

The appropriate sentencing framework for sexual assault by penetration cases:
BPH v Public Prosecutor [2019] SGCA 64

I. Executive Summary

Section 376 of the Penal Code (Cap 224, 2008 Rev Ed) (“PC”) sets out the offences of sexual assault by penetration, including those through: digital-vaginal penetration; digital-anal penetration; and fellatio. The case of *Pram Nair v Public Prosecutor* [2017] 2 SLR 1015 (“*Pram Nair*”) established a sentencing framework for cases of sexual assault through digital-vaginal penetration. However, it left open the following questions: (a) whether the *Pram Nair* framework should apply to *other* forms of sexual assault by penetration, and (b) whether there was a hierarchy of severity, for the various permutations of “sexual assault by penetration” under section 376 of the PC.

The Court of Appeal (“CA”) answered these two questions in *BPH v Public Prosecutor* [2019] SGCA 64. It held that:

- (a) the *Pram Nair* sentencing framework applies to *all* offences of sexual assault by penetration under section 376; and
- (b) there is no hierarchy of severity for the various permutations of sexual assault by penetration under section 376. Instead, the courts should weigh a range of factors in assessing the seriousness of a particular permutation of the offence.

The judgment in this case decided two cases which came up on appeal before the CA on the same day, being *BPH v Public Prosecutor* (“*BPH*”) and *BVZ v Public Prosecutor* (“*BVZ*”). Both cases involved an adult sexually assaulting minors, with both offenders appealing their respective sentences. The CA issued a joint grounds of decision as both offenders pleaded guilty to their respective charges and there was no dispute as to the facts of their cases. On appeal, the CA upheld both their sentences applying the *Pram Nair* sentencing framework.

II. Material Facts

The two cases involved the following accused persons:

- a. BPH between 60 and 62 years old, the maternal grandfather of the victim VB (between 7 and 8 years old), and
- b. BVZ (then-47 years old), who committed acts against four victims (V1, V2, V3 and V4, each then-14 years old).

A. BPH

Sometime in February or March 2015, BPH asked VB to follow him to BPH’s bedroom. Both laid down on the bed, where BPH started kissing VB and fondling his penis. BPH then proceeded to undress himself and VB, and touched VB’s penis again. The act was interrupted when the domestic helper called for VB. BPH told VB not to tell anyone about what happened. Between December 2015 to September 2016, BPH was confined in the Drug Rehabilitation Centre. Subsequently, BPH returned to reside in the flat. Approximately a week after his release, BPH again asked VB to follow him to his bedroom. BPH again undressed VB and placed his finger into VB’s anus (*ie*, he digitally penetrated VB). Finally in October 2016, VB told his mother (BPH’s daughter) about the molestation. She confronted BPH, who admitted his wrongdoing. A police report was made the following day.

At the High Court (“HC”), BPH pleaded guilty to two charges: sexual assault by penetration (“digital-anal”) of a person under 14 years of age, punishable under section 376(2)(a) read with section 376(2)(b) of the PC; and outrage of modesty of a person under 14 years of age, punishable under section 354(1) read with section 354(2) of the PC. Three further charges were admitted and taken into consideration for the purpose of sentencing.

The HC held that the appropriate sentence was 11 years’ imprisonment for the sexual penetration

charge, and 30 months' imprisonment for the outrage of modesty charge. Applying the *Pram Nair* sentencing framework, the HC considered the aggravating factors¹ of abuse of trust, the victim's young age, and the moral corruption involved, as well as other factors such as BPH's plea of guilt and lack of prior convictions. It also considered digital-anal penetration to be a less serious offence than digital-vaginal penetration. The HC adjusted the sentences to ten years' imprisonment for sexual penetration and two years' imprisonment for outrage of modesty, on account of the totality principle.² It also held that both sentences should run consecutively, resulting in an aggregate sentence of 12 years' imprisonment.

B. BVZ

The four victims, V1, V2, V3, and V4, were friends from primary school. They would often spend time in V3's home, and sometimes stay there overnight. BVZ was V3's biological father. BVZ's wife worked the night shift and would only return home in the morning.

(i) First and second sexual penetration charge (V1)

One night in September 2016, V1 went to V3's flat. Only BVZ was at home. V1 initially stayed for a while as BVZ told her there was "something" outside the flat, but when she later insisted on going home, BVZ pretended to be spiritually possessed. He then removed his shirt, pulled down his jeans and told V1 that if she wanted him to "become normal", she had to give him a "blow job" (*ie*, fellatio). Out of fear, V1 did so. The act continued for a few minutes until he ejaculated in her mouth. She then swallowed his semen on his instructions. After the act was completed, BVZ ran out of the flat. When he returned, he pretended he was normal again. He also told her not to tell anyone what had happened.

After this incident, V1 would only go to V3's house when V3 was at home. In July 2017, V1 was with V3 in V3's bedroom, watching movies. V3 fell asleep. When V1 left V3's room to use the toilet, she encountered BVZ. BVZ asked V1 to take him to a shop which she and V3 frequented; he also said not to wake V3 up. BVZ then brought V1 to his friend's house, leaving only around midnight. However, on the way back, the battery of BVZ's electronic bicycle went flat. BVZ then brought V1 to the fourth floor of a nearby multi-storey carpark. At the carpark, BVZ asked V1 to give him another "blow job". V1 started crying and refused. He told her this would be the last time and that he would not disturb her anymore after this. When she refused again, he held her neck and threatened to punch her while making a gesture of punching her stomach. V1 kept crying, feeling helpless and afraid for her safety, but eventually complied. BVZ again ejaculated in her mouth.

(ii) Outrage of modesty charge (V4)

In late September 2016, V4 ran away from home and stayed at V3's flat. In early October 2016, V4 was asleep alone in the bedroom as V3 had left for school. BVZ woke V4 up and told her to "satisfy" him. He touched her breast over her t-shirt. He then asked her for a "blow job", telling her she was staying for free in his flat. She was frightened and began crying. She escaped to the bathroom where she texted V2 for help. V2 informed V3 about what happened, and V3 asked her teachers for help. Two teachers from V3's school arrived and escorted V4 away.

(iii) Causing hurt by poison (V2)

In August 2017, V1 and V2 were alone with V3 at her flat. The three girls took BVZ's electronic bicycle and went out. BVZ returned to the flat at 5.00am the next day, and became angry with the V1 and V2 for using his electronic bicycle. At about 6.00am, BVZ asked to speak to either V1 or V2 individually outside the flat. They both refused to go. After asking V3 to persuade her friends, V3

¹ The court will consider certain factors when determining an offender's sentence. "Aggravating factors", such as abuse of trust, may result in a court increasing an offender's sentence, to reflect the severity of his or her crime. Conversely, "mitigating factors", such as remorse, may result in a court reducing an offender's sentence.

² This refers to the principle that the total sentence meted by the courts is proportionate to the offender's overall criminality, and is not excessive.

told V2 that BVZ wanted to see her. V2 was reluctant as she was afraid, but V3 assured her she would seek help. V2 went out to meet BVZ.

Outside, BVZ asked V2 to promise to take care of V3. He gave V2 four “Epam Nitrazepam BP 5mg” pills, which contained Nitrazepam (a poison listed in the Schedule to the Poisons Act (Cap 234, 1999 Rev Ed), and a prescription-only medication used to treat insomnia or convulsions). He asked her to consume the pills, with the intention of facilitating the commission of an offence of sexual penetration of a minor under section 376A(1)(a) of the PC. BVZ threatened her that if she refused, he would hit V3. V2 then consumed the pills. BVZ then gave V2 a cigarette and asked her to smoke it; when she did, she began to feel dizzy. BVZ then asked her to give him a “blow job.” However, V2 managed to walk away. She saw V1, and both of them went up to V1’s flat where they locked themselves in until the police arrived. They then returned to V3’s flat to meet the police officers. Later, V2 was brought to hospital and found to have symptoms of Nitrazepam overdose.

(iv) Sentencing

BVZ pleaded guilty to, and was convicted of: two charges of sexual assault by penetration (fellatio) under section 376(1)(a) of the PC (against V1); one charge of causing hurt by means of poison under section 328 of the Penal Code (against V2); and one charge of outrage of modesty under section 354(1) of the Penal Code (against V4). Six other charges were taken into consideration for sentencing.

The HC held that BVZ was a sexual predator who had preyed on vulnerable minors, and applied the *Pram Nair* sentencing framework for the two charges of sexual penetration by way of fellatio. The HC held that these charges each fell within Band 2 of the *Pram Nair* sentencing bands for the following reasons: (a) V1’s young age; (b) the abuse of trust; (c) the humiliating nature of BVZ’s acts; (d) BVZ’s premeditation³ in committing the offences; and (e) BVZ’s use of force. However, his guilty plea was a mitigating factor as this spared the victims from having to relive the traumatic events at trial. Thus, the HC sentenced BVZ to ten years’ imprisonment and eight strokes of the cane for each of the two charges. These two sentences were to run consecutively. The HC held that running the sentences consecutively would ensure that BVZ received a distinct punishment for his second offence against V1; conversely, it would be unjust if BVZ effectively received no real punishment for sexually assaulting V1 again.

For the charge of causing hurt by means of poison, the HC imposed three years’ imprisonment. For the outrage of modesty charge, the HC imposed ten months’ imprisonment. Thus, the total sentence ordered was 20 years’ imprisonment and 16 strokes of the cane.

III. Issues on Appeal

The CA decided two issues:

- a. Whether *Pram Nair* sentencing applied to all permutations of sexual penetration in section 376 of the Penal Code and whether there was a hierarchy of severity for the various permutations of sexual penetration in section 376 of the Penal Code; and
- b. Whether the sentences for BPH and BVZ were appropriate.

The CA also discussed whether the HC in *BPH* correctly adjusted the *Pram Nair* sentencing bands on the premise that digital-anal penetration was less serious than digital-vaginal penetration, and whether the HC in *BVZ* was right to apply the *Pram Nair* framework to sexual penetration by way of fellatio.

A. Applicability of Pram Nair sentencing framework, and hierarchy of severity

³ Premeditation involves planning for an offence beforehand (rather than committing an act on the spur of the moment). Sentences for crimes which are premeditated may be heavier than sentences for crimes which are not premeditated.

The CA held that the *Pram Nair* sentencing framework applied to all permutations of sexual penetration under section 376 of the PC, but there would be no hierarchy of severity for those permutations.

(i) Background

Sexual offences may fall under sections 375 and 376 of the PC. The offence of rape, which is generally regarded as the gravest of all the sexual offences, is set out in section 375. It defines rape as the penetration of a woman's vagina with the offender's penis, without the victim's consent or – when the victim is under 14 years old – regardless of consent.

In contrast, the offence of sexual assault by penetration in section 376 is defined more broadly. The offence has many permutations, depending on the instrument of penetration (penis, finger, other body part or object), the orifice being penetrated (mouth, vagina or anus), the genders of the perpetrator and the victim, who did the penetration or caused the penetration, and who was penetrated.

Ng Kean Meng Terence v Public Prosecutor [2017] 2 SLR 449 (“*Terence Ng*”) established a two-step sentencing framework for offences under section 375 of the PC (i.e. rape). At the *first* step, the court identifies which band (or category) the offence in question falls within, based on the manner and mode of the offence, as well as the harm caused to the victim. At the *second* step, the court will consider the aggravating and mitigating factors which are personal to the offender, to calibrate the appropriate sentence. These relate to the offender's personal circumstances, and are distinct from the factors considered in the first step.

In *Pram Nair*, the CA adapted the *Terence Ng* framework for the offence of “digital-vaginal penetration” (under section 376 of the PC). The two-step approach was retained, but the sentencing bands were adjusted downwards, with regard to the duration of imprisonment and number of strokes of the cane. This was because there was an “intelligible and defensible difference” between rape and digital penetration in terms of the severity of the offence.

Band 1 involved cases with no or limited offence-specific aggravating factors, and attracted sentences of 7-10 years' imprisonment and four strokes of the cane. Band 2 comprised cases with two or more offence-specific aggravating factors, and attracted sentences of 10-15 years' imprisonment and eight strokes of the cane. Band 3 comprised extremely serious cases with a high number and intensity of offence-specific aggravating factors.⁴ Such cases would attract sentences of between 15–20 years' imprisonment and 12 strokes of the cane.

Where either of the two statutory aggravating factors were present (*ie*, voluntarily causing hurt or putting any person in fear of death or hurt, and where the victim is under 14 years of age), the case would fall within Band 2 or even Band 3. However, the CA in *Pram Nair* expressly declined to decide whether the three revised bands apply in situations where the vaginal penetration was done with something other than the finger.

(ii) *Pram Nair* & Hierarchy

The CA found the present cases to be an appropriate occasion to decide the unanswered question in *Pram Nair*. In considering this question, the CA noted that prior cases had taken two main opposing approaches. The *first* approach was that the *Pram Nair* sentencing framework should be applied without distinction to the various forms of sexual penetration set out in section 376. The *second* approach was that section 376 created a hierarchy of offences. For instance, one court following the second approach drew up a hierarchy of the different types of sexual penetration offences, placing

⁴ This includes serious levels of violence paired with perversities, victims with high degrees of vulnerability, and a compelling public interest to deter potential offenders and protect the public.

fellatio and penile-anal penetration on the same level, and digital-anal penetration at the lowest level. This was also reflected in the sentences imposed, with a lower sentence for the digital-anal penetration offences.

However, the CA agreed with the *first* approach: *ie*, the sentencing framework set out in *Pram Nair* was applicable to all forms of sexual assault by penetration under section 376 of the PC. This was based on the following reasons.

First, there were a multitude of permutations for the offence of sexual penetration under section 376, which would make benchmark sentences for each permutation impractical. The CA listed four possible permutations under section 376(1), and 19 further possible permutations under section 376(2). To draw up a hierarchy of severity for the myriad permutations of the sexual assault by penetration offence in section 376 could entail fine distinctions having to be made regarding the penetrator, the one being penetrated, the orifice in question and the body part or object used for penetration.

Second, the actual language of section 376 did not indicate that the permutations of sexual assault by penetration were to be ranked in terms of severity. The offences in the provision merely described the types of acts that were criminalised, without stating that any one of them was a more or a less serious offence.

Third, there appeared to be no unanimity of views as to whether one form of sexual penetration was inherently more serious or more detestable than another. It was commonly agreed that rape was the worst of the sexual penetration offences. However, where sexual penetration other than rape was concerned, it was hard or even impossible to differentiate among the various permutations discussed, even on the ground that some acts carried the risk of transmission of disease. For instance, some people could be as appalled by forced penile-anal intercourse as by an object being thrust into the vagina. The “disgust factor” was too subjective and personal for there to be meaningful and commonly accepted distinctions among the various permutations of the offence under section 376. Moreover, some permutations of the offence might not even be for sexual gratification, but could be motivated by a thirst for sadistic humiliation and pain.

Hence, the CA decided it would be more practical and sensible to weigh a range of factors in assessing the seriousness of a particular permutation of the offence. These would include the risk of sexually transmitted diseases and the degree of physical violation of the victim, which could be factored within the present *Pram Nair* sentencing framework. The *Pram Nair* framework (for digital-vaginal penetration) was adapted from the *Terence Ng* framework (for rape), and many of the offence-specific aggravating factors listed in *Terence Ng* for rape were equally applicable to the offence of digital penetration, and now also other forms of sexual assault by penetration in section 376.

The CA clarified that this decision did not detract from the distinction between rape and sexual assault by penetration under section 376. The *Terence Ng* framework would continue to apply to rape, because the risk of an unwanted pregnancy was a factor unique to rape, and because rape had also been recognised as the gravest of sexual offences.

B. Appropriateness of sentences

After deciding that the *Pram Nair* framework applied to all forms of sexual penetration under section 376, the CA considered and upheld the sentences imposed in *BPH* and *BVZ*.

(i) BPH

With regard to the sexual penetration charge, the CA agreed with the HC that there were at least two offence-specific factors: the abuse of trust by a grandfather, and the vulnerability of the young victim.

Abuse of trust concerns cases where the offender is in a position of responsibility towards the victim, or where the offender is a person in whom the victim has placed trust. When an offender commits a serious sexual offence in such circumstances, he has committed a serious crime, and also violated the trust placed in him by society and by the victim. The focus is on the nature of the relationship between the offender and the victim, not the harm to the victim. The recognition of an abuse of trust as an aggravating factor was a reflection of the position that was occupied by the members of a family. Here, BPH was VB's maternal grandfather. As in most other cases of abuse of trust, BPH's position of authority and trust in relation to VB afforded him the opportunity to offend more than once.

With regard to the victim's vulnerability, a victim could be vulnerable because of age, physical frailty, mental impairment or disorder or learning disability. In this case, VB was especially vulnerable given his age at the time of the offences. Indeed, his young age was a statutory aggravating factor. Thus this case at least fell in the middle of Band 2 in the *Pram Nair* framework.

Overall, the CA held that the aggregate sentence imposed was in fact lenient towards BPH. With regard to the first charge, BPH would have received a minimum of eight years' imprisonment and 12 strokes of the cane, because VB was under 14 years of age at the relevant times. Indeed, BPH was sentenced to only ten years' imprisonment for this charge (after a reduction from 11 years). There had also been no increase in the imprisonment term in lieu of caning: BPH could not be caned as he was more than 50 years old.

(ii) BVZ

Applying the *Pram Nair* framework for the two sexual penetration by assault charges in that case, the CA held that the individual sentences of ten years' imprisonment and eight strokes of the cane for each of the two charges were also actually lenient.

The CA held that the HC in *BVZ* had correctly identified BVZ as a serial sexual predator. It agreed with the five aggravating factors considered by the HC. *First*, V1 was only 14 years old at the time of the offences, and was thus a young and vulnerable victim. *Second*, BVZ was the father of V3, who was V1's close friend. Since V1 and V3 were close friends since childhood and V1 would visit V3's house often, V1 would have met BVZ over the years and would have seen BVZ as a quasi-parental figure. BVZ therefore stood in a position of trust, which he abused by committing the offence. *Third*, the acts were of a humiliating nature. BVZ had forced V1 to fellate him twice, exposing her to the risk of contracting sexually transmitted diseases. The fact that BVZ had also told V1 to swallow his semen after ejaculation was also demeaning and aggravated the offence. *Fourth*, there was premeditation in both offences. Regarding the first occasion, *BVZ* had put on an act of being spiritually possessed and used that to trick V1 into fellating him. On the second occasion, he also brought V1 out of the flat to prevent his being discovered in the act by V3. *Finally*, BVZ used force, as well as the threat of using more force on V1, in respect of the second sexual penetration offence.

With regard to the two sexual assault by penetration charges, the CA stated that given the number of aggravating factors present, the offences should not have been treated as falling at the lower end of Band 2 of the *Pram Nair* sentencing bands. Instead, the aggravating factors placed each offence in at least the middle or upper half of Band 2, where each offence would have attracted between 12 to 14 years' imprisonment.

The CA noted that *BVZ's* appeal was essentially against the HC's decision that the imprisonment sentences for the two sexual assault by penetration charges run consecutively, resulting in an aggregate sentence of 20 years' imprisonment and 16 strokes of the cane. However, the CA held that there was no error in the HC's decision. While V1 was the victim on both occasions, the two offences occurred about ten months apart and were therefore distinct offences. She was made to suffer the

same invasion and indignity twice, even after taking the precaution of not going to BVZ's flat unless V3 was with her. If the imprisonment terms for the two sexual penetration offences ran concurrently (rather than consecutively), *BVZ* would effectively escape the consequences for the second incident.

The CA declined to moderate the aggregate sentence downwards, based on the totality principle. Had the proper individual sentences for the sexual penetration offences been ordered, the aggregate sentence would have exceeded 24 years' imprisonment. Taking into account the totality of BVZ's criminal behaviour, his plea of guilt and the charges that were taken into consideration, the aggregate sentence of 20 years' imprisonment was not manifestly excessive.

IV. Legal Implications

Before this judgment, it was unclear if the *Pram Nair* sentencing framework, which originally only applied to digital-vaginal penetration, would apply to all sexual assault cases. This judgment has made clear that the *Pram Nair* sentencing framework applies to all forms of sexual assault by penetration and that there is no hierarchy of severity as to the possible permutations of sexual assault under section 376.

This judgment also makes it clear that the determination of the appropriate sentence is also based on offence-specific factors. This is a welcome clarification, as it ensures that individual offender's actions and motivations will be taken into account in sentencing.

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