IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 241

Magistrate's Appeal No 9057 of 2020

Between

GDC

… *Appellant*

And

Public Prosecutor

… *Respondent*

GROUNDS OF DECISION

[Criminal Law] — [Offences] — [Outrage of modesty]
[Criminal Procedure and Sentencing] — [Charge] — [Alteration]
[Criminal Procedure and Sentencing] — [Sentencing] — [Benchmark sentences]

GDC
v
Public Prosecutor

[2020] SGHC 241

High Court — Magistrate's Appeal No 9057 of 2020
Sundaresh Menon CJ
24 July; 1 October 2020

4 November 2020

Sundaresh Menon CJ:

Introduction

1 The appellant claimed trial to one charge of aggravated outrage of modesty of a person under 14 years of age, an offence punishable under s 354A(2)(*b*) of the Penal Code (Cap 224, 2008 Rev Ed) ("the Penal Code"). He was convicted of that charge and sentenced to four years and six months' imprisonment and six strokes of the cane.

2 An offence of aggravated outrage of modesty is made out where the offender, in order to commit or to facilitate the commission of an offence of outrage of modesty against a person, voluntarily causes or attempts to cause to that person death, hurt, or wrongful restraint, or fear of instant death, instant hurt or instant wrongful restraint. At the trial, the Prosecution identified the relevant act of hurt to be the appellant's act of slapping the victim twice, but it

was not disputed that this act occurred ten minutes *after* the offence of outrage of modesty had been committed. That act could not therefore be said to have been done in order to commit or to facilitate the commission of that offence.

3 For that reason, I exercised the discretion that was afforded to me under s 390(4) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC") and amended the charge to one of outrage of modesty of a person under 14 years of age under s 354(1) read with s 354(2) of the Penal Code. Having heard the appellant's defence, I convicted the appellant of the amended charge. I consequently set aside the original sentence and, in its place, sentenced the appellant to two years' imprisonment and three strokes of the cane. I now set out the reasons for my decision, provide some guidance on relevant considerations that apply when considering whether to amend a charge on appeal and set out some observations on the appropriate sentence for offences under s 354(2) of the Penal Code.

Background

4 The appellant is 35 years old. He is the boyfriend of the victim's mother and the father of the victim's younger half-brother. The victim knew him as her stepfather. The family lived in a one-room flat where a screen was set up to partition a "room" from the main living area. The victim and her brother slept in the room while their mother and the appellant usually slept in the living area. At the material time, the victim was 12 years old.

5 The charge in question concerned an incident in the early hours of 28 August 2019. The victim testified that at some time between 3.00am and 4.00am, she was woken up by the appellant calling her name. Her brother was asleep in the room with her. The appellant was also in the room and told her that her mother had left the house. This was evidently untrue. The victim went back

to sleep but then felt the appellant's hand under her bra on her left breast for about a minute, applying a significant amount of force. The victim testified that the appellant pulled her hair and brought her face close to his groin three or four times, but she did not see if his private parts were exposed as she had turned away. She did not shout for help because she was afraid and did not think anyone would or could help her. Ten minutes after he had pulled her hair, the appellant slapped her twice. During those ten minutes, she tried to avoid the appellant's overtures and to move to her brother's bed. As a result, she did not see precisely what the appellant was doing in that time. The victim used a bolster, pillow and jacket to try to cover herself, and eventually managed to move to her brother's bed. The appellant continued trying to touch her but stopped when her brother woke up briefly. The victim stayed in bed until about 5.00am, when her mother came into the room and the appellant left.

6 The victim went to school that day and told her school counsellor that her father had touched her and she felt dirty. She wrote down what had occurred on a piece of paper ("Exhibit P10"). The counsellor then contacted the school principal and the police.

The proceedings below

7 The appellant claimed trial to the following charge:

> You, … are charged that you, … did use criminal force to one [name redacted], a person who was then under 14 years of age, intending to outrage the modesty of the said [name redacted] by such criminal force, *to wit*, by touching her left breast under her bra (skin-on-skin) for about one minute and pulling her hair and forcing her head towards your groin, and in order to facilitate the commission of this offence, you did voluntarily cause hurt to the said [name redacted] by slapping her face twice when she resisted, and you have thereby committed an offence punishable under Section 354A(2)(b) of the Penal Code.

8 The appellant was unrepresented and conducted his own defence. He denied committing the offence and claimed that the victim was lying. After a three-day trial, the district judge ("the District Judge") convicted the appellant of the charge. The Prosecution sought a sentence of at least five years' imprisonment and six strokes of the cane, and the District Judge sentenced the appellant to four years and six months' imprisonment and six strokes of the cane (see *Public Prosecutor v GDC* [2020] SGDC 57 ("GD")).

The present appeal

9 On 24 February 2020, four days after the date of conviction and sentence, the appellant filed a notice of appeal against the sentence. In his petition of appeal filed on 24 March 2020, he indicated that he was pleading for leniency because he felt that the sentence was excessive. However, from the submissions he filed on 3 July 2020, it became apparent that he continued to maintain that he had not committed the offence and was seeking to challenge his conviction.

10 Although the appellant did not comply with the proper procedure to bring an appeal against conviction, an appellate court has a broad discretion under s 380(1) of the CPC to permit an appeal against any judgment, sentence or order notwithstanding non-compliance with the proper procedure under the CPC if it considers it to be in the interests of justice (see *Public Prosecutor v Tan Peng Khoon* [2016] 1 SLR 713 at [38]–[40] and [42]; see also *Lim Hong Kheng v Public Prosecutor* [2006] 3 SLR(R) 358 ("*Lim Hong Kheng*") at [10] on the predecessor provision of s 380(1) which was s 250 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed)). In exercising its discretion, the court should consider the length of the delay, the explanation put forward for the delay and the prospects in the appeal (*Lim Hong Kheng* at [27]). Here, the appellant

was unrepresented at the trial below and in the appeal. It was clear from his conduct and submissions that he consistently maintained that he had not committed the offence and any delay in filing an appeal against conviction would have been a result of his unfamiliarity with the proper procedure. In my judgment, it was clearly in the interests of justice to allow the appellant to proceed with his appeal against conviction notwithstanding the fact that by the time the Prosecution and the court became aware that he was challenging his conviction, the time for bringing an appeal against the conviction had long expired. To the Prosecution's credit, it did not seriously contest this point.

The conviction

The events on 28 August 2019

11 The District Judge did not set out detailed reasons for his decision on conviction, in all likelihood because it was not evident from the notice of appeal that the appellant also wished to challenge the conviction: see GD at [11]. However, this did not hamper my ability, sitting in an appellate capacity, to assess the evidence that was available in the record of appeal.

12 The appellant repeatedly highlighted that there were no eyewitnesses to the incident and no medical reports to corroborate the victim's version of events. The victim's mother and brother, who were both in the flat at that time, testified that they had not witnessed anything unusual. The appellant submitted that the evidence came down to the victim's word against his. This was true but that did not mean there was no evidence to sustain the conviction as the appellant sought to contend. The question in the end was whether the victim's evidence was sufficient for this purpose.

13 As the Court of Appeal recently observed in *Public Prosecutor v Wee Teong Boo and other appeal and another matter* [2020] 2 SLR 533 ("*Wee Teong Boo*") at [44], in cases concerning sexual offences, where the Prosecution relies very substantially on the victim's testimony to sustain a conviction, that evidence must be unusually convincing, in the sense that it must be sufficient, in and of itself, to overcome any reasonable doubts that might arise from the lack of corroboration (see also *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2019] 2 SLR 490 at [58]). An "unusually convincing" standard means that such evidence is so convincing that the Prosecution's case may be established beyond reasonable doubt solely on that basis (*Wee Teong Boo* at [45]). In assessing the credibility of the victim, the court must bear in mind that there is no prescribed way in which victims of sexual assault are expected to act (*Wee Teong Boo* at [55]).

14 In my judgment, the victim's testimony met that "unusually convincing" threshold. Her evidence was candid and straightforward. She readily admitted that she did not have the answers to some questions, such as whether or not the appellant's private parts were exposed or what precisely he did during the ten minutes that intervened between his pulling her hair and slapping her. When the appellant accused her of lying, the victim admitted that she "used to lie before", but said she was telling the truth this time. Her evidence at the trial was not exaggerated. Importantly, it was also substantially corroborated by Exhibit P10, the report that she wrote in her school counsellor's office before the police report was made. The victim's school counsellor also testified as to the victim's demeanour on the day of the incident and how she plainly seemed to have been affected by what had allegedly occurred earlier. These factors added weight to the victim's testimony because it was implausible that she not only lied about the encounter, but also knew months ahead of a court appearance that she should

conduct herself in a particular way before third parties in order to create an appearance of credibility.

15 The appellant's defence, in contrast, was essentially a bare denial. I did not find the lack of medical evidence significant, because the nature of the assault that was described by the victim was such that it might not have left marks or bruises. The appellant also pointed to the fact that the victim's mother and brother were in the flat at the time, rendering it implausible that he would have embarked on such a brazen venture. While that might be so, it appeared that the mother was asleep in the living area while the brother, as a seven-year-old boy, might not have understood what he had witnessed even if he had woken up briefly. In the circumstances, there was no reason or basis for me to conclude that the District Judge's finding that the victim's version of events had been proved beyond reasonable doubt was incorrect or against the weight of the evidence.

*The charge under s 354A(2)(*b*) of the Penal Code*

16 However, while I accepted the victim's version of what had occurred on 28 August 2019, it was apparent that the evidence before the court did not support a charge of *aggravated* outrage of modesty of a person under 14 years of age under s 354A(2)(*b*) of the Penal Code.

17 The offence of outrage of modesty is defined as follows in s 354 of the Penal Code:

> **Assault or use of criminal force to a person with intent to outrage modesty**
>
> **354.**—(1) Whoever assaults or uses criminal force to any person, intending to outrage or knowing it to be likely that he will thereby outrage the modesty of that person, shall be punished with imprisonment for a term which may extend to 2

> years, or with fine, or with caning, or with any combination of such punishments.
>
> (2) Whoever commits an offence under subsection (1) against any person under 14 years of age shall be punished with imprisonment for a term which may extend to 5 years, or with fine, or with caning, or with any combination of such punishments.

18 The offence defined under s 354A is an aggravated version of the offence under s 354, and s 345A states:

> **Outraging modesty in certain circumstances**
>
> **354A.**—(1) Whoever, *in order to commit or to facilitate the commission of an offence against any person under section 354*, voluntarily causes or attempts to cause to that person death, or hurt, or wrongful restraint, or fear of instant death, instant hurt or instant wrongful restraint, shall be punished with imprisonment for a term of not less than 2 years and not more than 10 years and with caning.
>
> (2) Whoever commits an offence under subsection (1) —
>
> (*a*) in a lift in any building; or
>
> (*b*) against any person under 14 years of age,
>
> shall be punished with imprisonment for a term of not less than 3 years and not more than 10 years and with caning.
>
> [emphasis added]

19 Section 354A(1) requires that the aggravating element, which in this case was voluntarily causing hurt, be committed "in order to commit or to facilitate the commission of" an offence under s 354. In the charge, the s 354 offence was said to be constituted by the appellant's act of touching the victim's left breast under her bra for about one minute and pulling her hair and forcing her head towards the appellant's groin. The act of voluntarily causing hurt under s 354A(1) was identified to be his act of "slapping [the victim's] face twice when she resisted". The victim testified as follows in respect of the sequence of the relevant events:

> Q … [Y]ou told us that your stepfather had touched you under your bra, on your left breast for about 1 minute, and then after that, he had pulled your hair towards his penis 3 to 4 times, and then after that, he had slapped you twice. Can you just tell the Court, how long---when did the slap happen in relation to the pulling of your hair? How---how long passed---how much time passed? Just an estimate will do.
>
> A 10 minutes.
>
> Q And can you tell us what happened in these 10 minutes?
>
> A Trying to move---I was trying to move to my brother's, um, bed.
>
> Q And what was your stepfather trying to do when you were trying to move to your brother's bed? What was he doing? Sorry.
>
> A I---I did not see.

20 On the victim's evidence – which was the only evidence before the court, given the appellant's bare denial – not only did the act of hurt occur after the acts of outrage of modesty, it occurred *ten minutes after* and she was unable to describe what the appellant was doing during those ten minutes.

21 The question of whether hurt was caused *in order to commit* the index offence is not new. In *Public Prosecutor v Chia Poh Yee* [1992] 2 SLR(R) 379 ("*Chia Poh Yee*"), an accused person pleaded guilty to a charge of committing robbery with hurt pursuant to s 394 of the Penal Code (Cap 224, 1985 Rev Ed). According to the statement of facts, the accused person had been in a lift with a boy when he reached into the boy's pocket and removed 40 cents. At the same time, he slapped the boy and ordered him not to take the same lift again. The Prosecution applied to the High Court for a criminal revision and conceded that an offence of robbery with hurt had not been made out because the basic offence of robbery *was not* made out on the facts. For theft to amount to robbery, any force or threat of force used in the course of a theft had to be for the purpose of committing the theft or of carrying away or trying to carry away the property

obtained by the theft. However, in the case at hand, the slap had not been administered for the purpose of stealing from the boy or of making off with the money once the accused person had obtained it (*Chia Poh Yee* at [5]). The conviction for robbery with hurt was set aside and the accused person was convicted of the use of criminal force in the course of committing theft instead. The original sentence of seven years' imprisonment and 12 strokes of the cane was set aside and in its place the accused person was sentenced to two years' imprisonment (*Chia Poh Yee* at [5]–[8]).

22 More recently, in *Public Prosecutor v Mohammed Liton Mohammed Syeed Mallik* [2008] 1 SLR(R) 601 ("*Mohammed Liton*"), the Court of Appeal considered whether a charge of rape *simpliciter* should be amended to a charge of aggravated rape (*Mohammed Liton* at [50]). One element of the offence of aggravated rape was that the accused person must have put the victim in fear of hurt to herself in order to facilitate the commission of rape. This required that there be a sufficient nexus between the act which put the victim in fear and the rape itself (*Mohammed Liton* at [51]). In that case, the accused person had pointed a knife at the victim before tying and gagging her. He then raped her (*Mohammed Liton* at [52]). The Court of Appeal held that this was not enough to sustain the conviction for aggravated rape. The acts in question would have been unrelated to the rape unless the accused person did those acts in order to facilitate the commission of rape. On the facts, it appeared that the accused person had only restrained the victim, tied her up and gagged her in order to put an end to the quarrel and to stop her from screaming and he had not, at that time, formed the intention to commit rape (*Mohammed Liton* at [52]).

23 In *Mohammed Liton*, the fact that the relevant act was committed *before* the rape was in itself insufficient to allow the court to infer the necessary nexus between the act and the index offence. Here, the act of hurt was much further

removed from the index offence because it occurred ten minutes *after* the offence had been committed. Logically, the slaps could not have been administered in order to commit an offence that had already been committed.

24 While the Prosecution did not highlight this issue in in its submissions on appeal, in its submissions before the District Judge it stated:

> 47 The Prosecution avers that the [appellant's] acts of slapping [the victim] twice, though committed ten minutes after his last outrage of her modesty, have to be considered in the totality of the [appellant's] actions that night. It should be noted that the [appellant] had persisted in his attempts to 'touch' [the victim] even after slapping her twice. Seen in this light, [the victim] was placed in imminent fear and under threat of *a further outrage of her modesty* by the [appellant]. This is evident from the fact that [the victim] had to resort to retrieving her [brother]'s bolster and jacket in order to protect herself from further intrusions upon her person by the [appellant]. The [appellant] only stopped once he saw that [the victim's brother] had woken up from his sleep for a brief moment. In the premises, it is submitted that *the [appellant's] act of slapping the victim twice was committed in order to facilitate his attempt to commit further offences against the victim that night* until [the victim's brother] was roused from his sleep.
>
> 48 In the alternative, the Prosecution submits that the [appellant] had voluntarily caused fear of instant hurt to [the victim] in order to facilitate the commission of an outrage of modesty offence. The [appellant's] act of slapping [the victim] twice within the close confines of her bedroom only sought to reinforce her fear that the [appellant] might hit her or use weapons against her if she tried to escape. Indeed, it emerged during the trial that the [appellant] was never one to shy away from using family violence against members of his own family. Therefore, we submit that [the victim] was more than justified to have a deep-seated fear of instant hurt after being slapped in the face by the [appellant] twice that night.
>
> [emphasis in original removed; emphasis added]

25 Before the District Judge, the Prosecution had contended that the act of causing hurt had been done in order to facilitate the commission of *further offences* or, alternatively, that the slaps were administered to cause *fear* of instant hurt. These arguments could not be accepted. In so far as further offences

were concerned, the extent of intrusion that occurred after the slaps was not at all clear on the evidence. The victim only testified that the appellant continued trying to touch her but did not provide specific details as to what this touching entailed. There was therefore no basis for finding that such touching amounted to offences under s 354, and the mere possibility of future offences by the appellant could not make out the charge. As for the Prosecution's submission that the slaps put the victim in fear of hurt, the charge plainly referred to an act of causing *hurt*, and not the *fear* of hurt. Had the Prosecution intended to amend the aggravating element, it should have applied to do so. The argument that the court should consider the totality of the appellant's actions that night also glossed over the requirement that there must be a sufficient nexus between the act of hurt (or causing fear of hurt) and the offence of outrage of modesty (see *Mohammed Liton* at [51]). At the first hearing of the appeal, when I put these concerns across, the Prosecution readily conceded that the charge as framed at the trial had not been made out.

The appropriate amended charge

26 The Prosecution then sought and was granted an adjournment to address me on whether the charge under s 354A(2)(*b*) of the Penal Code could stand on the basis of any other instance of hurt or whether it should be amended to a charge of outrage of modesty *simpliciter* under s 354(2).

27 At the second hearing, the Prosecution proposed that the charge under s 354A(2)(*b*) could stand if the following amendment was allowed:

> You, … are charged that you, … did use criminal force to one [name redacted], a person who was then under 14 years of age, intending to outrage the modesty of the said [name redacted] by such criminal force, *to wit*, by forcing her head towards your groin with your hand, and in order to facilitate the commission of this offence, you did voluntarily cause wrongful restraint to the said [name redacted] by pulling her hair, and you have

> thereby committed an offence punishable under section 354A(2)(b) of the Penal Code, (Cap 224, 2008 Rev Ed).

28 In sum, the Prosecution proposed replacing the original aggravating element, which was voluntarily causing hurt by slapping the victim, with a different element, namely wrongful restraint by pulling the victim's hair. It will be evident from the extract of the victim's evidence reproduced at [19] above that this too occurred after the appellant had touched her breast. The Prosecution therefore further proposed that the particulars of the offence of outrage of modesty would be amended by removing reference to the appellant's act of touching the victim's breast; instead, the charge would focus solely on his act of forcing the victim's head towards his groin. The Prosecution indicated that it would still seek to rely on the appellant's acts of touching the victim's breast and slapping the victim as aggravating factors and submitted that the sentence of four years and six months' imprisonment and six strokes of the cane should be maintained on this basis.

29 Section 390(4) of the CPC permits an appellate court to frame an altered charge (whether or not the charge attracts a higher punishment) if it is satisfied that, based on the material before the court, there is sufficient evidence to constitute a case which the accused person has to answer. This is a power that should be exercised cautiously, subject always to careful observance of the safeguards against prejudice to the defence. In particular, the court must be satisfied that the proceedings below would have taken the same course and that the evidence led would have been the same had the amended charge been presented at the trial (see *Sim Wen Yi Ernest v Public Prosecutor* [2016] 5 SLR 207 at [12]). The concern over such potential prejudice is all the more acute where the conviction is arrived at after a trial as compared to where the accused person had pleaded guilty. This is so because the accused person may have

conducted his defence in a particular way in response to the charge on which he was tried and this would likely have impacted the evidence led before the court.

30 In my judgment, the Prosecution's proposed amendment changed the complexion of the case entirely. At the trial, its case was that there had been a long struggle between the appellant and the victim in the course of which the appellant carried out three distinct acts of varying degrees of intrusion. The proposed amended charge zeroed in on the appellant's single act of forcing the victim's head towards his groin several times, which would not have lasted very long. Because of this revised focus, it became necessary to scrutinise the evidence that pertained to this specific issue. The evidence led at the trial was not always clear on whether the appellant had pulled the victim's hair or pushed her head. Further, there was no evidence as to whether or not the appellant's penis was exposed at the time as the victim testified that she had turned away while attempting to resist his further overtures and so could not have seen whether his penis was exposed. Such lack of detail might have been acceptable when the charge was broader, covered the entire struggle and did not focus specifically on the act of pulling the victim's head towards the appellant's groin as the critical act constituting the outrage of modesty because in that context the victim could not have been expected to remember with precision each of the actions and movements that took place that night in the course of the struggle. However, if the subject matter of the charge were confined to the act of bringing the victim's head towards the appellant's groin, it would have been material for the Prosecution to have elicited far more detail from the victim on this point at the trial below. That would have permitted a proper assessment of the elements of the charge, including whether an offence of outrage of modesty could even be said to have been made out if the appellant's penis was not exposed at the time. Based on the evidence available, the District Judge could only conclude that there was "no clear evidence" that the appellant's penis was exposed (GD

at [18]) and did not accept the Prosecution's submission that the appellant nearly penetrated the victim's mouth. The Prosecution raised this in the context of identifying aggravating factors at the *sentencing* stage, yet if the appellant's act of pushing the victim's head towards his groin was the sole alleged act of outrage of modesty, then whether his penis was exposed might very well have been relevant to the District Judge's decision even in the context of *conviction*. There was therefore a reasonable possibility that the trial might have proceeded in a different way had the appellant been tried on the Prosecution's proposed altered charge, and in my judgment, adopting the Prosecution's proposed amendment would have prejudiced the appellant.

31 The issue of prejudice also arose because the Prosecution intimated its intention to raise the appellant's act of touching the victim's breast as an aggravating factor, notwithstanding that this would have been deleted from the particulars of the proposed amended charge. It further submitted that the original sentence remained appropriate, which meant it was effectively submitting that I should accord the same weight to the act even though it no longer formed part of the particularised offence of outrage of modesty. Specifically, the District Judge found that, on the original charge, there was a high degree of sexual exploitation partly because the appellant had made skin-to-skin contact with the victim's breast persistently for about a minute (see GD at [18]). While the Prosecution's proposed amended charge made no mention of the appellant's act of touching the victim's breast, the Prosecution still cited the "high degree of sexual exploitation involving intrusion of the victim's private parts" as an aggravating factor in sentencing.

32 The charge is the central feature of criminal proceedings and it must contain all the essential ingredients of the alleged offence so as to give the accused person notice of the case he must meet and ensure that he has the

opportunity properly to defend himself (see *Li Weiming v Public Prosecutor and other matters* [2013] 2 SLR 1227 at [32]). It therefore did not seem fair to the appellant to amend the charge by deleting an act from the particulars of the charge and yet raise the very same act as an aggravating factor in sentencing and maintain that it should be treated as though it remained part of the charge. While aggravating factors do not have to be included in the charge, where the Prosecution omits an important fact but then seeks to rely on that very fact as an aggravating factor, it risks infringing the rule that an offender cannot be punished for offences for which no charges have been brought (see *Chua Siew Peng v Public Prosecutor and another appeal* [2017] 4 SLR 1247 ("*Chua Siew Peng*") at [74]–[78] and *Vasentha d/o Joseph v Public Prosecutor* [2015] 5 SLR 122 at [62]). A sentencing court can and should consider all relevant and proved facts if they bear a sufficient nexus to the offence, such as those that form part of the immediate circumstances of the offence or those relevant to the offender's culpability (*Chua Siew Peng* at [84] and *Public Prosecutor v Bong Sim Swan, Suzanna* [2020] 2 SLR 1001 ("*Suzanna Bong*") at [65]–[66]), but the weight to be accorded to such facts will vary when compared to a situation where those facts are part of the charge. An illustration will elucidate the point: an outrage of modesty offence that is constituted by skin-to-skin contact with the victim's breast is a more serious violation than one that is constituted by a touch of the victim's thigh over her clothes. Suppose that both violations have taken place in a given case. In such a setting, the Prosecution might choose to bring two separate charges. However, if the Prosecution chose for some reason to bring a single charge for the less serious violation, in my judgment, the sentencing analysis would be quite different than would have been the case had the charge been for the more serious violation. The fact that there was another violation that also occurred in the same incident and that involved a more serious intrusion would very likely feature as an aggravating factor that would result in

a more onerous sentence than would have been the case had the sole intrusion been the touching of the victim's thigh over her clothes. But even accounting for this aggravating factor, the analysis would not generally result in the sort of sentence that would have been warranted if the primary charge had been for skin-to-skin contact with the victim's breast. To put it another way, an aggravating factor will make the original offence more serious but it should not, as a matter of principle, result in the court sentencing the offender for what in essence is a different offence. Where the Prosecution wishes to rely on such facts, rather than raising these as aggravating factors in relation to a less serious offence, the fair thing to do would be to frame an additional charge so as to ensure that the accused person has adequate notice of the conduct he is on trial for (*Suzanna Bong* at [64]).

33 In the present case, had the Prosecution originally proceeded on the proposed amended charge, it should – and likely would – have framed an additional charge to account for the appellant's act of touching the victim's breast as a distinct act of sexual intrusion. Naturally, it did not do so at this late stage, possibly due to the prejudice that would be occasioned to the appellant, but at least provisionally, I was not satisfied that it could then rely on that act as an aggravating factor that would result in the same sentence being meted out as would have been the case had the charge been for the act of touching the victim's breast (see also *GBR v Public Prosecutor and another appeal* [2018] 3 SLR 1048 ("*GBR*") at [28]–[29]).

34 Aside from the question of prejudice, I was not persuaded that the proposed amended charge was correct. The original charge referred to the appellant's act of "pulling [the victim's] hair and forcing her head towards [his] groin" as part of the offence of outrage of modesty. The amended charge broke that movement into two distinct acts to fulfil two separate elements of the

offence of aggravated outrage of modesty, where the act of wrongful restraint was constituted by the appellant's pulling of the victim's hair and the act of outrage of modesty was constituted by his forcing the victim's head towards his groin. Yet at the trial below, the Prosecution appeared to treat these two acts as a single composite act. For example, in cross-examination, it was put to the appellant that he "then pulled her hair and forced her head towards [his] groin", to which he disagreed. At no point in the victim's testimony at the trial did she refer to the appellant pushing her head towards his groin as an act distinct from his pulling her hair.

35 Given that the Prosecution had chosen, at the trial, to treat the appellant's acts of pulling the victim's hair and forcing her head towards his groin as a single composite act for the purpose of the original charge, I did not see how the charge could be amended on appeal such that the former act was treated as a distinct element. I was not satisfied on the basis of the material before me that the very criminal force at issue could also be counted as the act of restraint.

36 At the hearing, the Prosecution explained that while it was cognisant of the potential problem that inhered in characterising the appellant's acts as constituting two distinct elements of the offence (namely, the act of wrongful restraint and the act of outrage of modesty), it also wished to avoid drawing unduly fine distinctions between cases involving substantially similar facts. In its submissions, it cited several precedents where momentary acts of restraint had been relied on to convict an accused person of an offence of aggravated outrage of modesty (see *Seow Fook Thiam v Public Prosecutor* [1997] 2 SLR(R) 887, *Public Prosecutor v Thangavelu v Tamilselvam* [2010] SGDC 479 and *Public Prosecutor v Sng Boon Teck* [2001] SGDC 303). Whether or not wrongful restraint is made out is ultimately a question of fact and depends on the evidence led in each case, but a perusal of those cases will show that even

where the alleged act of wrongful restraint was a momentary one, it was an act distinct from the act constituting the outrage of modesty. The same could not be said here, where the appellant's act of pulling the victim's hair was treated as one and the same as his act of pushing her head towards his groin. At least provisionally, this seemed to me to pose a legal obstacle to the Prosecution's intended course. I did not need to come to a final view on this, given the finding of potential prejudice that I have set out at [30] above.

37 In the circumstances, I declined to allow the Prosecution to amend the particulars of the charge to maintain the charge as one brought under s 354A(2)(*b*) of the Penal Code. In the alternative, the Prosecution proposed amending the charge to one of outrage of modesty *simpliciter* of a person under 14 years of age under s 354(1) read with s 354(2) of the Penal Code, and removing the reference to the act of slapping the victim from the charge. In my judgment, this proposed alteration would not cause any prejudice to the appellant because it was simply a lesser version of the original charge, and there was no reason at all to think that the trial would have proceeded differently had the appellant faced this charge below.

38 I accordingly proceeded under s 390(4) of the CPC to amend the change to one of outrage of modesty *simpliciter* of a person under 14 years of age. The appellant indicated that he intended to offer the same defence, being a denial of the entire incident, and after considering the nature of the defence and having satisfied myself that there was no prejudice to the appellant, I convicted the appellant on the amended charge.

The appropriate sentence

39 The next question concerned the appropriate sentence that should be imposed for the amended charge. An offence under s 354A(2) of the Penal Code

carries a minimum sentence of three years' imprisonment and a maximum sentence of ten years' imprisonment, with mandatory caning, while an offence under s 354(2) does not carry a minimum sentence and only carries a maximum sentence of five years' imprisonment without mandatory caning. The Prosecution submitted that an appropriate sentence was at least 30 months' imprisonment and three strokes of the cane, relying on the framework for offences under s 354(2) of the Penal Code that was set out in *GBR* ([33] *supra*).

40 The sentencing framework set out in *GBR* (at [26]–[41]) was recently affirmed by the Court of Appeal in *BRJ v Public Prosecutor* [2020] 1 SLR 849 ("*BRJ*") (at [10]). Briefly, the framework requires the sentencing court to first consider the *offence-specific* aggravating factors, including the degree of sexual exploitation, the circumstances of the offence, and the harm caused to the victim, in order to identify the appropriate sentencing band that the offence falls within:

(a) Band 1 (less than one year's imprisonment): This is appropriate for cases at the lowest end of the spectrum of seriousness that do not present any or only one aggravating factor, and caning would generally not be imposed in such cases.

(b) Band 2 (one to three years' imprisonment): This is appropriate for cases that involve two or more aggravating factors, and caning will almost always be imposed, with a suggested starting point of at least three strokes of the cane. Cases at the higher end of the spectrum of Band 2 would involve skin-to-skin touching of private parts or sexual organs, or the use of deception.

(c) Band 3 (three to five years' imprisonment): These involve the most serious instances of aggravated outrage of modesty and caning

> should be imposed, with a suggested starting point of at least six strokes of the cane. These cases typically involve the exploitation of a vulnerable victim, a serious abuse of a position of trust, or the use of violence or force.

41 After identifying the relevant sentencing band, the court should then take into account any *offender-specific* aggravating and mitigating factors, such as the offender's remorse, his relevant antecedents, a timeous plea of guilt or the presence of a mental or intellectual disorder.

42 In sentencing the appellant, the District Judge noted that the following offence-specific factors were present in the context of the s 354A(2)(*b*) offence (GD at [18]–[20]):

> (a) There was a high degree of sexual exploitation, involving forceful skin-to-skin contact with the victim's breast for about a minute and the appellant forcefully pulling the victim's head towards his groin three to four times.
>
> (b) There was an abuse of trust and authority, given that the appellant was a father figure who had known the victim since she was young and the abuse was committed within the family home.
>
> (c) There was psychological harm caused to the victim, who had developed a fear of men.

43 These offence-specific aggravating factors were equally applicable to an offence under s 354(2). As the act of slapping the victim no longer formed part of the charge under s 354(2), the Prosecution also contended that it was nonetheless relevant as an additional aggravating factor. While the act of

slapping the victim could not be said to have been committed in order to commit the offence of outrage of modesty, it bore a sufficient connection to the outrage of modesty to be taken into consideration as an aggravating factor as it undoubtedly formed part of the circumstances in which the offence was committed. Taking this act into consideration did not infringe the rule that an offender cannot be punished for uncharged conduct, given that the act took place just ten minutes later in the context of the same struggle in the same place (see *Chua Siew Peng* ([32] *supra*) at [84] and *Suzanna Bong* ([32] *supra*) at [73]). Importantly, any uplift in the sentence arising out of consideration of this aggravating factor would not be the equivalent of preferring an additional charge. In my judgment, the use of force could be considered an additional offence-specific aggravating factor under the amended charge.

44 Given the number and the nature of the offence-specific aggravating factors, the present case clearly fell within Band 2 of the *GBR* framework, and in fact within the higher end of the spectrum for Band 2 cases. In terms of offender-specific aggravating factors, the appellant's antecedents reflected a history of domestic abuse against the victim's family, including an incident involving a charge of voluntarily causing grievous hurt to the victim's mother committed just days before the present offence. The appellant was eventually sentenced to eight months' imprisonment for that charge. I agreed with the District Judge that the appellant's actions reflected an escalation in severity of acts of domestic abuse (see GD at [24]). In the circumstances, the Prosecution's submission of 30 months' imprisonment and six strokes of the cane appeared to be a fair one, being towards the high end of Band 2, but it appeared to be out of step with recent precedents for offences under s 354(2) of the Penal Code. Three cases are worth mentioning.

45 In *BRJ* ([40] *supra*), the offender was the neighbour of the then-eight-year-old victim's parents. While they were not biologically related, there was a close friendship between their families and the victim addressed the offender as an uncle (specifically as "aunt's husband" in Mandarin) (*BRJ* at [3]). The offender pleaded guilty to several charges, of which one charge under s 354(2) concerned an incident where the offender entered the victim's home and watched pornographic videos with her. He then undressed the victim and himself, followed the victim as she walked to her bedroom naked, licked and touched her nipples, touched her vulva with his finger and rubbed his penis against her vagina. The High Court judge applied the *GBR* framework and placed the charge within Band 3. Having regard to the offender's plea of guilt, his expression of remorse, his co-operation with the authorities and his lack of antecedents, the sentence was adjusted downwards to 30 months' imprisonment and six strokes of the cane (*BRJ* at [8]). The offender appealed against the sentence for this charge and this appeal was dismissed by the Court of Appeal (*BRJ* at [10]–[12]).

46 *GBR* involved acts committed by an uncle against his niece, who was then 13 years old. He claimed trial to one charge of fondling the victim's breasts for five minutes and touching and licking the area of her vagina for five minutes, and was convicted and sentenced in the district court to 21 months' imprisonment and four strokes of the cane (*GBR* at [1]–[2]). He appealed against his conviction and sentence, and the Prosecution cross-appealed on sentence, seeking a sentence of 27 months' imprisonment. After affirming the conviction and setting out the sentencing framework for s 354(2) offences, the High Court placed the offence within the high end of Band 2 and sentenced the accused person to 25 months' imprisonment and four strokes of the cane. The court specifically rejected the Prosecution's submission for a sentence of 27 months'

imprisonment on the ground that a sentence that high was not warranted (*GBR* at [44]).

47 In *BPH v Public Prosecutor and another appeal* [2019] 2 SLR 764 ("*BPH*"), the offender pleaded guilty to two sexual offences against his grandson. In relation to the s 354(2) charge, he had asked the then-seven-year-old victim to follow him into the bedroom where he kissed the victim's face and neck before slipping his hand into the victim's shorts and fondling the victim's penis. He then undressed himself and the victim, put his thigh across the victim such that it made contact with the victim's penis, fondled the victim's penis again, and then positioned the victim's body so that the victim's back faced the offender. The offender then grabbed the victim's buttock (*BPH* at [4]). For this charge, the High Court sentenced the offender to 30 months' imprisonment. While the High Court's decision was reached prior to the decision in *GBR* ([33] *supra*), the appeal was heard after *GBR* and the Court of Appeal held that this offence fell at the highest end of Band 2 but did not alter the sentence (*BPH* at [73]–[75]).

48 The offenders in *BRJ* and *BPH* pleaded guilty to their respective charges and also faced more than one charge, and it was possible that in imposing the sentences for the s 354(2) offences, the High Court and the Court of Appeal might have thought it appropriate to calibrate the individual sentences downwards to ensure that the aggregate sentence was not excessive (see *GBR* at [36(b)]; see also *Pram Nair v Public Prosecutor* [2017] 2 SLR 1015 at [171]). It must also be recognised that although the sentences in *BRJ* and *BPH* were not disturbed on appeal, this was in the context of the *offenders'* appeals against sentence and the courts in those cases may not have been inclined to *increase* the sentences in that situation. At the same time, it could not be denied that these precedents appeared to involve a considerably higher degree of sexual intrusion

than the present case. Further, the sentences appeared to me to have been lower than might have been appropriate under the strict application of the *GBR* framework. One of the principal reasons for developing a sentencing framework is to ensure that the full sentencing spectrum prescribed by the law, up to the statutory maximum (of five years' imprisonment), is utilised (*GBR* at [26]), and yet the sentences for s 354(2) offences continue to cluster towards the lower end or middle of the range.

49 I was troubled that while the correct application of the *GBR* framework could have justified a higher sentence being imposed on the appellant, the precedents have imposed sentences in the range of 25 to 30 months' imprisonment for more severe conduct. In spite of the number and nature of aggravating factors in this case, I felt obliged to maintain an appropriate degree of relativity with those precedents. That having been said, I do consider that the sentencing framework for s 354(2) offences or its application may have to be reconsidered on a future occasion. In the circumstances, I sentenced the appellant to two years' imprisonment and three strokes of the cane on the altered charge under s 354(1) read with 354(2) of the Penal Code.

Conclusion

50 For these reasons, I allowed the appeal. I set aside the sentence of four and a half years' imprisonment and six strokes of the cane and in its place, imposed a sentence of two years' imprisonment and three strokes of the cane.

51 I close with a brief observation on the conduct of the appeal. To the Prosecution's credit, it took very reasonable positions at the hearings of the appeal, both in relation to the procedural requirements for an appeal against conviction and the alterations to be made to the charge. It readily conceded the problem with the original charge and proposed possible alterations. However, it

appeared from the submissions below and the position taken in the appeal that the Prosecution had been aware of the potential problem with the charge from the time of the trial (see [24] above).

52 While the Prosecution does not have the duty to make the case for an accused person, the difficulty here concerned the safety of the conviction. As the Court of Appeal stated recently in *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 (at [37]), "the Prosecution owes a duty to the court and to the wider public to ensure that only the guilty are convicted, and that all relevant material is placed before the court to assist it in its determination of the truth" (see also *Muhammad bin Kadar and another v Public Prosecutor* [2011] 3 SLR 1205 at [200] and *K Saravanan Kuppusamy v Public Prosecutor* [2016] 5 SLR 88 at [7]). Where it considers that a conviction may be unsafe, the Prosecution should not remain silent. In such circumstances, the Prosecution rises to its best traditions by drawing any legitimate concerns to the court's attention *for the court to decide*. If, for example, the appellant had pleaded guilty to the same charge on the same facts and had not filed an appeal, the appropriate course of action for the Prosecution would have been to file a criminal revision to set aside the conviction, as it did in *Chia Poh Yee* ([21] *supra*).

Sundaresh Menon
Chief Justice

The appellant in person;
Winston Man and Tay Jia En (Attorney-General's Chambers) for the respondent.