

## **A principled approach to sentencing: Ng Kean Meng Terence v Public Prosecutor**

### **I. Introduction:**

1. Sentencing has always been something of an art. The balance between doing justice to the facts of the case and judicial consistency has proven to be somewhat elusive, in no small part due to the medley of factors which might arise for consideration.<sup>1</sup>
2. Fortunately, the recent Court of Appeal (“CA”) decision in *Ng Kean Meng Terence v Public Prosecutor*<sup>2</sup> (“*Ng Kean Meng*”) has laid out a more principled approach to sentencing. While the CA proposed this framework in the context of sentencing rape offences, the author believes that the generality of the revised framework makes it suitable for application to other offences as well.

### **II. Key Facts:**

3. The Appellant pleaded guilty to two charges in relation to sexual acts which he committed, on two separate occasions, against a female who was then under 14 years of age (“the minor”).<sup>3</sup> The two had met at the Appellant’s cobbler stall, and became friends thereafter. The minor and her parents trusted the Appellant, allowing him to act as her caretaker and godfather.<sup>4</sup> However, the Appellant subsequently became sexually attracted to the minor, and committed the two offences in question.<sup>5</sup>
4. The High Court judge sentenced the Appellant to 13 years’ imprisonment and 12 strokes of the cane for the statutory rape charge, and 1 year’s imprisonment and 2 strokes of the cane for the digital penetration charge.<sup>6</sup> He ordered these sentences to run

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<sup>1</sup> *Tan Wei v PP* [2016] SGHC 72 at [1].

<sup>2</sup> *Ng Kean Meng Terence v PP* [2017] SGCA 37 (“*Ng Kean Meng*”).

<sup>3</sup> *Id.* at [75].

<sup>4</sup> *Id.* at [78].

<sup>5</sup> *Id.* at [79].

<sup>6</sup> *PP v Ng Kean Meng Terence* [2015] SGHC 164 at [21]

consecutively for an aggregate sentence of 14 years' imprisonment and 14 strokes of the cane.<sup>7</sup> The Court of Appeal affirmed this sentence and dismissed the appeal.<sup>8</sup>

### **III. State of the Law**

#### **A. *The Previous Framework***

5. The CA noted the murky state of existing sentencing structures for rape offenders,<sup>9</sup> and embarked on an extensive project to clarify the law. Previously, the sentencing of rape offenders was governed by guidelines laid down by the High Court in *PP v NF*, which classified rape offences into four categories, with each category carrying different sentencing benchmarks.<sup>10</sup> This analysis involved two stages: the court would first have to identify the correct benchmark which would act as the starting point, before further adjusting this starting point based on the aggravating and mitigating factors of the case.<sup>11</sup>
  
6. Before *PP v NF*, the general sentencing practice for rape was to decide on a single benchmark sentence, before adjusting the sentence to account for mitigating or aggravating factors.<sup>12</sup> However, it was observed that this approach caused inconsistency in sentencing, particularly in cases involving a vulnerable victim or abuse of trust and authority.<sup>13</sup> The *PP v NF* categories were thus formulated largely to resolve this inconsistency.<sup>14</sup>
  
7. However, this categorical approach meant that *PP v NF* could not apply comprehensively to the full spectrum of offences,<sup>15</sup> rendering it inapplicable in many cases.<sup>16</sup> Moreover, since *PP v NF* was designed to deal with a few specific classes of

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<sup>7</sup> *Ibid.*

<sup>8</sup> *Ng Kean Meng*, *Supra* n 2 at [91].

<sup>9</sup> *Ng Kean Meng*, *Supra* n 2 at [2].

<sup>10</sup> *PP v NF* [2006] SGHC 165 (“**PP v NF**”) at [20] – [38].

<sup>11</sup> *Id.* at [43] – [44].

<sup>12</sup> *Chia Kim Heng Frederick v PP* [1992] 1 SLR(R) 63.

<sup>13</sup> *Id.* at [18].

<sup>14</sup> *Ng Kean Meng*, *Supra* n 2 at [22].

<sup>15</sup> *Ng Kean Meng*, *Supra* n 2 at [12].

<sup>16</sup> *Ng Kean Meng*, *Supra* n 2 at [19]. The CA noted that the *PP v NF* framework had not even been cited in 30% of rape cases, showing that it is of limited applicability.

offences, it did not elaborate more on offences beyond those categories, causing the categories to appear somewhat arbitrary, with no clear criteria for distinguishing between them<sup>17</sup>.

8. Furthermore, the CA noted that the *PP v NF* framework did not clearly articulate how the statutory aggravating factors and minimum sentences were to be taken into account.<sup>18</sup> The CA noted that these problems have led to cases where the *PP v NF* framework could not be applied or adhered to, and that the framework needed to be revised for future use.<sup>19</sup>

#### **B. The Revised Framework**

9. The CA laid out a revised sentencing framework for rape offences, based on the New Zealand Court of Appeal case of *R v Taukei*<sup>20</sup>. This is a two-stage framework which aims to achieve consistency while maintaining proportionality in sentencing, by having regard to the “offence-specific” and “offender-specific” factors present in each case.<sup>21</sup> The former determines the relevant sentencing band (or range of sentences) to use as a starting point, whereas the latter seeks to calibrate a suitable sentence from that starting point.
10. At the first stage, the court will identify the relevant sentencing band, having regard only to “offence-specific” factors, i.e. factors which relate to the manner and mode by which the offence was committed as well as the harm caused to the victim.<sup>22</sup> This sentencing band defines the range of sentences which may usually be imposed for cases with such “offence-specific” traits.<sup>23</sup> The court will then decide precisely where the present offence falls within that sentencing band, to arrive at an “indicative starting point” which reflects the seriousness of the offending act.<sup>24</sup>

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<sup>17</sup> *Ng Kean Meng*, *Supra* n 2 at [13].

<sup>18</sup> *Ng Kean Meng*, *Supra* n 2 at [20]- [21].

<sup>19</sup> *Ng Kean Meng*, *Supra* n 2 at [22].

<sup>20</sup> *R v Taukei* [2005] 3 NZLR 372.

<sup>21</sup> *Ng Kean Meng*, *Supra* n 2 at [35].

<sup>22</sup> *Ng Kean Meng*, *Supra* n 2 at [39].

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

11. At the second stage, the court will consider “offender-specific” aggravating and mitigating factors and the weight to be placed on each factor.<sup>25</sup> At this stage, the court will consider factors which relate to the offender’s personal circumstances, including whether there was a plea of guilt.<sup>26</sup> Based on this, the court will calibrate the sentence from the “indicative starting point.”<sup>27</sup> The CA noted that exceptional cases may call for an adjustment beyond the relevant sentencing band, but that the judge should clearly explain the reasons for such departure.<sup>28</sup>
12. The CA believed that this revised framework would be able to address the weaknesses in the old *PP v NF* framework, especially in four areas:<sup>29</sup>
  - a. First, the revised framework clearly articulates the seriousness of each offence, allowing the court to express its disapproval of the offence itself even while it adjusts the sentence to take into account any extenuating circumstances;
  - b. Secondly, the revised framework promotes transparency and consistency in sentencing, since courts have to clearly articulate the precise weight being ascribed to a particular factor;
  - c. Thirdly, by maintaining a clear distinction between “offence-specific” and “offender-specific” factors, the revised framework clearly defines the type of factors which may affect the sentencing band itself, as opposed to merely adjusting the sentence afterwards; and
  - d. Fourthly, the revised framework covers the entire range of offending acts instead of specified pockets like the previous *PP v NF* framework. It thus allows the judge greater flexibility to arrive at a proportionate sentence.

#### **IV. Discussion**

13. The author believes that *Ng Kean Meng* represents a huge step forward in the law on sentencing, moving from a more rigid categorical approach to a more comprehensive framework. Unlike the rigid categorical approach in *PP v NF*, the revised framework

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<sup>25</sup> *Ibid.*

<sup>26</sup> *Ng Kean Meng*, *Supra* n 2 at [73].

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ng Kean Meng*, *Supra* n 2 at [62].

<sup>29</sup> *Ng Kean Meng*, *Supra* n 2 at [37].

can be applied across the entire spectrum of cases, allowing for a more proportionate response to any offence.

14. In its analysis, the CA had considered a long list of past rape cases,<sup>30</sup> and showed how the revised framework could be easily applied to them. The clear distinction between offence-specific and offender-specific factors meant that all these past cases were easily dissected, and the weight of each factor in the ultimate sentence was clearly identified, thus granting increased clarity and transparency to the sentencing process.
15. The beauty of *Ng Kean Meng* is that it provides an arguably universal framework for the analysis of criminal cases. Although the CA implemented the framework in response to a rape offence and tailored its analysis accordingly, the framework can be easily adapted for use in practically any other offence, albeit with sentencing bands tailored to that class of offences.
16. At present, there is no single approach to sentencing. Instead, there are four main existing approaches:<sup>31</sup>
  - a. the “single starting point” approach;
  - b. the “multiple starting points” approach;
  - c. the “benchmark” approach; and
  - d. the “sentencing matrix” approach.
17. However, the existing approaches each have their limitations. For instance, the “benchmarking” approach is not suitable where there is no archetypal case to benchmark against.<sup>32</sup> Using different approaches to address the distinct fact patterns of each offence may be a useful stop-gap measure, but it does not promote clarity and coherence in the sentencing process.
18. In contrast, the revised framework offers a single, overarching platform with which to analyse cases. Its formulation of “offence-specific” factors is principled enough to offer real assistance to judges, but is also broad and general enough to apply to arguably any

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<sup>30</sup> *Ng Kean Meng*, *Supra* n 2 at [51] – [61].

<sup>31</sup> *Ng Kean Meng*, *Supra* n 2 at [26].

<sup>32</sup> *Ng Kean Meng*, *Supra* n 2 at [28].

offence under the Penal Code. Every criminal case would certainly have factors specific to the offence as well as those personal to the offender. While these factors vary between offences (for example, the factors in murder cases and cybercrime cases are likely to be different), *Ng Kean Meng* provides an effective mechanism for judges to analyse these factors and articulate their respective impact on the final decision.

19. In fact, there is already evidence that the framework can be applied to different offences. The revised framework was founded in *R v Taueki*, which was a case of serious violence, whereas *Ng Kean Meng* is a case of rape. Since *Ng Kean Meng* was decided, the revised framework has also been extended to apply to offences of digital penetration as well (see *Pram Nair v Public Prosecutor* [2017] SGCA 56).
20. Furthermore, it is arguable that the revised framework does not conceptually represent a *de novo* departure from the existing approaches. The CA emphasized that the revised framework was not meant to be a radical departure from existing law, but sought to rationalize existing judicial practice.<sup>33</sup>
21. A close look at the existing approaches will reveal that the single starting point,<sup>34</sup> multiple starting points<sup>35</sup> and benchmark<sup>36</sup> approaches merely seek to establish an “indicative starting point” by reference to established categories before adjusting the sentence based on the aggravating/mitigating factors. However, these categories are generally determined by considering the specific characteristics of the offence in question, with any adjustments merely accounting for characteristics of the offender, such as young age. This is substantially similar to the revised framework, which uses “offence specific” factors to determine an “indicative starting point” and “offender specific” factors to adjust the sentence. The revised framework simply offers a more effective explanation for how these “indicative starting points” could be determined, thus allowing the court to account for novel situations which may not fit neatly into the old, established categories.

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<sup>33</sup> *Ng Kean Meng*, *Supra* n 2 at [74].

<sup>34</sup> *Ng Kean Meng*, *Supra* n 2 at [27].

<sup>35</sup> *Ng Kean Meng*, *Supra* n 2 at [29].

<sup>36</sup> *Ng Kean Meng*, *Supra* n 2 at [31].

22. Admittedly, the sentencing matrix approach also seeks to identify an “indicative starting point” and an associated range of sentences, by considering the “principal factual elements” of the case.<sup>37</sup> This approach already bears clear similarities to the revised framework, as the CA in *Ng Kean Meng* noted.<sup>38</sup> However, the revised framework is far more comprehensive and detailed than the traditional “sentencing matrix” approach, since it considers all offence-specific factors instead of only the “principal factual elements”, and more clearly distinguishes between factors.<sup>39</sup> It does not reject the conceptual foundations of the “sentencing matrix” approach, but merely extends it to situations where “principal factual elements” may differ between cases.
23. As such, adoption of the revised framework is not inconsistent with previous sentencing practices, but merely builds on the foundations laid by these old sentencing models. The previous approaches are suitable for certain cases and unsuitable for others, since they all involve certain assumptions, such as the existence of a common set of “principal factual elements” under the “sentencing matrix” approach. The author agrees with the CA that *Ng Kean Meng* provides a superior, overarching framework, by clearly articulating these unspoken considerations, without being inconsistent with the previous approaches.<sup>40</sup> There is no logical incoherence between the revised framework and the old approaches, and cases previously decided under the old approaches can be seamlessly subsumed under the revised framework.

## V. Conclusion

24. Effective sentencing guidelines must always ensure consistency and clarity while allowing for flexibility. *Ng Kean Meng* achieves all these aims, and thus presents an excellent opportunity to revamp our sentencing regime and provide the coherence as befits a world-class judicial system.

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<sup>37</sup> *Ng Kean Meng*, *Supra* n 2 at [33].

<sup>38</sup> *Ng Kean Meng*, *Supra* n 2 at [37].

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ng Kean Meng*, *Supra* n 2 at [74].