

## Stealthing: Filing charges for non-consensual condom removal

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### I. Introduction

“My body, my choice”. This slogan originates from the feminist movement’s fight for bodily autonomy: the right to choose what they can do with their bodies.<sup>1</sup> The concept of bodily autonomy extends to *sexual* autonomy – women should also have the right to choose whether to have sex, whether to use contraception, or whether to get pregnant.<sup>2</sup>

However, practices that undermine sexual autonomy remain pervasive in society. One example is non-consensual condom removal during sex (colloquially known as “stealthing”),<sup>3</sup> which is a disturbing “sex trend” that has become more prominent recently.<sup>4</sup> Stealthing is dangerous, as it poses both physical (*e.g.*, unwanted pregnancies and sexually transmitted infections), as well as emotional (*e.g.*, psychological distress) risks to victims.<sup>5</sup>

Unfortunately, you may have been a victim of stealthing. But regardless of whether you get pregnant, Singapore’s criminal laws recognize stealthing as a criminal offence and you can file charges against your boyfriend.

### II. Discussion

This article will explore the criminal offence of stealthing under s 376H of the Penal Code (“PC”).<sup>6</sup> First, the article will discuss the rationale behind the provision as well as the elements of the offence. Second, the article will explain what you can expect if you report the crime. Lastly, the article will go through some of the processes that you will go through if the case is taken to court.

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<sup>1</sup> United Nations Population Fund website, <<https://algeria.unfpa.org/en/news/my-body-my-choice-5-means-uphold-right-bodily-autonomy-2>> (accessed 23 October 2021).

<sup>2</sup> UN Women website, <<https://asiapacific.unwomen.org/en/news-and-events/stories/2021/05/bodily-autonomy>> (accessed 23 October 2021).

<sup>3</sup> Eric Glasser, “A disturbing sex trend called 'stealthing' is on the rise”, *USA Today* (26 Apr 2017) <<https://www.usatoday.com/story/news/nation-now/2017/04/26/disturbing-sex-trend-called-stealthing-rise/100921352/>> (accessed 11 November 2021).

<sup>4</sup> *Ibid.*

<sup>5</sup> Kate Shkodzik, “What is Stealthing? Non-Consensual Condom Removal Explained”, (20 Apr 2020) <<https://flo.health/menstrual-cycle/sex/sexual-health/what-is-stealthing>> (accessed 11 November 2021).

<sup>6</sup> Penal Code (Cap 224, Rev Ed 2008) (“PC”).

## A. *Penal Code s 376H*

### (1) *Background*

Stealthing was not a criminal offence until reforms were made to the PC in 2019.<sup>7</sup> Prior to the reforms, once consent to sex is given, it was only deemed legally invalid if the victim was mistaken as to: (a) the sexual nature of the act; (b) the sexual purpose of the act; or (c) the identity of the person doing the act, and the person doing the act knows that the consent was given due to the victim's mistaken belief.<sup>8</sup> If consent is legally invalid, the victim is deemed to have not given their consent, which can potentially lead to rape charges.<sup>9</sup>

However, stealthing does not fall within these categories because the mistake does not relate to non-consensual sex, but rather to non-consensual *condom removal*. Thus, to address stealthing, a new offence titled "Procurement of sexual activity by deception or false representation"<sup>10</sup> was added to the PC under s 376H.<sup>11</sup> As stated by the Minister of Law in Parliament, the rationale behind criminalizing stealthing stemmed from the "serious risks to the victim"<sup>12</sup> as well as it being "a greater violation of the victims' sexual autonomy".<sup>13</sup>

### (2) *Elements of the offence*

For someone to be found guilty under s 376H PC, the court must find that:

- (a) He obtained the victim's consent to sex by means of deception or false representation relating to the use of any sexually protective measure.<sup>14</sup>
- (b) He knew or had reason to believe that the victim's consent was given in consequence of such deception or false representation.<sup>15</sup>

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<sup>7</sup> Neo Rong Wei, "Criminal Law Reform Bill: A look at key changes in the Penal Code", *TODAY* (06 May 2019) <<https://www.todayonline.com/singapore/criminal-law-reform-bill-look-key-changes-penal-code>> (accessed 23 October 2021).

<sup>8</sup> Penal Code, s 377CB.

<sup>9</sup> Penal Code, s 375.

<sup>10</sup> Penal Code, s 376H.

<sup>11</sup> Ministry of Law website, "Factsheet on Criminal Law Reform Bill" (11 February 2019) <<https://www.mlaw.gov.sg/files/news/press-releases/2019/02/Factsheet%20on%20Criminal%20Law%20Reform%20Bill.pdf>> at p 12.

<sup>12</sup> *Singapore Parliamentary Debates, Official Report* (06 May 2019) vol 94 (K Shanmugam, Minister for Home Affairs and Minister for Law).

<sup>13</sup> *Ibid.*

<sup>14</sup> Penal Code, ss 376H(1)(c) and 376H(1)(d)(i).

<sup>15</sup> Penal Code, s 376H(1)(e).

The Australian case of *Diren* serves as a helpful illustration of these requirements.<sup>16</sup> There, the accused had initially put on a condom at the victim's request before they had sex.<sup>17</sup> However, while the victim's back was turned, he removed the condom.<sup>18</sup> The court found that the accused's actions amounted to a deception or false representation that "he would wear a condom during sexual penetration which [he] did not".<sup>19</sup>

Similarly, regarding (a), your boyfriend's act of putting the condom on but taking it off later without your consent likely amounts to a deception or false representation that he would use a condom. Regarding (b), he is also likely to have known that your consent was given in consequence of his deception because you had explicitly told him to put on a condom. Thus, it is likely that he will be found to have contravened s 376H.

If your boyfriend is convicted, he will be punished with imprisonment for up to 10 years, or with a fine, or with caning, or any combination of such punishments.<sup>20</sup>

#### **B. What happens when I make a police report?**

If you wish to file charges, your first port of call should be to make a police report.<sup>21</sup> This is the process that you can expect at the police station:<sup>22</sup>

1. An officer trained in victim care will help you with the report lodging process. To protect your identity, you will be interviewed in a private room.
2. After processing the report, an Investigation Officer who is trained in sexual assault cases will record a statement from you.
3. If you require emotional support, you may request the assistance of a Victim Care Officer who specializes in providing support for victims of sexual assault.
4. You may be brought to the One-Stop Abuse Forensic Examination Centre if forensic medical examination is required.

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<sup>16</sup> *R v Diren* [2020] VCC 61 ("*Diren*").

<sup>17</sup> *Id.*, at [8].

<sup>18</sup> *Id.*, at [9].

<sup>19</sup> *Id.*, at [19].

<sup>20</sup> Penal Code s 376H(2)(a)(i).

<sup>21</sup> Singapore Police Force website, "Sexual Crime Info Pamphlet" (8 Feb 2021) <<https://www.police.gov.sg/-/media/Sexual-Crime-Info-Pamphlet-English.pdf>> (accessed 23 October 2021).

<sup>22</sup> Singapore Police Force website, "Sexual Crime Info Pamphlet" (8 Feb 2021) <<https://www.police.gov.sg/-/media/Sexual-Crime-Info-Pamphlet-English.pdf>> (accessed 23 October 2021).

You should go to the police as soon as possible, preferably within 72 hours after the incident. This is because it is easier to collect forensic evidence from your body, clothes, or belongings within the first 72 hours after intercourse.<sup>23</sup> For example, semen yields from a vaginal swab are reduced considerably after 72 hours.<sup>24</sup> In order to preserve evidence, it is best to bathing or showering, using the restroom, and cleaning up the area until the forensic medical examination is completed.<sup>25</sup>

### **C. What happens during prosecution?**

If investigations show that a crime has been committed, the police will refer the case to prosecutors, who will prosecute your boyfriend in court. If your boyfriend claims trial, you may be required to testify in court.<sup>26</sup>

Having said this, the law offers certain protections to victims of sexual crimes to make their experience easier. If you wish to avoid going through the potentially traumatising experience of seeing your boyfriend while giving your testimony, you can choose to testify over video-link.<sup>27</sup> Further, you can also apply for a gag order to protect your identity from being reported in the media.<sup>28</sup>

However, one common difficulty that stealthing victims face in court is that there is often no evidence to prove that the condom was removed without their consent, other than their own testimony.<sup>29</sup>

Under Singapore law, for someone to be convicted of a crime based on the uncorroborated testimony of a single eyewitness, the testimony must be of an “unusually convincing” standard.<sup>30</sup> This means that it must be so convincing such that the court is convinced that there is no reasonable doubt as to the accused person’s guilt.<sup>31</sup> Some relevant considerations include

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<sup>23</sup> *Singapore Parliamentary Debates, Official Report* (04 January 2021) vol 95 (K Shanmugam, Minister for Home Affairs and Minister for Law).

<sup>24</sup> Saint Mary’s Sexual Assault Referral Centre website, “Forensic Science In Sexual Offence Investigations” <<https://www.stmaryscentre.org/application/files/9514/7697/8318/stmaryspresentation21.1.16.pdf>> at p 13 (accessed 23 October 2021).

<sup>25</sup> Association of Women for Action and Research website, “WHAT TO DO IN THE FIRST 72 HOURS AFTER RAPE OR SEXUAL ASSAULT” <<https://sacc.aware.org.sg/get-information/first-72-hours-rape-sexual-assault/>> (accessed 23 October 2021).

<sup>26</sup> Sexual Crime Info Pamphlet, *supra* n 15.

<sup>27</sup> Criminal Procedure Code, ss 281(1) and 281(2)(d).

<sup>28</sup> Attorney-General’s Chambers website, “Application of Gag Orders” <<https://www.agc.gov.sg/legal-processes/application-of-gag-orders>> (accessed 23 October 2021).

<sup>29</sup> McKenney Cornett, “Taking the Lead: A Strategic Analysis of Stealthing and the Best Route for Potential Civil Plaintiffs to Recover” 27 *Wm. & Mary J. Women & L.* 931 (2021) at 940.

<sup>30</sup> *Public Prosecutor v GCK and another matter* [2020] 1 SLR 486 at [89].

<sup>31</sup> *Ibid.*

the witness's demeanour in court, as well as the internal and external inconsistencies of the testimony.<sup>32</sup> The threshold required is high, and you should thus try to collect more evidence that could corroborate your testimony.

To date, there have been no recorded prosecutions under s 376H. However, in other countries, victims have mostly proven stealthing using a confession from the culprit. This is done using a pretext call, which is a recorded telephone call between the victim and the culprit.<sup>33</sup> The call is usually initiated by the victim under the supervision of police officers while the culprit is not aware that the call is being recorded.<sup>34</sup> Such calls are effective because culprits are more likely to discuss the incident if they believe the victim is alone and that they are not under investigation.<sup>35</sup>

For example, in *Diren*, the victim managed to extract a confession from the culprit via a pretext call.<sup>36</sup> During the call, the victim asked the culprit whether he had taken off the condom without asking her, and he confessed that he did.<sup>37</sup> This recording served as crucial evidence to prove the culprit's guilt as he refused to answer questions during police interrogations.<sup>38</sup>

Confessions can also be extracted via text messages, which was the case in *Hutchinson*.<sup>39</sup> There, the victim's boyfriend poked holes into a condom without her knowledge. The victim later confronted her boyfriend over text, and he confessed that he did it because he wanted a baby with her.<sup>40</sup> These messages, as well as evidence of past conduct showing that condoms were used as contraception whenever they had sexual intercourse were used to prove his guilt.<sup>41</sup>

Thus, you should attempt to collect evidence in a similar manner (*e.g.* by confronting your boyfriend in cooperation with the police). If you do not wish to speak to your boyfriend over the phone, you could also do it via text. Evidence showing your past stance on condom usage, (*e.g.* messages that shows that you requested your boyfriend to use condoms on previous occasions you had sex) would also bolster your case.

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<sup>32</sup> *Id.*, at [88].

<sup>33</sup> Harold Eisenga, "Using "Pretext" Phone Calls in Sexual Assault Investigations", *U.S. Department of Justice* (1999) at p 1 <<https://www.ojp.gov/pdffiles1/nij/179946.pdf>> (accessed 11 November 2021).

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Diren*, *supra* n 16, at [14].

<sup>37</sup> *Diren*, *supra* n 16, at [14].

<sup>38</sup> *Id.*, at [15].

<sup>39</sup> *R v Hutchinson* [2010] NSCA 3 ("*Hutchinson*").

<sup>40</sup> *Id.*, at [6].

<sup>41</sup> *Id.*, at [2].

### **III. Conclusion**

Stealththing is a serious criminal offence, and you should report your boyfriend to the police as soon as possible. If you feel intimidated by the process of going through the criminal justice system, you can turn to non-governmental organisations. For example, the Association of Women for Action and Research offers a Befriender programme. Befrienders are trained to provide information and emotional support for victims of sexual assault.<sup>42</sup> They can support you throughout the process by accompanying you to the police station to report your case as well as to the courts for the proceedings.<sup>43</sup>

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<sup>42</sup> Association of Women for Action and Research website, “POLICE AND COURT PROCESSES” <<https://sacc.aware.org.sg/get-information/police-and-court-processes/>> (accessed 23 October 2021).

<sup>43</sup> *Ibid.*