Ng So Kuen Connie v Public Prosecutor
[2003] SGHC 164

Case Number : MA 314/2002

Decision Date : 01 August 2003

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Shashi Nathan and Cho Peilin (Harry Elias Partnership) for appellant; David Chew Siong Tai (Deputy Public Prosecutor) for respondent

Parties : Ng So Kuen Connie — Public Prosecutor

Criminal Law – Elements of crime – Mens rea – Rashness – Whether accused person suffering from serious mental condition was capable of possessing mens rea of rashness

Criminal Law – General exceptions – Unsoundness of mind – Whether accused person suffering from serious mental condition, but certified to be of sound mind, exonerated under Penal Code

Criminal Law – Offences – "Killer litter" – Penal Code (Cap 224, 1985 Rev Ed) s 336

Criminal Procedure and Sentencing – Sentencing – Mentally disordered offenders – Weight of deterrent element in sentencing

Criminal Procedure and Sentencing – Sentencing – Mentally disordered offenders – Whether custodial sentence appropriate – Weight of expert opinion

Evidence – Admissibility of evidence – Expert evidence – Whether trial judge entitled to reject conclusion of expert witnesses on issue of mens rea

1 The appellant was convicted in the magistrate's court for an offence under s 336 of the Penal Code and was sentenced to two months' imprisonment. She appealed against both conviction and sentence. I dismissed the appeal against conviction but allowed the appeal against sentence in part. I set aside the imprisonment term and substituted it with a fine of $250. I now give my reasons.

Facts

2 The appellant is a 42 year-old female who claimed trial to the following charge:

> You, … are charged that you on the 26th day of February, 2002 at or about 6.30 pm at Blk 52 Bayshore Road #07-05, Singapore, did a certain act, to wit, by throwing down from your unit #07-05, 5 video tapes in a box, 5 bottles of protein powder, two pillows, one dumbbell weighing 3LB, one hanger, one glass, some clothing, new year decorations, few VCD's, two small soft toys, a pair of slippers, two large hangers and a few magazines, which act was so rash as to endanger human life and you have thereby committed an offence punishable under Section 336 of the Penal Code, Chapter 224.

3 The actus reus of the offence was not in dispute. At the trial below, the only issue was whether the appellant possessed the requisite mens rea of rashness for the offence.

Testimony of the complainant Eugene Tan

4 The complainant was one Eugene Tan Thiam Hee ('Eugene'). At the material time, he was the property manager of Bayshore Park condominium. On the evening of 26 February 2002, Eugene was informed that someone was throwing things from a unit at one of the blocks. When he went to the

scene, he saw things being thrown down from the seventh floor of that block. Subsequently, Eugene went up to the seventh floor. After ascertaining that the items were being thrown down from unit 07-05, he knocked on the door of the unit. Initially, there was no reply. He testified that at that point he could hear shouting inside the apartment, but he could not ascertain what the shouting was about.

5 Then the appellant answered the door. She repeatedly told Eugene that she was cleaning the house. Eugene told her that, even though she was cleaning the house, she should not be throwing things down. To Eugene, the appellant appeared to be very agitated and was speaking very fast. He also testified that, even though he had heard shouting, there was no one in the apartment with the appellant. Under cross-examination, Eugene said that, in his lay opinion, there was 'something wrong' with the appellant.

6 Eugene then went into the neighbouring unit where he was told by the appellant's neighbours that they were trying to contact the appellant's husband who was overseas. Eugene testified that whilst he was in the neighbour's unit, he continued to hear shouting from the appellant's unit. He also testified that by communicating with the security guards downstairs through a walkie-talkie, he knew that more items were being thrown from the appellant's unit.

7 Eugene eventually called the police and the appellant was arrested. After her arrest, the appellant was sent to the Institute of Mental Health ('IMH') the next day (27 February 2002) and was discharged nine days later on 8 March 2002.

The appellant's evidence

8 At the trial below, the appellant elected to give evidence. Under examination-in-chief, she raised the following as events leading up to the day of the incident:

(a) Her younger sister was diagnosed with leukaemia in September 2001 and she had been making frequent trips to Hong Kong to visit her sister (her sister eventually passed away in August 2002);

(b) She was experiencing stress from her work; and

(c) In January 2002, her husband had to undergo an emergency circumcision operation because of an infection and this operation was not successful, resulting in the husband suffering from pain and frequent bleeding. The relationship with her husband also became strained.

9 She testified that on the day of the incident, she sent her husband to the airport when he left for a business trip to the United States. Thereafter, her testimony did not adhere to a coherent timeline. She made the following points about what happened on the day of the incident:

(a) She went to the two hospitals that had treated her husband with the aim of lodging complaints against their poor service;

(b) She then proceeded to the Television Corporation of Singapore at Caldecott Hill in an attempt to purchase air time to express her grievance to the public about the state of the health care system in Singapore;

(c) She gave out $50 notes (with her name and date written on the notes) to taxi drivers, passers-by and the security guard at her condominium because she wanted to do good deeds so that her husband could come back safely;

(d) She intended to go to Hong Kong to visit her sister but her mother-in-law suggested that she should go to the United States to join her husband. So, she started packing to go to the United States;

(e) Her neighbour, one Mrs Wong, came to visit her with a friend and tried to evangelize her. She recalled that she was very angry, agitated, confused and wanted them to leave;

(f) She had two friends visiting her and she asked them to help her to pack for her impending trip; and

(g) She thought she was her younger sister who was ill and throwing tantrums at that time and that she imagined herself being her little sister and started throwing a tantrum in the house.

10 She testified that after her arrest she thought she was talking to Mr Lee Kuan Yew when she was in police custody. She also testified that when she was in the patrol car, she thought she was on a flight to Hong Kong. She thought that there was a camera shooting at her when she was being questioned by the police. When she was in the IMH subsequently, she thought she was in the labour room, waiting for her sister-in-law to give birth.

11 In her examination-in-chief, she repeatedly said that she could not remember why she threw the things down. This was largely her stance under cross-examination as well. However, this was undermined by one important part of her examination-in-chief where she stated:

> At the material time, I did not have any intention to hurt anybody. I did not have any intention to throw these items down and to injury anybody. The fact was that these things landed on the ground. I suspect that I was my younger sister at that time. She was ill and throwing tantrums. I tried to recall what had happened. I thought I was my younger sister. I threw the things down to show Mrs Wong that I was helpless at that time. I had no intention to hurt anybody. I was very irritated when Mrs Wong visited me. (emphasis added)

Evidence from prosecution witness Dr Tommy Tan

12 Two psychiatrists were called to give evidence at the trial below. The prosecution's witness, one Dr Tommy Tan ('Dr Tan'), was the consultant psychiatrist at the IMH who had been treating the appellant since her admission. Dr Tan testified that at the time of the incident, the appellant was suffering from a condition known as hypomania or more commonly known to a lay person as a nervous breakdown.

13 In his letter to the Investigation Officer ('the first letter'), Dr Tan stated that the appellant had been mentally unwell for a few weeks before she was admitted to the IMH. More importantly, he added that "she [the appellant] knew what she was doing but she did not appreciate the consequences of her action then." In another letter from Dr Tan to the appellant's former solicitor ('the second letter'), Dr Tan wrote:

> She was mentally unwell when she threw the several objects out of her house. However, she was not of unsound mind in the strict legal sense. Although she knew what she was doing, she was unable to control her actions then and did not appreciate the consequences of her actions.

14 In a subsequent letter to the appellant's former solicitor ('the third letter'), Dr Tan stated that the appellant's condition had progressed to one of depression. He also stated, that if she is imprisoned, her depression may worsen.

15 Under cross-examination, Dr Tan gave the following testimony:

> Q: You said that she knew what she was doing but she did not fully appreciate the consequences of her actions?
>
> A: Yes.
>
> Q: When she was throwing things out of her window, she was conscious of doing it?
>
> A: Yes. […]
>
> Q : Could she at that time, realise that what she was doing was dangerous and could hurt other people?
>
> A: Yes, she could have. […]
>
> Q: The charge she is facing is one of doing a rash act so as to endanger life […] Could you tell if she acted in a rash manner?
>
> A: Not in my opinion. By your definition, it would suggest a person has some degree of control over herself. A person could choose or choose not to commit the rash act. In her case, she had no control over herself at all. [emphasis added]

16 In the first letter, Dr Tan stated that in his opinion, the appellant did not appreciate the consequences of her action then. However, at trial, Dr Tan testified that in his opinion, she did not fully appreciate the consequences of her action at that time. Under re-examination, Dr Tan gave the following clarification of what he meant when he added the word 'fully':

> Q: Earlier on, you added that she did not fully appreciate?
>
> A: She might have known what consequences. Because of her mental state, she might have realised the consequences. At the same time, she might not have realised the consequences. That was why I amended my report to 'fully'.

Evidence from defence witness Dr Lim Yun Chin

17 The other psychiatrist who gave evidence was one Dr Lim Yun Chin ('Dr Lim') who was a defence witness. Dr Lim concurred with Dr Tan that the appellant was suffering from hypomania. He was of the opinion that at the time when she threw the things down, she could not form an intent for her behaviour because of her illness. Under cross-examination, Dr Lim also testified that the appellant was incapable of understanding her behaviour at the moment when it took place. Further, he added that in his opinion the appellant could not have appreciated the danger or risk of what she was doing.

The decision below

18 The trial judge found that the appellant possessed the necessary mens rea for the charge at the material time. He noted that both psychiatrists had opined that the appellant did not possess the mens rea for the offence. However, he held that the issue of determining whether an accused person possessed the necessary mens rea for an offence has always been a question to be decided by the court. In doing so, he disagreed with Dr Tan's finding that the appellant could not control her actions. He found that to be against the weight of the evidence. However, he accepted Dr Tan's finding that

the appellant could have realised the consequences of her actions at the time because that was consistent with the weight of the evidence.

19 The trial judge then went on to rely on three bases for finding that the appellant had the requisite mens rea. First, he found that, by being able to attend to Eugene's knock at the door, the appellant retained the ability to realise the consequences of her actions at the material time and the facts indicated her ability to be in control of the situation. Secondly, he held that Eugene's evidence was such that the prosecution had made out a complete case against the appellant. Thirdly, the trial judge also drew adverse inferences against the appellant on certain issues. He noted that the appellant did not mention her hallucinations at the time of the offence (viz. that she thought she was her younger sister) to either of the psychiatrists. He also drew adverse inferences against the appellant for failing to call her neighbour, Mrs Wong, to testify, if she wanted the court to believe her testimony on this aspect. Finally, he drew adverse inferences against the appellant for failing to call on her two friends who were allegedly with her at the time of the incident.

20 On the issue of sentencing, the appellant's counsel submitted at the trial below that an imprisonment term would be crushing on her condition and urged the trial judge to grant her a conditional discharge. The trial judge disagreed with counsel and came to the conclusion that a conditional discharge was inappropriate in this case because it was a 'killer litter' case where the appellant had thrown down 25 items including some highly dangerous ones.

21 The trial judge then held that he would have been minded to consider this case as a 'worst case scenario' and impose the maximum term of three months on the appellant. However, taking into account her condition and predicament at that time and also the fact that the trial proceeded solely on the question of mens rea, about which she felt that she had a viable defence, the trial judge imposed an imprisonment term of two months instead.

The appeal against conviction

Whether the trial judge was entitled to reject the expert evidence

22 The preliminary question to be answered in this appeal was whether the trial judge was entitled to reject the expert evidence of both psychiatrists who testified in court that in their expert opinion the appellant did not have the requisite mens rea of rashness.

23 Counsel for the appellant relied on the decision of the Court of Appeal in *Chou Kooi Pang & Anor v PP* [1998] 3 SLR 593 where it was held at 598:

> Further, it is well established that expert opinion is only admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge. If, on the proven facts, a judge can form his own conclusions without help, the opinion of an expert is unnecessary […]

24 Counsel for the appellant contended that the expert opinion of both psychiatrists should have been admitted by the trial judge. The trial judge was not entitled to reject their expert testimony and substitute it with his own opinion on the matter as the expert evidence dealt with 'scientific information likely to be outside the experience and knowledge of a judge'. They contended that the question of whether the appellant showed indifference to obvious consequences and to the rights of others could only be answered by the medical experts who examined the appellant. They also relied on a passage in the decision of the Court of Appeal in *Dr Khoo James & Anor v Gunapathy d/o Muniandy & another appeal* [2002] 2 SLR 414 it was held at 419:

> We often enough tell doctors not to play god; it seems only fair that similarly, judges and lawyers should not play at being doctors.

25 I disagreed with counsel's argument. I was of the opinion that whether the appellant had the requisite mens rea was not something within 'scientific information that is outside the experience and knowledge of a judge'. In general, whether an issue falls within the rubric of 'scientific information' is a question to be determined on the facts of each case. There is a whole spectrum of facts in which certain issues are clearly within the realm of 'scientific information' while others are clearly not. The citation of a few examples from recent local decisions will illustrate this point.

26 First, in *Saeng-un Udom v PP* [2001] 3 SLR 1, the issue was whether the appellant caused the death of the victim. The only forensic expert in that case gave testimony that the appellant's weapon could not have been the weapon used to inflict the injuries found on the deceased. Despite the expert's opinion, the trial judge concluded that the injuries were caused by the appellant's weapon and convicted the appellant. The Court of Appeal found that the trial judge's rejection of the expert evidence was erroneous. *Saeng-un Udom v PP* was a clear case where the expert evidence on pathology was strictly out of the realm of the judge's experience and expertise. Consequently, the trial judge was not entitled to substitute the expert's opinion with his own.

27 In coming to its conclusion, the Court of Appeal cited this passage from *Halsbury's Laws of Singapore* (2000) at paragraph 120.257:

> The role of the court is restricted to electing or choosing between conflicting expert evidence or accepting or rejecting the proffered expert evidence, though none else is offered (*Muhammad Jefrry bin Safii v PP* [1997] 1 SLR 197). The court should not, when confronted with expert evidence which is unopposed and appears not to be obviously lacking in defensibility, reject it nevertheless and prefer to draw its own inferences. While the court is not obliged to accept expert evidence by reason only that it is unchallenged (*Sek Kim Wah v PP* [1987] SLR 107), if the court finds that the evidence is based on sound grounds and supported by the basic facts, it can do little else than to accept the evidence.

28 Next, in *Dr Khoo James & Anor v Gunapathy d/o Muniandy & Anor* [2002] 2 SLR 414, the Court of Appeal essentially held that in determining whether there was negligence in the treatment of Gunapathy's tumour, the trial judge was not entitled to reject the expert opinion of the neurologists on a highly technical, complex and controversial area and then come up with a theory of his own.

29 In coming to that conclusion, the Court of Appeal held at 419:

> It would be pure humbug for a judge, in the rarified atmosphere of the courtroom and with the benefit of hindsight, to substitute his opinion for that of the doctor in the consultation room or operating chamber. We often enough tell doctors not to play god; it seems only fair that, similarly, judges and lawyers should not play at being doctors.

30 The above two cases serve to illustrate that where the expert evidence is clearly within the realm of science (e.g. pathology and standard practice in neurology and radiology), the judge should defer to the opinion of either of the experts and not come to his own opinion.

31 This has to be contrasted with the case of *Chou Kooi Pang v PP* (supra). In that case, one of the two appellants sought to raise evidence from a clinical psychologist who testified that he (the appellant) was of borderline intelligence and therefore could not have had the mens rea for the offence. In dismissing this argument (and the appeal), the Court of Appeal held at paragraph 17 on p

598:

> The question was whether the first appellant knew or at least suspected that he was carrying drugs. This could only be inferred from the surrounding circumstances by the trier of fact, and was a matter entirely within the trial judge's purview. A chief and justified concern of the courts is that the fact-finding process should not be surrendered to professionals such as psychiatrists, but should remain the province of the courts. As such, we were of the view that the trial judge was entitled to reject the evidence of DW1 [the clinical psychologist] and to come to his own conclusions from the surrounding circumstances. [emphasis added]

32 I found the facts of the present case to be similar to those found in *Chou Kooi Pang v PP*. In this case, the critical issue was whether the appellant had the requisite mens rea. That was a finding of fact to be inferred from the available evidence and surrounding circumstances. As a trier of fact, the trial judge was just as capable of assessing the evidence as the psychiatrists. At best, the role of the psychiatrists was to support the trial judge's finding of fact. At no point should the trial judge's fact-finding role be abrogated to the experts. Thus, I found that as a matter of law, the trial judge was correct when he chose not to accept the evidence of both psychiatrists who came to the conclusion that the appellant could not have the requisite mens rea.

33 The above analysis would have been sufficient for me to hold that the trial judge was entitled to reject the evidence of both psychiatrists. Nevertheless, for the sake of completeness, I will deal with an issue raised by counsel for the appellant. Counsel argued that the trial judge was wrong in rejecting the evidence of both the psychiatrists because both experts had been unanimous in coming to the conclusion that the appellant did not possess the requisite mens rea.

34 This argument was unmeritorious. While there was a superficial agreement between the two experts in their conclusion, their testimonies had materially differed. This was rightly pointed out by the trial judge. First, Dr Tan had stated that the appellant could, at the time of the offence, realise that what she was doing was dangerous and could hurt other people. Secondly, under re-examination, when asked to explain why he had added the word 'fully' into the phrase, 'she was unable to appreciate the consequences of her action', he stated, "[b]ecause of her mental state, she might have realised the consequences. At the same time, she might not have realised the consequences." Taking the two statements together, the effect of Dr Tan's testimony was that the appellant could have realised that what she was doing was wrong. The consequential effect of this testimony was that she was rash. This is in direct contrast with the part of his testimony where he testified that the appellant could not have been rash because she did not have control over her actions at that time. To the extent that there was a discrepancy within Dr Tan's testimony, the trial judge was entitled to prefer one part of his testimony over the other: see *Mohammed Zairi bin Mohamad Mohtar & Anor v PP* [2002] 1 SLR 344.

35 With the conclusion that there was a part of Dr Tan's testimony which supported a finding that the appellant was rash, the trial judge was then faced with a dichotomy between Dr Tan's views and Dr Lim's views. Faced with two sets of expert evidence, the trial judge was perfectly entitled to choose one (Dr Tan's) over the other (Dr Lim's). This is in line with the principle from *Halsbury's Laws of Singapore* cited in *Saeng-un Udom's case* above.

36 Even if the two experts' evidence were in total agreement, the trial judge was still entitled to come to his own views if the conclusion he came to can be supported by the facts and circumstances of the case. In *Sek Kim Wah v PP* [1987] SLR 107, where the issue revolved around whether the trial judges were entitled to reject one side's expert evidence on the issue of abnormality of mind, the Court of Appeal held at p 111:

> [T]he verdict as to abnormality of mind is plainly finding of fact which must be founded on all the evidence which evidence of course includes medical opinion. Even where such medical opinion is unchallenged, the trial judges would be perfectly entitled to reject or differ from the opinions of the medical men, if there are other facts on which they could do so. In such a case, an appellate court would not, and indeed could not, disturb their finding (see, for example, *R v Stefan Ivan Kiszko* (1978) 68 Cr App R 62) – a fortiori, if such medical opinion is challenged and there is conflicting medical opinion in addition to other non-medical evidence. [emphasis added]

37 In light of this, I found that the trial judge was entitled to reject the psychiatrists' evidence as he did. The remaining issue was whether, based on the available evidence, the trial judge drew the correct inferences and came to the correct conclusion that the appellant possessed the requisite mens rea for the offence. In order to answer that question, it is necessary to first survey the law on the mens rea of rashness.

The law on mens rea of rashness

38 The appellant was charged under the 'rash' limb of s 336 of the Penal Code. Section 336 reads:

> Whoever does any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment for a term which may extend to 3 months, or with fine which may extend to $250, or with both.

39 The definition of 'rash' has been dealt with at great length in a number of local and Indian decisions. In *PP v Teo Poh Leng* [1992] 1 SLR 15, Rubin JC (as he then was) drew the distinction between the rashness and negligence for offences under the Penal Code (and more specifically, in that case, for the purposes of s 304A of the Penal Code). In doing so, he relied on the following decisions of the Indian courts. First, in *Nidamarti Nagabhushanam* (1872) 7 MHC 119, Hollow J held at p 120:

> Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precaution to prevent their happening. The imputability arises from acting despite the consciousness (luxuria) [emphasis added]

40 Next, in *Empress of India v Idu Beg* (1881) ILR 3 All 776, Straight J held at p 780:

> Criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury, but without intention to cause injury, or knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences.

41 With these principles in mind, I moved on to determine whether the trial judge drew the correct inferences from the available evidence in coming to his conclusion that the appellant possessed the requisite mens rea for the offence.

The trial judge's bases for finding that the appellant had the requisite mens rea

42 In considering the soundness of the trial judge's bases for finding against the appellant, I bore in mind the following principles enunciated by Warren Khoo J in *Teknikal dan Kejuruteraan Pte Ltd v Resources Development Corp (Pte) Ltd* [1994] 3 SLR 743 at 754:

> The principles governing the review by an appellate court of findings of fact of the trial court are well established. […] The evaluation involves testing a witness's evidence against inherent probabilities or against uncontroverted facts, including the conduct of the parties at the relevant time. We are in this instance in as good a position as the court of first instance, although we must, where appropriate, give due allowance to the fact that we have not had the advantage of seeing the witnesses that the trial court had. [emphasis added]

43 This proposition was cited with approval by the Court of Appeal in *Peh Eng Leng v Pek Eng Leong* [1996] 2 SLR 305 at 310. I then considered each of the bases in detail.

44 I found difficulty in agreeing with each of the three bases for the trial judge's decision. The first basis related to the finding that the appellant retained the ability to realise the consequences of her actions at the material time because she came to answer the door. In *Adnan bin Khamis v PP* [1972] 1 MLJ 274, it was held:

> [T]he test to be applied for determining the guilt or innocence of an accused person charged with rash or negligent conduct is to consider whether or not a reasonable man in the same circumstances would have been aware of the likelihood of damage or injury to others resulting from such conduct and taken adequate and proper precautions to avoid causing such damage or injury. This test is partly objective and partly subjective – objective in the sense that the situation must be one fraught with potential risk of injury to others or whatever consequences contemplated in any particular section of the Penal Code. It is also subjective in that such a situation should have arisen by reason of some fault on the part of the accused: see *R v Gosney* [1971] 3 WLR 343 at p 347 per Megaw LJ. [emphasis added]

45 It must be remembered that the test of determining whether the appellant had the requisite mens rea of rashness is a partly objective and partly subjective test. While the trial judge was entitled to take into account objective factors, such as her ability to answer the door, I found that in doing so, he had overemphasised the objective part of the test at the expense of neglecting the subjective limb. The fact of her answering the door must be weighed against the other pieces of evidence. These included, amongst others, the appellant's testimony that she had given out $50 notes to strangers earlier in the day and that she thought she was talking to Mr Lee Kuan Yew when she was in police custody. (The testimony on this point was not challenged by the prosecution.) The chain of events before and after the throwing incident showed that on balance, the appellant had a disturbed mind on the day of the incident. As such, I found that the trial judge was too hasty when he concluded that the appellant was in control of her senses simply because she answered the door.

46 Secondly, the trial judge held that the case had been proven beyond reasonable doubt based on Eugene's testimony. The trial judge placed emphasis on the fact that the appellant continued throwing the items after Eugene had told her not to throw the things. I found that Eugene's testimony was, at best, equivocal. It must be remembered that Eugene also testified that the appellant was constantly shouting, before and after he spoke to her, even though there was nobody in the apartment with her. He also observed that she appeared agitated and spoke very fast. More importantly, in his lay opinion, Eugene testified that he thought there was 'something wrong' with the appellant when he spoke to her. These statements put together made it difficult for me to agree with the trial judge that the prosecution's case had been proven beyond reasonable doubt based on Eugene's testimony alone.

47 Thirdly, the trial judge drew certain adverse inferences against the appellant for failing to divulge her hallucinations to the psychiatrists and for failing to call on certain witnesses to give testimony on her behalf. Counsel for the appellant argued that the trial judge had erred in drawing

adverse inferences against her for failing to divulge her hallucinations to the psychiatrists. I agreed with counsel on this point. It must be remembered that in the course of the trial below, not one, but two psychiatrists testified that hallucination was not important for the diagnosis of the hypomaniac condition. Therefore, I found that the failure to mention her hallucinations to the psychiatrists was neither here nor there.

48 Further, the trial judge also drew adverse inferences against the appellant for failing to call certain witnesses, viz, the two friends who she claimed were with her and her neighbour, Mrs Wong. Again, I found that the failure to call these witnesses was neither here nor there. The material question for this case was the appellant's mens rea at the time of the incident. The psychiatrists and the complainant, Eugene, had provided both expert and lay opinion on this point. As such, I doubt whether these other witnesses would have been able to provide any testimony which would assist the judicial decision-making process. In any case, counsel rightly pointed out that one of her friends, one Tan Peck Liang Julie, was on the prosecution's list of witnesses. If the prosecution had chosen not to call on this witness, I failed to see how an adverse inference could be drawn against the appellant for failing to call this witness.

The proper inference to be drawn from the available evidence

49 While I did not agree with the trial judge for the bases for his conclusion, I was of the opinion that the conviction could be upheld. There was one critical piece of evidence which the trial judge omitted to make reference to in his Grounds of Decision. This came from the appellant's own testimony in the trial below. Under examination-in-chief, the appellant stated that she had thrown the items down 'to show Mrs Wong that [she] was helpless at that time'. (The full passage had been cited earlier in paragraph 11 above.) I found this piece of testimony from the appellant to be material in showing that the appellant was conscious of her actions at the time of the incident. Contrary to her claims under cross-examination that she could not remember, or that she was hallucinating that she was her younger sister, this unequivocal passage demonstrated that the appellant remembered throwing the items to prove a point to Mrs Wong who had upset her by attempting to evangelize her. Testing her testimony against the inherent probabilities and uncontroverted facts, I found that the appellant had thrown the items out of frustration and anger at Mrs Wong. This proved that she threw the items in spite of her consciousness.

50 Further, Dr Tan had testified that the appellant could have realised the dangerous consequences of her actions. Taking this together with her own admission, I found that the case against the appellant had been proven beyond reasonable doubt. Thus, even though I did not agree with the reasoning of the trial judge, I found that his conclusion that the appellant possessed the requisite mens rea could nevertheless be supported.

51 In addition, the prosecution raised a valid argument which I took into account when I dismissed the appeal against conviction. The prosecution rightly pointed out that, while the appellant was suffering from a known medical condition at the time of the incident, for which she was hospitalised at the IMH for nine days, the state of the law is such that her medical condition was not one which the law recognised as a general defence. Under the Penal Code, there is no general defence apart from 'unsoundness of mind'. (Diminished responsibility is a partial defence applicable only in cases of murder.) If an accused person suffering from a mental condition is charged with an offence other than that of murder under the Penal Code, the law does not exonerate him on account of his mental condition, serious though it may be. This is so unless he is certified to be of unsound mind and unfit to stand trial. The question of whether he possessed the requisite mens rea for the offence in spite of the mental condition then became a question of fact to be determined by the trial judge.

52 In the present case, Dr Tan had testified that the appellant was of sound mind at the time of the incident. Being of sound mind, I agreed with the prosecution that the appellant could not be excused under the law even though she was belabouring under a confused mind at that time. For the reasons above, I found as a question of fact that the appellant did have the requisite mens rea of rashness. In short, the appellant's mind was disturbed at the time of the incident, but that was not sufficient to exonerate her in the eyes of the law. Consequently, I dismissed the appeal against conviction.

The appeal against sentence

53 Under s 336 of the Penal Code, a convicted person may be sentenced to three months' imprisonment and/or a fine of $250. I had two observations about the wording of this provision. First, s 336 of the Penal Code gives a sentencing judge a discretion to mete out either an imprisonment term of up to three months or a fine of $250 or both. This is regardless of whether the mens rea was one of rashness or negligence. The statute does not limit the court's discretion by stating that an imprisonment term is necessary if the accused person is convicted on the 'rash' limb of s 336. A custodial sentence has been generally imposed for convictions under the 'rash' limb: see, for example, *Saku Alwudeen Fathima v PP* (MA 109/93/01) and *Parameswari d/o Vaithianathan v PP* (MA 162/97/01). In the former case, the appellant, during a dispute with her husband, threw out two speakers from the 11th floor which were aimed at her husband, but missed. However, there are also cases where the convicted person was sentenced to an imprisonment term even though the mens rea for the charge was 'negligence': see *Chua Kim Hua v PP* (MA 344 of 2000).

54 Secondly, I noted that the maximum fine of $250 under s 336 has not been reviewed since the last time this provision was amended on 31 October 1952: see Ordinance No. 37 of 1952. In that amendment, the maximum fine under s 336 of the Penal Code was increased from $125 to $250. In *Ngian Chin Boon v PP* [1999] 1 SLR 119, I made the following observation about the maximum fine limit under s 336 of the Penal Code:

> The maximum quantum of the fine under s 336 was legislated by Parliament. If it is thought that this amount is too low to have any deterrent effect in today's circumstances, the proper solution would be to have Parliament enact legislation increasing the amount of fine which may be imposed, and not to impose a custodial sentence instead on the accused.

55 It is unfortunate that the upper limit of fines under this provision has not been amended since my decision in *Ngian Chin Boon v PP*. It is timely for the maximum fine under s 336 of the Penal Code to be reviewed in order to bring it in line with the value of money in this day and age. With these observations in mind, I examined the arguments raised by counsel and the prosecution on the appeal against sentence.

56 Counsel for the appellant submitted that the sentence of two months' imprisonment imposed by the trial judge was unduly harsh and manifestly excessive in light of the very special and unique facts of this case. On the other hand, the prosecution contended that the sentence of two months' imprisonment was not manifestly excessive bearing in mind that the appellant threw down 25 items from her apartment on the seventh floor.

57 The starting point for the consideration of the appropriate sentence in this case ought to be the fact that the appellant was belabouring under a serious psychiatric condition at the time of the incident. In *Sentencing Practice in the Subordinate Courts (2nd edition)* (2003), the learned authors opined that the existence of a mental disorder is always a relevant factor in the sentencing process.

The learned authors also cited, at p 93, the following approach suggested in the case of *R v Wiskich* [2000] SASC 64 (a decision of the Supreme Court of South Australia delivered by Martin J) at paragraph 62:

> An assessment of the disorder is required. A sentencing court must determine the impact of the disorder upon both the offender's thought processes and the capacity of the offender to appreciate the gravity and significance of the criminal conduct. It is not difficult to understand that the element of general deterrence can readily be given considerably less weight in the case of an offender suffering from a significant mental disorder who commits a minor crime, particularly if a causal relationship exists between the mental disorder and the commission of such an offence. In some circumstances, however, the mental disorder may not be serious or causally related to the commission of the crime, and the circumstances of the crime so grave, that very little weight in mitigation can be given to the existence of the mental disorder and full weight must be afforded to the element of general deterrence. In between those extremes, an infinite variety of circumstances will arise in which competing considerations must be balanced. [emphasis added]

58 The prosecution sought to impress upon me the strong public interest element to curb 'killer litter' cases and a need for a custodial sentence to deter such cases. I commend the prosecution for its efforts. However, I found that (as Martin J rightly pointed out) the element of general deterrence can and should be given considerably less weight if the offender was suffering from a mental disorder at the time of the commission of the offence. This is particularly so if there is a causal link between the mental disorder and the commission of the offence. In addition to the need for a causal link, other factors such as the seriousness of the mental condition, the likelihood of the appellant repeating the offence and the severity of the crime, are factors which have to be taken into account by the sentencing judge. In my view, general deterrence will not be enhanced by meting out an imprisonment term to a patient suffering from a serious mental disorder which led to the commission of the offence.

59 I was also persuaded by counsel for the appellant that this was a unique case. The following facts bore repeating to show why the peculiar facts of this case warranted a departure from the norm. Not one, but two psychiatrists of sufficient standing opined that the appellant was suffering from hypomania at the time of the incident. One of these psychiatrists, Dr Tan, was in fact the prosecution witness. He opined that the appellant had been mentally unwell for a few weeks prior to the incident. In the same letter, Dr Tan stated that "[s]ince the acts were related to her mental state, she is unlikely to commit the same acts again if she continues treatment and follow-up" [emphasis added].

60 Also, the symptoms of hypomania, namely pressure of speech (i.e. talking very quickly) and agitation were demonstrated and witnessed by Eugene at the time of the incident. Further, after her arrest, she was hospitalised for nine days at the IMH where she received treatment for her hypomania. Finally, Dr Tan opined in the third letter that her condition had developed into one of depression. He opined that, if she is imprisoned, her depression may worsen.

61 I was persuaded by the objectivity of Dr Tan. These were not the opinions of an expert whom the appellant had consulted in an attempt to appeal for a lighter sentence. These were views of an independent physician called upon to be a witness for the prosecution. I found that the opinion of Dr Tan warranted the court to place significant weight on it. I also took into account the fact that since February 2002, the appellant had gone through a 16-month ordeal leading up to this appeal, which both psychiatrists opined, had had an adverse impact on her mental health.

62 The trial judge raised a series of cases to demonstrate why a custodial sentence was

necessary in this case. The starting point has always been that sentencing precedents only offer guidelines to the sentencing judge. In my judgment in *Soong Hee Sin v PP* [2001] 2 SLR 253, I stated at p 258:

> in my view, the regime of sentencing is a matter of law which involves a hotchpotch of such varied and manifold factors that no two cases can ever be completely identical in this regard. While past cases are no doubt helpful and sometimes serve as critical guidelines for the sentencing court, that is also all that they are, ie, mere guidelines only. […] At the end of the day, every case which comes before the courts must be looked at on its own facts, each particular accused in his own circumstances […].

63 Of the precedents cited by the trial judge, all but one case could be distinguished on the ground that the offender in each of those cases was not suffering from a mental disorder at the time of the offence. The only case which appeared to have facts similar to the present case was *PP v Lee Sai Leng Christina* (DAC 3555 of 2000) (reported in *Sentencing Practice in the Subordinate Courts (2nd Edition)* at p 186). In that case, the accused person threw down a total of 16 items from her ninth-storey flat. She was later diagnosed as suffering from schizophrenia. She pleaded guilty to the charge under the 'rash' limb of s 336 of the Penal Code and was sentenced to two months' imprisonment. The trial judge (a magistrate) took into account the mitigating factors but found that it was a serious offence for which a short custodial sentence was necessary.

64 I was not bound to follow the sentence in that case. While I recognised that consistency in sentencing is a desirable goal, it is not an inflexible or overriding principle: see *Lim Poh Tee v PP* [2001] 1 SLR 674 at 681. It must be remembered that the sentences in similar cases may have been either too high or too low: see *PP v Mok Ping Wuen Maurice* [1999] 1 SLR 138 at para 26 and *Yong Siew Soon v PP* [1992] 2 SLR 933 at p 936. In any event, I found that the special facts of the present case warranted a departure from the sentence meted out in *PP v Lee Sai Leng Christina*. Here, Dr Tan, a prosecution witness, found that the appellant's condition would worsen if she were to be imprisoned. I perused the case file of *PP v Lee Sai Leng Christina* and found that the psychiatrist for the prosecution in that case did not make a similar finding.

65 Bearing in mind that this was a sad case with special facts, I found that the sentence of two months' imprisonment was manifestly excessive. In coming to that conclusion, I was mindful of the fact that a sentencing court is entitled to the full range of punishment prescribed under s 336 of the Penal Code. While a custodial sentence is the norm for persons convicted under the 'rash' limb of that section, I found that due to the unique facts of this case, the aims of general deterrence would not be met by meting out a custodial sentence to the appellant. Consequently, I set aside the imprisonment term and substituted it with a maximum fine of $250 instead.

66 As a concluding note, I would add that this decision does not stand for the proposition that all persons with disturbed minds at the time of the commission of an offence under s 336 of the Penal Code are to be excused from a custodial sentence. While a discretion exists under s 336 to mete out either a custodial sentence or a fine (or both) regardless of the mens rea, the sentencing judge has to exercise that discretion by considering all the facts and circumstances of each case. These include the seriousness of the mental condition, whether the accused person is likely to repeat the offence and the available evidence from the psychiatrists (particularly the psychiatrist for the prosecution).

Appeal against conviction dismissed; appeal against sentence allowed in part.