Sivakumar s/o Selvarajah *v* Public Prosecutor
[2014] SGCA 17

Case Number	: Criminal Appeal Nos 7 & 8 of 2013
Decision Date	: 13 March 2014
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; V K Rajah JA; Tay Yong Kwang J
Counsel Name(s)	: Mr Foo Cheow Ming (instructed), Ms Gloria James and Mr Amarjit Singh (Gloria James-Civetta & Co) for the appellant in CCA7 of 2013 and for the respondent in CCA 8 of 2013; Mr Mark Tay, Mr Ng Yiwen, and Mr Tan Soo Tet (Attorney-General's Chambers) for the respondent in CCA7 of 2013 and for the appellant in CCA 8 of 2013
Parties	: Sivakumar s/o Selvarajah — Public Prosecutor

Criminal law – Offences – Rape

13 March 2014

Chao Hick Tin JA (delivering the grounds of decision of the court):

Introduction

1 These were two related appeals brought by the accused person (hereinafter referred to as "the Appellant") and the Public Prosecutor, respectively, following a trial and the finding of guilt by the High Court judge ("the Judge") against the Appellant on three sexual offence charges and the acquittal of the Appellant of a single charge of impersonation under s 170 of the Penal Code (Cap 224, 2008 Rev Ed) ("s 170" and "the Code" respectively). CCA No 7 of 2013 ("CCA 7") was the Appellant's appeal against the convictions found against him as well as the sentences imposed. CCA No 8 of 2013 ("CCA 8") was the Public Prosecutor's appeal against the acquittal.

2 At the conclusion of the hearing, we dismissed CCA 7 but allowed CCA 8 and convicted the Appellant on the charge of impersonation. We now give our reasons.

The Charges

3 The charges which were brought against the Appellant were as follows:

> 1st Charge: [You, the Accused] sometime in the afternoon of 16 July 2010, in Singapore, did pretend to hold the office of a public servant, *to wit*, a Police Officer of the Singapore Police Force, knowing that you did not hold such office, and in such assumed character did inform [the Complainant] [DOB], female/ then 16 years old, that you would bring her to the Police Station if she did not have sexual intercourse with you, and you have thereby committed an offence punishable under section 170 of the Penal code, Chapter 224.
>
> 2nd Charge: [You, the Accused], sometime in the afternoon of 16 July 2010, at Tampines Industrial Avenue 4, Singapore, did use criminal force on [the Complainant] [DOB], female/ then 16 years old, with intent to outrage her modesty, *to wit*, by sucking her nipple, touching her buttock and rubbing your fingers on her vagina, and you have thereby committed an offence

punishable under section 354(1) of the Penal code, Chapter 224.

3rd Charge: [You, the Accused] sometime in the afternoon of 16 July 2010, at Tampines Industrial Avenue 4, Singapore, did commit sexual assault by penetration of [the Complainant] [DOB], female/ then 16 years old, *to wit*, by penetrating the mouth of [the Complainant] with your penis without her consent, and you have thereby committed an offence under section 376(1)(a) and punishable under section 376(3) of the Penal code, Chapter 224.

4th Charge: [You, the Accused] sometime in the afternoon of 16 July 2010, at Tampines Industrial Avenue 4, Singapore, did commit rape of [the Complainant] [DOB], female/ then 16 years old, *to wit*, by penetrating the vagina of [the Complainant] with your penis without her consent, and you have thereby committed an offence under section 375(1)(a) and punishable under section 375(2) of the Penal code, Chapter 224.

4 The Judge acquitted the Appellant on the 1st charge on the ground that it had not been proven but convicted him on the 2nd, 3rd and 4th charges. The Judge then sentenced the Appellant to:

(a) 1 year imprisonment and 2 strokes of the cane for the 2nd charge;

(b) 11 years' and 5 strokes of the cane for the 3rd charge; and

(c) 11 years' and 5 strokes of the cane for the 4th charge.

The Judge also ordered the prison sentences for the 3rd and 4th charges to run concurrently and the 2nd charge to run consecutively with the 3rd and 4th charges. The total sentence was therefore 12 years' imprisonment and 12 strokes of the cane.

Background facts

5 At the time of the alleged offences, the Appellant, a 39 year old technician, was married with two young children. He lived at Block 647 Woodlands Ring Road. The victim was a 16 year old secondary four student ("the Victim") at a school located in Tampines. She lived near her school. She was then in a relationship with a 20 year old polytechnic student ("PW23"). The Victim and PW23 came from Muslim families. The Victim broke up with PW23 following the alleged offences. We shall refer to the Victim and PW23 collectively as "the couple."

The circumstances leading to the confrontation

6 On the afternoon of 16 July 2010, after school, at about 2.30 pm, the Victim met up with PW23 who drove her in his Kia Cerato ("the Kia") to a multi-storey carpark at Block 685 Woodlands Drive 73 ("the Carpark"). PW23 drove up to the 5th storey of the Carpark and parked the Kia at Lot 621. Soon after, they started getting intimate with each other inside the Kia.

(A) Victim's evidence

7 According to the Victim, while she was in the midst of fellating PW23 in the backseat of the Kia, the couple noticed the Appellant's white Mazda CX-7 ("the Mazda") driving past the Kia. [note: 1] Soon after this, PW23 ejaculated and cleaned himself up using a piece of tissue paper which he threw out of the right rear window of the Kia. [note: 2]

8 Thereafter, the couple started to have protected sexual intercourse. At some point, PW23's condom tore and he proceeded to put on another condom. After a few minutes, [note: 3] the Victim observed that the Mazda had parked at Lot 629 (about seven lots away from the Kia). [note: 4]

9 The Victim told PW23 that she was not comfortable with the presence of the Mazda. PW23 went out to see if there was anyone in the Mazda. After a minute or two, PW23 returned and told her that there was someone at the driver's seat in the Mazda.

10 The couple continued to engage in sexual intercourse but only for a few minutes. Thereafter, the couple returned to the front seats of the Kia. They talked and PW23 also had a smoke. Soon, they got aroused again and the Victim fellated PW23 for the second time. [note: 5]

(B) Appellant's evidence

11 The Appellant said that on that same day, at or around 3pm, he drove the Mazda from his home to collect some electronic goods for his employer from a vendor at Senoko Drive. On the way towards Gambas Avenue, he saw two boys behaving suspiciously at the staircase of the Carpark. The Appellant averred that he had previous unpleasant encounters with people who littered around his neighbourhood. He therefore decided to see what the two boys were up to.

12 He drove up to the 5th storey of the Carpark and parked the Mazda at Lot 629. He walked down one of the Carpark staircases and found the two boys smoking and saw them throwing their cigarettes butts onto the ground. He chastised them for littering and told them to dispose of the cigarette butts properly (which they did).

13 The Appellant then returned to the 5th storey of the Carpark. While he was about one car length away from his Mazda, he saw a man in a red shirt (who was PW23) looking at his Mazda before turning back towards the direction of the Kia. The Appellant returned to the Mazda and started to use his phone. He then saw someone throwing a tissue out through the right rear window of the Kia. Having just told off the two boys for littering, he got upset that someone else was committing the same anti-social act. After a short while, he got out of the Mazda and approached the Kia, intending to admonish the litterbug. As he approached the Kia, the Appellant noticed that the Victim was in the act of fellating PW23. He then knocked on the window on the driver's side.

The confrontation

(A) Victim's evidence

14 According to the Victim, the Appellant asked PW23 to step out of the Kia and further asked PW23 whether he had littered. He also inquired as to what the couple were doing in the Kia. Moments later, the Appellant asked the Victim to get out of the Kia and also demanded to see their identity cards ("IDs"). As the Victim only handed over her EZ-Link card which did not have her address on it, the Appellant demanded to know where the Victim was staying. She eventually revealed to the Appellant that she stayed in Tampines. PW23 admitted to the Appellant that they were having sex and that he was the one who had littered. The Appellant then proceeded to take photographs of the litter below the Kia.

15 The Appellant told the couple that he was doing his rounds with his team. He said that he saw what they were doing and that he would bring them to the police station and charge them. He also

said he had just caught two boys taking drugs in the Carpark. The couple begged him not to bring them to the police station. He then said he would give them a chance if the Victim would follow him as he wanted to make sure that the Victim returned home safely as he did not trust PW23. He also asked PW23 to go home and to meet the Appellant later at the void deck of PW23's flat to discuss what the latter had done. [note: 6] Embarrassed and afraid of getting into trouble with her parents as well as with the law in relation to what she and PW23 were doing in the Kia, she complied with the Appellant's instructions and got into the Mazda.

(B) Appellant's evidence

16 The Appellant did not materially dispute the Victim's account as set out at [13] above. However, he said that after speaking to PW23 on the right side of the Kia, he walked over to the left side of the Kia and found condom wrappers and tissues on the floor. It was only then that he took photographs of the litter. The Appellant also asked PW23 whether the condom wrappers and tissues on the left side of the Kia were thrown by him which he admitted. [note: 7]

17 The Appellant denied saying that he was doing the rounds with his team. Instead, he claimed that he told PW23 that he was going to call the police and inform them that PW23 had littered in the Carpark. PW23 begged him to refrain from doing so. The Appellant claimed that after the Victim revealed that her home was in Tampines, she volunteered to show the Appellant where she stayed and said that he could send her home. [note: 8] The Appellant agreed and even told PW23 that he could come along. PW23 declined and said that it was fine for the Appellant to send the Victim home.

18 The Victim then took her belongings from the Kia and sat in the front passenger seat of the Mazda. According to the Appellant, at that point, his thoughts were: [note: 9]

> In my mind, er, I feel that she---she voluntary [sic] said that she wanted to show me the place and I think she feel very comfortable, er, following me to show me that place which I was, er, very normal of me of the way of--- I did talk to them and, erm, she really wanted to show me the actual place that where she stay.

19 At a certain juncture in the conversation at the Carpark (it is unclear from the Appellant's evidence when this occurred), the Appellant also told the couple that he would like to call her parents to inform them that she was at the Carpark with PW23. The couple begged the Appellant not to do so.

20 It was not in dispute that the following events took place in the Carpark after the Appellant's confrontation with the couple:

(a) Before the Appellant returned to the Mazda, he asked PW23 to remove the litter from below the Kia which PW23 duly did.

(b) Before the Appellant drove off from the Carpark, PW23 called the Victim to ask if she was all right. The Appellant overheard the conversation and told PW23 not to worry. [note: 10]

(c) At the Appellant's demand, the Victim gave him PW23's as well as her own handphone ("HP") number. In order to verify those numbers, the Appellant gave the Victim's HP a missed call and then proceeded to call PW23. [note: 11]

The drive to Tampines Industrial Avenue 4

(A) Victim's evidence

21 According to the Victim, after leaving the Carpark, the Appellant drove to a dead-end road. There, he told the Victim that it was up to her as to whether he would take her to the police station to be charged. He added that he would let her go only if she were to "please him" and explained that "please him" meant that he wanted the Victim to have sex with him. He also said that he would "delete all pictures that he took of [her] and [PW23] doing things after [she] please[d] him, if [she] did what he asked [her] to". [note: 12] The Victim cried and begged the Appellant not to do that. Eventually, the Victim agreed to have sex with the Appellant to which the latter said "so this is what you want ah". [note: 13]

22 At some point (it was unclear from her testimony as to the exact moment this occurred), the Victim received another call from PW23. This time PW23 told her to keep her HP on. The Appellant noticed that and made her terminate the call. [note: 14]

23 While driving towards Tampines, the Appellant pointed to a building along the way and claimed that it was the Woodlands Police Station and that he was a policeman from "the J Division" and that the Victim could find his photograph there. [note: 15] The Appellant kept talking about police related matters and repeated that he was a policeman doing his rounds with his team at the Carpark to check on people who were dealing in drugs. [note: 16]

24 Upon exiting the Tampines Expressway ("TPE") near Ikea Tampines, the Appellant asked the Victim where they could have sex. When she refused, he said he could still bring her to the police station even though they were now in Tampines. He also indicated to the Victim that he was unfamiliar with Tampines. The Victim pointed to the old Tampines area where there was on-going construction work and old buildings, *ie*, Tampines Industrial Avenue 4. Once the Appellant reached the area, he parked the Mazda between two trailers.

(B) Appellant's evidence

25 The Appellant denied having taken the Victim to a dead end road to threaten her. Instead, he said that he headed directly towards the Seletar Expressway ("SLE") after he exited the Carpark. The only point at which he stopped was at a traffic junction and the only question he had asked her there was as to the direction he should take to go to Tampines. In reply, she told him that they could take the SLE towards the TPE and thereafter she would give him directions.

26 Along the journey, the Victim got "very comfortable" with the Appellant and told him that she was offering a "service". When the Appellant asked what that was, the Victim replied that she could provide him with "sex service". She offered the Appellant sex for $200. The Appellant claimed that his mind then was "totally away" [note: 17] and he accepted the offer. By that point, they were driving along the TPE and he asked her which exit he should take and where they could have sex. The Victim then directed him to Tampines Industrial Avenue 4.

The sexual encounter between the Victim and the Appellant

27 According to the Victim, after the Appellant had parked the Mazda, he walked over to the left side of the Mazda to open the door for her. He asked the Victim to come out of the Mazda and move to the left rear seat. She complied. He then walked over to the other side and entered the Mazda from the right rear door.

28 The Victim said that at that point she did not run away because the Appellant was taller and bigger than her. She also did not shout for help as she was afraid he might hit her. Moreover, they were in a deserted area where no one was in sight. In addition, she was reluctant to run away because her bag, EZ-Link card and HP were still in the Mazda.

29 On this aspect of the evidence the version of the Appellant did not materially differ from that of the Victim except that the latter had opened the front passenger door herself.

30 The sexual activities described in the 2nd, 3rd and 4th charges then took place between the Appellant and the Victim in the backseat of the Mazda. It was not disputed that the sexual encounter lasted only for a very short period of time. [note: 18]

Events after the sexual encounter

31 According to the Victim, after they put on their clothes, the Appellant drove her towards the Tampines bus interchange. At that point, the Victim read a text message from PW23 who had asked her to take down the licence plate number of the Mazda. As he was driving, the Appellant told the Victim that she "was lucky that it was not his other partner who was a Malay man who was a very pious man and that no mercy would be [shown] on [the Victim] if it were his partner who had caught [her]." [note: 19] The Victim alighted at a bus stop near the Darul Ghufran Mosque at Tampines Avenue 5, but before that, the Appellant showed the Victim that he had deleted all the photographs he had taken of her and PW23 at the Carpark and that he had also deleted the Victim's and PW23's HP numbers from his HP. After alighting from the Mazda, she called PW23 and told him that the Appellant had raped her. She then went home.

32 According to the Appellant, after they put on their clothes, the Victim asked for $200 which he had earlier agreed to pay for her services. He then took out a $50 note from his wallet to pay her. He claimed he only paid her $50 for two reasons. First, he did not enjoy the sex. Second, and more importantly, he did not have enough cash with him since the whole encounter was not planned. Because he could not pay the Victim the agreed sum, she became very unhappy and angry and asked him to drop her home.

Decision Below

33 The Judge acquitted the Appellant on the 1st charge because:

(a) The evidence was not sufficiently cogent or consistent to show that the Appellant indicated to the couple that he was a police officer.

(b) Even if he did say he was a police officer, more was required before one could be convicted of a s 170 offence.

34 However, the Judge convicted the Appellant on the 2nd, 3rd and 4th charges because in his view the version of the events as recounted by the Appellant was "highly improbable" whereas the Victim's account was also corroborated by PW23, PW23's cousin and the Victim's family.

Accused's appeal against conviction

35 We first consider the Appellant's appeal against his conviction on the three sexual offence charges. The main grounds of appeal put forward by the Appellant were as follows:

(a) The Judge was not justified in finding that the Victim's account of the offences was "unusually convincing";

(b) The Judge erred in holding that the Victim's account was corroborated when there were inconsistencies in the evidence tendered by the Prosecution and when an adverse inference should have been drawn against the Prosecution for the non-production of certain evidence; and

(c) The Judge erred and was inconsistent when he convicted the Appellant on the 2nd to 4th charges and yet held that the sexual encounter was not induced by the Appellant impersonating a police officer.

The question of consent

36 The charge of outraging modesty under s 354(1) is made out if the Prosecution establishes that an accused had used criminal force on a complainant with the intention of outraging her modesty. Criminal force is defined under s 350 of the Code as the use of intentional force on a person without that person's consent. The charge of sexual assault by penetration under 376(1) is made out if the accused penetrated the complainant's mouth with his penis without her consent. The charge of rape under s 375(1) is made out if the accused penetrated the complainant's vagina with his penis without her consent.

37 The central element in relation to all the three sexual offence charges, therefore, was the question of consent on the part of the Victim. If the Appellant had proven that the Victim had consented to the sexual encounter in the Mazda at Tampines Industrial Avenue 4, then clearly the convictions recorded against him on the 2nd to 4th charges could not stand. Although the Code does not define "consent", s 90 provides that:

90. A consent is not such a consent as is intended by any section of this Code —

(a) if the consent is given by a person —

(i) under *fear of injury* or wrongful restraint to the person or to some other person; or

(ii) under a misconception of fact,

and the person doing the act *knows, or has reason to believe*, that the consent was given in consequence of such fear or misconception…

[emphasis added]

Section 44 of the Code also provides that :

"Injury"

44. The word "injury" denotes any harm whatever illegally caused to any person, in body, mind, *reputation* or property.

[emphasis added]

38 It is clear that pursuant to s 90 read with s 44 of the Code there is no consent if the Prosecution can show that the consent given by a complainant was made under fear of injury to her

reputation and the accused knew or had reason to believe that the consent was given in consequence of such fear.

39 In the present case, the Prosecution did not explicitly address the point why there was a lack of consent on the part of the Victim. But we hardly think that there was any need to do so. On the Victim's version of the events, it was clear that she consented to have sex with the Appellant because of her fear of being exposed by the Appellant as to what she and PW23 did in the Kia at the Carpark and that the Appellant took advantage of this. On the Appellant's version, the Victim consented to have sex with him as a business transaction, *ie*, for payment. If there was valid consent, then the convictions must be set aside. This probably explained why both the Prosecution and the Appellant proceeded on the basis that the pivotal question at trial was whose version of events – the Victim's or the Appellant's – was the truthful one.

Applicable legal principles on appeal

40 It is settled law that an appellate court will not lightly disturbfindings of fact of the trial judge unless they are clearly arrived at against the weight of the evidence: see *Public Prosecutor v Mohammed Liton Mohammed Syeed Mallik* [2008] 1 SLR(R) 601 ("*Liton*") at [32]. Where a case turns on the evidence of the complainant against that of the accused, the court should only convict the accused if the complainant's evidence is "unusually convincing". This has been described in *Liton* at [39] as:

> 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.

41 Otherwise, corroborative evidence would be required to secure a conviction. If such corroborative evidence is required, the trial judge should first identify the aspect of the evidence which is not so convincing before looking 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 a reasonable doubt: *Tang Kin Seng v PP* [1996] 3 SLR(R) 444 at [44] and [68] and *Kwan Peng Hong v Public Prosecutor* [2000] 2 SLR(R) 824 at [35].

42 Our approach to corroborative evidence is a liberal one. In determining whether a particular piece of evidence can amount to corroboration, one has to look at 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: see *Liton* at [43] (for the English common law definition of corroborative evidence, see *R v Baskerville* [1916] 2 KB 658).

Was the Victim's evidence unusually convincing?

43 The Victim's testimony (as summarized above) was internally consistent and credible and satisfied the test of being unusually convincing. Like the Judge, we had no doubt as to what transpired on that eventful day. Before this fateful day, the Appellant was a total stranger to the Victim. It is wholly conceivable that a 16 year old girl from a Muslim family caught in the same compromising position as the Victim would have behaved in the way that she did in order to prevent her parents from finding out that she had sex with her boyfriend. Why would the Victim leave her boyfriend (PW23) at the Carpark and go with a complete stranger in his car if she had not been coerced or threatened? It is simply unbelievable that the Victim would, out of the blue, offer the Appellant sexual service for payment, bearing particularly in mind the Appellant's claim that when he was confronting the couple at the Carpark he offered to take her home for her protection. We also

noted that it was PW23, and not her, who insisted that a police report be made. This showed her concern as to what her parents would have thought with regard to her conduct.

44 On the other hand, we found that the Appellant's testimony was internally inconsistent and defied belief. It may be noted that when the Appellant was interviewed at the Criminal Investigation Department on 18 July 2010 (two days after the alleged offences) and 28 July 2010 (12 days after the alleged offences) he denied that oral sex took place. Yet at trial he accepted that the Victim did perform oral sex on him and was unable to satisfactorily explain this inconsistency.

45 Further, the following points made in the Prosecution's Closing Submissions at the trial were indeed germane:

(a) In relation to the two boys whom the Appellant purportedly also caught littering, the accused could not explain why he did not ask them for their IDs, or tell them that he would call the police or their parents or take photographs of the litter which they had thrown.

(b) It was inconceivable that the Victim would voluntarily go into the Mazda and offer to show a complete stranger where she lived, especially when this stranger had just moments before threatened to expose what she had done in the Kia to her parents and the police.

(c) It was inconceivable that a schoolgirl who had been caught by an allegedly law-abiding citizen would suddenly turn around and offer sexual services to him in exchange for money.

(d) The Appellant was unable to explain his sudden change in attitude from a person who was concerned about the safety of a young girl (thus wanting to send her home) to one who would immediately agree to have sex with her. The Appellant was also unable to explain why he decided to send the Victim home to Tampines which was certainly not on the way to Senoko Drive (where he was supposed to have picked up, on behalf of his employer, some electronic goods from a vendor).

(e) If the Victim was a sex worker and had indeed offered sexual services for money, it was inconceivable that she would cry rape and expose herself to the stress of a trial (as well as letting her parents know what she had done at the Carpark) merely because she was short-changed of $150.

The central theme of his defence that the Victim had, in his car, offered him sexual services for payment was simply bizarre.

Corroboration by PW23

46 Even if the evidence of the Victim were to require corroboration, the testimony of PW23 amply substantiated what she had said as far as what happened at the Carpark was concerned. Very briefly, PW23 said:

(a) He picked the complainant up from her school in Tampines at about 2:30pm. [note: 20]

(b) He drove to the Carpark where they started being intimate with the Victim performing oral sex on him at the front seats of the Kia. However, because of space constraints they moved to the back seats where the Victim continued to fellate him. [note: 21]

(c) Later, while the couple were having sexual intercourse in the backseats of the Kia he

observed a vehicle, the Mazda, pass by his vehicle. [note: 22] He and the Victim then stopped their activity and watched the Mazda which made one round and then parked at Lot 629. They continued hugging and kissing. After a while, PW23 got dressed and stepped out of the Kia to check on the Mazda and he saw a man inside with his head down. He assumed that the man was talking on his phone. He then returned to the Mazda to update the Victim.

(d) Being reassured by what PW23 told her, and considering that the back seat of the Kia and the front seat of the Mazda was blocked by a pillar, [note: 23] the couple continued with their activity, including changing the condom he was wearing and putting on a new one. He estimated that from the moment he saw the Mazda parked at Lot 629 until the time he put on the new condom, there could be a lapse of some 15 to 20 minutes.

(e) After PW23 ejaculated, the couple cleaned themselves up and got dressed. PW23 then threw the tissues and condom wrappers out of the left rear side of the Kia. [note: 24]

(f) They then got out of the Kia to get some fresh air and returned to the front seats where they talked and listened to the radio. It was then around 4pm. Soon after, they got aroused and the complainant began to fellate PW23 again.

(g) The Appellant knocked on the window of the Kia and asked for their IDs. [note: 25] The Appellant asked the Victim where she stayed and told the couple that he was from an authority so they had "better tell the truth". [note: 26] The Appellant also told them that he was at the Carpark doing some checks and that he had seen teenagers at the Carpark taking drugs and that he had a van with warrant officers inside. PW23 believed that he was from "CNB or CID".

(h) The Appellant took a picture of the litter on the ground and said he was going to press charges against PW23 for littering. [note: 27]

(i) The Appellant then gave the Victim and PW23 two options: the first was for PW23 to return home himself and the Appellant would send warrant officers to check on him at his home while the Appellant would send the Victim home. The second was that he would send both of them to the police station.

(j) As PW23 and the complainant were afraid that their parents might find out what they did, and not wanting trouble, they agreed to the first option.

(k) On the way down the Carpark building, PW23 called the Victim. Soon after he terminated the call, PW23 received a call from a private number which turned out to be the Appellant. PW23 estimated that he exited the Carpark at about 4:30pm. [note: 28]

(l) Between 4:30pm and 5:30pm, he sent the Victim a text or made a call to her (he could not remember which) asking her to take down the vehicle number of the Mazda. [note: 29]

47 In light of the foregoing analysis of the evidence, we agreed with the Judge that the Victim's testimony was strongly corroborated by PW23's testimony. On a review of all the evidence we were satisfied that the Appellant had failed to raise any reasonable doubt in the Prosecution's case.

Prosecution's appeal against acquittal

48 Next, we turn to the issues relating to the impersonation charge under s 170 in respect of which we set aside the decision of acquittal of the court below and instead recorded a conviction against the Appellant. The following were the inter-related issues which were pertinent to the charge:

(a) What are the elements of the offence of "personating a public servant" under s 170?

(b) Did the Judge err in holding that the offence of impersonation under s 170 required stricter proof than someone merely saying that he was a police officer?

(c) Was the Judge's finding in relation to the 1st charge against the weight of the evidence?

The law

49 Section 170 of the Code reads:

> Whoever pretends to hold any particular office as a public servant, knowing that he does not hold such office, or falsely personates any other person holding such office, and in such assumed character does or attempts to do any act under colour of such office, shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with both.

It is not in doubt that a police officer is a "public servant" as defined in s 21 of the Code.

50 To date it would seem that the local authorities have not discussed the elements of this offence in any great detail. Nevertheless, it is clear from the wording of s 170 that the offence can be committed in two manners:

(a) First, if:

(i) X, who knows that he is not a public servant, *pretends* to be such a public servant; and

(ii) in that assumed character, X does or attempts to do any act under colour of the office of such a public servant.

(b) Second, if:

(i) X *personates* any person who is a public servant; and

(ii) in such an assumed character, X does or attempts to do any act under colour of the office of that public servant.

51 According to *The Oxford English Dictionary* (prepared by J A Simpson and E S C Weiner) (Clarendon Press, 2nd Ed, 1989), "pretend" means "to put forth an assertion or statement (expressed by an [infinitive]) about oneself; now usually implying mere pretension without foundation: to feign *to be* or *do something*" [emphasis in original] (Vol XII at p 431-432). In the same dictionary, "personate" means "to assume or counterfeit the person of (another), usually for the purposes of fraud; to pretend to be, pass oneself off as" (Vol XI at p 604). It is clear that the second manner of committing the offence requires the accused to take on the specific identity of another person who is a public servant. Since the Appellant in this case did not do so, this court was only concerned with the first manner of committing the offence.

52 As regards the first element under s 170 of "pretends to be such a public servant" (see [50(a)(i)] above), the Judge held that "the offence of impersonation of a police officer requires stricter proof than someone merely saying that he was a police officer" (see the GD at [4]). It was not clear to us what exactly the Judge was suggesting when he said that "stricter proof" was required. Did he mean that as a matter of law the Victim's evidence needed corroboration? If that was what the Judge meant to suggest, we would respectfully disagree. On the other hand, if he meant to say that on the evidence, he felt it unsafe to convict without corroboration that would be different.

53 In the present case one must bear in mind the charge preferred against the Appellant, which was that he, having pretended that he was a police officer, threatened the Victim that if she did not have sexual intercourse with him he would bring her to the police station (in relation to what she and PW23 had done in the Kia at the Carpark) (see [3] above). Obviously, pretension can come in various forms. Express words would be the most obvious situation. To the extent that the Judge seemed to think that express words were a necessary requirement, we do not agree. One can feign to be a police officer even without expressly uttering or saying so. For example, a conviction under s 170 was also recorded against an accused who flashed a card with the words "Tanglin Police" on it and said that he worked in a police station: see *PP v Christopher s/o M P Nathan* [2000] SGHC 43. In our view, the context and the words used and/or the actions of the alleged offender would be crucial. It would be foolhardy for any court to lay down hard and fast rules as to what words or actions would be sufficient to constitute pretension as a police officer. Ultimately, the court must be satisfied, beyond a reasonable doubt, on the totality of the evidence adduced, that the accused had pretended to be a police officer and under colour of that pretension proceeded to do an act or attempted to do the act.

54 Furthermore, we would add that, if someone merely says that he is a police officer and does nothing beyond that pretension, no offence under s 170 would have been committed as he would not have done any act, or attempted to do any such act, pursuant to that pretension. Both the first and second elements of the offence under s 170 must be made out. But if a person, who is not a police officer, says to another person that he is a police officer and then proceeds to demand to see the ID of that other person, the offence under s 170 would have been committed. A case in point is *Sarjit Singh Rapati v PP* [2005] 1 SLR(R) 638 where the accused falsely represented to be an "immigration officer" and demanded to inspect the work permit of his victim who worked in a restaurant. His conviction was upheld on appeal. What we would underscore is that s 170 does not impose any stricter requirement of proof going beyond demonstrating that the accused has pretended that he is a public servant and pursuant to that pretension proceeded to do an act.

55 As regards the second element under s 170 of "does or attempts to do any act under colour of such office" (see [50(a)(ii)] above), the act done or attempted to be done by the accused need not be an act which that public servant (that the accused pretended to be) could legally have done. There are two lines of authorities in the Indian jurisprudence on this issue. In *Emperor v Aziz-Ud-Din* [1905] ILR 27 All 294 ("*Aziz-Ud-Din*") the judge said:

> It is not in my opinion necessary for the application of the section that the act done under colour of office should be a legal act on the part of the accused. If he pretended to be a police officer and as such pol ice officer tried to extort money or things from a fruit-seller, I think the offence under s 170 was committed.

However, in the case of *Biswanath Mukherjee v State of West Bengal* [1966] LNIND 1966 CAL 206 ("*Biswanath*"), the Calcutta High Court held that because of the phrase "under colour of such office" in s 170, the act done, or attempted to be done, must be an act which the accused could legally do under the colour of that office which he pretended to hold.

56 On the authority of *Biswanath*, a person who pretended to be a police officer and then threatened to report his victim for some alleged wrongdoing unless his victim pay him a sum of money would not have committed an offence under s 170. We agree with the Prosecution that the approach taken in the *Biswanath* line of authorities would seriously undermine the effectiveness of s 170 and lead to a rather strange result. It would mean that a s 170 offence would have been committed if the act done under pretence as a public servant fell within the scope of duty of that public servant, but not if an illegal act (which is likely to be more heinous) was done in pursuance of such a pretence. This would be outrageous as the more heinous the act which the impersonator carried out the less likely he would be caught by s 170.

57 At this juncture we would refer to an important Malaysian Federal Court decision in *Tomm Wong v PP* [1973] 1 MLJ 215 ("*Tomm Wong*") where this very issue came under consideration. There, the accused went to a police station to lodge a report and pretended to hold the office of a detective police constable. The magistrate court acquitted the accused of a charge under section 170 of the Malaysian Penal Code (which was in *pari materia* with our s 170). The High Court set aside the acquittal but a question of law in these terms was referred to the Malaysian Federal Court for an opinion:

> Do the words 'in such assumed character does or attempts to do any act under colour of such office' appearing in s 170 of the Penal code refer only to such acts as could legally be done by a person who in fact and in truth holds such office or do such words also cover acts which fall outside the permitted limits of the actual authority or power conferred or vested in the public servant whose character the accused pretends to assume.

The Federal Court, having noted that the Indian authorities were not in unison, preferred the position expounded in *Aziz-Ud-Din* and held:

> [A]n offence under this section is committed whenever any person falsely holds himself out to be a public servant, and does or attempts to do any act whatsoever under colour of such office. The harmless character of that act or attempt may be relevant as to punishment, but the offence under s 170 is nonetheless committed whenever any act is done or attempted to be done by a person impersonating a public servant.

For the reasons alluded to in [56] above, and bearing in mind the clear wording of s 170, we endorse the views of the Federal Court in *Tomm Wong.*

Problems with the Judge's finding

58 We note that in coming to his decision on the impersonation charge, the Judge, although he did refer to what the Appellant said to the Victim on the way to Tampines (GD at [4]), appeared to focus very much on what was said by the Appellant to the Victim and PW23 at the Carpark. It was not disputed that the Appellant did not, while the parties were at the Carpark, say that he was from the police (see GD at [3]). Nevertheless, during the journey to Tampines, the Appellant clearly represented to the Victim that he was a police officer. Furthermore, while the Judge noted that the Victim testified that the Appellant said that he was a civilian, she did explain that she understood this to mean that the Appellant was an officer in civilian attire. [note: 30] As to the reason the couple complied with the Appellant's threats, the Judge was of the view that they did so because "he seemed fierce and looked like he could cause them trouble" (See GD at [4]). However, in coming to this conclusion it appeared that he disregarded what the Appellant had clearly said to the Victim during the journey to Tampines.

59 As stated above at [40], 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. However, with respect, we found that in coming to his decision, the Judge focused too much on what transpired at the Carpark and did not have the charge specifically in mind. As mentioned at [53] above, the charge against the Appellant was that on the pretension of being a police officer he threatened to bring the Victim to the police station for what she and PW23 did at the Carpark if she did not agree to have sex with him ("the sex threat").

60 In our opinion, the following were the critical facts which clearly established the impersonation charge :

(a) At the Carpark, the Appellant asked the couple for their ID (see GD at [3]). The Judge stated that neither the Victim nor PW23 "clearly believed he was a police officer" but that they thought that the Appellant might be someone "with authority". We pause here to reiterate that, given the compromised position in which the Appellant caught the Victim and PW23, and having regard to the words and actions of the Appellant, any reasonable person in similar circumstances would have believed that the Appellant was a police officer or someone from an enforcement agency. It would not matter that the couple, at that point, were unsure as to whether he was a police officer or not. The object of the provision would be seriously undermined if a victim must fully believe that the accused was who he pretended to be before the offence could be made out.

(b) The Appellant, while not denying that he did ask to see the IDs of the couple, explained that he did so because he wanted to verify if they belonged to his "hometown". [note: 31] This explanation is ridiculous and made no sense. Obviously, for motives of his own, he wanted them to think that he was a police officer since a police officer had the authority to ask a member of the public for his ID. In furtherance of that pretension, the Appellant also gave the couple two options (this fact was accepted by the Judge): either he would send both of them to the police station and charge them or he would, for the Victim's protection, send her home alone.

(c) After leaving the Carpark the Appellant drove to a dead-end road where he made the sex threat to the Victim. Along the way to Tampines, the Appellant pointed in a certain direction and said that that was the Woodlands Police Station and further told the Victim that he was from "the J Division" and that she could find his photograph there. There could be no doubt as to what this utterance represented and this was of critical importance to the impersonation charge. We did not think it mattered whether the Victim absolutely believed that the Appellant was a police officer. There may have been a slight doubt in her mind but she was unsure enough that she decided not to call his bluff. The fact that she did not challenge the pretended authority of Appellant because of fear, or for any other reason, was immaterial to the commission of the offence.

61 We found great difficulties with the Judge's views when he said that he was not satisfied "even if the [Appellant] had said in the course of his verbal exchange with [the couple] that he was a police officer, that was sufficient to amount to an impersonation of a police officer". Granted that, as stated in [52] above, if the Appellant had just moved away after making that statement, no offence of impersonation would have been committed because in that scenario he would not have done any act or attempted to do any act under colour of that pretension. In the present case more did happen. The Appellant proceeded, under the pretence of being a police officer to make the sex threat.

62 We note that in relation to the sexual offence charges the Judge had found the version of the events as narrated by the Victim to be "the true account" (GD at [10]) and preferred her version of

the events over that of the Appellant, thus rejecting the latter's assertion that the sexual act with the Victim was consensual. In our view, the Judge's finding on the impersonation charge could not be sustained in light of his own other findings and is in any event wholly against the weight of the evidence.

63 In our judgment, the Judge had erred in these respects. First, in holding that the Appellant had not pretended to the Victim that he was a police officer. Second, in finding that even if the Appellant had explicitly said that he was a police officer that would not, in the circumstances of the present case, be sufficient to constitute a s 170 offence; he seemed to suggest that something more was required before a s 170 offence could come into being. Yet the Judge did not elaborate, in the context of this case, what that something more should be but only said that "stricter proof" was required. In the result, we set aside the acquittal and convicted the Appellant on the 1st charge.

Appeal against sentence

64 It is trite law that an appellate court will not disturb the sentence imposed by the trial court unless it is satisfied that (a) the judge erred with respect to the proper factual basis for sentencing; (b) the judge failed to appreciate the materials placed before him; (c) the sentence was wrong in principle; or (d) the sentence was manifestly excessive or inadequate, as the case may be: *Public Prosecutor v UI* [2008] 4 SLR(R) 500 at [12].

65 The following are the punishments prescribed in the Code for the 2nd to 4th charges:

(a) Outrage of modesty: imprisonment of up to 2 years, and with a fine or caning (s 354(2) of the Code).

(b) Sexual assault by penetration: imprisonment of up to 20 years, and with a fine or caning (s 376(3) of the Code).

(c) Rape under s 375(1)(a) of the Code: imprisonment of up to 20 years, and with a fine or caning (s 375(2) of the Code).

66 Section 18 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) (which was the provision in force at the time the Appellant was charged) provided that where at one trial a person was convicted and sentenced to imprisonment for at least 3 distinct offences, the court would order the sentences for at least two of those offences to run consecutively. The equivalent provision in the current Criminal Procedure Code (Cap 68, 2012 Rev Ed) is s 307.

Benchmark Sentence for "Category 1" Rape

67 In *Chia Kim Heng Frederick v Public Prosecutor* [1992] 1 SLR(R) 63 ("*Frederick*"), the Court of Appeal held (at [20]) that in a contested case the benchmark sentence for rape without any aggravating or mitigating factors would be 10 years' imprisonment and six strokes of the cane. In *PP v NF* [2006] 4 SLR(R) 849, the High Court termed this as "Category 1" rape. A "Category 2" rape would be a case which involved the exploitation of a particularly vulnerable victim. A "Category 3" rape would involve the repeated rape of the same victim or of multiple victims. A "Category 4" rape would be one where the offender has demonstrated that he would remain a threat to society for an indefinite period of time.

68 In *Frederick*, the offender was supposed to drive his girlfriend's nephew's 16-year old girlfriend home but instead drove her to a deserted road where he forced her to masturbate and fellate him

before raping her. The offender was charged – and pleaded guilty to – one charge of rape under s 376(1) of the Penal Code (Cap 224, 1985 Rev Ed). This court took into account as mitigating factors (a) his guilty plea, (b) his cooperation with the police and (c) the unlikelihood of re-offending. However, the court did not take into account the fact that the offender did not use violence against his victim. Instead the court took into account as aggravating factors the fact that (a) the offender was in "something of a responsible position of trust" and (b) the offender had forced his victim to put up with the additional indignity of masturbating and fellating him. The offender was sentenced to eight years imprisonment and eight strokes of the cane.

69 It would be noted that the benchmark sentence of 10 years imprisonment and six strokes of the cane set by this court in *Frederick* was for a rape without aggravating or mitigating factors and where the offender claimed trial. In *Frederick* itself the court imposed a somewhat below the benchmark sentence of eight years because the offender pleaded guilty. However, the caning imposed was two strokes higher than the benchmark of six presumably because of aggravating circumstances. For the present case, we were of the view that the benchmark set in *Frederick* was applicable as the Appellant claimed trial to the charges.

70 Like in *Frederick*, there were aggravating factors in the present case. Here, the Appellant had placed himself in a quasi-position of trust since he had told PW23 as well as the Victim that he would send the Victim home. In addition, he made the Victim suffer degradation (in relation to the acts described in the 2nd and 3rd charge) before being raped. On the other hand, we could not see any mitigation in favour of the Appellant. While we recognised that no physical violence or threat of violence was inflicted on the Victim we were unable to view that as a mitigating factor as he had effectively put her in so much fear that she was not able to resist his demand.

71 In light of the above, and bearing in mind the benchmark set in *Frederick*, we did not think that the sentence of 11 years and five strokes could be regarded as manifestly excessive for the 4th charge. While the prison term imposed was one year longer than the benchmark, the caning was one stroke less. Moreover, as said before, there were aggravating factors with no mitigating factors.

72 No arguments were advanced to disturb the sentence imposed for the 3rd charge which ran concurrently with the sentence for the 4th charge; nor for the sentence for the 2nd charge which ran consecutively with the sentences for the 3rd and 4th charges. Accordingly, the sentences for the 2nd and 3rd charges were upheld.

The sentence for impersonating a police officer

73 Finally, there remains the question of the appropriate punishment for the impersonation charge on which we had found the Appellant guilty. The law prescribes that a person who impersonates a public servant contrary to s 170 of the Code could be imprisoned for up to two years, or be fined or both. The commentary in the *Sentencing Practice in the Subordinate Courts* (LexisNexis, 3rd Ed, 2013) at page 1086, states:

> The offence (in s 170 of the Penal Code) is intended to prevent persons from performing unlawful or unauthorized acts under colour of purported official authority. It also guards against the danger that the reputation of public servants will be tarnished or their authority undermined when an offender purports to act under colour of such official authority.
>
> Whether a fine or imprisonment is appropriate would depend essentially on the nature of the act

done under colour of the office. If the act was innocuous, then a fine would be appropriate. However, if there were aggravating circumstances, for example, the consequences of the act were serious to the victim or where a vulnerable victim was taken advantage of, a custodial sentence would be justified.

74 In *Iskandar bin Abdul Rahim v PP* [2001] SGDC 46, the offender pretended to be a police officer and conducted a check on his victim. He requested his victim to follow him to the police station to verify her identity. While in the car, he outraged his victim's modesty under the pretext of doing his job as a police officer. He was sentenced to four months' imprisonment for the s 170 charge and 12 months' imprisonment and four strokes of the cane for outraging his victim's modesty.

75 In the present case, given the heinous motive behind the impersonation, and the tarnish caused to the reputation of the Singapore Police Force, we were of the opinion that an appropriate sentence would be an imprisonment term of six months. However, as this charge formed part of the same transaction as the 2nd to 4th charges, it was only appropriate and just that this sentence should be ordered to run concurrently with the existing global imprisonment term of twelve years and we accordingly so ordered.

[note: 1] NE Day 2 Page 18 Line 17

[note: 2] NE Day 2 Page 19 Line 1.

[note: 3] NE Day 2 Page 19 Line 14-15.

[note: 4] ROP Vol 1 p 97.

[note: 5] NE Day 2 Page 21 Line 9-13.

[note: 6] NE Day 2 Page 25 Line 29 – Page 26 Line 3.

[note: 7] NE Day 7 Page 15 Line 9.

[note: 8] NE Day 7 Page 17 Line 31 - Page 19 Line 1.

[note: 9] NE Day 7 Page 18 Line 26-29.

[note: 10] NE Day 7 Page 22 Line 27 – Page 23 Line 20.

[note: 11] NE Day 2 Page 28 Line 1-13.

[note: 12] NE Day 2 Page 36 Line 16-17.

[note: 13] NE Day 2 Page 30 Line 3.

[note: 14] NE Day 2 Page 30 Line 5-9.

[note: 15] NE Day 2 Page 30 Line 10-13.

[note: 16] NE Day 2 Page 30 Line 25-26.

[note: 17] NE Day 7 Page 24 Line 1.

[note: 18] NE Day 7 Page 30 Line 14 (Accused testimony); NE Day 2 Page 35 Line 16-24 (Complainant's testimony).

[note: 19] NE Day 2 Page 36 Line 12-15.

[note: 20] NE Day 6 Page 11 Line 9.

[note: 21] NE Day 6 Page 11 Line 12-17.

[note: 22] NE Day 6 Page 13 Line 15-23.

[note: 23] ROP Vol 1 p24, P44. NE Day 6 Page 16 Line 8-23.

[note: 24] NE Day 6 Page 17 Line 14-27.

[note: 25] NE Day 6 Page 20 Line 32.

[note: 26] NE Day 6 Page 21 Line 5-6.

[note: 27] NE Day 6 Page 21 Line 22-24.

[note: 28] NE Day 6 Page 25 Line 11.

[note: 29] NE Day 6 Page 25 Line 7-9.

[note: 30] NE Day 2 Page 26 Line 5-10; Page 55 Line 28 – Page 56 Line 1.

[note: 31] NE Day 7 Page 49 Line 2-21.