IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 82

Magistrate's Appeal No 9232 of 2019/01

Between

Public Prosecutor

… *Appellant*

And

Siow Kai Yuan Terence

… *Respondent*

JUDGMENT

[Criminal Procedure and Sentencing] — [Sentencing] — [Adult offenders] — [Extremely strong propensity for reform]

Public Prosecutor
v
Siow Kai Yuan Terence

[2020] SGHC 82

High Court — Magistrate's Appeal No 9232 of 2019/01
Sundaresh Menon CJ
10 March 2020; 30 March 2020

27 April 2020 Judgment reserved.

Sundaresh Menon CJ:

Introduction

1 The aim of criminal justice, subject to some exceptions, is ultimately to secure the rehabilitation, reform and reintegration into society of all offenders, without undermining broader societal goals of preserving law and order. This objective guides sentencing judges when they consider the range of sentencing options at their disposal in a given case. To that end, sentencing judges may consider a variety of considerations and assess which have pre-eminence in a given case. In some instances, the judge might conclude that what will work best for the particular offender before her, without undermining those broader societal goals, is a sentence that minimises the disruption to the offender's life, such as probation. In many, if not most, instances, the judge will conclude that a dose of deterrence is called for, directed not only at the offender at hand, but also to other like-minded would-be offenders. Such sentences may also secure

retributive ends. In each case, the judge must examine the circumstances of the offence and the relevant characteristics and background of the offender. But in considering those characteristics and that background, the court is *never* concerned with the offender's social status, wealth or other *indicia* of privilege and position in society. Justice exists for all and no judge worthy of the office would ever consider it appropriate to pass a sentence based on such extraneous considerations. A judge is bound by her Oath of Office to do right to all manner of people after the laws and usages of the Republic of Singapore *without fear or favour, affection or ill-will to the best of her ability*, as well as to preserve, protect and defend the Constitution of the Republic of Singapore. Yet, although judges endeavour to explain their decisions with care and attention to detail, it can sometimes be the case that those who read their judgments overlook the nature of this quintessential judicial mission. That mission is premised on *objective* and *relevant legal* criteria, and its ultimate aim (in the context of sentencing) is to *balance* a myriad of factors, which are often in tension with each other.

2 The present case concerned an offender who outraged the modesty of a victim while using the public transport network. He was, and remains, a university undergraduate with a seemingly bright future. The learned District Judge ("DJ") sentenced him to probation and rejected the Prosecution's submission for a six-week custodial sentence. The DJ explained her decision in a judgment spanning 16 pages. Among the principal factors she took into account in preferring a non-custodial sentence were the relative gravity (or lack thereof) of the offences committed and the fact that because of the offender's academic record and potential, the chances were high that he could be successfully rehabilitated.

3 In doing this, the DJ was not adopting an approach that was unprincipled. Nor was it especially remarkable. She was certainly not suggesting that undergraduates were a privileged class immune from the usual consequences visited upon those who break the law. Unfortunately, that is how some have interpreted her decision. This is regrettable, to say the least, because there are few things more corrosive of the legitimacy of the judiciary, upon which the justice system is founded, than the perception that it is stacked in favour of any individual or class. And, that is especially regrettable, where, as is the case here, it is wholly without basis.

4 On the same day I heard this appeal, I also dealt with the appeal of one Abdul Qayyum bin Abdul Razak, who was not a graduate, but a young offender raising four children and struggling to turn his life around. I sentenced Abdul Qayyum to a community-based sentencing regime and dismissed the Prosecution's submission that he should be incarcerated for at least three months (see *Public Prosecutor v Abdul Qayyum bin Abdul Razak and another appeal* [2020] SGHC 57 ("*Abdul Qayyum*")). That case did not attract any public comment or media interest, which is unsurprising, but for the contrast with the media interest in the arguments made in this appeal, minutes after I had given my decision in *Abdul Qayyum*. Each and every day, judges in our courts dispense sentences that are ultimately directed at doing justice, advancing law and order, and securing the best chances of rehabilitating and reintegrating offenders into society. Both the case at hand and *Abdul Qayyum* are relevant to the broader point that the rehabilitative goals of the criminal justice system are indifferent to the economic, educational or other status of those who come before us. Unfortunately, the different ways in which these cases are viewed or reported in the public space can influence public perceptions and result in regrettable and avoidable misconceptions, when broader points, such as the nature of the judicial mission and task, are overlooked or ignored.

5 On the specific relevance of an offender's educational background, I can do no better than to refer to these observations of Steven Chong JA in *Praveen s/o Krishnan v Public Prosecutor* [2018] 3 SLR 1300 ("*Praveen*") at [45]:

> [T]he quest for academic qualifications is merely one indicator of rehabilitative capacity. Although it usually helps that young offenders are good students as it stands them in better stead and fortifies their chances of reform…, the issue is *not* ultimately whether the offender is academically promising. Rather, the relevant question is whether he has demonstrated a positive desire to change and whether there were conditions in his life that were conducive to helping him turn over a new leaf. In this regard…, scholastic mediocrity or the fact that the offender is no longer in school should not be reasons *by themselves* to conclude that the offender is incapable of rehabilitation. Other avenues, such as vocational training or employment, would also be pertinent in assessing the offender's prospect for reform. [emphasis in original]

6 The question in each case is ultimately the same: what is the most appropriate sentence that fits the circumstances of the particular offender and the particular offence before the court. As I have already noted, judges are there to balance considerations that can, and often do, pull in different directions, in an endeavour to reach what they hope will be the right answer in each case. But, in seeking that answer, the social status of the offender is invariably *irrelevant* because in the eyes of the law, all are equal before it.

Facts

7 The facts in this matter are relatively simple and not in dispute. Terence Siow Kai Yuan ("the Respondent") was 22 years of age when he saw the victim taking a seat on the train. He decided to sit beside her and, feeling an urge, used his left hand to touch the side of the victim's right thigh. The victim shifted away from the Respondent, and crossed her right thigh over her left leg. Undeterred, the Respondent again used his left hand to touch the side of the victim's right thigh.

8 The victim then moved one seat away from the Respondent. When she alighted at her station, the Respondent alighted with her. It is not disputed that this was not done with a view to stalking the victim as the Respondent had intended to alight at the station in any event.[1]

9 After alighting, the Respondent followed the victim. Again, he felt the urge to touch her. While they were ascending the escalator, he stood behind the victim and used his finger to touch her buttocks over her shorts.

10 The victim immediately turned around and saw the Respondent. She shouted at him, and he quickly walked towards the control station. The victim then informed the station officer that she had been molested, pointing to the Respondent. Meanwhile, the Respondent hastened to the exit and left the station. The police were notified, and the victim duly made a police report.

11 Following investigations, the Respondent was arrested and eventually charged with offences arising out of these acts against the victim. By the time he entered his plea, the Respondent was 23 years of age. He pleaded guilty to one charge of outraging the victim's modesty by touching her buttocks over her shorts with his finger while on the public transport network ("the proceeded charge"). He consented to two other charges, concerning his touching of the victim's thigh, being taken into consideration for the purpose of sentencing ("the TIC charges"). At the time of sentencing, the Respondent was untraced.

Conduct of proceedings below

12 In her submissions on sentence, the learned Deputy Public Prosecutor Deborah Lee ("DPP Lee") sought a custodial term of at least six weeks' imprisonment. This was arrived at by the application of the offence-specific and offender-specific factors that were identified in *Kunasekaran s/o Kalimuthu*

Somasundara v Public Prosecutor [2018] 4 SLR 580 ("*Kunasekaran*") (at [45]), being factors that are relevant when sentencing for outrage of modesty offences under s 354(1) of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code"). In DPP Lee's view, the present case fell within the higher end of Band 1 of the *Kunasekaran* framework.

13 In mitigation, counsel for the Respondent, Mr Raphael Louis ("Mr Louis"), made a number of points that can broadly be grouped into three main points:

(a) The Respondent was only 22 years old at the time of the offence, which was a year past the age of majority. Mr Louis suggested that in these circumstances, the court should give due consideration to the fact that he was just past the age at which a primarily rehabilitative sentencing option, such as probation, would have been presumptively applied.

(b) The Respondent was still in university with a strong academic record and this suggested that he had a strong propensity for reform and rehabilitation.

(c) Consideration should be given to avoiding further unnecessary disruption to his studies as he had already been suspended from the university for one semester because of these offences. Since it is plain that this could not have been based on the Respondent's convenience, I take it that it was raised in the context of seeking to maximise the Respondent's prospects of rehabilitation.

14 In addition, Mr Louis pointed to the fact that the Respondent had sent a letter of apology to the victim. In all the circumstances, he urged the DJ to call

for a probation report with a view to assessing the Respondent's suitability for probation.

15 DPP Lee countered some of these points, noting that because the Respondent was over the age of majority, deterrence rather than rehabilitation was the dominant sentencing consideration, and that this would be so unless the Respondent could demonstrate an *extremely strong propensity for reform* and/or exceptional circumstances. In short, while probation was not necessarily excluded, it would only be selected exceptionally.

16 Having heard the parties, the DJ held that, "on the balance", a probation report ought to be called. Sentencing was therefore adjourned to enable the preparation of the report.

The probation report

17 The probation report was prepared by Ms Tan Yiqi Jacinda ("the Probation Officer"), who found the Respondent suitable for probation and recommended 21 months' supervised probation, with a time restriction of 11pm to 6am daily, and a community service order of 150 hours. Further, she recommended that the Respondent attend an offence-specific treatment programme.

18 In her assessment, the Probation Officer noted that the psychologist, Ms Jodi Chiang, had assessed the Respondent's risk of sexual re-offending to be "moderate". In this respect, a number of risk factors were identified:

> (a) The *modus operandi* and offending behaviour suggested boldness in his actions and cognitive distortions towards sexuality and social boundaries.

(b) His involvement in these offences suggested an inability to manage his stressors and desire for sexual gratification pro-socially. This led him to devise deviant methods to gain pleasure with little regard for the nature of his actions.

(c) His consumption of and exposure to pornography increased his sexual preoccupation and contributed to the cognitive distortions mentioned at [18(a)] above.

(d) The Respondent admitted to the Probation Officer that he was "usually attracted to exposed skin on females and engaged in sexual fantasies". He also admitted to have "previously also touched other females in crowded buses or trains but managed to escape detection." While he "[w]as unable to recall the number of times" he had done so, he "reported that the behaviour started when he commenced university in Aug[ust] 2016." His previous successes in avoiding detection for these inappropriate acts towards other females, coupled with a lack of moral guidance from his parents, had emboldened him to continue with such behaviour.

(e) The Respondent's parents failed to supervise his private and online activities and were oblivious to his unhealthy exposure to pornography. In this regard, aside from the Respondent's consumption of pornography, he admitted that he had started drinking in 2016 during an orientation camp in school. According to him, he had consumed "Soju" on the day of the offence which impaired his thinking.

19 On the other hand, the following protective factors were also identified:

(a) The Respondent had received positive reports from his school and his National Service supervisors. His good behavior across various settings suggested that he was able to behave pro-socially when guided closely.

(b) He had maintained good academic performance through the years, which highlighted his potential to excel in life.

(c) He expressed willingness to receive offence-specific intervention.

(d) A time restriction had been implemented on a trial basis. He had adhered to this, thus demonstrating the capacity to be responsible and disciplined.

(e) His parents had expressed their willingness to work towards improving their parenting skills and communication with the Respondent.

(f) There was an absence of other anti-social behaviours, which suggested a positive prognosis for his rehabilitation.

20 In all the circumstances, the Probation Officer assessed probation to be a suitable option for the Respondent.

Sentencing the Respondent to probation

21 On 25 September 2019, after the probation report had been prepared, the learned Deputy Public Prosecutor Benedict Chan ("DPP Chan") and Mr Louis appeared before the DJ to make submissions on whether probation would be the appropriate sentence for the Respondent.

22 DPP Chan emphasised the seriousness of the offence and the fact that it had taken place while the Respondent and the victim were using the public transport network, which has been held to be an aggravating factor. He pointed out that the High Court in *Kunasekaran* (*supra* [12]) had observed (at [58]) that general deterrence ought to be the predominant sentencing consideration when such offences were committed in this setting. In these circumstances, unless an adult offender, such as the Respondent, had an extremely strong propensity for reform or was able to point to exceptional circumstances, he should not be granted probation. DPP Chan also observed from the probation report that the Respondent had committed similar offences since 2016, which suggested a deeper problem. As he considered that there was nothing to deviate from the sentencing norm for similar cases involving adult offenders, he, like DPP Lee, sought an imprisonment term of six weeks.

23 In reply, Mr Louis submitted that the Respondent did indeed demonstrate a strong propensity for reform, pointing to the following: (a) he was still pursuing his education; (b) he had remained free of any criminal behavior since the offence; (c) he had sought and obtained counselling; (d) he had made a conscious effort to seek treatment to address his sexual urges; and (e) he had been very candid during the interview and admitted to his prior conduct of touching other females, which was a "clear indication of remorse".

24 Having heard the submissions and considered the contents of the probation report, the DJ found that the Respondent had "demonstrated an extremely strong propensity for reform". While he was 22 years old at the time of the offence, which suggested that deterrence was presumptively the dominant sentencing consideration, she noted that "the nature of the acts [were] relatively minor". She also had regard to the Respondent's academic record, which suggested a good prognosis. In all the circumstances, she considered that "the

sentencing of probation [was] the most appropriate disposition". Accordingly, in line with the Probation Officer's recommendation, the DJ sentenced the Respondent to 21 months' supervised probation with time restrictions from 11pm to 6am daily. He was also required to serve 150 hours of community service, and to attend offence-specific treatment programmes.

Stay of sentence

25 The Prosecution appealed against the sentence imposed by the DJ and, on 4 October 2019, the Probation Order was stayed pending the disposition of the present appeal.

The DJ's decision

26 In her grounds of decision, (see *Public Prosecutor v Terence Siow Kai Yuan* [2019] SGMC 69 ("the GD")), the DJ recognised that "age is a critical factor and the imposition of probation for adult offenders is the *exception rather than the norm*" [emphasis added], with one such exception arising where the offender demonstrates an "extremely strong propensity for reform" (the GD at [23]).

27 Furthermore, the DJ observed that, even if the adult offender is found to have demonstrated an "extremely strong propensity for reform", this "can be eclipsed or diminished by considerations of deterrence or retribution if the circumstances warrant". Broadly speaking, this may be case where (a) the offence is serious; (b) the harm caused is severe; (c) the offender is hardened and recalcitrant; or (d) the conditions do not exist to render rehabilitative sentencing options viable (citing *Public Prosecutor v Lim Chee Yin Jordon* [2018] 4 SLR 1294 ("*Jordon Lim*") at [35]): the GD at [24]).

28 On the present facts, the DJ observed that while the offences were serious in nature, their particular manifestation in terms of the intrusions in this case were relatively minor. Specifically, it involved "a brief and light touch with one finger" (for the proceeded charge) and "momentary touches to the side of the thigh" (for the TIC charges) (the GD at [41] and [51]). Nonetheless, in the light of the setting of the offences, namely that these had occurred on public transport, and the fact that there were *three* offences (including the TIC charges) against the victim, the DJ held that the custodial threshold would in principle be crossed. However, she considered that the case would fall within the lower end of Band 1 of the *Kunasekaran* framework, warranting an imprisonment term of two weeks at the highest (the GD at [42]).

29 The DJ also observed that the Respondent had pleaded guilty at the earliest time and spared the victim any further anguish. Further, the investigation officer reported that the Respondent had been co-operative during investigations. In the circumstances, she accepted that his plea of guilt had been motivated by regret and accorded weight to this (the GD at [50]).

30 Turning to the appropriate sentencing principles, the DJ recognised that deterrence would ordinarily be the dominant sentencing consideration for such a case. However, considering that the nature of the intrusions was relatively minor and also that the overall gravity of the offences here fell at the lower end of Band 1, she determined that rehabilitation should be given prominence notwithstanding the need for deterrence (the GD at [51]).

31 On that footing, the DJ proceeded to consider whether in all the circumstances, an order of probation was justified. She concluded that it was after considering the Respondent's close relationship with his mother, his good record in National Service and in his education, and the remorse he had

expressed for the hurt he had caused the victim and his parents (the GD at [53]–[61]).

The parties' submissions

The Prosecution's submissions

32 Before me, the learned Deputy Public Prosecutor Ms Kristy Tan ("DPP Tan"), who appeared on behalf of the Prosecution, first submitted that the analytical approach undertaken by the DJ was erroneous, in that the DJ seemed to consider that rehabilitation and deterrence were considerations that were equally applicable. DPP Tan submitted that the appropriate starting point in this case was to recognise that deterrence was the dominant sentencing consideration for an adult offender, which the Respondent was, and that rehabilitation would only eclipse the need for deterrence if he was able to demonstrate exceptional circumstances or an extremely strong propensity for reform.

33 In this case, neither exceptional circumstances nor an extremely strong propensity for reform had been demonstrated. While the Respondent demonstrated a measure of self-awareness and a recognition of his problems, the degree of his family support was unexceptional. Most importantly, DPP Tan submitted that nothing in the material before the court evidenced a nexus between the Respondent's good performance in other areas of his life, such as in his National Service or his education, and his rehabilitative capacity in the context of his urges to engage in these types of offences. In fact, she pointed out that the Respondent had committed the present offences *at the same time that* he was performing well in school, suggesting that he was able to *compartmentalise* his deviance and wrongdoing from other well-functioning aspects of his life. DPP Tan was at pains to register the fact that the Prosecution

was taking this stance not to fulfil purely retributive or penal ends but because it considered that the emphasis on deterrence in this case was principled and would most likely result in the successful rehabilitation of this offender. DPP Tan submitted that a short custodial sentence of at least three weeks would be appropriate in this case, and could prove to be the critical change agent that would "kick-start" the Respondent's reformative journey.

The Respondent's submissions

34 As was his position before the DJ, Mr Louis submitted that the Respondent did in fact demonstrate an extremely strong propensity for reform, such that probation was the appropriate sentence. In Mr Louis' submission, the Respondent had shown deep remorse for his actions. He also emphasised that the Respondent had actively sought help by seeking a referral for treatment with a psychiatrist from his university-mandated counsellor, Mr Benjamin Tan ("Mr Tan"). The Respondent was also positively engaged at school, and had not engaged in any criminal behaviour since the offences. He pointed to the fact that the Probation Officer had noted that the Respondent had a sincere desire and willingness to change, and that this was said to underscore his exceptional propensity for reform.

The psychiatric report

35 At the hearing of the appeal, I observed that the reports from Mr Tan (dated 7 March 2019 and 17 July 2019), which had been relied on by the Respondent before the DJ and myself, did nothing more than record the Respondent's attendance at a number of counselling sessions. It also stated that he had requested a referral for a consultation with a psychiatrist. Mr Louis referred to Mr Tan's reports to submit that the Respondent had actively sought treatment in order to address his sexual preoccupation and urges. However,

there was nothing from the psychiatrist to confirm this. Nor was there anything that might help in the assessment of the progress that the Respondent had actually made from any such intervention. As I considered it to be potentially relevant, I asked Mr Louis to procure a report from the psychiatrist. Mr Louis subsequently obtained and furnished the report of Dr Ko Soo Meng ("Dr Ko"), the Visiting Consultant Psychiatrist from the University Health Centre who had attended to the Respondent following the referral by Mr Tan. In his report ("the psychiatric report"), Dr Ko stated that the Respondent had consulted him on three occasions, namely 2 April, 22 May and 2 July 2019.

36 During the first consultation on 2 April 2019, the Respondent informed Dr Ko that he was under investigations for the present offences. In his account of the events to Dr Ko, he stated that his apartment was undergoing the Home Improvement Programme at the material time and, as a result, he was "feeling tired". He was on his way home when he "accidentally touched" the right thigh of the victim. He claimed that as the victim did not show any objection, he did not move his hand away. When she alighted at the station, he alighted too, and followed her up the escalator, and again "accidentally poked her right buttock". It was then that she reported him to the staff of the station. As had been the case with his Probation Officer, the Respondent also spoke about his frequent use of pornography, which could last for "up to 2 hours every other day", although it was "about an hour every other day" when he was busy with his work.

37 The Respondent admitted that he did not seek the victim's consent, and that he knew that what he was doing was wrong; he expressed regret for his actions as well as the hope that he would be shown leniency. In Dr Ko's assessment, the Respondent was able to empathise with the victim, as evidenced in his statement that he would not want to be at the receiving end of what he had done to the victim. Further, the Respondent did not exhibit any signs of a mental

disorder, although he showed anxiety over having to deal with the molestation charges. No medication was prescribed for him after the first consultation, and he was advised to continue seeing his counsellor (Mr Tan) for further psychological support. It was therefore evident that the Respondent could not assert that his actions were induced by any sort of medical condition. In fairness, Mr Louis did not attempt to mount any such argument.

38 Dr Ko saw the Respondent for two further reviews on 22 May and 2 July 2019. In the course of those sessions, the Respondent again expressed remorse and shame for his behaviour, as well as fear that his future career could be ruined once the case became a matter of public knowledge. He was also afraid of receiving a custodial sentence for the offences, and expressed hope that he would be given a second chance to turn over a new leaf. In Dr Ko's assessment, his mood was not depressed, and no medical treatment was needed. Even though the Respondent was invited to seek psychiatric treatment subsequently if the need arose, he did not return for further consultations with Dr Ko after 2 July 2019.

39 Instead, he voluntarily resumed his counselling with Mr Tan, seeing him on seven occasions between January and October 2019. While the Respondent had demonstrated during these sessions a willingness to focus on specified "treatment issues", specifically the anxiety brought about by the repercussions of the present proceedings as well as "recidivism avoidance", no specific treatment programme was followed during these sessions. Instead, they "focused on the topic of anxiety, mainly as triggered by the legal/court process and media scrutiny" surrounding the Respondent's case. The topic of recidivism avoidance was monitored during each session through an ongoing discussion.[2]

The central issue before me

40 As I explained to DPP Tan during the course of the hearing before me, I do not think that the DJ misapprehended the applicable principles that guided her decision. As seen at [19]–[25] of her GD, the DJ clearly appreciated that general deterrence was presumptively the dominant sentencing consideration in this case. She also recognised that the imposition of probation for adult offenders was the exception rather than the norm, and that this required the adult offender to demonstrate an extremely strong propensity for reform or other exceptional circumstances. Further, even if the adult offender was found to have such an "extremely strong propensity for reform", the significance of rehabilitation could be eclipsed by an emphasis on the need for deterrence where, for example, the offence was a serious one, or the harm caused was severe. In my judgment, the DJ correctly articulated the relevant and applicable principles in this case.

41 Therefore, the central issue before me is whether she *applied* them correctly and, more specifically, whether the Respondent, as an adult offender both at the time of the offence and of sentencing, has demonstrated an extremely strong propensity for reform, such that rehabilitation comes to the fore. This is where I part company with the DJ. For the reasons that follow, I find that the Respondent has failed to provide sufficient evidence to support such a finding. Accordingly, deterrence remains the controlling principle that guides sentencing in this context.

My decision

Deterrence is generally the dominant sentencing consideration for adult offenders who outrage a victim's modesty

42 I begin with the observation I made in *Public Prosecutor v Lim Cheng Ji Alvin* [2017] 5 SLR 671 ("*Alvin Lim*") at [6] and [7], that while the law takes a presumptive view that rehabilitation is the dominant sentencing consideration for offenders aged 21 or under, this is not the case for offenders above the age of majority. Here, "the law rightly takes the view that rehabilitation would typically *not* be the operative concern … *unless* the particular offender concerned happens to demonstrate an extremely strong propensity for reform or there exist other exceptional circumstances" [emphasis in original] (*A Karthik v Public Prosecutor* [2018] 5 SLR 1289 ("*Karthik*") at [44]; see also *GCO v Public Prosecutor* [2019] 3 SLR 1402 ("*GCO*") at [35]).

43 In the specific context of cases involving the outrage of modesty by an adult offender, deterrence will be the operative sentencing consideration: see *GCO* at [41]. This is especially so when the offence is committed on the public transport network (*Kunasekaran* (*supra* [12]) at [58]). This is an aggravating factor because it interferes with the routine and safe enjoyment of public services, which is a basic entitlement and expectation of every person in Singapore.

44 At the time of the offence and of sentencing, the Respondent was above the age of 21. Furthermore, the offence of outrage of modesty was committed on the public transport network. Hence, unless the Respondent is able to demonstrate an extremely strong propensity for reform or that there are exceptional circumstances, a sentence that places emphasis on deterrence would be appropriate.

Extremely strong propensity for reform

45 The need to demonstrate an *extremely strong propensity for reform* to justify displacing deterrence as the primary sentencing consideration was first articulated by Yong Pung How CJ in *Goh Lee Yin v Public Prosecutor* [2006] 1 SLR(R) 530 ("*Goh Lee Yin*") at [28]. Since then, the principle has been referred to in a number of reported decisions of the High Court (see, for instance, *Jordon Lim* (*supra* [27]) at [33], *Karthik* at [34], *Sim Kang Wei v Public Prosecutor* [2019] 5 SLR 405 at [51] and *GCO* at [42]). A review of the authorities demonstrates that the assessment of an offender's propensity for reform is necessarily a multi-factorial inquiry, which focuses more on the traits of the *offender* rather than on aspects of the *offence*. The nature of the offence is a separate inquiry that is undertaken later in the analysis in order to determine whether, despite the offender's extremely strong propensity for reform, the emphasis should nonetheless remain on deterrence for one or more of the reasons that the DJ herself had identified, as summarised at [27] above.

Focus on offender-specific factors

46 I begin by outlining the approach taken in a number of the precedents.

47 In *Leon Russel Francis v Public Prosecutor* [2014] 4 SLR 651 ("*Leon Russel Francis*"), Chao Hick Tin JA considered the following factors to be relevant in determining a young drug offender's *capacity for rehabilitation*: (a) the strength of familial support and the degree of supervision provided by the offender's family for his or her rehabilitation; (b) the frequency and intensity of the offender's drug-related activities; (c) the genuineness of remorse demonstrated by the offender; and (d) the presence of risk factors such as negative peers or bad habits (at [15]). It is evident that this was a multi-factorial

inquiry directed at the *offender's* particular situation in order to assess whether he had manifested an extremely strong propensity for reform.

48 In *Praveen* (*supra* [5]), Chong JA considered the appellant, who was 17 years old when he committed serious drug offences, to have "good potential for reform" (at [44]). This was based on the following factors: (a) the positive prognosis of his academic pursuits; (b) the appellant had taken the initiative to channel his energy into productive endeavours; (c) the appellant's family had been "remarkably supportive of his rehabilitative efforts"; (d) the appellant was a first-time offender who had not reoffended since his arrest; (e) the appellant was genuinely remorseful and expressed a willingness to abide by the conditions of probation; and (f) the appellant did not present any significant factors that could lead to a risk of reoffending. Again, emphasis was placed on the *offender's* circumstances and how these bore on his propensity for reform.

49 Similarly, in *Karthik* (*supra* [42]), I considered that the appellant had "evinced a capacity for rehabilitation that was demonstrably high" because he had (a) strong support from his family members; (b) consistently engaged in meaningful employment and had remained crime free in the intervening period of more than five years since he committed the offences in 2012; (c) expressed genuine remorse for his actions, as reflected in his acknowledgment of the seriousness of his offences and his decision to come clean on all that he had done, when he was eventually arrested; and (d) made a conscious effort to spend more time with his family and to dissociate himself from negative influences, such that his risk of offending was assessed to be "very low" (at [73]).

50 From these cases, it can be seen that the assessment of an offender's rehabilitative capacity is necessarily a multi-factorial one, with a particular focus on *offender*-specific, rather than *offence*-specific, factors. This is

consistent with the observations in *Public Prosecutor v Mohammad Al-Ansari bin Basri* [2008] 1 SLR(R) 449 at [29]:

> Professor Andrew Ashworth astutely notes in *Sentencing and Criminal Justice* (Cambridge University Press, 4th Ed, 2005) at p 82 that the rehabilitative rationale for sentencing seeks to justify compulsory rehabilitative measures as a medium for achieving the prevention of crime. In turn, this usually necessitates a range of sentences and facilities designed to offer various programmes of treatment. To that extent, therefore, ***the crucial questions for the sentencing judge concern the perceived needs of the offender, not the gravity of the offence committed***. … [emphasis added in bold italics]

51 This focus on the offender-specific traits is also in line with the approach undertaken in other contexts: rehabilitation is the key sentencing consideration for a *young* offender (*Public Prosecutor v Mok Ping Wuen Maurice* [1998] 3 SLR(R) 439), as well as for an offender who was belabouring under a *serious psychiatric condition* at the time of the offence (*Ng So Kuen Connie v Public Prosecutor* [2003] 3 SLR(R) 178 at [58]; *Goh Lee Yin* (*supra* [45]) at [29]). In each of these settings, it is the unique features of the offender that justify the adoption of a particular sentencing approach.

52 This is not to say that the nature or gravity of the offence is not relevant. As the DJ had noted (see [27] and [40] above), even if the adult offender demonstrates an extremely strong propensity for reform, the significance of rehabilitation as the dominant sentencing consideration in such circumstances may be displaced, for instance, by a persistent need for deterrence and even retribution because of the gravity of the offence: see *Public Prosecutor v Koh Wen Jie Boaz* [2016] 1 SLR 334 ("*Boaz Koh*") at [30]. In *GCO* (*supra* [42]), the appellant, who was 25 years old at the time, was working on a project with the victim and her boyfriend until the early hours of the morning at a computer lab in the university. In the course of working on the project, the victim, her boyfriend, and the appellant all fell asleep. At about 6am, the appellant woke up

to use the washroom. As he was walking there, he noticed the victim sleeping, and proceeded to place his hand through the opening of her shorts. Upon feeling someone touch the area of her private parts from beneath her shorts, the victim woke up. Realising this, the appellant quickly walked away. The victim and her boyfriend confronted the appellant, who apologised to them. The appellant was subsequently charged with the offence of outrage of modesty. The issue on appeal was whether probation ought to have been ordered.

53 In finding that probation was inappropriate, See Kee Oon J considered that the appellant "might … be said to" have an "extremely strong propensity for reform" (*GCO* at [42]). This was because he had complied with his counselling and psychiatric treatment schedules, had strong family support from his family and his girlfriend, and was untraced prior to the commission of the offence. Nonetheless, See J considered that the appellant's potential for rehabilitation was eclipsed by deterrence given the serious nature of the offence. This was compounded by the specific aggravating factors such as the exploitation of the vulnerability of a sleeping victim (*GCO* at [41]).

Three-limbed assessment of an offender's propensity for reform

54 I return to the assessment of the offender's propensity for reform. In my judgment, "the relevant question is whether [the offender] has *demonstrated a positive desire to change* and *whether there [are] conditions in his life that [are] conducive to helping him turn over a new leaf*" [emphasis added] (*Praveen* (*supra* [5]) at [45]). Unpacking that, it becomes evident that there are two distinct elements: the offender's own desire for reform, and the supporting framework to help him achieve this. But, in the overall assessment of an offender's reformative capacity, these two factors must be weighed against the *presence of risk factors*, such as an association with negative peers, or the

presence of bad habits like an offender's drug use (*Leon Russel Francis* (*supra* [47]) at [15]; *Praveen* at [57]).

55 In my judgment, a three-limbed framework may be applied in order to evaluate whether the particular offender has demonstrated an extremely strong propensity for reform:

(a) First, the court should consider whether the offender has demonstrated a **positive desire to change** since the commission of the offence(s) ("the first limb").

(b) Second, the court should consider whether there are conditions in the offender's life that are **conducive to helping him turn over a new leaf** ("the second limb").

(c) If, after considering the first two limbs, the court comes to a *provisional* view that the offender has demonstrated an extremely strong propensity for reform, the court should then consider, in light of the **risk factors** presented, whether there are reasons to revisit the finding of such a high capacity for reform ("the third limb").

56 Under the first limb, the court examines the offender's *own* resolve to change, as gleaned from evidence of his remorse and the trajectory of his rehabilitative progress between the time of offending and sentencing. The following are some non-exhaustive factors indicating a positive desire to change:

(a) **Evidence of *genuine* remorse:** As DPP Tan accepted, remorse is the beginning of reform. For real change to occur, the offender must first develop self-awareness and recognise the wrongfulness of his

actions. This then manifests in genuine contrition. This point has been expressed and recognised in the case law in various ways, which highlights the different factual circumstances in which remorse may be shown. This is seen, for example, in the following:

(i) *A plea of guilt, especially if entered at the earliest available opportunity (Praveen* at [62]*)*: As observed in *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 ("*Terence Ng*"), a plea of guilt can be a "subjective expression of genuine remorse and contrition" (*Terence Ng* at [66]). Further, in the context of sexual crimes, a plea of guilt helps ensure that the trauma suffered by the victims need not be amplified by having the victim recount the incident in court (*Terence Ng* at [69]). In so far as the plea of guilt evinces the offender's efforts to own up to his mistakes and to minimise further harm to the victim, this can indeed evidence genuine remorse.

(ii) *Acknowledgment of the seriousness of the offences and its implications*: In *Karthik* (*supra* [42]), this was reflected in the offender's decision to come clean and confess to all that he had done upon his eventual arrest (at [73(c)]). Similarly, in *Public Prosecutor v Justin Heng Zheng Hao* [2012] SGDC 219 ("*Justin Heng*"), it was considered relevant that the offender had co-operated fully with the police and admitted his guilt from the outset (at [28]).

(iii) *Full and frank disclosure of criminal activities beyond the offences for which the offender is presently charged:*

(A) In *Praveen*, it was observed that "the full and frank disclosure of criminal activities *beyond* the

offences for which the offender is presently charged clearly goes towards showing the offender's repentance" [emphasis in original] (*Praveen* at [62]).

(B) In *Justin Heng,* it was observed that the offender's "sincere remorse was also evident in his candour during investigations and the pre-sentence interviews, when he had not sought to hide the fact of his previous involvement since December 2010 in trafficking cannabis to his friends" (*Justin Heng* at [28]).

(C) In *Public Prosecutor v Wong Jia Yi* [2003] SGDC 53 ("*Wong Jia Yi*"), the offender was 17 years old when she was arrested for selling ketamine, a Class B drug, to undercover Central Narcotics Bureau officers. She was found to have displayed "sincere remorse", which "was evident in her candour during the pre-sentence interviews, when she had not sought to hide the fact of her previous involvement in selling ketamine to other buyers" (*Wong Jia Yi* at [36]).

(b) Taking active steps *post-offence* to leave errant ways behind: Contrition, in and of itself, is insufficient to signify real change. Instead, this is reflected in the taking of *active steps* to address issues that pre-existed the offence. It is these active steps that demonstrate that the offender is willing to take charge of his own reform:

(i) In *Praveen*, the offender was found to have "good potential for reform". Among the factors considered in coming to this conclusion was the "positive prognosis of his academic pursuits". In this respect, the offender's course chair had written

that he had a "good *change* of attitude" [emphasis added], as seen in his completing a higher proportion of his assignments and improving his attendance after the offence. This, it was said, demonstrated a "sufficient level of willingness to change" (*Praveen* at [44]). He also channeled his energy into productive endeavours, such as volunteering to teach guitar lessons to younger children at the Singapore Indian Development Association ("SINDA") youth programme (*Praveen* at [46]).

(ii) In *Wong Jia Yi*, the offender "made concerted efforts to reform herself" (at [35]). After her arrest for drug-trafficking, she stopped associating with her negative peers, ceased her late night activities, took the initiative to seek counselling (which she was noted to respond well to), and voluntarily admitted herself to a Home to undergo an intensive residential rehabilitation and recovery programme (*Wong Jia Yi* at [17]–[18]).

(iii) In *Karthik*, the offender was found to evince a "capacity for rehabilitation that was demonstrably high" as, among other things, he had "made a conscious effort to spend more time with his family and to dissociate himself from the negative influences that he had previously exposed himself to". He had also stopped consuming alcohol altogether (*Karthik* at [73(d)]).

(c) **Compliance with and amenability to rehabilitative measure(s)**: The offender's compliance with and amenability to rehabilitative measures, such as the conditions of probation that may be imposed by the court, counselling programmes or urine tests, may also

evidence his desire for and commitment to reform (*GCO* at [42]; *Praveen* at [55]).

(d) **Offender has not re-offended since his offence**: That an offender has not re-offended since his arrest may also point towards his desire to change. However, the significance of this factor would depend on the length of the period between the time of the offence, and when the offender is eventually sentenced. For example, in *Karthik*, this factor was significant because the offender had committed the offences in June 2012, but was sentenced more than *five years later*, on 20 November 2017. In the extensive intervening period, he had consistently been engaged in meaningful employment, received glowing reviews while in National Service, and remained crime-free. This was thought, in the round, to demonstrate his "robust commitment towards leaving his errant ways behind" (*Karthik* at [73(b)]).

(e) **The index offence(s) were "out of character"**: The genuineness and potential efficacy of an offender's desire to change can also be evaluated against his past conduct. In this regard, a factor that is often alluded to is the offender's lack of antecedents prior to the offence (*GCO* at [42]; *Praveen* at [53]; *Justin Heng* at [27]). In my judgment, the significance of this factor varies from case to case. It ought not to be treated as a factor pointing towards the offender's propensity for reform as a matter of course. As explained in *Wong Jia Yi* at [13], an offender's "hitherto clean record and otherwise unexceptional conduct and temperament" may be relevant in so far as it shows that the offences committed were "out of character", and were likely an aberration. A similar point was made in *Public Prosecutor v Teo Chang Heng* [2018] 3 SLR 1163 at [18]. Conversely, if the offender has previously engaged

in criminal conduct, even if he has not been charged, the lack of a court antecedent plainly would not suggest that the index offence is a "one-off aberration" (*Alvin Lim* (*supra* [42]) at [20]). Similarly, the fact that the offender has generally been shown to be a person of good repute, or has made past contributions to society (such as through volunteer work and charitable contributions), would also be irrelevant in so far as it reflects the "moral worth" of the offender. However, such conduct in the past could be given *modest* weight if it fairly allows the court to infer that the offender's actions in committing the offence was "out of character", and that he is therefore *unlikely to re-offend* (*Ang Peng Tiam v Singapore Medical Council and another matter* [2017] 5 SLR 356 at [102]).

57 Turning to the second limb, the key inquiry here is whether the offender's environment presents conditions that are conducive in helping him turn over a new leaf. This may be discerned from the following non-exhaustive factors:

(a) **Strong familial support**: The strength of the offender's familial support is a useful indicator of the support system available to the offender in his journey towards reform (*GCO* at [42]; *Leon Russel Francis* at [15]; *Praveen* at [48]; *Karthik* at [73(a)]; *Wong Jia Yi* at [38]):

(i) In *Praveen*, the offender's family was found to be "remarkably supportive of his rehabilitative efforts and ha[d] taken initiatives to increase their supervision over him." The offender and his father had referred themselves for counselling with SINDA, and his parents not only followed up with this by voluntarily attending the counselling sessions at SINDA with the offender, but were also supportive and cooperative in updating

the counsellors about the offender's attitude and behavioural pattern at home (*Praveen* at [48]).

(ii) In *Leon Russel Francis*, the level of familial support for the offender was thought to be "undoubtedly strong". Among other things, he shared a close relationship with his parents and his brother. This tended to suggest that the offender would be provided a significant degree of supervision by his family (*Leon Russel Francis* at [15]).

(iii) In *Justin Heng*, the court considered it relevant that the offender's parents "had shown that they were ready and able to undertake their responsibilities in guiding him back on the right path. They were conscious of their failings and had taken immediate initiatives to address his needs. He was also amenable to their supervision" (*Justin Heng* at [30]).

(b) **Availability of external support system**: Apart from familial support, the availability of a positive external support system, whether from the offender's romantic partner (*GCO* at [42]), medical professionals, religious community, or the probation office (*Justin Heng* at [29]), may also be relevant.

(c) **External sources of motivation for reform**: There may also be strong external sources of motivation that bode well for the offender's reformative journey. For instance, in *Abdul Qayyum* (*supra* [3]), the young offender had a young family of four children that was largely intact. I observed that "this provided him with the strongest possible reason to *want* to reform himself" [emphasis in original], which was supported by the fact that, since the offence, he had secured a more

stable job with better compensation, as well as a rental flat to provide a stable home for his young family (*Abdul Qayyum* at [12]).

(d) **Availability of positive avenues to channel energy:** The availability of positive outlets for an offender to channel his energy towards his reform will also be relevant. Thus, DPP Tan accepted that, "enrolment in school is frequently accepted as a protective factor … because it minimises the opportunities for a young offender to associate with negative peers, and keeps him within a structured environment where he can learn discipline and receive positive guidance from teachers." That said, it should always be noted that "the quest for academic qualifications is merely one indicator of rehabilitative capacity", and "scholastic mediocrity or the fact that the offender is no longer in school should not be reasons *by themselves* to conclude that the offender is incapable of rehabilitation. Other avenues, such as vocational training or employment, would also be pertinent in assessing the offender's prospect for reform" [emphasis in original] (*Praveen* at [45]).

58 If, after considering the first and second limbs, the court comes to a provisional view that the offender has demonstrated a sufficiently strong propensity for reform, the inquiry will then shift to the risk factors that are present in order to determine whether, in all the circumstances, the offender can indeed be said to have an "extremely strong propensity for reform". Risk factors include the offender's association with negative peers, or the presence of bad habits such as an offender's habitual drug use or dependence (*Leon Russel Francis* at [15]; *Praveen* at [57]).

59 It will readily be seen that the focus of the approach I have just outlined is directed at the *offender's* propensity for reform; in other words, the enquiry is an *offender-specific* one and the key concern is to establish the *offender's* rehabilitative capacity and prospects. What follows from this is that reference to an offender's scholastic excellence would, in and of itself, be irrelevant, unless a *link* can be drawn between the offender's scholastic excellence and the offender's rehabilitative capacity.

60 In the final analysis, the assessment of whether the offender has demonstrated an "extremely strong propensity for reform" is a fact-sensitive one, which involves weighing the factors in favour of such reform against the risk factors that might counteract and so compromise the efficacy of the reformative efforts. The framework I have set out above will help sentencing judges organise and evaluate the competing considerations in a systematic way. Before leaving this point, I reiterate the point I have already made at [52] above, which is that it remains necessary and relevant for the court to consider the gravity of the offence as the final step in the analysis. This is to determine whether, *despite the offender's extremely strong propensity for reform*, it nonetheless remains appropriate in all the circumstances to retain the emphasis on deterrence.

Application of principles to the facts of the case

First limb - Positive desire to change

61 I turn to apply those principles to the facts of this case. I first consider the Respondent's desire to change. While the Respondent initially fled from the scene of the offence, he was noted by the investigation officer to be cooperative after his arrest, and he intimated his wish to plead guilty at the earliest opportunity, even before a pre-trial conference was fixed. The reports from his

Probation Officer, as well as the psychiatric report, show that he had expressed remorse and regret for his actions, as well as a degree of empathy for the victim. He also hand-wrote a letter of apology to the victim. While the letter was written six months after the offences were committed, and shortly after he had engaged Mr Louis to defend him for the present offences, I accept Mr Louis's explanation that the delay in reaching out to the victim was caused, at least in part, by the Respondent having been previously informed by the Police that he was *not* to reach out to the victim. The letter notably provides no excuse for his actions. While I regard this as a positive sign, I must also consider it in light of the fact that the Respondent had written it after he had obtained legal advice.

62 I also accept that the Respondent's admission of his past conduct to the Probation Officer reflects a measure of contrition. As I have explained, a "full and frank disclosure of criminal activities *beyond* the offences for which the [Respondent] is presently charged … goes towards showing the [Respondent's] repentance" [emphasis in original] (*Praveen* (*supra* [5]) at [62]; see also *Justin Heng* (*supra* [56]) at [28] and *Wong Jia Yi* (*supra* [56]) at [36]). I also accept Mr Louis' submission that an offender should not be penalised for such candour, as it would otherwise act as a disincentive to the sort of frankness that is an essential first step towards reform.

63 And, in considering the degree and extent of the Respondent's remorse, I have regard as well to what I have been able to discern from the Respondent's interaction with Dr Ko, the psychiatrist to whom he had been referred at his request. No information pertaining to his consultations with Dr Ko was available to the learned DJ. Moreover, the only information that was available to her were the reports of Mr Tan which, with respect, said very little of substance at that time, given that the reports focused on the "presenting concerns of the [Respondent]". In other words, Mr Tan's reports merely recorded the *self-*

reported or *presented* concerns of the Respondent. They *did not* contain an assessment of the Respondent's rehabilitative progress. Having sought and obtained Dr Ko's report and the detailed responses to certain questions directed by Mr Louis to Mr Tan, I am better guided in discerning the extent of the Respondent's desire to change.

64 For one thing, it became evident that, at least in the initial stages, the Respondent remained in denial about his culpability in relation to the offence. Significantly, he had told Dr Ko during his first session on 2 April 2019 that his repeated touching of the victim were *accidental* in nature.[3] This somewhat reduces the weight to be placed on the letter of apology addressed to the victim, which was written on 14 March 2019, after he had obtained legal advice and *before* his first session with Dr Ko, and in which he had offered no excuse at all for his conduct.

65 The Prosecution also submitted that the overall tenor of the psychiatric report indicated that the Respondent had consulted with Dr Ko primarily to address the anxiety that he felt about the present case, rather than to treat an underlying condition that could have led to his offending.[4]

66 In response, Mr Louis contended that while the Respondent had disclosed his worries over his criminal proceedings to Dr Ko, such disclosure was "part and parcel of a patient being open with his doctor", and did not "detract from [the Respondent's] primary motivation to see a psychiatrist to find out whether he had a psychiatric problem and … that he regretted his conduct and genuinely wanted to seek help to understand and address the *root causes* that led to his offending" [emphasis added].[5]

67 In my judgment, the psychiatric report does not bear out Mr Louis' submission. In the report, Dr Ko clearly explained that the Respondent did not have a treatable psychiatric disorder and, while he had repeatedly reported his anxiety over the criminal proceedings, such a "psychological reaction was situational, and did not amount to any formal psychiatric disorder." Dr Ko therefore encouraged the Respondent to continue seeing his counsellor, Mr Tan, for psychological support, and to learn how he might better manage his anxiety. Crucially, however, Dr Ko was of the opinion that *no medical treatment was needed*, and his report makes no mention of any effort being undertaken to address the *root causes* of the Respondent's offending behaviour; indeed, Dr Ko's report made *no* mention of what were, in his professional opinion, the root causes of the offences. Accordingly, I am unable to accept Mr Louis' submission that the sessions with Dr Ko were focused on addressing the root causes of the Respondent's offending. Rather, as the Prosecution submitted, the sessions were mainly targetted at addressing his anxiety relating to the present proceedings.

68 Furthermore, any remorse that the Respondent expressed appeared to come in tandem with his fear for the *personal consequences* of his actions, rather than due to a recognition of the harm that his actions could cause. As Dr Ko reported:

> [The Respondent] came for a second review on 22 May 2019. As he has been suspended from school…, he was giving tuition and was able to cope with the job. *He was still worried about the charge of molestation. He said he had hoped to settle the case out of court.* His parents have been very supportive. He felt remorseful and was ashamed of his behaviour. *He was also fearful that his future career might be ruined when the case is made public.* He had reflected on his action, and knew that it was wrong. …
>
> [The Respondent] came for his third review on 2 July 2019. *He was anxious and afraid that he would be given a custodial sentence for the said offence. He reported having a nightmare*

> *about being sent to jail.* Otherwise, his mood was not depressed and his appetite normal. He felt remorseful and said that although he was psychologically prepared for the outcome, he hoped that he would be given a second chance to turn over a new leaf. …
>
> [emphasis added in italics]

69 In my judgment, Dr Ko's psychiatric report highlights the importance of going beneath the surface in order to try to understand the real nature of the Respondent's situation. I do recognise, at one level, the positive factors that have been identified and summarised at [61] and [62] above, as well as the fact that the Respondent has complied with his counselling schedule. In fact, apart from the first counselling session, which was mandated by the university's disciplinary board, the Respondent attended six additional counselling sessions as well as three psychiatric treatment sessions *of his own volition*. This was relied on both by Mr Louis as evidence of the Respondent's commitment to reform. The difficulty is that once the details of these sessions are considered, it becomes apparent that they were primarily targetted at addressing the Respondent's *anxiety over the repercussions of his offences*. They did not manifest a concerted effort to weed out the root causes of his offending behaviour, in particular his preoccupation with pornography. Specifically, Dr Ko observed that the Respondent did not exhibit any signs of a mental disorder, and that his sessions were focused on addressing his anxiety surrounding the present proceedings and the consequences therefrom.[6] The Respondent's university counsellor, Mr Tan, made the same observation, stating that in the seven face-to-face counselling sessions which he had with the Respondent, there was no treatment programme in place, and "[t]he sessions focused on the topic of anxiety, mainly as triggered by the legal/court process and media scrutiny."[7] I therefore do not think the efforts that the Respondent undertook to get psychiatric help or psychological counselling were especially suggestive of a personal commitment to reform.

70 I turn to his consumption of pornography, which was in the Probation Officer's view, a risk factor as it "increased his sexual preoccupation and contributed to his distortions." In this respect, Mr Louis submitted that the Respondent has demonstrated a "desire to change and seek help", and that this is evinced by Mr Tan's report of 17 July 2019, which stated that the Respondent had "stopped consuming pornography". However, as explained at [63] above, this assertion was *self-reported*, and Mr Tan had simply recorded that the *Respondent* "[h]as reported he has stopped consuming pornography". As Mr Tan explained in his response to queries posed by Mr Louis after the hearing of this appeal, his sessions with the Respondent were focused on the Respondent's anxiety over the ongoing court proceedings and the negative media attention, although the "[t]opic of recidivism avoidance was monitored [at] each session". In other words, while concerns of recidivism stemming from, for instance, the Respondent's use of pornography, were on the agenda at the counselling sessions, such concerns appeared to have featured tangentially to the Respondent's well-being, which was the focus of Mr Tan's attention, in his capacity as the Respondent's counsellor. Viewed in this light, Mr Tan's report of 17 July 2019 serves simply as evidence of the Respondent's self-professed cessation of the consumption of pornography.

71 Shortly after the 17 July 2019 report had been prepared, on 6 August 2019, the DJ called for a probation report. After several assessments by the Probation Officer and a psychologist, the Respondent was assessed to have a "moderate" risk of sexual re-offending. In her report dated 11 September 2019, the Probation Officer recorded the Respondent's frequent use of pornography for masturbation prior to the present offences. According to him, between 2016 to 2018, he watched pornography and masturbated every day or every other day. However, and contrary to his professed cessation of the use of pornography to Mr Tan, he also claimed to have *reduced* his consumption of pornography to

"once in 3 weeks in 2019 after he was arrested for his current offences". The Respondent further "[o]pined that he could become addicted if he did not manage his habits and wanted to reduce his dependence on pornography and masturbation." Therefore, in her Case Management Plan, the Probation Officer identified one of her concerns as being an "[i]ncrease in unhealthy activities such as pornography use when he was not engaged". For this reason, she identified the need to ensure that the Respondent was constructively engaged throughout the probation (if this was ordered). What strikes me is that as at September 2019, when the probation report was prepared, and shortly *after* the Respondent had reported to Mr Tan that he no longer consumed pornography, it was the Probation Officer's view that this remained an area of concern necessitating intervention.

72 In light of the probation report, while I accept that the Respondent has undertaken *some* efforts since the offences were committed to curb his reliance on pornography, I do not think that there is sufficient evidence to lead one to the conclusion that there has been a complete *cessation* of pornographic use. At the highest, his reduced use of pornography demonstrates *some* measure of change. The ultimate enquiry, however, is whether such a desire rises to the level of showing an *extremely strong* propensity for reform. This, as I have said, is a multi-factorial enquiry, which leads me to the next factor.

73 The Respondent has not re-offended since the present offences. However, this is a factor of modest weight given that it has only been about 18 months since the offences were committed (on 12 September 2018), and this is far shorter than was the case in *Karthik* (*supra* [42]), where there was an intervening period of more than five years between the offender's offending conduct and his eventual sentencing. As I have observed, the shorter the period, the less weighty a favour this will be.

74 Finally, I do not think the present offences could be said in any way to aberrant. He had a history of considerable pornographic use and several previous instances of similar behaviour that had actually emboldened him. I emphasise that I refer to this not to penalise the Respondent but to capture the reality of the Respondent's situation. In my view, the present offences were a manifestation of a persistent problem that the Respondent has had for some time and it would be simply inappropriate for me to ignore that fact.

75 Seen in the round, the position may be summarised as follows:

(a) There is *some* evidence of remorse and this can fairly be seen as the first step towards reform. He pleaded guilty, acknowledged the gravity of the offence, and did disclose his wider difficulties arising from his preoccupation with pornography. However, he also evidenced some degree of rationalisation in the early stages as seen in his interactions with Dr Ko, when he described the present incidents as having occurred accidentally.

(b) I am not satisfied on the evidence that he has ceased or significantly reduced his consumption of pornography even though he seems to recognise that this was at the root of his sexual misconduct. His continued use of pornography is a factor weighing against his desire for and commitment to reform, as his Probation Officer had clearly stated that his "[e]xposure to pornography increased his sexual preoccupation and contributed to his distortions" towards "sexuality and social boundaries".

(c) While he did appear compliant with measures such as attendance before Mr Tan and Dr Ko, the majority of which were sought voluntarily, much of his time with them seemed to me to be for the

purpose of addressing his anxiety about the present proceedings. Such situational anxiety, while common, is generally not a relevant sentencing consideration (*Idya Nurhazlyn bte Ahmad Khir v Public Prosecutor and another appeal* [2014] 1 SLR 756 at [42]), and certainly does not go towards demonstrating a positive desire to change.

(d) I accept that the Respondent has not reoffended, but this is of limited weight given the modest duration that has passed since his commission of the offences.

(e) This was not an aberrant act or out of character. I return here to an important point made by DPP Tan. While it is true the Respondent has a bright future, with ample reason and opportunities to focus on his academic pursuits, which is a point I will turn to in the next section of my analysis, it is also the case that at the material time, the two sides of his character were co-existing. His preoccupation with pornography which was causing him to step well outside the boundaries of acceptable behaviour were co-existing with his studious, successful and seemingly well-functioning outward persona of a good student.

76 Having regard to all these considerations, I cannot say with conviction that the Respondent makes out a very strong case for displacing deterrence as the dominant sentencing consideration.

Second limb - Environmental factors

77 This leads me to the second limb. As I have just said, the Respondent remains positively engaged in school, and thus has a positive avenue to channel his attention and energy. However, I agree with DPP Tan that this must be viewed in light of his offending behaviour, which he appeared to be able to

compartmentalise and keep separate from other pro-social aspects of his life. What this means is that the presence of these positive outlets is not new, and was already present in the Respondent's life while he was pursuing in parallel a pattern of behaviour involving the frequent consumption of pornography and inappropriate touching of females without their consent. This conduct remained undetected and eventually emboldened him to commit the present set of offences. I note that this point was not made by the Prosecution in the same terms to the DJ.

78 Furthermore, I am not satisfied that the recently expressed commitment of his parents to supervise the Respondent will be effective or sufficient to curb his offending behaviour. While the Respondent shares a cordial and close relationship with his parents and is generally open to their advice, he also said that he had been raised in a strict and conservative household, where matters pertaining to sexuality were not discussed. His parents acknowledged this, and expressed regret that they had not discussed such matters with the Respondent. They were also receptive to intervention in order to improve their parenting skills, and to learn how they could help the Respondent manage his sexual urges. However, they expressed some hesitation in monitoring the Respondent's phone and computer usage, although they said they would do so if instructed by the Probation Officer.

79 Without seeking to discount the well-meaning intentions of his parents, I do not think that they are in a position to play a significant part in addressing the root of his problem, which stems from his pornographic preoccupations and cognitive distortions towards sexuality and social boundaries. In fact, even after their discovery of the present offences and despite their disappointment with the Respondent, it appears that the Respondent continues to watch pornography and it is not clear if they know this or are able to stop him from doing so. This is

unsurprising, given that the Respondent's behaviour in this regard occurs in the most private of circumstances, and parental intervention and supervision is likely not feasible. This would, if anything, be exacerbated by the conservative nature of the household, as a result of which efforts to break down the barriers to communicating about such matters will necessarily be a slow and gradual process.

80 Given the deep *personal* issues that led to the Respondent's offences, what is vital is an equally strong *personal* resolve on the Respondent's part to change himself for the better. If I had been satisfied of that, then the support of his parents in driving such change might have been accorded more weight. But, for the reasons I have already canvassed, I am not satisfied that the Respondent has taken sufficient steps to demonstrate a positive desire and commitment to reform himself. Under such circumstances, it is difficult to see how his familial support, in and of itself, would change the analysis.

Risk factors

81 Flowing from the foregoing analysis, I am not able, even provisionally, to conclude that the Respondent has demonstrated an extremely strong propensity for reform. In any event, I am not satisfied that the risk factors identified in this case (see [18] above) have been adequately displaced. The psychologist who assessed the Respondent for the purposes of preparing the probation report had also assessed the Respondent's risk of re-offending as "moderate". The analysis I have undertaken leads me to think that, as DPP Tan suggested, the best means of securing his rehabilitation is ultimately a deterrent sentence. The Respondent himself has cited his strongly negative ongoing experience of the court proceedings as well as the critical media coverage as key reasons that cause him to wish to avoid any recurrence of his offending

conduct;[8] significantly, any reformative intervention, which he might have received from the numerous counselling and psychiatric consultations, were not mentioned.

82 In all the circumstances, I have come to a different conclusion than the DJ, and find that the circumstances are such that the Respondent has failed to demonstrate an *extremely strong* propensity for reform. I acknowledge that the Probation Officer has opined that his "good behaviour across various settings suggest an ability to behave pro-socially when guided closely". Furthermore, notwithstanding the risk factors identified, she considered probation to be a suitable option for the Respondent. However, as I explained in *Alvin Lim* (*supra* [42]), a probation officer's optimism about the prospects of an offender's rehabilitation will become a factor of marginal significance to the sentencing court if the key consideration in the case is something other than rehabilitation (at [16]). This is precisely the case here – given that the Respondent, an adult offender, has not been able to show an extremely strong propensity for reform. Rehabilitation is simply not the key sentencing consideration in these circumstances, and probation, which places rehabilitation at the "front and centre" of the court's deliberation (*Boaz Koh* (*supra* [52]) at [35]), would not be an appropriate sentencing option.

The appropriate sentence

83 I turn then to consider the appropriate sentence. The DJ considered, and the parties do not dispute, that the relevant sentencing framework is that found in *Kunasekaran* (*supra* [12]), where Chan Seng Onn J set out three sentencing bands for the offence of outrage of modesty under s 354(1) of the Penal Code (at [49]):

(a) Band 1: less than five months' imprisonment;

(b) Band 2: five to 15 months' imprisonment; and

(c) Band 3: 15 to 24 months' imprisonment.

84 In determining the appropriate sentencing band, the court first considers the offence-specific factors, namely (a) the degree of sexual exploitation, (b) the circumstances of the offence, and (c) the harm caused to the victim (*Kunasekaran* at [45(a)], citing *GBR v Public Prosecutor and another appeal* [2018] 3 SLR 1048 at [27]–[30]). The court then ascertains the gravity of the offence, and determines which of the three bands is appropriate (*Kunasekaran* at [45(b)]). Thereafter, the court considers the offender-specific aggravating and mitigating factors, making upward or downward adjustments to the sentence as appropriate (*Kunasekaran* at [45(c)]).

85 Applying the *Kunasekaran* framework, the DJ considered that "an imprisonment term of one week, or two weeks' at its highest" (GD at [42]) would have been appropriate. While DPP Lee and DPP Chan had submitted for a sentence of six weeks' imprisonment below, before me, DPP Tan submitted that the Prosecution's sentencing position has been revised downwards, such that it is now seeking a sentence of at least three weeks' imprisonment. In support of its sentencing position, DPP Tan referred me to several unreported decisions of the State Court, two of which bore some similarity to the present case:

(a) In *Public Prosecutor v Arulsamy Charles* (SC-905070-2019), the offender, a 38 year old male with no antecedents, grabbed the right thigh of the female victim who was seated next to him on the train before standing up and walking out of the train. There was no skin-to-skin contact as the victim was wearing long pants. The offender was sentenced to two weeks' imprisonment, and no appeal was filed.

(b) In *Public Prosecutor v Marimuthu Jayabal* (SC-907361-2019), the offender, a 67 year old male with no antecedents, touched and moved his hand along the male victim's thigh while aboard the train. The offender was sentenced to three weeks' imprisonment, and no appeal was filed.

86 As I have previously observed, unreported decisions carry little, if any, precedential value because they are unreasoned: *Alvin Lim* (*supra* [42]) at [13]. Two cases which might appear superficially similar may differ substantially if, for example, the degree of remorse shown by the two offenders had been materially different, and this may be the case even if both offenders pleaded guilty to the offences in question (see *Terence Ng* (*supra* [56]) at [69] and [71]). Further, the weight given to charges that are taken into consideration, if any, may also affect the aggregate sentence. Additionally, the degree of harm suffered by two different victims may also vary, and this may affect the eventual sentence, given the "intuitive moral sense that outcomes do matter" (*Public Prosecutor v Hue An Li* [2014] 4 SLR 661 at [70]).

87 The more principled methodology for arriving at the appropriate sentence, therefore, is to apply the *Kunasekaran* framework, and consider where the present case falls. In so doing, it is important to note as the Court of Appeal did in *Mohd Akebal s/o Ghulam Jilani v Public Prosecutor and another appeal* [2020] 1 SLR 266 at [20], that sentencing guidelines are "not meant to yield a mathematically perfect graph that identifies a precise point for the sentencing court to arrive at in each case. Rather, they are meant to *guide* the court towards the appropriate sentence in each case using a methodology that is broadly consistent" [emphasis added]. In plain terms, the framework is but a *guideline* for this court to arrive at a sentence that would be *broadly consistent* with cases of a similar nature. To much the same effect is Lord Woolf CJ's reminder in

R v Millberry [2003] 1 WLR 546 at [34], which bears repeating: "*[g]uideline judgments are intended to assist the judge to arrive at the correct sentence. They do not purport to identify the correct sentence*. Doing so is the task of the [sentencing] judge" [emphasis added].

88 Applying *Kunasekaran*, I am satisfied that the DJ correctly observed that the degree of sexual exploitation in the proceeded charge was low, as the touches were momentary and there was no skin-to-skin contact (GD at [28]–[30]). Furthermore, while such an offence is naturally distressing to the victim, there was also no evidence that the harm caused in this case was severe, and no victim impact statement was tendered in this regard. Therefore, the key offence-specific aggravating factor is the fact that the offences were committed on the public transport network, in respect of which Parliament has highlighted on several occasions a growing need for deterrence (*Kunasekaran* at [58]). I think that is correct also because the public transport network is used by the vast majority of persons in Singapore each and every day; it is a matter of immense importance that they be able to do so feeling safe. To this end, it is critical that the Respondent and other like-minded prospective offenders clearly understand that such misconduct, which is offensive and demeaning to the victim, no matter how minor the intrusion, will almost invariably attract a sharp punitive response. That being said, upon considering all the circumstances, it is evident that the present case clearly fell within the lower end of Band 1 given that there was essentially one aggravating factor. DPP Tan quite reasonably accepted this.

89 Nonetheless, given the need to deter the commission of such offences on the public transport network, for the reasons I have just outlined, I am satisfied that the custodial threshold is crossed in this case.

90 Turning to the offender-specific factors, I note that there are two TIC charges in this case which, while not as severe as the proceeded charge, are of a similar nature, thereby justifying some increase in the sentence (*Public Prosecutor v UI* [2008] 4 SLR(R) 500 at [38]; *Terence Ng* (*supra* [56]) at [64(a)]). Against this, as I have explained above, I do accept that the Respondent is somewhat remorseful for the offences, even if the source of such remorse perhaps stems more from his fears over the outcome of these proceedings. Furthermore, the position he took in the proceedings spared the victim from having to relive any trauma stemming from her encounter with the Respondent through a trial. In the circumstances, I do accord *some* mitigating weight to his plea of guilt, and for his cooperation in the investigations.

91 Having regard to all of the above, I find that a sentence of two weeks imprisonment is appropriate, and I sentence the Respondent accordingly.

Conclusion

92 I have no doubt that, even after the conclusion of these proceedings, the ordeal of his encounter with the criminal justice system will remain firmly etched in the Respondent's mind. It is my hope that he will realise that this is a consequence of his bad choices, and that, while he has reason to remain optimistic about his future, he needs to make a real effort to overcome some deep-seated issues. The fact that he has managed as well as he has in many areas of his life should not detract from the reality of his distorted perspectives on sexuality, social boundaries and the need to treat women respectfully. It is therefore my wish that he will be motivated to get help to overcome his preoccupation with pornography, and focus on building a career and forming orderly and functional relationships. I hope that this term of imprisonment will serve as the much-needed driver for the Respondent's reform, so that he may

face his future committed to the pursuit of a meaningful life as an able and contributing member of society, which he plainly can be.

93 I close with a brief observation that returns to the point I began with. Upon convicting an accused person, pursuant to ss 228(6) and 230(1)(*x*) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed), a court must pass sentence in accordance with *the law*. It is the *law* that governs the appropriate sentence. Sentencing judges must confine themselves to *legal* considerations, which include the range of sentencing options available to the court for the offence at hand, and the body of principles relevant for arriving at the appropriate sentence. This is precisely what the DJ and I have each sought to do. While the outcomes arrived at were ultimately different, this was influenced in part by the additional evidence that was before me but not before her; in part, by the different way in which specific points had been put by the Prosecution before each of us; and in part by the analytical process that was applied by her as a judge of first instance and me as an appellate judge. That, in the end, is why two judges looking at the same case have come to different conclusions.

Sundaresh Menon
Chief Justice

Kristy Tan, Gail Wong and Benedict Chan Wei Qi (Attorney-General's Chambers) for the appellant;
Raphael Louis (Ray Louis Law Corporation) for the respondent.

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[1] Record of Appeal pp 35, 63 and 65.
[2] Letter from Respondent's Counsel (24 March 2020), p 14.
[3] Letter from Respondent's Counsel (24 March 2020) p 6, para 2.
[4] Response to DC letter dated 24 March 2020 (30 March 2020), para 2.
[5] Reply to PP's letter dated 30 March 2020 (6 April 2020), para 3.
[6] Letter from Respondent's Counsel (24 March 2020), pp 6 to 7.
[7] Letter from Respondent's Counsel (24 March 2020), p 14, para (h)(ii).
[8] Letter from Respondent's Counsel (24 March 2020), p 15; Response to DC Letter dated 24 March 2020 (30 March 2020), para 8.