IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC 187

Magistrate's Appeal No 9159 of 2022

Between

Huang Xiaoyue

… *Appellant*

And

Public Prosecutor

… *Respondent*

JUDGMENT

[Criminal Law — Offences — Public decency and morals]
[Criminal Law — Statutory offences — Massage Establishments Act 2017 (2020 Rev Ed)]
[Criminal Procedure and Sentencing — Sentencing — Appeals]

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v
Public Prosecutor

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12 July 2023 Judgment reserved.

Vincent Hoong J:

Introduction

1 Massage establishments, while serving to relieve bodily pain, often create pains for law enforcement by serving as fronts for vice activity. This is an appeal against a sentence imposed on a massage establishment operator for carrying on the business of providing massage services without a licence under the Massage Establishments Act 2017 (2020 Rev Ed) ("MEA"), and a good opportunity to consider the sentencing framework for this strict liability offence.

2 The Appellant, Ms Huang Xiaoyue, claimed trial to two charges under s 5(1) of the MEA for carrying on the business of providing massage services without either having a licence issued under the MEA or an exemption under

s 32 of the MEA, which were both punishable under s 5(4)(*b*) of the MEA.[1] She was convicted on both charges and sentenced to 12 weeks' imprisonment for each charge, running consecutively for an aggregate term of 24 weeks' imprisonment.[2] The Appellant originally appealed against both her conviction and sentence,[3] but clarified in her Petition of Appeal that she would only be appealing against her sentence.[4]

The legal context

3 The MEA was enacted to "take tougher action against unlicensed massage establishments", many of which were "fronts for vice activities, the proverbial 'wolf in sheep's clothing'" (*Singapore Parliamentary Debates, Official Report* (6 November 2017) vol 94 (Mrs Josephine Teo, Second Minister for Home Affairs) (*"2017 Debates"*)).

4 Section 9 of the Massage Establishments Act 2013 (Cap 173, 2013 Rev Ed) ("repealed MEA 2013") was the precursor to the current s 5 of the MEA. Section 9 of the repealed MEA 2013 provided:

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1 *Public Prosecutor v Huang Xiaoyue* [2022] SGDC 199 ("GD") at [1].

2 GD at [2].

3 GD at [3].

4 Petition of Appeal (Record of Proceedings ("ROP") at pp 15–16).

> **Offences**
>
> 9. Any person who —
>
> > (*a*) carries on an establishment for massage in respect of which he does not hold a valid licence;
> >
> > …
> >
> > (*d*) carries on an establishment for massage in contravention of the provisions of this Act or any rules made thereunder or any condition of a licence; or
> >
> > …
>
> shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $1,000 and to a further fine not exceeding $50 for every day during which the offence continues after conviction.

5 It should be noted that the penalties for operators of unlicensed massage establishments under the repealed MEA 2013 were limited to a maximum fine of $1,000 with an additional fine of up to $50 per day of continuing offending. This was found to be "grossly insufficient compared to the profits that unlicensed massage establishments can make, especially by engaging in vice activities" (*2017 Debates*).

6 Section 5 of the MEA thus provides for a much harsher penalty regime which increased the maximum fine amounts, introduced the sentencing option of a custodial sentence, and created separate punishment provisions for first-time and repeat offenders. Section 5 states:

> **No carrying on business of providing massage services in establishment for massage without licence, etc.**
>
> **5.**—(1) A person must not carry on the business of providing massage services in an establishment for massage unless the

person is authorised to do so at those premises by a licence under this Act.

(2) A person must not advertise or otherwise hold out that the person is carrying on the business of providing massage services in an establishment for massage unless the person holds a valid licence to do so at those premises.

(3) An owner or occupier of any premises must not allow the premises, or any part of the premises, to be used by any person whom the owner or occupier knows is carrying on the business of providing massage services in an establishment for massage without a valid licence to do so at those premises.

(4) A person who contravenes subsection (1), (2) or (3) shall be guilty of an offence and shall be liable on conviction —

(*a*) to a fine not exceeding $10,000 or to imprisonment for a term not exceeding 2 years or to both; and

(*b*) where the person is a repeat offender, to a fine not exceeding $20,000 or to imprisonment for a term not exceeding 5 years or to both.

(5) For the purposes of subsection (4), a person is a repeat offender in relation to an offence under subsection (4) if the person who is convicted of —

(*a*) an offence under subsection (4) for contravening subsection (1) has been convicted on at least one other earlier occasion of —

(i) an offence under subsection (4) for contravening subsection (1); or

(ii) an offence under section 9(*a*) of the repealed Act, whether the conviction was before, on or after 1 March 2018; or

(*b*) an offence under subsection (4) for contravening subsection (2) has been convicted on at least one other earlier occasion of —

(i) an offence under subsection (4) for contravening subsection (2); or

(ii) an offence under section 9(*e*) of the repealed Act, whether the conviction was before, on or after 1 March 2018.

7 It is also appropriate to briefly outline the relevant licensing regime under the MEA. An operator can either apply to operate a legal massage establishment with a licence under s 7(1) of the MEA or apply to operate an exempted premise under s 32 of the MEA read with the Massage Establishments (Exemption) Order 2018 ("ME Exemption Order"). A differentiated approach was preferred between licensed massage establishments, of which less than 3% were found to have vice-related infringements, and unlicensed massage establishments, where vice activity was detected in 40% of such establishments in 2016 (*2017 Debates*).

8 Under O 6(1) of the ME Exemption Order, an operator may apply to operate as an exempted massage establishment if, amongst other conditions, notification is given to the relevant authority before the commencement of the business, and massages are provided in full public view:

> **Premises at which massage is provided in full public view**
>
> 6.—(1) Any premises described as follows is exempt from the provisions of the Act:
>
> (*a*) any customer and any member of public can see at any time the massage services provided in every part of the premises from inside and outside of the premises;
>
> (*b*) no window in the premises and no entrance to the premises is obscured with any device or accessory, such as a tinted glass panel, a curtain, blinds or any poster or notice;
>
> (*c*) there are no rooms, partitions, cubicles, or other form of furniture in the premises that allow massage services to be administered in private;
>
> (*d*) the provision of massage services at the premises only takes place between 7 a.m. to 10.30 p.m. in a day (both times inclusive);
>
> (*e*) the person carrying on the business of providing massage services at the premises notifies the Licensing

> Officer of the name and address of the establishment for massage before the date when the person starts carrying on that business.

Undisputed facts

9 It is against this legal backdrop that I set out the facts of the present case. The Appellant is the sole shareholder and director of the company which operated Four Seasons Spa (the "Spa"), a massage establishment ("ME") in the business of providing massage services.[5] Although the Spa was not issued a licence under the MEA, it had received permission to operate as an exempted massage establishment under s 32 of the MEA read with O 6(1) of the ME Exemption Order.[6]

10 On 17 September 2019, police officers conducted checks on the Spa and found that it was operating,[7] and had rooms with doors. This incident (the "First Incident") formed the factual basis for the first charge. At trial, the Appellant did not dispute that the Spa had rooms on the premises which allowed message services to be administered in private, and that it therefore had breached the conditions of its exemption under the ME Exemption Order.[8] As the Spa was disallowed from operating without a massage establishment licence or an exemption under s 32 of the MEA, the staff were told to lock the establishment on 17 September 2019.

11 On 9 December 2019, police officers conducted a second check on the Spa and found that the establishment was again operating despite not having a

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5 GD at [4]; Statement of Agreed Facts ("SOAF") at paras 1 and 2 (ROP at p 9).

6 GD at [5]; Exhibit A9 (ROP at p 501).

7 GD at [11].

8 Exhibit A9 (ROP at p 501); GD at [9]; SOAF at para 4 (ROP at p 10).

licence or valid exemption (the "Second Incident"),[9] forming the subject of the second charge.

12 The Appellant had previously been convicted on 17 September 2019 of an offence under s 5(1) of the MEA, punishable under s 5(4)(*a*) of the MEA, for which she was sentenced to a fine of $7,000.[10] An offence under s 9(*d*) of the repealed MEA 2013 was taken into consideration.[11] By virtue of s 5(5)(*a*)(i) of the MEA, the Appellant was thus liable to be sentenced under the enhanced statutory regime for repeat offenders under s 5(4)(*b*) of the MEA.

The proceedings below

The Prosecution's case

13 In addition to the testimony of police officers present during the First and Second Incidents, the Prosecution also relied on the evidence of four customers who had variously visited the Spa on 17 September and 9 December 2019 to corroborate the fact that the Spa was operating on both these days. Two of these customers further testified that they had been offered sexual services during their massages, which they turned down.[12] As it was undisputed that the Spa had been operating without a licence and the Appellant was the sole shareholder and director of the company operating the Spa, she had therefore carried on the business of providing massage services without a valid licence or exemption during both the First and Second Incidents.[13]

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9 GD at [7]; SOAF at para 4.

10 SOAF at para 5 (ROP at p 10).

11 Criminal Records of Huang Xiaoyue (ROP at p 514).

12 GD at [12] and [13].

13 Prosecution's Closing Submissions ("PCS") at para 28 (ROP at p 550).

14 As for the state of the Appellant's knowledge, the Prosecution's case was that the Appellant's knowledge (or lack thereof) of the Spa's operations was irrelevant as s 5(1) MEA is an offence of strict liability.[14] Further, the Prosecution submitted that the Appellant had not established a defence of exercising reasonable care. The Appellant had provided her employee with a set of the keys and failed to conduct sufficient checks to ensure the Spa was not operating.[15] She also failed to make any arrangements to ensure the Spa was not operating while she was overseas,[16] or to check the CCTV in the Spa diligently.[17] This was despite her having full access to information about the conditions necessary under O 6(1) of the ME Exemption Order for the Spa to retain its exempted massage establishment status.[18]

The Appellant's case

15 The Appellant did not dispute that she had carried on the business of providing massage services without a valid licence or exemption. Her defence was that she had exercised reasonable care to ensure that her employees did not offer massage services,[19] and had neither consented to nor had knowledge of the provision of massage services by her employees.[20] She testified that she had left the daily operations of the Spa to her staff,[21] and only checked on the premises

14 PCS at para 52 (ROP at p 561).

15 PCS at para 44 (ROP at p 558).

16 PCS at para 45 (ROP at p 558).

17 PCS at para 47 (ROP at p 559).

18 PCS at para 49 (ROP at p 560).

19 Defence's Closing Submissions ("DCS") at para 6 (ROP at p 819).

20 DCS at paras 59 and 120 (ROP at pp 834 and 849).

21 DCS at paras 61 and 74 (ROP at pp 834 and 837–838).

as and when her schedule permitted.[22] The Appellant had also expressly instructed her staff not to operate the Spa on the days of the First Incident[23] and Second Incident.[24]

16 In relation to the Second Incident, the Appellant testified that she did not take steps to ensure that the Spa was not operating as she was in China at the material time, and no one had helped her to check this.[25] The Appellant conceded that the onus was on her to comply with the conditions of the ME Exemption Order,[26] and that she was "careless" in leaving the operations of the Spa to her staff without performing sufficient checks.[27]

The DJ's decision on conviction

17 The District Judge's ("DJ") reasons for her decision are found in *Public Prosecutor v Huang Xiaoyue* [2022] SGDC 199 ("GD"). The DJ found that the Prosecution had proven beyond a reasonable doubt that the Spa was not exempted from the MEA's provisions[28] when it provided massage services on 17 September and 9 December 2019 without a licence, in contravention of s 5(1) of MEA.[29] The DJ also found that the Appellant had not exercised reasonable care as she had admitted to being careless in running the Spa by leaving its

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22 DCS at para 5 (ROP at p 819).

23 DCS at para 59 (ROP at p 834).

24 DCS at para 87 (ROP at p 840).

25 Notes of Evidence ("NEs"), 13 April 2022, Page 86 Line 23 to Page 87 Line 23 (ROP at pp 371–372).

26 NEs, 13 April 2022, Page 71 Lines 27–29 (ROP at p 356).

27 NEs, 12 April 2022, Page 95 Lines 2–7 (ROP at p 269).

28 GD at [26].

29 GD at [27].

operations to her staff, and had not performed sufficient checks to ensure the spa was not operating.[30] The DJ accordingly convicted her on both charges.

The parties' positions on sentence

18 At trial, the Prosecution proposed that the court sentence the Appellant based on its suggested sentencing bands framework,[31] reproduced in the DJ's GD at [30]. It submitted that both charges fell within "Band 3" of the suggested framework as vice activity was detected at the spa, the Appellant was traced for previous vice-related convictions and the Appellant was a repeat offender.[32] The range of sentences for this band was from a fine of $20,000 to six months' imprisonment. The Prosecution submitted that a global sentence of 26 weeks' imprisonment for both charges would be appropriate, having regard to the sentence imposed in *Public Prosecutor v Ong Han Seng & Choo Kon Ying* [2020] SGDC 14 ("*Ong Han Seng*").[33]

19 The Appellant submitted that a high fine was sufficient[34] as the duration of the offending was short and the Appellant had been diligent in checking on the premises once a week.[35]

The DJ's decision on sentence

20 The DJ declined to adopt the Prosecution's proposed sentencing framework on the basis that benchmarks should generally be left to appellate

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30 GD at [28].

31 Prosecution's Address on Sentence at paras 1 and 2 (ROP at pp 521–522).

32 Prosecution's Address on Sentence at paras 3 and 4 (ROP at pp 523–524).

33 Prosecution's Address on Sentence at para 5 (ROP at p 525).

34 Defence's Plea-In-Mitigation at para 40 (ROP at p 861).

35 Defence's Plea-In-Mitigation at paras 31 and 34 (ROP at pp 859–860).

courts.[36] However, she considered the sentencing factors in *Ong Han Seng* relevant, given the similarity of that case with the present factual matrix.[37]

21 In sentencing the Appellant, the DJ considered that vice activities were detected,[38] there was no evidence of disamenities caused,[39] and the duration of operation in contravention of the MEA was two days.[40] A need for specific deterrence was highlighted as the Appellant had failed to take remedial actions after the police had issued a verbal warning during the First Incident, leading to her subsequent offence during the Second Incident.[41] The DJ also considered that the Appellant was unrepentant and "had a relevant antecedent".[42] The DJ therefore sentenced the Appellant to imprisonment terms of 12 weeks each for the first and second charges, running consecutively for a global sentence of 24 weeks' imprisonment.[43]

The parties' cases on appeal

The Appellant's proposed sentencing framework

22 The Appellant proposes that a five-step "sentencing matrix" framework, as set out by Sundaresh Menon CJ in *Logachev Vladislav v Public Prosecutor* [2018] 4 SLR 609 (*"Logachev"*), should be adopted for offences under s 5(1)

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36 GD at [36].

37 GD at [36].

38 GD at [37].

39 GD at [38].

40 GD at [39].

41 GD at [40].

42 GD at [42].

43 GD at [43] and [44].

punishable under s 5(4) of the MEA.[44] Applying this framework, the Appellant submits that six to eight weeks' imprisonment for each charge would be appropriate, with the sentences to run concurrently, because the level of harm is slight[45] and the Appellant's culpability is low.[46] The DJ's sentence of 12 weeks' imprisonment per charge, with both sentences to run consecutively, would thus be manifestly excessive.[47]

23 It is helpful at this juncture to elaborate on the nature of the framework in *Logachev*. The first stage of the framework is focused on a general holistic assessment of the seriousness of the offence by reference to all the offence-specific factors (*Ye Lin Myint v Public Prosecutor* [2019] 5 SLR 1005 at [46]). This involves three steps:

(a) Step 1: Identify the level of harm caused by the offence and the level of the offender's culpability.

(b) Step 2: Identify the applicable indicative sentencing range in a three-by-three matrix by reference to the level of harm caused by the offence (in terms of slight, moderate and severe) and the level of the offender's culpability (in terms of low, medium and high).

(c) Step 3: Identify the appropriate starting point within the indicative sentencing range having regard to the level of harm caused by the offence and the level of the offender's culpability.

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44 Appellant's Submissions dated 30 March 2023 ("AS") at paras 79 and 80.

45 AS at para 102.

46 AS at para 104.

47 AS at para 110.

24 The second stage of the framework focuses on adjustments to the indicative starting point sentence identified at the first stage. This stage involves two steps:

(a) Step 4: Adjust the starting point sentence having regard to offender-specific aggravating and mitigating factors.

(b) Step 5: Where an offender has been convicted of multiple charges, make further adjustments, if necessary, to the sentence for the individual charges in the light of the totality principle.

25 In particular, the Appellant proposes separate matrices for the indicative sentencing ranges at Step 2 of the *Logachev* framework for first-time and repeat offenders under s 5(4)(*a*) and s 5(4)(*b*) of the MEA who claim trial.[48] I reproduce these below:

First-time offenders

Harm / **Culpability**	**Slight**	**Moderate**	**Severe**
Low	Fine or imprisonment of up to 1 month	1 to 3 months' imprisonment	3 to 6 months' imprisonment
Medium	1 to 3 months' imprisonment	3 to 6 months' imprisonment	6 to 12 months' imprisonment
High	3 to 6 months' imprisonment	6 to 12 months' imprisonment	12 months to 2 years' imprisonment

[48] AS at para 92.

Repeat offenders

Harm / Culpability	**Slight**	**Moderate**	**Severe**
Low	Fine or imprisonment up to 2 months	2 to 9 months' imprisonment	9 to 18 months' imprisonment
Medium	2 to 9 months' imprisonment	9 to 18 months' imprisonment	18 months to 3 years' imprisonment
High	9 to 18 months' imprisonment	18 months to 3 years' imprisonment	3 to 5 years' imprisonment

The Prosecution's proposed sentencing framework

26 The Prosecution agrees that a sentencing framework should be adopted.[49] It submits that a sentencing benchmark approach is the most appropriate,[50] as the overwhelming majority of cases under s 5(1) of the MEA involved a police enforcement check at a massage establishment which provided massage services without the establishment possessing a valid licence or exemption (the "Prosecution's Archetypal Case").[51]

27 The sentencing benchmarks suggested by the Prosecution for offences based on the Prosecution's Archetypal Case where the offender claimed trial are as follows.

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49 Respondent's Submissions dated 3 April 2023 ("RS") at para 17.

50 RS at para 24.

51 RS at para 28.

S/N	Prosecution's Archetypal Case (Claim Trial)	Benchmark Sentence
1	First-time offenders where vice activities were not detected	Fine of between $4,000 and $6,000[52]
2	First-time offenders where vice activities are detected	Fine of between $8,000 and $10,000[53]
3	Repeat offenders	Between two and four weeks' imprisonment[54]

28 Additionally, the Prosecution suggests several modifications that may be made to the benchmark sentence to account for different factual patterns:

(a) First-time offenders may be given imprisonment terms if certain aggravating factors feature prominently, such as where the scale of vice activities was significant or the offender has a vice-related antecedent, such as under the Women's Charter 1961 (2020 Rev Ed).[55]

(b) There should be a "significant uplift" in the benchmark sentence of two to four weeks' imprisonment for a repeat offender where vice activities were detected, or the offender's antecedents involved vice activities.[56]

(c) A fine may be appropriate for repeat offenders where there are "exceptional mitigating factors".[57]

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52 RS at para 32.

53 RS at para 33.

54 RS at paras 35 and 36.

55 RS at para 34.

56 RS at para 37.

57 RS at para 38.

29 The benchmark sentence should then be calibrated based on the applicable aggravating and mitigating factors. Two particular aggravating factors would generally warrant a significant upward calibration in sentence: (a) the presence of vice activities at the ME, such as the provision or offer of sexual services, and (b) for repeat offenders, the presence of vice activities in their relevant antecedent.[58]

30 On the facts of the present case, a benchmark sentence of two to four weeks' imprisonment per charge should be applied to the Appellant as she is a repeat offender.[59] From this benchmark, a substantial uplift is warranted given the need for specific deterrence,[60] the involvement of vice activities,[61] the Appellant's antecedents, and the Appellant's lack of remorse.[62] The Prosecution submits that the Appellant's sentence would not be manifestly excessive on the basis of this framework.

The YIC's proposed sentencing framework

31 On appeal, Mr Alexander Choo Wei Wen ("Mr Choo") was appointed as a Young Independent Counsel (the "YIC") to address the Court on the appropriate sentencing framework to apply for offences under s 5(1) punishable under s 5(4) of the MEA, and in particular, when the custodial threshold is crossed and how repeat offenders should be punished.[63]

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58 RS at para 29.

59 RS at para 40.

60 RS at para 42.

61 RS at para 41.

62 RS at para 45.

63 YIC's Skeletal Submissions ("YS") at para 2.

32 The YIC's proposed framework is modelled after the two-step "sentencing band" framework in *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 (*"Terence Ng"*),[64] which bears some similarity to the *Logachev* framework proposed by the Appellant. The two steps in this framework are as follows (*Terence Ng* at [39]):

> (a) First, the court should identify the band the offence in question falls within, having regard to offence-specific factors. Within the range of sentences in that band, the court should then determine precisely where within that range the present offence falls in order to derive an "indicative starting point" reflecting the intrinsic seriousness of the offending act.
>
> (b) Second, 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. 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.

33 The YIC proposes that the following bands should apply at the first step of the *Terence Ng* framework.[65] This framework would apply to sentencing for both first-time and repeat offenders.[66]

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64 YS at para 3(a).

65 YS at para 39.

66 YS at para 41.

	Low Culpability *e.g. lack of due diligence or failure to take reasonable care, one-off basis, shows remorse*	**Medium Culpability** *e.g. involvement in day-to-day business operations, wilful blindness, presence of relevant antecedents*	**High Culpability** *e.g. repeat offending, lack of remorse, knowledge of vice activities*
Low Harm (Band 1) *e.g. None to low degree of Offence-Specific aggravating factors. For example, no vice-related activities but operations without a licence, or low degree of vice-related activities but short duration.* Note: Imprisonment is generally not imposed for low harm due to the absence of vice-related activities, although it is not excluded altogether and can be ordered where there is high [*sic*] of culpability.	Fine not exceeding $1,000.	Fine not exceeding $10,000.	1 day – less than 1 months imprisonment And/or Fine not exceeding $15,000.

Medium Harm (Band 2) *e.g. Medium degree of Offence-Specific aggravating factors, medium scale and sophistication of vice-related activities.*	1 month – less than 3 months' imprisonment And/or Fine not exceeding $10,000.	3 months – less than 6 months imprisonment And/or Fine not exceeding $15,000.	6 months – 3 years imprisonment And/or Fine not exceeding $20,000.
High Harm (Band 3) *e.g. High degree of Offence-Specific aggravating factors, high scale and sophistication of vice-related activities, evidence of syndicate involvement.*	3 months – less than 6 months imprisonment And/or Fine not exceeding $15,000.	6 months – 3 years imprisonment And/or Fine not exceeding $20,000.	3 – 5 years imprisonment And/or Fine not exceeding $20,000.

34 In this regard, I note that although the YIC's methodological approach is based on the two-step framework in *Terence Ng*, the proposed assessment of offence-specific factors seems more akin to the framework adopted in *Logachev*. Specifically, the first step of the *Terence Ng* framework is based on a "sentencing bands" approach, where factors relating to both harm and culpability are assessed together in arriving at an overall assessment of the gravity of the case (*Terence Ng* at [42] and [44]). The prescribed sentencing ranges in *Terence Ng* are for this reason categorised into only three bands along a single dimension of assessment – a "spectrum of seriousness" (*Terence Ng* at [50] and [73(b)(i)]). Conversely, the indicative sentencing ranges at the second step of the *Logachev* framework are calibrated in a matrix that distinguishes

between the two dimensions of harm and culpability (*Logachev* at [78]). In so far as the YIC's framework encompasses analytically distinct assessments of harm and culpability, it bears more similarity to the framework in *Logachev* than to the framework in *Terence Ng*.

35 The YIC further proposes that the framework set out at [33] should be read alongside the following non-exhaustive list of offence-specific and offender-specific aggravating factors:[67]

Offence-Specific Aggravating Factors	**Offender-Specific Aggravating Factors**
(a) Presence of vice-related activities/massage establishment used as a front for vice-related activities (b) Duration of unlicensed operation (c) Location of massage establishment – whether located in or near residential premises (d) Continued operation of unlicensed massage establishment after being charged in court (e) Evidence of syndicate involvement	(a) Repeat offending (b) Presence of relevant antecedents (c) Lack of remorse (d) Offences taken into consideration for the purposes of sentencing (e) Degree of involvement in business operations and management of massage establishment (f) Degree of negligence / wilful blindness / knowledge of vice activities (g) Offender had engaged the masseurs specifically to provide massage *and* sexual services (h) Any other personal circumstances

67 YS at para 39.

(f) Sophistication of vice-related activities – *e.g.* whether there were advance warning systems in place to warn masseurs of presence of police, storing of condoms inside or outside of premises which made detection of vice activities more difficult. (g) Scale of operations (evidenced by the number of masseurs and number of customers) and the amount of profits made by the offender from the vice activities (h) Procurement of vice-related workers from abroad to come to work in Singapore	

Issues to be determined

36 There are three issues in this appeal:

(a) First, should a sentencing framework be adopted for offences under s 5(1) punishable under s 5(4) of the MEA?

(b) Second, if a sentencing framework should be adopted, what form should that sentencing framework take?

(c) Third, applying the appropriate sentencing framework adopted by the Court, was the Appellant's sentence manifestly excessive?

Whether a sentencing framework should be adopted for s 5(1) of the MEA

37 I agree with parties that a sentencing framework should be adopted for offences under s 5(1) punishable under s 5(4) of the MEA. Given that the lower courts have adopted inconsistent approaches to deriving sentences for offences

under s 5(1) of the MEA,[68] a sentencing framework would reduce such inconsistencies and provide a clear structure to guide the exercise of their sentencing discretion (*Sue Chang v Public Prosecutor* [2023] 3 SLR 440 ("*Sue Chang*") at [45]).

38 I begin by making a preliminary point that the sentencing framework in this case is only applicable to offences under s 5(1) of the MEA. I decline to extend it to offences under s 5(2) or s 5(3), which are also punishable under s 5(4) of the MEA, for reasons of practicality. Although sentenced under the same provision, s 5(2) and s 5(3) of the MEA target different types of offences. Section 5(2) criminalises advertising an unlicensed massage business, while s 5(3) sanctions landlords knowingly letting out premises to be used by unlicensed massage businesses. It would also generally be undesirable as a matter of principle to lay down sentencing frameworks for offences that are not before the court. It is not the role of the court – being a judicial rather than legislative or quasi-legislative body – to lay down sentencing frameworks for offences that are not before it (*Public Prosecutor v GED and other appeals* [2022] SGHC 301 at [41]). The possible factual matrices in which these offences are carried out may vary, such that different sentencing considerations would be applicable. For example, the scope, method and extent of advertising, and the extent of complicity of landlords to the carrying on of unlicensed massage establishments are sentencing considerations not relevant to offences under s 5(1) MEA. It would therefore not be appropriate for the present framework to be extended to offences under s 5(2) or s 5(3) MEA.

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[68] RS at para 18.

A benchmark sentence is the appropriate sentencing framework for offences under s 5(1) punishable under s 5(4) of the MEA

39 I next outline the scenarios in which each of the proposed frameworks by parties would be most appropriate.

40 The "benchmark approach" is the most suitable where there are 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]). In such cases, an archetypal case, or series of archetypal cases, should be identified and a notional sentence calibrated in respect of such case(s) (*Terence Ng* at [31]).

41 There is more limited guidance as to when a two-step "sentencing band" or a five-step "sentencing matrix" approach is appropriate. In *Vijay Kumar v Public Prosecutor* [2023] SGHC 109 ("*Vijay Kumar*"), See Kee Oon J found at [44]–[45] that the approaches of the Court of Appeal and High Court respectively in *Terence Ng* and *Logachev* suggested that both frameworks might be applicable where no other sentencing framework is suitable.

42 Having considered the submissions of parties and the YIC, I agree with the Prosecution that a sentencing benchmark should be adopted for offences under s 5(1) punishable under s 5(4) of the MEA. I outline four reasons why I prefer this approach.

43 First, based on my observations from the case documents of 69 unreported precedents helpfully tendered by the Prosecution, offences under s 5(1) of the MEA did overwhelmingly manifest in particular ways. I say this with the caveat that my view of the "archetypal case" differs slightly from the Prosecution. The Prosecution suggests that the archetypal case be defined as a

case involving a police enforcement check at an ME, where massage services are provided, and the ME does not have a valid licence or exemption. With respect, I do not consider this definition to have sufficient 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* at [31]). In particular, I am unable to agree with the Prosecution's definition of an archetypal case to the extent that it does not distinguish between cases where an offender applies for an exemption but breaches the conditions of that exemption, and where an offender makes no attempt to apply for an exemption in the first place.

44 I find that offences under s 5(1) of the MEA overwhelmingly manifest in two particular forms. One form in which the offence manifests is as follows ("the Archetypal Non-vice Case"):

> (a) a police enforcement check is conducted at a massage establishment;
>
> (b) during the enforcement check, it is found that massage services were provided at the massage establishment;
>
> (c) the massage establishment does not have a valid massage establishment licence under s 7 of the MEA; and
>
> (d) the massage establishment has received notification that it can operate as an exempted massage establishment under s 32 of the MEA, but has breached the conditions under O 6(1) of the ME Exemption Order as massages were not done in full public view.

45 The other way in which the offence manifests is identical to the situation above, but additionally involves a massage therapist giving offers for sexual services in exchange for additional payment in the course of the massage ("the Archetypal Vice Case").

46 Second, the range of sentencing considerations for offences under s 5(1) of the MEA tends to be circumscribed. This was a consideration identified in *Terence Ng* at [28] in relation to the "single starting point" framework. However, in my view this consideration would be applicable to a benchmark sentence as well, as both sentencing approaches are described in similar terms in *Terence Ng* and were identified to have "considerable overlap and substantial similarity" in *Vijay Kumar* at [48]. As I outline below, there are a fixed number of key factors which would normally determine the gravity of the offence, such as the presence of vice, the nature of the accused's involvement, and the nature of the breach of the conditions of an exempted licence (if applicable).

47 Third, s 5(1) of the MEA is a strict liability regulatory offence. It involves enforcing standards of conduct or behaviour in a specialised area of activity, for the purpose of the prevention of harm or certain consequences through enforcement of minimum standards of conduct (*Vijay Kumar* at [60]). This indicates that a framework based on a single starting point or benchmark sentence would be particularly appropriate for two reasons. One is that such offences, as noted above, almost invariably tend to manifest in a particular way (*Terence Ng* at [28]). Another reason, as noted in Kow Keng Siong, *Sentencing Principles in Singapore* (Academy Publishing, 2nd Ed, 2019) at [14.012], is that the parity principle is likely to be more relevant in regulatory or strict liability offences (see also *Public Prosecutor v Sinsar Trading Pte Ltd* [2004] 3 SLR(R) 240 at [32]–[34]). A benchmark sentence has the obvious advantage of engendering a greater degree of consistency and certainty in the sentencing of

offences (*Public Prosecutor v Fernando Payagala Waduge Malitha Kumar* [2007] 2 SLR(R) 334 at [74]) and would make application of the parity principle more straightforward than a framework modelled after *Terence Ng* or *Logachev*.

48 Fourth, in so far as a good sentencing framework should be instructive without being prescriptive, this would include the aspect of ease of application of the sentencing framework by the courts (*Sue Chang* at [45]). Section 5 of the MEA being a commonplace regulatory offence, this aspect would be particularly pertinent given the volume of such cases that regularly pass through the courts. I agree with the Prosecution[69] that a benchmark sentence would be easier to apply than a sentencing matrix or sentencing bands approach, whilst retaining sufficient flexibility in sentencing.

The benchmark sentence

The scope of the benchmark sentence

49 Before I set out the proposed benchmark sentence, I make two preliminary points on the scope of the framework in the present case.

50 First, the benchmark sentence is based on a situation where the accused claims trial. This accords with the Court of Appeal's view in *Terence Ng* at [40] that no uniform weight can be attached to a plea of guilt and would avoid giving the "appearance" that offenders who claim trial are being penalised for exercising their constitutional right to claim trial.

51 Second, I agree with the Prosecution that separate benchmarks should be set for the archetypal cases punishable under s 5(4)(*a*) and s 5(4)(*b*) of the

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[69] RS at paras 28 and 30.

MEA, as the significant disparity in the sentencing ranges for the provisions warrants different starting points for each of them.

When the custodial threshold is crossed

52 A custodial sentence should not generally be imposed as a default punishment unless the nature of the offence justifies its imposition retributively or as a general or specific deterrent (*Yang Suan Piau Steven v Public Prosecutor* [2013] 1 SLR 809 at [31]). Having regard to the legislative intent in revising the scale of punishments under the MEA to deter unlicensed operators, I am of the view that a custodial sentence would be well justified as part of the range of punishments that offences under s 5(1) of the MEA could attract. The relevant question is where the custodial threshold lies along the spectrum of severity of such offences. In answering this question, the two principal parameters of assessment would be the harm caused by the offence, and the accused's culpability. Harm is a measure of the injury which has been caused to society by the commission of the offence, whereas culpability is a measure of the degree of relative blameworthiness disclosed by an offender's actions and is measured chiefly in relation to the extent and manner of the offender's involvement in the criminal act (*Public Prosecutor v Goh Jun Hao Jeremy* [2018] 4 SLR 1438 ("*Jeremy Goh*") at [36]). As to harm, given the objective of the MEA to prevent massage establishments from becoming fronts for vice activities, the most obvious determinant would be the actual presence of vice on the premises, alongside the scale of the accused's establishment(s). In terms of culpability, though s 5(1) of the MEA is a strict liability offence, relative blameworthiness can still be inferred from repeated offending, or from evidence of actual knowledge of the offence.

53 As helpfully pointed out by the YIC,[70] in the context of other offences courts have often found a custodial sentence to be inappropriate where the level of harm and culpability caused is both low (*Stansilas Fabian Kester v Public Prosecutor* [2017] 5 SLR 755 ("*Stansilas*") at [77], *Jeremy Goh* at [37]). In my view, the custodial threshold for offences under s 5(1) of the MEA would be crossed when *both* the level of harm and the level of culpability are more than low. This would be the case, for example, where vice activity is detected, and the offender is a repeat offender.

Identifying the benchmark sentence

54 I accordingly set out the benchmark sentences applicable to an Archetypal Non-vice Case or an Archetypal Vice Case punishable under s 5(4)(*a*) and s 5(4)(*b*) of the MEA where the offender claims trial:

S/N	**Archetypal Case for an offence under s 5(1) punishable under s 5(4)(*a*) MEA**	**Benchmark Sentence**
1	First-time offender in Archetypal Non-vice Case	Fine of $5,000
2	First-time offender in Archetypal Vice Case	Fine of $10,000
	Archetypal Case for an offence under s 5(1) punishable under s 5(4)(*b*) MEA	**Benchmark Sentence**
3	Repeat offender in Archetypal Non-vice Case, where the only previous conviction was on a single, non-vice charge	Fine of $15,000

[70] YS at para 52.

4	Repeat offender in Archetypal Vice Case, where the only previous conviction was on a single, non-vice charge	Five weeks' imprisonment

55 For a first-time offender who claims trial to an offence under s 5(1) punishable under s 5(4)(*a*) of the MEA, the benchmark sentence for an Archetypal Non-vice Case should be a fine of $5,000. Where an offender claims trial to the same offence for an Archetypal Vice Case, the benchmark sentence should be a fine of $10,000. I emphasise that the imposition of non-custodial sentences for first-time offenders is not a strict rule. This should be departed from where there are significant aggravating factors, such as where the scale of operations is large and involves multiple establishments.

56 For a repeat offender who claims trial to an offence under s 5(1) punishable under s 5(4)(*b*) of the MEA, the benchmark sentence for an Archetypal Non-vice Case should be a fine of $15,000. Where an offender claims trial to the same offence involving an Archetypal Vice Case, the benchmark sentence should be five weeks' imprisonment. This would reflect the need for specific deterrence where offenders have had an earlier brush with the law for a similar offence and would thus know the importance of adherence to the MEA's licensing requirements. For the purposes of these benchmark sentences, I regard a repeat offender as a person who has a single previous conviction involving a single charge under the relevant provisions of the MEA or repealed MEA 2013, where there was no evidence of vice activity. I would consider the custodial threshold to be crossed in an Archetypal Non-vice Case punishable under s 5(4)(*b*) of the MEA where an accused's antecedents involve the presence of vice, as the need for specific deterrence would be increased in such cases.

Sentencing considerations modifying the benchmark sentence

57 It is helpful to set out, based on my observations from the precedents tendered by the Prosecution, some of the sentencing considerations pertaining to offences under s 5(1) of the MEA that would be relevant in calibrating the benchmark sentence. I set out a non-exhaustive list of offence-specific factors relating to harm that may be relevant:

(a) The scale and sophistication of the enterprise (*Poh Boon Kiat v Public Prosecutor* [2014] 4 SLR 892 ("*Poh Boon Kiat*") at [81]). This relates to both the number of establishments operated by the accused and the number of massage therapists and customers for each establishment. In my view, this would be a particularly significant aggravating factor as a larger scale of operations increases the amount of harm caused to society through potential proliferation of vice, and *prima facie* would often be suggestive that an accused person was not genuinely ignorant of the activities in the establishment(s).

(b) Evidence of the amount of profit made by an offender (*Poh Boon Kiat* at [81]).

(c) The location of the unlicensed massage establishment near a residential area, as this increases the potential harm to society through social unease (*Poh Boon Kiat* at [84]).

(d) The period of offending during which the massage establishment remained open (*Poh Boon Kiat* at [85]).

(e) Whether there was advertisement of massage or vice-related services on vice-related websites or platforms. However, I note that this factor would only be relevant where there is evidence that the offender

was aware of such advertisement. This would mostly be the case where the accused person runs a one-person establishment where he or she is also the provider of massage services.

(f) Other factors include evidence of syndicate involvement, the illegal employment of foreign workers, or evidence that there were planned measures to conceal the offending such as advance warning systems to detect the presence of police.

58 It is also helpful to set out some sentencing considerations relating specifically to the nature of the breach of the MEA licensing regime.

(a) The exact extent of an offender's attempt to comply with the MEA licensing regime would be relevant to their culpability. Specifically, where an offender applies for and receives an exemption under s 32 of the MEA but goes on to breach one of the conditions under O 6(1) of the ME Exemption Order, it would indicate a lower level of culpability than an offender who does not make an application at all. This is because an offender who complies with the MEA by providing information on the name and address of their establishment assists law enforcement in regulating such activities.

(b) Where a massage establishment has received permission to operate as an exempted massage establishment but breaches the conditions under the ME Exemption Order, the exact nature of the breach is relevant as well in assessing the offender's culpability. The degree of permanence of the structures or doors put up to prevent massages from taking place in public view would *prima facie* be relevant to the extent that they indicate the degree of negligence or wilful blindness shown by the operator to activities happening on the premises.

59 The following offence-specific factors relating to culpability may be relevant:

(a) The degree of the offender's negligence, wilful blindness, or knowledge of the operations of the massage establishment and any vice activities occurring therein. Where an operator personally provides massage services or offers sexual services, for example, this would reflect a much higher degree of knowledge that massage operations or vice activities were being carried out in the establishment.

(b) The degree of the offender's involvement in the operations and management of the massage establishment.

60 Finally, the following offender-specific factors may be relevant:

(a) Where an accused person is sentenced as a repeat offender, the nature of the offender's antecedents should be examined. As set out above at [56], the benchmark sentence is calibrated based on a repeat offender who has a single conviction with a single charge for a non-vice related offence. Accordingly, any number of charges and/or convictions beyond this should be considered as aggravating factor(s) in sentencing. Where an offender only has a single previous conviction involving a single charge without evidence of vice, this should not be considered as an aggravating factor to avoid double counting.

(b) Other general offender-specific factors such as the presence of charges taken into consideration for sentencing, the presence of remorse, cooperation with authorities, and pleading guilty would also be relevant.

Application of the framework to the present case

61 Applying the framework above, the benchmark sentence for this case is five weeks' imprisonment, being that of an Archetypal Vice Case for a repeat offender where the only previous conviction was on a single, non-vice charge.

62 As to the offence-specific considerations, I note that the charges only concern a single establishment, and that the duration of offending as accepted by the Prosecution was only two days.[71] There was no illegal procurement of vice-related workers, as both masseuses were on work permits. There was also no evidence of disamenities caused. Conversely, I agree with the DJ that there was a need for specific deterrence given the lack of remedial action after the First Incident.[72] The nature of the breach of the conditions under O 6(1) of the ME Exemption Order also involved permanent structures as there were rooms with doors on the premises.[73] The Appellant was aware of this, and in fact had personally issued instructions to put the doors back.[74]

63 As to offender-specific considerations, I agree with the Prosecution that an uplift from this benchmark is warranted on the basis that the Appellant had on two previous occasions been discovered to have carried on vice-related activities in the Spa. To the extent that there was more than one previous charge, and that vice activities were detected, an uplift from the repeat offender benchmark would be appropriate. I also note that these antecedents involve the exact same Spa as the present case, which gives all the more reason the

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71 GD at [39].

72 GD at [40].

73 Exhibit P1.6–P1.9 (ROP at p 462).

74 NEs, 12 April 2022, Page 100 Lines 25–29 (ROP at p 273).

Appellant should not have been ignorant as to what was going on behind literal closed doors.

64 However, I am unable to agree with the DJ and the Prosecution that the Appellant's behaviour at trial warrants a further uplift to her sentence on account of a lack of remorse. The Appellant was within her rights to argue that she had exercised reasonable care in devolving responsibility to her masseuses, although this argument may not have been persuasive to the trial judge. Such an argument, in my view, was not equivalent to shirking all responsibility arising from her position. The Appellant's remarks quoted by the DJ that "the only thing I will admit to is that I have been too careless, and I have been too trusting"[75] in fact presume some acknowledgement that she had a responsibility to be careful as the Spa's operator. Further, they could even be construed as a concession that she had failed to exercise reasonable care, where this is a possible defence to the strict liability offence under s 5(1) of the MEA. Thus, I do not find that there is sufficient evidence to show that the Appellant's behaviour during trial demonstrated a lack of remorse necessitating an uplift in the sentence.

65 Having regard to the above factors, I consider an uplift of four weeks' imprisonment would be appropriate on the facts of the present case. This would result in a sentence of nine weeks' imprisonment in respect of each charge.

66 In assessing whether the sentences should run consecutively or concurrently, I agree with the DJ that as the offences were unrelated and committed on separate occasions, the sentences for them should be ordered to

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[75] GD at [42]; NEs 12 April 2022 page 95 lines 2 and 3 (ROP at p 269).

run consecutively.[76] The aggregate term of imprisonment would thus be 18 weeks' imprisonment.

67 In my view, the disparity between this sentence and the sentence of 24 weeks' imprisonment imposed below requires substantial alteration to remedy injustice towards the Appellant (*Public Prosecutor v Mohammed Liton Mohammed Syeed Mallik* [2008] 1 SLR(R) 601 at [83).

Conclusion

68 I accordingly find that the sentence imposed by the DJ was manifestly excessive, and allow the appeal against sentence. I set aside the sentence of 24 weeks' imprisonment and impose an aggregate sentence of 18 weeks' imprisonment on the Appellant.

69 Finally, I would like to express my deep gratitude to the Prosecution team led by Deputy Attorney-General Mr Tai Wei Shyong, the YIC Mr Choo, as well as counsel for the appellant, Mr Low Chun Yee, for their research and thoughtful submissions on the legal issues raised in this appeal.

Vincent Hoong
Judge of the High Court

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[76] GD at [43].

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