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

[2024] SGHC 220

Magistrate's Appeal No 9092 of 2023

Between

GHI

… *Appellant*

And

Public Prosecutor

… *Respondent*

GROUNDS OF DECISION

[Criminal Law — Statutory offences — Penal Code]
[Criminal Law — Appeal]

TABLE OF CONTENTS

GHI
v
Public Prosecutor

[2024] SGHC 220

General Division of the High Court — Magistrate's Appeal No 9092 of 2023
Vincent Hoong J
2 April 2024

29 August 2024

Vincent Hoong J:

Introduction

1 The overriding aim of the criminal justice system is to ensure that justice is served whilst balancing the need to protect witnesses and maintain the integrity of the judicial process, against the fundamental rights of the accused. Parties should bear in mind that effective cross-examination elicits evidence without aggressive, repetitive and oppressive questioning. Ultimately, the pursuit of justice should never compromise the dignity of the individuals involved.

2 The proper administration of justice requires the court to assiduously maintain the delicate balance between preserving the accused's right to a fair trial on the one hand, and ensuring that the dignity, security and wellbeing of witnesses are not compromised. Shielding measures may be employed to

recalibrate the power dynamics between the accused and the victim, in view of the susceptibility of particular victims to harm that may be occasioned in the course of criminal proceedings. For instance, such measures may be employed in cases involving alleged victims of a sexual offence or witnesses below 18 years of age. The appropriate use of shielding measures facilitates the search for truth while preserving the golden thread that the accused is presumed innocent. Ultimately, the determination of innocence or guilt will only be made after a rigorous assessment of the evidence presented at trial.

3 In the present appeal, the appellant claimed trial to a single charge of aggravated outrage of modesty punishable under s 354(2) of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code"). The learned District Judge ("DJ") convicted him of that charge and sentenced him to 14 months' imprisonment, with a further two months' imprisonment imposed in lieu of caning.

4 The appellant appealed against his conviction and sentence. After considering the parties' submissions, I dismissed the appeal and delivered an oral judgment.

5 I now set out the detailed reasons for my decision and make some observations regarding the giving of evidence by vulnerable witnesses at trial. In particular, I address: (a) the appropriate conduct of counsel when cross-examining victims of sexual offences (in the present case and more broadly); and (b) applications for shielding measures, particularly when there are objections to such applications.

Background

6 The appellant operated and tutored at a tuition centre in Singapore (the "tuition centre"). The tuition centre offered lessons to students of different

levels, from those in primary school to those in junior college.[1] On 23 November 2018, the victim registered as a student at the tuition centre for English language, mathematics and science lessons during the school holidays at the end of the year (the "December school holidays").[2] The victim was 10 years old at the material time.[3]

7 On 12 December 2018, the victim was the only student in the appellant's English language lesson scheduled from 5pm to 6.30pm (the "lesson"). There were usually two other students who attended the lesson with the victim, but they were absent for various personal reasons that day.[4] As such, the appellant and the victim were the only people in the classroom ("Classroom 1"). The lesson was conducted in the following manner. The appellant prepared five worksheets for the victim to complete. After the victim completed a worksheet, the appellant would sit beside the victim to mark the worksheet. The appellant would then hand another worksheet to the victim to complete. This cycle repeated until the end of the lesson.[5]

8 The appellant's long-time friend ("DW2") ran the tuition centre with the appellant and also tutored there. At the time of the lesson, DW2 was conducting a lesson in another classroom ("Classroom 2"), which was diagonally opposite Classroom 1.[6]

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1 The appellant's statement dated 14 December 2018 (the "appellant's police statement") at p 1; Record of Appeal ("ROA") at p 832.

2 The victim's registration form at the tuition centre; ROA at p 848.

3 The appellant's charge sheet; ROA at p 5.

4 Notes of Evidence ("NEs") at Day 3 p 49 lines 1 to 5; ROA at p 275.

5 NEs at Day 3 p 51 lines 8 to 13; ROA at p 277.

6 NEs at Day 4 p 10 lines 1 to 19 and the floor plan of the tuition centre (the "Floor Plan"); ROA at pp 346 and 869.

9 During the lesson, the appellant allegedly: (a) used his hand to touch the victim's right breast over her clothes; (b) placed his hand on her left thigh; (c) used his hand to touch her crotch area; and (d) kissed the back of her neck.[7]

The Prosecution's case below

10 When the appellant sat down on the victim's left to mark a worksheet, he slid his right hand across her back and through her armpit, and then touched her right breast over her clothes with his right hand. She felt the appellant's hand "fiddling" at her nipple.[8] The appellant also placed his left hand on her left thigh and touched her "private area" or "crotch area". However, the victim crossed her legs to prevent him from going further down.[9] During the lesson, the appellant also "swiped" the victim's hair to the right, so that the victim's neck was exposed, and he kissed the back of the victim's neck.[10]

11 The victim left the tuition centre after her lesson ended and did not inform anyone about the molest, including DW2 and the victim's grandfather who was waiting for her outside the tuition centre.[11] Later that evening, the victim recounted the incident to her father ("PW2").[12] PW2 discussed the matter with his wife, the victim's mother,[13] and brought the victim to lodge a police report the next morning, *ie*, 13 December 2018.[14]

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7 The appellant's charge sheet; ROA at p 5.

8 NEs at Day 1 p 27 lines 5 to 12; ROA at p 53.

9 NEs at Day 1 p 28 lines 1 to 11 and p 40 lines 16 to 25; ROA at pp 54 and 66.

10 NEs at Day 1 p 41 lines 16 to 24; ROA at p 67.

11 NEs at Day 1 p 43 lines 5 to 12; ROA at p 69.

12 NEs at Day 1 p 47 lines 1 to 17; ROA at p 73.

13 NEs at Day 1 p 111 lines 24 to 32; ROA at p 137.

14 The victim's police report; ROA at p 430.

The Defence's case below

12 The appellant's defence in the court below was that of bare denial. At most, he had only patted the victim on her shoulder or back to offer her encouragement as he explained the worksheets to the victim.[15] The appellant raised the following arguments in the court below:

(a) The appellant provided his DNA sample, which was tested against the victim's pink dress (the "DNA test"). The report by the Health Sciences Authority ("HSA") yielded a negative result, *ie*, the appellant's DNA was not found on the pink dress. The appellant's lack of hesitation in providing his sample for the DNA test, and the negative test result, raised a reasonable doubt in the Prosecution's case.[16]

(b) There was no opportunity for him to commit the alleged offences. First, as the door to Classroom 1 was left open during the lesson, the appellant and victim were in full and unobstructed view of anyone who walked by Classroom 1.[17] The closed-circuit television ("CCTV") camera near the entrance of the tuition centre captured the outside of the classrooms.[18] The footage revealed that multiple people had walked past Classroom 1 to access the toilet or the office area at the back of the tuition centre. In fact, that same day, there was a training class for adult students conducted by an external vendor in a separate classroom ("Classroom 3"). The training class ended at around 5.30pm,

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15 The appellant's police statement at Q2/A2 and Q3/A3; ROA at pp 836 to 837.

16 Defence's closing submissions dated 8 February 2023 ("DCS") at [86] to [89]; ROA at pp 925 to 926.

17 DCS at [49]; ROA at p 901.

18 NEs at Day 3 p 12 line 17 to p 13 line 10; ROA at pp 238 to 239.

and students in Classroom 3 would have to walk pass Classroom 1 to access the toilet or back-office area.[19]

(c) Moreover, at the time of the lesson, DW2 was conducting a lesson in Classroom 2 (see above at [8]). The victim showed no signs of distress or abnormal behaviour when she left the tuition centre at about 6.33pm. She did not raise any complaint to DW2 about the appellant's alleged molest despite having multiple opportunities to do so.[20] In fact, the CCTV footage revealed that, during the lesson, DW2 entered Classroom 1 at two points.[21]

The appeal against conviction

The decision below

13 The DJ found that the victim was unusually convincing. Despite the time that had elapsed between the incident and the trial, the victim could recall the essential details of the molest and described the inappropriate touches with specificity. Although there were inconsistencies in the victim's testimony, these were not material or significant, and did not adversely impact her overall credibility.[22] Moreover, there was no motive for the victim to falsely implicate the appellant. In the victim's own words, she was "okay with [the tuition centre] because [the teachers at the tuition centre, *ie*, the appellant and DW2] were really nice" and "[t]hey weren't mean, they weren't nasty to me".[23]

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19 DCS at [35] to [41]; ROA at pp 891 to 895.

20 DCS at [52] to [53]; ROA at pp 903 to 904.

21 DCS at [51]; ROA at pp 902 to 903.

22 Grounds of Decision ("GD") at [21]; ROA at pp 413 to 414.

23 GD at [21]; ROA at pp 413 to 414.

14 The DJ also found that the CCTV footage was not helpful to the Defence, as there were multiple periods of time where there was no one walking by Classroom 1. As such, there remained "pockets of opportunity" for the appellant to commit the offences without being seen.[24]

15 Although DW2 was in close proximity to Classroom 1, and the victim saw her as a "friendly teacher", it was not inconsistent for the victim to be uncomfortable with sharing about the molest with DW2. As explained by the victim, the victim saw DW2 as someone who was close to the appellant. The victim was also fearful and shocked by the sexual assault and thus only informed PW2 about the incident when the victim was at home.[25]

16 The DJ thus convicted the appellant of the charge.[26]

Parties' cases

The appellant's case

17 The appellant's case on appeal against his conviction was broadly as follows:

(a) First, the DJ erred in finding that the victim was an unusually convincing witness, in view of the "multitude of inconsistencies in the [v]ictim's evidence".[27] The fact that the victim was able to recall

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24 GD at [32]; ROA at p 419.

25 GD at [36] to [37]; ROA at p 421.

26 GD at [40]; ROA at p 422.

27 The appellant's written submissions for the appeal dated 22 March 2024 ("AWS") at [13].

consistently *where* she had been touched was insufficient to meet the standard of being unusually convincing.[28]

(b) Next, the DJ erred in finding and placing weight on the fact that there was no reason or motive for the victim to lie and falsely implicate the appellant. The appellant was not required to prove a motive on the victim's part as he would not have any insight into the victim's mind.[29]

(c) The DJ also failed to give any consideration to the fact that the DNA test carried out on the pink dress yielded a negative result, *ie*, the appellant's DNA was not found on the victim's dress. There was no mention of the DNA test in the DJ's reasoning.[30]

(d) The DJ erred in placing too much weight on the fact that there were "pockets of opportunity" for the appellant to commit the molest without being seen (see above at [14]). Based on the circumstances at the time of the alleged offence, it was "highly implausible" that the appellant "would have been so brazen as to have committed the offence".[31]

(e) While the victim's evidence was riddled with inconsistencies and inherently at odds with the objective evidence, the appellant's evidence was "clear, consistent and infallible … from the very outset" and "there [was] nothing which [pointed] towards the [a]ppellant's evidence being 'inherently incredible or at odds with the objective evidence'" [emphasis in original omitted]. In fact, the DJ made "no

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28 AWS at [16].

29 AWS at [68].

30 AWS at [28].

31 AWS at [34].

finding against the reliability, credibility and/or veracity of the [a]ppellant's evidence".[32]

The Prosecution's case

18 The Prosecution urged this court to affirm the conviction for the following reasons:

(a) the victim's evidence was unusually convincing as she was able to recall the critical details of the molest, and the inconsistencies highlighted by the appellant were immaterial;[33]

(b) the victim had no reason to lie about what the appellant did to her;[34] and

(c) the results of the DNA test did not assist the Defence, *ie,* they did not mean that the appellant did not commit the offence.[35]

Issues to be determined

19 The issues to be determined were as follows:

(a) whether the DJ erred in finding that the victim was an unusually convincing witness;

(b) whether the DJ erred in making the finding and placing weight on the fact that there was no discernible motive on the victim's part to falsely implicate the appellant;

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32 AWS at [74] to [75].

33 Prosecution's written submissions for the appeal dated 22 March 2024 ("PWS") at [3] and [9].

34 PWS at [30].

35 PWS at [31] to [32].

(c) whether the DJ erred by not considering the DNA evidence;

(d) whether the circumstances at the time of the alleged offence were such that it was implausible for the appellant to have committed the offence; and

(e) whether the DJ failed to consider the reliability, credibility and/or veracity of the appellant's evidence.

20 I considered each issue in turn.

My decision

Whether the victim was an unusually convincing witness

21 A witness's testimony would need to be "unusually convincing" if that testimony alone is to be sufficient to prove the Prosecution's case beyond a reasonable doubt (*Public Prosecutor v GCK and another matter* [2020] 1 SLR 486 ("*GCK*") at [90]). A witness's testimony would be considered unusually convincing 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" (*Public Prosecutor v Mohammed Liton Mohammed Syeed Mallik* [2008] 1 SLR(R) 601 at [39]). The relevant considerations include the witness's demeanour, and the internal and external consistencies of his or her evidence (*GCK* at [88]). The requirement that the witness's evidence should be "unusually convincing" does not change the ultimate rule that the Prosecution must prove its case beyond a reasonable doubt, but it sets the threshold for preferring the witness's testimony over the accused's where it boils down to one person's word against another's (*XP v Public Prosecutor* [2008] 4 SLR(R) 686 at [31] and [34]).

22 There were four main purported inconsistencies in the victim's evidence that the appellant relied on in his appeal: (a) whether the touch on the victim's breast was over one or two layers of clothing; (b) whether the door to Classroom 1 was left open or closed during the lesson; (c) whether the victim spoke to DW2 during the lesson; and (d) how the victim recounted the molest to PW2. The appellant averred that the DJ was wrong to find that the inconsistencies did not diminish the victim's credibility.

23 I agreed with the DJ that none of these inconsistences diminished the credibility of the victim, and that her testimony was indeed unusually convincing. I considered each purported inconsistency in turn.

(1) The nature of the touch on the victim's breast

24 The first alleged inconsistency in the victim's evidence related to whether the appellant touched her breast over one or two layers of clothing. The victim testified that the appellant had touched her right breast under her pink dress but over the black "thin-covered layer" or "top" that she was wearing under the pink dress (the "black top").[36] This was different from the victim's account in her police statement dated 13 December 2018 that "[a]ll the touches were over [her] clothing" and in which there was no mention of the black top at all.[37] Upon refreshing her memory with her statement, the victim confirmed that her version in the police statement was correct, *ie*, that the appellant had touched her over her pink dress. The victim explained that she recalled the "temperature" of the appellant's hand on her armpit and, since the sleeve of her dress did not

36 NEs at Day 1 p 21 lines 11 to 15; ROA at p 47.

37 DCS at [21] to [22]; ROA at pp 879 to 882.

cover her armpit well, she mistakenly assumed that the appellant's hand was under her dress but over the black top.[38]

25 The appellant highlighted that no other witness, such as the victim's father (*ie,* PW2) or the investigative officer, mentioned the black top. Not only was this a material discrepancy in her evidence, but the victim's explanation was also "nonsensical".[39] Moreover, if the black top had been mentioned at the appropriate time, the DNA test would have been conducted on that instead of the pink dress.[40]

26 In my view, and as the learned DJ had also found, the victim's explanation for the inconsistency was reasonable, particularly in view of the four years that had elapsed between the incident and the trial. After the victim's memory was refreshed with her police statement, the victim readily admitted that her initial statement was accurate. She explained that her memory of the incident was based on the feeling of the appellant's touch and her memory of that was "vivid" at the time of statement-taking which was only a day after the incident. However, at the time of her court testimony, the victim recalled the "[feeling] of [the appellant's] hands on [her] armpits" and mistakenly assumed that the appellant's hand was under her dress:[41]

> Q: I will let you explain, [redacted], because are you now saying that what you say in your statement may also not be correct?
>
> A: **What I say in my statement was correct** because that was how I was—how I felt that I were—how I was touched **because I felt it on that day during that incident and that**

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38 NEs at Day 1 p 37 lines 20 to 24; ROA at p 63.

39 AWS at [21].

40 AWS at [25].

41 NEs at Day 1 p 70 lines 17 to 29; ROA at p 96.

> **was, like, a very, like—how to say—vivid thing**. **But this morning, I said those stuff because of an unclear memory of the feel—the touch and the feeling** … Because as I said, when I was giving the statement of his right hand, I could remember feeling his arms on my armpits and that I couldn't—I ca—can't remember what he hand—his hands did **so I probably assumed that since I could remember the—the felt of his hands on my armpits, I think that his hands went in between my two clothing.**
>
> [emphasis added]

27 In my view, this was a reasonable explanation that the DJ correctly accepted. As held by this court in *Tay Wee Kiat and another v Public Prosecutor and another appeal* [2018] 4 SLR 1315 (at [27] and [31]), adequate allowance must be accorded to human fallibility in retention and recollection, and inconsistencies on points of detail are not unexpected over the passage of time. Further, notwithstanding the inconsistency regarding whether the appellant touched the victim's breast over one or two layers of clothing, the victim was clear that there was no skin-on-skin contact.[42] The victim was also otherwise able to describe the appellant's touch in detail, such as where she was seated, where the appellant was seated and how his hand moved (see above at [10]). As such, the explanation provided for the discrepancy was a reasonable one and this discrepancy did not undermine the victim's credibility.

28 Since the victim's eventual account remained that the appellant had touched her over the pink dress, there was no need to address the appellant's point that the DNA test should also have been conducted on the black top. Furthermore, as I explain later (see below at [48]–[51]), the results of the DNA test did not assist the appellant's case.

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42 NEs at Day 1 p 91 lines 23 to 31; ROA at p 117.

(2) Whether the door to Classroom 1 was left open during the lesson

29 The next alleged inconsistency related to whether the door to Classroom 1 was left open or closed during the lesson. The appellant rehashed the same argument as he did in the court below that the victim was inconsistent on this point. Initially, the victim testified that the appellant would "sometimes close the door, sometimes slight[ly] open the door" though she conceded that she could not recall whether the door was open or closed.[43] The appellant then relied on the following extract of the victim's evidence to argue that the victim contradicted herself by confirming, at a later point, that the door was indeed fully open during her classes:[44]

> Q: … Now, that is with the door fully open.
>
> A: Yes.
>
> Q: Am I right that that is always the position whenever you have your classes?
>
> A: **Yes, I think**.
>
> [emphasis added]

30 In my view, this was *not* an inconsistency in the victim's evidence, especially with the relevant context. As the DJ observed, the victim had already admitted that she "didn't take note" and "didn't pay attention to the door".[45] Even when counsel for the appellant continued to question the victim about the door (see above at [29]), the victim caveated her answer with an "I think". In the circumstances, it was clear that the victim was uncertain about whether the door was open or closed.

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43 NEs at Day 1 p 61 lines 4 to 12; ROA at p 87.

44 NEs at Day 1 p 68 lines 4 to 9; ROA at p 94.

45 NEs at Day 1 p 44 lines 1 to 6; ROA at p 70.

31 In relation to whether the door to Classroom 1 was indeed open or closed at the material time, I considered this together (see below at [52]–[56]) with the significance of the CCTV footage, since the appellant relied on both these points, amongst others, to argue that it was implausible for him to have committed the offence in such a brazen manner.

(3) Whether the victim spoke to DW2 at the tuition centre on the day of the incident

32 The next purported inconsistency in the victim's evidence related to whether she spoke to DW2 on the day of the incident. Initially, the victim testified that that she "did not think" she spoke to DW2 that day. However, the CCTV footage revealed that DW2 entered Classroom 1 at two points. DW2 testified that she had entered Classroom 1 for the first time near the start of the lesson to greet the victim, and the second time near the end of the lesson to ask the victim about her school schedule for the new year.[46] When DW2 entered Classroom 1 for the second time, the appellant had left the classroom and it was only the victim and DW2 alone in Classroom 1 at that point. After reviewing the CCTV footage, the victim accepted that that had happened.[47]

33 In my view, there was no inconsistency because the victim had already accepted that she was could not recall whether she saw DW2 on that day:[48]

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46 NEs at Day 4 p 9 lines 1 to 29; ROA at p 345.

47 NEs at Day 1 p 118 lines 2 to 31; ROA at p 144.

48 NEs at Day 1 p 72 lines 18 to 32; ROA at p 98.

> Q: Right. Did you see [DW2]?
>
> A: **I don't think I did.**
>
> Q: You don't think or you cannot recall?
>
> A: **I cannot recall.**
>
> Q: Okay. Well, would I be right to ask you this, is that [DW2] actually said that … she came to say hello to you when you were in your class.
>
> A: **I don't remember. I don't think she did.**
>
> Q: You don't remember that she came to say hello to you, to find out how you are and all that before you start your lesson?
>
> A: **No.**
>
> Q: Okay. Can you recall her actually also coming to talk to you near to the end of the class when you were still in the class?
>
> A: **No.**
>
> [emphasis added]

Similar to the alleged inconsistency in the victim's evidence regarding whether the door to Classroom 1 was closed, the appellant made much hay about this issue when the victim had already prefaced her answer by saying that she was unable to recall that particular detail.

34 The victim had explained that she did not think she had spoken to DW2 about the upcoming school year because, in her mind, there appeared to be no need to.[49] I agreed with the DJ this was a reasonable explanation.[50] According to the victim, she had only registered for lessons at the tuition centre during the December school holidays and there was thus no need for DW2 to know about

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49 NEs at Day 1 p 73 lines 9 to 16; ROA at p 99.

50 GD at [34]; ROA at p 420.

the victim's schedule for the upcoming school year.[51] In any event, I did not find the issue of whether the victim spoke to DW2 on the day of the incident to be a material one, bearing in mind the time that elapsed between the offence and the trial.

35 Relatedly, the appellant also rehashed the argument that the victim's failure to leave Classroom 1 (or the tuition centre) and/or to inform DW2 of the molest despite the multiple opportunities to do so rendered the victim an unreliable witness.[52] The DJ correctly rejected this argument. Victims of sexual crimes cannot be straitjacketed in the expectation that they must act or react in a certain manner (*GBR v Public Prosecutor and another appeal* [2018] 3 SLR 1048 ("*GBR*") at [20]). There is no general rule requiring victims of sexual offences to report such offences immediately or in a timely fashion. In particular, young victims of sexual assault may not report offences in a timely manner for various reasons including feelings of shame and fear. Delay in reporting is not, on its own, a reason to disbelieve a victim. The court should consider the reasons for the delay in reporting the offences to the police or to anyone else (*Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2019] 2 SLR 490 at [65]–[68]).

36 I found that the victim provided a reasonable explanation for her actions. The victim explained that she did not push the appellant's hands away or leave the premises as she froze due to her shock and fear. The victim explained she "[didn't] know what to do. So [she] just froze on [the] spot … [w]aiting for the class to end … [she] felt that … it was useless running away from [the

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51 NEs at Day 1 p 73 lines 9 to 16; ROA at p 99.

52 AWS at [60] to [67].

appellant's] actions".[53] The victim went on to explain that she was scared that if she ran out of the classroom, the appellant would have noticed it. As she was ten years old at the time, she felt that she "couldn't possibly … defend [herself]".[54]

37 The victim also did not report the molest to DW2 at the tuition centre because she did not see DW2 as a trusted adult. The victim only had a few classes with DW2 thus far, and the victim recognised that DW2 worked together with the appellant.[55] Taken together with her young age, the victim's reaction to the offence was reasonable. In any event, the victim's reporting of the incident to PW2 and then to the police less than a day after the incident (see above at [11]) can hardly be described as delayed reporting.

(4) The victim's recounting of the incident to her father, PW2

38 The final alleged inconsistency in the victim's evidence related to how the victim recounted the molest to PW2:[56]

> (a) The victim's version was that she had taken "quite a few hours to have the courage" to share about the incident with her father. She opened up as she "[could not] take it anymore" and felt "overwhelmed by what happened", and her voice was "shaky" as she recounted the incident to PW2.[57] According to the victim, she had only informed PW2 of the incident at the time, as the victim's mother was rushing off to a

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53 NEs at Day 1 p 96 lines 23 to 32; ROA at p 122.

54 NEs at Day 1 p 101 line 28 to p 102 line 7 and p 103 lines 18 to 32; ROA at pp 127 to 129.

55 NEs at Day 1 p 104 lines 22 to 28; ROA at p 130.

56 AWS at [49] to [54].

57 NEs at Day 1 p 47 lines 1 to 32; ROA at p 73.

party at her workplace.[58] At a later point, PW2 informed the victim's mother of what the victim told him.[59]

(b) However, PW2 testified that the victim only brought up the incident when he confronted her about her excessive mobile phone usage and whether she had completed her tuition homework.[60] PW2 also testified that the victim did not seem "hysterical or … traumatised … [b]ut just quiet".[61] Furthermore, according to PW2, the victim's mother was indeed with him when the victim shared about the incident at the tuition centre, and it was the victim's mother who asked the victim for more details of the incident.[62]

39 As such, according to the appellant, not only was the victim's evidence contradicted by PW2, but that it was "extremely telling that the [v]ictim had completely omitted to mention the circumstances of her father confronting her about her excessive mobile phone usage and homework".[63] The appellant thus averred that the victim purposefully omitted these facts, which called into question her credibility. The appellant also highlighted that, despite these inconsistencies and that the victim's mother was the one who asked about the incident in more detail, the victim's mother was not called as a witness by the Prosecution or offered to the Defence.[64]

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58 NEs at Day 1 p 111 lines 3 to 7; ROA at p 137.

59 NEs at Day 1 p 111 lines 24 to 32; ROA at p 137.

60 NEs at Day 1 p 127 lines 25 to 32; ROA at p 153.

61 NEs at Day 2 p 12 lines 20 to 24; ROA at p 178.

62 NEs at Day 2 p 22 lines 6 to 16; ROA at p 188.

63 AWS at [56].

64 AWS at [58].

40 Firstly, I agreed with the DJ that the differences between the victim's and PW2's evidence on how the victim informed PW2 about the incident were immaterial. More importantly, both the victim and PW2 were consistent that the victim informed PW2 the night of the molest, which led PW2 and the victim's mother to speak with DW2 to find out more about the incident, and ultimately bring the victim to the police station to make a report.[65]

41 Secondly, insofar as the appellant alluded to the victim's purposeful omission of the circumstances in which the molest was brought up as indicative of her motive to falsely implicate the appellant, this had to be rejected. I noted that the appellant argued, in the court below, that the victim's motive for falsely implicating the appellant was to deflect responsibility when PW2 confronted her about her excessive mobile phone usage and the homework assigned by the tuition centre. The appellant similarly highlighted, in the court below, that the omission by the victim to disclose these circumstances of the conversation between herself and PW2 was significant, and it was thus "not inconceivable" that the victim made up the sexual allegations against this backdrop.[66]

42 However, the appellant did not suggest or put to the victim that she had a motive to fabricate her evidence.[67] Even if it was accepted that issue only arose after PW2 (who testified after the victim) gave evidence of the circumstances of the conversation between the victim and himself, there was no indication of any attempt by the Defence to recall the victim. The argument that the victim concocted the entire assault to deflect from her mobile phone usage and homework was only belatedly raised in the Defence's closing submissions at

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65 GD at [39]; ROA at p 422.

66 DCS at [72]; ROA at p 919.

67 Prosecution's Closing Submissions dated 8 February 2023 ("PCS") at [16]; ROA at pp 452 to453.

the end of the trial, without any evidential basis.[68] In any event, I agreed with the Prosecution that the proposition that the "victim would cleave to such serious allegations for more than four years for such a comparatively petty reason [did] not sit well with reason".[69]

43 In sum, not only was the allegation of a motive on the victim's part a clear afterthought, but there was no evidence adduced of any plausible motive.

Whether the DJ erred in making the finding and placing weight on the fact that there was no motive to fabricate

44 Relatedly, the appellant argued that that the DJ was wrong to make the finding and place weight on the fact that the victim had no reason to falsely implicate the appellant. According to the appellant, it was not for him to prove that the victim had some reason to falsely implicate him. Furthermore, the victim "[could not] be taken at her word simply because the [c]ourt found no discernible reason or motive for her to fabricate the allegations against the [a]ppellant".[70]

45 I disagreed with the appellant's reasoning. First, the appellant had misunderstood the law. The DJ was entitled to make the finding and place weight on the fact that the victim had no ostensible reason to falsely implicate the appellant since it is trite that the presence of a motive to falsely implicate an accused person may raise a reasonable doubt as to his guilt (*Public Prosecutor v Yue Roger Jr* [2019] 3 SLR 749 ("*Yue*") at [50]).

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68 Prosecution's reply submissions dated 28 February 2023 ("PRS") at [16]; ROA at p 633.

69 PRS at [16]; ROA at p 633.

70 AWS at [70].

46 Secondly, it was indeed the appellant's onus to adduce sufficient evidence of a motive to fabricate. The burden on the Prosecution to prove absence of motive to fabricate does not arise in every instance; such burden only arises where the Defence raises sufficient evidence of a motive to fabricate so as to raise a reasonable doubt in the Prosecution's case (*Yue* at [48(b)]). Where the Defence raises sufficient evidence of a motive to fabricate, the Prosecution has to prove that there was no such motive (*Yue* at [48(c)]). As I found earlier (see above at [42]), there was no evidence adduced of any such motive.

47 Finally, contrary to the appellant's submission, the DJ did not take the victim's word simply because there was no ostensible motive to fabricate. The DJ merely made the finding that there was "no reason or motive for the [v]ictim to lie and fabricate her evidence against the [appellant]", and *not* that the absence of a motive was, *by itself*, sufficient to render the victim's testimony unusually convincing. As such, that there was no discernible motive for the victim to falsely implicate the appellant was merely *one of the factors* the DJ took into consideration when assessing the victim's credibility.[71] In my view, the DJ was correct to reason in this way. While the presence of a motive to falsely implicate an accused may raise a reasonable doubt as to his guilt, the absence of a proved motive is in itself insufficient to render a complainant's testimony unusually convincing and thereby establish guilt beyond a reasonable doubt (*Yue* at [50]).

Whether the DJ erred by failing to consider the DNA evidence

48 Next, the appellant submitted that the DJ failed to consider the fact that the victim's dress tested negative for the appellant's DNA. Given that the

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[71] GD at [21]; ROA at pp 413 to 414.

touches alleged were not fleeting, the fact the test yielded negative results raised a reasonable doubt in the Prosecution's case.[72] In addition, the DJ failed to consider the fact that the appellant's lack of hesitation and consent to providing his DNA sample was a reaction unlike that of a guilty person.[73]

49 In my view, the DNA test results did not assist either the Prosecution's or the appellant's case. The HSA analyst testified that, based on the results, it was possible that the appellant either did not touch the dress *or* that he did not leave sufficient DNA to be interpreted.[74] The HSA analyst confirmed that there were many reasons why DNA may not be deposited, such as the duration of the touch and the individual's propensity to shed DNA.[75] Moreover, based on the appellant's own evidence, he had "pat[ted]" the victim's hair, shoulder or back area to offer the victim encouragement during the lesson.[76] The back and shoulder area of the exterior of the dress was one of the areas examined for the appellant's DNA, which tested negative as well.[77]

50 I also noted that there appeared to be no evidence given as to how the victim's dress was handled prior to the dress being handed to the police, such as whether it was washed. The only evidence in that regard was that, on the day of the police report, PW2 asked his domestic helper to retrieve the dress from their home and to bring it to the police station.[78] In the circumstances, I found

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72 AWS at [29].

73 AWS at [31].

74 NEs at Day 2 p 42 lines 1 to 11; ROA at p 208.

75 NEs at Day 2 p 48 lines 13 to 23; ROA at p 214.

76 The appellant's police statement at Q2/A2 and Q3/A3; ROA at pp 836 to 837.

77 HSA DNA profiling report dated 17 January 2019; ROA at p 829.

78 NEs at Day 2 p 27 lines 1 to 9; ROA at p 193.

that the DNA test results were inconclusive as to whether the appellant had touched the victim.

51 Finally, the appellant's consent to provide his DNA sample was not indicative of his lack of guilt. He may have consented for a variety of reasons and it was not for the court to draw an inference of guilt, or the lack thereof, based on merely this and nothing else.

Whether the circumstances at the time were such that it was implausible for the appellant to have committed the offence

52 The appellant submitted that the DJ erred by attributing undue weight to the fact that the CCTV footage revealed that there were "pockets of opportunity" for the appellant to commit the offence without being seen, since there were periods of time where nobody walked past Classroom 1.[79] The appellant accepted that he was unable to prove that it was impossible for him to commit the offence, *ie*, it was impossible to show that there was *always* someone walking past Classroom 1. However, he highlighted that: (a) the classroom door was open at all times; (b) there were multiple people on the premises at the time, such that someone could walk by without warning if there was something untoward happening in Classroom 1; and (c) anyone walking past Classroom 1 would have been in close proximity to where the victim had been.[80] Put in another way, it was implausible for the appellant to have committed the offence under such brazen circumstances.

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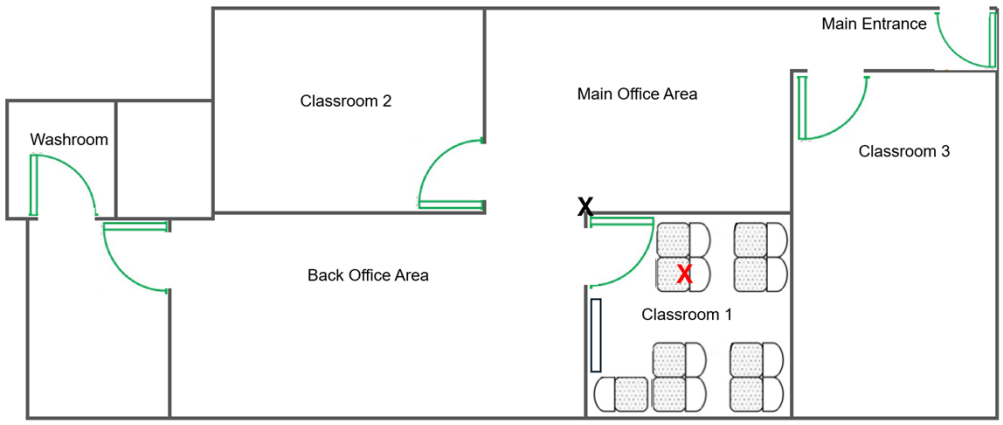
79 AWS at [32].

80 AWS at [34].

53 However, as pointed out by the Prosecution, the Classroom was not as "open or transparent as [the appellant] would have the court believe".[81] I attach a simplified floor plan of the tuition centre for our present purposes.[82] The victim's desk and seat at the material time are indicated with a red "X":



54 Even if the door was left wide open, the appellant conceded that there were certain areas in Classroom 1 which people would have difficulty looking into. In particular, the appellant agreed that the victim's seat was obscured by the wall that separated Classroom 1 from the "Main Office Area".[83] Furthermore, according to the appellant, near the door to Classroom 1 there was a "pillar that [was] quite wide" where a "whole person can be hidden in front of the pillar". With respect to the "pillar", the appellant was referring to a beam that bordered the door to Classroom 1, which is marked with a black "X" above.[84] The appellant had accepted that, when he stood near the pillar, the

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81 PWS at [20].

82 Floor Plan; ROA at p 869.

83 NEs at Day 3 p 82 lines 7 to 15; ROA at p 308.

84 DCS at [10]; ROA at p 1136.

victim would not be able to see him (and the necessary implication was that, neither would he be able to see the victim).[85]

55 Furthermore, even assuming both doors to Classroom 1 and 2 were wide open, the appellant also accepted that the people in Classroom 2 would have difficulty seeing the victim in her seat in Classroom 1.[86] I also noted that the door to Classroom 2 was indeed left closed for certain periods at the time of the lesson.[87] As such, I agreed with the Prosecution that the environment at the time of the offence was not as "open" as portrayed by the appellant.

56 In any event, the fact that the molest took place in potential sight of others was not a reason, on its own, to disbelieve the victim's testimony (*Yue* at [42]). Sexual offences, including rape, have taken place at various places, including at public locations (*Yue* at [42]).

Whether the DJ erred by not making any finding in relation to the appellant's credibility

57 Finally, the appellant submitted that the DJ erred by making no finding in relation to the reliability, credibility and/or veracity of his evidence. In *Yoganathan R v Public Prosecutor and another appeal* [1999] 3 SLR(R) 346, the High Court upheld the lower court's decision to accept the Prosecution's version of the material events instead of the Defence's case, since the latter was "inherently incredible or at odds with the objective evidence" (at [28]–[32]). According to the appellant, that was not the case here as the appellant's evidence was "clear, consistent and infallible" from the outset. For instance, the appellant

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85 NEs at Day 3 p 86 lines 13 to 17; ROA at p 312.

86 NEs at Day 3 p 82 lines 10 to 15; ROA at p 308.

87 NEs at Day 4 p 22 lines 16 to 22; ROA at p 358.

highlighted (and consistently maintained) important details including that the door to Classroom 1 was open throughout the lesson, and that there were multiple people walking past Classroom 1 during the lesson.[88]

58 I found that the DJ was right to focus his scrutiny on the victim's credibility, to first determine if there was a reasonable doubt within the Prosecution's case. There are two ways that reasonable doubt may arise in the Prosecution's case. First, a reasonable doubt could arise from "*within the case mounted by the Prosecution*" [emphasis in original], that is, considering all the evidence adduced by the Prosecution at each stage of the proceedings. The court must particularise the specific weakness in the Prosecution's own evidence that irrevocably lowers it below the threshold of proof beyond a reasonable doubt. Once the court has identified the flaw internal to the Prosecution's case, weaknesses in the Defence's case cannot ordinarily shore up what is lacking in the Prosecution's case to begin with (*GCK* at [134], [140] and [142]).

59 The second way a reasonable doubt may arise is on the "*totality of the evidence*" [emphasis in original] which includes the Defence's case and any weaknesses therein. The assessment of the totality of the evidence is intimately connected with the "unusually convincing" standard, which arises in situations involving one person's word against another's. In order to find a reasonable doubt in the Prosecution's case on the totality of the evidence, the court has to articulate the specific doubt that has arisen in the Prosecution's case and ground it with reference to the evidence (*GCK* at [143], [144] and [147]). In the present case, there was no specific doubt that had arisen in the Prosecution's case. As I had explained earlier, it was insufficient to raise a doubt in the Prosecution's case for the appellant to simply maintain that the door to Classroom 1 was

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[88] AWS at [75].

always open, and that there were people walking outside Classroom 1 (see above at [52]–[56]).

60 For these reasons, I dismissed the appeal against conviction.

The appeal against sentence

The decision below

61 The DJ found that the case fell into Band 2 of the sentencing framework in *GBR* at [31], which corresponded to an imprisonment term of one to three years. The DJ determined that a sentence of 14 months' imprisonment was appropriate in view of the following offence-specific factors:[89]

(a) The level of intrusion was significant. The inappropriate touches on the victim's private part were substantial, in that they were not fleeting or momentary in nature.

(b) As the victim's tutor, the appellant abused the trust reposed in him.

(c) The victim's age was an aggravating factor since she was ten years old at the time of the offence, which was younger than the stipulated age ceiling (*ie,* 14 years old) for victims of offences punishable under s 354(2) of the Penal Code.

62 Caning was nearly always imposed for cases, such as the present, that fell into Band 2 of the sentencing framework in *GBR* and the suggested starting point was three strokes of the cane (*GBR* at [33]). The DJ would have ordered three strokes of the cane to achieve a sufficiently deterrent and retributive

[89] GD at [57] to [60]; ROA at pp 427 to 428.

sentence in view of the circumstances of the case. However, as the appellant was above 50 years old at the time of sentencing, the DJ imposed an additional two months' imprisonment in lieu of caning. Consequently, the appellant was sentenced to 16 months' imprisonment in total.[90]

Parties' cases

The appellant's case

63 The appellant agreed that the present case fell into Band 2 of the sentencing framework in *GBR*. However, the appellant submitted that the appropriate sentence was 12 months' imprisonment:[91]

(a) The DJ erred in finding that the degree of sexual exploitation in the present case was high. The inappropriate touches did not feature skin-on-skin contact, and the victim presented with no particular vulnerabilities.[92]

(b) There were no substantial aggravating factors, such as violence used or an exploitation of a particularly vulnerable class of victims, which warranted the enhancement of the imprisonment sentence in lieu of caning. As such, the DJ erred in imposing the two-month enhancement.[93]

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90 GD at [62]; ROA at pp 428 to 429.

91 AWS at [86].

92 AWS at [84].

93 AWS at [85].

The Prosecution's case

64 The Prosecution submitted that the sentence imposed of 16 months' imprisonment was not manifestly excessive:

(a) A sentence of a year's imprisonment was at the lowest end of the sentencing range for cases falling within Band 2 of the *GBR* framework. In view of the offence-specific factors in the present case (see above at [61]), the DJ correctly held that the appropriate sentence should be higher than a year's imprisonment.

(b) The appellant ought to have been sentenced to three strokes of the cane, which was the starting point suggested by the court in *GBR* (at [33]) and the DJ correctly imposed two months' imprisonment in lieu of caning.

My decision

65 It was undisputed that the present case fell into Band 2 of the sentencing framework in *GBR,* which corresponded to an imprisonment term of one to three years. Cases that fell into the lower end of Band 2 (at around one year's imprisonment) would involve intrusion to the victim's private parts, but no skin-on-skin contact (*GBR* at [33]). This squarely applied to the present case. However, in view of the *other* aggravating factors such as the appellant's abuse of the trust reposed in him as a teacher and the victim's age, the sentence of 14 months' imprisonment could not be said to be manifestly excessive. The victim was ten years old at the time of the offence. The victim's young age would, in relation to enhanced offences, be further aggravating if the victim concerned was materially younger than the stipulated age ceiling, and in a graduated manner depending on how much younger the victim was (*GBR* at [29(f)]).

66 Caning would nearly always be imposed for cases that fall within Band 2 of the sentencing framework in *GBR*, and the suggested starting point would be at least three strokes of the cane (*GBR* at [33]). Pursuant to s 325(1)(*b*) of the Criminal Procedure Code 2010 ("CPC"), the appellant was over 50 years of age and could not be punished with caning. Nonetheless, as provided by s 325(2) of the CPC, the court may impose a term of imprisonment of not more than 12 months in lieu of the caning which it could have ordered in respect of the relevant offences.

67 I was unable to accept the appellant's submission that there were no substantial aggravating factors in the present case, such that no enhancement of the imprisonment sentence should be ordered. The appellant abused his position of trust and exploited a young victim who was only ten years old at the material time. I agreed with the DJ that an enhancement of the imprisonment sentence was necessary to achieve a sufficiently deterrent and retributive sentence. Where an offender avoids between one to six strokes of the cane, he may face up to an additional three months' imprisonment (*Amin bin Abdullah v Public Prosecutor* [2017] 5 SLR 904 at [90(a)]). The two-month enhancement of the imprisonment sentence corresponded to the number of strokes of the cane avoided and was just and fair. I thus affirmed the total sentence imposed of 16 months' imprisonment.

The giving of evidence by vulnerable witnesses

68 Before concluding, I make some observations regarding the giving of evidence by vulnerable witnesses. In particular, I address the appropriate conduct of parties when cross-examining alleged victims of sexual offences and applications for shielding measures.

Cross-examining alleged victims of sexual offences

69 First, I noted that the victim in the present case was questioned on her attire at the time of the molest. The practice of asking victims about their clothing at the time of the alleged offence is acceptable *if this sheds light on how the offence was committed*. For example, the line of questioning may confirm whether the touching was above or under clothes, whether there was skin-on-skin contact and/or how there came to be such skin-on-skin contact. Such questions are necessary to provide the court with the proper context in which the offence was committed. However, the enquiry becomes objectionable when it is premised on, or leads to, the submission that the victim's attire had in some way, invited the sexual assault. For example, any line of questioning which invites the implication that the victim had encouraged unwanted attention because she was dressed provocatively, must be rejected.

70 In the present case, the questions about how the victim was clothed first arose in her evidence-in-chief, when the victim explained how and where the appellant had placed his hand on her breast. The victim then brought up the black top she was wearing under her pink dress for the first time and testified that the appellant touched her breast over the black top but under her pink dress, which was inconsistent with her earlier statement (see above at [24]). Thereafter, in the victim's cross-examination, counsel for the appellant zeroed in on this inconsistency in the victim's evidence. I reproduce a part of the victim's cross-examination by counsel below:[94]

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[94] NEs at Day 1 p 84 lines 14 to 26; ROA at p 110.

> Q: Okay. And did you mention at all about this black thin covered layer?
>
> A: Yes.
>
> Q: Are you sure? Because there's nothing in your statement that says that. I ask you this, [redacted], **because in a case of an allegation of molest, it would have been important to know what clothing was being worn. Like were you wearing a bikini, did you wear a bra, did you wear underwear. That kind of situation.** I'm sure you would have been asked, right? And if you had said, 'yes'. You were wearing also a black thin covered layer. As you also elaborate you said it wasn't exactly a bra, it was just a top.
>
> …
>
> Q: … Would I be right to say that you did not tell [the investigation officers] of this black thin covered layer?
>
> A: Yes.
>
> [emphasis added]

71 While counsel's comments to the 14-year-old witness could have been much better articulated, I was of the view that his questions to the victim did not cross the line insofar as he did not perpetuate the harmful stereotype that sexual assault is provoked by what the victim wears. I was also of the view that this line of inquiry about the victim's clothes at the material time was relevant in view of the victim's evidence on the manner in which the offence was committed and the DNA evidence relied upon by the Defence. However, I still caution parties against making broad, unnuanced statements, such as the one above, that "in a case of an allegation of molest, it would have been important to know what clothing was being worn", since this is not always necessarily the case (see above at [69]). I emphasise that the court will not tolerate a line of inquiry regarding the victim's attire when its implication is such that the victim invited the sexual assault.

72 Next, I observed that there was *no prolonged* cross-examination of the victim in the present case, which lasted half a day. While there were some comments that could be phrased better to the young victim (see above at [70]), the questions put to the victim were generally relevant and put in a measured way, and the victim was given the opportunity to clarify her answers at multiple points.

73 It should be borne in mind that the purpose of cross-examination is not to cause unnecessary discomfort to, harass or abuse a witness. In cases of sexual offences especially, unwarranted questioning of the victim's credibility, delving into irrelevant personal history or insinuating blame can not only re-traumatise the victim but also perpetuate harmful stereotypes about sexual violence. This approach can dissuade other victims from coming forward for fear of being subjected to a similar ordeal. It is too frequently overlooked that the purpose of cross-examination is to elicit evidence from the witness to support the cross-examiner's case (*Dzulkarnain bin Khamis v Public Prosecutor and another appeal and another matter* [2023] 1 SLR 1398 at [104], citing Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 7th Ed, 2017) at paras 20.006 and 20.007). While cross-examination is a means of ensuring that the evidence of a witness is properly tested when in conflict with the case of the party cross-examining, it is not designed to be an opportunity for theatricality nor for an advocate to demonstrate a flair for antagonistic or aggressive, repetitive and oppressive questioning.

74 Under s 148 of the Evidence Act 1893 (2020 Rev Ed) ("Evidence Act"), witnesses may be asked, during cross-examination, questions which tend to test their accuracy, veracity or credibility, discover their identity and position in life, or shake the witness' credit by injuring his or her character. While cross-examination can be robust, appropriate cross-examination involves asking

clear and purposeful questions that are relevant, and within legal limits. Questions should not be asked without reasonable grounds or be indecent or scandalous in nature, and speculative queries or irrelevant probing into the victim's past are proscribed by law:

(a) As provided in s 153 of the Evidence Act, the court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the court, unless they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed.

(b) In particular, ss 150 and 151 of the Evidence Act provide that questions that are relevant to the suit or proceeding only insofar as they affect the credit of the witness by injuring the witness's character ought to be asked only if there are reasonable grounds for thinking that the imputation conveyed is well founded.

(c) Cross-examination should not be a platform for personal attacks or insulting or annoying remarks under the guise of questioning. Indeed, as per s 154 of the Evidence Act, the court is to forbid any question which appears to be intended to insult or annoy, or appears to be needlessly offensive in form.

75 Section 154A(1) of the Evidence Act specifically provides that the questions that may be asked of an alleged victim of a sexual offence or child abuse offence are subject to restrictions as set out in the relevant sub-legislation. Rule 3 of the Evidence (Restrictions on Questions and Evidence in Criminal Proceedings) Rules 2018 ("Evidence Rules") is set out in full as follows:

> **Restrictions on questions and evidence in criminal proceedings involving sexual offence or child abuse offence**
>
> **3**. In criminal proceedings where the accused is charged with committing a sexual offence or child abuse offence, the following apply:
>
> (*a*) except with the permission of the court, no question may be asked of the alleged victim of the offence, during cross-examination by or on behalf of the accused, about the alleged victim's sexual behaviour or physical appearance;
>
> (*b*) except with the permission of the court, no evidence may be adduced by or on behalf of the accused about the alleged victim's sexual behaviour or physical appearance.

76 Rule 4(1) of the Evidence Rules provides that an application for permission under rr 3(*a*) or 3(*b*) is to be heard in the absence of the alleged victim of the offence. Under r 4(2), permission under rr 3(*a*) or 3(*b*) may be granted only if it would not be in the interests of justice to disallow the asking of the question or the adducing of the evidence. These restrictions exist to ensure that alleged victim is not the subject of distressing questions that are irrelevant to the case (Singapore Parl Debates; Vol 94, Sitting No 69; [19 March 2018] (Indranee Rajah, Senior Minister of State for Law) ("Second Reading Speech")).

77 Ultimately, cross-examination can and should be performed to elucidate the facts without resorting to intimidation or re-traumatisation of witnesses. It is possible to challenge the reliability and credibility of a witness in a way which is measured, respectful and prioritises the elicitation of the truth while preserving the dignity of all involved and upholding the decorum of the court. This critical balance between thorough examination and respectful treatment of witnesses, reinforces the principle that the pursuit of justice should never compromise the dignity of the individuals involved.

Applications for shielding measures

78 I now turn to consider the issue of shielding measures. At the commencement of the trial in the court below, the Prosecution applied for a shielding measure under s 281A of the CPC for the duration of the victim's testimony, on the basis that the victim was below 18 years of age at the time.[95] The victim was 14 years old when she gave evidence in court. The Defence objected to the application and submitted that a shielding measure implied that there had been "some sort of threat made to the victim… and [that] she [was] therefore frightened to see the [appellant] face-to-face".[96]

79 However, an application for shielding measures *does not necessarily* imply that a threat was made to the victim. An application under s 281A of the CPC may be made in respect of specific categories of witnesses, including but not limited to an alleged victim of a sexual offence or one that is below 18 years of age. For ease of reference, I set out the provision below:

> **Measures to prevent witness from seeing accused**
>
> **281A.**—(1) Despite any provision of this Code or any other written law, but subject to this section, the court may make an

95 NEs at Day 1 p 2 lines 7 to 10; ROA at p 28.

96 NEs at Day 1 p 3 lines 1 to 4; ROA at p 29.

> order allowing a witness to give evidence while prevented by a shielding measure from seeing the accused, if —
>
> (*a*) the witness is below 18 years of age;
>
> (*b*) the witness is the alleged victim of a sexual offence or child abuse offence that the accused is charged with; or
>
> (*c*) the court is satisfied that —
>
> (i) either or both of the following apply:
>
> (A) the witness is afraid of the accused, or of giving evidence in the presence of the accused;
>
> (B) the witness will be distressed if the witness is required to give evidence in the presence of the accused; and
>
> (ii) the reliability of the witness' evidence will be diminished by such fear or distress, as the case may be.

80 Such an application, if granted by the court, allows the witness to give evidence while prevented by a shielding measure from seeing the accused. It is well-recognised that the giving of evidence can be re-traumatising for complainants of sexual offences. Special measures like shielding serve to mitigate the trauma that complainants of sexual assault often associate with the experience of giving live testimony in the same physical environment as the accused.

81 Section 281A of the CPC was inserted when the Criminal Justice Reform Act 2018 (Act 19 of 2018) was passed. At the Second Reading Speech, Ms Indranee Rajah stated that:

> 28 In the past two years or so, there has been a concerted effort to ensure that vulnerable victims of crime are sufficiently protected by our criminal justice system.
>
> 29 One particularly vulnerable group of victims are those who are subject to sexual or child abuse. We have re-examined every step in the system, to minimise the trauma that such

> victims experience in the process of bringing perpetrators to justice.

82 To this end, shielding measures were introduced together with a slew of other measures including s 425A of the CPC providing for the automatic prohibition against the publication of information that is likely to lead to the identification of an alleged victim of a sexual or child abuse offence, and s 281B of the CPC provides that all alleged victims of sexual or child abuse offences will give testimony in a closed-door hearing, unless they wish to give evidence in open court. Further, under ss 281(1)(*b*) read with 281(2)(*d*) of the CPC, the evidence of *a person* in Singapore (except the accused), *may* be given through *live video* in a sexual offence trial.

83 This approach is not unique to Singapore. In the English courts, vulnerable witnesses such as child witnesses under the age of 18 years at the time of the hearing (s 16 of the Youth Justice and Criminal Evidence Act 1999 (c 23) (UK) ("YJCEA")), are similarly eligible for special measures that can be used to facilitate their giving of evidence. Intimidated witnesses whose quality of evidence is likely to be diminished by reason of fear or distress over testifying may also be eligible for special measures (s 17 of the YJCEA). Such special measures include screening so that the witness does not have to see the accused, the giving of evidence by way of a live link and the exclusion of members of the public when such a witness is giving evidence (ss 23 to 30 of the YJCEA).

84 In New South Wales, Australia, under s 306ZH(2) of the Criminal Procedure Act 1986 (NSW) ("NSW CPA"), where a vulnerable person is entitled or permitted to give evidence by means of CCTV or similar facilities but does not do so (whether by choice or circumstance), the courts *must* make alternative arrangements to restrict the vulnerable person's contact (including visual contact) with any other persons when the former is giving evidence. As

set out in s 306ZH(3) of the NSW CPA, these alternative arrangements may include the use of screens, planned seating arrangements and the adjournment of the proceeding or any part thereof to other premises. Moreover, a complainant in prescribed sexual offence proceedings may also be entitled to such alternative arrangements, which may only be disallowed if there are special reasons in the interests of justice for the complainant to not give evidence by such means (s 294B of the NSW CPA). Under s 291 of the NSW CPA, proceedings must be held *in camera* when the complainant of a prescribed sexual offence is giving evidence unless the court directs otherwise. Nevertheless, representatives of the media are permitted to view or hear the evidence being given, so long as the media representative is not present in the courtroom or other place where the evidence is given during the *in camera* proceedings (s 291C of the NSW CPA). An example would be for the media representative to view proceedings *via* CCTV facilities.

85 With respect to the approach in Victoria, Australia, if the complainant in a criminal proceeding that relates to a charge for a sexual offence is giving evidence in the courtroom, the court *must* direct for the use of screens unless the court is satisfied that the complainant is aware of the right to give evidence with the use of screens and does not wish a screen to be used (s 364 of the Criminal Procedure Act 2009 (Vic) ("VIC CPA")). Under s 363 of the VIC CPA, the court *must* direct that such complainant gives evidence from a place other than the courtroom by remote hearing technology unless: (a) the prosecution applies for live in-court evidence; (b) the court is satisfied that the complainant is aware of his or her right to give evidence from a place other than the courtroom; and (c) the court is also satisfied that the complainant is able and wishes to give evidence in the courtroom. Finally, as provided by s 360(d) of the VIC CPA, the court may permit only persons specified by the court to be present while the complainant gives evidence.

86 In New Zealand, a sexual case complainant is entitled to give evidence in the courtroom without seeing the accused, from an appropriate place outside the courtroom either in New Zealand or elsewhere, or by a video record made before the trial (s 106D(1) of the Evidence Act 2006 (NZ)). Pursuant to s 199 of the Criminal Procedure Act 2011 (NZ), in any case of a sexual nature, no person may be present in the courtroom while the complainant gives oral evidence, except for parties such as, and not limited to, the lawyers engaged in the proceedings and members of the media, unless an order is made restricting or excluding the media's attendance at the making of a pre-trial video recording of the complainant's evidence.

87 In Scotland, under s 271K of the Criminal Procedure (Scotland) Act 1995 (c 46) (UK) ("CPSA"), a screen may be used to conceal the accused from the sight of the vulnerable witness. In relation to special measures, under ss 271H read with 271J of the CPSA, vulnerable witnesses, which include child witnesses and adult complainants of sexual offences, may give evidence remotely *via* live television link. This is often done in another room within the same court building but can also be done from another building. Section 271HB of the CPSA provides that, while members of the public can be excluded during the taking of evidence from a vulnerable witness, members of the press are permitted to be present in accordance with the principle of open justice.

88 The concept of shielding measures in legal proceedings brings to the fore complex questions about the balance between the presumption of innocence and the rights of the witness. Ultimately, the overriding aim is to ensure that justice is served whilst balancing the need to protect the witness and maintain the integrity of the judicial process, against the fundamental rights of the accused. If the court implements a shielding measure despite an objection,

it should, in the interest of transparency, clearly explain its reason(s) for doing so. In this regard, it would be prudent for the court to:

(a) highlight that it has a duty to navigate the complex intersection of ensuring a fair trial and protecting the rights of the accused on the one hand, whilst safeguarding the dignity, security and wellbeing of the victim/witness on the other;

(b) underscore the fact that the shielding measure *does not* negate the accused's presumption of innocence but rather seeks to address the power dynamics and potential for harm that can arise in the courtroom, especially in cases involving vulnerable witnesses; and

(c) reassure parties that the determination of innocence or guilt will only be made after an assiduous assessment of the evidence presented at trial.

Conclusion

89 For the above reasons, the appeals against conviction and sentence are dismissed.

Vincent Hoong
Judge of the High Court

Jeffrey Beh and Shaun Sim (Lee Bon Leong & Co) for the appellant;
Timotheus Koh (Attorney-General's Chambers) for the respondent.