IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 09

Magistrate's Appeal No 9187 of 2016/01

Between

KUNASEKARAN S/O KALIMUTHU SOMASUNDARA

… Appellant

And

PUBLIC PROSECUTOR

… Respondent

JUDGMENT

[Criminal Law] — [Offences] — [Criminal force and assault] — [Outrage of modesty]

[Criminal Procedure and Sentencing] — [Appeal]

[Criminal Procedure and Sentencing] — [Sentencing] — [Principles] — [Outrage of modesty] — [s 354(1) Penal Code (Cap 224, 2008 Rev Ed)]

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11 January 2018 Judgment reserved.

Chan Seng Onn J:

Introduction

1 Mr Kunasekaran s/o Kalimuthu Somasundara, a 63-year-old male Singaporean ("the appellant"), faced a single charge under s 354(1) of the Penal Code (Cap 224, 2008 Rev Ed) ("the Penal Code") for using criminal force on Ms [C], who was 14 years old at the time of the incident ("the victim"), by touching her groin area from outside her school skirt with the fingers of his left hand, knowing it likely that he would thereby outrage her modesty. The appellant denied the victim's allegations and claimed trial. At the conclusion of the trial, the District Judge convicted the appellant and sentenced him to eight months' imprisonment: see *Public Prosecutor v Kunasekaran s/o Kalimuthu Somasundaram* [2017] SGDC 74 ("the GD"). Dissatisfied with the decision, the appellant appealed against both his conviction and sentence.

2 After hearing the submissions of both parties on appeal, I reserved judgment. I now set out my decision and the accompanying reasons.

The Prosecution's case

3 According to the victim, the incident occurred on 2 July 2013 at about 6.40am, when she was making her usual short commute to school. She boarded Singapore Bus Service ("SBS") bus no 17, which was a double decker bus, at the bus stop in front of Blk 108 Bedok North. The victim claimed that she saw the appellant board the same bus as her from the same bus stop.[1] After the victim boarded the bus, she stood next to the staircase leading to the second deck of the bus. She then saw the appellant coming down the corridor of the first deck towards her, and standing in front of her with his back facing her.[2] As the bus was moving, the victim felt something touch her groin area. When she looked down, she saw the appellant's left hand touching her groin area from the outside of her school skirt. The appellant's hands were curled up and moving.[3] In response, the victim first looked at the appellant, and when the touching persisted, she tried to push his hand away using her bag in her left hand. However, it was to no avail, as the appellant continued to touch her groin area.[4] The victim did not alert anyone else on the bus about what just happened because she was too shocked and frightened, and also thought that no one would believe her.[5] The victim also could not move away because the bus was crowded and there were two other girls directly behind her.[6] The incident lasted for about

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1 ROP, p 29, NE 8 July 2015, 14:4–12.

2 ROP, p 29, NE 8 July 2015, 14:13–21; ROP, p 48, NE 8 July 2015, 33:13–22.

3 ROP, p 30, NE 8 July 2015, 15:3–25.

4 ROP, pp 30–31, NE 8 July 2015, 15:26–16:2; ROP, p 59, NE 8 July 2015, 44:22–27.

5 ROP, pp 55–56, NE 8 July 2015, 40:28–41:9.

6 ROP, p 54, NE 8 July 2015, 39:13–17.

less than a minute, and only stopped when the victim managed to disembark as the bus reached the bus stop at her school.[7]

4 After the incident, the victim immediately told her friend, her form teacher and her school counsellor about the incident. She then made a police report on the same day at 9.35pm.[8] The next day, on 3 July 2013, the victim's father ("PW3") accompanied the victim on her commute to school. As they were walking towards the same bus stop, the victim saw the appellant on an SBS bus no 17 which passed them as it was leaving the bus stop. Although the victim informed PW3, PW3 did not see the appellant. PW3 then called the police, who advised him to accompany the victim to school again the next day.[9] On 4 July 2013, when the victim and PW3 were walking towards the bus stop and were about 10m away, the victim again saw the appellant standing at the bus stop, and alerted PW3. This time, PW3 saw the appellant. They did not follow the appellant when he boarded SBS bus no 17 as the victim was afraid. PW3 called the police, who informed him that they would set up an ambush the next day.[10] On 5 July 2013, the victim spotted the appellant at the bus stop again and informed PW3. PW3 recognised the appellant as the same person from the previous time he saw him on 4 July 2013. PW3 then informed the police officers, IO Seow Ming Huat ("PW4") and SSGT Muhd Faizal bin Haji Warin ("PW5"), who were waiting at the void deck near the bus stop.[11] PW4 and PW5 then came forward to arrest the appellant.

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7 ROP, p 31, NE 8 July 2015, 16:3–6.

8 ROP, pp 384–385.

9 ROP, pp 124–126, NE 9 July 2015, 5:3–7:23.

10 ROP, pp 126–128, NE 9 July 2015, 7:24–9:2.

11 ROP, pp 128–129, NE 9 July 2015, 9:3–10:18.

5 On the same day, after the appellant was brought back to the police station, a photo identification process was conducted, whereby the victim was asked to identify the appellant's photograph from a line-up of nine photographs of Indian men. The victim managed to correctly identify the appellant's photograph.[12]

The Defence's case

6 The appellant raised several defences in response to the allegations.

7 First, the appellant argued that the victim might have mistakenly identified him as the culprit because: (a) he might not have been on the same bus as the victim at the time of the incident, given that he usually prefers to board a single decker bus and does not board a double decker bus unless he is late for work; [13] (b) the victim could not have identified him given that his back was facing her and he never turned around to look at her while on the bus;[14] and (c) he does not own any orange polo shirt, given that he usually wears blue, white or chocolate-coloured shirts, and does not wear polo shirts or T-shirts.[15]

8 Next, the appellant argued that he could not have touched the victim in the manner described by the victim because: (a) while the victim alleged that he touched her with his left hand, it is his usual practice to hold his wallet in his left hand when he is on the bus;[16] (b) he suffers from injuries to his shoulders, which would cause him pain when he brings his hand to his back;[17] and (c) even

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12 ROP, pp 67–69, NE 8 July 2015, 52:31–54:1; ROP, p 155, NE 9 July 2015, 36:15–28.

13 ROP, pp 198–199, NE 1 October 2015, 3:31–4:18.

14 ROP, p 67, NE 8 July 2015, 52:21–30.

15 ROP, pp 206–207, NE 1 October 2015, 11:16–12:21.

16 ROP, p 202, NE 1 October 2015, 7:9–17.

17 ROP, p 205, NE 1 October 2015, 10:28–32.

if he had touched someone on the bus, it would have been entirely accidental, given that the bus was very crowded.[18]

The decision below

9 In finding the appellant guilty of the offence, the District Judge made the following findings:

(a) The victim had correctly identified the appellant as the person who had molested her on the bus. Her evidence was clear, consistent and unequivocal as to whom her molester was (the GD at [24]–[27]).

(b) The victim's account of the incident was "credible, consistent and unequivocal". Her evidence was unusually convincing (the GD at [32]–[34]).

(c) The evidence of the appellant's medical condition was "really neither here nor there". The evidence did not totally exclude the possibility that the appellant could have committed the offence in the manner described by the victim (the GD at [28]–[31]).

(d) The appellant's evidence was unconvincing, self-serving and contradictory (the GD at [35]–[39]). The appellant's credit was impeached pursuant to the Prosecution's application to impeach his credit under s 157 of the Evidence Act (Cap 97, 1997 Rev Ed) ("the EA") with reference to his statement recorded on 5 July 2013 pursuant to s 22 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC") ("the 5 July 2013 statement"). The appellant's attempts to explain the material discrepancies between his account in court and his 5 July 2013 statement were "totally inadequate" (the GD at [40]–[42]).

[18] ROP, p 206, NE 1 October 2015, 11:9–15.

10 The District Judge sentenced the appellant to eight months' imprisonment for the following reasons:

(a) While an imprisonment sentence is appropriate because the appellant touched the victim's groin area for a prolonged period, the sentencing benchmark of nine months' imprisonment with caning laid down by the High Court in *Public Prosecutor v Chow Yee Sze* [2011] 1 SLR 481 ("*Chow Yee Sze*") is not applicable because the appellant did not touch the victim's private parts *per se*. The appropriate starting point is thus in the range of five to six months' imprisonment (the GD at [51]–[53] and [62]–[63]).

(b) An uplift on the identified starting point was necessary because the following aggravating factors were present: (i) the incident took place on a public transport vehicle; (ii) the victim was only 14 years old at the time of the offence; and (iii) the victim suffered from emotional and psychological trauma as a result of the incident (the GD at [55]–[59]).

(c) Ultimately, the appropriate sentence should be eight months' imprisonment because: (i) although the appellant, being above the age of 50, was not eligible for caning, an additional imprisonment term in lieu of caning was not necessary because the present offence was not one for which caning was an appropriate sentence in the first place (the GD at [60]); and (ii) the appellant was a first-time offender who volunteered actively (the GD at [61]).

Issues to be determined

11 In respect of the appeal against conviction, the issues that arise for my determination are:

(a) whether the victim correctly identified the appellant; and

(b) whether the victim's evidence was "unusually convincing".

12 As for the appeal against sentence, given that the appellant's appeal against sentence is only brought on the basis that the sentence imposed is manifestly excessive,[19] the only issue that I have to decide is whether the sentence of eight months' imprisonment imposed is manifestly excessive.

The appeal against conviction

13 Having carefully considered all the evidence before me, I do not think that the District Judge's decision to convict the appellant was wrong in law or had been reached against the weight of the evidence before him.

14 It is trite that in dealing with appeals against conviction, the role of the appellate court is not to reassess the evidence in the same way that a trial judge would, but to consider: (a) whether the trial judge's assessment of the credibility and veracity of the witness is plainly wrong or against the weight of evidence; (b) whether the trial judge's verdict is wrong in law and therefore unreasonable; and (c) whether the trial judge's decision is inconsistent with the material objective evidence on record, bearing in mind that an appellate court is in as good a position to assess the internal and external consistency of the witnesses' evidence, and to draw the necessary inferences of fact from the circumstances of the case (*Pram Nair v Public Prosecutor* [2017] SGCA 56 ("*Pram Nair*") at

[19] ROP, p 11; Petition of Appeal, para 16.

[55] and *Haliffie bin Mamat v Public Prosecutor and other appeals* [2016] 5 SLR 636 ("*Haliffie*") at [31]–[32]).

Whether the victim correctly identified the appellant

15 In my view, the District Judge rightly found that the victim had correctly identified the appellant as the culprit.

16 In *Heng Aik Ren Thomas v Public Prosecutor* [1998] 3 SLR(R) 142 ("*Thomas Heng*"), M Karthigesu JA (delivering the grounds of judgment of the Court of Appeal) adapted the guidelines laid down by Lord Widgery CJ (with whom Roskill and Lawton LJJ agreed) in the English Court of Appeal decision of *R v Turnbull* [1977] QB 224 for assessing the reliability of identification evidence and reformulated them into the following three-step test (at [33]–[35]):

> 33 … The first question which a judge should ask when encountering a criminal case where there is identification evidence, is *whether the case against the accused depends wholly or substantially on the correctness of the identification evidence which is alleged by the Defence to be mistaken.*
>
> 34 If so, the second question should be this. *Is the identification evidence of good quality, taking into account the circumstances in which the identification by the witness was made?* A non-exhaustive list of factors which could be considered include the length of time that the witness observed the accused, the distance at which the observation was made, the presence of obstructions in the way of the observation, the number of times the witness had seen the accused, the frequency with which the witness saw the accused, the presence of any special reasons for the witness to remember the accused, the length of time which had elapsed between the original observation and the subsequent identification to the police and the presence of material discrepancies between the description of the accused as given by the witness and the actual appearance of the accused. In considering the circumstances in which the identification was made, the judge should take note of any specific weaknesses in the identification evidence. If after evaluation of the identification evidence, the judge is satisfied that the quality of the identification is good,

> he may then go on to safely assess the value of the identification evidence.
>
> 35 Where the quality of the identification evidence is poor, the judge should go on to ask the third question. *Is there any other evidence which goes to support the correctness of the identification.* If the judge is unable to find other supporting evidence for the identification evidence, he should then be mindful that a conviction which relies on such poor identification evidence would be unsafe. The supporting evidence need not be corroboration evidence of the kind required in *R v Baskerville* [1916] 2 KB 658. What the supporting evidence has to be is evidence that makes the judge sure that there was no mistake in the identification. …
>
> [emphasis added]

17 Applying the *Thomas Heng* ([16] *supra*) three-step test to the facts of the present appeal, it is first common ground that the present case depends substantially on the correctness of the victim's identification of the appellant.

18 In respect of the second question, I am satisfied that the victim's identification evidence is of good quality. First, the victim had ample opportunity to observe the appellant up close for a sustained period of time while on the bus:

(a) The victim had a good opportunity to observe the appellant for the entire time when he was boarding the bus and moving to stand next to her. This is clear from her testimony at trial that when she first boarded the bus and stood next to the staircase leading to the second deck, she noticed the appellant boarding the bus, moving down the corridor of the first deck and standing in front of her.[20]

(b) The victim also managed to clearly observe the appellant from up close during the entire incident. The appellant suggested that the victim could not have gotten a clear look of him because *he stood with*

[20] ROP, p 80, NE 8 July 2015, 65:11–16.

his back facing the victim, and never once turned to look at her while he was on the bus.[21] I reject the appellant's submission because the victim clarified that what she meant in her oral testimony was that *she was standing behind the appellant, with his left side facing her*.[22] Hence, while it might be true that the appellant never turned to look at her during the entire incident, the victim clearly could observe the left profile of the appellant during the entire bus ride, which lasted for about three to five minutes, while standing directly next to the appellant.[23]

19 Secondly, there were special reasons for the victim to vividly remember the appellant:

(a) First, the appellant had a distinctive physical appearance. As he had himself admitted at trial, he has a huge paunch.[24] Also, it was the victim's evidence in her First Information Report ("P1") that the appellant was wearing an "orange striped polo-t". Leaving aside for the moment whether the appellant was indeed wearing a polo T-shirt (which I will address below at [21(b)]), the appellant himself agreed that orange is a distinctive colour that people usually do not wear.[25]

(b) Secondly, while the victim might indeed ordinarily not remember her fellow passengers on a public bus, the fact that she had been molested would have incited her to take a good look at the appellant and commit his face to memory. This is evident from Yong Pung How CJ's previous observation that a victim of molest would have good

21 ROP, p 67, NE 8 July 2015, 52:21–30.

22 ROP, pp 80–81, NE 8 July 2015, 65:22–66:6.

23 ROP, p 83, NE 8 July 2015, 68:19–27.

24 ROP, p 207, NE 1 October 2015, 12:13–21.

25 ROP, pp 206–207, NE 1 October 2015, 11:30–12:3.

reason to remember the molester because it would be "precisely the fact that she had been molested which would have caused [her] to take a really good look at her molester and commit his face to memory": *Public Prosecutor v L (a minor)* [1999] 1 SLR(R) 1041 at [28], cited with affirmation in *Ye Wei Gen v Public Prosecutor* [1999] 2 SLR(R) 1074 at [19].

20 Thirdly, the victim was able to accurately identify the appellant to PW3 on each of the next three days after the incident, and also to the police when the appellant was being arrested by PW4 and PW5 on the third day after the incident. The victim was also subsequently able to correctly identify the appellant from a photograph line-up comprising of nine Indian men. In my view, the fact that all these were achieved without the assistance of any photographs or CCTV footage showed the conviction that the victim had in her identification of the appellant. The fact that the victim's subsequent identification of the appellant to the police took place just three days after her original observation of the appellant also enhanced the probative value of her identification evidence.

21 Finally, while there were indeed discrepancies between the victim's description of the appellant in P1 and the actual appearance of the appellant, I do not think that these discrepancies are material enough to diminish the probative value of the victim's identification evidence. In P1, the victim states that the appellant is a "Male Indian … in his 30s, plump built, height about 1.7m tall and wearing a[n] orange striped polo-t and a pair of black pants".[26]

(a) The first discrepancy is that the appellant was in fact about 60 years old at the time of the incident, and is taller than 1.7m. I accept the victim's evidence that the height recorded in P1 was different from the

[26] ROP, p 384, P1.

appellant's actual height because the victim was merely relying on the police officer's prompts in agreeing that the appellant was approximately of the police officer's height. I also accept the Prosecution's submission that the victim was not able to furnish the police with an accurate description of the appellant's height and age when P1 was being recorded because of her lack of proficiency in estimating a person's height and age, which in turn is entirely reasonable given that she was only 14 years old at the time of the incident.[27] What is critical is that at the end of the day, although the victim was unable to give an accurate verbal description of the appellant, she was able to identify the appellant on multiple occasions after the incident.

(b) The second discrepancy is that whereas the victim had described that the appellant was wearing an orange striped polo shirt, the appellant claimed that he did not own an orange polo shirt, and would usually wear white, blue or chocolate-coloured shirts. In the first place, I do not think that the distinction between a *polo shirt* and a *shirt* is a material one in this context. The victim was unable to give an accurate verbal description of the *type* of shirt that the appellant was wearing, and was once again heavily reliant on the police officer's suggestion that the appellant was wearing a polo shirt.[28] The victim subsequently clarified at trial that the appellant was wearing a button up shirt, *ie*, a shirt with buttons from the top to the bottom of the front of the shirt. In my view, contrary to the appellant's suggestion that the victim was making up her evidence at trial, it is perfectly reasonable for the victim not to have known how to describe the appellant's top at the time of the incident given her age at the material time. Indeed, the fact that counsel for the

27 Respondent's Submissions dated 24 July 2017, paras 28–31.

28 ROP, p 73, NE 8 July 2015, 58:3–11.

> appellant was himself similarly imprecise in his various references to a polo shirt, a shirt, and a T-shirt at trial serves to bring home this point.[29] Turning then to address the *colour* of the appellant's shirt, I also do not think that the appellant's claim that he did not own an orange-coloured shirt is detrimental to the victim's identification evidence. While it is true that the police should ideally have searched the appellant's house and seized the orange striped shirt that was mentioned by the victim in P1, this only goes towards the lack of supporting evidence. The appellant's bare assertion that he did not own an orange-coloured shirt is insufficient to show that the victim's evidence that the appellant was wearing one on the day in question is necessarily untrue.

22 As for the third question, even assuming that the victim's identification evidence is not of a sufficiently good quality, there is supporting evidence that corroborates the victim's identification of the appellant as the culprit. At trial, Mr Dennis Siah Keng Siong, an executive from SBS, testified that SBS's bus records showed that the appellant and victim boarded the exact same bus at the exact same bus stop on 2 July 2013.[30] In other words, it is incontrovertible that the appellant and victim were on the same bus no 17 at the time of the incident. Further, given that it was the evidence of neither the appellant nor the victim that either of them had moved up to the second deck of the bus during their respective commutes, this places the appellant at the same deck as the victim in the same bus. This makes the victim's misidentification of the appellant an unlikely proposition.

23 Taking into account the entirety of the identification evidence, I find that the victim's identification evidence is of good quality. Moreover, it is also

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[29] ROP, p 61, NE 8 July 2015, 46:18–26.

[30] ROP, p 297, NE 5 October 2015, 34:1–8.

backed up by independent supporting evidence. Hence, I am convinced that the victim did indeed correctly identify the appellant as the culprit.

Whether the victim's testimony was "unusually convincing"

24 In my view, the victim's evidence was "unusually convincing".

The applicable legal principles

25 When a conviction is based solely on the bare words of the complainant and nothing else, the complainant's testimony can constitute proof beyond reasonable doubt on its own, only when it is so "unusually convincing" as to overcome any doubts that might arise from the lack of corroboration. In other words, if the evidence of the complainant is not unusually convincing, the conviction on the sole basis of the complainant's testimony would be unsafe unless there is further corroborative evidence. See *Pram Nair* ([14] *supra*) at [57] and *Haliffie* ([14] *supra*) at [27] and [30].

26 A complainant's testimony would be considered "unusually convincing" only if the testimony, "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". A trial judge evaluates whether this standard is met by weighing the demeanour of the complainant alongside both the internal and external consistencies found in the complainant's testimony. See *Haliffie* ([14] *supra*) at [28] citing *Public Prosecutor v Mohammed Liton Mohammed Syeed Mallik* [2008] 1 SLR(R) 601 at [39].

27 Further, it is necessary for a court to assess *all* the relevant evidence when determining whether the Prosecution's case is proven beyond reasonable

doubt. Hence, a court, when considering whether the complainant's evidence is "unusually convincing", must "assess the complainant's testimony against that of the accused", such that the complainant is found to be "unusually convincing" to the extent that "the court can safely say his account is to be unreservedly preferred over that of another": *XP v Public Prosecutor* [2008] SGHC 107 at [34] *per* V K Rajah JA.

28 Synthesising the foregoing principles for the purposes of my analysis in the present appeal, I gather that when an appellate court is tasked with determining whether the complainant's testimony is "unusually convincing", the court has to evaluate: (a) the internal and external consistency of the complainant's testimony (but not the demeanour of the complainant); and (b) the appellant's evidence. It is only if the complainant's evidence is not "unusually convincing" that further corroborative evidence would be needed to sustain the conviction.

Evaluation of the victim's evidence

29 Having scrutinised the evidence of the victim, I find that the victim's evidence was both internally and externally consistent. In this regard, I agree with the District Judge's finding that the victim's account of the incident was "credible, consistent, and unequivocal" enough to be considered "unusually convincing".

30 First, the victim's account was internally consistent. On the whole, this was evident because the victim gave a measured and systematic account of the entire incident, clearly recounting where she and the appellant were standing at the time of the offence and how the appellant had touched her groin area. In my view, her vivid description of the manner in which the appellant had touched her groin area made it clear that the appellant had touched her intentionally (and

not accidentally, as he had alleged). Additionally, the credibility of the victim's account was enhanced by the lack of embellishment of her evidence in court. For example, she was candid in admitting under cross-examination that she does not keenly observe the people around her when she is commuting on the bus. Indeed, I would have found it dubious if the victim did not make this concession, given that most individuals probably do not keep a close watch of their fellow passengers during their daily commutes in the absence of anything unusual.

31 Also, the victim was able to provide logical and rational explanations for the case theories that the appellant had sought to advance in his own defence at trial. For example, in response to the appellant's suggestion that she could not have seen the appellant at all because she did not usually observe who was around her while on the bus, the victim explained that she was able to identify the appellant as the culprit in this case given that she specifically recalled seeing the appellant walking down the corridor of the first deck of the bus towards the staircase, where she was. Next, in response to the appellant's suggestion that it was suspicious for her not to alert any of the other passengers around her when she was allegedly molested, the victim explained that she did not alert anyone else on the bus about what just happened only because she was too shocked and frightened, and also thought that no one would believe her.[31] I find these to be perfectly reasonable justifications in response to the doubts that the appellant had attempted to sow in the victim's testimony.

32 For the above reasons, I agree with the Prosecution's submission that the substantive core of the victim's evidence remained unshaken, and her credibility remained unblemished, even after the victim had been subjected to the rigours of cross-examination. Therefore, I find that the victim's evidence was internally consistent.

[31] ROP, pp 55–56, NE 8 July 2015, 40:28–41:9.

33 Secondly, the victim's account was externally consistent. First, regarding her subsequent identification of the appellant on multiple occasions on the days immediately following the incident, her evidence is consistent with that of her father, PW3. In this regard, PW3's evidence is consistent with the victim's evidence specifically regarding the days on which the victim saw the appellant at the same bus stop, the colour of the appellant's shirt that the victim claimed that she saw the appellant wear, the fact that PW3 is "physically big", and how PW3 had arranged with the police for the ambush of the appellant on 5 July 2013. Second, the victim's oral testimony regarding the entire incident is also consistent with her statement given when she made the police report in the evening of the day on which the incident occurred, P1. P1 provides the following description of the incident by the victim:

> … It was a double deck bus and it was crowded when I boarded the bus. I was standing on the lower deck, on the left side of the stairs, facing the alighting door. When I was at the next bus stop, there were many other commuters waiting to board the bus. As such, the passengers on board were moving in. There was this Male Indian who moved in and stood infront [*sic*] of me. He was standing side ways, with his left side facing me. Out of a sudden, I felt a hand touching my private part area. I looked down and saw that the said man's hand was touching my private part area. I tried to use my left hand to push his hand away. But to no avail.

As is apparent from the foregoing discussion of the victim's account of the events at trial, the account provided by the victim in P1 remained broadly consistent throughout the victim's entire oral testimony at trial. Therefore, I also find that the victim's evidence was externally consistent.

Evaluation of the appellant's evidence

34 I also do not think that the appellant's evidence is sufficient to cast any reasonable doubt on the finding that the victim's evidence was "unusually

convincing". I take the view that the appellant's credit was rightly impeached at trial.

35 The material portions of the 5 July 2013 statement, where the appellant described the incident, are reproduced as follows:

> 3 … The bus 17 came and I boarded the bus. There were a lot of people boarding the same bus. I was in the middle group to board the bus. I used my EZ-link card … to board the bus. The bus was very crowded. Usually I will stand near to the driver's area as there is railing. From Monday to Thursday of this week, I remembered I have been standing around the area.
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> 4 The bus I took was more with school children. The children are from St Anthony School. Usually during school day, the bus is crowded until the bus stop near St Anthony School. The students will alight and the bus will not be so crowded.
>
> 5 I remember that from Monday to Thursday, I had taken bus 17 and whilst on my way to work, the bus was crowded. I was standing amidst the passenger. *In this 4 days period, I remember there was one occasion I had accidentally touched a girl with the back of my left palm. The bus was moving and it was crowded during this moment. I can remember this girl pushing my hand away. I did not say sorry to her.*
>
> 6 This is the only time that such incident happened to me. The touch is accidental. I did not see who this girl is.
>
> [emphasis added]

36 The District Judge found the following material inconsistencies between the appellant's oral testimony at trial and the segments of the 5 July 2013 statement reproduced above, which the appellant failed to provide satisfactory explanations for:

> (a) First, the appellant testified at trial that he "never touched anyone at all" on 2 July 2013. However, at para 5 of the 5 July 2013 statement, the appellant stated that he could recall a single occasion when he had accidentally touched a girl with the back of his left palm. When

confronted with this inconsistency at trial, the appellant explained that what he actually meant was that when he was giving his statement, he merely thought that he *might* have accidentally touched someone and not known about it due to the numbness that he suffers in his hand.[32]

(b) Secondly, the appellant testified at trial that he could not remember if he felt someone pushing his hand at the material time. However, at para 5 of the 5 July 2013 statement, the appellant stated that he could recall the particular girl whom he had accidentally touched pushing his hand away. When confronted with this inconsistency at trial, the appellant insisted that he could not remember if someone had pushed his hand away because it is common to be pushed and shoved in a crowd.[33]

(c) Thirdly, the appellant testified at trial that he could not have touched the victim with his left hand because he would usually hold his wallet on his left hand. However, the appellant failed to make any mention of this fact when making the 5 July 2013 statement. When asked about this omission, the appellant explained that he simply did not mention this fact because he was not asked about it.[34]

37 I agree with the District Judge that the explanations provided by the appellant for the discrepancies between the 5 July 2013 statement and his oral testimony were woefully inadequate for the following two reasons:

(a) Regarding the appellant's allegation that the recorder had erroneously taken down his responses, the appellant did not deny that

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32 ROP, pp 243–244, NE 2 October 2015, 26:8–27:32.

33 ROP, pp 245–247, NE 2 October 2015, 28:1–30:19.

34 ROP, p 247, NE 2 October 2015, 30:20–28.

the 5 July 2013 statement was voluntarily taken and that he agreed with the contents of the statement.[35] Also, the appellant agreed that he understood what was interpreted to him by the interpreter during the statement-taking.[36] I thus do not accept his explanation that what he had meant to convey in the 5 July 2013 statement was that he *might* have accidentally touched a girl. A plain and literal reading of para 5 of the 5 July 2013 statement clearly does not support the speculative interpretation that the appellant now tries to accord to the statement.

(b) I also do not accept the appellant's explanation that he did not mention his wallet in the 5 July 2013 statement because he was not informed of the details of his charge.. While it is true that the charge had not yet been read to the appellant at that stage, I accept the Prosecution's submission that the appellant had already known that he was facing a potentially serious charge regarding an allegation made by the victim that he had outraged her modesty by touching her groin area. Hence, the onus ought to have been on the appellant to share all relevant and pertinent information with the police in his defence, including the material fact that he could not have touched the victim as he was holding onto the railing of the bus with his right hand and his wallet with his left.

Therefore, the District Judge rightly found that the appellant's credit was impeached at trial pursuant to s 157(*c*) of the EA.

38 At this juncture, it would be appropriate for me to clarify that insofar as the District Judge relied on the contents of the 5 July 2013 statement to establish that the appellant had in fact admitted to having "accidentally touched a girl

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35 ROP, p 244, NE 2 October 2015, 27:3–27.

36 ROP, p 254, NE 2 October 2015, 37:5–17.

with the back of his left pal[m]", and that he could "*remember this girl pushing [his] hand away*" [emphasis in original] (see the GD at [35]), this is impermissible. At trial, the 5 July 2013 statement was never admitted into evidence. The Prosecution had elected not to admit the 5 July 2013 statement under s 147(3) of the EA as evidence of any fact stated therein of which direct oral evidence by the appellant would otherwise be admissible; instead, the Prosecution only elected to rely on the 5 July 2013 statement under s 157(*c*) of the EA as proof of a former statement inconsistent with portions of the appellant's oral evidence, in order to impeach the appellant's credit.[37] Hence, the Prosecution should now not be entitled to substitute various parts of the appellant's oral testimony at trial that were inconsistent with the 5 July 2013 statement with the contents of the statement.

39 Having said that, given that I have found that the appellant's credit was rightly impeached at trial, it must surely follow that little or no weight should be placed on the appellant's evidence. *A fortiori*, regardless of whether parts of the 5 July 2013 statement may be used to substitute parts of the appellant's oral testimony, the appellant's evidence should have no impact on the finding that the victim's evidence was "unusually convincing", which was made on the basis that the victim's testimony was both internally and externally consistent.

Conclusion on the appeal against conviction

40 For the reasons stated above, I find that the victim had correctly identified the appellant as the perpetrator of the offence, and also find that the victim's evidence was so "unusually convincing" as to be sufficient to sustain the appellant's conviction on its own. Accordingly, I dismiss the appellant's appeal against conviction.

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[37] ROP, pp 239–240, NE 2 October 2015, 22:32–23:2; ROP, p 290, NE 5 October 2015, 27:24–32.

The appeal against sentence

41 Turning now to the appeal against sentence, I do not think that the sentence of eight months' imprisonment imposed on the appellant is manifestly excessive.

The applicable legal principles

42 It is trite that an appellate court possesses a limited scope of intervention in disturbing the sentences meted out by a lower court, and should only find a sentence to be "manifestly excessive" if there is a need for a *substantial alteration* to the sentence to remedy the injustice, rather than an insignificant correction: *Public Prosecutor v UI* [2008] 4 SLR(R) 500 at [13].

43 Section 354 of the Penal Code reads as follows:

> **Assault or use of criminal force to a person with intent to outrage modesty**
>
> **354.—**(1) Whoever assaults or uses criminal force to any person, intending to outrage or knowing it to be likely that he will thereby outrage the modesty of that person, shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with caning, or with any combination of such punishments.
>
> (2) Whoever commits an offence under subsection (1) against any person under 14 years of age shall be punished with imprisonment for a term which may extend to 5 years, or with fine, or with caning, or with any combination of such punishments.

44 As a starting position, the oft-cited sentencing benchmark in relation to outrage of modesty under s 354(1) of the Penal Code is that where a victim's private parts or sexual organs are intruded upon, nine months' imprisonment and caning would be imposed: *Chow Yee Sze* at [9], quoting *Chandresh Patel v Public Prosecutor* [1995] 1 CLAS News 323 *per* Yong CJ and cited with

approval in *Public Prosecutor v BLV* [2017] SGHC 154 at [140]. However, recent developments in the local jurisprudence regarding sentencing for sexual offences necessitate the revisiting of this approach to sentencing for s 354(1) offences. It is thus to this specific endeavour that I now direct my mind.

45 In *GBR v Public Prosecutor* [2017] SGHC 296 ("*GBR*"), See Kee Oon J laid down the following sentencing framework regarding offences under s 354(2) of the Penal Code for aggravated outrage of modesty committed against a child under 14 years of age:

> (a) The court should first consider the following offence-specific factors (at [27]–[30]):
>
> > (i) The degree of sexual exploitation. This includes considerations of the part of the victim's body the accused touched, how the accused touched the victim, and the duration of the outrage of modesty.
> >
> > (ii) The circumstances of the offence. These include considerations of: (A) the presence of premeditation; (B) the use of force or violence; (C) the abuse of a position of trust; (D) the use of deception; (E) the presence of other aggravating acts accompanying the outrage of modesty; and (F) the exploitation of a vulnerable victim.
> >
> > (iii) The harm caused to the victim, whether physical or psychological, which would usually be set out in a victim impact statement.
>
> (b) Based on the consideration of the foregoing offence-specific factors, the court should ascertain the gravity of the offence and then

place the offence within any of the following three bands of imprisonment (at [31]–[38]):

(i) Band 1: This includes cases that do not present any, or at most one, of the offence-specific factors, and typically involves cases that involve a fleeting touch or no skin-to-skin contact, and no intrusion into the victim's private parts. Less than one year's imprisonment should be imposed, and caning is generally not imposed, although this depends on the precise facts and circumstances of each case.

(ii) Band 2: This includes cases where two or more of the offence-specific factors present themselves. The lower end of the band involves cases where the private parts of the victim are intruded, but there is no skin-on-skin contact. The higher end of the band involves cases where there is skin-on-skin contact with the victim's private parts. It would also involve cases where there was the use of deception. One to three years' imprisonment, and at least three strokes of the cane, should be imposed.

(iii) Band 3: This includes cases where numerous offence-specific factors present themselves, especially factors such as the exploitation of a particularly vulnerable victim, a serious abuse of a position of trust, and/or the use of violence or force on the victim. Three to five years' imprisonment, and at least six strokes of the cane, should be imposed.

(c) Finally, the court should also consider the aggravating and mitigating factors that relate to the offender generally but which are not offence-specific (*ie*, offender-specific factors). Aggravating factors include the number of charges taken into consideration, the lack of

> remorse, and relevant antecedents demonstrating recalcitrance. Mitigating factors include a timeous plea of guilt or the presence of a mental disorder or intellectual disability on the part of the accused that relates to the offence (at [39]). The court should also consider whether there are grounds to enhance the sentence by way of the imposition of imprisonment in lieu of caning if the accused is certified to be unfit for caning because he is above 50 years of age at the time of caning (s 325(1)(*b*) of the CPC), or is certified to be medically unfit for caning (s 331 of the CPC) (at [40]).

46 Indeed, I note that this very framework was in fact adopted from the "two-step sentencing bands" approach laid down by the Court of Appeal in *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 ("*Terence Ng*") in the context of conducting a fundamental review of the sentencing framework for rape. In *Terence Ng*, the Court of Appeal, following a compendious analysis of the various types of guideline judgments that may be employed (*ie*, the "single starting point" approach, the "multiple starting points" approach", the "benchmark" approach, and the "sentencing matrix" approach), preferred the methodology espoused by the New Zealand Court of Appeal in *R v Taueki* [2005] 3 NZLR 372 (see *Terence Ng* at [26]–[38]). The "two-step sentencing bands" approach set out by the Court of Appeal may be summarised thus (at [39]):

> (a) First, the court should identify under which band the offence in question falls within, having regard to the factors which relate to the manner and mode by which the *offence* was committed as well as the harm caused to the victim (we shall refer to these as "offence-specific" factors). Once the sentencing band, which defines the range of sentences which may *usually* be imposed for a case with those offence-specific features, has been identified the court should then determine precisely where within that range the present offence falls in order to derive an "indicative starting point", which reflects the intrinsic seriousness of the *offending act*.

> (b) Secondly, the court should have regard to the aggravating and mitigating factors which *are personal to the offender* to calibrate the appropriate sentence for that offender. These "offender-specific" factors relate to the offender's particular personal circumstances and, by definition, *cannot* be the factors which have already been taken into account in the categorisation of the offence. In exceptional circumstances, the court is entitled to move outside of the prescribed range for that band if, in its view, the case warrants such a departure.
>
> [emphasis in original]

47 In my view, the "two-step sentencing bands" approach, as set out by the Court of Appeal in *Terence Ng* ([46] *supra*) for the purposes of sentencing for rape, and suitably modified by See J in *GBR* ([45] *supra*) for the purposes of sentencing for aggravated outrage of modesty under s 354(2) of the Penal Code has much to commend it. It is a reliable methodology to adopt in the context of sentencing sexual offences because it improves clarity, transparency, coherence and consistency in sentencing such offences. The court in *Terence Ng* elaborates in this regard as follows (at [37]):

> (a) First, it allows the court to clearly articulate the seriousness of the offence while allowing the sentence to be tailored according to the circumstances of each case. This promotes the communicative function of the criminal law, as it allows the court to express disapprobation for the *act* even if there are exceptional personal mitigating circumstances which might warrant a significant sentencing discount for the *offender*.
>
> (b) Secondly, it promotes transparency and consistency in reasoning. Courts will have to openly and clearly articulate the precise weight that is being ascribed to a particular factor. This is especially important when an adjustment is made to account for the personal circumstances of the offender, where the dangers of inconsistency and arbitrariness are greater. If applied consistently over a period of time, the accumulation of transparently reasoned precedents will undoubtedly help future courts to accurately benchmark the seriousness of an offence against others of like nature.
>
> (c) Thirdly, it will promote greater coherence. The dichotomy between *offence*-related factors and *offender*-specific factors is conceptually sound (see, generally, Jessica Jacobson and Mike Hough, *Mitigation: The Role of Personal Factors in Sentencing* (Prison Reform Trust, 2007) at p *vii*) …

> (d) Fourthly, we consider that the approach of having several sentencing "bands" which are defined in general terms has significant advantages … . Chiefly, these advantages are (i) it will cover the entire range of offending acts instead of several select pockets of offending; and (ii) the use of sentencing ranges rather than fixed starting points will afford courts with greater flexibility to arrive at a proportionate sentence.
>
> [emphasis in original]

48 Accordingly, while the framework in *GBR* ([45] *supra*) was proposed by See J in the context of offences of aggravated outrage of modesty under s 354(2) of the Penal Code, I take the view that it should similarly be applicable to offences of outrage of modesty *simpliciter* under s 354(1). I see no reason why the three main categories of offence-specific aggravating factors identified by See J for s 354(2) offences (*ie*, the degree of sexual exploitation, the circumstances of the offence, and the harm caused to the victim), which bear upon the assessment of the appropriate sentence, should be any different from those for s 354(1) offences. The only distinction between both provisions, on which the significant uplift in the imprisonment sentences that may be imposed for s 354(2) is premised on, is the age of the victim against whom the offence is committed: when the victim of the outrage of modesty is a child under 14 years of age, Parliament has signalled the additional gravity associated with the outrage of modesty offence by raising the statutory maximum punishment by two and a half times from two years' imprisonment for s 354(1) offences to five years' imprisonment for s 354(2) offences.

49 In my view, given that the distinction between the statutorily permitted sentencing outcomes available for s 354(1) and s 354(2) offences is essentially premised on the difference in the age of the victim, the sentencing bands of imprisonment that were carefully calibrated by See J in *GBR* ([45] *supra* at [31]) to reflect the full spectrum of possible sentences for s 354(2) offences could accordingly be scaled down linearly to cater to the statutory maximum

punishment of two years' imprisonment for s 354(1) offences. Therefore, the sentencing bands that would take into account the full spectrum of sentences that may be imposed for s 354(1) offences should be as follows:

(a) Band 1: less than five months' imprisonment;

(b) Band 2: five to 15 months' imprisonment; and

(c) Band 3: 15 to 24 months' imprisonment.

50 How then can this "two-step sentencing bands" approach be reconciled with the "well-established sentencing benchmark" of nine months' imprisonment with caning as laid down in *Chow Yee Sze* ([10] *supra* at [9])? In my view, *Chow Yee Sze* still remains instructive in respect of its guidance that the starting point in respect of the imposition of *caning* is where the outrage of modesty involves the intrusion upon the victim's private parts or sexual organs. Indeed, this was similarly recognised by See J in *GBR* ([45] *supra* at [31]).

51 As for the suggestion in *Chow Yee Sze* ([10] *supra*) that the benchmark imprisonment term is nine months' imprisonment as a starting point, I am of the respectful view that this benchmark should no longer be followed. To this end, I make the following two observations:

(a) First, as a matter of principle, the approach adopted by the court in *Chow Yee Sze* is not suitable for the sentencing of offences under s 354(1) of the Penal Code. *Chow Yee Sze* embraces the "benchmark" approach, which requires the court to identify an archetypal case (or a series of archetypal cases) and calibrate the sentence which should be imposed in respect of such a case. The problem with this approach is that the "notional case must be defined with some specificity, both in

terms of the factual matrix of the case in question as well as the sentencing considerations which inform the sentence that is meted out, in order that future courts can use it as a touchstone" (*Terence Ng* ([46] *supra*) at [31]). In the context of the benchmark set in *Chow Yee Sze*, the court merely refers to the intrusion upon the victim's private parts or sexual organs as the basis upon which nine months' imprisonment with caning should be imposed. No other details are furnished to "allow future judges to determine what falls within the scope of the 'norm', and what exceptional situations justify departure from it" (*Abu Syeed Chowdhury v Public Prosecutor* [2002] 1 SLR(R) 182 at [15]). Additionally, the benchmark approach is "particularly suited for offences which overwhelmingly manifest in a particular way or where a particular variant or manner of offending is extremely common and is therefore singled out for special attention" (*Terence Ng* at [32]). Just like how the Court of Appeal in *Terence Ng* concluded that there is no such thing as a "typical" case of rape, I similarly find that there is no such thing as a "typical" case of outrage of modesty under s 354(1) of the Penal Code. There is, like for rape, great variance in the manner in which the offence of outrage of modesty can potentially present itself. The "benchmark" approach adopted in *Chow Yee Sze* may thus not suitably provide for clear, transparent, coherent and consistent sentencing.

(b) Secondly, as a matter of practice, I note that even though the reliance on the "benchmark" approach is to be eschewed, the benchmark sentence of nine months' imprisonment with caning as laid down in *Chow Yee Sze* is not actually entirely inconsistent with the sentencing bands that I have proposed (at [49] above). The sole offence-specific factor highlighted in respect of the benchmark in *Chow Yee Sze* is the intrusion of the victim's private parts or sexual organs. According to the

> sentencing bands as described in *GBR* ([45] *supra*) (see [45(b)] above), the presence of this factor would tend to place an offence within Band 2, which has an indicative sentencing range of between five to 15 months' imprisonment (see [49(b)] above). The *Chow Yee Sze* benchmark sentence of nine months' imprisonment is thus congruent with the proposed "two-step sentencing bands" approach in this regard. The upshot of this observation is that the adoption of the "two-step sentencing bands" approach does not actually conduce to a dramatically different sentencing outcome, in the exclusive context of s 354(1) offences that only involve a basic intrusion of the victim's private parts (with no other offence-specific factors). But this does not render the proposed "two-step sentencing bands" approach otiose; the merits of the proposed approach only truly manifest themselves when the court deals with a case that presents a myriad of offence-specific factors.

52 With all of the foregoing discussion in mind, I now turn to apply the legal principles canvassed above to the facts of the present appeal.

The two-step sentencing bands approach applied

53 In my judgment, the sentence of eight months' imprisonment imposed by the District Judge cannot in any way be said to be manifestly excessive.

The offence-specific aggravating factors

54 I begin by considering the relevant offence-specific aggravating factors.

(1) Degree of sexual exploitation

55 The victim here merely alleged that the appellant had touched her *groin area*, as opposed to her private parts. This distinction matters because whereas the *private parts* refer to the victim's genitalia *per se*, the *groin area* is merely the junctional region between the abdomen and thigh, which includes the genitalia. In other words, if the victim's groin area is touched, it does not *ipso facto* mean that her private parts have been intruded upon; on the other hand, if the victim's private parts have been intruded upon, it should *ipso facto* mean that the groin area is touched. Although the victim did state in P1 that the appellant's hand was touching her "private part *area*" [emphasis added], I find this description too ambiguous to be the basis of a finding that the appellant had intruded upon the victim's private parts or sexual organs *per se*. In any event, the victim had, during the course of trial, consistently testified that the appellant had touched her "groin area".

56 I also note that there was no skin-to-skin contact, with the touching taking place over the victim's skirt. However, the touching of the victim's groin area was continuous, lasting for about a minute.

(2) Circumstances of the offence

57 I first note that the present case involves the appellant's exploitation of a vulnerable victim – it is undisputed that the victim was only 14 years old at the time of the incident.

58 Secondly, I also have to consider the fact that the present offence took place on board a public transport vehicle. The growing need for the courts to deter offenders from committing outrage of modesty cases on public transport has been highlighted on multiple occasions in Parliament. In 2013, Deputy

Prime Minister and then Minister for Home Affairs Teo Chee Hean made the following remarks in response to a question posed in Parliament about what measures were being taken to ensure that commuters are not harassed or have their modesty outraged on public trains and buses (*Singapore Parliamentary Debates, Official Report* (5 February 2013) vol 90 at Question No 33):[38]

> *Over the past five years, the number of outrage of modesty cases reported on public transport has increased.* The number of cases per one million passenger trips has remained largely stable, as passenger trips also increased during this period. The rate for 2012 was 0.07 cases per one million passenger trips.
>
> …
>
> The higher number of reported outrage of modesty cases has to be seen in the context of higher public transport ridership over the same time period. However, I would like to assure the Member that Police are watching the situation carefully and will continue to enhance measures to detect offences within our public transport system and apprehend offenders. We urge all members of the public to be vigilant and to report incidents to the authorities as soon as possible.
>
> [emphasis added]

In 2016, questions concerning measures taken to prevent the outrage of modesty were again posed in Parliament (albeit specifically regarding outrage of modesty on public trains). The Parliamentary Secretary to the Minister for Home Affairs Amrin Amin gave the following response on behalf of the Minister for Home Affairs (*Singapore Parliamentary Debates, Official Report* (1 March 2016) vol 94 at Question No 21):[39]

> Mdm Speaker, *over the past three years, there has been an annual average of 71 outrage of modesty cases on MRT and LRT trains. There were 65 cases in 2013, 79 cases in 2014 and 69 cases last year.* These numbers have to be seen in the context of an increasing number of passenger trips on trains over the years, with almost three million passenger trips daily on trains. The number of outrage of modesty cases on trains represent

[38] Respondent's Bundle of Authorities, Tab I

[39] Respondent's Bundle of Authorities, Tab J.

> about 5% of the total number of outrage of modesty cases reported annually.
>
> …
>
> The maximum penalty for outrage of modesty is two years' imprisonment or a fine or caning, or any combination of these punishments. This increases to five years' imprisonment if the victim is under 14 years of age. ***The courts have been meting out stiff sentences for those convicted of molestation on trains.***
>
> [emphasis added in italics and bold italics]

In view of the recurrent attention that outrage of modesty offences committed on board public transport has received in Parliament, it is clear that general deterrence ought to be the predominant sentencing consideration in this context. The fact that the appellant committed the present offence on board a public bus is thus an aggravating factor.

(3) Harm caused to the victim

59 I find that the victim suffered from significant emotional and psychological trauma as a consequence of the incident. I accept the victim's evidence that she is so traumatised by the incident that she now has to resort to taking a different bus to school, suffers from frequent panic attacks and fainting spells, has turned to self-mutilation to cope with her trauma, and continues to seek counselling from a psychiatrist in school.[40] The appellant submits that the victim's evidence in this regard should be disregarded because the Prosecution did not submit a victim impact statement detailing the exact harm suffered by the victim. I disagree with the appellant. In my view, the lack of a victim impact statement should only affect the *weight* to be accorded to the victim's evidence of psychological harm. In any event, I find it safe to accept the victim's evidence in this regard because it is substantially corroborated by the evidence of PW3.[41]

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[40] ROP, pp 37–39, NE 8 July 2015, 22:15–24:19.

The appropriate sentencing band

60 Based on the offence-specific factors as discussed above, I find that this appears to be a case that falls somewhere in the middle of Band 2.

61 While the degree of sexual exploitation was not the most egregious because the appellant did not intrude upon the victim's private parts *per se* and also did not make skin-to-skin contact, there exist numerous other aggravating factors, as discussed above, that certainly take the appellant comfortably out of Band 1. On this basis alone, the appellant's submission for a fine must surely fail.

62 At this juncture, I pause to offer more reasons addressing the lack of merit underlying the appellant's submission for a fine, *even assuming that the "two-step sentencing bands" approach is not applied*. First, the three State Court cases that the appellant relied on to argue that a fine is justified in this case are all unreported cases.[42] It is trite that sentencing precedents without grounds or explanations are of relatively little, if any, precedential value because they are unreasoned and hence it will not be possible to discern what had weighed on the mind of the sentencing judge or why the sentencing judge had approached the matter in a particular way: see *Keeping Mark John v Public Prosecutor* [2017] SGHC 170 at [18], *Janardana Jayasankarr v Public Prosecutor* [2016] 4 SLR 1288 at [13(b)] and *Yap Ah Lai v Public Prosecutor* [2014] 3 SLR 180 at [11(d)]. Secondly, even considering the reported decisions that the appellant had cited before the District Judge below in support of his submission that a fine should be imposed (*ie*, *Teo Keng Pong v Public Prosecutor* [1996] 2 SLR(R) 890 ("*Teo Keng Pong*") and *Ng Chiew Kiat v*

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41 ROP, pp 130–132, NE 9 July 2015, 11:23–13:32.

42 Appellant's Submissions dated 25 July 2017, para 93.

Public Prosecutor [1999] 3 SLR(R) 927 ("*Ng Chiew Kiat*")), I am of the view that the present case is clearly sufficiently severe to warrant the imposition of a custodial sentence. In *Chow Yee Sze* ([10] *supra*), the court made the following observation regarding when the custodial threshold would be crossed for offences under s 354(1) of the Penal Code (at [12]):

> A fine would only suffice if the act of molest was a relatively minor one: see *Teo Keng Pong v PP* [1996] 2 SLR(R) 890 where a tuition teacher with no antecedents was fined $500 on each charge for four charges for caressing a student's thigh and a fifth charge of caressing her thigh and squeezing her back; and *Soh Yang Tick v PP* [1998] 1 SLR(R) 209 where an employer was fined $2,000 for slapping his secretary's buttock lightly on the spur of the moment.

The facts in *Teo Keng Pong* have been helpfully summarised in the above excerpt from *Chow Yee Sze*. As for *Ng Chiew Kiat*, an employer with no antecedents was fined $4,000 for grabbing his foreign domestic worker's buttock. In the present case, the appellant's molesting act involved the deliberate touching of the victim's groin area over a prolonged period of about a minute. It was thus not a mere fleeting touch, and was committed over an area that was extremely close to the victim's private parts. A fine is thus clearly inappropriate.

63 I now turn back to address the exact length of the imprisonment term that would be appropriate under the proposed "two-step sentencing bands" approach. Far from finding that the sentence of eight months' imprisonment imposed by the District Judge was manifestly excessive, I take the view that the sentence imposed was not inappropriate having regard to the degree of sexual exploitation, the circumstances of the offence and the harm caused to the victim. There is no good reason for me to disturb the sentence of eight months' imprisonment imposed by the District Judge.

The offender-specific factors

64 I also find that there is no need to disturb the sentence imposed on account of the applicable general offender-specific factors.

65 First, I find the fact that the appellant is a first-time offender to be a neutral factor because it is not positive evidence of good character that could in turn be considered a valid mitigating factor: see Kow Keng Siong, *Sentencing Principles in Singapore* (Academy Publishing, 2009) at paras 21.016–21.017, citing *Public Prosecutor v Tan Fook Sum* [1999] 1 SLR(R) 1022 at [32]. Also, the absence of antecedents is merely the absence of an aggravating factor (*ie*, the presence of relevant antecedents that thereby evince recalcitrance). It is trite that the mere absence of an aggravating factor cannot be construed as a mitigating factor which the appellant should be given credit for: see *Edwin s/o Suse Nathen v Public Prosecutor* [2013] 4 SLR 1139 at [24]–[26], *Public Prosecutor v AOM* [2011] 2 SLR 1057 at [37] and *Chow Yee Sze* ([10] *supra*) at [14].

66 Secondly, I also consider the fact that the appellant had claimed trial to be a neutral factor. A plea of guilt is regarded as a mitigating factor that might entitle an offender to a reduced sentence because the plea of guilt: (a) can be a subjective expression of genuine remorse and contrition, which can be taken into account as a personal mitigating factor; (b) spares the victim the ordeal of having to testify, thereby saving the victim the horror of having to re-live the incident; and (c) saves the resources of the State which would otherwise have been expended if there were a trial (*Terence Ng* ([46] *supra*) at [66], citing *Regina v Millberry* [2003] 1 WLR 546 at [27]–[28]). The appellant, by claiming trial and failing to plead guilty at the first instance, is thus not entitled to any sentencing discount in this regard.

67 Thirdly, I do not consider it necessary to impose a term of imprisonment in lieu of caning even though this court is empowered under s 325(2) of the CPC to do so for offenders certified unfit for caning under s 325(1)(*b*) on account of them being above 50 years of age at the time of caning. In *GBR* ([45] *supra*), See J made the following observations (at [40]):

> … Following the High Court's decision in *Amin bin Abdullah v Public Prosecutor* [2017] SGHC 215 ("*Amin bin Abdullah*") at [53] and [58], it is clear that the term of imprisonment should not be enhanced unless there are grounds to do so. The court should thus consider whether there are grounds to enhance the sentence by way of the imposition of imprisonment in lieu of caning. In an offence such as outrage of modesty, an imprisonment term in lieu of caning may be appropriate where there is the need for a sufficiently deterrent and retributive sentence (see *Public Prosecutor v Tan Kok Leong and another appeal* [2017] SGHC 188 ("*Tan Kok Leong*") at [91], cited in *Amin bin Abdullah* at [73]), for example, if there are substantial aggravating factors such as violence used or an exploitation of a particularly vulnerable class of victims.

68 It is useful to pick up on the facts of the decision in *Tan Kok Leong* ([67] *supra*) that was mentioned in the above excerpt to better illustrate the appropriate conclusion that should be reached in this regard for the present appeal. In *Tan Kok Leong*, an aesthetic doctor committed sexual offences against his patient, who was also the offender's business partner and a fellow doctor. The offender was charged with, amongst others, three counts of outrage of modesty under s 354(1) of the Penal Code. On appeal, See J found the offender guilty of all three s 354(1) charges, and increased the sentences for each charge to 14 months' imprisonment. In arriving at this sentence, See J exercised his discretion under s 325(2) of the CPC and imposed two months' imprisonment in lieu of caning for each of the three charges under s 354(1) of the Penal Code. Critically, See J held that imprisonment in lieu of caning should be imposed in this case in order to give effect to the dominant sentencing objectives of deterrence and retribution. The need for deterrence was premised

on the "gravity and egregiousness of the offending conduct" of the offender (at [88]), which was evinced in how the offender had shown a complete lack of remorse at trial, had "gravely abused his position of trust and authority as a medical professional to take advantage of his own patient, who was ostensibly also his protégé and business partner", had engaged in actions that were "clearly planned and premeditated", and had "indulged in multiple instances of skin-to-skin contact with the victim's penis when the victim was completely unconscious, at his most vulnerable and defenceless" (at [86]). The need for retribution was premised on the need to reflect the retributive element in sentencing for offenders who abuse the trust reposed in them as medical professionals to commit the offences (at [90]).

69 Turning back to the facts of the present appeal, it is clear that the substantial aggravating factors identified in *Tan Kok Leong* ([67] *supra*) – such as the exploitation of a particularly vulnerable victim and the serious abuse of a position of trust – do not present themselves here. Hence, the sentencing considerations that displace the starting position that an offender's term of imprisonment should not be enhanced just because he is exempted from caning are not present. This is thus not an appropriate case to impose an additional imprisonment term in lieu of caning.

Conclusion on the appeal against sentence

70 In the result, I find that the sentence of eight months' imprisonment imposed by the District Judge was not manifestly excessive. I thus dismiss the appeal against sentence.

Conclusion

71 For all of the above reasons, I do not think that the District Judge's decision to convict the appellant was wrong in law or had been reached against the weight of the evidence before him. I also do not think that the sentence of eight months' imprisonment imposed on the appellant was manifestly excessive. I thus dismiss the appellant's appeals against both his conviction and his sentence.

Chan Seng Onn
Judge

Thangavelu and Syafiqah Ahmad Fu'ad (Thangavelu LLC) for the appellant;
Ng Yiwen (Attorney-General's Chambers) for the respondent.