IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 179

Magistrate's Appeal No 9103 of 2018

Between

Public Prosecutor

… *Appellant*

And

Thompson, Matthew

… *Respondent*

GROUNDS OF DECISION

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Introduction

1 This is the prosecution's appeal against sentence in respect of one charge of outraging the modesty of an air stewardess ("the victim") during the course of her duty during a flight. The respondent is a 47-year-old Australian male national. He was a passenger on board a Singapore-registered "Scoot" flight from Sydney to Singapore in September 2017. He was convicted after trial on two charges under s 354(1) of the Penal Code (Cap 224, 2008 Rev Ed) read with s 3(1) of the Tokyo Convention Act (Cap 327, 1985 Rev Ed) ("TCA"). The respondent was sentenced to four months' imprisonment for the first charge and one month's imprisonment for the second charge, with the imprisonment terms for the two charges ordered to run concurrently.

2 The appeal pertained only to the sentence for the first charge. The prosecution argued that the District Judge erred in his application of the sentencing framework for s 354(1) Penal Code offences set out by the High Court in *Kunasekaran s/o Kalimuthu Somasundara v Public Prosecutor* [2018] SGHC 9 ("*Kunasekaran*"). The Prosecution submitted that having regard to the *Kunasekaran* framework, a sentence of at least nine months' imprisonment should have been ordered.

3 I allowed the prosecution's appeal in part and increased the sentence to six months' imprisonment. I now set out my reasons.

Facts

4 The respondent was convicted of two charges under s 354(1) of the Penal Code read with s 3(1) TCA. The first charge was in respect of the respondent using his left hand to touch the victim at her right hip, over her stomach until her lower breast in one motion, knowing it to be likely that he would thereby outrage the modesty of the victim. The respondent was convicted on this charge and sentenced to four months' imprisonment. The second charge was in respect of the respondent using his left hand to touch the victim at her right hip and over her stomach in one motion, knowing it to be likely that he would thereby outrage the modesty of the victim. The respondent was convicted on this charge and sentenced to one month's imprisonment.

5 The detailed facts are set out in District Judge's Grounds of Decision in *Public Prosecutor v Thompson Matthew* [2018] SGMC 22 ("GD"). I set out only the essential facts relevant to this appeal. The respondent was travelling on board a Singapore-registered "Scoot" flight from Sydney to Singapore in September last year. The victim was a cabin crew member on that flight.

6 Roughly four hours into the flight, the victim commenced the second service. She was pushing the food and beverage cart from the front of the aircraft towards the back of the aircraft, when she noticed that the respondent was awake. She stopped close to the respondent's seat, 25D, to take an order from another passenger. Seat 25D is an aisle seat. While the victim was keying in the passenger's purchase into a point-of-sale electronic device, the respondent used his left palm to touch her right hip, stomach and lower left breast in one motion. The Victim pushed the respondent's hand away, and asked him if he was okay. The respondent did not respond and merely stared blankly at her. The respondent then reached out a second time and used his left palm to touch the Victim's right hip and stomach in one motion. As the respondent's hand was travelling towards the victim's left breast, she pushed his hand away.

7 After the respondent touched the victim the second time, she immediately stopped the service and pushed the food and beverage cart to the back of the aircraft. She told a fellow crew member to immediately stop serving alcoholic beverages to the respondent. The crew member asked the victim why, but she did not reply. She then went to a toilet and cried out of fear. After coming out of the toilet, she confided in a crew member. The crew members notified the authorities. The respondent was escorted off the aircraft by the authorities upon the aircraft's arrival in Singapore.

Arguments Below

8 The respondent did not appeal against his conviction. The District Judge's findings of fact were therefore not in dispute. The prosecution also did not appeal against the sentence of one month's imprisonment on the second charge. On appeal, the focus was solely on the sentence in respect of the first charge.

9 Before the District Judge, the prosecution sought a sentence of at least six months' imprisonment in respect of the first charge. The prosecution submitted that the sentencing framework in *Kunasekaran* applied. On the first step of that framework, the prosecution submitted that the offending act which was the subject matter of the first charge fell within the lower end of Band 2 of the *Kunasekaran* framework. This was because of the offence-specific factors present, namely the offence being committed against the victim in the course of her work as a public transport worker, and the fact that there was an intrusion upon the Victim's private parts, *ie*, her lower left breast. The prosecution also emphasised that deterrence was the primary sentencing consideration as the courts should send a clear message that all acts of criminal violence against public transport workers will not be tolerated. It was also important to take into account the fact that the victim suffered psychological harm.

10 On the second step of the *Kunasekaran* framework, the prosecution submitted that there were no mitigating factors in the respondent's favour. The absence of previous antecedents was merely a neutral factor. The respondent had not pleaded guilty, but instead had claimed trial, and thus no discount in sentence could be given for a plea of guilt that demonstrates genuine remorse and saves state resources. Further, no mitigating value could be accorded to the respondent's public service and professional standing, because whatever mitigating value that might be attributed to these factors was outweighed by the need for general deterrence.

11 In contrast, the respondent sought a substantial fine, or at most a short term of imprisonment. The respondent argued that the touch to the victim's lower left breast was fleeting, and emphasised that there was no skin-to-skin contact between the respondent and the victim. The respondent also did not

pursue the victim with the intent of outraging her modesty, did not use force or violence on her, and did not cause physical hurt to her.

12 The respondent also cited the following as offender-specific mitigating factors: his character references attested to his good character and he had no criminal record either in Singapore or Australia; he had served in public service as a veterinary surgeon with a department of the federal government; he had passionate political aspirations which would be extinguished by a conviction; he faced the prospect of disciplinary proceedings and disqualification by the professional body he was a member of; and he had undergone a long period of separation from his family, in particular his young children, due to the prohibition on him leaving the jurisdiction.

Decision Below

13 The District Judge applied the *Kunasekaran* framework to this case. In respect of the first charge, he found that the respondent had used his left hand to touch the victim at her right hip, over her stomach, and up to her lower left breast in one motion: GD at [70]. The touch was made over her uniform, only slight pressure was applied, and the touch was brief: at [70]. He also found that there was (i) no premeditation; (ii) no use of force or violence; (iii) no abuse of trust; (iv) no use of deception; (v) no other aggravating acts accompanying the outrage of modesty; and (vi) no disruption to the orderliness of the aircraft cabin, the comfort of other passengers, or threat to the safety of the aircraft, its crew, or other passengers: at [73]. The District Judge noted, however, that the victim was carrying out her duties as a public transport worker when she became the victim of these offences. He therefore considered that general deterrence assumed a special significance and relevance to sentencing: at [68]. The District Judge also noted that although the victim did not suffer any physical harm, she

suffered psychological harm. She cried after the offending acts, and although she continued to work as an air stewardess after this incident, she asked to be redeployed to non-Australian routes where it is less likely that she will encounter male Caucasian passengers: at [73].

14 These findings led the District Judge to conclude that the offending act, which was the subject of the first charge, fell within Band 2 of the *Kunasekaran* framework. The absence of aggravating factors other than the victim being a public transport worker also led him to find that the offence fell within the lowest end of Band 2: at [74].

15 The District Judge considered the sentencing precedents placed before him by the prosecution and the respondent. He largely distinguished those precedents, finding that the precedents were either dated, or had limited precedential value in light of the sentencing framework adopted in *Kunasekaran*: at [88]. He also distinguished the precedents on the basis that the offenders in the precedents had abused a position of trust, or had repeated the offending acts, or had engaged in a greater degree of physical contact: at [88].

16 This analysis led the District Judge to determine that five months' imprisonment was the appropriate starting point: at [89]. He then took into account various mitigating factors, including the fact that the respondent had a clean record, held a respectable job in the public service, and had good character references, which supported a greater likelihood of reform and a lower probability of re-offending. The District Judge also took into account in sentencing the fact that the respondent had been unable to return to Australia for six months, during which time he had no source of income.

17 The District Judge ultimately decided that a sentence of four months' imprisonment would be appropriate in respect of the first charge.

Appellant's Case / Respondent's Case

18 On appeal, the prosecution sought a sentence of at least nine months' imprisonment in respect of the first charge. The prosecution submitted that the District Judge wrongly applied the *Kunasekaran* framework. Although the District Judge correctly identified the offending act as falling within Band 2 of the framework, he wrongly held that the act fell within the lowest end of the sentencing range. The District Judge failed to take into account important offence-specific factors, such as (i) the duration of physical contact, which was not fleeting but lasted for about 10 seconds; (ii) the fact that the victim was vulnerable in her capacity as a public transport worker and (iii) the high degree of psychological harm suffered by the victim. These factors should have led the District Judge to place the offending act in the middle of the Band 2 sentencing range as a starting point.

19 The prosecution also submitted that the District Judge wrongly accorded mitigating value to various factors, when in truth they were at most neutral factors.[1] The prosecution submitted that an absence of antecedents was not necessarily positive evidence of good character, and the respondent's clean record therefore was not a mitigating factor. Similarly, the respondent's respectable occupation in the Australian public service could not be given mitigating value, as whatever mitigating value might be attributed to it was displaced by the need for general deterrence. Further, the fact that the respondent was required to stay in Singapore, and thus suffered separation from his family and loss of income, was not a mitigating factor. Hardship to the

[1] PP's submissions at para 22(b), and paras 66 onwards (Part D).

family by way of financial loss or other family circumstances is of little weight unless it is exceptional. Finally, the District Judge also erred in his consideration of the sentencing precedents. To be consistent with the precedents, the prosecution submitted that a sentence of at least nine months' imprisonment ought to have been ordered.

20 The respondent submitted that the sentence of four months' imprisonment ordered by the District Judge was only two months short of what the prosecution initially sought below, and this difference did not make the sentence manifestly inadequate. The respondent agreed with the prosecution that the relevant sentencing framework is that set out in *Kunasekaran.* But the District Judge erred in applying that framework because the offending act should have been classified under Band 1 of the framework. The respondent highlighted that the contact with the lower part of the victim's left breast was fleeting, with only a brush past the breast. There was no skin-on-skin contact. There were also no other offence-specific aggravating factors, other than the victim being a public transport worker.

21 The respondent stressed that there were several mitigating factors. The respondent emphasised the hardship he had suffered from being separated from his young children and aged parents for the past ten months. The respondent also highlighted the severe repercussions to his professional standing and the high likelihood of losing his job. All these factors, the respondent maintained, were sufficient to serve the aims of specific deterrence. His "career-destroying family-destroying experience" and the dire consequences that ensued would also suffice to send a strong message of general deterrence.

22 Finally, the respondent also distinguished the sentencing precedents cited by the prosecution, on the basis that all of those precedents involved

offenders who engaged in a far greater degree of physical contact, or displayed other aggravating factors such as intoxication or abuse of authority which were not present here.

Young *Amicus Curiae*'s submissions

23 Considering that the facts of this case raised two interesting legal questions, Mr Devathas Satianathan was appointed as Young *Amicus Curiae* to assist the court. The first question is whether sentencing for an offence should be approached differently when the offence is committed on board an aircraft. The second question is whether, and if so, how, should the sentencing framework in *Kunesekaran* apply when the offence is committed on board an aircraft.

24 In summary, Mr Satianathan submitted that there was no need for a new sentencing framework simply because an offence was committed on board an aircraft. As far as s 354(1) Penal Code offences specifically were concerned, the fact that the offence was committed on board an aircraft could be taken into account in the *Kunasekaran* framework as offence-specific and offender-specific aggravating factors. I set out his submissions and consider them in greater detail below.

Issues before this Court

25 The issues on appeal were as follows:

(a) Whether the court should approach sentencing differently when an offence is committed on board an aircraft?

(b) How should the court take into account the fact that an offence was committed on board an aircraft in sentencing for a s 354(1) Penal Code offence?

(c) If the *Kunasekaran* framework is applicable, did the District Judge err in his application of the framework?

(d) If so, what is the appropriate sentence in respect of the first charge?

Sentencing when an offence is committed on board an aircraft

26 This first question broadly asks whether there is anything unusual or different about an offence being committed on board an aircraft that warrants a different approach in sentencing. Mr Satianathan analysed this question as involving two queries. First, whether the starting points, *ie*, benchmarks, for sentencing should differ. Second, whether the various factors to consider, including offence-specific and offender-specific factors, should differ.

27 On the first query, Mr Satianathan submitted that the courts must distinguish between offences for which commission on board an aircraft was integral to the charge, as compared to offences for which commission on board an aircraft was merely incidental to the charge. Within the former category would fall offences that involve some form of threat to the safety of aircraft passengers, such as offences under the Air Navigation Act (Cap 6, 2014 Rev Ed). Within the latter category would fall offences where the fact of the offence being committed on board an aircraft was simply part of the factual background, or was only necessary to establish jurisdiction, as with s 3(1) TCA which gives the Singapore courts jurisdiction to try offences committed on board Singapore-controlled aircraft flying outside the territory of Singapore. Mr Satianathan

submitted that the "integral-incidental" model should be seen as a spectrum along which offences were placed, and not as a strict binary divide.

28 Mr Satianathan argued that courts should devise new sentencing frameworks for offences committed on board an aircraft only where the fact of the offence being committed on board an aircraft was *integral* to the charge. Conversely, where the fact that the offence was committed on board an aircraft was incidental to the charge, the courts should retain the existing sentencing benchmark or framework. The fact of the offence having been committed on board an aircraft could then be accounted for as an offence-specific or offender-specific factor.

29 Mr Satianathan further submitted that the fact that the offence was committed on board an aircraft was merely incidental to a s 354(1) Penal Code offence. An outrage of modesty on board an aircraft did not go to an aspect of air travel that necessitated a development of a new sentencing framework. The present charge was brought under s 354(1) Penal Code read with s 3(1) TCA but s 3(1) TCA was merely procedural in nature, and did not create a substantive offence. Section 3(1) TCA established this court's jurisdiction over offences committed on board Singapore-controlled aircraft travelling outside the territory of Singapore, which if committed in Singapore would constitute offences under Singapore law. The function of s 3(1) TCA in establishing this court's jurisdiction did not make the offence any more closely targeted at an aspect of flight safety or air travel that would make the fact that the offence was committed on board an aircraft integral to the charge. Thus, Mr Satianathan concluded that the fact that an outrage of modesty had occurred on board an aircraft was merely an important part of the factual background that should be taken into account in the *Kunasekaran* framework.

30 The prosecution's view was also that the *Kunasekaran* framework should be retained in this case, notwithstanding the fact that the respondent's acts took place on board an aircraft in flight. The prosecution agreed with Mr Satianathan that the TCA was enacted for the purposes of establishing jurisdiction, and did not envisage a separate set of sentencing factors or a different framework.

31 The respondent offered no views on whether the fact that an offence was committed on board an aircraft should change a court's approach to sentencing.

32 I agree with both the prosecution and Mr Satianathan that it is unnecessary to develop a new framework for s 354(1) Penal Code offences simply because the offences are committed on board an aircraft. The fact that an outrage of modesty occurs on board an aircraft against an air transportation worker would present several unique features to be taken into account in sentencing, as I elaborate below. But these features can be taken into account under the existing *Kunasekaran* framework. The fact of the outrage of modesty occurring on board an aircraft is merely a part of the factual backdrop to the case, albeit an important part of it. The offence does not go towards a particular form of harm closely associated with flight safety or air travel that warrants the development of a new framework.

Accounting for the offence being committed on board an aircraft in sentencing for s 354(1) Penal Code offences

33 The next issue pertains to how the court should account for the offence being committed on board an aircraft when sentencing for s 354(1) Penal Code offences.

34 Mr Satianathan submitted that the fact that a s 354(1) Penal Code offence was committed on board an aircraft could be accounted for as an offence-specific factor under the first step of the *Kunasekaran* framework, and also as an offender-specific factor under the second step of the *Kunasekaran* framework.

35 On the first step, Mr Satianathan submitted that the mere fact of the offence being committed on board an aircraft was *not* in and of itself relevant. It might become relevant if the offence was committed in a way that exploited the role of an air stewardess, was motivated by vengeance, jeopardised the safety or the crew, or was an abuse of authority. Notably, moreover, Mr Satianathan submitted that the mere fact that a victim was a public transport worker, whether on an aircraft or otherwise, should not be an aggravating factor. Public transport workers are exposed to different risks depending on the nature of the public transport, and it would be wrong to consider their vulnerabilities as a group without differentiating between these risks. In the case of commercial airlines, flight attendants are typically trained to deal with situations of aggressive or overly friendly passengers, and thus may not be vulnerable solely by dint of their role. Much of the analysis would ultimately have to be fact-specific, and mere citation of statistics of increased rates of offending on board aircraft would have to be treated with caution as it failed to account for the increase in commercial air traffic over the years, and also failed to account for the possibility of an increased incidence of reporting. Further, an increase in the rate of offending did not, without more, warrant a higher sentence. The court must first be satisfied that a higher sentence would discernibly or plausibly address the higher rate of offending before ordering such a sentence.

36 Mr Satianathan also acknowledged several features unique to flying that should be taken into account in the analysis of an offence being committed on

board an aircraft as an offence-specific factor. The first feature he cited was that commercial air travel is a high-pressure environment, as a large number of people are seated together over a long period of time without much freedom to move about. The second feature flowed from the first – the high-pressure environment may cause some passengers to become angry. This may manifest externally as angry outbursts or responses towards the flight crew or other passengers, but may also manifest internally through unruly or antisocial behaviour, such as excessive alcohol consumption. The third feature was the trust required between the passengers and the crew, and also amongst the passengers themselves. Passengers typically stow their carry-on luggage in communal unsecured areas, and trust that neither the crew nor their fellow passengers will rifle through their luggage when they are asleep, or visiting the restroom. The fourth feature was that there is no convenient means of escape from an aircraft. This means that a victim may have to endure prolonged exposure to the offender for the rest of the duration of the flight, with the scope of avoidance being limited due to the confined space of the aircraft cabin. This would contribute all the more to the victim's distress.

37 Mr Satianathan further submitted that some aspects of air travel as listed above might be considered offender-specific factors in the second step of the *Kunasekaran* framework. Excessive alcohol consumption by an offender on a flight would be such an example.

38 As for the sentencing principle of general deterrence, Mr Satianathan queried whether increasing the sentence for offences committed on board an aircraft would serve the purpose of general deterrence. He suggested that it was unlikely that a foreigner on board a Singapore-registered aircraft would be aware of Singapore laws and it was therefore unlikely that foreigners would be deterred.

39 The prosecution agreed with some of Mr Satianathan's analysis, notably with his descriptions of the aspects unique to air travel that should be incorporated into the analysis of offence-specific factors, as summarised at [36] above.

40 The prosecution disagreed, however, with several other aspects of Mr Satianathan's approach. The prosecution submitted that the fact that a victim was a public transport worker should in and of itself be considered an aggravating factor, so long as the offence was committed against the public transport worker in the course of his duties. The prosecution's position was that public transport workers performing their duties were vulnerable *as a class*, and while some public transport workers might have the benefit of more training or more experience than others, that only went to the degree of harm suffered by the individual victim that could be accounted for *after* the vulnerability of the class was recognised. The fact that a public transport worker might have received training to handle aggressive or overly friendly passengers certainly did not diminish an offender's culpability in any way.

41 The prosecution also submitted that the fact that an offence occurred on board public transport, even if not directed at a public transport worker, was an aggravating offence in and of itself. When s 354(1) Penal Code offences occurred on board public transport, especially commercial air transport, they could easily be disguised as accidental contact and were difficult to detect because a victim might be fooled into believing that the contact was unintentional. Moreover, they were easily committed because of the close and restrictive quarters on public transport, but they were difficult to investigate and prosecute because the offender, the victim, and the key witnesses might have divergent travel plans bringing them out of the jurisdiction and beyond the reach of law enforcement. The prosecution also highlighted the possibility of a risk of

escalation arising from confrontations, given the high-pressure environment, which could potentially jeopardise the safety of the aircraft and its passengers.

42 The prosecution emphasised that the principle of general deterrence should not be undermined. The prosecution noted that a Singapore citizen, just as much as a foreigner, might be the subject of a charge under s 354(1) Penal Code. Foreigners, too, should know that outrage of modesty is an offence. The prosecution submitted that general deterrence through an uplift in sentence still had a role to play.

43 In my judgment, the proper framework to be applied to a s 354(1) Penal Code offence is the two-step sentencing bands framework laid down by the High Court in *Kunasekaran*. That framework was adapted from the framework I set out for s 354(2) Penal Code offences in *GBR v Public Prosecutor* [2018] 3 SLR 1048. I agree with Chan Seng Onn J that the only distinction between s 354(1) and 354(2) Penal Code offences is the difference in the ages of the victim. The factors to be taken into account in determining the appropriate sentence are the same.

44 In my view, the fact that a s 354(1) Penal Code offence is committed aboard an aircraft is in and of itself an aggravating factor. The fact that a s 354(1) Penal Code offence is committed against an air transportation worker is also in and of itself an aggravating factor. These will generally be taken into account as offence-specific aggravating factors.

Committing a s 354(1) Penal Code offence on board an aircraft is an aggravating factor

45 I consider that there are several unique features to air travel that make the commission of a s 354(1) Penal Code offence on board an aircraft an

aggravating factor. In particular, the presence of these features support a finding that an offence being committed on board an aircraft is *more* aggravating than an offence committed on other types of public transport, for the reasons I give below. I take the view that these features are of general application and should be considered each time a court deals with an offence committed on board an aircraft. But they may factor into the analysis to varying degrees depending on the unique facts of each case.

46 The first feature, which Mr Satianathan rightly identified, is that commercial air travel is often a high-pressure environment. There will often be at least a hundred passengers – and sometimes, several hundred passengers – packed into the confined space of an aircraft cabin for a lengthy period of time, typically several hours or more. During this time, they have limited mobility, limited interaction with other passengers or crew, and limited entertainment or distraction. Even the number of restrooms is limited. This suggests that nerves are more easily frayed, and that tempers are more easily strained. The close physical proximity between the individuals on board an aircraft means that it is more likely that undesired physical contact may occur, and this contact may be more easily disguised or be more difficult to detect.

47 This is less true of other means of public transportation such as travel via train, bus or taxi. On these other methods of public transport, the trip duration is typically shorter, the number of passengers is typically fewer, and the amount of freedom of movement is typically greater. Indeed, two people can hardly pass each other abreast on an airplane aisle, which speaks to a greater level of physical confinement and restriction than even on a public bus or train. It is true, of course, that the restricted physical freedom of commuters on a bus or train during peak hours should not be understated and travelling under such

conditions can often be extremely uncomfortable and stressful. But the duration of such journeys will, in most cases, still be shorter than a flight.

48 Another feature of air travel that Mr Satianathan rightly identified, which distinguishes it from other forms of public transportation, is that there is no ready means of escape. The flight has a set path with a set time. There is no question of a detour for the convenience of one or even a few passengers, and the only time one can justifiably expect a deviation from the intended flight plan is if there is an emergency. This means that a victim of outrage of modesty on board an aircraft has to endure a prolonged period of distress, knowing that the perpetrator remains on board the same aircraft, within the vicinity. This victim cannot, unlike a victim on board a bus, train, or taxi, simply cut short her journey and step out of the vehicle. It may be of some comfort to a victim that she may be able to change her seats to move some distance away from her attacker, although the attacker remains on the same flight. But it will be no comfort at all if the flight is full and there is nowhere else for the victim to go to.

49 The respondent pointed out in oral submissions that a perpetrator on board an aircraft would be unable to make a quick escape, unlike the case where other modes of public transportation such as a bus, train, or taxi were involved. While this is true, it hardly makes the commission of the offence any less aggravating. It is precisely the perpetrator's continual presence on board the aircraft that contributes to his victim's prolonged distress.

50 A third unique feature of air travel, as the prosecution rightly pointed out, is the difficulty in obtaining the assistance of law enforcement. There is no way for the police to get to an aircraft mid-flight. The victim thus has to endure the remainder of her journey until the aircraft arrives at an airport to obtain the assistance of law enforcement. The same cannot be said of a victim on board a

bus, train, or taxi, who can more readily and speedily receive the assistance of the authorities once they are duly notified.

51 For completeness, I also set out the features of air travel I do *not* consider to be relevant to my determination that an offence being committed on board an aircraft is an aggravating factor. Thus, where these features are called upon in support of an argument that it is an aggravating factor that the offence was committed on board an aircraft, the court should not find an aggravation of the offence without identifying exceptional reasons for doing so.

52 One factor Mr Satianathan pointed out was the fact that alcohol is generally available on board most commercial flights. It is certainly true that most other forms of public transportation do not involve the provision of alcoholic beverages. But that is not to say that there are no drunk passengers on board other forms of public transport. The case law is littered with examples of taxi drivers who were violently assaulted by drunk passengers they picked up on the streets. This is therefore not a risk factor unique to air transportation. In any event, intoxication is already recognised to be an aggravating factor on its own: see *Wong Hoi Len v Public Prosecutor* [2009] 1 SLR(R) 115 ("*Wong Hoi Len*"). Where the circumstances warrant it, a charge may also be brought under s 8B(3) of the Air Navigation Act, which specifically targets drunk passengers on board aircraft.

53 Another factor which the prosecution pointed out was that an offence committed on board an aircraft presents difficulties in investigation and prosecution. The prosecution was right to point out that passengers and potential witnesses will typically come from foreign jurisdictions and have quite different travel plans, resulting in difficulties in obtaining evidence. But it seems to me that this factor cuts both ways. It will be equally if not more difficult for the

defence to obtain exonerating evidence from witnesses beyond the jurisdiction, especially without the benefit of the resources of the state.

54 A third factor the prosecution highlighted was that the very nature of air travel makes offences on board an aircraft more serious. The prosecution pointed to the possibility of "air rage" which threatens the safety of the aircraft, its crew, and the passengers. Air rage has already arisen in case law. In *Public Prosecutor v Tan Fook Sum* [1999] 1 SLR(R) 1022 ("*Tan Fook Sum*"), an exceptionally disgruntled passenger who was told off by the flight crew for misbehaving lit a fire in an aircraft toilet and jeopardised the safety of the aircraft and all the individuals aboard it. It seems to me, however, that if such an exceptional act of endangerment of the safety of others occurs, the proper approach is for the prosecution to bring a charge that reflects the gravity and seriousness of the offender's actions. Indeed, I note that the offender in *Tan Fook Sum* was charged and convicted of an offence under the Air Navigation Order (Cap 6, O 2, 1990 Rev Ed), which is a provision designed for such serious offences. It would not be correct, in my view, simply to say that because an offence has occurred on board an aircraft and there is the possibility of air rage or other dangerous actions by a disgruntled passenger, whether a victim or an attacker, that all offences committed on an aircraft automatically deserve an uplift in sentence. This denies the gravity of that separate act of endangerment, and presents far too tenuous a connection between the nature of the offending act under the s 354(1) Penal Code charge and the eventual harm which results from the separate act of air rage or similar dangerous action.

55 It is my view that the three unique features of air travel I have identified above at [46]–[50] contribute to the severity of an offence being committed on board an aircraft. For these reasons, where the offence is committed in such a way as to implicate or raise any of these features, the fact that an offence is

committed on board an aircraft should ordinarily be treated as an aggravating factor. In particular, it should ordinarily be considered more aggravating as compared to an offence committed on other forms of public transportation.

56 I stress, however, that the features may be present to varying degrees depending on the facts of the case. For example, where an offence takes place only in the last 30 minutes of a flight lasting over 16 hours in duration, the distress suffered by the victim from remaining in the vicinity of her attacker is attenuated. Similarly, a victim may be able to obtain immediate assistance from an air marshal if one is present on board. The court should take these facts into account in sentencing in determining the *degree* to which the conduct is aggravating. In some rare cases, it would be fair to say that the degree of aggravation is lower than that of the same offence being carried out on board other means of public transportation, although *ordinarily* one would expect the degree of aggravation to be greater.

Committing a s 354(1) Penal Code offence against an air transportation worker is an aggravating factor

57 The foregoing analysis shows that it is ordinarily an aggravating factor for a s 354(1) Penal Code offence to have been committed on an aircraft. That analysis has been done without distinction as to the role of the victim: the victim could equally be a passenger or a member of the flight crew. I now come to the question whether the fact that the s 354(1) Penal Code offence is committed by a passenger against an air transportation worker, such as a flight stewardess, should be considered as even more aggravating than if it had been committed against a fellow passenger. I also consider the question of whether the law should distinguish between air transportation workers such as flight stewardesses, and other public transport workers.

58 I take the view that the commission of a s 354(1) Penal Code offence by a passenger against an air transportation worker is more aggravating than if it had been committed against a fellow passenger. The latter two of the three features I identified above at [48] and [50] – that there is no convenient means of escape and there is typically a delay in obtaining assistance from law enforcement – are equally applicable to the flight crew. But the first feature identified above at [46] is exacerbated where flight stewardesses are concerned. It is part of the role of flight stewardesses to move up and down the aircraft to check on and respond to passengers' needs, to conduct the meal service, and to carry out duty-free sales. Although they are therefore afforded a greater degree of freedom than the average passenger, they are exposed to a much greater risk of undesired physical contact by passengers. An aircraft aisle is a very narrow space. It is often the case that a flight stewardess has to reach over other passengers to pass out meal trays to passengers seated further away from the aisle and collect them after the meal service. A flight stewardess is thus especially vulnerable to unwanted physical contact, compared to the average passenger.

59 Mr Satianathan made the argument that flight stewardesses receive training to deal with unwanted advances from passengers on flights. That may be true, and it may manifest in a less severe degree of psychological harm suffered by a victim. But that depends on the individual victim. It certainly does not make the offender any less culpable for his actions. In my view, air transportation workers including flight stewardesses are, *as a class*, more vulnerable to a s 354(1) Penal Code offence. The law should deter s 354(1) Penal Code offences by recognising that the commission of such an offence against air transportation workers *as a class*, such as flight stewardesses, is an aggravating factor.

60 I would also add that another good reason why it is more aggravating when a flight stewardess is targeted, instead of a fellow passenger, is that the flight stewardess performs a function essential to the safety and well-being of passengers as a whole, as compared to the average passenger. Flight stewardesses are trained to deal with emergencies. A flight stewardess who is left traumatised and incapacitated by distress at having been physically violated is unable, or less able, to respond to an emergency. Her crew members are left shorthanded, and the passengers exposed to greater danger. This is a real risk the law should also recognise and deter.

61 I turn now to the question whether there is any useful distinction to be drawn between air transportation workers and other public transport workers. I start with the case law. The High Court decision of *Wong Hoi Len* is often cited as authority that the commission of offences against public transport workers immediately warrants a custodial sentence. *Wong Hoi Len* itself is a case involving a passenger convicted of voluntarily causing hurt to a taxi driver. In his observations on sentence, Rajah JA was of the view that public transport workers in general, including bus captains, "are more vulnerable to criminal violence than their counterparts in most other professions", because "[t]hey are constantly exposed on the service frontline and, very often, are left to fend for themselves when confronted with difficult and/or unruly passengers": at [11]. Violence against public transport workers affects the provision of a public service, hence general deterrence should assume special significance and relevance: at [17]. Public transport workers "provide the larger community with an invaluable and essential service, and they have every right to work in a safe and secure environment": at [18].

62 The observations made by Rajah JA, with the exception of the comment that public transport workers often have to confront unruly passengers alone,

are all applicable to flight stewardesses as well. A flight stewardess is part of the crew and thus does not face the passengers alone, but it is also true that flight stewardesses are required as part of their occupation to have a greater degree of interaction with passengers compared to taxi drivers or bus captains. Taxi drivers and bus captains may have little control over who is permitted to enter their vehicles, whereas passengers on flights are typically screened by security personnel before being allowed to board the aircraft. These minor differences do not warrant any distinction being drawn in principle between flight stewardesses and other public transport workers. Commercial air transport is an invaluable and essential service to the community. Flight stewardesses have as much a right as any public transport worker to work in a safe and secure environment.

63 I am therefore in agreement with the general expressions of principle made by Rajah JA in *Wong Hoi Len*. I would, however, supplement those general expressions of principle by including my analysis of the features unique to air travel. This means that where a s 354(1) Penal Code offence is committed against an air transportation worker, the court's focus should be on examining whether any of the features I have identified above at [46]–[50] and [58]–[60] are present, and if so, to what degree. Where s 354(1) offences are committed against flight stewardesses, the general expressions of principle in *Wong Hoi Len* remain applicable, but it is more accurate to examine the commission of an offence against an air transportation worker in particular, as opposed to a public transport worker in general, as an aggravating factor. The particular incorporates the general and appropriately expands on it for the specific situation at hand.

64 I note at this juncture that I have *not* considered the question whether the commission of a s 354(1) Penal Code offence by an air transportation worker

against a fellow air transportation worker should be treated as more aggravating than the other scenarios of a s 354(1) Penal Code offence being committed on board an aircraft. Factors such as abuse of authority or position may come into the picture, and the question is best left for consideration on another occasion when the court is able to receive the benefit of arguments on the issue.

Did the District Judge correctly apply the *Kunasekaran* framework?

65 Under the *Kunasekaran* framework, the court must first determine which of the three sentencing band the offending act falls within by considering the offence-specific factors, namely the degree of sexual exploitation, the circumstances of the offence, and the physical or psychological harm caused to the victim. Next, the court should consider offender-specific factors that are aggravating or mitigating (*Kunasekaran* at [45] and [48]). The District Judge was correct in holding that the *Kunasekaran* framework should apply but with respect, he erred in his application of the framework.

66 On the first factor, *ie*, the degree of sexual exploitation, there was intrusion into the victim's private parts. This alone takes the offending act outside Band 1. That said, the District Judge expressly found at [73] of the GD that the duration of contact was "brief". The contact was in the nature of a "brush" and made "in one motion" ([73] of the GD). The action was taken at a "slow/normal speed" ([19]), and there was no skin-on-skin contact ([73]). The degree of sexual exploitation therefore suggests that the act falls within the lower end of Band 2.

67 On the second factor, the court must examine the circumstances of the offence, including the presence of aggravating factors. On the analysis I have undertaken above, the fact that the offending act was committed against an air transportation worker, in this case a flight stewardess, is a significant

aggravating factor. The features I identified above at [46] to [50] and [58] to [60], which make the commission of a s 354(1) offence against an air transportation worker an aggravating factor, are all present here. The respondent took advantage of the close quarters on board the aircraft cabin to carry out the offence. The cabin was a narrow confined space, and the victim had no convenient means of escape. She had to resort to seeking temporary refuge in the toilet. She was left shaken by her experience, and was not able to continue working for part of the flight. Her crew members had to console her and cope without her for part of the flight. The offending act took place slightly more than midway through the flight. The victim thus had to endure the distress of remaining in the vicinity of the offender, and could only obtain assistance from law enforcement several hours later upon the aircraft's arrival in Singapore.

68 On the third factor, the court must examine the harm caused to the victim. The victim did not suffer any physical harm. She did, however, suffer psychological harm. She cried out of distress and fear after the offending acts, and sought refuge in an aircraft toilet. She continues to work as a flight stewardess, but has requested to be redeployed to non-Australian routes where there is a lower chance of encountering male Caucasian passengers. The psychological harm she has suffered is not inconsequential.

69 The prosecution has placed before me three sentencing precedents involving s 354(1) Penal Code offences committed on board an aircraft. However, the facts in those cases diverge widely from the present case and are not helpful to the analysis. In *Balasubramanian Palaniappa Vaiyapuri v Public Prosecutor* [2002] 1 SLR(R) 138 the offender carried out offending acts *three* times during the journey from Osaka to Singapore: at [44]. In *Public Prosecutor v Pierre Gauthier* [2004] SGDC 92, it was a flight captain who outraged the modesty of a flight stewardess, thus attracting concerns of abuse of authority.

The court also found that the offender had collaborated with a witness to bolster his defence, which was a separate aggravating factor: at [33]. In *Public Prosecutor v Kizhakkumkkara Thomas Ajeesh* (Magistrate's Arrest Case Nos 908850 and 908851 of 2015)(unreported), the offender was intoxicated, which is a separate aggravating factor. The respondent also rightly pointed out that the statement of facts in that case indicated a greater degree of sexual exploitation, as the offender in that case had brushed his hand from the victim's right breast to her left breast in a single motion. In any event, all these decisions pre-date the sentencing framework in *Kunasekaran*, and thus have limited precedential value.

70 I have conducted a holistic assessment of the factors in the first step of the *Kunasekaran* framework for the present case. That exercise, in particular giving due weight to the aggravating factor that the offence was committed against an air transportation worker in the course of her duties, should have led the District Judge to find that the offending act lies above the minimum sentencing point in Band 2 as a starting point. In my assessment, the appropriate starting point would not be five months' imprisonment which is the minimum sentencing point in Band 2 (at [49] of *Kunasekaran*). I determined on the facts in this case that the starting point ought to be pegged at eight months' imprisonment.

71 The court must consider the offender-specific aggravating and mitigating factors at the next step of the *Kunasekaran* framework (at [45] and [48] of *Kunasekaran*). The District Judge found that the respondent's clean record, his respectable job in government service, and good character references supported a greater likelihood of reform and a lower probability of re-offending, and thus considered these to be mitigating factors.

72 The respondent's clean record, good character and work credentials do strongly suggest that the commission of the offence is an aberration and he is unlikely to reoffend. Indeed, I note that the prosecution did not dispute this. Instead, the prosecution relied on the decision of Menon CJ in *Stansilas Fabian Kester v Public Prosecutor* [2017] 5 SLR 755 ("*Kester*") for the proposition that the mitigating weight to be attributed to a lessened need to specifically deter an offender may be offset by the interest of general deterrence (at [100]). That is certainly correct as a matter of law. But it must first be shown that there is a need for a heightened dose of general deterrence. In *Wong Hoi Len*, Rajah JA noted a "reported increase in criminal acts targeting persons working in the field of public transport", citing newspaper articles and questions asked of the Minister of Transport in Parliament: at [8]–[11]. This brought the interest of general deterrence to the fore. Similarly, Menon CJ in *Kester* had the benefit of statistics from the State Courts Sentencing Information and Research Repository, as well as a report from the Singapore Police Force, both showing an upward trend in drunk driving cases that warranted greater significance being given to general deterrence: at [43], [44] and [100]. No such evidence was before me here.

73 The fact that an air transportation worker is the victim of the offence and the fact that the offence affected the provision of a public service would point towards general deterrence assuming special significance and relevance (*Wong Hoi Len* at [17]). Nevertheless, by treating the two factors as significant aggravating factors, general deterrence would already have been given due weight, and I found that the need for general deterrence does not substantially trump the lessened need for specific deterrence in this case. Some mitigating value may still be given to the respondent's good character and work credentials as supporting a high potential for rehabilitation and a lesser need for specific deterrence.

74 The District Judge also appeared to have taken into account as a mitigating factor the fact that the respondent was not allowed to leave the jurisdiction for a period of six months while on bail. During that time, the respondent was separated from his family, and had no source of income. In my view, this is not a mitigating factor. The District Judge appeared to have assumed that a foreigner in the respondent's position would suffer more hardship than a Singapore resident in the same position, as the Singapore resident granted bail pending trial could presumably return to his family and continue his work. But there is no safe basis for a court to make such an assumption – it assumes that the offender has a family to return to, and that his employment remains available to him. In any event, the fact that the respondent was not allowed to leave the jurisdiction is the normal and unexceptional consequence of the determination of him as a flight risk. It is the conventional operation of the bail regime that a foreigner with no strong ties to the jurisdiction is more easily found to be a flight risk than a Singapore citizen. The regime is not deliberately designed to inflict more hardship on a foreign citizen as compared to a Singapore resident. Instead, it aims to secure the alleged offender's presence in court at the trial. There is no mitigating value to be attributed to the respondent's prolonged stay in Singapore while out on bail.

75 On balance, having regard to all the circumstances in the round, the sentence would be appropriately calibrated at six months' imprisonment.

Conclusion

76 For the above-stated reasons, I allowed the prosecution's appeal in part and increased the sentence in respect of the first charge to six months' imprisonment. This sentence would run concurrently with the sentence of one month's imprisonment which was imposed in respect of the second charge.

77 I am grateful to the parties for their submissions and especially to Mr Satianathan, the Young *Amicus Curiae*, for presenting his recommendations and ably assisting the court on the sentencing issues.

See Kee Oon
Judge

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