alarmed.* The threat must be sufficient to overcome the ordinary free will of a firm man. It may be inappropriate to adopt Ong J's dicta in *Lee Yoke Choong* without this qualification, as a purely literal approach might engender absurd conclusions.

In the present case, what the prosecution had to establish was that on 28 March 1992 the threats were uttered by the appellant with the intent to cause alarm. *The prosecution went further to show that Colin was in fact alarmed by the threat. This was not a required element of the charge but such evidence did fortify it to a significant extent*.

[emphasis added]

However, in the later case of *Ameer Akbar* ([63] *supra*), Yong CJ clarified (at [46]) his view in *Ramanathan Yogendran*, as follows:

... I must emphasise that the victim's perception of the words must not be confused with whether the victim was actually frightened or not. ***And, to this extent, the offence of criminal intimidation does not depend on the nerves of the individual being threatened*.** In my opinion, this must have been what Ong J had in mind when he stated in *Lee Yoke Choong v PP* [1964] MLJ 138 that '[t]he offence of criminal intimidation lies in the intent behind a threat, not in its *effect*.' Thus, in [*Ramanathan Yogendran*], I concluded that a literal approach to Ong J's dicta without any qualification was inappropriate precisely because his use of the word '*effect*' is likely to mislead one into thinking that the state of mind of the victim is always irrelevant. [emphasis added in bold italics]

65 It would thus appear that the effect of the threat on the victim is not entirely irrelevant, but would assist the court in determining whether the alleged offender in fact had the intention to commit the offence of criminal intimidation. If, for example, the threat was uttered in circumstances in which no reasonable person in the victim's shoes could have apprehended alarm, that would be a factor (or even a strong factor) that could be invoked by the accused to support the argument that he did *not* have the *requisite intention* to commit the offence. If, however, there is such an objective basis for apprehension present, then it would not matter if the victim did *not*, *in fact*, apprehend alarm as a result of the threat. This was confirmed by Yong CJ in *Ameer Akbar*, where the learned Chief Justice observed thus ([63] *supra* at [51]–[53]):

Of course, *guilty intent* was a question of fact to be inferred. Thus, if it could be shown that the victim had *some objective basis* to apprehend alarm, even if he was never actually alarmed, and the threat was sufficient to overcome the ordinary free will of a firm man (see *Ramanathan*

Yogendran v PP … at p 590), *that would then fortify a finding of the guilty intent.*

The appellant here had threatened to assault the complainant. The fact that the threat was not carried out eventually was irrelevant. On the evidence, it was apparent that the threat was uttered because the appellant was angry, and he wanted to frighten the complainant. The obvious and irresistible inference was that the appellant had uttered the threat with intent to cause alarm to the complainant.

Clearly, in the light of their relationship, there was some objective basis for the complainant to apprehend alarm over the threat made. Moreover, the fact that there was also evidence to show that he was actually alarmed, even though such an element was not required in the charge, *reinforced my finding of the relevant guilty intent*.

[emphasis added]

66 It would also be helpful, in our view, to consider the Indian authorities which have dealt with this issue to a more detailed extent. In *In re A K Gopalan* AIR (36) 1949 Mad 233, the accused was convicted of the Indian equivalent of s 503 of our Penal Code for delivering a speech which was described as "very vehement in character and vulgar in tune" and which was directed at a particular district's police force. As the speech was addressed to a defined and ascertainable body of individuals, and extracts of it showed that the accused had intended to frighten the members of that police force with injury to their person, reputation or property, Govinda Menon J held that that the conviction was correctly reached. In so deciding, Menon J also stated (at 234) that:

Whether as a matter of fact any one was actually frightened or not, cannot affect the question of the liability under S. 503, Penal Code. It is the intention of the speaker that has to be considered in deciding ... whether what he stated comes within the mischief of S. 503, Penal Code.

67 However, the learned authors of *The Indian Penal Code* ([59] *supra*) note at p 2606 that the case of *Jogendra Kumar Sarkar v Hem Chandra Roy* (1964) 1 Cri LJ 255 (Cal) ("*Jogendra Kumar Sarkar*") stands for the contrary proposition, *ie*, that where the evidence discloses that none of the persons present when the threat was made actually got alarmed, there should be no conviction for an offence committed under the Indian equivalent of s 503 of our Penal Code. With respect, we are unable to agree with this reading of *Jogendra Kumar Sarkar*. In that case, an old and sick man, aged 74, allegedly said that he would kill the complainant and bury him. By the evidence of the complainant himself, after this statement was uttered, the complainant, along with other persons, continued to remain in the accused's house. Tea was served by the accused to all of them, although the complainant refused to take the tea in view of the accused's prior behaviour. In dismissing the complainant's appeal against the accused's acquittal for criminal intimidation, T N R Tirumalpad JC held that it could not be said, with regard to these facts, that there was an intention on the accused's part to cause alarm to the complainant even though the accused had apparently used words to the effect that he would kill the complainant and bury him. Tirumalpad JC stated further (at 256) that:

This [referring to the statement referred to above] may no doubt amount to threat of injury to the person of the complainant. But it must be shown, in order to prove criminal intimidation, that the threat was with intent to cause alarm to that person or to cause that person to do any act which he was not legally bound to do or to omit to do any act which he was legally entitled to do. *The intent has not been proved in this case*. After all, the respondent is an old and sick man aged 74 years and these 4 or 5 persons had gone to his house and if in the course of the talk, he got excited and said that he [would] kill the complainant, nobody [would] take him seriously and

> nobody [would] get alarmed. … It seems to me that much has been made about a silly incident in which an old man appears to have got excited and used some meaningless words. [emphasis added]

From the passage cited, it seems that Tirumalpad JC's paramount consideration was the intention of the accused, and not the effect of the allegedly threatening statement. Although Tirumalpad JC sought to ascertain the accused's intention from the impact which the statement had on the complainant, this must not be taken as requiring the threat in question to have an actual effect on the complainant. Indeed, the learned judge also placed emphasis on the accused's age and behaviour after the allegedly threatening statement was made to decide whether or not the accused had the requisite intention. To put it another way, even if there had been no reaction on the part of the complainant, the requisite intention for the offence of criminal intimidation could still be proved if other facts supported such a contention. Indeed, the two local cases which we highlighted above (at [63]–[65]) would seem to also support such a proposition.

68 Returning to the present case, as the second and fifth charges were framed, the appellant proceeded on the basis that the threat was to the complainant with an intention to cause alarm to her. We now turn to consider each of the specific charges separately on this particular basis.

The second charge (criminal intimidation by pointing a knife)

(1) Whether there was a threat

69 The gist of the offence of criminal incrimination is the effect which the threat is intended to have upon the mind of the person threatened, and it is clear that before the threat can have any effect upon that person's mind, it must either be made to him by the person issuing the threat or be communicated to him in some way. In the Singapore High Court decision of *Ameer Akbar* ([63] *supra*), Yong CJ explained (at [44]) how a court should ascertain whether there was a threat in cases involving spoken words:

> For there to be a threat, the words uttered must be such that they would actually cause the victim, and any reasonable man in the victim's circumstances, to at least comprehend the words as having the *effect* of a threat to begin with. Otherwise, such words will not constitute a threat. [emphasis in original]

70 In our view, the same approach could be used in the present case even though the threat in question took the form of an act, as opposed to spoken words. Adopting this approach, it must first be ascertained whether the respondent pointed a knife at the complainant. The complainant's evidence was that there were at least two occasions on which the respondent pointed a knife at her, namely:

> (a) Before the first alleged incident of rape, when the complainant was still filling in the forms, the respondent pulled out a knife and said, "You think I Bangla man, I come empty hand?" (*Official Transcript* for 11 September 2006 at p 410)
>
> (b) After the first alleged incident of sodomy, the respondent took the knife and said that he wanted to hurt the complainant (*Official Transcript* for 11 September 2006 at p 416).

These allegations are corroborated by P73. At para 11 of the statement, which we referred to earlier at [51], the respondent said:

11 Inside the room, we sat on the floor and [the complainant] started to fill in the form. She told me she was rushing for time and I got very angry as I found her very rude towards me. She was not like that previously. *I took a knife which I saw beside me and pointed at her*. [emphasis added]

And later:

Q12 After the anal sex, did you take the knife again and threaten to cut her so that her husband will not want her back?

Ans: *Yes*, but I was only trying to *force* her to be with me[.] I have no intention to cut her.

[emphasis added]

(2) Whether the threat was intended to cause alarm

71 Having ascertained that the respondent did point a knife at the complainant more than once and that his actions amounted to threats, we next considered whether the threats were intended to cause alarm.

72 With respect to the second instance when the knife was pointed at the complainant, the respondent's intention to cause alarm may be discerned from his answer to Q12 in P73 (see [70] above), *viz*, "I was only trying to *force* her to be with me …" [emphasis added]. In our view, the element of intention to cause alarm was made out since the intention to force someone to do something must necessarily be premised upon an intention to cause that person alarm.

73 Accordingly, we were of the view that the second charge was proved beyond a reasonable doubt against the respondent, and we allowed the appeal against his acquittal of the said charge. We will address the sentence which we imposed after dealing with the appeal against acquittal in respect of the fifth charge.

The fifth charge (criminal intimidation by threatening to distribute the nude photographs)

(1) Whether there was a threat

74 Following the approach above (at [62]), it must first be determined whether the threat to distribute the nude photographs was made by the respondent to the complainant. The complainant testified at the first trial that the respondent took the nude photographs so that he could "show to people that ... [the complainant] was a no-good girl" (*Official Transcript* for 11 September 2006 at p 417). This account is corroborated by P73, where the respondent stated in response to Q16:

Q16 Why did you want to take her nude photograph[s]?

Ans: I want to use the photo[s] to threaten her. I told her that if she tell [*sic*] anyone of what had happened, I will print the photograph[s] and show [them] to her colleague[s].

Accordingly, we were satisfied that there was a threat made by the respondent to the complainant to distribute the nude photographs.

(2) Whether the threat was intended to cause alarm

75 As we noted in respect of the second charge (at [72] above), an intention to threaten someone must necessarily be accompanied by an intention to cause alarm. This was clearly the case here. As such, we were satisfied that the fifth charge was proved beyond a reasonable doubt against the respondent, and we allowed the appeal against his acquittal of the said charge. We now turn to the sentences which we imposed in respect of the second and fifth charges.

The sentences imposed

(1) The second charge

76 In *Tan Kay Beng v PP* [2006] 4 SLR 10 ("*Tan Kay Beng*"), Rajah J, distinguishing the case of *PP v Luan Yuanxin* [2002] 2 SLR 98 ("*Luan Yuanxin*"), held that a suitable sentence for criminal intimidation by pointing a knife at the victim was three months. Rajah J noted that in *Luan Yuanxin*, the unprovoked, violent and vicious acts of the accused were premeditated and prolonged, which warranted a far more severe sentence. In particular, the accused there had deliberately carried out his threat with the use of a weapon, and had gone further by attacking the victim, strangling and biting her, and causing her serious physical injuries, for which she was given three days' medical leave. These were the reasons why the sentence for criminal intimidation in *Luan Yuanxin* was enhanced by the High Court from two months to two years.

77 In our view, the facts of the present case were more similar to those in *Tan Kay Beng* ([76] *supra*), especially since there was no premeditation and also because the respondent did not cause the complainant any serious physical injuries. Indeed, *Tan Kay Beng* is not the only case in which a relatively light sentence was imposed for criminal intimidation through the use of a weapon. In *Roslani bin Ahmad v PP* Magistrate's Appeal No 210 of 1992 (unreported), the accused swung a parang with a 15-inch blade at the victim. He was sentenced to two months' imprisonment. Similarly, in *Lee Tian Siong v PP* Magistrate's Appeal No 406 of 1993 (unreported), where the accused used a broken glass and demanded repayment of a debt from the victim, the accused was sentenced to three months' imprisonment. In view of these precedents, we sentenced the respondent to two months' imprisonment in relation to the second charge.

(2) The fifth charge

78 With respect to the fifth charge, an analogous case would be *Tay We-Jin v PP* Magistrate's Appeal No 191 of 2001 (unreported) ("*Tay We-Jin*"), in which the accused was sentenced to 12 months' imprisonment for sending messages threatening to expose the victim's promiscuous lifestyle to her family and her school unless she allowed him to become her pimp. However, given that *Tay We-Jin*, although similar to the present case in some respects, concerned a threat to injure the victim's reputation, we were of the view that its facts could be distinguished. First, there was only a single threat in this case, as opposed to the many messages sent to the victim in *Tay We-Jin*. Secondly, the accused in *Tay We-Jin* wanted the victim to allow him to become her pimp – this was far more serious than the present case, where there had been a prior relationship between the parties and where the respondent simply wanted the complainant to be with him. In view of these differences, we regarded a sentence of two months' imprisonment for the fifth charge as sufficient, and we sentenced the respondent accordingly.

Summary in relation to the appeal against acquittal

79 To summarise our conclusions in relation to the appeal against acquittal, we dismissed the appeal against the respondent's acquittal in respect of the first, third and eighth charges, but allowed the appeal against acquittal in respect of the second and fifth charges. We sentenced the

respondent to two months' imprisonment each on the second and fifth charges. Having considered the appeal against acquittal, we now deal with the appeal against sentence.

The appeal against sentence

80 To recapitulate, the trial judge imposed a sentence of three months' imprisonment on the fourth charge, 18 months imprisonment on the sixth charge and two years' imprisonment on the seventh charge. The sentences imposed on the sixth and seventh charges were ordered to run concurrently, making a total sentence of two years and three months' imprisonment with effect from 27 December 2005 (see [2] above). The appellant appealed against these orders. Before we deal with the appeal, it would be useful, as was the case with the appeal against acquittal, to set out the general legal principles which are applicable in this case.

Applicable legal principles

Appellate reappraisal of sentences

81 It is well-settled law that an appellate court has only a limited scope to intervene when reappraising sentences imposed by a court at first instance. This is because sentencing is largely a matter of judicial discretion and requires a fine balancing of myriad considerations: see *Angliss Singapore Pte Ltd v PP* [2006] 4 SLR 653 ("*Angliss*") at [13].

82 Notwithstanding the discretionary nature of the sentencing process, it has also been established in cases such as *Tan Koon Swan v PP* [1986] SLR 126 and *PP v Cheong Hock Lai* [2004] 3 SLR 203 that an appellate court will nonetheless correct sentences in the following situations:

(a) where the sentencing judge erred in respect of the proper factual basis for sentence;

(b) where the sentencing judge failed to appreciate the materials placed before him;

(c) where the sentence imposed was wrong in principle and/or law; and/or

(d) where the sentence imposed was manifestly excessive or manifestly inadequate, as the case may be.

83 With respect to reason (d) in the preceding paragraph, which was relied on by the appellant in the present appeal, Yong CJ in *PP v Siew Boon Leong* [2005] 1 SLR 611 clarified (at [22]) what was meant by a sentence that was manifestly excessive or manifestly inadequate:

> When a sentence is said to be manifestly inadequate, or conversely, manifestly excessive, it means that the sentence is unjustly lenient or severe, as the case may be, and *requires substantial alterations rather than minute corrections* to remedy the injustice … [emphasis added]

It has also been said (in the Malaysian High Court decision of *Sim Boon Chai v Public Prosecutor*[1982] 1 MLJ 353) that a sentence is manifestly excessive when it fails to accommodate the existing extenuating or mitigating circumstances. A sentence which is plainly out of line with an established benchmark is also manifestly excessive: see, for example, *Tuen Huan Rui Mary v PP* [2003] 3 SLR 70. By parity of reasoning, the same must also apply in ascertaining whether a sentence is manifestly inadequate. Indeed, in *Moey Keng Kong v PP* [2001] 4 SLR 211, it was observed that a

sentence would be manifestly inadequate when, although it should reflect the need for both deterrence and retribution, it reflected only deterrence or retribution (which was not the situation on the facts of that particular case). At this point, we pause to observe that while guidelines and benchmarks provide consistency and predictability so far as sentencing is concerned, courts should never apply benchmarks mechanically without a proper evaluation of the facts of the case.

84 On this premise, it bears repeating that an appellate court should only intervene where the sentence imposed by the court below was "manifestly" inadequate – that in itself implies *a high threshold* before intervention is warranted. In the light of the highly discretionary nature of the sentencing process and the relatively circumscribed grounds on which appellate intervention is warranted, the prerogative to correct sentences should be tempered by a certain degree of deference to the sentencing judge's exercise of discretion. Indeed, as Rajah J reiterated in *Angliss* ([81] *supra* at [14]):

> The *mere fact that an appellate court would have awarded a higher or lower sentence than the trial judge is not sufficient* to compel the exercise of its appellate powers, unless it is coupled with a failure by the trial judge to appreciate the facts placed before him or where the trial judge's exercise of his sentencing discretion was contrary to principle and/or law. [emphasis added]

Method of reappraisal

85 Further, in assessing the adequacy of a lower court's sentence, due regard may be given to previous sentencing precedents involving similar facts or offences, for the simple reason that these cases give an indication of the appropriate sentence to be imposed. Such precedents are, however, only *guidelines* as each case, of course, ultimately turns on its own facts: see, for example, *Viswanathan Ramachandran v PP* [2003] 3 SLR 435 at [43]. While references to such "benchmarks" facilitate consistency and fairness by providing a focal point against which subsequent cases with differing degrees of culpability can be accurately determined, *it must be reiterated that benchmarks "are not cast in stone, nor [do they] represent an abdication of the judicial prerogative to tailor criminal sanctions to the individual offender"*: see *Abu Syeed Chowdhury v PP* [2002] 1 SLR 301 at [15]. With these principles in mind, we turn to the appeal in respect of the sentences imposed in relation to the specific charges.

The fourth charge (insulting the modesty of a woman)

Previous sentencing precedents

86 The trial judge imposed a sentence of three months' imprisonment on the fourth charge under s 509 of the Penal Code of insulting the complainant's modesty by taking the nude photographs. In this respect, s 509 provides as follows:

> **Word or gesture intended to insult the modesty of a woman**
>
> **509.** Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by such woman, or intrudes upon the privacy of such woman, shall be punished with imprisonment for a term which may extend to one year, or with fine, or with both.

87 The authors of *Sentencing Practice in the Subordinate Courts* (LexisNexis, 2nd Ed, 2003)

("*Sentencing Practice*") note (at p 329) that for the offence under s 509 in general, a fine of $1,000 to $2,000 is the norm: see, for example, *Raveendran v PP* Magistrate's Appeal No 125 of 1992 (unreported) and *Tan Pin Seng v PP* [1998] 1 SLR 418. On the other hand, imprisonment is appropriate where aggravating factors are present: see *Mohd Raus bin Othman v PP* Magistrate's Appeal No 17 of 1993 (unreported), where the offence was committed in a lift; *Ramakrishnan s/o Ramayan v PP* [1998] 3 SLR 645, where there were multiple charges and the victims were young; and *PP v Johari bin Samad* Magistrate's Appeal No 69 of 1999 (unreported), where the offender had a previous conviction for a sexual offence.

88 However, more relevantly for the present case, imprisonment is also appropriate where the offence was carried out using modern technology to record a victim's private moments without her knowledge. In *PP v Tay Beng Guan Albert* [2000] 3 SLR 785 ("*Albert Tay*"), it was said that such an offence differed from other "Peeping Tom" cases as the recording on a tape could be replayed and there was also a risk of circulation of the tape to third parties. In *Albert Tay*, the victim, a female colleague of the offender, discovered a video-camcorder switched to recording mode hidden in a basket of soft toys in the bathroom of the offender's flat. She removed the tape, and later found that the recording showed her undressing before her bath, and then stepping out of the bathtub and drying herself after showering. The tape also contained a footage of another female ex-colleague of the offender relieving herself in the toilet; that footage was recorded using the same *modus operandi*. The offender pleaded guilty to both charges of intruding into the privacy of a woman. The District Court's sentence of a fine of $1,000 on each charge was enhanced by the High Court on appeal to one month's imprisonment on each charge, to run consecutively, in addition to the fine imposed by the lower court.

Whether the sentence imposed by the trial judge was manifestly inadequate

89 Comparing the previous sentencing precedents with the sentence imposed by the trial judge, we were of the view that the sentence of three months' imprisonment was not manifestly inadequate. The facts of the present case were similar to those in *Albert Tay* ([88] *supra*), in so far as modern technology (the digital camera function of a mobile telephone in this case) was used to record the complainant's private moments. The policy considerations that such recordings (digital photographs in this case) can be replayed and may be circulated to third parties were reflected in the trial judge's imposition of a term of imprisonment in lieu of the norm of a fine of $1,000 to $2,000. Compared to the one-month imprisonment imposed in *Albert Tay* for the video recording of the victim bathing, and bearing in mind the circumscribed manner in which an appellate court will decide whether or not to interfere with the sentence imposed by a court of first instance, the three months' imprisonment imposed by the trial judge in the present case could not be said to be plainly out of line with an established benchmark so as to be excessively inadequate (see [83] above).

90 Accordingly, we dismissed the appeal against the trial judge's sentence on the fourth charge.

The sixth charge (rape)

Previous sentencing precedents

91 The trial judge imposed a sentence of 18 months' imprisonment on the sixth charge of rape under s 376 of the Penal Code, which provides as follows:

> **Punishment for rape**

> **376.** —(1) Subject to subsection (2), whoever commits rape shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to fine or to caning.
>
> (2) Whoever, in order to commit or to facilitate the commission of an offence of rape against any woman —
>
> (*a*) voluntarily causes hurt to her or to any other person; or
>
> (*b*) puts her in fear of death or hurt to herself or any other person,
>
> and whoever commits rape by having sexual intercourse with a woman under 14 years of age without her consent, shall be punished with imprisonment for a term of not less than 8 years and not more than 20 years and shall also be punished with caning with not less than 12 strokes.

As the authors of *Sentencing Practice* ([87] *supra*) note at p 276, the punishment for the offence of rape is divided into two limbs or levels: the first limb is commonly referred to as "rape *simpliciter*" and the second limb as "aggravated rape". The maximum punishment is the same for both rape *simpliciter* and aggravated rape, except that aggravated rape carries a minimum *mandatory* term of imprisonment of eight years and mandatory caning of at least 12 strokes. As the sixth charge was one of rape *simpliciter*, there was no minimum mandatory term which we had to impose on the respondent. As such, it remains for us to consider the sentencing precedents.

92 Rape, by its very nature, is viewed as a violent assault against the person (see *PP v Soh Lip Yong* [1999] 4 SLR 281 ("*Soh Lip Yong*") at [29]), and caning is therefore warranted. The decision of this court (sitting as the then Court of Criminal Appeal) in *Chia Kim Heng Frederick v PP* [1992] 1 SLR 361 ("*Frederick Chia*") is the leading case in so far as guidelines and benchmarks on sentencing for rape offences are concerned. The starting point in sentencing adult offenders for rape committed without aggravating or mitigating factors is ten years' imprisonment in a contested case, in addition to six strokes of the cane (see *Frederick Chia* at 367, [19]–[20]):

> In our opinion, even the offence of rape under s 376(1), without any aggravating or mitigating factors, in which sexual intercourse with a woman is constituted by penetration against her will, must by its very act contain an element of violence and *a sentence of caning of not less than six strokes should normally be imposed in addition to a term of imprisonment*. Any degree of violence amounting to hurt used in the commission of rape will render the rapist liable to a higher punishment under s 376(2), if he is charged thereunder.
>
> … In our opinion, for a rape committed without any aggravating or mitigating factors, *a figure of ten years' imprisonment should be taken as the starting point in a contested case*, in addition to caning. [emphasis added]

This court stated in that case (at 367, [20]) that the court, with the above starting point in mind, should proceed to consider the mitigating factors which merited a reduction of the sentence. A guilty plea which saved the victim further embarrassment and suffering would be an important consideration and would merit a reduction of one-quarter to one-third of the sentence. In contrast, aggravating factors such as the victim's youth, the offender's position of responsibility and trust towards her, or perversions or gross indignities forced upon the victim would justify a longer sentence. In *Frederick Chia* itself, the sentence of eight years' imprisonment and eight strokes of the cane was upheld on appeal (see also [117] below).

93 In so far as the aggravating factors which warrant an increase from the benchmark

sentences outlined above are concerned, it may also be helpful to refer to the case of *Regina v Roberts* [1982] 1 WLR 133, in which the English Court of Appeal listed many of the factors considered to aggravate the offence of rape as follows (at 135):

> Some of the features which may aggravate the crime are as follows. Where a gun or knife or some other weapon has been used to frighten or injure the victim. Where the victim sustains serious injury, whether that is mental or physical. Where violence is used over and above the violence necessarily involved in the act itself. Where, there are threats of a brutal kind. Where the victim has been subjected to further sexual indignities or perversions. Where the victim is very young or elderly. Where the offender is in a position of trust. Where the offender has intruded into the victim's home. Where the victim has been deprived of her liberty for a period of time. Where the rape, or succession of rapes, is carried out by a group of men. Where the offender has committed a series of rapes on different women, or indeed on the same woman.

In the (also) English Court of Appeal decision of *Regina v Millberry* [2003] 1 WLR 546 ("*Millberry*"), Lord Woolf CJ also identified (at [32]) a list of nine aggravating factors that are often present in rape offences, namely:

(a) the use of violence over and above the force necessary to commit the rape;

(b) the use of a weapon to frighten or injure the victim;

(c) planning of the offence (*ie*, premeditation);

(d) an especially serious physical or mental effect on the victim (this would include, for example, a rape resulting in pregnancy or in the transmission of a life-threatening or serious disease);

(e) further degradation of the victim, *eg*, by forced oral sex or urination on the victim;

(f) the offender breaking into or otherwise gaining access to the place where the victim is living;

(g) the presence of children when the offence is committed;

(h) the covert use of a drug to overcome the victim's resistance and/or obliterate his or her memory of the offence; and

(i) a history of sexual assaults or violence by the offender against the victim.

94 These guidelines were comprehensively reviewed by Rajah J in *PP v NF* [2006] 4 SLR 849 ("*NF*"). Referring to the case of *Millberry* ([93] *supra*), where the English Court of Appeal reviewed the sentencing practice of the English courts for rape offences while building upon the analytical sentencing framework previously established by the same court in *Regina v Billam* [1986] 1 WLR 349 ("*Billam*"), Rajah J in *NF* decided that the approach in *Millberry* and *Billam* of classifying rape offences into various broad categories was both helpful and useful, and could be broadly adopted and employed with appropriate adaptation to the Penal Code. In the result, Rajah J demarcated (at [20]–[21]) four broad categories of rape and assigned (at [24] and [36]–[38]) a benchmark sentence to each category so as to ensure stability and a measure of predictability the in sentencing of rape offenders. These four categories were defined as follows:

(a) at the lowest end of the spectrum, rapes that featured no aggravating or mitigating circumstances ("category 1 rapes");

(b) rapes where there had been aggravating factors, the common thread of which consisted in the exploitation of a particularly vulnerable victim – either because the perpetrator was related to the victim in a way that allowed him to abuse his position of trust or authority, or because the perpetrator exploited a numerical advantage or acted out of hate towards a minority group ("category 2 rapes");

(c) cases involving repeated rape, on different occasions, of the same victim or of multiple victims ("category 3 rapes"); and

(d) cases where the offender had manifested perverted or psychopathic tendencies or gross personality disorder, and where he was likely, if at large, to remain a danger to women for an indefinite period of time ("category 4 rapes").

Rajah J decided that the benchmark sentence for category 1 rapes should be ten years' imprisonment and not less than six strokes of the cane, while the appropriate starting point for category 2 rapes would be 15 years' imprisonment and 12 strokes of the cane. In respect of category 3 rapes, Rajah J noted that the Prosecution would, in most cases, proceed with multiple charges against the accused, and the sentencing judge would have to order at least two sentences, with the discretion to order more than two, to run consecutively in order to reflect the magnitude of the offender's culpability. As such, there was no overriding need for judges to commence sentencing at a higher benchmark than that which applied to category 2 rapes. For category 4 rapes, Rajah J stated that where the circumstances so dictated, it was not inappropriate to sentence the offender to the maximum sentence of 20 years' imprisonment and 24 strokes of the cane allowed under s 376 of the Penal Code.

95 In our opinion, apart from considering the aggravating and mitigating factors in each case in deciding how much to depart from these benchmark sentences, the courts should be guided by three broad principles in assessing the appropriate sentence to impose. These three principles were succinctly summarised by the UK Sentencing Advisory Panel at para 9 of its written advice to the English Court of Appeal (dated 24 May 2005) on sentencing guidelines for rape offences ("*The Panel's Advice*") (available, at the time of writing, at <http://www.sentencing-guidelines.gov.uk/docs/rape.pdf>) as follows:

(a) the degree of harm to the victim;

(b) the level of culpability of the offender; and

(c) the level of risk posed by the offender to society.

In *Millberry* ([93] *supra*), the English Court of Appeal accepted (at [8]) that "courts should consider each of these dimensions whenever a sentence for rape is imposed". Accordingly, while the aggravating and mitigating factors gleaned from decided cases are helpful, the courts should also be guided by the above three general principles in deciding how much to depart from the established benchmark sentences, and ultimately arrive at a just and appropriate sentence pursuant to the specific (and unique) facts of each case. As we mentioned above (at [85]), *it must be reiterated that benchmark sentences are not cast in stone, nor do they represent an abdication of the judicial prerogative to tailor criminal sanctions to the individual offender*. The present appeal was an example of just how inappropriate it would be to apply a blanket rule to all instances of rape *without*

considering the unique facts which are present in each and every case.

Whether the sentence imposed by the trial judge was manifestly inadequate

96 With these principles in mind, and considering the above sentencing precedents, it is clear, in our view, that the trial judge imposed a sentence which was manifestly inadequate. As was held by this court in *Frederick Chia* ([92] *supra*) (and restated by Rajah J in *NF* ([94] *supra*) at [24] in relation to category 1 rapes), the starting point in sentencing for rape committed without aggravating or mitigating factors is ten years' imprisonment, in addition to six strokes of the cane. (The present case was not a category 2 rape (as classified in *NF*) because it did not involve a young or vulnerable victim, and therefore did not attract a starting point of 15 years' imprisonment and 12 strokes of the cane.) The trial judge imposed a sentence which was more than eight years shorter than the prescribed starting point of ten years' imprisonment; he also did not impose the prescribed caning of not less than six strokes. Unless there were sufficient mitigating factors in the present case, it would clearly be the case that the sentence imposed by the trial judge was manifestly inadequate, inasmuch as there was a failure to accommodate aggravating factors (see [83] above) as well as undue weight given to the mitigating factors present. We thus had to consider, in particular, what mitigating factors were present on the facts of the present case and the role which they played in the assessment of the sentence meted out by the trial judge.

Hardship on the respondent's relatives

97 We deal first with a relatively straightforward factor. From defence counsel's mitigation plea in the first trial, it appears that one of the mitigating factors was that the respondent's mother had recently passed away and, according to P80 (see *Record of Proceedings* vol 6 at p 82), the respondent only had an elder sister in Bangladesh who was married to a paralysed husband and who depended on him for support.

98 The cases are both clear and consistent on this point. In the absence of very exceptional or extreme circumstances, little, if any, weight should be attached to the fact that the accused's family will suffer if the accused is imprisoned for a substantial period of time: see, for example, *Lai Oei Mui Jenny v PP* [1993] 3 SLR 305 (at 308, [11]); *PP v Perumal s/o Suppiah* [2000] 3 SLR 308 (at [23]); and *Ang Jwee Herng v PP* [2001] 2 SLR 474 (at [78]). Accordingly, this factor could not, in the present case, have been of sufficient mitigating value to justify an eight-year departure from the starting point prescribed in *Frederick Chia* (at [92] above).

Relationship between the respondent and the complainant

99 In our view, it was more likely that the trial judge attached significant importance to the intimate relationship which had existed between the respondent and the complainant. Indeed, the trial judge made specific reference to this novel aspect of the case as follows (see *Mohammed Liton (No 1)* ([4] *supra*) at [34]):

> The *unusual* aspect of this case is that the complainant and the accused were lovers not long before the offences were alleged against the accused. For the avoidance of doubt, I should state that they were lovers in the full sense of that term, and not merely two persons who were in love – they were consummated lovers who had sexual intercourse with each other on a regular basis. [emphasis added]

The trial judge again made reference to this "unusual aspect" of the case just prior to imposing sentence at the end of the first trial (*Official Transcript* for 27 October 2006 at p 721):

Court: Now, this is a most *unusual* case so I don't think there's any point looking for [precedents] ... nor would this be a precedent for other cases unless there's some other case that's so similar to this.

So on the basis of the facts of this case, I sentence you … [passes sentence]

[emphasis added]

The trial judge's use of the word "*unusual*" when he referred to the relationship which had existed between the respondent and the complainant and his use of the same word when he imposed sentence probably meant that he took this – *ie*, the parties' relationship – to be an extremely significant factor in considering the appropriate sentence to impose. Thus, we had to consider whether the intimate relationship between the respondent and the complainant as "consummated lovers" was of such mitigating value that it justified the trial judge's imposition of a sentence which was more than eight years shorter than the starting point prescribed in *Frederick Chia* ([92] *supra*).

(1) Local cases

100 In Singapore, this appears to be the first case in which the issue of the appropriate sentence to be imposed in a case of "relationship rape" has arisen for consideration. As such, while we would expect there to be no direct precedent, we must point out that there are, nevertheless, some decisions which could aid this court as to the appropriate attitude (if not the sentence) to be adopted in cases such as this.

101 In *PP v N* [1999] 4 SLR 619 ("*N*"), the accused forcibly had sexual intercourse with his wife, but could not be convicted of rape owing to the marital exception to rape (see the statutory exception in s 375 of the Penal Code). Nonetheless, in addressing the adequacy of the sentence meted out for the alternative offence of voluntarily causing hurt, Yong CJ made some very useful remarks (at [17]–[18]) about the relevance of a prior relationship between the attacker and the victim in such cases:

> As for the remaining charges, I was of the view that a pecuniary punishment for these offences was also manifestly inadequate. The district judge did not appear to have addressed his mind to the circumstances surrounding the commission of the offences and, in particular, the violent behaviour of the respondent. One relevant consideration was his motive in restraining the wife. The use of force was deemed necessary by him to compel her to submit to his sexual desires when she rejected his initial sexual advances. It was held in *Chia Kim Heng Frederick v PP* [1992] 1 SLR 361 that sexual intercourse with a woman against her will 'must by its very act contain an element of violence'. Even though the respondent could not be charged for rape because of the statutory exception set out in s 375 of the Penal Code which provides that a man shall not be guilty of raping his wife so long as she is not under 13 years of age, this does not detract from the fact that non-consensual sexual intercourse with the wife is still an act of violence which ought to have been regarded as an aggravating factor. The wife here was also subjected to further humiliation by the respondent when she was slapped for refusing to put on the new blouse he had bought for her.
>
> At this junction, I would like to deal briefly with the prosecution's submission that the trial judge had placed undue weight on the fact that the offences occurred as a result of a domestic dispute. Although the district judge made a passing reference in his judgment to the fact that 'the offences happened consequent to a domestic dispute', it was not entirely clear as to the exact weight [which] he ... placed on this factor in deciding on the sentence. *In my view, it would be wrong to regard this as a mitigating factor. An offence committed against one's*

spouse should not be treated any less seriously than an offence committed against a complete stranger.

[emphasis added]

102 In *Liew Kim Yong v PP* [1989] SLR 97 ("*Liew Kim Yong*"), the accused was convicted of raping an acquaintance. There appeared to have been no prior sexual relationship between the accused and the victim; the prior relationship was solely one of acquaintanceship, in that the parties knew each other before the rape and were not complete strangers. In that case, this court, sitting as the then Court of Criminal Appeal, appeared *not* to have regarded the prior relationship between the parties as a mitigating factor (*id* at 105, [29]–[30]):

> We gave anxious consideration to what was said on the appellant's behalf in the appeal against sentence. There had been no violent assault, no weapon, no threats; the complainant was a worldly young woman, *the relationship between her and the appellant prior to the offence had been pleasant and easy-going*; they had been drinking; and the appellant had driven her home after the offence and telephoned her the next day. Thus it is true to say that many of the aggravating features of a rape were absent. It was also urged upon us that the appellant is allergic to pain-killing drugs, and that the sentence of caning ought to be set aside on this ground as well, since the consequences would be very painful if that part of the sentence were carried out.
>
> In the event, we dismissed the appeal against sentence as well. Rape involves an element of depravity, and the more so does a double rape. *There was more than a hint of premeditation* – a game of forfeits with which the complainant was unfamiliar, resulting in her, a nondrinker, consuming two glasses of beer; dropping [off] Jessica [the complainant's companion] first when the complainant had expressly asked to be taken home; going to the High Street car park close to No 22, to which the appellant had access. It is clear, too, that the complainant was severely shocked, distressed and humiliated. The learned trial judge evidently looked at the two offences [namely, the rape committed by the accused and his abetment of the victim's rape by another man], in effect, as one transaction, and imposed sentences which cannot under any circumstances be described as manifestly excessive. We were not disposed to interfere with the sentence of caning on the grounds of the appellant's allergy to analgesics. That was not a matter which we were disposed to take into account, although it will no doubt have been borne in mind by those concerned with the execution of that part of the sentence, if drawn to their attention.
>
> [emphasis added]

103 In our view, it appeared that this court in *Liew Kim Yong* ([102] *supra*) regarded the prior relationship between the parties as not being of mitigating value to the eventual sentence imposed on the accused. Similarly, in *N* ([101] *supra*), Yong CJ did not regard the spousal relationship between the parties as being of any mitigating value, albeit in the context of a charge of voluntarily causing hurt. In other words, in the limited number of local cases which have considered the value to be placed on the prior relationship between the parties in the context of rape, it appears that the value ascribed has been neither aggravating nor mitigating; instead, it has been neutral.

(2) English cases

104 In view of the admittedly limited local jurisprudence on this issue, it would be helpful to look at the position in England. Useful reference may be made to *The Panel's Advice* ([95] *supra*), in which it was noted that there was evidence that before marital rape became an offence in the UK (as

established in the landmark House of Lords decision of *Regina v R* [1992] 1 AC 599 and placed on a statutory footing by the Criminal Justice and Public Order Act 1994 (c 33) (UK)), overall sentencing levels were lower in cases where the victim had had a pre-existing relationship with the offender (whether sexual or not), and, in some cases at least, the courts appeared to have explicitly treated such a relationship as a mitigating factor (see, generally, *The Panel's Advice* at paras 17–21). There is, in fact, some appellate authority for such an approach, particularly in *R v Arthur John Berry* (1988) 10 Cr App R (S) 13 ("*Berry*"), where the English Court of Appeal observed thus (at 15):

> The rape of a former wife or mistress may have exceptional features which make it a less serious offence than otherwise it would be ... To our mind ... in some instances the violation of the person and [the] defilement that are inevitable features where a stranger rapes a woman are not always present to the same degree when the offender and the victim had previously had a longstanding sexual relationship.

105 In a similar vein, in *R v Paul Richard M* (1995) 16 Cr App R (S) 770, the English Court of Appeal (*per* Lord Taylor CJ) made a distinction (at 772) between cases of marital rape where the parties were estranged, and those where they were still living together:

> In the present case we would point out that there is a distinction between a husband who is estranged from his wife and is parted from her and returns to the house as an intruder either by forcing his way in or by worming his way in through some device and then rapes her, and a case where, as here, the husband is still living in the same house, and, indeed, with consent occupying the bed as his wife. We do not consider that this class of case is as grave as the former class.

Such an approach is similar to what Prof Glanville Williams suggested in his article, "Rape is Rape" (1992) 142 NLJ 11. While Prof Williams was critical about the martial exemption to rape, he suggested that a husband who raped his wife should be treated differently from a stranger who did the same. He suggested that there were four differences worthy of note where the rape was committed by a husband as compared to a stranger. First, the rape, as unwelcome to the wife as it was, could not be as horrible as rape by a stranger. Secondly, the stranger-rapist was a greater menace to society. Thirdly, the husband-rapist deserved some sympathetic consideration. Fourthly, the victim herself might want a lesser fate to befall her husband. These considerations, subject to the appropriate modifications, apply equally to the present case where there was no husband-wife relationship between the respondent and the complainant (although the evidence suggests that they were close to marriage at one stage), but, instead, an intimate relationship which was also sexual in nature. Indeed, in certain jurisdictions, such an approach has been embodied in the relevant legal regime itself. It has been pointed out that in Sweden, for example, the approach is to distinguish between rape by a stranger and rape by a husband (see Tan Cheng Han, "Marital Rape – Removing the Husband's Legal Immunity" (1989) 31 Mal LR 112 at 127). At the time the article just mentioned was published, rape by a stranger (in the Swedish context) carried a prison term of no fewer than two and no more than ten years. In contrast, husbands, being outside this category, were only vulnerable to prosecution for sexual assault, which carried a maximum sentence of four years' imprisonment.

106 We should also note, however, that there has been trenchant academic criticism of the above approach as well (see, for example, Philip N S Rumney, "When Rape Isn't Rape: Court of Appeal Sentencing Practice in Cases of Marital and Relationship Rape" (1999) 19 OJLS 243).

107 Other cases suggest that a previous sexual relationship between the offender and victim is generally treated by the English courts as a mitigating factor, *but one which may be outweighed by aggravating factors such as violence* (and see, for example, the English Court of Appeal decision of *R v Kevin Arthur Workman* (1988) 10 Cr App R (S) 329). Following the criminalisation of marital rape, the

application of the *Billam* ([94] *supra*) guidelines to such a case was explicitly discussed by Lord Taylor CJ in *R v Stephen W* (1993) 14 Cr App R (S) 256 ("*W*"), as follows (at 260):

> In our judgment, it should not be thought that a different and lower scale of sentencing attaches automatically to rape by a husband as against that set out in *Billam*. *All will depend on the circumstances of the individual case. Where the parties were cohabiting normally at the time and the husband insisted on intercourse against his wife's will, but without violence or threats, the consideration identified in* Berry *... will no doubt be an important factor in reducing the level of sentencing.* Where, however, the conduct is gross and does involve threats or violence, the facts of the marriage, of long cohabitation and that the defendant is no stranger will be of little significance. Clearly between those two extremes there will be many intermediate degrees of gravity which judges will have to consider case by case. [emphasis added]

The approach in *W* does not impose a blanket rule in regard to relationship rape, but advocates that the courts should consider each case on *its own facts*, with the prior relationship of the parties possibly reducing the level of sentencing in some cases, whilst not in others.

108 However, contrary to the prevailing practice of the English courts as outlined above, the UK Sentencing Advisory Panel noted in *The Panel's Advice* ([95] *supra*) that there should be *no* mitigating value attached to a pre-existing relationship (whether sexual or not) between the accused and the complainant. In particular, the Panel observed thus (at para 23):

> It appears that the existing practice of the courts, following *Berry* and other appellate cases, is to treat the relationship as a mitigating factor, albeit one for which credit may be reduced or lost in cases where serious aggravating factors (especially violence) are present. The results of the Panel's research project, and of other research into the experience of rape victims, suggest that in taking this line, the courts have underestimated the impact of 'acquaintance rape' and 'relationship rape' on the victims. It is clear from this research that the sense of violation experienced by the victim is just as great, whatever the victim's relationship to the offender. Although 'stranger rape' is seen as a more frightening and potentially dangerous experience, the breach of trust involved in 'relationship rape' or 'acquaintance rape' makes it equally serious.

109 Moreover, as noted in *The Panel's Advice* (([95] *supra*) at para 24), research evidence, including the findings of the study commissioned by the UK Sentencing Advisory Panel (see Alan Clarke *et al*, "Attitudes to Date Rape and Relationship Rape: A Qualitative Study" (2002) ("*Study*") (available, at the time of writing, at http://www.sentencing-guidelines.gov.uk/docs/research.pdf>)), demonstrates clearly that rape by a husband or other sexual partner is as serious as "stranger rape" in terms of its impact on the victim, thus rebutting the idea that the "worst" types of rapes are those committed by strangers. In addition, the *Study* also found (at p 54) that:

> [R]ape within a relationship was both experienced as harder to deal with and recover from by survivors, and perceived as such by many respondents … and that it was at the very least not any less serious than stranger rape and should not be judged as such.

As some of the victims interviewed in the *Study* pointed out, marriage implied reciprocity in terms of loving, caring and protecting, which was incompatible with the use of force by one partner (*id* at p 11).

110 Taking into account all of these considerations, the UK Sentencing Advisory Panel proposed (see *The Panel's Advice* ([95] *supra*) at para 26) that the English Court of Appeal should make a clear statement to the effect that the starting point for sentencing for rape offences was that cases of

"relationship rape" and "acquaintance rape" were to be treated as being of equal seriousness to cases of "stranger rape", with the sentence increased or reduced, in each case, by the presence of specific aggravating or mitigating factors. Thus, the relationship between the parties was *not* to be taken as a mitigating factor by itself.

111 The English Court of Appeal in *Millberry* ([93] *supra*) "generally agree[d]" (at [9]) with these propositions. It then quoted (at [12]) from para 41 of a paper published in November 2002 by the UK Home Office entitled "Protecting the Public" (Cmnd 5668, 2002) (available, at the time of writing, at http://www.homeoffice.gov.uk/documents/protecting-the-public.pdf?view=Binary>), as follows:

> Date rape has recently received much attention in the media and there have been calls for the creation of a separate offence of date rape. Our view is that rape is rape, and cannot be divided in this way into more and less serious offences. It can be just as traumatic to be raped by someone you know and trust who has chosen you as his victim, as by a stranger who sexually assaults the first man or woman who passes by. It is up to the courts to take all the particular circumstances of a case into account before determining the appropriate penalty.

Agreeing that this should be the approach of the English courts, the court in *Millberry* then pronounced its own views on the punishment for "relationship rape" as distinguished from "stranger rape" as follows (at [13]):

> *There will be an appropriate starting point that we have yet to identify that will be the same for each of these different classes of rape. This does not mean that the sentence will be the same in the case of all offences to which the relevant starting point applies.* All the circumstances of the particular offence, including the circumstances relating to the particular victim and the particular offender, are relevant. Clearly, there can be mitigating circumstances as the panel recognises. Where, for example, the offender is the husband of the victim there can, but not necessarily, be mitigating features that clearly cannot apply to a rape by a stranger. On the other hand, as the advice from the panel points out, as is confirmed by the research commissioned by the panel, because of the existence of a relationship the victim can feel particularly bitter about an offence of rape, regarding it as a breach of trust. This may, in a particular case, mean that looking at the offence from the victim's point of view, the offence is as bad as a "stranger rape". *The court has the task of balancing any circumstances of mitigation against the aggravating circumstances. In drawing the balance it is not to be overlooked, when considering "stranger rape", that the victim's fear can be increased because her assailant is an unknown quantity.* Is he a murderer as well as a rapist? In addition, there is the fact (not referred to specifically by the panel) that when a rape is committed by a stranger in a public place, not only is the offence horrific to the victim it can also frighten other members of the public. This element is less likely to be a factor that is particularly important in a case of marital rape [where] the parties to the marriage are living together. [emphasis added]

The court proceeded to observe later, as follows (at [26]):

> There are ... differences of emphasis because of the need to recognise that where there is a relationship the impact on a particular victim can still be particularly serious. In other cases this may not be the situation because of the ongoing nature of the relationship between the offender and the victim. In such a situation the impact on the victim may be less. It may also be the case where, while the offender's conduct cannot be excused, the continuing close nature of the relationship can explain how a particular offender came to commit what is always a serious offence that is out of character. There can be situations where the offender and victim are sharing the said same bed on a regular basis and prior to retiring to bed both had been out

drinking and because of the drink that the offender consumed he failed to show the restraint he should have. It would be contrary to common sense to treat such a category of rape as equivalent to stranger rape as, on one interpretation of the research material, the panel could appear to be suggesting.

112 While the English Court of Appeal in *Millberry* ([93] *supra*) apparently drew no distinction between "stranger rape" and "relationship rape", it will be appreciated that its remark (as set out at [111] above) that "when considering 'stranger rape', ... the victim's fear can be increased because her assailant is an unknown quantity" shows that the court expressed at least some implicit reservation to the effect that there were circumstances in which the relationship between the accused and the complainant could, *by itself*, be of mitigating value. Indeed, the learned authors of *Rook & Ward on Sexual Offences Law and Practice* (Sweet & Maxwell, 3rd Ed, 2004) note (at para 1.33) that the English Court of Appeal was "reluctant to place the culpability of 'stranger rape' and 'relationship rape' or 'acquaintance rape' on precisely the same footing", and that it "emphasised the need to consider, on a case-by-case basis, any aggravating or mitigating factors".

113 Whatever the merits of the apparent distinctions between "relationship rape" and "stranger rape" drawn in *Millberry* ([93] *supra*) and notwithstanding the broad acceptance of *The Panel's Advice* ([95] *supra*) in the same case, the position in England is probably still that which was enunciated in *W* ([107] *supra*), which is that while the relationship between the parties may have mitigating value *by itself* (and whatever value this factor has is now probably greatly diminished in the light of the general pronouncement in *Millberry* that all rapes are to be treated alike), this may be neutralised or outweighed by other factors in the context of each individual case.

(3) Parties' prior relationship to be taken into consideration with all the relevant facts

114 In our view, it would be unwise to apply an inflexible rule whereby the prior relationship between the parties would be automatically regarded as an aggravating, a mitigating or a neutral factor.

115 We acknowledge that there have been studies which show that the trauma caused to women who have been raped by a non-stranger may in fact be worse than if they had been raped by a stranger, primarily because the element of breach of trust makes the act even more hurtful. As such, to treat *all* prior relationships as being of mitigating value in cases of rape would be wrong. Indeed, we agree with *The Panel's Advice* (as set out at [108] above) that "relationship rape" and "acquaintance rape" are not less serious. It is a myth that there is *always* less "violation" in such cases as compared to "stranger" rapes. Rape in such circumstances is not *always* less grave. Indeed, it might be said that the impact on the woman is not less inasmuch as she is not less defiled or violated simply because she has previously had consensual sex with the accused.

116 In so far as the issue of whether the parties' prior relationship should constitute an *aggravating* factor is concerned, it has been said that the element of breach of trust involved is a factor which further *aggravates* the crime. Prof Kate Warner put this most aptly in "Sentencing in cases of marital rape: towards changing the male imagination" (2000) 20 Legal Studies 592, where she observed (at 601):

> It could be added that the wrong of rape lies in the fact that an act that is valued because it expresses connection and intimacy is abused to express power and domination, to objectify, humiliate and degrade. *Surely if sexual intercourse is abused by one with whom the victim has experienced sexual intercourse as an act of love, the violation is greater rather then less. Certainly, the element of breach of trust makes the act more hurtful*. To be hurt by a family

> member or close friend, by insult or betrayal, is worse than if the same thing is done by a stranger. What changes when it is rape? [emphasis added]

In our view, just as it would be wrong to treat the prior relationship between the parties as *always* being a mitigating factor, it would be *equally wrong* to treat this factor as *always* being an aggravating one. With respect, the views of Lord Taylor CJ in *W* ([107] *supra*) are undoubtedly of useful guidance. We agree that the effect of any prior relationship between the parties will *depend on all the circumstances of the case*. Such an approach is also consistent with the approach taken by the local courts in *Liew Kim Yong* ([102] *supra*) and *N* ([101] *supra*), in which the prior relationship between the parties was treated as a neutral factor as a starting point, which could then be either aggravating or mitigating, depending on the facts of the case. With these principles in mind, we now turn to the facts of the present case.

(4) Application to the present case

117 We commence with *Frederick Chia* ([92] *supra*). In that case, the accused pleaded guilty to the rape (under s 376(1) of the Penal Code) of a 16-year-old girl. Prior to the act of rape, the appellant had forced the victim to masturbate and fellate him. There was no prior relationship between the parties. The appellant was sentenced to eight years' imprisonment and eight strokes of the cane, a sentence which was upheld on appeal.

118 In the present case, there was undoubtedly a prior relationship between the respondent and the complainant. It was significant that the parties had engaged in intimate sexual activities (although, according to the complainant, this intimacy did not escalate to sexual intercourse) just a few days before the offences took place on 23 December 2005. Specifically, on around 19 December 2005, the complainant had masturbated the respondent and had also performed fellatio on him (see [13] above). After the complainant was raped on 23 December 2005, she engaged in consensual sex with the respondent, although this was for a short while and allegedly because she wanted to please the respondent so as to be set free. The significance of these sexual activities may be that the complainant was not as traumatised as she might have been after the incident of rape, although we must emphasise that our comments in this regard must not be taken to downplay the actual trauma felt by the complainant at the material time.

119 In addition, as the trial judge noted in *Mohammed Liton (No 1)* ([4] *supra* at [34]), it was a fair conclusion that the parties had been deeply in love with one another, to the extent that they had even contemplated marrying each other, and the respondent had in fact sold off his land in Bangladesh with the intention of using the money to marry the complainant. On 23 December 2005, the series of events prior to the rape had the characteristics of a lovers' quarrel which, unfortunately, escalated into something that neither party, we believe, wanted. In our view, there was no premeditation on the part of the respondent, and what transpired on 23 December 2005 was the result of the respondent losing control of himself in the midst of the quarrel. We did not believe that the respondent had lured the complainant to the flat with the intention to rape her. Indeed, as the evidence revealed, he had simply wanted her to sign some forms, which in turn led to the quarrel between the parties which formed the foundation for the unfortunate events which happened subsequently. Such a characterisation is further supported by the respondent's own statements that he had lost control of his mind while he was raping the complainant as he was deeply in love with her. Finally, the intimate and *consensual* sexual activities which the parties engaged in, so close to the rape and even *after* the rape itself, lent further strength to the characterisation of what had happened as being wholly unplanned and unforeseen.

120 Ultimately, these facts are quite different from those in *Frederick Chia* ([92] *supra*), which

concerned the rape of a 16-year-old girl. This court paid particular attention to the fact that the accused in that case was in something of a responsible position of trust towards the victim, because he had in fact been charged with the responsibility of conducting her safely home on the night of the incident. This factor made violence unnecessary and caused the victim to be less prepared for his advances, and, further, made it more difficult for her to defend herself against him. The accused had also prevented the victim from escaping from his car (which was where the rape took place) twice before he raped her. In addition, he had forced her, by threatening her with the loss of her virginity, to put up with the additional indignity of masturbating and fellating him. Accordingly, this court upheld the lower court's sentence of *eight* years' imprisonment and eight strokes of the cane. As our analysis of the facts above (at [119]) shows, the present appeal did not concern an abuse of a position of trust; what happened was due to impulse, with no premeditation involved. The entire context of the case made it possible for the prior relationship between the parties to be viewed as having mitigating value.

121 We must emphasise that our comments in this regard must not be interpreted to mean that a prior relationship between an accused and the complainant in an offence of rape *always* has mitigating value. As we have stressed earlier, each case must be considered on its own facts; it would be an abdication of the judicial function of a sentencing court to formulate and apply blanket rules without due regard to the unique facts which are capable of arising in each case. This is especially needful in the criminal context, where the life and liberty of the accused are at stake. We must also stress that we are not downplaying in any way the hurt which was undoubtedly caused to the complainant. Indeed, we acknowledge that there were some aggravating factors in this case, particularly the fact that the respondent sodomised the complainant, took the nude photographs and used a knife against her (even though he had not intended to use the knife to facilitate the commission of the subsequent rape). However, we note that some of the aggravating factors were the subject of separate charges, and would bear this in mind when considering the appropriate sanction for the rape offence. The overall circumstances should always be borne in mind in each case because it would naturally be more traumatic for a victim to be subject to a series of offences, one after another, not knowing when the torment will end.

122 Taking all the circumstances into consideration, we were of the view that an appropriate sentence would be six years' imprisonment and four strokes of the cane, and we allowed the appeal in respect of this charge accordingly.

The seventh charge (carnal intercourse against the order of nature)

Previous sentencing precedents

123 The trial judge imposed a sentence of two years' imprisonment on the seventh charge of carnal intercourse against the order of nature (sodomy, in this case) under s 377 of the Penal Code. In this respect, s 377 provides as follows:

> **Unnatural offences**
>
> **377.** Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animals, shall be punished with imprisonment for life, or with imprisonment for a term which may extend to 10 years, and shall also be liable to fine.

124 As the authors of *Sentencing Practice* ([87] *supra*) note at p 318, carnal intercourse committed by way of sodomy represents "the gravest form of sexual abuse", especially when vulnerable children are involved. It contains, by its very act, an element of violence: see *Lim Hock Hin*

Kelvin v PP [1998] 1 SLR 801 ("*Kelvin Lim*"). Next in the scale of seriousness would be a case where the accused coerced or cajoled a young victim to perform the act of fellatio on him. At the bottom of the scale would be a case where the offender himself performs the act of fellatio on his victim: see *Adam bin Darsin v PP* [2001] 2 SLR 412.

125 Apart from making a distinction in sentencing on the basis of the form of the unnatural carnal intercourse, other facts relevant to sentencing for this particular type of offence would be consent or the lack thereof, as well as the age of the victim. There are, in this regard, three broad categories of unnatural carnal intercourse: (a) that between consenting adults; (b) that between non-consenting adults; and (c) that committed on young victims. Offences between consenting adults would be viewed as the least serious. As imprisonment is mandatory, these offences are likely to be dealt with by short custodial sentences. As for offences against non-consenting adults, a substantial term of imprisonment can be expected in such cases. The six-month imprisonment term for fellatio imposed by the trial judge in *PP v Victor Rajoo* [1995] 3 SLR 417, albeit allowed to stand by this court, must be understood in the light of the fact that the trial judge was of the view that the victim had been a consenting party and the fact that the Prosecution did not appeal against the trial judge's decision on this particular charge. Thus, in *Kanagasuntharam v PP* [1992] 1 SLR 81 ("*Kanagasuntharam*"), in which the accused pleaded guilty to a charge of rape with hurt and two charges of voluntarily having carnal intercourse, this court upheld the High Court's sentence of 14 years' imprisonment and 24 strokes for the rape charge, six years' imprisonment for the fellatio charge and eight years' imprisonment for the sodomy charge, with the sentences for the rape and sodomy charges to run consecutively. It should be noted that the accused had a previous conviction for rape, for which he had received a sentence of four years' imprisonment in 1987. In addition, for the purpose of sentencing, the accused also had two other charges of voluntarily having carnal intercourse against the order of nature taken into consideration. These last-mentioned offences took place, in fact, shortly before the three offences which the accused pleaded guilty to.

126 In a related context, the guideline and benchmark for sentencing paedophiles are to be found in *Kelvin Lim* ([124] *supra*). In that case, this court stated that the starting point in sentencing paedophiles who committed unnatural carnal intercourse (in the form of sodomy) against young children below the age of 14 years, without any aggravating or mitigating factors, was ten years' imprisonment. It made no difference whether the victim was a young girl or boy. The court would then have to consider the aggravating and mitigating factors in increasing or reducing the sentence.

Whether the sentence imposed by the trial judge was manifestly inadequate

127 The first factor for consideration in the present appeal is that of consent. It was clear that the complainant did not consent to the sodomy in the present case. The respondent in P73 said (at para 12):

> I rested for a short while before I lifted up one of her legs and put her lying sideway. Her hand was still tied behind her back. I then inserted my penis into her anus. [The complainant] then told me it was very painful and started to cry. At that time I [had] already lost my mind, I was very angry because I love her so much. I continued to move my penis in and out of her anus until I felt the urge to ejaculate. ...

And then, in reply to Q11 in the same statement:

Q11 When you were performing anal sex to [the complainant], did she plead with you to stop?

Ans: I do not know. I [had] already lost control of myself.

The lack of consent was also evident in P80, in which the respondent said in reply to Q79:

Q79 On 23rd December 2005, in your house at 174B Joo Chiat Place, did you tell [the complainant] anything when you want[ed] to perform anal sex on her?

Ans: Before I want[ed] to have anal sex with her[,] I asked her 'backside backside' and she did not say anything. She just lay there motionless.

128 Since there was no consent and this case concerned sodomy, which is regarded as the "gravest form of sexual abuse" (see [124] above), a substantial custodial sentence should be imposed. In this respect, the trial judge's imposition of a two-year term of imprisonment is short compared to the eight-year term imposed in *Kanagasuntharam* ([125] *supra*), even taking into account the fact that the accused in that case had antecedents for sexual offences. One must also consider this court's statement in *Kelvin Lim* ([124] *supra*) that the starting point for sentences for sodomy with non-consenting young victims is ten years' imprisonment (see [126] above). Accordingly, taking these factors into account, together with the existence and the effect of the prior relationship between the parties, we were of the view that a suitable term of imprisonment was five years, and we allowed the appeal in relation to the sentence imposed on the seventh charge accordingly.

Summary in relation to the appeal against sentence

129 To summarise, we allowed the appeal against the respondent's sentence in relation to the sixth and seventh charges and increased the sentences therein to six years' imprisonment and four strokes of the cane, and five years' imprisonment, respectively. However, we dismissed the appeal with regard to the sentence imposed in relation to the fourth charge.

Consecutive or concurrent sentences

130 Since this was a case in which the respondent was convicted and sentenced to imprisonment for at least three distinct offences, s 18 of the CPC, which provides that the sentences for at least two of those offences shall run consecutively, came into play. In this respect, the sentencing court is invested with the discretion as to which, and how many, of the sentences ought to run consecutively, and there is no absolute rule precluding the court from making more than two sentences consecutive: see, for example, *P Shanmugam v PP* [2000] 2 SLR 673 and *Maideen Pillai v PP* [1996] 1 SLR 161. When exercising its discretion, the court should have regard to the common law principles of sentencing applicable to the imposition of consecutive sentences, namely, the "one transaction rule" and the totality principle (see, *inter alia*, *Kanagasuntharam* ([125] *supra*) at 83, [5] and 84, [12]).

131 In our view, as the rape and the sodomy (*ie*, the sixth and seventh charges) arose in the same transaction, there was no need to impose a consecutive sentence in relation to these two offences so as to reflect their severity in the circumstances of this case. Accordingly, we ordered the sentences for only the fourth and sixth charges to run consecutively.

Conclusion

132 To summarise:

In so far as the appeal against acquittal was concerned:

(a) We dismissed the appeal in relation to the first, third and eighth charges.

(b) We allowed the appeal against the second and fifth charges, and we sentenced the respondent to two months' imprisonment on each of these charges.

In so far as the appeal against sentence was concerned:

(a) We dismissed the appeal in relation to the fourth charge.

(b) We allowed the appeal in relation to the sixth and seventh charges, and sentenced the respondent to:

(i) six years' imprisonment and four strokes of the cane on the sixth charge; and

(ii) five years' imprisonment on the seventh charge.

We ordered the sentences for the fourth and sixth charges to run consecutively, and the rest of the sentences to run concurrently with these two sentences, all with effect from 27 December 2005. The total sentence imposed on the respondent was, therefore, six years and three months' imprisonment and four strokes of the cane.