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

**[2023] SGHC 202**

Magistrate's Appeal No 9164 of 2022

Between

Tien Kiat Chong

… *Appellant*

And

Public Prosecutor

… *Respondent*

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# *EX TEMPORE* JUDGMENT

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[Criminal Law — Offences — Sexual offences — Section 509 of the Penal Code (Cap 224, 2008 Rev Ed)]
[Criminal Procedure and Sentencing — Sentencing]

Version No 1: 27 Jul 2023 (16:27 hrs)

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# Tien Kiat Chong
# v
# Public Prosecutor

**[2023] SGHC 202**

General Division of the High Court — Magistrate's Appeal No 9164 of 2022
Vincent Hoong J
27 July 2023

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**Vincent Hoong J (delivering the judgment of the court *ex tempore*):**

## Introduction

1 This is a case involving voyeuristic conduct. It centres on the relevance of rehabilitation as a sentencing consideration where the offender contends that he demonstrates an extremely strong propensity for reform.

2 The appellant, Mr Tien Kiat Chong, pleaded guilty and was convicted of an amalgamated charge under the now-repealed s 509 of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code") read with s 124(4) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) for using his mobile phone to take upskirt videos of young female strangers on 19 different occasions on escalators in public places, a Mass Rapid Transit ("MRT") station, and a retail shop. He consented for another charge of possession of 37 obscene films in his mobile phone under

s 30(2)(*a*) of the Films Act (Cap 107, 1998 Rev Ed) to be taken into consideration for the purposes of sentencing.

3 The District Judge ("DJ") rejected the appellant's submission that probation was a suitable sentencing option for the following reasons:

(a) while the Appellant showed *some* propensity for reform, he did not demonstrate an *extremely strong* propensity for reform; and

(b) deterrence was the dominant sentencing consideration, especially given the aggravated circumstances of the offending.

The DJ thus sentenced the appellant to 12 weeks' imprisonment (see *Public Prosecutor v Tien Kiat Chong* [2022] SGMC 54 ("GD")).

4 In the present appeal, the appellant seeks a sentence of probation on the ground that, since his arrest almost three years ago, he has taken significant steps to secure his own rehabilitation, including seeking psychological treatment. In the alternative, he argues that the sentence of 12 weeks' imprisonment is manifestly excessive.

**My decision**

5 This appeal first raises the question of whether the appellant should be granted probation in lieu of imprisonment, notwithstanding that he is 27 years old. In this regard, s 5(1) of the Probation of Offenders Act 1951 (2020 Rev Ed) provides:

> **Probation**
>
> **5.**—(1) Where a court by or before which a person is convicted of an offence (not being an offence the sentence for which is fixed by law) is of the opinion that having regard to the circumstances, including the nature of the offence and the



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> character of the offender, it is expedient to do so, the court may, instead of sentencing him, make a probation order, that is to say, an order requiring him to be under the supervision of a probation officer or a volunteer probation officer for a period to be specified in the order of not less than 6 months nor more than 3 years:
>
> Provided that where a person is convicted of an offence for which a specified minimum sentence or mandatory minimum sentence of imprisonment or fine or caning is prescribed by law, the court may make a probation order if the person —
>
> (*a*) has attained the age of 16 years but has not attained the age of 21 years at the time of his conviction; and
>
> (*b*) has not been previously convicted of such offence referred to in this proviso, and for this purpose section 11(1) shall not apply to any such previous conviction.

6 As Sundaresh Menon CJ observed in the High Court decision of *A Karthik v Public Prosecutor* [2018] 5 SLR 1289 ("*A Karthik*") at [32], it is clear from the language of s 5(1) that there is no age-based restriction as to when the court is permitted to make a probation order, so long as the offender is not convicted of an offence for which a specified minimum sentence or mandatory minimum sentence of imprisonment or fine or caning is prescribed by law. In the present case, the offence which the appellant was convicted of is not of that nature. Therefore, there is no statutory bar against the grant of a probation order.

7 However, this does not mean that the age of the offender at the time of sentencing is entirely irrelevant. This is because the making of a probation order requires rehabilitation to be a dominant sentencing consideration: see *Public Prosecutor v Lim Chee Yin Jordan* [2018] 4 SLR 1294 at [29]. While the law takes a presumptive view that rehabilitation is the dominant sentencing consideration for offenders aged 21 years or under, this is not the case for offenders above the age of majority unless the offender is able to demonstrate an "extremely strong propensity for reform", or there exist other exceptional



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circumstances: see *Public Prosecutor v Siow Kai Yuan Terence* [2020] 4 SLR 1412 at [42] ("*Terence Siow*") and *A Karthik* at [44].

8 Counsel for the appellant, Mr Murugaiyan, does not argue that there are any exceptional circumstances in the present case. The focus of my inquiry is thus whether the appellant demonstrates an extremely strong propensity for reform.

9 In assessing whether an offender demonstrates an extremely strong propensity for reform, the High Court in *Terence Siow* at [55] laid down a three-limb framework ("the *Terence Siow* framework"):

> (a) First, the court should consider whether the offender has demonstrated a positive desire to change since the commission of the offence(s).
>
> (b) Second, the court should consider whether there are conditions in the offender's life that are conducive to helping him turn over a new leaf.
>
> (c) If, after considering the first two limbs, the court comes to a provisional view that the offender has demonstrated an extremely strong propensity for reform, the court should then consider, in light of the risk factors presented, whether there are reasons to revisit the finding of such a high capacity for reform.

10 In this regard, I note that there are factors that point towards some degree of capacity for reform by the appellant. I deal with each of them in turn.



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***There is evidence of a positive desire to change***

11 Turning to the first limb of the *Terence Siow* framework, I find that there is evidence of a strong positive desire to change. For one, as the DJ rightly recognised, there is evidence of remorse in the appellant's early plea of guilt, willingness to attend counselling sessions with his school and seek consultation with a clinic, and candidness in interaction with his psychologist and probation officer. However, as the DJ also noted, this should be balanced against the fact that the appellant was "equally driven by the hope of securing a favourable sentencing outcome",[1] given the way he had conducted himself during the Ministry of Social and Family Development's ("MSF") psychological assessment. The DJ regarded the evidence in totality as showing that the appellant had demonstrated a "fair amount of resolve to change".[2]

12 In my view, the DJ should in fact have given more weight to the appellant's contrition. The appellant's efforts to rehabilitate himself were substantial. His counselling sessions lasted more than a year. His admission to offences he had not been charged with is also very laudable. In addition, he did eventually confess to his offences in a statement to the police.

13 That having been said, I do not find that the DJ erred in his overall conclusion that the appellant had only demonstrated a "fair" amount of resolve to change. This conclusion was rightly informed by the motivation behind the appellant's actions rather than their mere extent. In this regard, I agree with the DJ that the appellant's remorse should be viewed with some circumspection.

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1 Grounds of Decision ("GD") at [33]; Record of Proceedings ("ROP") at p 144.

2 GD at [43]; ROP at p 149.



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14 The first reason is the delayed nature of the appellant's confessions. The appellant had more than enough time to come clean in the nine months between his offences and his eventual inculpatory statement. He chose not to admit to his offences in the interim. In fact, he denied taking any upskirt video both when he was first confronted in the MRT station, and in his first statement to the police.[3] As the Prosecution points out, the appellant only confessed to the offences after his phone, which he would have known to contain inculpatory material, had been seized by the police.[4] In this light, it is reasonable to doubt whether the appellant's remorse genuinely stems from a recognition of the wrong he had done to others, rather than a desire for self-preservation and reduction of any future punishment. I agree with the DJ's observation that the appellant "may well have reckoned that the game was up as the police would have access to the incriminating videos recorded on his phone".[5]

15 The second reason is the appellant's "very much above average" scores on the Paulhaus Deception Scale (a self-report instrument that measures an individual's tendency to give socially desirable responses on self-report measures)[6] and his other behaviour that suggest impression management with the MSF psychologist. This would have created some doubt as to whether the positive self-reporting by the appellant was motivated by him trying to "game" the system.

16 That having been said, I note that one of the DJ's reasons for giving less weight to the "steps taken by the [appellant] post-offence to leave his errant

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3 Statement of Facts at paras 3-4; ROP at pp 8–9.

4 GD at [31]; ROP at p 143.

5 GD at [31]; ROP at p 143.

6 Report of Mr Ken Ang Lip Tat, Forensic Psychologist, Ministry of Social and Family Development at para 5; ROP at p 660.



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ways behind" was that the appellant only sought counselling and treatment *after* he had been caught.[7] With respect, the DJ erred in stating so. As the appellant rightly points out, the inquiry here is concerned exclusively with post-offence conduct. The fact that such actions only took place after offending should not be reason to doubt the genuineness of his desire to change.

17 However, given the reasons that I have stated above, I find that the DJ did not err in concluding that the overall amount of resolve to change demonstrated by the appellant was "fair", in light of his other behaviour.

18 For completeness, I do not find that the DJ erred in his assessment of the appellant's reduction in consumption of pornography. This was a factor which the DJ acknowledged suggested some measure of change, though not amounting to a full and complete resolve. While credit should be given to the appellant for his honesty, the DJ rightly considered that this was a trigger that made the appellant susceptible to sexual offending.

19 Similarly, the DJ did not err in his assessment of the appellant's lack of re-offending. This was "given due weight" by the DJ,[8] and there is no evidence that insufficient weight was placed on this factor.

### *There is insufficient evidence of the existence of conditions that are conducive to helping the appellant turn over a new leaf*

20 I now consider the second limb of the *Terence Siow* framework, which relates to the conditions in the appellant's life that are conducive to helping him turn over a new leaf.

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7 GD at [36]; ROP at p 145.

8 GD at [40]; ROP at p 147.



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21 The appellant submits that the DJ erred in finding that the appellant's peer and intimate relationships were insufficient evidence of a supportive external environment. In this regard, the appellant says that he has a romantic partner, as well as university and church friends, from whom he draws support. However, I find that the DJ did not err in finding there was room for improvement in this area given that, despite these factors, there were still concerns expressed by the Probation Officer as to the appellant's lack of positive social connections and structured activities.

22 Additionally, the appellant submits that the DJ erred in according little weight to his strong desire to pursue his tertiary education by reason of his admission of taking upskirt videos while he was in ITE and polytechnic. The appellant argues that, as he was at a different stage of maturity before entering university, it would be onerous to accord weight to this. I do not accept this submission. As recognised in *Terence Siow* at [77], if positive influences were already present before the offence was committed, the fact that the appellant was able to compartmentalise these influences and pursue a parallel pattern of behaviour in committing the offences raises the question of whether such influences were able to channel the appellant to constructive non-offending behaviour. If such circumstances have not changed, the degree to which these positive influences are able to prevent further re-offending would not be judged to be very high.

23 Further, I also disagree with the appellant's submission that a constructive environment would be more helpful just because the appellant is now older. It may even be the case that a supportive environment may be more likely to help a *younger* person whose habits are less likely to be set in stone.



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24 Lastly, contrary to the appellant's position, I also find that the DJ did not err in finding that the appellant's familial support would only assist to a limited degree. This has less to do with the earnestness of the involvement of his mother and brothers, who by all accounts have been supportive, and more to do with the nature of the offence in question. As the DJ correctly noted, because such offences occur in the most private of circumstances, parental intervention and supervision are not likely to be feasible. This was also recognised in *Terence Siow* at [79]. I stress that this is not any indictment of the supportiveness of the appellant's family but relates to the suitability of familial intervention in general for offences of such nature.

25 Given the above factors, I find that the DJ did not err in considering that the appellant, while clearly demonstrating some propensity for reform, did not demonstrate an *extremely strong* propensity for reform. It is thus unnecessary to move to the third limb of the *Terence Siow* framework to assess whether there would be risk factors that warrant a revision of a finding that the appellant had a strong propensity for reform.

***Even if the appellant has an extremely strong propensity for reform, deterrence would have remained as the dominant sentencing consideration***

26 Before I conclude, I should state that I agree with the DJ's assessment that even if the appellant had demonstrated an extremely strong propensity for reform, deterrence would have remained the dominant sentencing consideration.

27 As set out by a three-judge panel of the High Court in *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [42] ("*Nicholas Tan*"), deterrence is generally the dominant sentencing consideration for offences under



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s 377BB(4) of the Penal Code, at least in so far as adult offenders with no mental condition contributing to their offending conduct are concerned. It would rarely be the case that the emphasis would shift from deterrence to rehabilitation even where offenders have demonstrated an extremely strong propensity for reform. While this statement was made in the context of s 377BB(4) of the Penal Code, I am of the respectful view that this legal principle should also apply in ascertaining the dominant sentencing consideration for voyeurism offences under the now-repealed s 509 of the Penal Code which would have been prosecuted under the current s 377BB(4).

28 The factors cited by the DJ for the seriousness of the appellant's offending were legitimate and given due weight. Such offences of recording upskirt videos using a mobile phone have seen an increase in prevalence. They are easy to commit but difficult to detect. The appellant had taken numerous videos, including at least one on public transport. There is a need for specific deterrence given the repeat offending by the appellant. I stress that I do not base the need for specific deterrence on the uncharged offending to which the appellant candidly admitted in his psychological assessment, but solely on the conduct with which he was charged. Even confining our examination to the charges before the court, the appellant's conduct, which involved the taking of 19 videos in the course of 100 days, was egregious. It is further aggravating that the appellant, unlike the offender in *Nicholas Tan*, reviewed the videos he had recorded at home. The absence of a vulnerable victim does not diminish this consideration at all.

29 This was clearly not an exceptional case to warrant rehabilitation being the dominant sentencing consideration.



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30 Having concluded that probation was indeed not a suitable sentencing option for the appellant, I now turn to the appropriate length of the imprisonment term.

***Duration of imprisonment term***

31 Both parties agree that the present case does not possess many of the aggravating factors that were present on the facts of *Public Prosecutor v Chong Hou En* [2015] 3 SLR 222 ("*Chong Hou En*"). The charges in *Chong Hou En* that arose out of the filming of young victims in their residential homes are thus of limited relevance in calibrating the imprisonment term in the present case. What is instructive, however, is the charge relating to the filming of a stranger in a shopping mall, for which a sentence of 12 weeks' imprisonment was imposed. The appellant points out that even though the offender in *Chong Hou En* was caught red-handed in the commission of his offence, credit was still given to the genuine remorse and plea of guilt.[9] The appellant argues that mitigating weight should similarly be accorded to his remorse. Even accepting this, a sentence of 12 weeks' imprisonment in fact accords the appellant *more* mitigating weight than the offender in *Chong Hou En*. This is because the charge in *Chong Hou En* related to only one victim in a shopping mall, compared to the amalgamated charge with 19 victims in the present case. If anything, the imprisonment term could have been calibrated even higher than the 12 weeks' imprisonment term in *Chong Hou En.*

32 In my view, 12 weeks' imprisonment also does not compare unfavourably with the sentence of 24 weeks' imprisonment imposed on the offender in *Ang Zhu Ci Joshua v Public Prosecutor* [2016] 4 SLR 1059, after

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[9] Appellant's Skeletal Arguments dated 10 February 2023 at para 108.



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taking into account the severity of the aggravating factors in the latter case. Neither does the term compare unfavourably with the other precedents cited by the Prosecution.

33 In the circumstances, the sentence imposed by the DJ was not manifestly excessive, even after taking into account the appellant's plea of guilt, co-operation with the authorities, and efforts to seek treatment and counselling.

34 I thus dismiss the appeal against the appellant's sentence. It leaves me to thank parties for their helpful and timely submissions on this matter.

Vincent Hoong
Judge of the High Court

Kalidass Murugaiyan and Chua Hock Lu (Kalidass Law Corporation) for the appellant;
Ng Jun Chong (Attorney-General's Chambers) for the respondent.



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