IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 296

Magistrate's Appeal No 9169/2017/01

Between

GBR

… *Appellant*

And

Public Prosecutor

… *Respondent*

Magistrate's Appeal No 9169/2017/02

Between

Public Prosecutor

… *Appellant*

And

GBR

… *Respondent*

GROUNDS OF DECISION

[Criminal Law] — [Offences] — [Outrage of Modesty]

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Introduction

1 The appellant, GBR, is a 45-year-old male Singaporean who faced the following charge under s 354(2) of the Penal Code (Cap 224, 2008 Rev Ed) for aggravated outrage of modesty of his 13-year-old niece ("the victim"):

> You…are charged that you on 10 February 2014, sometime in the afternoon, at [xxx] Singapore, did use criminal force on one [xxx] (DOB: 28 August 2000, 13 years old at the time), *to wit*, by:
>
> (a) fondling both of her breasts;
>
> (b) touching her vagina area; and
>
> (c) licking her vagina area
>
> intending to outrage the modesty of the said [xxx], and you have thereby committed an offence punishable under Section 354(2) of the Penal Code (2008 Rev Ed).

2 At the end of a trial, the District Judge convicted the appellant of the charge and sentenced him to 21 months' imprisonment and four strokes of the cane. The appellant appealed against both his conviction and sentence. The Prosecution cross-appealed against the sentence imposed.

3 After hearing the parties, I dismissed the appellant's appeals against his conviction and sentence. I allowed the Prosecution's cross-appeal against sentence and increased the appellant's imprisonment term to 25 months. I ordered that the caning imposed remain at four strokes. I now provide full grounds for my decision.

Undisputed facts

4 While the acts constituting the offence were contested, the events before and after the alleged offence were largely undisputed and have been set out in the District Judge's Grounds of Decision recorded at *Public Prosecutor v GBR* [2017] SGDC 169 ("the GD") at [5]–[10]. I shall outline these facts in brief.

5 The appellant is the victim's uncle. He is married to the victim's maternal aunt (*ie*, her mother's sister).The day before the alleged offence, the victim's parents were embroiled in a domestic dispute. The appellant and his wife went to the victim's residence that evening to try to mediate the dispute and did so until the wee hours of the morning. The next day, on 10 February 2014, the victim did not go to school. That afternoon, the appellant brought the victim to his flat on the pretext that it would be more conducive for her to do her schoolwork there. The appellant was alone with the victim as his wife had gone to work. The offence was alleged to have taken place on the sofa in the living room of the appellant's flat during that period of time.

6 The appellant subsequently left the flat to pick up the victim's younger brother and brought him back to his flat to join the victim. Upon her brother's arrival at the flat, the victim requested to go down to the playground.

7 About three days after the offence was allegedly committed, on the evening of 13 February 2014, the appellant brought the victim to a playground near her house and spoke to her alone. On 14 February 2014, the victim lodged a police report in relation to the alleged offence on 10 February 2014.

The parties' cases below

8 The Prosecution called nine witnesses, including the victim, her mother, her friends, her teacher, a child psychiatrist and police officers. The Prosecution's case was primarily based on the victim's testimony as well as the corroborating evidence of the victim's friends and teacher, whom she had confided in after the alleged offence. According to the victim, she was seated next to the appellant on the sofa in the living room of the latter's flat at the time of the offence. The appellant asked her whether he could touch her and she said no. She could sense that the appellant was angry and she became afraid. Despite her refusal, the appellant proceeded to insert his hands under her T-shirt and bra and fondled her breasts for what felt like five minutes. He then removed her shorts and panties before touching and licking her vagina for another five minutes. The acts only stopped when the appellant's mobile phone rang and he went into his bedroom to receive the call.

9 The Prosecution contended that the victim's evidence was consistent with her act of blocking the appellant's contact number on her mobile phone immediately after the incident, the appellant's insistence on speaking to the victim alone on 13 February 2014 (during which, according to the victim, the appellant indicated he would commit similar acts over the coming weekend), as

well as a report by Dr Parvathy Pathy ("Dr Pathy") of the Child Guidance Clinic, which stated that the victim's reported distress and acts of self-harm after the incident were symptomatic of post-traumatic stress disorder.

10 With regard to sentence, the Prosecution highlighted the various aggravating factors in the present case and sought a sentence of 27 months' imprisonment and four strokes of the cane. The Prosecution drew comparisons with the case of *Public Prosecutor v Azhar Bin Mohamed* [2015] SGDC 116 ("*Azhar*"), in which the accused was sentenced to 18 months' imprisonment for each charge of aggravated outrage of modesty under s 354(2) of the Penal Code. The Prosecution argued that the present case was more serious than *Azhar* and deserved a sentence that was higher than that imposed in *Azhar*.

11 The appellant testified in his defence and also called his wife as a defence witness. His case was essentially a bare denial. He emphasised that he treated the victim like his own daughter and could not have committed the offence. He insinuated that the victim had been subject to undesirable influences in her school, and had purported motives for making the false allegations against him. For example, he said that the victim could have been angry that the appellant had sided with the victim's father during the domestic dispute between her parents. He also pointed out that the victim did not react like a typical victim of a sexual crime during and after the alleged offence.

The District Judge's decision

12 After setting out the evidence of the Prosecution and defence witnesses, the District Judge noted that the Prosecution's case rested largely on the testimony of the victim (at [56] of the GD). He proceeded to assess the veracity, reliability and credibility of the victim's evidence (at [65] of the GD). He concluded that the victim appeared to be a "mature, sensible and reasonable

girl" who was able to provide a coherent account of events. She was largely consistent in her accusations and allegations against the accused (at [66] of the GD). The District Judge added that he had observed the victim's demeanour when she gave evidence and found her to be "entirely truthful" (at [79] of the GD) and her evidence to be "absolutely and unusually convincing and compelling". He stated that the victim had "testified to the best of her memory and in an internally consistent manner" and her evidence of the events and alleged acts of molest was "both internally consistent and externally consistent with her immediate behaviour and response and the conduct of the [appellant] in the days following the offence" (at [80] of the GD).

13 In particular, the District Judge noted that there was no "list of checkboxes" of expected or known behaviour that the victim was supposed to exhibit after the alleged offence (at [68] of the GD). In the present case, the victim was an "innocent and sexually inexperienced 13 year old student" who was completely unprepared and in a state of shock when the offence occurred; she did not stop the appellant as she was afraid of him (at [69] and [70] of the GD). The District Judge also found that the victim's complaint was corroborated by her subsequent conduct of telling her friends, her teacher, her parents and the police, the blocking of the appellant's number on her mobile phone, the appellant taking the victim out and speaking to her alone, and the victim's distress and acts of self-harm (at [82] of the GD). The evidence of the other Prosecution witnesses was also substantially consistent (at [83] of the GD). The District Judge observed that the victim had no motive to lie and "stood to gain nothing but in fact lost much" in making the allegations against the appellant (at [103] of the GD).

14 On the other hand, the District Judge did not believe the appellant's defence (at [91] of the GD). He noted that the appellant had failed to put various

material aspects of his defence to the victim, thus demonstrating that they were "unmeritorious afterthoughts" (at [92]–[93] of the GD). Further, the appellant's credit was impeached by the Prosecution in respect of some material aspects of his evidence (at [94] of the GD).

15 With regard to sentence, the District Judge took into account the aggravating factors of (a) an abuse of position of trust by the appellant; (b) the appellant's intrusion of the victim's private parts; (c) the sustained duration of the offence; (d) the presence of premeditation; (e) the appellant intimating to the victim that he would perform further acts of molest in the subsequent days; and (f) the adverse psychological effects on the victim. He noted that the appellant did not plead guilty and would not have been entitled to any sentencing discount (at [112]–[114] of the GD). There were no real mitigating factors in the present case (at [122] of the GD). However, the District Judge did not agree with the Prosecution's submission that the facts of the present case were more aggravated than that in *Azhar*. In the latter case, the victim was much younger and was subjected to more counts of molest. The accused had also caused hurt to the victim. Thus, he disagreed that the sentence for the present case must be *significantly* higher than the 18 months' imprisonment given in *Azhar* (at [118] of the GD). He duly imposed a sentence of 21 months' imprisonment and four strokes of the cane on the appellant.

The arguments on appeal

16 The appellant's main contention on his appeal against conviction was that the victim's evidence was not "unusually convincing". He reiterated that her behaviour during and after the offence was atypical of a victim of sexual assault. For example, she did not scream, shout or cry during the alleged sexual acts, and did not call for help immediately following the incident. He pointed

out material inconsistencies in relation to some aspects of the victim's evidence and maintained that she had a motive to lie. With regard to sentence, he contended that it was manifestly excessive for a single charge. Should the conviction be upheld, he sought a reduced sentence of 12 months' imprisonment and two strokes of the cane.

17 In the Prosecution's cross-appeal against sentence, it argued that the District Judge erred in:

> (a) Failing to give sufficient weight to the sentencing principles of retribution and deterrence. These principles were particularly relevant given that the appellant was a trusted family member of the victim, the age of the victim, the extremely intrusive and degrading nature of the acts, and the conduct of the appellant in claiming trial and disparaging the victim in the course of his defence;
>
> (b) Failing to give due weight to the aggravating factors in the present case;
>
> (c) Failing to apply his mind to the full sentencing spectrum available to him. In this regard, the sentence imposed was only 35% of the five years' statutory maximum imprisonment that could be imposed; and
>
> (d) Failing to adequately consider the applicable sentencing precedents.

The Prosecution maintained on appeal, as it did below, that the appropriate sentence should be at least 27 months' imprisonment and four strokes of the cane.

My decision on the appeal against conviction

18 The appellant's appeal against his conviction turned solely on the District Judge's findings of fact and assessments of the victim's credibility. It is well-established that an appellate court should be slow to overturn a trial judge's findings of fact unless they are "plainly wrong" or reached "against the weight of the evidence". This principle is especially pertinent where the findings hinge on the trial judge's assessment of the credibility and veracity of the witnesses. The rationale for this is that an appellate court has neither seen nor heard the witnesses; it is thus in a less advantageous position as compared to the trial judge who has had the benefit of hearing the evidence of the witnesses in full and observing their demeanour. The upshot is that factual findings are *prima facie* correct and will not be lightly disturbed in the absence of good reasons: see *Yap Giau Beng Terence v Public Prosecutor* [1998] 2 SLR(R) 855 at [24].

19 In the present case, I saw no reason to disturb the findings of fact by the District Judge; in particular there was no basis for me to overturn his findings on the demeanour and credibility of the victim, whose evidence the Prosecution chiefly relied on. The findings were not clearly wrong, nor were they against the weight of the evidence. I further agreed with the District Judge's finding that the victim's evidence was internally consistent and externally corroborated by the testimony of the other Prosecution witnesses.

20 I should add that I saw absolutely no merit in the appellant's insinuation that the victim must have been making false allegations against him because her behaviour at and around the time of the alleged offence was atypical of a victim of a sexual crime. I shared the District Judge's view (at [68] of the GD) that victims of sexual crimes cannot be straitjacketed in the expectation that they must act or react in a certain manner. The fact that the victim was young,

sexually inexperienced and was thus likely to have been taken aback by the appellant's unexpected but brazen conduct meant that her reaction was well within the realm of possibilities and indeed would have been perfectly foreseeable.

21 Finally, I also agreed with the District Judge that the victim simply had no motive to lie. The appellant did not adduce any evidence in support of any of the alleged "motives" ascribed to her – in fact, as the District Judge observed, many of these allegations were not even put to the victim; the accusations were thus rightly characterised as "vague and unsubstantiated" and "nothing but afterthoughts" (at [91] of the GD).

My decision on the appeals against sentence

22 I turn to the appeals by both the appellant and the Prosecution against the sentence imposed by the District Judge. It will be recalled that the District Judge imposed a sentence of 21 months' imprisonment and four strokes of the cane on the appellant. The appellant argued that this was manifestly excessive, while the Prosecution took the opposite position that it was manifestly inadequate and unduly lenient.

The legal principles

23 Section 354 of the Penal Code provides:

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

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

24 Section 354(2) was added to the Penal Code by s 63 of the Penal Code (Amendment) Act 2007 (No 51 of 2007). According to the Explanatory Statement to the Penal Code (Amendment) Bill 2007 (Bill 38 of 2007), s 354(2) is intended to provide an enhanced penalty where outrage of modesty is committed against a child under 14 years of age. The statutorily prescribed maximum sentence that can be imposed is increased two and a half times, from two years to five years. In addition, such offences, unlike outrage of modesty *simpliciter* under s 354(1) of the Penal Code, are non-compoundable.

25 The sentencing benchmark in relation to outrage of modesty under the non-aggravated s 354(1) of the Penal Code, where a victim's private parts or sexual organs are intruded upon, is nine months' imprisonment and caning: *Public Prosecutor v Chow Yee Sze* [2011] 1 SLR 481 at [9]. In my view, a significant uplift is necessary for offences against minors under the aggravated s 354(2) of the Penal Code: see *Public Prosecutor v BLV* [2017] SGHC 154 ("*BLV*") at [140].

A proposed sentencing framework

26 In my judgment, it would be helpful to take a leaf from *Ng Kean Meng Terence v Public Prosecutor* [2017] SGCA 37 ("*Terence Ng*") and set out a sentencing framework in relation to offences under s 354(2) of the Penal Code. This would be useful for two reasons. First, it would go towards achieving some measure of consistency of punishment among the different cases brought under the section. Second, it would ensure that the full sentencing spectrum, up to the

statutory maximum penalty, is utilised so that the appropriate sentence can be calibrated somewhere along that spectrum.

Offence-specific factors

27 In line with *Terence Ng* at [39(a)], the court should first consider the offence-specific factors, which I enumerate below. The factors are of course non-exhaustive and only represent a digest of those that were examined in precedent cases. There are in my view three main categories of factors: the first two broadly relate to the *culpability* of the offender, and the third to the *harm* caused to the victim. Many of them overlap with the offence-specific aggravating factors listed in *Terence Ng*.

28 The first category of factors relates to the *degree of sexual exploitation*. These include the part of the victim's body the accused touched, how the accused touched the victim, and the duration of the outrage of modesty (see *Public Prosecutor v Heng Swee Weng* [2010] 1 SLR 954 ("*Heng Swee Weng*") at [22]). The offence is more aggravated if the victim's private parts are touched, there is skin-to-skin contact (as opposed to touching over the clothes of the victim), and the sexual exploitation continued for a sustained period rather than a fleeting moment.

29 The court should next consider the *circumstances of the offence*. These include, but are not limited to:

(a) *The presence of premeditation*: see *Heng Swee Weng* at [22(d)];

(b) *The use of force or violence*: see *Azhar* at [17] (see also [36(a)] below);

(c) *The abuse of a position of trust*: as noted in *Terence Ng* at [44(b)], this primarily concerns two types of cases. The first is where the accused is in a position of responsibility towards the victim, *eg*, parents and step-parents and their children (*Azhar*; *GBJ v Public Prosecutor* [2017] SGDC 6 ("*GBJ*") and *Public Prosecutor v ABO* [2016] SGDC 80 ("*ABO*")), medical practitioners and patients, and teachers and their pupils (*Public Prosecutor v Lewis Ian* District Arrest Case No 916213 of 2016 and another ("*Lewis Ian*")). The second is where the accused is a person in whom the victim has placed her trust by virtue of his office of employment, *eg*, a bus driver and a school child (*Public Prosecutor v Chan Boon Wee* [2011] SGDC 199 ("*Chan Boon Wee*")). Deterrence is a particular concern where there is an abuse of trust in an inter-familial context, given the difficulty in the detection of the offences and the considerable barriers faced by the victim in reporting them: see *Public Prosecutor v NF* [2006] 4 SLR(R) 849 at [40];

(d) *The use of deception*: in *Public Prosecutor v Al-Habib Sheih Haji Ismail Al Mahberoh* [2010] SGDC 400 ("*Al-Habib*"), the accused entered the victim's house under the pretence of giving a massage to the victim's mother, who believed that the accused had special healing powers. The accused then brought the victim to the kitchen toilet under a guise of removing "ghosts" from her body. There, the accused touched the victim's breasts and twisted her nipples for five minutes. In *Public Prosecutor v GAO* [2015] SGDC 3 ("*GAO*"), the accused, who was a massage therapist, suggested to the victim that he perform a body massage on her to improve her blood circulation. In the course of the massage, the accused fondled and stroked the victim's breasts, caressed her buttock and touched her vagina;

(e) *Other aggravating acts accompanying the outrage of modesty*: for example, in *GBJ*, the accused showed the victim a pornographic film before he outraged her modesty. Another illustration would be the use of sedating drugs to render the victim unconscious before the sexual exploitation;

(f) *The exploitation of a vulnerable victim*: I note that s 354(2) is itself a provision that deals with outrage of modesty of a child below the age of 14. However, as pointed out by Aedit Abdullah JC (as he then was) in *BLV* at [132], although the enhanced framework represents a general position that offences against minors should be dealt with more severely than those against non-minors, the framework did not intend to treat *all* offences committed against minors equally. The aggravating factor of young age would, in relation to enhanced offences, apply if the victim concerned was materially younger than the stipulated age ceiling, and in a graduated manner depending on how much younger the victim was. I agree with this approach: if the offence were, for example, perpetrated against a toddler, this would be more aggravated than that against an older child for the reason that the toddler would be defenceless and unable to extricate himself or herself from the situation. I would add that if the victim presents further vulnerabilities, such as if he or she were suffering from any mental or physical infirmities, this would further aggravate the offence. Concerns of general deterrence weigh heavily in favour of the imposition of a more severe sentence to deter would-be offenders from preying on such victims: see *Terence Ng* at [44(e)].

30 Finally, the court should have regard to the *harm caused to the victim*, whether physical or psychological. This would usually be set out in a victim impact statement.

The sentencing bands

31 Once the gravity of the offence has been ascertained based on the above non-exhaustive factors, the court should place the offence within an appropriate band of imprisonment. In *Angliss Singapore Pte Ltd v Public Prosecutor* [2006] 4 SLR(R) 653 at [84], the Court of Appeal held that where Parliament sets a statutory maximum, it signals the gravity with which the public, through Parliament, views that particular offence. Sentencing judges must therefore take note of the maximum penalty and then apply their minds to determine precisely where the offender's conduct falls along the spectrum of punishment devised by Parliament. In other words, the court must carefully explore the *full spectrum* of sentences in determining the appropriate sentence. Taking this into account, in my judgment, the sentencing bands should span the entire continuum up to the statutory maximum punishment of five years' imprisonment, as follows:

(a) Band 1: less than one year's imprisonment;

(b) Band 2: one to three years' imprisonment; and

(c) Band 3: three to five years' imprisonment.

Caning should also be imposed if the facts and circumstances of the case warrant this as an additional deterrent. Adopting the principle in *Chow Yee Sze* at [9], the starting point is that caning will be imposed where a victim's private parts or sexual organs are intruded upon.

32 Band 1 comprises cases at the lowest end of the spectrum of seriousness. These would include those which do not present any (or at most one) of the aggravating factors, for example, those that involve a fleeting touch or a touch over the clothes of the victim, and do not involve the intrusion into the victim's private parts. Caning is *generally* not imposed for this category of cases, although the possibility of caning is not excluded altogether; this depends on the precise facts and circumstances of each case. In *Public Prosecutor v NYH* [2014] SGDC 432 ("*NYH*") at [39], the district judge surveyed the precedents and held that a custodial term would be imposed even where the victim's private parts were not intruded upon and there was no abuse of authority. Two examples of Band 1 cases are as follows. In *Public Prosecutor v Palanisami Mohankumar* District Arrest Case No 501215 of 2013 and others (cited in *NYH* at [39(i)]), a sentence of four months' imprisonment was imposed on the accused who had put his hand through a window and rested it on the thigh of an 11-year-old female victim. A similar charge was taken into consideration for the purposes of sentencing. In *Public Prosecutor v Gee Ah Meng* District Arrest Case No 55192 of 2010 and others (cited in *NYH* at [39(ii)]) ("*Gee Ah Meng*"), a ten-week imprisonment term was imposed on the accused, a stranger to the victim who was a ten-year-old male student. The accused had suddenly approached the victim and touched and caressed his chest for approximately half a minute.

33 Where two or more of the aggravating factors present themselves, the case will almost invariably fall within Band 2. Caning will nearly always be imposed, and the suggested starting point would be at least three strokes of the cane. All the cases cited by the Prosecution in the present case came within this band. At the lower end of the band would be cases in which there was an absence of skin-to-skin contact with the private parts of the victim, for example, if the touching occurred over the victim's clothes. In *GBJ*, the accused rubbed the left breast of the victim over her clothes and kissed her eyebrow. He also pulled her

shoulder so that she lay down with her head on his stomach. The accused then unfastened the Velcro fastener on his shorts, but the victim left the room before he could do anything further. He was sentenced to 18 months' imprisonment and three strokes of the cane. In the first and second charges under s 354(2) of the Penal Code in *ABO*, the accused touched the victim's vagina and buttocks over her shorts, and rubbed his penis over her shorts at her vagina area. On appeal, 18 months' imprisonment was imposed in relation to the first charge and 21 months' imprisonment and three strokes of the cane meted out for the second charge: *Public Prosecutor v BAT* Magistrate's Appeal No 9047 of 2016/01 (2 September 2016). In both these cases, there were other aggravating factors such as the abuse of a position of trust (the offenders and the victims were stepfather and stepdaughter) and the touching of a private part of the victim. In *GBJ*, there was an additional aggravating factor in that the accused showed the victim a pornographic film before the outrage of modesty began, even though the nature of the sexual exploitation may not have been as intrusive as that in *ABO*. These would have taken the cases outside the scope of Band 1.

34 At the higher end of the spectrum of Band 2 cases would be those involving the skin-to-skin touching of the victim's private parts or sexual organs. In the third charge in *ABO*, for example, the accused rubbed his exposed and erect penis against the victim's vagina. He was sentenced (upon appeal by the Prosecution) to two years' imprisonment and three strokes of the cane. The sentence imposed was higher than that for the first and second charges, as described above.

35 The use of deception by the accused is also a relevant aggravating factor which would bring a case to the higher end of the spectrum of Band 2 cases. I have already highlighted the facts of *GAO* and *Al-Habib* at [29(d)] above, which were cases cited by the Prosecution. In each case, the accused was sentenced to

24 months' imprisonment. Another case involving deception is *Public Prosecutor v Ng Ban Keong* District Arrest Case No 26192 of 2010 and others (cited in *Public Prosecutor v GBE* [2016] SGDC 223 ("*GBE*") at [11]). In that case, the accused was charged with various sexual offences committed against young girls aged between nine and 12. The accused pretended to be a doctor and offered to perform medical check-ups on them under this guise. He even supported his ruse by carrying a thermometer, surgical gloves, and a stethoscope. In respect of a charge against an 11-year-old victim under s 354(2) of the Penal Code, the accused noticed the victim on the bus and followed her. He then told her that he was asked by her school principal to do a check-up for her and brought her to the car park staircase of a nearby shopping centre. There, he touched the victim's stomach under her dress, pulled down her shorts and panties, and used his thumb and index finger to rub her vagina in a circular motion for about ten to 15 seconds. He was sentenced to two years and six months' imprisonment in respect of this charge. It should be noted that the accused persons in these cases were spared from caning because they were above 50 years of age at the time of sentencing.

36 Two cases appear to be somewhat anomalous with the general trend I observed above:

(a) In *Azhar*, which was cited by the Prosecution below and considered by the District Judge, the 51-year-old accused faced two charges for outraging the modesty of his eight or nine-year-old stepdaughter. A similar charge was taken into consideration for the purposes of sentencing. In respect of one of the charges, the accused was alone with the victim at home. He told her to take off her shirt but she refused. He proceeded to cane her until she cried. He then forcefully removed her shirt, pushed her onto the floor, removed her shorts and

panties and rubbed her nipples and vagina area. He also licked her nipples. On the other occasion, he pulled her towards him, forcefully removed her panties, and pushed her to the floor before licking her vagina. I did not consider that the District Judge had erred in finding that the facts of *Azhar* were more aggravated than the present case. In my view, the sentence in *Azhar* may well have been unduly lenient, given the clear aggravating factors such as the victim's tender age, the abuse of the position of trust, and the violence and criminal force used. These were in fact acknowledged by the trial judge himself in his grounds of decision in *Azhar* (at [8]–[11]). I observe that the trial judge was perhaps influenced by the Prosecution's submissions, which only sought 18 months' imprisonment. But in my view, on the framework I have proposed, *Azhar* should have fallen within the highest end of Band 2 at the minimum, or even within Band 3.

(b) The second case is that of *Chan Boon Wee*. In that case, the accused, who was a school bus driver, slipped his fingers under the victim's leotard and panties before touching her vagina on two occasions. Although there was skin-to-skin touching of the victim's private part, he was only sentenced to 15 months' imprisonment and four strokes of the cane on each charge. While this was not expressly stated by the trial judge, one possible reason for this anomaly may be that the sentences for the two charges were ordered to run *consecutively*, leading to a global sentence of 30 months' imprisonment and eight strokes of the cane. As reiterated in *Pram Nair v Public Prosecutor* [2017] SGCA 56 at [171], a court may consider it necessary to calibrate the individual sentences downwards to ensure that the *aggregate* sentence is not excessive; the trial judge could have considered it necessary to do so in *Chan Boon Wee*.

37 Band 3 cases are those which, by reason of the number of the aggravating factors, present themselves as the most serious instances of aggravated outrage of modesty. Caning ought to be imposed, and the suggested starting point would be at least six strokes of the cane. These would include cases such as those involving the exploitation of a particularly vulnerable victim, a serious abuse of a position of trust, and/or the use of violence or force on the victim. Two examples of existing cases which may conceivably fall within Band 3 are as follows:

(a) In *BLV*, the accused was the biological father of the victim. At the time of the offences, the victim was between 11 and 13 years old. The accused faced (among others) three charges of aggravated outrage of modesty under s 354(2) of the Penal Code. The accused had (a) rubbed his penis against the victim's face while she was on the floor – some degree of coercion was present and the accused's conduct caused the victim fear; (b) touched and rubbed the area outside the victim's vagina and attempted to digitally penetrate it and (c) forcefully pulled the victim onto the bed despite her refusal. Despite the victim turning her body away, the accused persisted with some degree of force. He then rubbed his penis against her vagina and anus. All of these took place within the family residence. The accused was sentenced to three years' imprisonment and six strokes of the cane for the first two of these charges, and three years and six months' imprisonment and six strokes of the cane for the third charge. I note that at the time of this decision, there is a pending appeal by the accused against his conviction and sentence.

(b) In District Arrest Case No 31193 of 2011 and others (name redacted) (cited in *GBE* at [11]), the accused was the biological father

> of the two victims, who were 13 and 11 years old at the time of the offence. In respect of the charge involving his younger daughter, the accused asked her to masturbate him. Thereafter, he made her lie down on the bed and open her legs. He then attempted to penetrate her vagina with his penis. While doing so, the victim shouted in pain. The accused then turned the victim around such that she was in a "baby crawl" position and rubbed his penis against her buttocks near her anus. He was sentenced to three years and three months' imprisonment and nine strokes of the cane. No appeal was lodged against this decision.

In my judgment, the same aggravating factors existed in both cases: the high degree of abuse of position and trust in a familial context (the accused and the victim being *biological* father and child), the intrusive nature of the acts (including attempted penile and digital penetration) and the force used and fear or distress caused to the victim.

38 I should add that these precedent cases are set out for illustrative purposes only. Ultimately, it is the particular factual circumstances of each case that should be thoroughly considered in determining the appropriate sentence.

General aggravating and mitigating factors

39 Finally, the sentence that is ultimately imposed must take into account aggravating and mitigating factors which relate to the offender *generally*, but which are not offence-specific. Aggravating factors include the number of charges taken into consideration, the lack of remorse, and relevant antecedents demonstrating recalcitrance (*Heng Swee Weng* at [22(f)]). Mitigating factors include a timeous plea of guilt (which tends to show contrition, which would save the victim the trauma of having to testify in court, and which saves the resources of the state: see *Terence Ng* at [69]), or the presence of a mental

disorder or intellectual disability on the part of the accused (*Heng Swee Weng* at [22(g)]). In relation to the last factor, the presence of a mental disorder or intellectual disability must relate to the offence, for example, there must be proof of a reduced ability to understand the nature of the act. General allegations of mental illnesses such as depression that are unrelated to the commission of the offences would not take the accused very far (see *Chan Boon Wee* at [65]).

Other considerations

40 Finally, if the accused is certified to be unfit for caning, for example, because he is above 50 years of age at the time of caning (s 325(1)(*b*) of the CPC), or is certified to be medically unfit for caning (s 331 of the CPC), ss 325(2) and 332(2)(*b*) of the CPC empower the court to enhance his imprisonment term by up to a maximum of 12 months. Following the High Court's decision in *Amin bin Abdullah v Public Prosecutor* [2017] SGHC 215 ("*Amin bin Abdullah*") at [53] and [58], it is clear that the term of imprisonment should not be enhanced unless there are grounds to do so. The court should thus consider whether there are grounds to enhance the sentence by way of the imposition of imprisonment in lieu of caning. In an offence such as outrage of modesty, an imprisonment term in lieu of caning may be appropriate where there is the need for a sufficiently deterrent and retributive sentence (see *Public Prosecutor v Tan Kok Leong and another appeal* [2017] SGHC 188 ("*Tan Kok Leong*") at [91], cited in *Amin bin Abdullah* at [73]), for example, if there are substantial aggravating factors such as violence used or an exploitation of a particularly vulnerable class of victims.

41 For the avoidance of doubt, I should add that the sentencing framework outlined above applies equally where the victim is male, which was the case in *Gee Ah Meng* and *Tan Kok Leong* (although the accused in the latter case was

charged under s 354(1) of the Penal Code for outrage of modesty *simpliciter*). The offence in s 354(2) itself is one perpetrated against "any *person* under 14 years of age" [emphasis added] and the provision does not make a distinction based on the gender of the victim. This is for good reason: the offence of outrage of modesty – whether against a male or female victim – is reprehensible, especially when committed against a minor under the age of 14. The court ought to give effect to this through parity in sentencing regardless of the gender of the victim.

Application to the present case

42 Applying the framework to the present case, I begin by identifying the offence-specific aggravating factors. The appellant fondled the victim's breasts for about five minutes. He then touched and licked her vagina for another five minutes. This meant that there was skin-to-skin touching of the victim's private parts and the sexual exploitation lasted for a substantial period. There was a degree of premeditation on the part of the appellant, because he capitalised on the victim's parents' domestic dispute the night before the offence and purported to offer the victim a more conducive space for studying, knowing that they would be alone in his flat. The case also presented itself as a paradigm situation where there was an abuse of position of trust in a familial context: the appellant was the victim's uncle. The victim's evidence was that she did not immediately tell her parents or her aunt about the appellant's conduct because she feared that they would not believe her. This underscores the very real concern that the courts have over the difficulty of detection of such cases and consequently, the view that general deterrence must feature prominently in the sentencing equation. Further, it was clear that the victim suffered psychologically. As outlined in Dr Pathy's report, the victim experienced

distress and had self-harm tendencies. She had difficulties concentrating on her studies, felt dirty, and had nightmares and flashbacks of the alleged act.

43 In terms of general aggravating and mitigating factors, I note that the appellant did not plead guilty, which meant that he would not have been eligible for any sentencing discount. In fact, he did not display any semblance of remorse for his conduct. Instead, he disparaged the victim's character and imputed various fabricated motives to her for making allegedly false accusations against him.

44 In view of the totality of the aggravating factors in the present case, I was of the view that the appellant's conduct would fall within the middle to upper range of Band 2, with a sentence in the region of at least 24 months. In my judgment, the sentence ought to have been calibrated at a higher level than the 21 months imposed by the District Judge. At the same time, I was not convinced that a sentence as high as 27 months sought by the Prosecution was warranted. In the circumstances, I considered that a sentence of 25 months' imprisonment would be appropriate. The caning imposed remained at four strokes.

Conclusion

45 For the above reasons, the appellant's appeals against his conviction and sentence were dismissed. The Prosecution's cross-appeal against sentence was allowed and the appellant's imprisonment term was increased to 25 months. The caning imposed remained at four strokes. As at the date of this judgment, the appellant has begun serving his sentence.

See Kee Oon
Judge

Kanagavijayan Nadarajan (Kana & Co) for the appellant in MA 9169/2017/01 and the respondent in MA 9169/2017/02; Winston Man and Sruthi Boppana (Attorney-General's Chambers) for the respondent in MA 9169/2017/01 and the appellant in MA 9169/2017/02.