IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 267

Magistrate's Appeal No 9066 of 2020

Between

Tan Wai Luen

… *Appellant*

And

Public Prosecutor

… *Respondent*

GROUNDS OF DECISION

[Criminal Law] — [Offences] — [Unnatural offences]
[Criminal Procedure and Sentencing] — [Sentencing] — [Principles]

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v
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Introduction

1 The appellant claimed trial before a District Judge ("DJ") to a charge of sexual assault by penetration, an offence under s 376(2)(*a*) punishable under s 376(3) of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code"). The appellant was represented for part of the trial, but his counsel discharged himself after the victim had testified. He was unrepresented for the remainder of the trial.

2 The DJ convicted the appellant and sentenced him to seven years and four months' imprisonment, and four strokes of the cane. The DJ's grounds of decision are reported as *Public Prosecutor v Tan Wai Luen* [2020] SGDC 128 ("GD").

3 The appellant appealed against his conviction and sentence. After hearing the parties' submissions, I dismissed the appeal. I gave brief reasons

orally for my decision at the hearing on 18 September 2020, and I now set out my full grounds of decision.

Background

4 The appellant was a Muay Thai instructor at the Encore Muay Thai gym (the "Gym"). The victim had attended a free Muay Thai trial session conducted by the appellant at the Gym where he was working in October 2016. After the session ended, she accepted the appellant's offer of a free Thai massage. In the course of the massage, the appellant allegedly inserted his finger into her vagina. This formed the substance of the charge against the appellant.

The victim's account of events leading up to the massage

5 On the victim's account, she had signed up for a free Muay Thai trial class at the Gym, scheduled for 1 October 2016 at 12.00pm.[1] The victim testified that she arrived late at the Gym at about 12.15pm.[2] The appellant introduced himself as the instructor for the class before conducting a body analysis on her. Three other female participants then entered the Gym and joined the victim for the class, which lasted for about one to one and a half hours with two or three breaks of between five to ten minutes each.[3] During two of these breaks, the victim bumped into the appellant and engaged in small talk with him.[4]

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1 Notes of Evidence ("NE") 15 May 2019 at p 32 ln 1–5

2 NE 15 May 2019 at p 36 ln 1–3

3 NE 15 May 2019 at p 39 ln 1–11

4 NE 15 May 2019 at p 42 ln 1–27

6 After the trial class, the victim went to the toilet to change out of her exercise clothes. When she came out, the appellant offered her a cup of 'Kopi-O' (*ie,* black coffee), which he claimed would help to break down fats. The victim took a few sips of the coffee at his insistence. The three other participants were no longer around and she surmised that they had left.[5] The appellant then showed the victim a price list and asked her to sign up for a gym package, which she declined. When the victim saw a Thai massage service listed on the said price list, she enquired as to whether the Gym offered Thai massages. The appellant responded that it did, and that he was the only one trained to offer it.[6] The appellant then offered her a free massage. The victim testified that she accepted his offer because it was free, and because the appellant was trained to offer Thai massages and "should know…the places to avoid on a woman's body".[7]

The appellant's account of events leading up to the massage

7 The appellant testified that on the day of the alleged incident, he had told the other students to wait for the victim to arrive as she was late for class. When she reached, they commenced the Muay Thai training.[8] He stopped the class for five-minute breaks as he wanted to take smoke breaks. He went down from the Gym which was on the second level to the open area at ground level to smoke, and he testified that the victim also went down to the same area to smoke. They made some small talk, and the victim asked him what the massage bed in the Gym was for. The appellant informed her that it was mainly for sports therapy

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5 NE 15 May 2019 at p 43 ln 1 to p 44 ln 5

6 NE 15 May 2019 at p 44 ln 15–21

7 NE 15 May 2019 at p 45 ln 6–31

8 NE 9 October 2019 at p 13 ln 1–4

and "myofascial", which according to the appellant, was meant for muscle relaxation.[9] The victim then asked whether the table was used for massages, as she was under the impression that the Gym would also offer Thai massages since it was a Muay Thai gym. The appellant testified that he initially stated that the Gym did not offer massages. However, as the Gym had recently opened and he would do anything to obtain more sales, he told the victim that he could try to give her a Thai massage if she really wanted one, but that he was "not well-trained" and did not have a licence for it.[10]

8 After class, the victim asked the appellant whether there was any way to cut down fats. The appellant told her that the only method he used was to drink 'Kopi-o Kosong', and offered to make a cup for her, which she accepted. When the other students had left and the victim was drinking her coffee, the appellant asked her whether she still wanted to have a Thai massage.[11]

The victim's account of the massage and the alleged incident

9 On the victim's account, the appellant then told her to go behind the curtain and to take off all her clothes except for her panties and lie face down on the massage table. The victim did as instructed and used a towel to cover her back.[12] When the appellant came into the area covered by the curtain, she turned around to check that it was the appellant. He then switched off the lights.[13] According to the victim, he rubbed Ginvera olive oil on his hands and started to

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9 NE 9 October 2019 at p 13 ln 24 to p 14 ln 16; p 14 ln 31–32

10 NE 9 October 2019 at p 15 ln 1–18

11 NE 9 October 2019 at p 16 ln 1–18

12 NE 15 May 2019 at p 48 ln 27–28

13 NE 15 May 2019 at p 46 ln 2–20

massage her calf. He then moved to massaging her thigh and then her back. Afterwards, he moved back to massaging her calf, and proceeded to massage her inner thigh area with both hands.[14] This made her feel uncomfortable, and she therefore moved her legs to indicate to the appellant that he was "not supposed to massage that". The appellant then went back to massaging her calf.[15] She testified that the appellant had shifted the towel such that his hands were in direct contact with her skin during the massage.[16] At this point, the towel was shifted to the top of her back,[17] but was still covering her buttocks.[18]

10 The appellant then went up to her inner thigh area near her vagina,[19] before his finger "went under [her] panty" and he inserted his finger into her vagina.[20] She testified that something was inserted which had the texture of a fingernail.[21] When asked to use a ruler to estimate the approximate depth to which he inserted his finger, she estimated 2.5cm.[22] According to the victim, it was an "in and out thing" and he put his finger into her vagina for a "few seconds"[23] because she turned and shouted "Oi" at him when it happened. He then looked at her with a straight face with a "look that he didn't did [*sic*]

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14 NE 15 May 2019 at p 52 ln 19–22; p 53 ln 15

15 NE 15 May 2019 at p 55 ln 22 to p 56 ln 9

16 NE 15 May 2019 at p 57 ln 15–28

17 NE 15 May 2019 at p 58 ln 1–14

18 NE 16 May 2019 at p 63 ln 28–30

19 NE 15 May 2019 at p 58 ln 15–17

20 NE 15 May 2019 at p 59 ln 2–9; ln 28–31

21 NE 15 May 2019 at p 60 ln 2–5; NE 16 May 2019 at p 2 ln 22–28

22 NE 15 May 2019 at p 62 ln 4–24

23 NE 15 May 2019 at p 62 ln 28–30

anything wrong".[24] She testified that she felt "angry", "upset" and "very violated" because she had demonstrated trust in the appellant by accepting his offer of a massage but he had broken that trust.[25]

11 Thereafter, he asked her to flip over, and he continued to massage her shoulder and legs.[26] She testified that she did not leave because she was only wearing her panties and she was fearful that if she tried to leave suddenly, he could hit her or rape her. He was a Muay Thai instructor and likely to be stronger than she was.[27]

12 When the massage ended an hour to an hour and a half later, the appellant walked out of the curtained area. She put on her clothes and went down the staircase to leave. She then discovered that the door was locked from the inside.[28] She was able to unlock the door to let herself out.[29] She testified that although she did not see the appellant locking the door, he was the only staff member present and the door was locked from the inside.[30]

The appellant's account of the massage and the alleged incident

13 The appellant admitted to offering the victim a massage but denied sexually assaulting her. On his account, he started the massage from the victim's shoulder before moving down to her legs. After he told her to flip over, he

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24 NE 15 May 2019 at p 61 ln 24–32

25 NE 15 May 2019 at p 63 ln 19–25

26 NE 15 May 2019 at p 64 ln 1–4

27 NE 15 May 2019 at p 64 ln 17–28

28 NE 15 May 2019 at p 65 ln 5–31; p 67 ln 27–30

29 NE 15 May 2019 at p 68 ln 7–9

30 NE 15 May 2019 at p 69 ln 1–4

massaged her front shoulder, her knee area, her thigh and her calf. The massage lasted for about 45 to 50 minutes. Thereafter, she changed back into her clothes, and he asked her whether she would sign up for lessons with the Gym. She said that she would give it a thought and left.[31]

14 During the cross-examination of the victim, Mr Walter Silvester ("Mr Silvester") was still representing the appellant and had not yet discharged himself. Mr Silvester specifically put to the victim that the appellant "[might] have accidentally touched [her] around the vagina area and when he realised his mistake, he immediately stopped massaging the area". The victim replied that it was not an accident.[32] Mr Silvester later put to the victim that the appellant "[might] have had some accidental contact with [her] vagina but it was a mistake". The victim responded that if it had been a mistake, the appellant would have apologised.[33] Thereafter, Mr Silvester put to the victim that "if there was any contact with [her] private parts, it was … [an] accident and [she was] actually aware that it may have been an accident".[34] He then put to the victim again that she "did not tell anyone [about the alleged incident] because at that time [she was] unsure that [it] was actually intentional" and that she "thought it … could have been an accident", to which the victim disagreed and confirmed that the act was intentional.[35] He subsequently put to the victim again that she "did not say or do anything [during the massage], because nothing actually happened", and that "[a]t most, it was an accidental touch … [b]ecause…it was

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31 NE 9 October 2019 at p 17 ln 11–31

32 NE 16 May 2019 at p 27 ln 24 to p 28 ln 7

33 NE 16 May 2019 at p 47 ln 27 to p 48 ln 6

34 NE 16 May 2019 at p 48 ln 17–20

35 NE 16 May 2019 at p 50 ln 11–17

dark".[36] The appellant's counsel further put to the victim that "at most, [the appellant] may have accidentally touched [her] vagina area and [she] may have felt it such that it was a bit more forceful that [*sic*] she thought", and that it was "an accident basically".[37] Finally, it was again put to the victim that "because it was slippery, it was oily, [the appellant might] have accidentally touched [her] vagina area, and [she] misconstrued this to be an insertion", and that "this was an accident and never intentional".[38]

15 However, during the appellant's evidence-in-chief, when he was no longer represented, he testified that there was "no way" he could have sexually assaulted the victim because "she was wearing her … undergarment and plus the … towel is covered already". He also testified that he stopped his massage at the lower half of the victim's thighs. In order to have sexually penetrated her, he would have needed to go nearer to the victim's inner thighs but he did not do so.[39]

Events following the alleged incident

16 It was undisputed that the victim did not make a police report immediately after the alleged incident. The victim testified that she had intended to make a police report, but that she needed to head home to look after her son who was ill. As she was about to leave the Gym, she checked her phone and noticed that her sister had sent her a WhatsApp message stating that she was taking a long time. She interpreted this message to mean that something was

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36 NE 16 May 2019 at p 70 ln 22 to p 71 ln 8

37 NE 16 May 2019 at p 72 ln 14–18

38 NE 16 May 2019 at p 73 ln 3–9

39 NE 9 October 2019 at p 18 ln 21 to p 19 ln 3

wrong with her son, who had already been having a fever the day before.[40] She explained that she did not relate the incident to her family or friends as it was "very personal" and she "[did not] want to get judged" by them.[41]

17 It was also undisputed that the victim had sent text messages to the phone operated by the Gym on 2 October 2016 (*ie,* the day after the alleged incident) at about 11.33am, and that Ms Chan Li Ping, Vivian ("Vivian"), who was an instructor and co-owner at the Gym, had responded to the victim's text messages and told the victim to give her a call. According to the victim, she wanted to inform Vivian about the alleged incident because the appellant might have "done it before" or "maybe he would do it in the future again to someone else".[42]

18 The victim testified that she gave Vivian a call which lasted for about five to seven minutes, during which she told Vivian that what she had messaged her was true, and that the alleged incident had happened the day before (*ie*, on 1 October 2016). Vivian then informed her that she would speak to the appellant about it.[43] The victim did not keep in contact with Vivian or contact anyone from the Gym thereafter.[44] The victim also testified that she had intended to make a police report after work but that before she could do so, she received a phone call from Bedok Police Station informing her that Vivian had lodged a police report regarding this incident.[45] Following the police report, the victim was seen

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40 NE 15 May 2019 at p 69 ln 11–31; p 70 ln 5–9

41 NE 15 May 2019 at p 70 ln 19–27

42 NE 15 May 2019 at p 71 ln 32 to p 72 ln 7

43 NE 15 May 2019 at p 75 ln 27 to p 76 ln 15

44 NE 20 August 2019 at p 32 ln 14–20

45 NE 15 May 2019 at p 75 ln 18 to p 77 ln 5

at KK Women's and Children's Hospital on 2 October 2016 at the police's request. A report dated 31 October 2016 was prepared by Dr Angsumita Pramanick ("Dr Pramanick"), a Senior Staff Registrar at the Department of Obstetrics and Gynaecology in relation to the alleged incident.

19 Vivian testified that she spoke to the appellant after the call with the victim. She showed him the text messages sent between her and the victim and asked him whether he had committed the alleged offence. The appellant allegedly "said [that] he did not [a] lot of times". Specifically, he said that he "did not do the Thai massage, he did not finger her", and that "[a]ll he did was to conduct the trial only". The appellant said that "after he conducted the trial, then [the victim] left together with the rest [of the girls who came for the trial]". Vivian further testified that she decided to make a police report because the company's image was at stake. It could be a case of rape and they did not know whether the victim would tell others about it.[46] It was undisputed that Vivian had lodged a police report on 2 October 2016 at about 2.07pm.[47]

20 The appellant also gave a police statement dated 3 October 2016, wherein he denied giving the victim a massage or having sexually assaulted her.[48]

21 The appellant first testified during his evidence-in-chief that he had lied to the police because he "did not know the seriousness of this case".[49] Later, upon questioning from the court, the appellant stated that he lied because he

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46 NE 20 August 2019 at p 32 ln 28 to p 33 ln 26

47 Record of Appeal ("ROA") at p 434

48 ROA at p 445

49 NE 9 October 2019 at p 19 ln 9–20

"thought he was in deep trouble". When asked to clarify what he meant, the appellant then stated that he "did not know that giving [a] false statement is a serious trouble". Finally, he stated that he lied because: [50]

> … what people tell me is that, the --- whatever woman say in Singapore…even though you never do we should confirm got do---okay…because I never, um, molest her or doing the penetration assault on her. So, I denied to the police for all the incidents…

The decision below

Conviction

22 The DJ found the victim's evidence to be unusually convincing and determined that she had no reason to concoct a very serious allegation against the appellant (GD at [60]). She found that the appellant did insert his finger into the victim's vagina in the course of massaging her (GD at [55]). The victim "gave a coherent, detailed, and credible account" of what the appellant had done to her, and her testimony was consistent with the overall backdrop of the available facts and circumstances, including her text messages and phone conversation with Vivian (GD at [56]). The DJ found the victim's explanation for not leaving the massage immediately after the sexual assault, *ie,* that she was afraid that the appellant might harm her, to be credible. The DJ also accepted the victim's explanation that she did not make a police report on the same day as she wanted to take care of her sick child. The victim had also testified that she was "experiencing a mixed bag of emotions" after the incident. The DJ found that the victim's conduct during and soon after the incident to be "reasonable and within the realm of human responses" to be expected for a sexual assault victim (GD at [58]–[59]).

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[50] NE 9 October 2019 at p 46 ln 20 to p 49 ln 7

23 The DJ found that in contrast, the appellant's version of events lacked credibility. His testimony that he did not go near the victim's inner thigh area during the massage and therefore could not have accidentally touched the victim's vagina contradicted his earlier case of a possible accident, which was repeatedly put to the victim by his previous counsel. It was also not put to the victim that he did not massage her at her inner thigh area (GD at [61]). Further, the reasons he gave for lying to the police were "contradictory and plainly unconvincing". He was trying to tailor his account and had given three different reasons in an attempt to explain away his lies (GD at [62]).

Sentence

24 The DJ found that as a starting point, the offence fell within Band 1of the framework in *Pram Nair v Public Prosecutor* [2017] 2 SLR 1015 ("*Pram Nair*"). The present case therefore warranted a lower indicative sentence as compared to the sentence imposed in *Pram Nair*, taking into account the overall difference in the levels of culpability and harm (GD at [71]). In particular, the present offence was committed over a much shorter duration, and the appellant had ceased offending once the victim shouted at him (GD at [82]).

25 The DJ considered that there was only one offence-specific aggravating factor in the present case, which was a limited degree of abuse of trust. The DJ found that the appellant did not act with a high degree of deliberation and planning, such that premeditation was not an aggravating factor in this case. There were also no offender-specific aggravating or mitigating factors.

26 The DJ also had regard to other post-*Pram Nair* cases which fell into Band 1 of the framework. The DJ found that a sentence of seven years and four months' imprisonment in addition to four strokes of the case was appropriate in the present case.

The appeal against conviction

Parties' cases

Appellant's case

27 The appellant submitted that there was insufficient evidence to support a conviction, and that the respondent's case was inconsistent and inherently implausible.[51]

28 First, the appellant argued that the victim's account of the events leading up to the massage was improbable for the following reasons:

(a) The victim testified that the topic of having a Thai massage came up after the appellant had shown her a massage price list. However, the appellant had testified that the massage bed in the room was not used for offering Thai massages, a fact which was corroborated by Vivian. Accordingly, it would be reasonable to assume that any official price list of the Gym would not have included Thai massage as a service. The victim had therefore either given incorrect evidence of having been shown a massage price list, or the appellant had prepared the price list as part of a premeditated plan. However, the respondent did not produce a copy of this alleged price list during trial. There was also no evidence that there was a computer and printer in the Gym from which the appellant could have printed the counterfeit price list, and it was improbable that he would have had time to do so. Further, the victim did not give evidence of the price of a Thai massage.[52]

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51 Appellant's Written Submissions ("AWS") at paras 77–78

52 AWS at paras 88–97

(b) Based on the version of events given by the victim, the appellant would have to do all of the following while the victim was changing: (i) descend the flight of stairs to the ground floor to lock the wooden door; (ii) climb up the same flight of stairs; (iii) prepare a 'Kopi-o' drink; and (iv) create and print the counterfeit price list containing the massage service. The sequence of events by which the appellant carried out the above events was material, but the respondent did not lead evidence on it.[53]

(c) Further, the victim's version of events was that the appellant offered to provide her with a free massage after she had declined purchasing a package of classes. However, this was an implausible account, as the appellant would not have offered her a free massage if she had already indicated that she would not purchase a package. It was more likely that the appellant was offering her a massage as a sweetener prior to her making any such indication, in the hope that she would sign up for a package.[54]

29 Second, the appellant argued that the victim's version of events as to what happened during the massage was highly implausible for the following reasons:

(a) The victim had testified that she had moved her legs when the appellant first massaged her inner thighs. However, when the appellant massaged her inner thighs again, she did not react to it.[55]

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53 AWS at paras 98–102

54 AWS at paras 103–107

55 AWS at paras 116–118

(b) It was illogical for the appellant to massage the victim's inner thighs again before carrying out the alleged sexual assault. By doing so, he would have been giving the victim a second opportunity to resist his advances and thwart his plans to sexually assault her.[56]

(c) The victim had testified that she was comfortable with exposing her vaginal area during the massage, instead of it being covered by a towel. According to the appellant, it was unclear why the victim felt it necessary for her vaginal area to be exposed. Further, the victim's testimony that she was comfortable with a massage which necessitated the positioning of the towel in a manner that exposed her vaginal area did not sit well with her evidence that she was uncomfortable with her inner thigh area being massaged.[57]

(d) Taking into account the anatomy of a female, the alleged sexual assault should have taken at least tens of seconds and could not have been an "in and out" affair as testified by the victim. It would have "defied…human anatomy" for the appellant to have penetrated the victim in a matter of seconds.[58]

(e) Further, the appellant would likely have had to "fumble, use force, or take an extended period of time" before he would have been able to insert his finger into the victim's vagina. This would have given her the opportunity to react. However, on the victim's evidence, she had

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56 AWS at paras 120–127

57 AWS at paras 130–135

58 Certified Transcript (14 September 2020) at p 7 ln 24 to p 8 ln 8

only reacted upon the digital penetration. The victim's testimony is therefore not one that was unusually convincing.[59]

(f) There was also an internal inconsistency in the victim's evidence, as she was confident about the depth to which the appellant had inserted his finger but was uncertain about the number of fingers he had inserted into her vagina.[60]

30 Third, the victim's account of the circumstances after the massage was difficult to believe for the following reasons:

(a) The DJ had concluded that the appellant had locked the door to isolate the victim. However, locking the door from the inside was consistent with seeking to prevent someone from walking in on the massage. In any event, the appellant denied locking the main door on the ground floor, or the glass door which provided access to the Gym on the second floor. There was at least a reasonable doubt as to whether the door at the ground floor was locked.[61]

(b) The victim had decided to send text messages to the Gym's mobile phone number, even though it could be the appellant on the receiving end of these messages.[62]

(c) The victim had chosen to send text messages to the Gym's mobile phone number instead of reporting the alleged sexual assault

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59 AWS at paras 140–143

60 Certified Transcript (14 September 2020) at p 8 ln 21 to p 9 ln 29

61 AWS at paras 144–147

62 AWS at para 155

directly to the police. The real reason for her choosing to do so, which was to obtain some benefit from the Gym, was alluded to in these text messages. According to the appellant, it would be "unusual" for a victim of sexual assault to express her sense of offense and outrage by claiming to be "very unhappy".[63] The appellant claimed that the victim's choice of words in the text messages sounded like the words of a disappointed customer, rather than a victim of a sexual assault.[64]

(d) The appellant claimed that there was a "realistic possibility" that the messages were part of an "attempted 'shakedown'" by the victim. The victim did not make a police report on the day of the alleged assault, and did not tell anyone about it, including her sister, family members or close friends.[65] Vivian's evidence further suggested that she thought the victim was attempting to extract some benefit from the Gym.[66]

31 Fourth, the appellant argued that he had lied to the police and to Vivian even though he was innocent because of "the fear that telling the truth would give rise to circumstances and assumptions that would make it difficult for him to explain the truth and his innocence". He was afraid of the consequences of being accused of committing a sexual offence and had thought that the "odds [were] stacked against men accused of sexual offences". He therefore decided to lie to the police to distance himself from the alleged sexual offence.[67]

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63 AWS at paras 160–167

64 AWS at paras 171–184

65 AWS at paras 185–189

66 AWS at paras 190–193

67 AWS at paras 199–207

32 Fifth, it was the appellant, together with Vivian and the other co-owners of the Gym, who had decided to report the matter to the police. They had done so because they had doubts over the victim's motives, and therefore decided to let the police look into the matter. The appellant would not have volunteered to involve the police if he had committed the offence but would instead have attempted to prevent the matter from escalating.[68]

33 Sixth, in relation to the defence of accident which the appellant had purportedly put forth at trial, the appellant submitted that the case had been "run as a hypothetical and without instructions".[69]

34 Seventh, Dr Pramanick did not find evidence of fresh injury during her examination of the victim. Dr Pramanick also recorded in the medical report that the victim pushed the appellant away. This contradicted the victim's evidence in court. Further, given that the victim claimed that she was fearful, it was doubtful that she would have pushed the appellant away. The appellant also claimed that it would have been physically impossible for her to turn around and push him while his finger was inside her vagina. This raised the issue of whether the victim had any motive in giving Dr Pramanick a dramatic retelling of her version of events.[70]

Respondent's case

35 The respondent submitted that the DJ had rightly found that the victim's evidence was unusually convincing. The victim could recount minute details,

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68 AWS at paras 208–211

69 Certified Transcript (14 September 2020) at p 15 ln 10–15

70 AWS at paras 215–223

was frank and did not embellish her testimony and also mentioned facts which were deeply embarrassing.[71] Further, the victim's evidence was externally consistent, as seen from Vivian's testimony and the medical report prepared by Dr Pramanick.[72]

36 The DJ had rightly rejected the appellant's attempt to diminish the victim's credibility on the basis that she did not file a police report after leaving the Gym. The victim's explanation that she needed to head home to take care of her child was a cogent one. The victim had explained that she did not know that a report could be made online and had intended to go to a police station after work such that she could give a statement right away. It was also understandable for her to contact Vivian as she had wanted to warn the staff of the Gym about the appellant's conduct. The victim's explanation for not abruptly leaving after the sexual assault was also persuasive. She was concerned that the appellant, being a Muay Thai instructor who was stronger than her, could have hit or raped her.[73] The victim also had no reason to falsely implicate the appellant.

37 The appellant's defence, on the other hand, was not credible. The appellant had departed from his own case that he could have accidentally touched the victim's vagina by denying the possibility of any accidental contact. He also gave contradictory explanations for why he denied giving the victim a massage in his police statement. Further, the DJ was correct in finding that the appellant must have locked the door to the shophouse on the ground floor. The appellant did not put material aspects of his defence to the victim, and had also belatedly advanced new arguments which were not suggested or put to the

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71 Respondent's Written Submissions ("RWS") at para 33

72 RWS at para 34

73 RWS at paras 36–39

victim, including that the victim's "bikini-style" underwear was too tight for him to have fingered her.[74]

38 As the DJ did not err in her assessment of the evidence, the respondent submitted that the appeal against conviction should be dismissed.

Decision

39 I note at the outset that the DJ was mindful that the victim's account was not independently corroborated. Nonetheless, she went on to find that the victim's evidence was unusually convincing.

40 As the respondent relied solely on the victim's testimony, the victim's evidence must be unusually convincing to overcome any doubt that might arise from the lack of corroboration (*Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2019] 2 SLR 490 ("*Mohd Ariffan*") at [58]). As stated by the Court of Appeal in *Public Prosecutor v Wee Teong Boo and other appeal and another matter* [2020] 2 SLR 533 at [45]:

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74 RWS at paras 44–51

> …in describing the complainant's evidence as "unusually convincing", what is meant is that such evidence is so convincing that the Prosecution's case may be proven beyond reasonable doubt solely on that basis (*Kwan Peng Hong v Public Prosecutor* [2000] 2 SLR(R) 824 at [33]). The focus is on the sufficiency of the complainant's testimony, and the court must comb through that evidence in the light of the internal and external consistencies found in the witness' testimony (*AOF v Public Prosecutor* [2012] 3 SLR 34 ("*AOF*") at [115]). The finding that a complainant's testimony is unusually convincing does not automatically entail a guilty verdict. The court must consider the other evidence and in particular, the factual circumstances peculiar to each case (*XP v Public Prosecutor* [2008] 4 SLR(R) 686 at [34]).

41 The appellant's primary arguments pointed to the inconsistencies and overall implausibility of the victim's account. In my view, the arguments canvassed by the appellant were without merit. I did not agree that there were material inconsistencies in the victim's evidence or patent implausibilities which would raise reasonable doubt as to render his conviction unsafe.

Credibility of the victim's account

(1) The victim's account of events leading up to the massage

42 First, I found that there was nothing inherently implausible in the victim's account of the circumstances leading up to her acceptance of the appellant's offer of a free Thai massage. I did not see how anything turned on her acceptance of this offer.

43 The appellant took issue with the victim's mention of a price list containing a Thai massage service and the probability of the sequencing of events leading up to the massage as testified by the victim. However, as submitted by the respondent, the victim's evidence that she was shown a price list which had a Thai massage service on it was not challenged by the appellant during cross-examination. The appellant had sought to adduce a price list during

the trial proceedings, but the victim had testified that that document was not what she was shown at the material time.[75] Given that the alleged incident had taken place in 2016 and the appellant was no longer working at the Gym, it would not be surprising that neither the appellant nor the respondent would have access to a price list that the Gym used in 2016. More importantly, it was not disputed that the appellant had given the victim a free Thai massage. As such, the production of a price list would not go very far in aiding the appellant to show that the alleged incident did not take place.[76] In relation to the sequencing of events, it was plausible for the appellant to offer the victim a massage in the hope that she would change her mind and take up a package with the Gym even after she had initially declined to do so.[77] On the whole, the account given by the victim was plausible.

(2) The victim's account of the massage and the alleged incident

44 Second, and more crucially, the victim's account of what occurred during the massage itself was credible. The appellant argued that the victim did not react when he allegedly massaged her inner thighs the second time, and that this rendered her account less credible. However, the victim had clearly testified during cross-examination that the first time, the appellant had stopped at her inner thighs and massaged her at that area. Conversely, the second time, the appellant had gone "straight up" and "didn't had [*sic*] a pause at the inner thighs".[78] When questioned as to why she did not stop the appellant, the victim answered that the appellant had gone "straightaway into [her] panty" and that it

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75 NE 16 May 2019 at p 17 ln 32 to p 18 ln 6

76 Certified Transcript (14 September 2020) at p 28 ln 10 to p 29 ln 4

77 Certified Transcript (14 September 2020) at p 29 ln 4–21

78 NE 16 May 2019 at p 64 ln 10–23

was a "very fast action".[79] Coupled with her evidence that he had inserted his finger for a "few seconds"[80] and that it was an "in and out thing",[81] her account is clear that the appellant did not pause at her inner thighs for a sufficiently long period of time for her to react to it. The appellant's description of the victim's lack of reaction to the second time he massaged her inner thighs was based on a mischaracterisation of her evidence.

45 The appellant argued that the victim's evidence was also not credible as she was willing to leave her vaginal area exposed instead of covering it with the towel during the massage. However, as submitted by the respondent, the victim was wearing her underwear which would have covered her vaginal area. She was uncomfortable being massaged in the area around her inner thighs, and she had indicated this to the appellant by moving her legs. When the appellant moved back down to her calves, she did not have a reason to apprehend any danger and pull down the towel to cover the back of her thighs, where she was comfortable being massaged at.[82] The fact that the victim did not shift the towel did not undermine the credibility of her evidence in any way.

46 There was also no internal inconsistency in the victim's evidence in respect of how many fingers had been inserted into her vagina during the sexual assault. The victim had initially testified that she was "not sure" how many fingers the appellant had inserted into her vagina,[83] but that based on the sensation that she felt, the finger had been inserted to a depth of about 2.5cm.[84]

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79 NE 16 May 2019 at p 66 ln 11–16

80 NE 15 May 2019 at p 62 ln 28–30

81 NE 15 May 2019 at p 61 ln 27–28

82 Certified Transcript (14 September 2020) at p 30 ln 16–31

83 NE 15 May 2019 at p 59 ln 32 to p 60 ln 1

47 The victim was later asked:[85]

> [Deputy Public Prosecutor ("DPP")]: Now, you told the Court yesterday that you were not sure how many fingers [the appellant] put into the hole you have sexual intercourse in, is that correct?
>
> [Victim]: Yes.
>
> [DPP]: Now, 1 hand there's 5 fingers, yes?
>
> [Victim]: Yes.
>
> [DPP]: Okay. Was it all 5 fingers that you felt being inserted into that hole that you have sex in?
>
> [Victim]: *I don't think it's all 5 fingers.*
>
> …
>
> [DPP]: Now, so, I want you to think---*think back on the sensation that you felt at that time. Are you able to say approximately how many fingers did you feel the [appellant] insert into the hole that you had sexual intercourse in?*
>
> [Victim]: *It should be 1.*
>
> [emphasis added]

48 The victim's evidence was initially that she was unsure of how many fingers had been inserted, but when asked to recollect and approximate the number of fingers inserted, she then answered that it "should be [one]". This answer was not inconsistent with her previous evidence, and there was nothing apparently contradictory with her evidence as to the depth to which the appellant's finger was inserted.

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84 NE 15 May 2019 at p 62 ln 20–24

85 NE 16 May 2019 at p 2 ln 6–21

49 The fact that the victim was wearing "bikini" style underwear and was lying in a prone position does not render it physically impossible for the "in and out" digital insertion motion she described to have taken place. There was no evidence before the court showing how the act of digital vaginal penetration was physically impossible for these reasons. Moreover, even on the appellant's own defence, he could possibly have accidentally touched her vagina. I pause to note that the two arguments of physical impossibility and possible accident are irreconcilable in that they stand as binary options. The appellant seemed to be wholly cognisant of this. I shall address these aspects of the appellant's arguments more fully in due course at [59]–[73] below.

50 The DJ accepted the victim's account of an "in-and-out" penetration, and I did not see how her account was illogical or not in accordance with the available evidence. The DJ had also accepted that the victim had satisfactorily explained her decision to allow the appellant to continue with the massage even after he had "fingered" her. The victim was concerned that, given the state of undress she was in, the appellant might overpower her and escalate his acts should she abruptly decide to end the massage and leave. I agreed with the DJ that this was a perfectly plausible explanation. Further, nothing turned on whether the door at the ground floor was locked from the inside during the massage. The victim had candidly testified that she was able to open the door and let herself out, and that she did not see the door being locked by the appellant.

(3) The victim's delay in reporting the alleged incident

51 In respect of the appellant's argument that the victim did not report the alleged incident on the day itself or tell her friends or family members about the incident, I did not think that this delay affected the victim's credibility. As stated

by the Court of Appeal in *Mohd Ariffan*, the court is to consider the explanations given by the complainant for his or her delay in reporting the offences to the police or disclosing the assault to anyone else, including his or her family members. A delay in reporting did not necessarily, on its own, undermine the credibility of a complainant, and the effect of any delay had to be assessed on the specific facts of each case (*Mohd Ariffan* at [66]–[68]).

52 The victim had explained that she did not head to the police station on the day of the incident itself as she had wanted to go home to take care of her sick child. She also explained that she did not want to be "judged" by her friends and family, although she may have actually meant to say "misjudged".[86] The victim had given a reasonable explanation for the delay, and this delay – which, in any event, was only less than a day before Vivian had pre-empted her by making a police report – should therefore not be held against her. It was also reasonable to accept that she had every intention to make a police report the very next day and would have done so but for the fact that Vivian had already made a police report.

(4) The victim's medical report

53 I turn next to consider the external consistency of the victim's evidence. It was undisputed that the victim had visited KK Women's and Children's Hospital on 2 October 2016 and that a medical report had been prepared. The relevant section of the medical report dated 31 October 2016 prepared by Dr Pramanick stated as follows:

> The alleged assailant involved is [the appellant], a Muay Thai instructor. According to [the victim], on 01 October 2016, she was at the Muay Thai School at Joo Chiat Road when [the

86 NE 15 May 2019 at p 70 ln 19–27

> appellant] (a Muay Thai Instructor) offered to give her a massage. She accepted the offer and at around 3.30 pm the massage started in a closed massage room in the school. She was lying down on her abdomen[.] She only had her panties on her. [The appellant] proceeded with the massage, 20 minutes into the session he inserted his hand into her panties and his finger into her vagina. *She immediately pushed him away and shouted at him.* He withdrew his finger and carried on with the massage for another 20 minutes. They parted after the massage. The massage was in a *single room with locked doors*.
>
> [emphasis added]

54 The appellant argued that the victim's account of events in the medical report was inconsistent with her evidence at trial, which did not involve her pushing the appellant away after the alleged incident. When shown the medical report during cross-examination, the victim testified that she did not push the appellant away, but she did shout at him. The area where the massage was carried out also did not have locked doors but only had curtains. She further testified that she was not given a chance to confirm the accuracy of the report as it was not shown to her by the doctor at that point in time.[87] I was of the view that the victim's testimony was believable, and it was probable that the medical report might not have accurately recorded the circumstances of the alleged incident. Based on Dr Pramanick's evidence, the recounting of the incident by the victim was relatively brief. The medical examination lasted 29 minutes, during which the following steps were taken, as described by Dr Pramanick:[88]

> So the first thing uh that we normally do is check with the witness if she's the one who had signed the consent and if she has consented for the---uh, for the interview and the examination. Then I proceed with asking her uh, brief medical history which is uh, relevant to the case. Then after that uh, ask her to recount the incidents in her own words. And following that do the physical examination focusing on the

87 NE 16 May 2019 at p 53 ln 26 to p 54 ln 4

88 NE 20 August 2019 at p 8 ln 21–32

> genital areas. Following that we do the swabs and the blood test to send to the lab to check for any infections.

55 There were also other errors in the report, which Dr Pramanick corrected during her examination-in-chief. The report stated that she had seen the victim on 3 October 2016, but she had in fact seen the victim on 2 October 2016. Further, the report incorrectly stated that the victim had tested negative for a condition named Gardnerella in respect of the VP3 test, when the victim had in fact tested positive for it.[89]

56 In the victim's text messages to Vivian (see [77] below), the victim stated that she had shouted at the appellant but not that she pushed him, which was consistent with her version of events at trial. As compared to the medical report, this record of events was personally sent by the victim by text message to Vivian. Vivian testified that over the phone, the victim "said very specifically that [the appellant] fingered her and gave her Thai massage".[90] I did not think that on these facts, the inconsistency in the medical report should be attributed to the victim.

57 In respect of the appellant's argument that the medical evidence pointed towards there not having been a sexual assault, Dr Pramanick's evidence was that if the perpetrator had sexually penetrated a victim with one finger and if a victim had been sexually active, it would be possible for her to not suffer any visible injury. Following from the doctor's evidence, I found that the victim not suffering any visible injury was a neutral factor in determining whether the alleged incident had taken place.

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89 NE 20 August 2019 at p 6 ln 16–25

90 NE 20 August 2019 at p 30 ln 17–23

58 On a holistic assessment of the evidence, I agreed with the DJ's assessment that the victim's evidence was unusually convincing.

Credibility of the appellant's defence

59 I accepted the respondent's arguments that the appellant's defence was inconsistent, and that he was not a credible witness. There was a clear inconsistency between his initial case (which was repeatedly put to the victim) that he could have accidentally touched her vaginal area, and his subsequent testimony maintaining that there could not even have been an accidental touch. On appeal, he went even further to argue that the contact was physically impossible. Saying that there had been a possible accidental touch and absolutely denying the physical possibility of any touch at all are distinctly inconsistent positions. This fortified my view that the DJ was correct in highlighting the appellant's inconsistency as a consideration that affected his credibility.

(1) The appellant's defence of physical impossibility

60 The respondent's case (*ie*, that the sexual assault was an "in-and-out" penetration) was based on the victim's testimony and consistent. The appellant had argued in the proceedings below that it would not have been possible for him to sexually penetrate the victim as he did not massage her at the inner thigh area, and the victim's vaginal area was covered by her underwear and the towel. To this, the victim had testified that the appellant had stuck his finger underneath her underwear, and that the towel was not covering her vaginal area.[91] On appeal, the appellant then further submitted that it would not have

[91] NE 16 May 2019 at p 66 ln 19–30

been physically possible for him to have penetrated her in an in-and-out motion as it would go against human anatomy. According to him, this was because the vaginal area was oriented downwards and would have been completely covered either by the towel or the victim's "bikini" style underwear, and the victim's thighs would have been closed at the time of the massage.[92] He also argued that the victim had admitted that it was not possible for him to have sexually penetrated her, relying on one line of the victim's evidence, namely, "[m]aybe it could have went in, but I was wearing my panty".[93]

61 It is well-settled that the prosecution must prove the guilt of an accused person beyond a reasonable doubt and that it is incumbent on the prosecution to address any gaps in its case (*Mui Jia Jun v Public Prosecutor* [2018] 2 SLR 1087 at [72]–[77]; *Sakthivel Punithavathi v Public Prosecutor* [2007] 2 SLR(R) 983 at [81]; *Jagatheesan s/o Krishnasamy v Public Prosecutor* [2006] 4 SLR(R) 45 at [59]–[61]). The Court of Appeal in *Public Prosecutor v GCK and another matter* [2020] 1 SLR 486 ("*GCK*") had conceptualised the principle of proof beyond a reasonable doubt in two ways. First, a reasonable doubt may arise from within the case mounted by the prosecution. Should such flaws in the prosecution's case be identified, weaknesses in the defence's case would not ordinarily be able to bolster the prosecution's case (*GCK* at [134], [142]). Second, a reasonable doubt may arise on the assessment of the totality of the evidence. In this regard, the assessment of the prosecution's evidence under the "unusually convincing" standard must be made with regard to the totality of the evidence, which logically includes the defence's case. The defence needs to bring the prosecution's case below the requisite threshold by pointing to such

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92 Certified Transcript (14 September 2020) at p 7 ln 24 to p 8 ln 8

93 Certified Transcript (14 September 2020) at p 8 ln 9–20

evidence that is capable of generating a reasonable doubt. If the prosecution fails to rebut such evidence, it would fail in its overall burden of proving the charge against the accused person beyond a reasonable doubt (*GCK* at [135], [144]–[145]).

62 In my assessment, no gaps had surfaced in the respondent's case theory in respect of whether the "in-and-out" penetration was physically possible. This was a case which boiled down to the victim's words against the appellant's, and the victim's testimony had been consistent. As submitted by the respondent, the victim was not given the opportunity to respond to any of the claims regarding physical impossibility which the appellant had raised only on appeal.[94] I did not think that the appellant had adduced evidence or pointed to any evidence which gave rise to a reasonable doubt.

63 The claims made by the appellant on appeal were based purely on speculation and conjecture. No evidence had been adduced by the appellant regarding this alleged physical impossibility either at the proceedings below or on appeal. In his submissions on appeal, the appellant had produced an illustration allegedly representing the female anatomy to support his argument that digital vaginal penetration in an in-and-out motion was physically impossible as the victim was lying in a prone position. However, no explanations were advanced as to why this would inexorably be physically impossible to achieve, aside from a mere assertion (based on the illustration produced) that the vaginal orifice was facing downwards. The appellant's other arguments supporting the alleged physical impossibility, *ie*, that penetration in the manner testified by the victim was not possible as her vagina would have

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94 Certified Transcript (14 September 2020) at p 31 ln 3–9

been covered by her underwear or a towel and the victim's thighs would have been closed during the massage, were similarly made without any evidentiary basis.

64 The appellant's submission that the victim's own evidence contained an admission of such physical impossibility was without merit. The section of the victim's testimony relied upon by the appellant had clearly been taken out of context. The victim had testified:[95]

> [Victim]: An accident?
>
> [Mr Silvester]: Yes
>
> [Victim]: You mean an accident can go under my panty?
>
> [Mr Silvester]: You can just tell us what you---
>
> [Victim]: I don't think so it's an accident. Because I was wearing my panty, if it's --- is --- *if I was not wearing my panty, maybe it could have went in but I was wearing my panty*. How could the fingers went under my panty ---
>
> [Mr Silvester]: Okay.
>
> [Victim]: if it's… an accident.
>
> [Mr Silvester]: So, it took some time, his fingers went under your panty and everything --- all this happened?
>
> [Victim]: Yes.
>
> [emphasis added]

65 It is clear that the victim's testimony was that the sexual penetration could not have been an *accident* as she was wearing an undergarment. There was no contradiction with her evidence that the penetration was physically possible and had taken place.

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95 NE 16 May 2019 at p 25 ln 3–15

(2) The appellant's defence of accident

66 On appeal, the appellant argued that the entire defence of accident had been put forth during the trial by his former counsel without instructions, and that Mr Silvester had acknowledged as much.[96] However, I saw no basis for his allegation. It appeared that the appellant's decision to resile from his defence of accident was very much an afterthought. It was tailored so that he could instead advance his new argument of physical impossibility on appeal. As I had noted at [49] above, these were irreconcilable and contradictory positions.

67 Mr Silvester's statement that he had no instructions had to be read in context. During the trial, the DJ had attempted to invite Mr Silvester to be more specific about the appellant's defence during the cross-examination of the victim. The DJ clarified the point as follows:[97]

> [Mr Silvester]: I put it to you that if there was any contact with your private parts, it was accidal and --- accident and you were actually aware that it may have been an accident when you send this text message.
>
> Court: Sorry.
>
> [Mr Silvester]: Is that correct?
>
> Court: Counsel, you have asked the question a few times. Perhaps ---
>
> [Mr Silvester]: And ---
>
> Court: and if instructed, could you --- *could you be a little bit more precise with the accidental contact with vagina part?* As in in---ins---inside or outside, which area of the vagina i---if you are --- if you are talking about that part. If you have instructions. Otherwise… *of course, it is for you to frame your questions* ---

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96 Certified Transcript (14 September 2020) at p 16 ln 3–15

97 NE 16 May 2019 at p 48 ln 17 to p 49 ln 9

> [Mr Silvester]: Understand, Your Honour.
>
> Court: *according to instructions.*
>
> [Mr Silvester]*: I'm not --- no, I don't have any instructions* on --- I'll go to the next ---
>
> Court: No --- *nothing* ---
>
> [Mr Silvester]: set of question. Understand, You Honour.
>
> Court: *specific on this contact? Alright. So, it was more like a hypothetical question if there was such contact, it would have been accidental.*
>
> [Mr Silvester]: Yes.
>
> [emphasis added]

68 Towards the end of the victim's cross-examination, the following exchange was recorded:[98]

> [Mr Silvester]: Okay. I put it to you, that at most, [the appellant] may have accidentally touched your vagina area and you mis --- may have felt it such that it was a bit more forceful that you thought. I put it to you as an accident basically.
>
> [Victim]: It's not an accident.
>
> Court: Counsel, again, I think the questions are fair, but the --- the phrase "touch the vagina area". I think it would be helpful to clarify what you mean by touch. Perhaps, touch which part –
>
> [Mr Silvester]: Oh okay.
>
> Court: or --- because the witness testimony is that that was not only a touch, it was insertion. So I think it might assist to clarify what the Defence position is. If there was accidental touch, wha --- are you talking about accidental insertion or accidental external touch. That might help to clarify the situation. I note that this question has been asked many times and answered many times. So I was wondering whether the Defence might be inclined to detail exactly what you mean by accidental touch.

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98 NE 16 May 2019 at p 72 ln 14 to p 73 ln 9

> [Mr Silvester]: Your Honour, can I just ---
>
> Court: Sure.
>
> [Mr Silvester]: Okay. *I put it to you that because it was slippery, it was oily, he may have accidentally touched your vagina area, and you misconstrued this to be an insertion. Is that correct?*
>
> [Victim]: No.
>
> [Mr Silvester]: I put it to you, that this was an accident and never intentional. Do you agree?
>
> [Victim]: No.
>
> [emphasis added]

69 As I sought to clarify with the appellant during the hearing on 14 September 2020, it appeared that Mr Silvester's statement that he did not "have any instructions" was a response to the court's question as to whether he could be more precise about the nature of the accidental contact and the area of contact.[99] He did not state that he had ventured into the entire defence of accident without any instructions. In fact, the defence of accident was put to the victim on multiple occasions.

70 Further, the transcripts showed that Mr Silvester was building up a factual case of a possible accident, and it would be fair to presume that this was based on the input and in accordance with the instructions of the appellant. Mr Silvester had first pointed out that oil was used, such that the victim's body would have been slippery to the touch. He then pointed out that the victim had just completed over two hours of exercise and did not shower. She would have been sweaty at that point and her skin would be slippery.[100] He further stated

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99 Certified Transcript (14 September 2020) at p 15 ln 16–18; p 15 ln 28 to p 16 ln 2

100 NE 16 May 2019 at p 59 ln 25 to p 60 ln 5

that the curtains in the Gym were heavy and closed at the material time, that the lights were switched off, and that the curtained area would therefore have been quite dark during the massage.[101] He also pointed out that a large towel was put across the victim's body.[102] Finally, he suggested that the victim's perianal warts might have caused her to be more sensitive than most around the genital area. Only after building up this case in a detailed and methodical manner did he put to the victim that the appellant might have accidentally touched her vaginal area and that it was merely an accident.[103] As can be seen at [68] above, when the court again sought further specificity on the defence's position with regard to the accidental touch, Mr Silvester put forth more details to support the line of argument. It is reasonable to infer that all these factual details were at Mr Silvester's disposal because he had obtained instructions from the appellant.

71 The High Court in *Lee Cheong Ngan alias Lee Cheong Yuen v Public Prosecutor and Other Applications* [2004] SGHC 91 made the following observation in the context of criminal revisions following plead guilty mentions at [28]:

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101 NE 16 May 2019 at p 60 ln 14–27

102 NE 16 May 2019 at p 71 ln 25–32

103 NE 16 May 2019 at p 72 ln 1–18

> In many petitions for criminal revision, the accused often challenges defence counsel's conduct of the case. Yet many of these allegations are often unfounded, and are raised by the accused only in a desperate attempt to escape the rigours of the law. In *Lee Eng Hock*, ([23] *supra*), the petitioner pleaded guilty, but later sought criminal revision on the ground that he had misunderstood his counsel's advice. While he was convinced of his own innocence throughout, he thought that his counsel had advised him that a plea of guilt would not occasion a custodial sentence. In dismissing the petition, I made the following observations at [10] of my judgment:
>
> > If the conduct of defence counsel could be so easily challenged, the chilling effect on the criminal Bar would be immense. While there may in some cases be a thin line between dispensing credible legal advice and pressurising one's client to plead guilty, it is undesirable to allow defence counsel to be made convenient scapegoats, on the backs of whom "backdoor appeals" are carried through.

72 Similar principles should apply in the situation of a trial. If the appellant had disagreed with the defence being put forth by his counsel, he could and should have instructed his counsel accordingly. He did not do so. Neither did he inform the trial judge that counsel had acted, as it would appear from the appellant's claims on appeal, on a frolic of his own. Only on appeal, after the DJ had made a finding that his defences had been inconsistent, did he surface the allegation that counsel was not acting upon his instructions in raising the defence of accident. Moreover, based on what was recorded in the transcripts, I did not think that Mr Silvester had mounted the defence of accident on his own accord. This bolstered my reading of Mr Silvester's statement that he did not have instructions to be only a response to the court's question as to whether he could provide further specificity, and not to extend to the entire defence of accident.

73 I also agreed with the respondent's submission that even if the questions were put to the victim as a hypothetical, they would still be materially

inconsistent with the appellant's case that he did not even massage the area near her inner thighs.[104] Further, I note that Mr Silvester had asked the victim whether permission was sought from her before her groin or buttock area was massaged:[105]

> [Mr Silvester]: Witness, I'm instructed that every time client does a massage, every time the---the accused does the massage and he's going to massage the groin or buttock area, he would ask for the---the client's permission. Did he ask for your permission before massaging the---the groin or buttock area?
>
> [Victim]: No.

This question was again fundamentally inconsistent with the appellant's own evidence-in-chief that he had never massaged the area near the victim's inner thighs and therefore could not possibly have accidentally touched her vagina.

74 In addition, the DJ rightly gave weight to the appellant's inability to provide any credible explanation as to why he had denied performing the massage on the victim when he was confronted by Vivian. He maintained this denial when questioned by the police. In the police statement, the appellant did not only deny giving her a massage or committing the offence, he went further to allege that the victim had a hidden motive to extort the Gym, stating:

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104 Certified Transcript (14 September 2020) at p 37 ln 11–19

105 NE 16 May 2019 at p 24 ln 3–8

> 11 … The reason why I reported to the police is *because I did not want [the victim] to extort money out of the company. I felt that it is very weird and she may ask for monetary compensation.*
>
> 12 *I do not know what [the victim's] hidden agenda is?* I did not ask her to strip and lie on the massage bed. I did not offer massage service or perform any massage on [the victim]. I did not do anything indecent or obscene to her. All I did was to speak to her with regard to my company packages and made a cup of Kopi O Kosong. She drank the Kopi O Kosong and left the gym.
>
> [emphasis added]

75 In this connection, the appellant's repeated and vehement denials about performing the massage would explain why he was prepared to agree with his Gym co-founders to report the matter to the police. Having lied to Vivian that he did not perform any massage, he had no qualms repeating his lie to the police, and even embellishing it to impute a sinister motive to the victim. These contemporaneous reactions were simply not consistent with his pleas of innocence. His various explanations for lying – that he thought he was in "deep trouble", that the odds were stacked against men when complaints of sexual assault are made, and yet did not think it was serious to lie in his police statement – are dubious and implausible. More tellingly, it was suggested on appeal that he was concerned about protecting the Gym but he did not want to tell Vivian about something he should not have done. If all that he had done had only been to give a free Thai massage in a bid to secure a potential customer's interest, it is difficult to see why he could not have been upfront about this from the outset.

(3) The appellant's "shakedown" allegation

76 The appellant further suggested on appeal that the victim had falsely accused him of the offence for some ulterior purpose, in a threatened "shakedown" akin to blackmail or extortion. This was not put or suggested to

the victim when she was cross-examined. In any event, the suggestion that the victim was seeking to extract monetary compensation is not borne out by the objective evidence and I did not see any basis to draw such an inference from her text messages.

77 For reference, the messages which relate to the "shakedown" allegation state as follows:[106]

[Victim]:	Hi.. Are u a staff at [the Gym]?
[Vivian]:	Yes. How can I help you?
[Victim]:	May I know ur name pls
[Vivian]:	Vivian
[Vivian]:	Is there anything I can do for you?
[Victim]:	I had my free trial class yesterday with [the appellant]… N I think… *he gave me a thai massage n he actually fingered me… Which is very wrong… I am very unhappy with that… Why did he have to do that…*
[Vivian]:	Can I have your name please
[Vivian]:	Do you mind if I give you a call in half an hour's time
[Victim]:	[Victim's name]… U can call me at 2pm
[Vivian]:	Possible to be earlier?
[Victim]:	Errr… Im at work actually… Free after 2
[Vivian]:	Roughly tell me over text what and how did it happened?
[Victim]:	After the class.. he made me kopi o n then he offered thai massage… So I agreed to it.. *N during the massage when im lying on my front he*

106 ROA at pp 435–438

> *actually fingered me. I shouted n him…* N he jus continued the massage without an apology… He said only he can do the thai massage.. As the rest do not know how… I do not know if this ever happen but it is really tarnishing the company image…
>
> [Vivian]: Please call me in awhile yeah
>
> [emphasis added]

78 It is in the nature of text messages that they may not be precise, complete or wholly coherent. Miscommunication and ambiguity can arise given the need for brevity. From the victim's text messages as set out above, however, they were clear in conveying her grievance over the appellant having done something "very wrong" as he had "actually fingered" her in the course of the massage. It was untenable for the appellant to suggest that the use of the words "very unhappy" was unusual for a victim of sexual assault and that these words instead showed that she was merely a disappointed customer who had experienced poor service. This would entail selectively reading far too much into the victim's choice of words without appreciating the full context of her messages. If there had been any underlying improper motive, it did not make sense for the victim not to make her intentions much more plain and obvious when she communicated with Vivian. The victim also did not keep in contact with Vivian or any of the staff members of the Gym after her phone correspondence with Vivian.

79 The DJ was thus entitled to accept that the victim had no reason to fabricate a serious allegation of sexual assault against the appellant. The appellant himself conceded that he could not conceive of any reason why she should have chosen to falsely implicate him. The appellant did not discharge the evidential burden to show that the victim had a plausible motive to falsely implicate him (see *AOF v Public Prosecutor* [2012] 3 SLR 34 at [215]–[216]).

80 The appellant also argued that Vivian's testimony showed that she was similarly under the impression that the victim might have an improper motive, which was why she decided to make a police report so as to protect the Gym.[107] However, this allegation was not borne out when Vivian's testimony was viewed as a whole. Vivian had testified in examination-in-chief that:[108]

> [DPP]: Why were you so concerned? Why were you so shocked? What was foremost on your mind --- the ---the main on your mind was what?
>
> [Vivian]: The main thing on my mind was the company. I don't know who is this [victim], I don't know what is her intention.
>
> …
>
> [DPP]: Now, why did you decided to make a police report?
>
> [Vivian]: Because my company's image is at stake. It's a --- it's a rape case that we will think. And we don't know if [the victim] will spread this out or not.
>
> [DPP]: So you mentioned earlier that because [the appellant] had said a lot of times that he didn't do it, you decided to call for the police and let them check, what do you mean by that?
>
> [Vivian]: That means to let the police investigate whether he really did it or not because we do not have CCTV in the gym.

81 It is clear from Vivian's testimony that while she made the report to protect the reputation of the Gym, it was not because she disbelieved the victim or necessarily suspected her of an improper motive. At any rate, Vivian did not do so purely or even primarily for these reasons. She had intended for the police to look into the matter to determine whether the alleged incident had taken place as she could not independently ascertain whether the appellant's or the victim's version was true.

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107 Certified Transcript (14 September 2020) at p 11 ln 13–26

108 NE 20 August 2019 at p 32 ln 6–10; p 33 ln 23–31;

82 For all of the above reasons, I upheld the appellant's conviction.

The appeal against sentence

Parties' cases

Appellant's case

83 I turn next to the appeal against sentence. The appellant argued that the sentence imposed was manifestly excessive.

84 The appellant submitted that the framework in *Pram Nair* should not be applicable to all cases of digital vaginal penetration without exception. The sentencing bands did not capture the full range of seriousness for offences involving digital vaginal penetration. In particular, they did not account for cases which had no offence-specific aggravating factors, which according to the appellant included the present case, or cases where the offence-specific factors were less aggravated than that in *Public Prosecutor v Koh Nai Hock* [2016] SGDC 48 ("*Koh Nai Hock*"). In *Koh Nai Hock*, the offender had held himself out as an alternative medicine practitioner. He penetrated the victim's anus and vagina with his finger by falsely representing that he was treating her for infertility. He faced 14 charges under s 376(2) of the Penal Code, and was sentenced to two to three years' imprisonment per charge, and a global sentence of seven years' imprisonment. No caning was imposed as the offender was over 60 years of age. The offender's appeal against sentence was dismissed by the High Court.

85 The appellant proposed that the lower bound of Band 1 in the *Pram Nair* framework should have been set at less than four years' imprisonment. In making this argument, the appellant compared the *Pram Nair* framework to the sentencing bands set out in *Kunasekaran s/o Kalimuthu Somasundara v Public*

Prosecutor [2018] 4 SLR 580 ("*Kunasekaran*") in respect of offences under s 354(1) of the Penal Code, and *GBR v Public Prosecutor and another appeal* [2018] 3 SLR 1048 ("*GBR*") in respect of offences punishable under s 354(2) of the Penal Code. The appellant argued that the *upper limit* of Band 1 in the sentencing bands set out in *Kunasekaran* and *GBR* was about one-fifth of the statutory maximum sentence, whereas the lower bound of Band 1 in *Pram Nair* was about one-third of the statutory maximum sentence.

86 The appellant contended that the DJ had erred in finding that abuse of trust was an offence-specific aggravating factor in this case, as it was not reasonable for the victim to have placed trust in the appellant. The appellant was also not in a position of responsibility vis-à-vis the victim, such as in a doctor-patient relationship, and he had only met her for the first time that day.

87 The appellant further argued that his sentence of seven years and four months' imprisonment and four strokes of the case, falling within Band 1 of the *Pram Nair* framework, was disproportionate. The appellant compared the sentence imposed in this case to sentences imposed in cases of outrage of modesty and aggravated outrage of modesty, and submitted that lower sentences were imposed in those cases despite the presence of aggravating factors which were far more serious.

88 The appellant also argued that the DJ should have considered that the *Pram Nair* framework should not have been strictly applied as there were no aggravating factors present and a very low degree of culpability and harm caused. The present case was less serious than that in *Koh Nai Hock*, and a sentence lower than the global sentence of seven years' imprisonment imposed in that case would therefore be appropriate.

89 The appellant further argued that the DJ's decision on sentence was wrong in law and manifestly excessive when the facts of the present case were compared to the cases which the DJ had relied upon in coming to her decision, namely *Pram Nair*, *Public Prosecutor v Ridhaudin Ridhwan bin Bakri and others* [2020] 4 SLR 790 ("*Ridhaudin*") and *Public Prosecutor v Wee Teong Boo* [2019] SGHC 198, the last of which has since been overturned. The DJ should have imposed a sentence that was far lower than that imposed in *Pram Nair* and *Ridhaudin.*

90 The appellant thus submitted that an appropriate imprisonment term would be two years' imprisonment, following the individual sentences imposed in *Koh Nai Hock* which was the most analogous precedent, and four strokes of the cane or such number of strokes as to adequately register the court's disapproval of the appellant's conduct.

Respondent's case

91 The respondent submitted that the DJ had appropriately considered the factual matrix and decided that it fell within Band 1 of the framework in *Pram Nair*. The DJ had correctly found that abuse of trust was an aggravating factor in this case, but had erred on the side of caution in finding that premeditation in this case would not be considered as an aggravating factor. The respondent argued that the appellant had acted in a manner which was "deliberate, calculated and considered" and that the offence was therefore premeditated.[109]

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109 RWS at paras 58–60

92 In response to the appellant's arguments, the respondent made the following submissions:[110]

(a) The Court of Appeal had laid down the sentencing framework for offences of sexual assault by penetration in *Pram Nair*, which was calibrated downwards from the framework in *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 (*"Terence Ng")* for rape offences.

(b) It would be absurd to peg the sentence for offences of sexual assault by penetration to that of outrage of modesty, as the former offences are more egregious.

(c) Band 1 in the *Pram Nair* framework applies to a situation where there are no aggravating factors. There was nothing so exceptional in the present case warranting a departure from the prescribed range of sentences in Band 1.

(d) The Court of Appeal had specifically cautioned against relying on *Koh Nai Hock* as a precedent for individual sentences.

(e) There were offence-specific aggravating factors present in this case.

Decision

93 The relevant sentencing framework for offences of sexual assault by penetration under s 376 of the Penal Code is set out in *Pram Nair.* The framework essentially requires the sentencing court to consider the offence-specific aggravating factors to identify the appropriate sentencing band within

110 Certified Transcript (14 September 2020) at p 39 ln 14 to p 41 ln 6

which the offence falls (*Pram Nair* at [159]; *Terence Ng* at [50], [53] and [57]). The said bands are as follows:

(a) Band 1 (seven to ten years' imprisonment and four strokes of the cane): These cases feature no offence-specific aggravating factors, or such factor(s) are only present to a very limited extent.

(b) Band 2 (10 to 15 years' imprisonment and eight strokes of the cane): These cases usually contain two or more offence-specific aggravating factors.

(c) Band 3 (15 to 20 years' imprisonment and 12 strokes of the cane): These involve the most serious cases, by reason of the number and intensity of the aggravating factors.

94 After identifying the sentencing band within which the offence falls, the court should then take into account any offender-specific aggravating and mitigating factors to determine the appropriate sentence.

95 As submitted by the respondent, the Court of Appeal in *Pram Nair* had transposed the *Terence Ng* framework applicable to rape offences to the offence of digital penetration by lowering the range of starting sentences for each band to reflect the lesser gravity of the offence (*Pram Nair* at [159]). It is clear that the framework in *Pram Nair* was intended to capture the full range of seriousness in offending, including cases where there were no offence-specific aggravating factors or where these factors were present to a limited extent.

96 I make a brief comment in respect of the appellant's contentions that the lower bound of Band 1 of the *Pram Nair* sentencing framework should not start at about one-third of the statutory maximum sentence. The Court of Appeal in

Terence Ng had commented on the lower bound of ten years' imprisonment in Band 1 of the framework for rape offences, noting that it was the judicial benchmark sentence for rape of all forms, as established in *Chia Kim Heng Frederick v Public Prosecutor* [1992] 1 SLR(R) 63 (*Terence Ng* at [49]). The lower bound in the *Pram Nair* framework would similarly amount to a benchmark sentence set for digital penetration offences (involving penetration using a finger), and there was nothing objectionable about the court setting such a benchmark sentence. As the respondent also pointed out, offences involving sexual assault by penetration are generally more egregious and invasive than offences of outrage of modesty, and there was therefore no reason to peg the starting point in the *Pram Nair* framework to that of *Kunasekaran* or *GBR*.

97 I also agreed with the respondent that the appellant's reliance on *Koh Nai Hock* was misplaced. This case pre-dated the *Pram Nair* framework and the prosecution had not appealed against the sentence. The Court of Appeal in *Pram Nair* had categorised the case, which had only one offence-specific aggravating factor, as a case which would have fallen within Band 1. The court noted that the global sentence imposed in that case was seven years' imprisonment and was therefore still broadly "somewhat consistent" with the Band 1 sentencing range, but the individual sentences of two to three years would be "some distance" from the sentencing bands. The court then explicitly cautioned against relying on the case as a precedent for individual sentences (*Pram Nair* at [169]).

98 The Court of Appeal also considered other precedent cases which it would categorise as falling within Bands 2 and 3, and noted that the actual sentences imposed in those cases were lower than the minimum sentences specified in *Pram Nair* for the respective sentencing bands. The court then stated that those cases "should not as a rule be relied upon", and that a judge who was minded to give a similar sentence as that imposed in those cases must

set out clear and coherent reasons for departing from the *Pram Nair* sentencing bands (*Pram Nair* at [170]). It is clear that the sentences for cases decided pre-*Pram Nair* have to be viewed with circumspection, and that the sentencing bands in *Pram Nair* should apply barring exceptional facts.

99 The DJ found only one offence-specific aggravating factor – abuse of trust. She formed the opinion that there was at best limited abuse of trust, and properly considered that the assault was momentary and not persistent. I agreed with her characterisation of this case as falling within the low end of Band 1 of the *Pram Nair* framework. I saw no reason to treat this as such an exceptional case as to fall completely outside the framework.

100 The court in *Terence Ng* had suggested the case of *Public Prosecutor v Mohammed Liton Mohammed Syeed Mallik* [2008] 1 SLR(R) 601 ("*Mohammed Liton*") as an example of a case which might call for a departure from the prescribed sentencing bands for rape offences (at [49]). In *Mohammed Liton,* the parties were in love, and had engaged in intimate and consensual sexual activities close in time to the rape and even after the rape itself, which pointed to the incident as one which was wholly unplanned and unforeseen (*Mohammed Liton* at [119]). Given that similar offence-specific aggravating factors that apply to rape offences would also apply to offences involving sexual assault by penetration, it is conceivable that a case with exceptional facts similar to those in *Mohammed Liton* could warrant a departure from the prescribed sentencing bands in *Pram Nair*.

101 In *Muhammad Anddy Faizul bin Mohd Eskah v Public Prosecutor* [2020] SGCA 113 ("*Muhammad Anddy*"), the offender pleaded guilty to and was convicted on nine charges, with 59 charges being taken into consideration for the purpose of sentencing, all of which were sexual offences. The offender

was a youthful offender who was approaching 16 years of age at the time of the earliest offence and was aged 18 years by the date of his last offence. The Court of Appeal stated that it had little reason to disagree with the High Court Judge's ruling on the sentences for each charge as they were in line with the sentencing frameworks in *Pram Nair* and *Terence Ng*. I note that the court also upheld two of the individual sentences for sexual assault and rape which were below the lowest ends of the sentencing frameworks in *Pram Nair* and *Terence Ng* respectively. The Court of Appeal stated that the mitigating factors and the totality principle had been given sufficient consideration by the High Court Judge, resulting in the comparatively low sentences. Pertinently, the court stated that it had "little doubt that had the [offender] been older, his sentence would have been more severe" (*Muhammad Anddy* at [11]).

102 In the present case, the victim and the appellant were strangers, and the appellant had opportunistically sexually assaulted the victim during a massage. The appellant was also not a young offender. There was nothing exceptional about the present facts such that the *Pram Nair* framework should not apply.

103 I also did not think that the DJ had erred in comparing the present case to *Ridhaudin* and *Pram Nair*, and in drawing her conclusion that the sentence in this case should be lower than that imposed in the two precedent cases. The DJ had correctly considered that the conduct of the offenders in those cases was more culpable, and categorised the present case as one falling within the lower end of Band 1 in the *Pram Nair* framework.

104 The appellant was a first-time offender, but he had claimed trial and was thus not entitled to any sentencing discount. I was unable to find any substantial mitigating factors.

105 In the circumstances, I was of the view that the DJ's calibration of the sentence was appropriate. The sentence was not manifestly excessive. While lower sentences may have been imposed in past cases on broadly similar facts, this is largely explicable on the basis that all the precedents cited on behalf of the appellant either pre-dated *Pram Nair* and/or did not specifically concern offences under s 376(2)(*a*) of the Penal Code.

Conclusion

106 For the above reasons, the appeal against conviction and sentence was dismissed. I was satisfied that there was no reason to differ from the DJ's decision. She had not erred in law or in her findings of fact.

See Kee Oon
Judge

Yu Kexin (Yu Law), Devathas Satianathan (Rajah & Tann Singapore LLP) and Poon Guokun Nicholas (Breakpoint LLC) for the appellant;
Kavitha Uthrapathy (Attorney-General's Chambers) for the respondent.