IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 56

Criminal Appeals No 15 and 16 of 2019

Between

Public Prosecutor

… *Appellant/Respondent*

And

Wee Teong Boo

… *Respondent/Appellant*

In the matter of Criminal Case No 85 of 2017

Between

Public Prosecutor

And

Wee Teong Boo

Criminal Motion No 2 of 2020

Between

Wee Teong Boo

… *Applicant*

And

Public Prosecutor

… *Respondent*

JUDGMENT

[Criminal Law] — [Offences] — [Rape]
[Criminal Law] — [Offences] — [Outrage of modesty]
[Criminal Procedure and Sentencing] — [Charge] — [Alternative charges]
[Criminal Procedure and Sentencing] — [Disclosure]

Public Prosecutor
v
Wee Teong Boo and other appeal and another matter

[2020] SGCA 56

Court of Appeal — Criminal Appeal Nos 15 and 16 of 2019 and Criminal Motion No 2 of 2020
Sundaresh Menon CJ, Steven Chong JA and Belinda Ang Saw Ean J
26 March 2020

10 June 2020 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 Dr Wee Teong Boo ("Dr Wee") is a medical practitioner who claimed trial to two charges brought against him. The first charge was for the offence of outrage of modesty ("the OM Charge") punishable under s 354(1) of the Penal Code (Cap 224, 2008 Rev Ed) (the "Penal Code"). Dr Wee was alleged to have used criminal force on the victim ("V"), who was his patient, by stroking her vagina with his fingers, with the intention of outraging her modesty at his medical clinic on 25 November 2015. The second charge was for the offence of rape ("the Rape Charge") under s 375(1)(*a*) of the Penal Code punishable under s 375(2) of the Penal Code. Dr Wee was alleged to have penetrated V's vagina with his penis without her consent at his medical clinic around midnight on 30 December 2015.

2 Dr Wee denied committing the offences. The crux of his defence was that the alleged events had never occurred. In relation to the OM Charge, Dr Wee claimed that he had conducted a routine examination on V in the course of which he did not touch V's vagina. In relation to the Rape Charge, Dr Wee claimed that because he suspected that V might have pelvic inflammation disease ("PID"), he carried out an internal pelvic examination by inserting two of the fingers of his right hand into her vagina. He maintained that he did this with her consent in order to check whether she had PID.

3 The High Court judge ("the Judge") found V in general to be a compelling and believable witness: see *Public Prosecutor v Wee Teong Boo* [2019] SGHC 198 ("GD") at [157]. The Judge convicted Dr Wee on the OM Charge and sentenced him to one year's imprisonment and two strokes of the cane. The Judge acquitted Dr Wee of the Rape Charge because he found that there was a reasonable doubt as to whether it would have been physically possible for Dr Wee to have carried out penile-penetration of V's vagina in the manner described by her, because of the evidence that was led of his erectile dysfunction ("ED"), among other things (GD at [108]).

4 The Judge however, rejected Dr Wee's claim that he had carried out an internal pelvic examination on 30 December 2015 as part of a medical intervention, and instead found that Dr Wee's digital penetration of V's vagina, based on his own account, was sexual in nature. The Judge proceeded to exercise his power under s 139 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC"). He convicted Dr Wee of the offence of sexual assault by digital penetration under s 376(2)(*a*) of the Penal Code ("the Digital Penetration Offence") without framing a charge and sentenced him to nine years' imprisonment and four strokes of the cane (GD at [178]). Dr Wee was 68 years old at the time of sentencing and so could not be caned pursuant to s 325(1)(*b*)

of the CPC. The Judge did not enhance the sentence on account of this. In the circumstances, Dr Wee was sentenced to an aggregate term of 10 years' imprisonment (see GD at [183]).

5 Dr Wee appealed against both his convictions as well as his sentence. The Prosecution appealed against Dr Wee's acquittal on the Rape Charge and cross-appealed against the sentence that was meted out. Before us, the parties' submissions focused on: (a) whether the Judge had erred in *fact*, in convicting Dr Wee of the OM Charge and acquitting him of the Rape Charge; and (b) whether the Judge had erred in *law*, in convicting Dr Wee of the Digital Penetration Offence by exercising his power under s 139 of the CPC. In this appeal, Dr Wee also applied to adduce an expert report in an effort to demonstrate the legitimacy of his claim that he had conducted an internal pelvic examination on valid professional grounds.

6 The present case again raises a procedural issue of importance: the Prosecution's duty to disclose evidence that could be material to the defence of an accused person. Given the Prosecution's overarching duty of fairness, a duty which we recently reiterated in *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] SGCA 25 ("*Nabill v PP*"), it was not satisfactory that one of the medical reports that the Prosecution had obtained in respect of Dr Wee's medical condition as well as a report from the polyclinic that V later attended were only adduced by the Prosecution and made available to Dr Wee *after* the commencement of the trial. We are satisfied that at least in respect of the medical report, an omission that was also noted by the Judge, the belated disclosure prejudiced Dr Wee in the conduct of his defence.

7 For reasons that we will set out in this judgment, we find that the Prosecution has failed to establish its case against Dr Wee beyond a reasonable

doubt in relation to the charges that were brought against him. We also find that the Judge had erred in law in convicting Dr Wee of the Digital Penetration Offence. Accordingly, we affirm the Judge's acquittal of Dr Wee on the Rape Charge, acquit him of the OM Charge and overturn his conviction on the Digital Penetration Offence.

Background facts

The events leading to the OM Charge

V's version of events

8 We begin our narrative by setting out the parties' respective versions of the events on 25 November 2015, which was the day on which Dr Wee allegedly outraged V's modesty. V was a 23-year-old student at a local tertiary institution at the time of the alleged offences. Dr Wee was a 65-year-old general medical practitioner at that time and V's regular doctor. According to V, on 25 November 2015, she experienced gastric discomfort and consulted Dr Wee in the late afternoon. Dr Wee spoke to her briefly in the consultation room before directing her to the examination room in his medical clinic. The examination room could only be accessed through the consultation room, and the two rooms were separated by a sliding door. The examination room had a bed for patients to lie on during an examination.

9 Dr Wee instructed V to unbuckle and unzip her jeans to enable him to check her pelvic area and she complied. He began by palpating V's lower abdominal area and then pressed on the "joint area" near V's groin and remarked that there was a lump. V claimed that Dr Wee proceeded to press on V's vagina over her panties using the fingers of his right hand and said "okay, okay" while he was doing so. V replied "okay" because there was no pain. Dr Wee then

allegedly slid his right hand under V's panties and started stroking her vagina with his right fingers in an up and down motion. He then asked V to sit up, and as she did so, he continued stroking V's vagina with his right fingers. After some time, V heard Dr Wee say "okay" before withdrawing his right hand. They both then returned to the consultation room.

10 V claimed that she thought Dr Wee's actions were "weird" because this was the first time someone of the opposite gender had touched her at her vaginal area. She said she felt "uneasy" because Dr Wee was standing very close to her (GD at [19]). However, she said nothing because she assumed that these actions were all part of the medical examination.

11 Unknown to Dr Wee, V subsequently scheduled an appointment on 5 December 2015 at a polyclinic ostensibly to have the lump in her groin area checked. She asked to see a female doctor and was attended to by Dr Sheena K Gendeh Jekinder Singh ("Dr Sheena"). She told Dr Sheena that a lump was suspected near her groin. Dr Sheena checked and found that there was indeed a lump, at which point V felt assured that what Dr Wee had previously done to her was, after all, part of a legitimate medical examination. However, the logic behind this was not evident to us since Dr Wee had apparently observed the presence of the lump well *before* allegedly venturing to touch V in her vaginal area both over and under her panties. We are also unable to fathom how those actions could have been in any way connected with the lump, and we will elaborate on this later in this judgment. We digress to note that on 20 April 2018, the Prosecution obtained a copy of the report from the polyclinic as to what had transpired ("the Polyclinic Record"). This showed that V visited Dr Sheena complaining of "pain over the left groin area for 3 days". There is nothing in the Polyclinic Record to suggest that V had visited the polyclinic in order to check on a lump that was already suspected as V maintained, or to verify what Dr Wee

had said of the lump, or even to suggest that V had mentioned her earlier consultation with Dr Wee to Dr Sheena. The Prosecution did not disclose the Polyclinic Record to the Defence until 7 May 2018, by which time V had already completed giving evidence at the trial.

Dr Wee's version of the events

12 Dr Wee denied that he had outraged V's modesty during the consultation on 25 November 2015. He claimed that V complained of gastric pain and phlegm, and he first performed a routine check of V's blood pressure, heart and lungs. He then directed V to the examination room and palpated her abdominal area, which was the standard abdominal examination he would have performed on all his patients in these circumstances. After the examination, he prescribed some medication for phlegm and gastritis and V left the consultation room. Dr Wee's clinic notes did not record any observation of a lump found at V's groin area.

The events leading to the Rape Charge

V's version of events

13 We turn to the events that led to the Rape Charge. We begin with V's version of the events. On the morning of 30 December 2015, V felt an itch at her genital area and noticed that she was urinating frequently. She went to a polyclinic in the afternoon to see a doctor but found it was very crowded, as a result of which, she would have a long wait. She then scheduled an appointment with Dr Wee's clinic for around 11.00pm on the same day. She had not seen Dr Wee since her last visit on 25 November 2015.

14 V was eventually attended to by Dr Wee at about 11.50pm and there were two more patients waiting to see him after her. She entered the consultation

room and informed Dr Wee of her symptoms. Dr Wee directed her to the examination room. V lay down on the examination bed and Dr Wee examined and palpated her abdomen area. He then pushed V's shorts lower with his hands and began examining her pelvic area. He allegedly pressed on the same "joint area" as he had done on 25 November 2015 and again told her that there was a lump. Using his right fingers, Dr Wee then rubbed V's vagina in an up and down motion over her panties. He asked V if this was where she felt the itch and she confirmed this.

15 He then asked V to pull down her shorts and panties. V did so to her thigh level which she thought was low enough to enable Dr Wee to conduct a genital examination. However, Dr Wee asked V to remove them completely. As V hesitated, he proceeded to remove her shorts and panties and placed them next to her left leg. V testified that she felt "very naked at that point in time" but said nothing because she thought this was just part of the medical examination.

16 Dr Wee positioned V on the examination bed such that her legs were apart and he was standing between them. He then grabbed V's legs and moved her to her right. V's buttocks and left thigh were still on the examination bed but her right leg was hanging off the bed and supported by Dr Wee's hand. V weighed about 48kg and was 1.64m tall at the material time.

17 V heard the sound of a zipper and from the corner of her eyes, saw Dr Wee's hand move toward his zipper. She thought that Dr Wee must have forgotten to zip his pants. She did not question Dr Wee and was not provided any explanation of what he was doing to her. From her position, she could only see Dr Wee's upper chest and head. Her legs were supported at Dr Wee's waist level and he was firmly holding them below her knees. In this position, Dr Wee pulled V towards him and she felt "something horizontal" poke into her vagina.

V saw Dr Wee's body moving forward and backward with each poking sensation, while his hands were holding V's legs below her knees at all times. After a few moments, V told Dr Wee that she felt pain. He then released V's legs, and at the same time, moved his hands to support her lower back and pulled her closer to him in a "half-seated" position. V tried to stabilise herself by resting her right toes on the top of the photocopier that was in the examination room. She also felt something push deeper into her vagina and when she looked down, she saw Dr Wee's penis partially inside her vagina. She was shocked and put up her left hand as a gesture to Dr Wee to stop.

18 Dr Wee then withdrew his penis and let go of V. He turned his back to her and she again heard the sound of a zipper. V put on her shorts and panties and got off the examination bed. Both V and Dr Wee then returned to the consultation room. V testified that she was in a state of shock. She said that she was functioning at that point on "auto-pilot" and was merely going "through the motions". Before leaving the consultation room, V requested medication to delay the onset of her period as she was about to leave on a school trip. She went to the toilet after leaving the consultation room. As there was no toilet paper available, she used her panty liner to wipe herself and saw streaks of blood on her panty liner. She could not find a bin to dispose of the panty liner and so held it in her hand.

19 V returned to the waiting area and collected her medication, which included some medication that she was allergic to. As V was walking home from the clinic, she disposed of her stained panty liner in a bin outside a coffee shop. V arrived home at about 1.00am on 31 December 2015. All her family members were asleep. V then took a shower because she "felt very dirty" as a result of what Dr Wee had done to her. V threw the panties that she had been

wearing into a pail of water. V was not able to sleep that night as she felt "numb" and "confused" and tried to "register what [had] happened at the [clinic]".

Dr Wee's version of events

20 Dr Wee denied raping V. He also denied penetrating her vagina with his penis. According to Dr Wee, V presented with complaints of gastric reflux, frequent urination and cough. In the examination room, he performed the standard abdominal examination, and when he palpated V's left lower abdomen, V told him that there was discomfort. After Dr Wee told V that the abdominal examination was over, V mentioned, "out of the blue", that she had a genital itch. Dr Wee was concerned that V might have PID which, if not treated early, could lead to infertility in young women. With V's express consent, Dr Wee proceeded to conduct a vaginal examination.

21 Dr Wee instructed V to remove her shorts and panties, which she did. He observed slight redness around her vulva and a slight clear discharge on the right side of the lower vulva. Because of this, he thought PID might be a "much more likely" possibility. He asked V if he could conduct an internal pelvic examination to exclude PID and V agreed. Dr Wee informed V of what he was about to do and V had no complaints. According to Dr Wee, he wet his right fingers using his saliva and then inserted his right index and middle fingers deep into V's vagina towards V's right pelvic area to check for pain and discharge. V said there was no pain or discomfort. He then repeated this process in V's middle and left pelvic area, and V said that she felt a slight discomfort in both of these areas. He informed V that if the discomfort continued, V should go to a hospital for a check-up. He then told her the examination was over and V got up while he was withdrawing his fingers.

22 After the examination, Dr Wee went back to the consultation room, washed his hands and started to record the medication to be prescribed to V. Before he finished, V came to the consultation room and requested medication to delay her period as she was about to leave for a school trip. Dr Wee testified that V was calm and relaxed when she returned to the consultation room. V did not raise any concern or make any complaint throughout the entire time that she was in the clinic. The clinic assistants also testified that V appeared to be calm and left the clinic after collecting her medication. Dr Wee attended to another three patients or so, and then left the clinic for his home at around 12.40am on 31 December 2015.

The events leading to Dr Wee's arrest

23 We next outline the events that led to Dr Wee's arrest. V's mother woke up around 4.30am on 31 December 2015 and went into V's room to retrieve some clothes. She saw V tossing in her bed and asked her why she was not asleep. At around 5.00am, they spoke in the living room. V informed her mother that she had visited Dr Wee's clinic, and questioned her mother as to the circumstances in which a doctor could properly "check a patient's private parts". V also told her mother that Dr Wee had taken *something* and "poked [her]" in her private part and that she felt violated as a result. V said nothing about Dr Wee having inserted his *penis* into her vagina. V's mother asked whether Dr Wee had been on top of her and when V replied that he had not been, and that he had used something to poke her, she told V that it was a "50/50 situation". It appeared from V's testimony at trial that what her mother meant by this was that it was not clear whether he had or had not done anything improper. The conversation lasted about 20 minutes.

24 V told her mother that she intended to make a police report and left home at around 5.30am for this purpose. V's mother left for work thereafter and did not accompany V to the police station. V arrived at the police station at about 6.00am and filed a First Information Report at 9.24am. Two police officers accompanied V back to her home and seized the clothing that she was wearing at the material time (including her panties that were still soaking in the pail of water).

25 At about 1.41pm on 31 December 2015, three officers from the Serious Sexual Crimes Branch of the Singapore Police Force arrived at Dr Wee's clinic and seized Dr Wee's case notes on V. The officers took photographs of the clinic and obtained Dr Wee's blood sample for DNA profiling. At around 4.05pm on the same day, the officers proceeded to Dr Wee's home where they arrested him and seized all the clothing that he had been wearing at the time of the alleged offences. The items seized from V and from Dr Wee were sent to the Health Sciences Authority for testing. Nothing incriminating was found in this regard.

26 On the same day, V was brought to KK Women's and Children's Hospital ("KKH") where she was examined by Dr Janice Tung Su Zhen ("Dr Tung") at 4.35pm. Dr Tung issued a report dated 26 January 2016 ("Dr Tung's Report"), in which she stated that there were two small superficial midline split-skin wounds in the posterior fourchette area of V's vagina and a very shallow fresh tear of the hymen. Dr Tung's testified that the injuries found on V were consistent with either penile or digital penetration of the vagina.

Evidence on Dr Wee's erectile function

27 We turn to the evidence on Dr Wee's erectile function. In his further statement to the police on 1 January 2016 ("Further Statement"), when asked

whether he was suffering from ED, he answered in the negative. However, in his cautioned statement dated 16 February 2017 ("Cautioned Statement"), he asserted that he did have ED at the time of the offence. At the trial, Dr Wee testified that he had suffered from ED for more than a year before his arrest and had a low sex drive, but had nonetheless been able to have sex with his wife about "once or twice a month" and was able to have penetrative sexual intercourse "most of the time".

28 This was somewhat corroborated by Dr Wee's wife ("Mrs Wee"), who testified that from 2014, there had been a decrease in the hardness of Dr Wee's erection. She claimed that in 2015, Dr Wee's penis was "soft like a noodle", and every time they had sexual intercourse, he would need to use his hand to direct his penis into her vagina. She also claimed that Dr Wee was not always able to achieve an erection.

29 Dr Wee underwent three separate medical examinations on his erectile function. The first was a doppler ultrasonography conducted at the request of Dr Peter Lim Huat Chye ("Dr Lim") on 5 January 2016. Dr Lim is a Senior Consultant and Medical Director of the Andrology, Urology & Continence Centre at Gleneagles Hospital. During Dr Wee's first consultation with Dr Lim on 5 January 2016, he informed Dr Lim that he had been suffering from ED for the past three years, and, in addition, that he had diabetes and hypertension. Dr Lim thought that Dr Wee might have vasculogenic ED, which is a condition of insufficient blood flow in the penile shaft. Dr Lim ordered a testosterone test and a doppler ultrasonography for Dr Wee. Dr Lim also conducted a transrectal ultrasound and an uroflowmetry examination. The former confirmed that Dr Wee had an enlarged prostate gland, and the latter suggested that Dr Wee had a bladder outlet obstruction. The doppler ultrasonography was conducted by Dr Gan Yu Unn ("Dr Gan"), a consultant radiologist at the Andrology, Urology

and Continence Centre, on 13 January 2016. Dr Gan injected 10 micrograms of Caverject, a chemical to help Dr Wee achieve maximum erection. An observing probe which sat transversely on the penis was used to measure Dr Wee's penile blood flow. In Dr Gan's report dated 13 January 2016 ("the First Doppler Report"), Dr Gan concluded that Dr Wee had bilateral varicoceles, which is the enlargement of the veins within the scrotum, and that there was no evidence of "arterial insufficiency or venous leak". The clinical laboratory report dated 5 January 2016 from Parkway Laboratory Services Limited showed that the accused's testosterone levels were in the low range of normality. Dr Lim summarised the results of the transrectal ultrasound, the uroflowmetry examination, the testosterone test and the doppler ultrasonography in a medical report dated 8 March 2016.

30 More importantly, in a medical memorandum to Asia Health Partners dated 13 January 2016 ("Dr Lim's Report"), Dr Lim reported that Dr Wee was able "to erect only 50 – 60% [and could not] maintain" an erection, and had a maximum Erection Hardness Score ("EHS") of three out of four, which could not be sustained. An EHS of three meant that the "penis [was] hard enough for penetration but not completely hard". An EHS of four would signify that the "penis [was] completely hard and fully rigid". In contrast, an EHS of two meant that the "penis [was] hard but not hard enough for penetration" while an EHS of one meant that the "penis [was] larger but not hard". At the trial, Dr Lim said he was surprised that the First Doppler Report showed that Dr Wee had no vasculogenic ED, which was contrary to his diagnosis. Dr Lim also explained that he arrived at an EHS of three by asking Dr Wee to elaborate on the maximum erection that he could have achieved during their consultation on 5 January 2016.

31 On 22 March 2016, at the direction of the police, Dr Wee saw Dr Teo Jin Kiat ("Dr Teo"), a Consultant Urologist at Changi General Hospital. Dr Teo initially prepared a report based on the results of the First Doppler Report. He was then informed by the police that a second penile doppler ultrasonography was required and this was ordered on 22 April 2016. It was carried out by Dr Wong Kai Min ("Dr Wong"), a Consultant at Changi General Hospital. In his report ("the Second Doppler Report"), Dr Wong stated that a full erection was not achieved and Dr Wee's penile shaft was flexible at his best-achieved erection. We digress to observe that the Prosecution did not disclose the Second Doppler Report to Dr Wee until 21 September 2018, which was after Dr Wee had given his evidence. We found this unsatisfactory because: (a) this had been requested by the police who *must* have considered it relevant; and (b) it was plainly material to the Defence. We will elaborate on this later.

32 On 7 June 2018, after the conclusion of Dr Wee's cross-examination, he underwent a haemodynamic test for erectile function administrated by Dr Sriram Narayanan ("Dr Sriram"), a Senior Consultant, Vascular and Endovascular Surgeon at Gleneagles Hospital and Mount Elizabeth Novena Hospital. The haemodynamic test was conducted by injecting 20 micrograms of Caverject. In Dr Sriram's report dated 7 June 2018 ("the Haemodynamic Report"), he stated that Dr Wee had significant bilateral venous leak, and could only achieve an EHS of one after ten minutes, with no improvement at 20 minutes. At the trial, Dr Sriram testified that Dr Wee essentially achieved "no erection" after an injection of 20 micrograms of Caverject. Dr Sriram also explained that the haemodynamic test was "more accurate" than the doppler ultrasonography and may pick up results that the latter did not. This is because there is difficulty in keeping the observing probe stable in a doppler ultrasonography and there is an intrinsic risk of variations due to the observer.

33 It appears that the findings of the First Doppler Report were not consistent with the Second Doppler Report, while the latter was more consistent with the Haemodynamic Report. It may also be noted that the First Doppler Report was based on a test conducted a week or so after the alleged rape offence, while the Second Doppler Report was based on a test done about three months later. The Haemodynamic Report was based on a test done some 2½ years after the alleged offences. According to Dr Sriram, the First Doppler Report suggested that Dr Wee had an erectile function of a typical 16-year-old who had varicoceles (meaning, the enlargement of the veins within the scrotum). Dr Sriram thought this was "strange" because Dr Wee, who was 65-years-old at the time of the alleged offences would be expected to have some degree of ED. Further, the First Doppler Report was inconsistent with Dr Lim's Report, which reflected that Dr Wee could only achieve 50-60% erection. Dr Teo, on the other hand, was not troubled by the results reflected in the First Doppler Report because he thought that it was possible that someone of Dr Wee's age and presenting with his medical conditions could obtain a "perfect score". Both Dr Teo and Dr Sriram agreed that the Second Doppler Report, which reflected that Dr Wee's penile shaft was flexible at his best-achieved erection, would have obtained an EHS score of between two and three. They also agreed that Dr Wee's condition as reflected in the Second Doppler Report would have existed well before April 2016, and they therefore concluded that the two Doppler Reports could not be reconciled with each other. Dr Sriram was also of the view that the Second Doppler Report was more consistent with his findings in the Haemodynamic Report, which showed a progression of Dr Wee's ED.

The decision below

34 The Judge convicted Dr Wee of the OM Charge. The Judge considered V's testimony to be compelling and believable, observing that she gave her

evidence simply, clearly and without embellishment (GD at [97]). The Defence submitted that if Dr Wee had indeed molested V on 25 November 2015, V would not have returned on 30 December 2015. The Judge however, accepted V's explanation that she believed Dr Wee's actions on 25 November 2015 were part of the medical examination, a belief that was reinforced when Dr Sheena confirmed that she did have a lump on her groin area as Dr Wee had noted.

35 The Judge acquitted Dr Wee of the Rape Charge (GD at [4]). The Judge found V's account of the events on 30–31 December 2015 to be consistent with (a) her mother finding her awake and restless in bed the following morning; (b) her conversation with her mother; (c) her statement to the police; and (d) the medical examination conducted by Dr Tung. The Judge also accepted V's evidence that she was in shock and functioning on "auto-pilot" after the alleged rape. Notwithstanding all this, the Judge found there was reasonable doubt as to whether Dr Wee *could* have penetrated V's vagina with his penis without any external assistance. This was because the objective medical evidence established on a balance of probabilities that Dr Wee was suffering from ED in December 2015. The Judge was also doubtful that Dr Wee would have attempted penile penetration given that there were clinic assistants as well as other patients waiting to be attended, at the clinic that night. The Judge does not appear to have considered and did not make any mention of the possible relevance of these other factors in relation to the Digital Penetration Offence.

36 The Judge then proceeded to exercise his powers under ss 138 and 139 of the CPC and convicted Dr Wee of the Digital Penetration Offence. We digress to observe that the Judge had expressly acted on the basis that he was not required to and therefore did not amend the Rape Charge. Instead, he convicted Dr Wee of the Digital Penetration Offence without framing a charge in this respect. This was based on Dr Wee's account of the events that had

happened on 30 December 2015. The Judge accepted Dr Wee's testimony that he had inserted his fingers in V's vagina, but rejected his claim that he had done so as part of an internal pelvic examination to exclude the possibility that V was suffering from PID. The Judge therefore found that Dr Wee had sexually penetrated V's vagina with his fingers without her consent.

37 The Judge meted out an aggregate sentence of 10 years' imprisonment for the OM Charge and Digital Penetration Offence. The Judge did not enhance the sentence on account of the fact that Dr Wee was not liable for caning.

The issues to be determined

38 These are the questions we must determine in this appeal:

(a) whether the Judge was correct to acquit Dr Wee of the Rape Charge. This is the subject of the Prosecution's appeal;

(b) whether the Judge was correct to convict Dr Wee of the OM Charge; and

(c) whether the Judge erred in law in convicting Dr Wee on the Digital Penetration Offence. The latter two questions arise from Dr Wee's appeal against his convictions.

The First Issue: The Rape Charge

The parties' respective cases on appeal

The Prosecution's case

39 The Prosecution submits that the Judge erred in acquitting Dr Wee of the Rape Charge for three principal reasons. First, V's testimony that she saw

Dr Wee's penis in her vagina should have been accepted because the Judge's acquittal of Dr Wee on this charge was irreconcilable with his view that V was a credible witness. Furthermore, V had no reason to implicate Dr Wee falsely. In addition, the Judge had placed undue weight and significance on the ostensible improbability of Dr Wee raping V while there were patients and clinic assistants in the clinic.

40 Second, the evidence in relation to Dr Wee's ED did not raise any reasonable doubt as to the credibility of V's account. Dr Wee evidently did not think he had ED when he gave his statement to the police on 1 January 2016. He also testified that he was able to have penetrative sex with his wife. The objective medical evidence also shed no light on whether he was able to achieve an erection hard enough to penetrate V's vagina unaided. Further, the evidence of Mrs Wee was plainly biased and exaggerated in her husband's favour, and hence, not to be believed.

41 Third, the Prosecution submits that the Judge was right to reject Dr Wee's claim that he digitally penetrated V's vagina *for a medical purpose*. Indeed, the Prosecution goes further and contends that the Judge should not have accepted Dr Wee's claim that he had penetrated V's vagina with his fingers, but should have found that he had done so with his penis. According to the Prosecution, this was because the hypothesis that Dr Wee had digitally penetrated V would have been inconsistent with the following surrounding considerations: (a) Dr Wee would have examined V for PID without first ascertaining her sexual history, when the evidence suggested that this was typically done as a precursor to considering a possible diagnosis of PID; (b) Dr Wee would have embarked on the examination instead of referring her to a specialist even though he lacked the equipment to perform certain tests, including a trans-abdominal ultra-sound, which Dr Tung said would typically

have been done before conducting an internal pelvic examination; (c) Dr Wee would have done the examination without having offered V any other diagnostic options despite its extremely invasive nature; (d) according to Dr Wee, he did not offer V a female chaperone or use gloves, which he admitted were basic requirements to be fulfilled before performing the examination; (e) Dr Wee's use of his saliva as a lubricant was contrary to all the applicable norms and standards; and (f) there was no mention at all of any findings in relation to PID in Dr Wee's case notes. Given all these circumstances, the Prosecution submits that the Judge should not have accepted Dr Wee's evidence that he had penetrated V's vagina with his fingers instead of with his penis.

The Defence's case

42 As against this, the Defence's case on appeal is that none of the Judge's findings in relation to the Rape Charge were plainly wrong or against the weight of the evidence, and therefore, these should not be disturbed. The Defence further submits that V's evidence was not unusually convincing. The Defence contends, in this regard, that V's description of the state of the examination room and what was or was not there, in particular, the location and position of the photocopier, were at odds with the evidence of the clinic assistants and the photographs taken by the police on the day after the alleged rape. In addition, the Defence contends that it is wholly implausible that: (a) despite V claiming that she had seen Dr Wee's penis in her vagina, she claimed to have been unsure whether this was in some way, part of a medical examination; and (b) despite having concluded by the morning of 31 December 2015 that she had been raped, she never told her mother this and instead claimed that Dr Wee poked some unspecified and/or unknown thing into her vagina.

43 At the hearing of the appeal, the Defence suggested that V must have fabricated the rape allegation because she was upset at the way in which Dr Wee had conducted the internal pelvic examination and then became concerned by her mother's characterisation of her complaint as a "50/50 situation".

Reasonable doubts in V's account of the events

44 We begin by first setting out the threshold that the Prosecution must meet in order to overturn Dr Wee's acquittal on the Rape Charge. As the Prosecution relies very substantially on V's testimony to sustain a conviction, V's evidence must be unusually convincing, in the sense that it is sufficient, in and of itself, to overcome any doubts that might arise from the lack of corroboration (*Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2019] 2 SLR 490 ("*PP v Ariffan*") at [58]). Proof beyond a reasonable doubt is the *only* standard to be applied in criminal proceedings, even where the victim's testimony is uncorroborated and forms the sole basis for a conviction. As we explained in *Public Prosecutor v GCK and another matter* [2020] SGCA 2 ("*GCK*") at [89] (see also [87]–[88] and [104]):

> In our judgment, the "unusually convincing" standard is *necessarily* applicable to the evidence of an eyewitness, just as it would apply to that of a complainant or an alleged victim, as long as the testimony of the witness in question is *uncorroborated* and therefore forms the *sole* basis for a conviction … [the basis for this standard] has everything to do with "the ultimate rule that the Prosecution must prove its case beyond a reasonable doubt": see [*XP v Public Prosecutor* [2008] 4 SLR(R) 686] at [31]. In the absence of any other corroborative evidence, the testimony of a witness … becomes the ***keystone upon which the Prosecution's entire case will rest*** … [original emphasis in italics; emphasis added in bold italics]

45 Thus, 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]).

46 In this case, the question as to whether V's evidence was unusually convincing arises because the Prosecution sought Dr Wee's conviction on the Rape Charge based solely on V's testimony. No other incriminating evidence was found (see [25] above). In addition, V's conversation with her mother could not be seen as corroborative because: (a) subsequent repeated complaints by V to her mother could not in and of themselves constitute corroborative evidence so as to dispense with the requirement for "unusually convincing" testimony (*AOF* at [114(a)]); and (b) in any event, the details of the conversation were not in fact corroborative of V's account (see [66] below).

47 With these legal principles in mind, we examine V's allegations of rape in detail. For reasons which we will explain, we are amply satisfied that the Judge was correct to have acquitted Dr Wee of the Rape Charge.

The manner of penetration

48 The Judge found on the medical evidence that Dr Wee had ED at the time of the alleged rape. We agree. The First and Second Doppler Reports had some discrepancies that the experts agreed were irreconcilable (see [33] above). However, Dr Sriram, whose evidence, according to the Judge, was objective

and persuasive, opined that the Second Doppler Report was more consistent with the Haemodynamic Report, which established that by the time the latter test was done, Dr Wee's ED had already advanced quite significantly. However, Dr Sriram could not say with certainty when precisely the ED set in in Dr Wee's case. The Prosecution's expert, Dr Teo, agreed with Dr Sriram that Dr Wee's condition as reflected in the Second Doppler Report could not have happened spontaneously in the short span of three or four months from the time of the First Doppler Report. Dr Teo was also unable to offer any explanation for the results reflected in the First Doppler Report and was unwilling to say which of the two reports was more accurate. In these circumstances, the Judge was plainly correct not to have placed any weight on the First Doppler Report. What is then left is the Second Doppler Report and the Haemodynamic Report and these clearly establish that: (a) Dr Wee had ED by April 2016; and (b) that it was progressing and had become quite advanced by 2018. Moreover, the fact that both experts agreed that Dr Wee's condition in April 2016 would not have developed spontaneously or suddenly but would have taken some time, plainly establishes that Dr Wee did suffer from ED at the time of the alleged rape. However, that evidence was inconclusive as to the severity of his condition. The Judge correctly observed that the fact that Dr Wee was suffering from ED did not necessarily mean that he could not have penetrative sexual intercourse. Much would depend on the severity of his ED. As such, the question to be considered is whether, in the light of Dr Wee's ED and its severity, he could have penetrated V's vagina in the manner described by her.

49 Before turning to that question, we first consider the significance of the Prosecution's submission that Dr Wee had said he was not suffering from ED at the material time, in the Further Statement he gave to the police shortly after his arrest. Dr Wee testified that when he was informed by the police on 31

December 2015 that he was being investigated for rape, he was shocked. He maintained at trial that he did in fact have ED by this time. Despite this, when asked whether he was suffering from ED, he had answered in the negative in his Further Statement. However, about a year later, in his Cautioned Statement, Dr Wee claimed that he did have ED:

> The accusations are absolutely false. I have erectile dysfunction due to moderate diabetes mellitus, hypertension and on medication that can contribute to this …

50 It is evident that Dr Wee's answer recorded in his Further Statement that he was not suffering from ED was at odds with his testimony at the trial and his Cautioned Statement. The Prosecution relies heavily on this admission to contend that Dr Wee did not in fact think that he had ED, and further that in line with this, it appears from the evidence that he had been able to have penetrative sexual intercourse with his wife in December 2015. This however, cannot be looked at in isolation. Dr Wee explained at the trial that he gave a negative answer in his Further Statement because his ED had never bothered him and it "didn't cross [his] mind". As noted above, he also said that he was shocked by the very allegation. In assessing this, it is important to consider the overall tenor of Dr Wee's various statements given to the police. Dr Wee was told on 31 December 2015 by the police that V had lodged a report of rape against him. From the time he was told that a complaint of rape had been made against him, Dr Wee's position had always been that there had never been any penile-vaginal penetration. On the contrary, his contention at all times, in his statements and his testimony, was that he had digitally penetrated V with her express consent for the purpose of a medical examination. In that light, whether he did or did not have ED, would not have seemed to him to be directly material to his defence, because his case was that the alleged act had *never happened*; and not that it *could not have happened* for one reason or another.

51 At the hearing of the appeal, Dr Wee's counsel, Mr Eugene Thuraisingam, expanded on this. He submitted that in any event, it was not realistic for Dr Wee to have robustly pursued the claim that he could not have committed the offence by reason of his ED as an alternative defence at the start of the trial. This was because he only had the First Doppler Report at that time and that suggested that Dr Wee at best had only a mild condition of ED. Had Dr Wee sought to advance a contrary case, he would have risked being confronted with the First Doppler Report and this could have severely affected his credibility. This was a matter of crucial importance in a case such as this, which turned on the credibility of the two key witnesses. Furthermore, Dr Wee was entitled to infer that the findings of the Second Doppler Report were corroborative of the First Doppler Report, and adverse to him because the Prosecution had not made a copy of it available to the Defence. This follows from the rule in *Muhammad bin Kadar and another v Public Prosecutor* [2011] 3 SLR 1205 ("*Kadar*") where we held that the Prosecution has a duty to disclose promptly to the Defence any unused material that is likely to be admissible and that might reasonably be regarded as credible and relevant to the guilt or innocence of the accused person, and this includes material that undermines the Prosecution's case or strengthens the Defence's case (at [113]). Since the Prosecution had not disclosed the Second Doppler Report, which had been obtained at the request of the police, the Defence would quite reasonably have made the inference that it was either inconclusive, or more likely, corroborative of the First Doppler Report. We will deal with the prejudice caused to Dr Wee by the Prosecution's delayed disclosure of the Second Doppler Report later in this judgment. At this stage, it suffices for us to observe that notwithstanding the delayed disclosure of the Second Doppler Report, Dr Wee did contend that even the First Doppler Report suggested that he had ED and did mention this at the trial:

A: … On 5 January I went to my urologist for a full assessment.

Q: And did he find that you had erectile dysfunction? Was there a finding made?

…

Q: ***Dr Wee, did your urologist … Dr Peter Lim … Did he make a finding that you have erectile dysfunction?***

A: **Yes.**

Q: He did?

A: Yes, based on my low normal testosterone.

[emphasis added in bold italics]

As noted above, he also mentioned his ED in his Cautioned Statement. In that sense, it was not an afterthought. The key point though, as Mr Thuraisingam pointed out, is that the crux of Dr Wee's defence to the Rape Charge was a complete denial of V's version of events and the evidence of his ED was less important to this than the question of whether penile penetration had taken place at all.

52 Against that backdrop, we return to the Prosecution's appeal against Dr Wee's acquittal on the Rape Charge and consider whether he *could* have penetrated V's vagina in the manner she described. We agree with the Judge that there was a reasonable doubt as to whether penile penetration could have taken place as alleged in this case. According to V, she had been raped while Dr Wee stood between her legs and held on to her legs throughout the incident:

Q: … So just before you felt something poke your vagina, tell us how he repositioned you the third time? So where were his hands now?

A: So his hands moved from my ***above ankle*** to just below the ***knees***. Then he pulled me closer to his direction.

…

> Q: Throughout the time you felt the poking sensation in your vagina, where were Dr Wee's hands?
>
> A: He was ***supporting my legs***.
>
> …
>
> [emphasis added in bold italics]

53 We find it implausible that Dr Wee could have penetrated V's vagina in the manner she described. At the trial, Dr Lim explained that even with an EHS of three (which was the score indicated in Dr Lim's Report and taking the Prosecution's case at the highest), it would have entailed *"great difficulty"* for the penis to enter the vagina unaided, especially if such penetration was of a virginal partner:

> Ct: Are you saying Dr Lim … that EHS score 3 was [hard] enough for penetration but not completely hard means penetration aided by the hand?
>
> A: EHS score 3 could, as I say, could possibly go in …
>
> Ct: ***Unaided by the hand?***
>
> A: With some ***difficulty***, yes. It is not totally impossible.
>
> …
>
> A: You have to be a non-virginal person, then it might be possible, but if you have a ***virgin partner***, a partner who is a virgin, with an unbroken hymen, it may have some ***great difficulty in penetrating***.
>
> [emphasis added in bold italics]

54 It was common ground that V was a virgin. This implausibility is exacerbated by the fact that V was not a willing partner and plainly did not facilitate the alleged penetration. In these circumstances, there is ample reason to doubt that Dr Wee, who had ED at the material time, would have been able to sustain sufficient tumescence to be able to penetrate a virginal partner, whilst using both his hands only to support her body weight in what must have been an uncomfortable position for her. In line with this, Mrs Wee's testimony was

that Dr Wee had to use his hand to direct his penis into her vagina *every time* they had sexual intercourse. The Prosecution sought to discredit Mrs Wee's evidence saying it was false, exaggerated and given to help her husband. We accept that the evidence may have been exaggerated in as much as she claimed Dr Wee's penis was as "soft as a noodle". But the Judge accepted her evidence as true because he plainly saw this as a hyperbole put forward to make the broader point that sexual intercourse was not a straightforward matter for Dr Wee. This is borne out by the fact that Mrs Wee accepted that they did have periodic penetrative sex, though on these occasions, Dr Wee had to use his hand to aid and guide his penis. Plainly, the allusion to "a noodle" could not be and was not taken literally, contrary to the Prosecution's suggestion. In addition, Dr Teo and Dr Sriram were in agreement that the Second Doppler Report reflected that Dr Wee had an EHS of between two and three, which adds to the implausibility of Dr Wee penetrating V's vagina in the manner she had described.

V's account of the alleged rape

55 We turn to examine V's account of her own conduct during the alleged rape. It is well-established that there is no prescribed way in which victims of sexual assault are expected to act. Aedit Abdullah J put it succinctly in *Public Prosecutor v Yue Roger Jr* [2019] 3 SLR 749 ("*Yue Roger*") at [34] (a decision that was affirmed by this court in *Yue Roger Jr v Public Prosecutor* [2019] 1 SLR 829 at [3]):

> … People react in different ways to sexual abuse and may compartmentalise or rationalise their reactions. A calm, undisturbed disposition may generally incline the court to conclude that no wrong was committed, but it is not necessary for a complainant to be distraught for her to be believed.

56 We revisit V's allegations of rape to examine this in detail. V claimed that Dr Wee removed her shorts and panties, positioned himself between her legs and pushed "something horizontal" into her vagina. V was only able to see Dr Wee's head and chest. She also saw his body moving forward and backward with each penetration and said his hands were holding onto her knees throughout this. V testified that at the time, she believed Dr Wee's actions were part of a medical examination:

> Q: You were afraid at that time? Were you not afraid at that time when he removed your shorts off your legs?
>
> …
>
> A: I just wanted the ***medical examination to quickly finish***. Then after that I didn't think of anything else.
>
> …
>
> Q: Why didn't you just get up from the bed and walk away?
>
> A: I mean, at that point I just wanted ***the examination to finish as soon as possible***...
>
> …
>
> Q: What did you think he was going to do, examine you?
>
> A: ***Yes, that is what was in my mind, examination***.
>
> …
>
> Q: Okay, so you did not leave or choose to leave because you knew that he was going to do an examination of you. That is why you continued to remain in that state, correct?
>
> A: Yes, it felt like he was going to do an examination.
>
> …
>
> Q: Right. So you felt the two legs being grabbed?
>
> A: Yes.
>
> Q: At that point of time, what was in your mind?
>
> A: I just want whatever ***examination to be over as soon as possible***.
>
> [emphasis added in bold italics]

57 Subsequently, Dr Wee allegedly brought V to a half-seated position. V looked down and saw Dr Wee's penis partially inside her vagina. At this stage, V testified that she was unsure whether this was also part of the medical examination:

> Q: Oh, so even though you said you saw his penis or dick, as you describe in your vagina, ***you did not know whether that was part of the medical examination*** or not?
>
> A: ***Yes***.
>
> [emphasis added in bold italics]

58 At the trial, V testified that she was shocked, operated in an "auto-pilot situation" and left the clinic after collecting her medication. The clinic assistants and Dr Wee, on the other hand, testified that V appeared to be calm and had no complaints. These claims are not incompatible and we accept that different people react differently to sexual assault. Thus, the fact that V did not appear to be distraught immediately after the alleged rape did not, in and of itself, render her testimony unbelievable. Thus, in *Yue Roger*, for example, the victim was 13 years of age, who trained and competed with the private rope skipping team that was coached by the accused person in that case. It was thought to be understandable that, from the victim's perspective, she would continue with her rope skipping training even though she had been the victim of his repeated sexual abuse (at [31]). Here, Dr Wee had been V's regular doctor and V would have trusted him. This was relied on by the Prosecution as a basis for understanding V's reaction to what had allegedly taken place. While we accept the general point, this however, has to be seen in the context of all the relevant facts and circumstances. In that light, with great respect, we are unable to see how the Prosecution's claim can be accepted that V's perception of what was happening to her was coloured by the fact that she trusted Dr Wee as her regular doctor. By way of context, it should be noted V was 23 years old at the time of

the offence and pursuing tertiary education. She had never had sexual intercourse at the time. In these circumstances, we find it impossible to understand how V could have thought that the alleged conduct of Dr Wee could ever have been explicable on the basis that it was part of a medical examination. How could he possibly have been examining anything if his head and chest were upright and both his hands were supporting V's knees? And how could he have been "poking" anything into V that was related to a medical examination when both his hands were being used to hold V up? And, finally, when V sat up and allegedly saw Dr Wee's penis still in her vagina, how could she possibly have imagined that this might be part of the medical examination? To put it bluntly, this would have been a violation of her person at the most horrific and abusive level and we find it difficult to understand how V could have failed to appreciate that. The question here is not so much one that concerns a victim's *reaction* to a sexual assault after the trauma of the incident; rather, it is the *credibility* of a victim's claim of what she thought was happening, while it was happening. Further, this was not in terms of fine details such as what the offender was wearing or what his position was, or how long the incident lasted, but at the most basic level, of whether a sexual assault was taking place at all.

59 We accept that up to the point *before* V alleged that Dr Wee penetrated "something horizontal" into her vagina, she might have thought that his actions (namely, removing her shorts and panties, and positioning himself between her legs) were perceived as being part of a medical examination. However, we find it incredible that V could have perceived any of Dr Wee's alleged actions *after* that point to be part of any medical examination. This is especially the case given her narrative, which was that Dr Wee's hands were holding on to her legs at all times, and he was moving back and forth while penetrating "something" into her vagina and later that she saw that his penis was partially inside her

vagina. With respect, we find this account and the explanation for allowing it to continue, namely that it was perceived as being part of an examination, far from convincing.

The presence of patients and clinic assistants

60 The Judge was also doubtful that Dr Wee would have attempted penile penetration given that at the material time, the clinic assistants and some other patients were waiting in the clinic. We agree. The Prosecution submits that the Judge placed undue weight on this because the patients would not have been able to enter the examination room, while the clinic assistants would not have done so under ordinary circumstances. Dr Wee would therefore have had fair warning if anyone were to enter the consultation room. While we accept that the clinic assistants and patients were unlikely to barge into the examination room, the fact remained that the sliding door leading to the examination room could not be locked, and *it would have been the easiest thing for V to have screamed for help*. The Prosecution also makes the point that the rashness of an act does not mean that it therefore could not have happened. We agree. But its implausibility is a factor that may be taken into account in assessing whether the relevant threshold of proof has been met. To overcome the implausibility of the Prosecution's case and find that Dr Wee had raped V in these audacious circumstances, he must have believed that he could get away with it because V would not even know that she was being raped and would remain completely silent throughout the ordeal. But, this was an improbable scenario to begin with for the reasons we have outlined at [55]–[59] above, and further, the Prosecution never put this to Dr Wee or explored this line of inquiry at the trial.

61 For all these reasons, we agree with the Judge that there were reasonable doubts that Dr Wee had raped V as alleged. This is sufficient to dispose of the Prosecution's appeal. But, for completeness, we consider V's credibility.

V's credibility

62 The Judge found V to be an honest and simple witness who gave her evidence clearly and without embellishment. The Judge, having assessed V's demeanour, was well placed to assess her credibility. However, we remain entitled to ascertain whether the Judge's assessment of V's credibility was plainly wrong or against the weight of evidence (*Pram Nair v Public Prosecutor* [2017] 2 SLR 1015 at [55]). This becomes a point of particular importance where the relevant threshold is that the evidence must be found to be unusually convincing, which then requires it to be carefully scrutinised in the light of the internal and external consistencies. Having evaluated the evidence, we are troubled by four aspects of the evidence that the Judge did not seem to have considered. In our judgment, these cast serious doubts on V's credibility.

The Judge's finding on penile penetration

63 The Judge, as we have observed, concluded that there were reasonable doubts over Dr Wee's guilt and specifically over whether penile penetration had occurred. This meant that despite having found that V was a credible witness, he was not convinced that the alleged rape had occurred as she maintained. With respect, given V's persistent assertion that Dr Wee had penetrated her with his penis even to the extent of saying that she had seen his penis in her vagina, once the Judge found on the basis of other evidence that this was not credible, it was incumbent on him to reappraise the entirety of V's credibility in that light. This was because his finding meant that he was unwilling to accept what she had said on a central aspect of her account by reason of its inconsistency with other

evidence. Furthermore, this was a point that could not be explained away as a mistaken perception on V's part given her insistence that she saw Dr Wee's penis in her vagina (see [117] below). Either the Judge believed that V did see the scene as she described it, in which case that would overcome any doubts raised by Dr Wee's condition, or the Judge did not believe that she did. Her testimony that she had seen Dr Wee's penis in her vagina and that his hands were supporting her legs throughout the incident was simply not capable of being reconciled with Dr Wee's evidence that he had used his fingers to examine her vagina (see also *GCK* at [161]). In the end, the Judge believed and convicted Dr Wee on his account. The Judge had to make that assessment in the context of all the evidence and his conclusion that it was the latter meant that he had to reconsider V's evidence in that light.

The Polyclinic Record

64 Second, as mentioned above at [9]–[11], V's evidence was that Dr Wee had found a lump at her groin area during the consultation on 25 November 2015. She then scheduled an appointment at the polyclinic for the *specific purpose* of having that lump checked:

> Q: Okay. So did you do anything about the lump that [Dr Wee] found on 25 November?
>
> A: I went to schedule an appointment with the Polyclinic.
>
> …
>
> Q: Okay. And just to be clear, the purpose of this visit on 5 December 2015?
>
> A: Is ***mainly to check out the [lump] issue that Dr Wee highlighted***.
>
> [emphasis added in bold italics]

According to V, Dr Sheena confirmed that there was a lump near her groin, at which point, she felt reassured that what Dr Wee had done to her on

25 November 2015 was part of a medical examination. As we have already noted at [11] above, it is not at all clear to us how this could have appeased any concern V had over what Dr Wee had allegedly done, *after* he found the lump. Those alleged acts had nothing at all to do with the lump.

65 Beyond this, V's evidence was not consistent with the Polyclinic Record. The Polyclinic Record reflected that V consulted Dr Sheena for "pain over the left groin area for 3 days" (see [11] above) and not for the purpose of having the lump checked, as she claimed. Dr Sheena had left Singapore by the time of the trial and was not an available witness. But V never mentioned in her testimony at trial that feeling pain in her groin area was the reason she went to see Dr Sheena. Further, neither the Polyclinic Record nor Dr Sheena's notes reflect any reference at all to V having seen Dr Wee or *suspecting* a lump on account of that. All she referred to was the pain that V reported feeling in that area for three days. Further, Dr Wee's clinic notes on 25 November 2015 neither recorded the findings of any lump nor indicated that he had prescribed any medication for it. Even if we were to assume that Dr Wee had deliberately or negligently omitted such a record, we find it odd, to say the least, that V sought a second opinion on the lump from Dr Sheena, but then made *no mention* to Dr Sheena about the first opinion arising from her consultation with Dr Wee, and merely informed Dr Sheena that she suspected "a lump in area". Unfortunately, the point was not fully explored when V gave evidence because the Polyclinic record was not available to the Defence at that time.

V's conversation with her mother

66 Third, V did not mention the alleged rape during her conversation with her mother. This raises questions as to whether the alleged rape had in fact occurred. V was evidently disturbed, upset and felt able to confide in her

mother. Yet when asked directly if Dr Wee had been on top of her, she never said she had been raped. Indeed the discussion had commenced with V asking her mother of the circumstances in which a doctor could *check a patient's private part* and she then went on to claim that Dr Wee had poked something into her vagina. The Defence submits that V's evidence was internally inconsistent on this critical point. At the trial, V explained that she did not have the chance to tell her mother what that "something" was because her mother "was not really listening and [was] kind of in a rush to go and shower and go for work". We accept that V's mother may have been in a rush because she had to report for work by 6.30am and apparently faced the possibility of retrenchment if she was late for work on more than three occasions. However, this does not explain why V did not mention the alleged rape to her mother during their conversation, in particular having regard to the following facts:

(a) the conversation between V and her mother was not fleeting as V seemed to suggest, but lasted approximately 20 minutes. There was ample time for V to have related the allegation of rape at some stage during that conversation, even if not at the very outset;

(b) as noted above, V's mother specifically asked V whether Dr Wee had been "on top of [her]". Yet V never mentioned the alleged rape when this would have been the most natural thing to do. Instead, she referred to the unspecified poking, even though V would have known by this point that this had involved Dr Wee's penis; and

(c) for V's mother to say that it was a "50/50" situation and that it could be seen as neither party's wrongdoing, she had plainly been given sufficient context to enable her to make that analysis and likely even been invited by V to do so.

The layout of the examination room

67 Fourth, V's evidence as to the layout of the examination room was inconsistent with that of the clinic assistants as well as what was reflected in the photographs taken by the police on the very next day. Pointedly, it was not suggested by the Prosecution that Dr Wee had rearranged that layout on the day of the alleged rape because he was expecting the police to come and arrest him sometime later. The photographs taken of the examination room by the police on 31 December 2015 at 3.26pm showed a white ladder and a green chair beside the head of the examination bed, and plastic boxes between the bed and the photocopier. At the trial, the seven clinic assistants testified that:

(a) the photocopier, plastic boxes, ladder and green chair were *by default*, positioned as reflected in the photographs;

(b) some of the plastic boxes contained heavy items and were difficult to move;

(c) the ladder was relatively light and was used to help the clinic assistants reach medicine in the higher cabinets and assist older patients to climb onto the examination bed;

(d) the green chair would sometimes be wheeled to the consultation room when an additional seat was required by a locum doctor or for a patient's accompanying family member, or if a staff member required access to the cabinet behind the green chair; and

(e) the plastic boxes in front of the photocopier would be moved when the photocopier had a paper jam, or when medicine inside the boxes was needed. The photocopier would be shifted to the left at an angle whenever there were paper jams. Nobody suggested that either the

photocopier or the boxes had been moved whether because of a jam or otherwise on the day of the alleged rape.

68 V claimed that while the rape was taking place, she had been able to touch the top of the photocopier with her right toes seemingly for support. She also maintained that the white ladder, green chair, and the plastic boxes between the photocopier and the examination bed were all not there at the material time:

> Q: Okay. Just to be clear … the plastic boxes that are between the bed and the photocopier that we see in photograph 22, were these plastic boxes in the same location during your consultation with Dr Wee on 30 December?
>
> A: No. No, there was [*sic*] ***no plastic boxes***.
>
> …
>
> Ct: Can I just ask: We keep seeing this ladder in the room next to the bed?
>
> A: There was no ladder at that day.
>
> Ct: On that day there wasn't?
>
> A: There ***wasn't any ladder or chairs*** so he was standing some – near that area.
>
> Ct: So the green chair was not there either?
>
> A: No the chair was not there.
>
> [emphasis added in bold italics]

69 The Prosecution submits that the clinic assistants' testimony as to where these items usually were, was inconsequential because none of them were asked whether they were all in the usual position at the material time. But there was no evidence before the court at all to suggest that the usual layout, which is exactly how it was when the police photographs were taken, had been disturbed just at the time of the alleged offence.

70 There was certainly no evidence before us to suggest that on the day in question, the examination room was virtually empty except for the bed and the photocopier.

71 It is significant that only a relatively short time had elapsed between the alleged rape (at around midnight on 30 December 2015) and the taking of the photographs (at 3.26pm on 31 December 2015). It was wholly implausible and never suggested that Dr Wee had removed the green chair, ladder and plastic boxes *before* the alleged rape and then placed them all back into its original position within this period of time, especially when he had no idea as to what the allegations against him were or even of their very existence. Indeed, Dr Wee did not even seem to be expecting the police to come by the clinic. Moreover, it is unclear where *all* these items would have been moved. V never suggested they were all in the consultation room. If the speculation then is that the large plastic boxes including those with heavy items, the ladder and the green chair had all been moved somewhere else in the clinic, it is wholly implausible that none of the clinic assistants knew about this or mentioned this in their testimonies.

72 For these reasons, we entertain serious reservations as to V's evidence in relation to the layout of the examination room and therefore also her assertion that she had tried to stabilise herself by resting her right toes on the top of the photocopier in the examination room (see [17] above).

73 For completeness, we reject the Prosecution's submission that even if the green chair, ladder and the plastic boxes had been present at the time of the alleged rape, it would have been physically possible for Dr Wee to have raped V in the manner she described. First, the discrepancy between V's evidence and the physical layout reflected in the police photographs would again cast doubt

on V's credibility. Second, it is imperative in such situations, involving a physical setting, for the court to have a sketch plan with detailed measurements. Without a sketch plan that reflected the dimensions of and distances between the examination bed, the photocopier, and the plastic boxes, we cannot possibly make a determination on this issue. No such sketch plan with measurements was provided to the court and it is impossible to say whether this could or could not have happened as V described it.

74 We therefore affirm the Judge's acquittal of Dr Wee on the Rape Charge. We turn to consider his appeal against his conviction on the OM Charge.

The Second Issue: The OM Charge

The parties' respective cases on appeal

The Defence's case

75 The Defence submits that the Judge had erred in convicting Dr Wee on the OM Charge because V was not a credible witness and suggested that she had fabricated this allegation in order to buttress her false allegation of rape. The Defence highlights the following inconsistencies that undermined V's account:

(a) V claimed that Dr Wee stroked her vagina for a long time until it became "wet". V however, evidently did not believe this was inappropriate, did not make a contemporaneous complaint and was not deterred from consulting Dr Wee again on 30 December 2015;

(b) V did not mention the alleged OM in her first police report. V claimed that *after* she had made the police report alleging rape against Dr Wee, and just before she saw Dr Tung, she realised that the medical

examination by Dr Wee on 25 November 2015 had been a wholly improper action that outraged her modesty. However, she did not mention this to Dr Tung;

(c) Dr Wee's clinic notes relating to the visit on 25 November 2015 did not mention any lump found at V's groin area or prescribe any medication for that lump;

(d) V initially testified that Dr Wee had stroked her vagina, but embellished this to say that he "play[ed] around with [her] vagina"; and

(e) V thought that the alleged act must have been a legitimate medical examination because Dr Wee had found a lump. V however, also claimed she was concerned enough to schedule an appointment with Dr Sheena to confirm this. That aside, we reiterate that we do not understand how the subsequent discovery of the lump could have justified Dr Wee's alleged actions in V's mind.

The Prosecution's case

76 In contrast, the Prosecution's position on appeal is that none of the Judge's findings in relation to the OM Charge were plainly wrong or against the weight of the evidence and they should not be disturbed. The Prosecution emphasises that V was an unusually convincing witness who gave textured and unwavering testimony about the sexual assaults. V was able to describe the incidents in detail, cogently explain why she did not resist Dr Wee's actions during the acts or report him for molest afterwards, and why she returned to the clinic on 30 December 2015. She also had no reason to falsely implicate him.

77 The Prosecution also submits that Dr Wee's arguments against conviction are unmeritorious because V's evidence was not internally or

externally inconsistent. The crux of the Prosecution's submission is that V believed that Dr Wee's actions were part of a medical examination due to her overwhelming trust in him, and she was reassured when Dr Sheena later found that there was a lump in her groin area. Dr Wee could also have failed to record the finding of the lump intentionally so as to maintain the plausibility of denying that he had asked V to unzip her jeans.

Reasonable doubt in V's account of events

78 As we have explained at [44]–[46] above, to sustain a conviction on the OM Charge, V's evidence must be found to be unusually convincing. Having assessed the evidence, we are troubled by two particular inconsistencies in V's account, which in our judgment, undermined her evidence so as to satisfy us that the Prosecution has failed to prove its case beyond a reasonable doubt.

V's claim that she believed Dr Wee's actions to be part of a medical examination

79 First, we have difficulty accepting V's testimony that she thought Dr Wee's alleged actions on 25 November 2015 were part of a medical examination. V claimed that she held such a belief because she trusted Dr Wee and because his examination of her vaginal area was similar to an abdominal examination, in that he palpated her abdominal area and asked if it was "okay" during the palpations. We accept that V could have reasonably assumed that Dr Wee's examination of her "joint area" near her groin and with considerable hesitation, perhaps even his *pressing* of her vulva using his right fingers outside her panties were part of the medical examination. We hesitate over the latter aspect of the evidence because V's medical complaint that day had nothing to do with her genital area at all. In fact, V testified that she consulted Dr Wee for

"gastric discomfort" and this is consistent with Dr Wee's clinic note which stated that V experienced "gastric pain" and additionally, "phlegm".

80 Dr Wee's subsequent alleged actions were, however, nothing like any medical examination. Dr Wee allegedly slid his right hand under V's panties and started *stroking* V's vulva in an up and down motion. V testified that the "medical examination" lasted a "very long" time and Dr Wee stroked her vagina until it became "wet":

> Q: Okay. Do you know how long this stroking of your vagina area lasted from the time you were lying down to the time that he … started stroking your vagina to the time that he withdrew his hand? …
>
> A: I mean, it ***felt very long to me*** from the point where I was lying down to the point I was asked to get up.
>
> …
>
> Q: All right. So that rubbing must have caused a lot of friction, because he was very close to you? You had now sat up, his hands [*sic*] is in there and he was close to you. Was he rubbing hard? Was there a lot of friction in your vaginal area?
>
> A: I mean, ***I was feeling wet*** at that point when he was rubbing, so what do you mean by friction? I mean he was just continuous rubbing non-stop.
>
> …
>
> Q: … Can you explain what do you mean, wet?
>
> A: I mean ***I just felt my vagina was wet***.
>
> Q: How do you know?
>
> A: I mean this is just a natural – I mean, when he was rubbing, then I just felt like my ***body is producing some fluids***.
>
> [emphasis added in bold italics]

81 V also claimed that she felt as though Dr Wee was "*playing around* with [her] vagina". Taken together, we find it incredible that V could have thought

that this was part of a medical examination. We also find it unusual that after the alleged *rape*, V asked her mother about the circumstances in which a doctor could "check a patient's private parts" even though on that occasion she had complained of itching in her genital area. Yet, she evidently did not do so after Dr Wee had allegedly done just that on 25 November 2015, when her only complaints had been of gastric pain and phlegm. This is especially improbable considering the fact that Dr Wee had allegedly stroked her vagina for a considerable period of time to the point that she felt that he was "playing around" with her vagina. To the extent V claimed that she had consulted Dr Sheena on 5 December 2015 for reassurance that Dr Wee's actions were part of a medical examination, we reiterate doubt as to whether this was truly the case (see [64]–[65] above). In short, we reiterate our doubt that Dr Wee had even found a lump when: (a) this was not recorded in his notes; (b) V did not mention seeing Dr Wee, let alone his finding of a lump when she consulted Dr Sheena; and (c) the Polyclinic Record reflected that V consulted Dr Sheena for "pain over the left groin area for [three] days" and not because, as V claimed, of any suspected lump that had allegedly been discovered more than a week earlier. We also reject the Prosecution's suggestion that Dr Wee may have deliberately failed to record the lump to maintain the plausibility of later denying having examined V's groin. It is wholly implausible that he would have taken such steps to record his notes inaccurately because he feared she might report him and at the same time, wholly overlook the obvious fact that V could have screamed or protested right away in the clinic at the time of the alleged offence.

V's belated realisation that Dr Wee had outraged her modesty

82 Second, we are troubled by the significant delay of 36 days between the alleged event and it being reported. A delay in reporting in and of itself, is not a reason to disbelieve the complainant or her allegations against an accused

person (*PP v Ariffan* at [66]). Instead, the court should examine the explanations proffered by the complainant for that delay to determine whether this adversely impacts her credibility (*DT v PP* [2001] 2 SLR(R) 583 at [62]; *PP v Ariffan* at [67]).

83 V claimed that she realised, while waiting at KKH on 31 December 2015, that Dr Wee's medical examination five weeks earlier was in fact an outrage of her modesty because prior to that: (a) Dr Sheena had reassured her that there was indeed a lump found in her groin area; and (b) Dr Wee's actions during the alleged rape were similar to the alleged outrage of modesty:

> Q: Okay. Why did you only disclose that incident, the November incident, to the police in December 2015? Why not any earlier? Why not after you left Wee's Clinic on 25 November?
>
> A: Because on the 25th, previously I assumed it was medical examination, because it was subsequently ***supported by another doctor's* [*sic*] *who tell me ... that indeed there was a lump***, so there was nothing different.
>
> So when I was sitting at [KKH], when I think back I ***realise*** actually on the 30th when Dr Wee did his examination, he did ***almost the same thing like what he had done on the 25th***, from checking from the upper abdomen to the lower abdomen and then asking me is this okay? Is it painful? You know.
>
> [emphasis added in bold italics]

84 We do not find V's explanations persuasive or credible. In relation to her assertion that she was reassured that Dr Wee's actions were part of a medical examination after her consultation with Dr Sheena (see [83(a)] above), we have explained our doubts as to whether V had indeed consulted Dr Sheena for the lump allegedly found by Dr Wee. We also reiterate the lack of logical coherence in this assertion. As regards V's assertion that it suddenly dawned on her that the alleged sexual assaults were similar (see [83(b)] above), we have difficulty

with this because the alleged sexual assaults were in fact so dissimilar that the events of the alleged rape could not possibly have coloured her perception of what had transpired on 25 November 2015. In particular, we fail to see how Dr Wee's alleged act of inserting his penis into V's vagina while holding onto her legs could possibly have caused V to change her mind about the quality of whatever act Dr Wee had allegedly done on the earlier occasion.

85 We also find it odd that V made no mention of Dr Wee's alleged outrage of her modesty to Dr Tung during their consultation. V explained that she did not see any need to do so, but: (a) Dr Tung had been tasked to take V's history and to "establish [her] account that she had been forcibly sexually assaulted"; and (b) V had allegedly realised *just before* her consultation with Dr Tung that Dr Wee had molested her on 25 November 2015. It would have been natural for her then, to inform Dr Tung about the alleged outrage of modesty. Her failure to do so in these circumstances, while not fatal, casts further doubts on the veracity of her account of events.

Conclusion

86 Finally, V's credibility in relation to the Rape Charge inevitably has an impact on her credibility in relation to the OM Charge because her rationalisation that Dr Wee had outraged her modesty allegedly happened shortly after the alleged rape. We have already outlined why we have doubts over V's credibility in relation to the Rape Charge (see [63]–[72] above). Of particular relevance to the OM Charge is the inconsistency between V's evidence that she scheduled an appointment at the polyclinic in order to have the lump checked and the Polyclinic Record, which reflected otherwise. Compounded with V's incredible claim that she believed Dr Wee's actions on 25 November 2015 were part of a medical examination and the significant delay

in reporting the alleged outrage of modesty offence, we do not find V's evidence to be unusually convincing so as to sustain the conviction.

87 For these reasons, we overturn Dr Wee's conviction on the OM Charge and acquit him accordingly. We turn finally to consider whether the Judge had erred in law in convicting Dr Wee on the Digital Penetration Offence.

The Third Issue: The Digital Penetration Offence

When can a person be convicted of an offence that he was not charged with, pursuant to ss 138 and 139 of the CPC?

88 This case presents us with the opportunity to set out the law in relation to the conviction of an accused person, of an offence that he was not originally charged with (which we refer to as an "unframed charge") pursuant to ss 138 and 139 of the CPC. Before considering whether the Judge had erred in relying on these provisions, we set them out in full:

> **If it is doubtful what offence has been committed**
>
> **138.** If a single act or series of acts is such that it is doubtful which of several offences the provable facts will constitute, the accused may be charged with all or any of those offences and any number of the charges may be tried at once, or he may be charged in the alternative with any one of those offences.
>
> *Illustrations*

> (a) *A* is accused of an act that may amount to theft or receiving stolen property or criminal breach of trust or cheating. He may be charged with theft, receiving stolen property, criminal breach of trust and cheating, or he may be charged with having committed theft or receiving stolen property or criminal breach of trust or cheating.
>
> (b) *A* states on oath before the committing Magistrate that he saw *B* hit *C* with a club. Before the High Court, *A* states on oath that *B* never hit *C*. *A* may be charged in the alternative and convicted of intentionally giving false evidence although it cannot be proved which of these contradictory statements was false.
>
> **When a person charged with one offence can be convicted of another**
>
> **139.** If in the case mentioned in section 138 the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under that section, he may be convicted of the offence that he is shown to have committed although he was not charged with it
>
> *Illustration*
>
> *A* is charged with theft. In evidence it appears that he committed the offence of criminal breach of trust or of receiving stolen goods. He may be convicted of criminal breach of trust or of receiving stolen goods, as the case may be, although he was not charged with that offence.

89 The relevant power to convict an accused person of an unframed charge in this case is conferred by s 139 of the CPC. To invoke that power, the court must be satisfied that the case comes within the ambit of s 138 of the CPC. Following the decision in *Rex v Tay Thye Joo* [1993] MLJ 35 ("*Tay Thye Joo*"), the Judge held that s 138 of the CPC provides for the framing of alternative charges, even when it was doubtful what *facts* could be proved. He considered that there was no reason why Dr Wee could not have been charged for rape, and in the alternative, with sexual assault by digital penetration. The Judge went on to find, on the basis of Dr Wee's evidence, that he had sexually penetrated V's vagina with his fingers on 30 December 2015 and convicted him of the Digital Penetration Offence. Having surveyed the relevant authorities, we are satisfied

that the Judge erred in law in convicting Dr Wee of the Digital Penetration Offence under s 139 of the CPC.

90 In *Tay Thye Joo*, the accused person was tried on three charges of cheating and an alternative charge of abetment in respect of each charge of cheating. Terrell J held that the charges were appropriately framed, on the basis that s 172 of the Criminal Procedure Code (SS Ord No 121 of 1934) ("CPC 1934"), which was materially in similar terms as s 138 of the CPC, "means what it says, namely that it is doubtful what facts can be proved" and that the "exact relation of the accused to the offence in question has not been fully ascertained" (at [6]). In our judgment, this was not an entirely correct interpretation of that provision. We will shortly turn to the correct interpretation of ss 138 and 139 of the CPC, but it is sufficient to note here that s 172 of the CPC 1934 states that it applies if the acts were such that "it is doubtful which of ***several offences*** the facts which can be proved will amount to". The emphasis here, at least, is on the particular *offence* that would be constituted by the facts.

91 In the subsequent decision in *Lew Cheok Hin v Regina* [1956] 00 SLR 59 ("*Lew Cheok Hin*"), which concerned ss 165 and 166 of the Criminal Procedure Code (No 13 of 1955) ("CPC 1955"), which too were materially in similar terms as ss 138 and 139 of the CPC respectively, an attempt was made to limit the seeming width of these provisions. There, the accused bought jewellery from three different jewellers. He obtained them "on approval", meaning he was obliged to either buy or return them within a few days. When the time came, he purported to buy them by handing over cheques that were post-dated by two days and he falsely represented that he had the funds to pay for them. As it turned out, the cheques were dishonoured. The accused person was charged with cheating by dishonestly obtaining delivery of the jewellery by means of the cheques, even though he had in fact obtained such possession some

days prior to handing over the cheques. Taylor J correctly held that this was the one case the Prosecution could not advance. The accused had either obtained *possession* of the jewellery by falsely representing that he would take them on approval, or obtained something else, perhaps *consent to retain* the jewellery by delivery of the cheques. The accused person was first charged with the offence of cheating under s 420 of the Penal Code (Cap 20, 1936 Rev Ed) which appears to have been a more serious version of the offence of cheating. The trial judge convicted the accused person of the less serious offence of cheating under s 417 of the same statute on the basis that he had induced the victims to allow him to retain possession by promising to pay. He did so without framing an alternative charge. On appeal, Taylor J having noted the importance of ensuring that the accused must have sufficient knowledge to meet the charge, went on to say (at [17]):

> There are two main tests. First, the ***facts must be such that the unframed charge was available from the start*** and ***could have been framed and tried concurrently*** under section 165; secondly, the evidence must have been presented in such a way as to ***raise all the same issues of fact as would have been raised had the unframed charge been framed*** and trial claimed on it. Not only must the evidence for the prosecution be the same but the Court must be satisfied that the ***evidence for the defence would also have been the same***.
>
> [emphasis added in bold italics]

92 Taylor J held that the unframed charge of obtaining delivery by deceit could in principle have been available in that case. However, he also found on the facts that s 166 of the CPC 1955 could not be invoked because the evidence had not been fully elicited or ventilated. In our judgment, the requirement that the evidence must have been "presented in such a way as to raise all the issues of fact as would have been raised had the unframed charge been framed" is to be understood as part of an overarching constraint of fairness and justice, which

inheres in these provisions. This was a point the Judge himself recognised (at [144(b)]) of the GD. In our judgment, it would be intolerably unfair to the accused person to be confronted with one case theory advanced by the Prosecution and to meet that case only to find that the judge convicts him of an unframed charge involving a different offence resting on a wholly different and incompatible theory of the facts.

93 More recently, in *Garmaz s/o Pakhar v Public Prosecutor* [1995] 3 SLR(R) 453 ("*Garmaz*"), Yong Pung How CJ had the opportunity to set out the law in relation to s 172 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("CPC 1985") which again was materially in similar terms as s 138 of the CPC. Yong CJ held that s 172 of the CPC 1985 was intended to cover situations where it was unclear what precise *offence* had been committed. The crucial issue in his view was whether the acts in question were capable of being characterised differently as one or more of several offences (at [40]):

> The two illustrations to s 172 suggest that the section is really intended to cover situations where it is unclear precisely what offence has been committed. The marginal note confirms this. The key is to examine ***whether the "single act" or "series of acts" is of "such a nature" as to be capable of being characterised differently as one or more of "several offences"***. [emphasis added in bold italics]

94 In *Garmaz*, the first appellant was originally charged under the Prevention of Corruption Act (Cap 241, 1993 Rev Ed) ("PCA") with bribery, by accepting a gratification of $2,000 on 6 July 1991. The second appellant was originally charged under the PCA with abetting the first appellant in committing the offence of bribery. The Prosecution applied to *amend* the charges under s 172 of the CPC 1985, by pressing an alternative charge against each appellant. The only difference was that the alternative charges specified that the offence took place on 10 July 1991 and not 6 July 1991. Yong CJ held that this was

impermissible because the alleged act of corruption was not capable of being characterised differently in terms of the possible *offences* that could be pressed (at [41]–[42]). In short, Yong CJ went completely the other way to Terrell J in *Tay Thye Joo*. In our judgment, this also seems at least partially incorrect. If one examines illustration (b) to s 138 of the CPC, it is evident that the section may be availed of, at least, in certain circumstances where the only uncertainty is as to what the precise facts are, including, at least in some circumstances, uncertainty as to the precise date of the offence.

95 In *Goh Gek Seng v Public Prosecutor* [1996] 1 SLR(R) 952, the High Court was again concerned with ss 172 and 173 of the CPC 1985. There, groups of men were seen approaching the appellant on several occasions. They handed sums of money to the appellant who put these in his right pocket. The appellant was arrested and found in possession of $3,614 and a piece of paper with writing related to bets placed on horses in a race. The appellant was originally charged with loitering in a public place *with intent to bet on the result of horse races*, contrary to s 5(1) of the Betting Act (Cap 21, 1985 Rev Ed) ("Betting Act"). At the end of the Prosecution's case, it became evident that the accused was not just a bettor, but was really a bookmaker. However, Yong CJ held this made no difference (at [11]). He convicted the appellant of the offence of loitering *for the purpose of betting*, punishable under s 5(1) of the Betting Act. Yong CJ held that this case fell squarely within ss 172 and 173 of the CPC 1985 (at [15] and [18]). With all respect, it is not at all clear to us what the difference was between "loitering with intent to bet" and "loitering for the purpose of betting", and it is therefore not clear to us why there was any need at all to avail of the powers under ss 172 and 173 for the purposes of the amendment.

96 We briefly consider the Indian authorities, dealing with s 221 of the Indian Code of Criminal Procedure 1973 ("ICPC"), which is materially in

similar terms to s 138 of the CPC. In the decision of the Delhi High Court in *Jatinder Kumar & Ors vs State (Delhi Admn) Delhi* [1992] CRI LJ 1482 (affirmed in the decision of the Bombay High Court decision in *Santosh Kudtarkar vs State and others* [2016] GOA 142 at [14]), the High Court held that the relevant doubt contemplated in s 221 of the ICPC was confined to the nature of the *offence* and not of the *facts*. It was therefore held not to be permissible for the Prosecution to run the alternative cases of murder and abetment of suicide given that there was a doubt as to the facts which can be proved (at [5]):

> A bare reading of the aforesaid section shows that the doubt has to be as to the nature of the offence and not about the facts. If in a given case, on the facts which can be proved by the prosecution, it is doubtful which of the offence the said facts will constitute the framing of the charge in the alternative is permissible. S. 221 is not intended to be applied to a case where facts are in doubt … The offence under [murder] and [suicide] are distinct. The ingredients of the two provisions are altogether different. The prosecution has to take a stand whether it is a case of murder or suicide. The prosecution cannot say that the accused has murdered the deceased and if the deceased has committed suicide, the accused has abetted the commission of suicide. The framing of such charge is not permissible under S. 221 of [ICPC] as there is a doubt about the facts which can be proved …

97 In *Shamnsaheb M.Multtani vs State of Karnataka* [2001] 1 MLJ (Crl) 422, the Supreme Court of India further restricted the application of s 211 of the ICPC by holding that it avails only if the court was satisfied that there were doubts as to the possible offences, at the *time the original charge was framed* (at [12]). There, the appellant husband kicked his wife to death, in part because her family had failed to meet his demands for dowry. The appellant was charged with murder under s 300 of the Indian Penal Code 1860 ("IPC"). The High Court judge convicted the appellant on the unframed charge of dowry death under s 304B of the IPC. The Supreme Court of India held that s 221 of the ICPC was

not applicable because, at the time of the framing of the charge, there "was absolutely no scope for any doubt regarding the offence [of murder]" (at [12]).

98 It is evident that the case law in this regard has been bedevilled by a lack of clarity and consistency. In our judgment, it is important to consider first the text of s 138 of the CPC, which is the basis upon which the court may convict the accused on an unframed charge under s 139 of the CPC. We make a brief observation first. Section 139 may be invoked in situations where the accused person could have been charged under s 138. We defer for another occasion any decision on whether there are considerations affecting s 139 that may be different from those that affect s 138. It should be noted that the power under s 139 *may* be invoked in the circumstances mentioned in s 138. We assume, without making any decision, that there may be a difference since s 138 deals with a situation where the accused person is being charged, whereas s 139 deals with the somewhat more unusual situation where the conviction rests on an unframed charge. Inevitably, we must consider both provisions, but for the avoidance of doubt and unless otherwise indicated, our decision is confined to s 139 because that is the provision we are presently confronted with. Upon an examination of the text of s 138 and having regard to what has been said in some of the case law in respect of the corresponding provisions to ss 138 and 139, the following propositions as to when it may be invoked become evident:

(a) There must be a factual base consisting of an act or a series of acts. This is evident from the plain language of s 138.

(b) That factual base may or may not be the entirety of the known factual substratum. This much is evident from the words "it is *doubtful* which of several offences, the *provable* facts will constitute" [emphases added]. The two words we have italicised indicate, in our view, that there

will commonly be an area of factual uncertainty. That uncertainty pertains to just what facts can be proved; and because of that uncertainty, it will be doubtful which of a number of possible offences the provable facts will constitute. This is also evident from the illustrations to s 138. Illustration (a), as we demonstrate below, deals with the situation where there may be uncertainty over at least some aspects of the factual narrative, and/or uncertainty as to the particular offences the provable facts may constitute. Illustration (b) on the other hand, concerns a situation where the sole uncertainty is a factual one and this arises because all the relevant evidence resides in the accused person alone.

(c) We add that certainly where s 139 is concerned, for the reasons set out at [92] above, the court must be satisfied that there is no prejudice to the accused person, and in particular, that the same issues of fact were in fact raised and ventilated as would have been the case had the unframed charge been framed. The primary consideration in this regard, is that a conviction on an unframed charge must not cause any injustice, and it must not affect the presentation of the evidence in connection with the defence of the accused person had the unframed charge been framed in the first place (see [91] above; see also *Public Prosecutor v Koon Seng Construction Pte Ltd* [1996] 1 SLR(R) 112 at [21]. This was a case concerning the amendment of charges, but we are satisfied that the same point applies in relation to ss 138 and 139).

99 We develop our analysis by reference to the illustrations. Illustration (a) covers the situation where "A" is accused of an act that may amount to theft or receiving stolen property or criminal breach of trust. For the avoidance of doubt, we digress to clarify that the illustration does not stand for a general rule that whenever a person stands accused of the offence of theft, he can instead be

convicted of the offence of criminal breach of trust. On the contrary, that will depend on whether the particular case comes within the ambit of s 138 of the CPC in the way we have explained it here. With that reservation, we return to the example that is contained in illustration (a).

100 It should be noted that the factual elements underlying the offences of theft and of criminal breach of trust are not identical. The offence of theft in s 378 of the Penal Code rests on the dishonest *taking* of property out of the possession of another. The offence of criminal breach of trust under s 405 of the Penal Code, on the other hand, does not entail the taking of property out of possession of another but instead rests on property having been entrusted with the offender who then dishonestly *misappropriates*, *converts*, *uses* or *disposes* that property in an unlawful manner. In the latter instance, the person entitled to the property may have *willingly* parted with the property in the first place, thus firmly and plainly taking it out of the remit of the offence of theft. As for the offence of receiving stolen property under s 411 of the Penal Code, that arises when someone other than accused person has stolen the property. Yet s 138 of the CPC may apply in these factually disparate situations with quite different legal consequences. Turning to illustration (b), as we have noted above, it is evident that this concerns a situation where the only uncertainty is one of fact. What then are the limits of the section?

101 To address this, it is helpful to consider the setting in which these provisions are to be found in the CPC. They are part of a raft of provisions that deal with charges. Section 123 sets out the general requirement that every charge must state the particular offence with which the accused person is charged. The rationale for the rule was stated as follows in *Jagar Singh* v *Public Prosecutor* [1936] MLJ 92, citing with approval the following *dicta* in *R v*

Mohamed Humayoon Shah [1874] 21 WR Cr 72 at 82 (see also, *Mui Jia Jun v Public Prosecutor* [2018] 2 SLR 1087 ("*Mui Jia Jun*") at [1]):

> The charge I take to be first, a notice to the prisoner of the matter whereof he is accused, and it must convey to him with sufficient clearness and certainty that which the prosecution intends to prove against him and of which he will have to clear himself; second, it is an information to the Court which is to try the accused, of the matters to which evidence is to be directed.

102 In line with this, ss 124 and 125 set out the sort of particulars which must be given to the accused person. Then at ss 128 – 131, there exist a series of provisions that pertain to the court's power to substitute the charge either by amending it or framing a new charge. It is not necessary for us to dwell on this here because this was canvassed as an option that the Judge could consider but he expressly chose *not* to go down the path of altering the charge or framing a new charge. This is significant because leaving aside the question of any limits that may apply in that context, those provisions set out further safeguards that seek, among other things, to ensure there is no prejudice to the Defence, or for that matter, to the Prosecution.

103 Also in line with the general rule of ensuring that the accused person has clear notice of the case that he must meet, s 132 lays down another general rule: that there must be a separate charge and a separate trial for each distinct offence. Despite this, it is plain that pragmatic considerations make it impossible to uphold this as a strict rule and so in the following sections, there are a number of exceptions. We highlight just a few. The accused person may be charged and tried on two or more offences at a single trial if:

(a) under s 133, these all form or are part of a series of offences of the same or a similar character;

(b) under s 134, these involve a series of acts that are connected so as to form the same transaction; and

(c) under s 135, the acts in question constitute an offence falling within two or more separate provisions by which offences are defined or punishable.

104 Then ss 138 through 141 concern the narrow situation where the court may convict the accused person on a charge that has not been framed. We will return to ss 138 and 139 momentarily, these being the provisions under which the Judge purported to act. But we first deal briefly with:

(a) s 140, which permits the court to convict an accused person of an attempt or of abetting the commission of the offence with which he has been charged, even if the attempt or abetment was not the subject of a separate charge; and

(b) s 141, which permits the court to convict the accused person of a lesser offence, meaning either that only certain particulars of the principal offence have been proved and these are sufficient to sustain the lesser charge, or if the facts proved reduce the offence charged to a lesser offence.

105 The general rules exist to safeguard the fair process applicable to the accused person. It is therefore unsurprising that these narrow exceptions, which depart from the general rules, have to be approached with caution because it is a matter of paramount importance that the accused person not be prejudiced whenever a court considers convicting him or her on an unframed or alternative charge (see *Mui Jia Jun* at [91]).

106 In that light, we return to our analysis of s 138. We first touch on the significance of illustration (b). In our judgment, that cannot stand for the proposition that a court may convict an accused person of an unframed charge *whenever* the facts are uncertain. Were it so, it would do considerable damage to the scheme of the various provisions that we have outlined above, all of which exist to ensure fairness to the accused person. In particular, it would make nonsense of the need for provisions such as ss 140 and 141 as well as the safeguards set out in ss 128 – 131 when a court considers whether to frame a new or amended charge. In our judgment, illustration (b) avails in the limited situation where, on the basis of the acts or statements of the accused person in and of themselves, it is evident that an offence has been committed, but some factual detail of it is unclear. The resolution of that uncertainty depends on a court's eventual ruling upon which of the various alternative factual narratives propounded by the accused person is the correct one. This makes sense because in that setting, there is no possible prejudice to the accused person.

107 We turn then to the rest of s 138, in particular, with reference to illustration (a). As we have noted above, this will typically arise where there is an area of factual uncertainty, which in turn gives rise to an area of legal uncertainty in terms of the possible offences this might give rise to.

108 Suppose that the relevant act or series of acts are these:

(a) A is entitled to certain property;

(b) B has sold that property to C without A's knowledge or permission and contrary to A's wishes and has then retained the proceeds of sale.

109 The relevant factual base is that property belonging to A has come into the possession of C through the act of B, without A's authorisation. What is not yet known is *how* the property came to be in B's possession. *This* is the paradigm situation covered by s 138 of the CPC. The Prosecution in this example may, pursuant to s 138 of the CPC, press charges against B for theft (on the premise he might have taken the property from A), or criminal breach of trust (on the premise that he might have been entrusted with the property with A's consent for a purpose but then misappropriated it to his own use), or with receiving stolen property (on the premise that someone else may have stolen the property and then handed it to B). In each of these situations, the core allegation against B remains the same: he has dealt with A's property in a way that is unauthorised and dishonest. That is the core factual substratum of the case. It is the details of how B came to be in possession of the property that remain uncertain, and consequently also the particular offence that may be constituted by the provable facts.

110 What follows from this analysis is that this is not a provision that may be invoked in a mechanistic way, without regard to whether in the particular facts before the court it may properly be done. This is unsurprising because, as we have said, ss 138 and 139 of the CPC are exceptions to the general rule that there shall be a separate charge and trial for every distinct offence of which a person is accused. And, as we have also said, this in turn rests on a rule of fairness: that it must be clear to the accused person exactly what is alleged against him and what the case that he must meet is. This is also an essential safeguard to ensure that the Prosecution does not run shifting or inconsistent cases against the accused person.

111 In this context, there is in our judgment, a constraint of particular importance that limits the circumstances in which, s 139 at least, may be

invoked. We reiterate that we confine the present observations to s 139 because that is the particular situation we are confronted with, in that Dr Wee was faced not with alternative charges, but was convicted on an *unframed* charge. That constraint is that where the Prosecution mounts a positive case against the accused person in respect of a factual element in the primary offence with which he has been charged ("the framed charge"), he cannot be convicted on an unframed charge, one or more key elements of which is or are fundamentally incompatible with the key factual elements of the framed charge.

112 We return here to the example of theft and criminal breach of trust. Suppose that:

(a) The accused person, B, is charged with theft of A's property;

(b) The Prosecution runs its case on the footing that B took the property from A without A's consent. A gives evidence and testifies that he never gave the property to B; and

(c) B's defence on the other hand, is that A *gave* the property to B.

113 In that situation, in the event the court rejected A's evidence and the Prosecution's case, it would *not* be permissible to invoke s 139 to convict B on an unframed charge of criminal breach of trust. This follows from the fact that the Prosecution cannot be permitted to seek a conviction on a factual premise that it has never advanced, and which it has in fact *denied* in the case it has mounted against the accused person. This might perhaps be seen as part of a wider duty not to run inconsistent cases that amount to an abuse of process but we leave that for fuller consideration on another occasion.

114 The short point here is that s 139 is an exception to the general rule that there must be a separate charge and trial for each offence brought against the accused person. The rationale for that general rule is among other things, to: (a) ensure that the evidence in support of each limb and element of each offence is sufficiently led by the Prosecution; (b) that a proper assessment is made of whether sufficient evidence has been led to warrant calling for the defence to be entered; (c) to ensure that the accused is not overwhelmed by having to defend several unconnected charges (*Lim Chuan Huat and another v Public Prosecutor* [2002] 1 SLR(R) 1 at [14]); and (d) ultimately, to ensure that the accused knows what case he is required to meet. These are critical safeguards embedded within the criminal justice process and there is no basis for thinking that either ss 138 or 139 in any way obviates the need to uphold these.

115 Hence, it follows from what we have said that in order to invoke s 139 in particular, it will be necessary:

(a) To ascertain that the case at hand does in principle fall within those provisions. This will necessitate consideration of the following factors:

(i) what the relevant factual base was;

(ii) what the areas of factual uncertainty were;

(iii) what were the potential offences that could be constituted by the provable facts as a result of the factual uncertainties; and

(iv) whether the unframed charge falls within those potential offences; and

(b) To ensure that the accused person would not be prejudiced in any way by invoking s 139 and convicting him on the unframed charge. This

> would necessitate consideration of the matters set out at [92] and at [109]–[114] above. Because this can be a nuanced exercise, it will often be advisable for a court considering the invocation of its power under s 139 to hear the parties before exercising it.

116 We emphasise that even where it is determined that s 139 of the CPC may be invoked, this does not automatically result in a conviction of the accused person on the unframed charge. The burden remains on the Prosecution to establish the facts on the basis of which the court may conclude that the accused is guilty of the unframed charged beyond a reasonable doubt. It is essential that the court is mindful of this. In that light, we turn to the facts.

Application to the facts

117 It is clear that the present case does not fall within the ambit of s 139 of the CPC. The factual narrative relied upon by the Prosecution is, and has always been, that Dr Wee penetrated V's vagina with his penis. At the trial, V denied that Dr Wee had penetrated her vagina with his finger and repeatedly *insisted* that she *saw* his penis in her vagina:

> Q: He then inserted his right index finger into your vagina?
>
> A: ***Disagree.*** He inserts something into my vagina which I only saw it after he bring me up which was his penis.
>
> …
>
> Q: I am instructed that he then inserted his right index and middle fingers into your vagina?
>
> A: ***Disagree***. His hands – both his hands were supporting my legs.
>
> Q: I put to you Dr Wee never inserted his penis into the vagina?
>
> A: ***Disagree. What I saw is [sic] Dr Wee's penis in my vagina, into my vagina***.

> …
>
> Q: … And whilst [Dr Wee's] two fingers was [*sic*] inside your vagina, onto your right side of the vagina, with his right fingers inside the vagina and the pelvic area, and left hand pressing down on your right pelvic area, he asked you if there was any pain or discomfort and you said "No"?
>
> A: Disagree. There was no such examination being done. ***His hands was* [*sic*] *always on my legs***.
>
> …
>
> Q: Well, I put to you all your account of the penis or seeing the penis is a complete fabrication and a figment of your imagination?
>
> A: Disagree. What I saw is [*sic*] ***really his penis into my vagina*** without my consent
>
> [emphasis added in bold italics]

118 The Prosecution to its credit, accepted in its submissions, though with more hesitation at the hearing before us, that the Judge had erred in relying on ss 138 and 139 of the CPC. It never ran a case on digital penetration and in fact, this was not one of the "provable facts" as far as the Prosecution was concerned given the nature of V's evidence and its mutually exclusive nature when compared to Dr Wee's evidence, as noted at [63] above. In short, the Digital Penetration Offence rested on a version of the facts that was fundamentally incompatible with the case mounted by the Prosecution and with the evidence of the complainant, V. Moreover, this was not a case where there was factual *uncertainty* in the Prosecution's case. Its case was that digital penetration never took place when V visited Dr Wee on the second occasion.

(a) The Prosecution's written submissions dated 2 March 2020 in this appeal ("Prosecution's Submissions") at [199] stated as follows: "The Prosecution could *not* have framed [the Digital Penetration Offence] in the alternative to the Rape Charge and have them tried simultaneously, because the facts supporting a charge of rape (penile

penetration) would have been mutually exclusive with the facts supporting a charge of … (digital penetration)" [emphasis in original].

(b) At [72] of the Prosecution's Submissions, the Prosecution stated: "A *central and unequivocal* part of the complainant's evidence was that the accused had penetrated her vagina with his *penis*, **not his fingers or anything else**" [original emphasis in italics; emphasis added in bold].

(c) At [74] of the Prosecution's Submissions, the Prosecution said: "There is absolutely no room for asserting that the complainant could have mistaken [Dr Wee's] fingers for his penis".

119 On the case that the Prosecution ran in respect of the Rape Charge, the Digital Penetration Offence was simply not within the range of possible offences that Dr Wee could have been convicted of. Consistent with this, the Prosecution accepts that it was not possible to have framed these charges in the alternative. The Defence agrees with the Prosecution, and we agree. That should have been and in fact is the end of the matter. If the Prosecution cannot run an alternative case, which is what s 138 is concerned with, we fail to see how s 139 can even arise.

120 Nevertheless, notwithstanding the Prosecution's concession to these points, the Prosecution submits that Dr Wee had suffered no prejudice and contends on this basis that the conviction on the Digital Penetration Offence should not be disturbed. In summary, the Prosecution argues that the Digital Penetration Offence emerged from Dr Wee's own testimony at trial as his defence to the Rape Charge. He had every opportunity at the trial to adduce evidence in support of this defence. He was cross-examined extensively about the implausibility of his account, and his defence to both the Digital Penetration

Offence and the Rape Charge would have been the same, namely, that he conducted an internal pelvic examination as he suspected PID.

121 In contrast, the Defence submits that Dr Wee's conviction on the Digital Penetration Offence was highly prejudicial. In summary, it submits that the Judge did not raise the possibility that he would exercise his power under s 139 of the CPC, and did not afford the Defence the opportunity to call or recall any witnesses. Further, Dr Wee might have conducted his defence differently if he had actually been charged with the Digital Penetration Offence.

122 We accept the Defence's submissions. First, we reiterate the point made at [98(c)] and at [115(b)] above, which is that the question of prejudice is a second order concern that does not even arise if the pre-requisites for invoking s 139 do not exist. But, aside from this, in our judgment, Dr Wee's conviction on the Digital Penetration Offence was highly prejudicial for any one of a number of reasons, and we are unable to accept the Prosecution's submissions to the contrary. First and most fundamentally, according to V and the case ran by the Prosecution, digital penetration did not take place. Indeed, on V's account of the events, digital penetration *could not have taken place*, since at all times, Dr Wee was using both his hands to support different parts of V's legs. Having taken and maintained this position, we are unable to see how the Prosecution could possibly say there was no prejudice to Dr Wee in being convicted on a case that according to the Prosecution and its principal witness, the complainant V, had never happened.

123 Secondly, to allow the conviction to stand on the basis that this is what Dr Wee said had happened, wholly ignores the critical fact that he had said this in response to an allegation of penile-vaginal penetration, which the Judge found had not happened. It also ignores the fact that Dr Wee had said that the

digital penetration had taken place in the context of a medical examination, and neither V nor any other Prosecution witness was in a position to challenge that specific factual averment because her position was that digital penetration had never taken place. Further, it also ignores all the crucial safeguards we have highlighted at [114] above such as ensuring that the accused person knows the case he must meet, ensuring there is sufficient evidence to call for the defence to be entered and ensuring that the Prosecution meets its burden of proof. In respect of the Digital Penetration Offence, the Prosecution did not lead any evidence on this and Dr Wee's defence to a notional charge of digital penetration could not even have been called because the Prosecution's position was that digital penetration never happened. Dr Tung did testify as to the appropriateness and propriety of Dr Wee's conduct of the internal pelvic examination. However, the Prosecution led such evidence to support its contention that Dr Wee had not actually performed such an examination (see [41]), rather than to sustain a conviction on the Digital Penetration Offence.

124 Further, had Dr Wee been charged with the Digital Penetration Offence, it is clear that he would have conducted his defence differently. We accept that Dr Wee had been cross-examined extensively in relation to whether he had inserted his fingers into V's vagina for a medical purpose and there was also expert evidence from Dr Tung on this issue. But Dr Wee focused his defence on showing that penile-vaginal penetration did not happen and could not have happened given his erectile function, all as part of his defence to the *Rape Charge*. Having not been charged with the Digital Penetration Offence, Dr Wee could not have been expected to adduce expert evidence regarding the appropriateness of the digital examination and propriety with which it was conducted. Notably, he attempts in this appeal to adduce the expert report of Dr Ching Kwok Choy ("Dr Ching") for this specific purpose. We note this to

illustrate the dangers that inhere in adopting a superficial analysis that there is no prejudice to the accused person in convicting him of an unframed charge, because at some level, it is derived from evidence he himself gave in defending a wholly different charge. It is an obvious point that we make yet again in this judgment because it has perhaps been overlooked here, that criminal procedures are there for a very good reason: to ensure fairness in the criminal process.

125 For these reasons, we are satisfied that Dr Wee had been substantially prejudiced by his conviction on the Digital Penetration Offence. We therefore allow his appeal against his conviction on the Digital Penetration Offence and acquit him of this. In these circumstances, it is not necessary for us to deal with Dr Wee's application for leave to adduce Dr Ching's expert report as further evidence and we make no order in this regard.

General duty of the Prosecution

The Prosecution's disclosure obligations

126 Before concluding this judgment, we take this opportunity to reiterate the Prosecution's overarching duty of fairness. The Prosecution owes a duty to the court and the public to ensure that only the guilty are convicted. Arising from this, the Prosecution is obliged to disclose relevant material that can assist the court in its determination of the truth. This extends to disclosure of certain documentary evidence (*Kadar* ([51] *supra*) at [113]):

> … [T]he Prosecution must disclose to the Defence material which takes the form of:
>
> (a) any unused material that is likely to be admissible and that might reasonably be regarded as credible and relevant to the guilt or innocence of [Dr Wee]; and
>
> (b) any unused material that is likely to be inadmissible, but would provide a real (not fanciful)

> chance of pursuing a line of inquiry that leads to material that is likely to be admissible and that might reasonably be regarded as credible and relevant to the guilt or innocence of [Dr Wee].
>
> This will not include material which is neutral or adverse to [Dr Wee] – it only includes material that tends to undermine the Prosecution's case or strengthen the Defence's case. …

127 Under *Kadar*, the Prosecution remains entitled to internally assess and evaluate the unused material in its possession before disclosing it to the Defence or the court (*Soh Guan Cheow Anthony v Public Prosecutor and another appeal* [2017] 3 SLR 147 at [98]). Generally, all disclosable materials should be given to the Defence *before* the beginning of the trial (*Kadar* at [113] and [121]).

128 We focus in this case on the Prosecution's delayed disclosure of the Second Doppler Report and the Polyclinic Record, which in our view, fell squarely within its *Kadar* obligations.

The Second Doppler Report

129 The Prosecution first disclosed the Second Doppler Report to the Defence on 21 September 2018, *after* Dr Wee had been called to enter his defence (see [31] above). The Judge held that the Second Doppler Report was caught by the *Kadar* obligation because it was relevant to the innocence of the accused. However, the Judge concluded that the Prosecution's late disclosure was not prejudicial to Dr Wee because he managed to undergo the haemodynamic test and the Judge in any event found that Dr Wee did suffer from ED in December 2015.

130 On appeal, the Defence submits that the delayed disclosure of the Second Doppler Report was prejudicial because it would otherwise have been in a position to make a robust submission of "no case to answer" at the close of

the Prosecution's Case. In addition, the failure to disclose the Second Doppler Report inevitably affected the way the Defence was run. For the reasons we have outlined at [51] above, the Defence was bound to focus on its case that penile-vaginal penetration *did* not occur at least somewhat at the expense of its further case that it *could not* have occurred. The Prosecution, on the other hand, submits that in the light of Dr Wee's denial that he had ED in his Further Statement, the Second Doppler Report only became relevant when it was clear that he had intended to rely on ED as a defence at the trial. Further, the Prosecution submits that even if the Second Doppler Report ought to have been disclosed at an earlier stage, Dr Wee suffered no prejudice because: (a) he did rely on the Second Doppler Report at the trial; (b) the late disclosure did not impede his ability to give evidence on his erectile function; and (c) the Judge would in any event have called on Dr Wee to enter his defence.

131 In our judgment, the Second Doppler Report is squarely caught by the *Kadar* obligation. It should be noted that this came about at the request of the police (see [31] above), and it was plainly helpful to the Defence because, it was contrary to and irreconcilable with the findings in the First Doppler Report and to that extent, it assisted the Defence in establishing the improbability of penile penetration. We cannot see how it could reasonably have been thought that the Second Doppler Report was not relevant to Dr Wee. *The point is especially weighty because accused persons and their counsel (not to mention the court) can and do function on the premise that the Prosecution will comply with its disclosure obligations*. In the premises, when an accused person knows a test has been done, and the Prosecution does not disclose the test report, it is entirely plausible that the inference drawn will be that the report is either immaterial to the Defence or worse, prejudicial, and this then becomes part of the calculus upon which the defence strategy is developed. In *Nabill v PP* ([6] *supra*) at [44],

reference was made to the candid admission of the Prosecution that "[t]he Prosecution may not, despite acting in good faith, fully appreciate the defence the accused is running or intends to run". This case illustrates that this does sometimes happen. In such circumstances, if there was any doubt as to whether a particular piece of evidence should be disclosed, the Prosecution is obliged to err on the side of disclosure because the consequences of non-disclosure can be severe (*Nabill v PP* at [47]–[48]; *Kadar* at [120]). In this case, notwithstanding Dr Wee's denial of ED in his Further Statement, he claimed in his Cautioned Statement, *well before the trial*, that he did have ED and therefore could not have committed the offence of rape (see [49] above). At that point, any possible doubt as to its relevance would have vanished and the Second Doppler Report, which went towards establishing that Dr Wee had a fairly advanced state of ED, became critically relevant to his innocence and subject to the *Kadar* disclosure obligation.

132 Furthermore, the Prosecution's delayed disclosure of the Second Doppler Report did prejudice Dr Wee. Leaving aside the question of whether he would have succeeded in a submission of "no case to answer", which we regard as speculative, it was prejudicial because Dr Wee would have assumed that the findings in the Second Doppler Report were consistent with the First Doppler Report when this ***was in fact not the case***. As we have noted above, this would have impacted the conduct of his defence at the trial, because he was not in a position to make an informed choice *before* the trial, as to whether he should pursue the state of his erectile function as an alternative defence with greater force. We reiterate that these disclosure obligations are there to ensure that the Defence is apprised of all the relevant information *before* the trial such that it may develop a defence strategy that will be best suited to assist the court in arriving at the truth.

The Polyclinic Record

133 We turn to the Polyclinic Record, which the Prosecution obtained on 20 April 2018 and disclosed to the Defence on 7 May 2018. While that was just 17 days later, critically, it was disclosed *after* V had completed her evidence, including her cross-examination (see [11] above). The Defence submits that because the Polyclinic Record was inconsistent with V's evidence at the trial, its late disclosure prejudiced and deprived the Defence of a significant line of cross-examination against V. As against this, the Prosecution submits that the Defence was not prejudiced because: (a) the Polyclinic Record was not directly related to the alleged sexual assaults; (b) it was disclosed three days before Dr Wee first took the stand; and (c) it was open for the Defence to have recalled V to question her about the Polyclinic Record.

134 We are satisfied that the Polyclinic Record was similarly caught by the *Kadar* obligations. As we have mentioned at [64]–[65] above, the Polyclinic Record was on its face *inconsistent* with V's evidence that she scheduled an appointment at the polyclinic for the specific purpose of having the lump checked after this had allegedly been identified by Dr Wee. This had a potentially adverse impact on V's credibility, which is a matter of crucial importance in allegations of sexual assaults without much or any corroborative evidence.

135 Having said that, we think that any prejudice to the Defence was limited by the fact that it was open to the Defence to apply for V to be recalled under s 283(1) of the CPC so that she could be questioned on the Polyclinic Record. While this was not optimal and might have delayed matters, we do not think it was altogether unviable.

136 Prosecutors are more than advocates and solicitors. They are "ministers of justice" assisting in the administration of justice (see *R v Banks* [1916] 2 KB 621 at 623). As a "minister of justice", the duty of the prosecutor is to assist the court to arrive at the correct decision. It is neither the prosecutor's duty to secure a conviction at all costs nor to "timorously discontinue proceedings the instant some weakness is found in their case" (see *Kadar* at [109]).

137 A prosecutor must always act in the public interest and it is generally unnecessary for the Prosecution to adopt a strictly adversarial position in criminal proceedings (see *Nabill v PP* at [37]). Steven Chong JA speaking extra-judicially to Legal Service Officers and Assistant Public Prosecutors on 10 November 2011 put it in these terms:

> The accused, the Court and the community are entitled to expect that in performing his function in presenting the case against an accused person, the Prosecutor will act with fairness and detachment ***with the sole and unadulterated objective to establish the whole truth in accordance with the law***. … The role of the Prosecutor therefore excludes any notion of winning or losing a case. … His role is to ***seek and achieve justice, and not merely to convict***. The role is to be discharged with an ingrained sense of dignity and integrity. [emphasis added in bold italics]

Conclusion

138 In all the circumstances, we dismiss the Prosecution's appeal against Dr Wee's acquittal on the Rape Charge. We allow Dr Wee's appeal on the OM Charge and the Digital Penetration Offence and acquit him of these convictions.

Sundaresh Menon Chief Justice	Steven Chong Judge of Appeal	Belinda Ang Saw Ean Judge

Lee Lit Cheng, Chew Xin Ying and Sarah Siaw (Attorney-General's Chambers) for the appellant in CCA 15 and respondent in CCA 16 and CM 2;
Eugene Singarajah Thuraisingam, Chooi Jing Yen, Syazana Binte Yahya and Johannes Hadi (Eugene Thuraisingam LLP) for the respondent in CCA 15 and appellant/applicant in CCA 16 and CM 2.