IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 233

Magistrate's Appeal No 9358 of 2018

Between

Anita Damu @ Shazana Bt Abdullah

… Appellant in HC/MA 9358/2018/01
… Respondent in HC/MA 9358/2018/02

And

Public Prosecutor

… Respondent in HC/MA 9358/2018/01
… Appellant in HC/MA 9358/2018/02

JUDGMENT

[Criminal Procedure and Sentencing] — [Accused of unsound mind] [Evidence] — [Admissibility of evidence] — [Expert evidence] — [Newton hearings]

Anita Damu
v
Public Prosecutor

[2019] SGHC 233

High Court — Magistrate's Appeal No 9358 of 2018
Sundaresh Menon CJ
19 July 2019

30 September 2019

Sundaresh Menon CJ:

Introduction

1 The evidence of psychiatric experts is often of considerable value when the court is confronted with the issue of an accused person's mental state, such as when a diagnosis of a mental illness at the time of the offence would negate any *mens rea*, or reduce the accused person's culpability for the offence. As I recently noted in *Kanagaratnam Nicholas Jens v Public Prosecutor* [2019] SGHC 196 ("*Kanagaratnam*") (at [1]), such reports are often crucial because they can have a real impact on an accused person's life and liberty. As with all domains that fall outside the court's area of expertise, the court rightly places significant weight on the evidence of psychiatrists. However, it must always be noted that the responsibility to adjudicate on the issues that are before the court is the court's alone, and it is incumbent on the court to satisfy itself that any

expert evidence it is invited to accept is first, relevant and admissible, and then, coherent and resting on sound premises.

2 The question of the relevance and admissibility of psychiatric evidence took centre stage in the present appeal. Expert evidence invariably comes in the form of opinion evidence. As a general rule, a court is concerned with factual evidence rather than with matters of opinion. One well-established exception to this is in relation to expert evidence. But to avail of this exception, it should first be determined whether it is appropriate at all to admit such expert evidence, having regard to the precise issue that is before the court. The Evidence Act (Cap 97, 1997 Rev Ed) ("Evidence Act") sets out in broad terms when such evidence may be adduced. I examine those circumstances more closely later in this judgment. But what is clear is that at least as a general rule, such evidence will not often be relevant or even admissible to resolve what, in substance, are purely matters of observable fact, the resolution of which do not raise a question of scientific or technical expertise. In my judgment, this became a point of importance in the present case because the main dispute between the parties was not whether the appellant suffered from a mental disorder, as to which expert psychiatric evidence would have been relevant, but whether she *in fact* experienced auditory hallucinations at the time of the offences, as to which the position might well be different. This, to my mind, at least had the potential to substantially undermine the relevance of the psychiatrists' opinions, given that the appellant did not herself give any evidence of having experienced such hallucinations at the material time; and indeed given that what she did admit, seemed to be quite to the opposite effect. Unfortunately, this was a nuance that appeared not to have been fully appreciated or explored by the learned District Judge, the Prosecution and the Defence in the hearing below. This gave rise to

a number of important issues, including in particular as to how justice should be done in the circumstances. I address these issues in this judgment.

Background facts

The proceedings below

3 I begin with the salient facts. The appellant in HC/MA 9358/2018/01 ("the appellant") pleaded guilty and was convicted of four charges under ss 323 and 324 of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code") punishable under s 73(2) of the Penal Code, as well as one charge under the Employment of Foreign Manpower Act (Cap 91A, 2009 Rev Ed). In brief, the appellant had committed various acts of abuse against her domestic helper ("the victim"), including scalding the victim by pouring hot water on her back, placing a hot iron on her hands, and failing to provide the victim with adequate rest. She also consented to four other charges, involving other acts of abuse, being taken into consideration for the purposes of sentencing. According to the statement of facts, which the appellant accepted without qualification, the appellant committed these offences for various reasons arising out of her frustration or anger with the victim: for example, she splashed hot water on the victim because the victim ate a longan without the appellant's permission and denied having done so; she burned the victim's hands with an iron because the victim was doing work slowly and the appellant was "furious" with her; and she would poke the victim with a bamboo pole when the victim made a mistake doing her chores or was caught sleeping inside the toilet.

4 After the appellant was duly convicted, she tendered by her counsel a mitigation plea which asserted that she was suffering from a mental illness at the material time that significantly affected her culpability at the time of the offences. Specifically, it was asserted that the appellant suffered from Major

Depressive Disorder ("MDD") with psychotic features, and that the appellant experienced auditory hallucinations which made her commit the offences. The reports of two psychiatrists, Dr Lim Cui Xi ("Dr Lim") and Dr Calvin Fones ("Dr Fones"), were appended to the mitigation plea in support of this assertion. The appellant's counsel, however, was at pains to emphasise that there was no intention to qualify the plea. Rather, the assertion being advanced was that the appellant's culpability was significantly diminished because there was, allegedly, a causal link between the appellant's mental illness and her offending. The Prosecution promptly took the point that it was disputing the assertion that the appellant experienced auditory hallucinations when she committed the offences in question, and that the appellant should be made to testify at a Newton hearing:

> [DPP] Yang: Your Honour, we know the basis of the---or the position which the defence is taking in terms of their mitigation, and actually there is a substantial dispute as to the factual basis of their position. I understand their position to be that she was labouring---the accused was labouring under the influence of voices at the material time of the offence. Prosecution is disputing whether that is correct and, secondly, even if that is so, we are disputing the extent to which these voices affected her self-control and her actions.
>
> …
>
> Yang: … [F]or the record, if there was indeed to be a Newton hearing as to this issue, as to whether she heard voices, I think it would be proper for the accused to testify on the same. But we'll leave it to my learned friend as to---

5 The appellant's counsel took the position at the hearing below that a Newton hearing was not necessary, primarily on the basis that the evidence of both psychiatrists were consistent. The appellant's counsel however wished nonetheless to call Dr Fones as a witness "to further clarify some aspects of his report". The Prosecution on the other hand maintained that a Newton hearing was necessary because the main point of contention between the parties was not

whether the appellant was or was not suffering from MDD, but whether in fact she experienced and acted under the influence of the claimed auditory hallucinations at the time of the offences:

> Yang: Yes, Your Honour. *We're asking you for a Newton hearing because we dispute that the accused had heard voices at the time of the offences.* Both the psychiatrists' diagnoses that she had heard voices were based on self-reports from the accused. However, based on what she had told the police initially and even the differences between what she told Dr Fones and Dr Lim, which I hope to elucidate later during the questioning of Dr Fones, we say Your Honour should find that she did not even hear these voices. And that is why a Newton hearing is needed. *It is not for Your Honour to decide just between Dr Fones' and Dr Lim's reports as per the extent in which the major depressive disorder with mood-congruent or just psychotic features have affected her actions, but if there was even such psychotic features in the first place.* [emphasis added]

6 In fact, the Prosecution made it abundantly clear that the Newton hearing was necessary *only* because of the allegations of auditory hallucinations and not on account of the diagnosis of MDD:

> Court: For the purpose of the Newton hearing, you have to be very specific as to what is the purpose of the Newton hearing. If you're talking about the major depressive disorder---
>
> Yang: Yes.
>
> *Court: ---is that disputed between the parties? If it is not, then you're only talking about the auditory hallucinations.*
>
> *Yang: Only talking about the auditory hallucination, Your Honour.*
>
> Court: Only talking about that, right?
>
> Yang: Yes. So if---
>
> Court: So---yes.
>
> [emphasis added]

7 Having heard the parties' submissions on whether a Newton hearing was necessary, the District Judge was of the opinion that he should first allow the

psychiatrists to give evidence and defer the decision as to whether the hearing should be converted into a Newton hearing until he had heard what each psychiatrist had to say, because it might not ultimately be relevant to determine whether the appellant actually heard voices.

8 Dr Fones was thereafter called to give evidence, and was examined by the appellant's counsel and cross-examined by the Prosecution. Midway through the cross-examination of Dr Fones, both parties made further submissions on whether the hearing should be converted into a Newton hearing. The appellant's counsel maintained that a Newton hearing was not necessary, because both psychiatrists agreed that the appellant had experienced auditory hallucinations. The District Judge eventually accepted the Prosecution's submission that since what was in dispute was "the factual occurrence of auditory hallucinations" and that would ultimately have a bearing on the appellant's sentence, a Newton hearing ought to be convened. The hearing was therefore converted into a Newton hearing, and the appellant's counsel was given the opportunity to further examine Dr Fones before the Prosecution resumed with cross-examination. Dr Lim was then examined by the appellant's counsel and thereafter cross-examined by the Prosecution. Even though it was clear that the main point of contention between the parties concerned only the existence of the appellant's auditory hallucinations, the psychiatrists were examined on their evidence more generally, including on their diagnosis of MDD and the severity of the appellant's symptoms of MDD.

9 The gist of the psychiatrists' oral evidence as well as the evidence contained in their psychiatric reports was largely consistent: both psychiatrists were of the opinion that the appellant suffered from MDD with psychotic features, these being the auditory hallucinations, and that the illness was causally linked to the appellant's offending, in that the auditory hallucinations

significantly affected the appellant's actions, such as by affecting her inhibitions and making her believe things about the victim. It was not in dispute that both psychiatrists' opinions that the appellant experienced auditory hallucinations were based on the appellant's self-reports of the same, although both psychiatrists also gave evidence that they had ruled out malingering as the appellant's self-reporting was consistent with nursing observations and the psychiatrists' own observations of her behaviour.

10 Apart from the two psychiatrists, the Prosecution also called the investigation officer ("IO") as a witness in the Newton hearing, and adduced two of the appellant's investigation statements through the IO. The appellant's counsel objected to this since the voluntariness of the investigation statements was not in dispute, but the Prosecution argued that it was necessary to do so since Dr Fones had expressed surprise at how the appellant could provide such detail in these investigation statements. The Prosecution also argued that the IO's evidence would be relevant to the District Judge's consideration of the appellant's behaviour at the material time since it related to observations of the appellant soon after the time of her arrest. The District Judge allowed the Prosecution to call the IO as a witness, on the basis that examination would be limited to the circumstances under which the investigation statements were recorded.

11 In these investigation statements, the appellant had given various reasons for her offending behaviour, such as that she had "completely lost trust in all of [her] maids" and "wanted to be firm [with the victim] so that she would not end up being replaced often". These statements also revealed some of the motivations for the specific offences, although these differed slightly from the statement of facts. For instance, the appellant said that she burned the victim's hands with an iron because she caught the victim sleeping while ironing, and

not because she found the victim to be slow in doing chores. In addition, the appellant said that she poured hot water on the victim's back because she was very angry about something that the victim had done, but did not reveal that this was because the victim had eaten a longan without permission. The IO further testified that the appellant had been coherent during the recording of the investigation statements and had not mentioned hearing voices or demonstrated any other observable signs suggestive of her being susceptible to any auditory or other hallucinations. The IO therefore had not thought it necessary to send her for a psychiatric assessment.

12 Notwithstanding the Prosecution's position that the appellant should give direct evidence at the Newton hearing on the assertion that she had at the relevant times experienced and acted under the influence of auditory hallucinations, the appellant did not take the stand. The appellant's counsel informed the District Judge at the conclusion of the Newton hearing that it was for him to decide how he would make out his case and he did not provide any reasons for not calling the appellant, save to say that the evidence adduced through the two psychiatrists was sufficient to establish what he wanted to establish.

13 The District Judge accepted that the appellant was suffering at the time of the offences from MDD with psychotic features, by which he appeared to be referring to the auditory hallucinations, and that there was a causal link between this and the appellant's offending. Even though the appellant did not testify at all, the District Judge was of the opinion that this did not materially affect the evidence that he did take into account, "given the nature of the Newton hearing which was to determine something that was within the expertise of the psychiatrists". It is not entirely clear from the grounds of decision (*Public Prosecutor v Anita Damu @ Shazana bt Abdullah* [2019] SGDC 35 at [5] and

[24]) whether the District Judge made a specific finding that the appellant was suffering from auditory hallucinations at the time of the offences. However, I consider on balance that it is at least implicit in his decision that he did make such a finding. I take this view for two reasons. First, the District Judge was plainly alive to the fact that this was the issue that was contested by the Prosecution and ultimately this was the question he was being asked to resolve. Second, he found that the appellant was suffering from MDD with psychotic features and it was evident from what was presented before him that the auditory hallucinations were part of the relevant psychotic symptoms. However, the District Judge was not satisfied that the appellant had been significantly deprived of self-control or the ability to appreciate the nature and consequences of her actions, and thus considered deterrence and retribution to be the dominant sentencing principles in the instant case such that a custodial sentence was appropriate. The District Judge considered the sentencing framework for domestic maid abuse in *Tay Wee Kiat and another v Public Prosecutor and another appeal* [2018] 4 SLR 1315, and took into consideration the egregious acts of physical abuse committed over a protracted period of time, the psychological harm suffered by the victim, and the appellant's mental disorder. Having considered all this, he sentenced the appellant to an aggregate sentence of 31 months' imprisonment. The appellant was also ordered to pay compensation to the victim in the sum of $8,000, in addition to the voluntary compensation of $4,000 already paid.

The hearing on 19 July 2019

14 The appellant and the Prosecution both filed appeals against the sentence as well as the compensation order (*vide* HC/MA 9358/2018/01 and HC/MA 9358/2018/02 respectively), and the appeals came before me on 19 July 2019. The appellant's position at the appeal was that she ought to have been given a

non-custodial sentence in view of the diagnosis of MDD with psychotic features and the effect this had on her culpability. The Prosecution on the other hand contended that the psychiatrists' opinions on the appellant's auditory hallucinations should be rejected on the ground that these were based entirely on the appellant's own accounts, which were unbelievable and internally inconsistent. The Prosecution contended that the appellant's MDD, which was not disputed, had no relevance to the sentence to be imposed because absent the auditory hallucinations, it was devoid of mitigating value.

15 At the hearing, it seemed to me that the parties may have been at cross purposes. It was clear that the Prosecution was not disputing the fact that the appellant was suffering from a mental illness. What it was disputing was the factual assertion that she was experiencing and acting under the influence of the auditory hallucinations at the material times. It seemed to me, even if the point was not squarely put in these terms by the Prosecution, that this was a question of fact on which the direct evidence of the appellant was most relevant, but conspicuously absent; whereas the evidence of the psychiatrists on this issue was either irrelevant and inadmissible, or alternatively, possibly admissible as *corroborative* evidence in the sense of being able to support a factual contention by the appellant that she was experiencing and acting under the influence of auditory hallucinations by establishing that such a contention was consistent with the medical diagnosis. I made known these concerns to the parties. Since this was not something that the parties had expressly addressed in their submissions, the hearing was then adjourned for the parties to make further submissions on three questions, which I framed in consultation with the parties:

> (a) What is the status of the psychiatrists' evidence, given that the appellant herself has not given evidence on the factual assertion that she heard voices at the time of the offences?

(b) Given the inconsistencies in the position taken by the appellant at the time of the plead guilty mention and what is set out in the statement of facts, how should the court now deal with the statement of facts?

(c) In view of the above, what are the appropriate orders to be made at this stage?

16 To assist parties in their submissions, and at their request, I also set out my *provisional* views on these issues, as follows:

> The question of whether the accused suffered from auditory hallucinations was not something that the psychiatric experts could opine on, as it was not a scientific or technical question but a pure question of fact on which the best evidence is that of the accused. Since she did not take the stand, there is no admissible evidence on this. The most the psychiatrists could say was that she was suffering from Major Depressive Disorder with psychosis, and that her reported auditory hallucinations were consistent with this.
>
> The Prosecution does not, however, appear to have taken the point below that there was no admissible evidence on whether the appellant had auditory hallucinations at all. The furthest that they went was to say that the psychiatric evidence was based on hearsay and that it should be accorded little weight. This seems wrong in principle, and so the Judge and Mr Bajwa [*ie*, the appellant's counsel] understandably proceeded purely on the basis of the strength of the psychiatric evidence, [as to] which it has to be noted that there was little if any reasoning in some respects. That the Prosecution cross-examined the experts on this might have added to the confusion.
>
> The parties are in agreement that the plea of guilt can stand although some parts of the statement of facts pertaining to the appellant's motivations for committing the offence may be inconsistent with the position she took in her mitigation plea.
>
> There appear to be two options before me at this point. First, to disregard the evidence of the psychiatrists for the purposes of the appeal. I am concerned that this may not be fair to the defence because they were not sufficiently put on notice about this position at the hearing below. Second, to send the matter back for a Newton hearing on the issue of the auditory

> hallucinations. The Prosecution would be able to rely on the appellant's contrary statements given to the police for the purposes of the Newton hearing, and it would be for the appellant to testify to rebut this. On this basis, the relevant parts of the statement of facts which are inconsistent with the position being advanced by the appellant would have to be excised.

The parties' cases

The appellant's case

17 In her further submissions, the appellant takes the position, in relation to the first question, that the psychiatric reports remain admissible and credible notwithstanding her failure to testify. The appellant notes the broad inclusionary approach behind s 47 of the Evidence Act which sets out the relevance of expert opinion. The appellant also observes that the ultimate issue rule, which seeks to prevent witnesses from giving opinion on the very issue which the court has to decide, has been abandoned or relaxed in other common law jurisdictions, and has also been the subject of academic criticism. Thus, the appellant argues that allowing psychiatrists to opine on the ultimate issue does not encroach on the role of the judge as a trier of fact but enables effective and accurate adjudication, and that a judge can freely adopt the evidence of an expert witness on the ultimate issue as long as she is satisfied that it is logical and objective. Where medical evidence is concerned, the court is in fact mandated to call on expert evidence given its own lack of expertise, and should not enter the fray in adjudicating over matters that are better left to the experts. In the instant case, the evidence of the psychiatrists is probative because they are best placed to report on the behavioural pathologies of the appellant, whereas ordinary lay persons might fail to perceive characteristics of psychosis. The appellant does not seem to address the specific issue of the status of the psychiatric reports given the appellant's failure to testify, save to say that there might be "difficulties in having her give evidence" due to her mental condition.

18 In relation to the second question, the appellant concedes that there was an oversight that resulted in her admitting to the statement of facts despite having taken the position that the auditory hallucinations made her commit the various offences. However, given that the psychiatrists' reports were appended to the mitigation plea, all parties were aware that the appellant's mental state was in issue, and as such no prejudice was occasioned to the Prosecution. Thus, the appellant argues that she should be allowed to "retract" the statement of facts to the extent that it omits reference to the fact that the offences were committed as a result of her mental illness as opposed to for other reasons.

19 In the circumstances, the appellant argues that the court should not disregard the psychiatrists' evidence, but should rather consider calling the psychiatrists to give further evidence in the High Court on the issue of auditory hallucinations. The appellant further submits that it would be "awkward" to send the matter back to the District Judge for a further Newton hearing given that he had decided on the strength of the psychiatrists' evidence that the appellant was not malingering, and also since the appellant might not be fit to testify given her recent diagnosis of schizophrenia.

The Prosecution's case

20 The Prosecution's position in its further submissions, at least on the first question, namely the status of the psychiatric evidence, is somewhat surprising. Even though it maintains that the issue of whether the appellant suffered from auditory hallucinations at the material time was a factual question that the psychiatric experts could not opine on, it takes the position that there was nonetheless admissible evidence on which the psychiatric evidence could be based. Specifically, it contends that the appellant's accounts to the psychiatrists could be regarded as a statement within the meaning of s 258(1) of the Criminal

Procedure Code (Cap 68, 2012 Rev Ed) ("CPC"), and would therefore be admissible on that basis. I note that this contradicts the Prosecution's position before the District Judge that the appellant's accounts to the psychiatrists would constitute inadmissible hearsay evidence.

21 Nonetheless, notwithstanding the supposed admissibility of the appellant's accounts to the psychiatrists, the Prosecution argues that these accounts should be rejected because they are internally inconsistent and contradicted by external evidence. In particular, the Prosecution relies on the fact that the appellant had failed to mention any auditory hallucinations in her statements to the police and related law enforcement officers. The appellant's failure to take the stand to explain such inconsistencies is said to be fatal to her case. Once the appellant's accounts to the psychiatrists are rejected as being unbelievable, the psychiatrists' opinions should naturally be rejected since the factual basis for such opinion has been shown to be flawed or untrue. The psychiatrists' evidence that the appellant was not malingering was a factual issue that the District Judge ought to have decided for himself, and should be rejected to the extent that it conveys the psychiatrists' views as to the truth of the appellant's account.

22 As to the second issue, the Prosecution argues that the appellant is bound by the contents of the statement of facts, and that the parts of her accounts to the psychiatrists which are inconsistent with the statement of facts should be disregarded. The appellant admitted to the statement of facts without qualification, and must be taken to have accepted the truth of the contents therein. The statement of facts thus demarcates the four corners of the case agreed by the parties, and both parties are accordingly bound by it. Allowing the appellant to disavow the contents of the statement of facts would prejudice the Prosecution to the extent that it intended to rely on the parts disavowed.

Further, the appellant is estopped from denying the truth of the statement of facts by virtue of s 117 of the Evidence Act.

23 The Prosecution argues that since the Defence made a deliberate decision not to call the appellant as a witness to provide an explanation for the inconsistencies in her account to the psychiatrists, despite the Prosecution's insistence at the hearing below that the appellant be called, the appellant must now bear the consequences of that decision. In the circumstances, instead of remitting the matter back for a fresh Newton hearing, the appeals against sentence should be decided on the basis that (a) the appellant is bound by the statement of facts; and (b) the psychiatrists' opinions are rejected.

My decision

The status of the psychiatric evidence

24 The parties are in agreement that the admissibility of expert evidence is generally governed by s 47 of the Evidence Act, which provides as follows:

> **Opinions of experts**
>
> **47**.—(1) Subject to subsection (4), when the court is likely to derive assistance from an opinion upon a point of scientific, technical or other specialised knowledge, the opinions of experts upon that point are relevant facts.
>
> (2) An expert is a person with such scientific, technical or other specialised knowledge based on training, study or experience.
>
> (3) The opinion of an expert shall not be irrelevant merely because the opinion or part thereof relates to a matter of common knowledge.
>
> (4) An opinion which is otherwise relevant under subsection (1) shall not be relevant if the court is of the view that it would not be in the interests of justice to treat it as relevant.

25 This calls into question whether the psychiatrists' opinion in this case was rendered on *a point of scientific, technical or other specialised knowledge*. As I have observed above, the difficulty in this case arises because the main and in fact *only* point of contention between the parties, regarding whether the appellant experienced auditory hallucinations at the time of offences, is a factual dispute that the court would be able to resolve by hearing the evidence of the appellant and then deciding, in accordance with normal forensic techniques, whether to accept that evidence or not. In short, it is not readily apparent how this is a question on a point requiring scientific, technical or other specialised knowledge. Even though experiencing auditory hallucinations is an accepted specifier of MDD (more usually characterised as a "psychotic feature") and is often an indication of some underlying medical condition, it is clear that the question whether such a condition was in fact experienced or not remains a question of fact capable of being resolved simply by assessing the evidence of the appellant, had this been adduced. The distinction is between whether the psychotic feature was in fact present, which is a question of fact that the Prosecution was disputing as is evident from the extract at [5] above, and the possible medical significance of that feature, which is a point of scientific and medical knowledge on which expert evidence would be admissible. Once it is appreciated that the key dispute between the parties is a purely factual question as to whether the appellant experienced auditory hallucinations at the time of the offences, it seems clear to me that the reliance on psychiatric evidence *alone* would be problematic for a number of reasons.

The appellant should testify as to matters within her exclusive knowledge

26 First, since the burden of proof lies with the party making the assertion, it is incumbent on the appellant in this case to adduce the best evidence available in support of her assertion that she heard voices which caused her to commit the

offences in question. Since whether or not the appellant heard voices is something that is uniquely within her personal knowledge, it stands to reason that the best evidence is that of the appellant herself. While the best evidence rule in modern application and under ss 63–67 of the Evidence Act, is confined to written documents tendered as evidence (*Halsbury's Laws of Singapore* vol 10(2) (LexisNexis, 2016 Reissue) ("*Halsbury's Laws*") at para 120.011; see also *Jet Holding Ltd and others v Cooper Cameron (Singapore) Pte Ltd and another and other appeals* [2006] 3 SLR(R) 769 at [36]–[62]; *Malayan Banking Bhd v ASL Shipyard Pte Ltd and others* [2019] SGHC 61 at [50]), a comparable rule is discernible in the context of parties failing to call key witnesses, such as where a witness is critical to establish an accused person's alibi for an offence (*Public Prosecutor v Lim Kuan Hock* [1967] 2 MLJ 114).

27 In such circumstances, an adverse inference may be drawn when a party fails to call a witness who might be expected to give supporting evidence; or when a party resorts to clearly inferior evidence when witnesses whose testimony would be superior in respect of the fact to be proved could have been called (*Buksh v Miles* (2008) 296 DLR (4th) 608 at [30]; cited with approval in *Sudha Natrajan v The Bank of East Asia Ltd* [2017] 1 SLR 141 at [26] and in *Independent State of Papua New Guinea v PNG Sustainable Development Program Ltd* [2019] SGHC 68 at [82]). The drawing of adverse inferences is an extension of the rule found in s 116 illus (*g*) of the Evidence Act to the effect that the court may presume that evidence which could be but is not produced would, if produced, be unfavourable to the person who withholds it. In the context of criminal proceedings, if an accused person refuses to testify, adverse inferences may be drawn in the appropriate case, especially where "it is only the accused who is in a position to contradict the evidence of the prosecution on matters that are peculiarly within his own knowledge or to displace a natural

inference as to his mental attitude at the time of the alleged offence" (*Oh Laye Koh v Public Prosecutor* [1994] SGCA 102 at [14], citing *Haw Tua Tau v Public Prosecutor* [1981] 2 MLJ 49).

28 In the context of Newton hearings in particular, the above principles are equally applicable, and it may be appropriate to draw adverse inferences where an accused person refuses to testify as to facts that are within his exclusive knowledge (*R v Underwood* [2005] 1 Cr App Rep 178 at [7]). As I have recently emphasised in *Kanagaratnam* at [36], where an accused person seeks to rely on a disputed fact in mitigation, he bears the onus to prove that fact to the requisite standard of proof. Thus, where the very point of contention that necessitated the Newton hearing is a matter which is within the exclusive knowledge of the accused person, it would, in my judgment, typically be incumbent on the accused person to testify, unless he was able to furnish an acceptable reason why inferior evidence ought to be accepted by the court. This was not done in the instant case.

The basis rule

29 The foregoing speaks primarily to drawing the appropriate inferences and conclusions from the appellant's unexplained failure to testify as to her having experienced auditory hallucinations at the material time.

30 But as far as the status of the psychiatrists' evidence is concerned, the fact that the appellant failed to give direct evidence to my mind seriously undermines the relevance of Dr Lim's and Dr Fones' evidence, because their opinion that the appellant was acting under the influence of a mental illness was based in part on what the appellant told them, but did not tell the court, as to her experience of auditory hallucinations. This opinion, therefore, is without a

proven factual basis. The "basis rule", where expert evidence is concerned, stipulates that the factual basis for the expert's opinion must itself be established on admissible evidence and not on hearsay (*Ramsay v Watson* (1961) 108 CLR 642). As Heydon J explained in *Dasreef Pty Ltd v Hawchar* [2011] HCA 21 at [90],

> Opinion evidence is a bridge between data in the form of primary evidence and a conclusion which cannot be reached without the application of expertise. The bridge cannot stand if the primary evidence end of it does not exist. The expert opinion is then only a misleading jumble, uselessly cluttering up the evidentiary scene.

31 It is true that the basis rule has often been relaxed in the interests of logistical practicality, such as to enable experts to rely on evidence from authoritative publications or other extrinsic material customarily employed in their line of work (Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) ("Pinsler") at para 8.044; Ian Freckelton & Hugh Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (Thomson Reuters, 5th Ed, 2013) ("Freckelton & Selby") at para 2.20.80). However, the relaxation of the basis rule most commonly occurs in cases where the expert's opinion is based on "general hearsay", such as prior research, as opposed to "specific hearsay" pertaining to a particular inquiry, fact, examination or experiment (*Halsbury's Laws* at para 120.225). This, to me, is a principled distinction. Where an expert gives evidence that relies in part on the work of other members of the profession which are generally accepted as authoritative and uncontroversial, it would be impractical to require in every instance that those other professionals also give evidence of their work, even though this might technically constitute *general* hearsay evidence. The relaxation of the basis rule in such circumstances would simply be in the interests of practicality and would not cast any doubt on the soundness of the expert's evidence. On the other hand, where an expert puts forth an opinion that is founded on the *specific*

hearsay evidence of another individual and the truthfulness of that other individual's assertion is not only hotly contested, but, as in this case, is the very issue in dispute, the basis rule ought to apply with full rigour. This follows from the fact that an expert's evidence in such a case will likely be found to be of no value when its factual basis cannot be tested. In other words, where the expert opinion rests on a hypothesis that has not been proven with admissible evidence and is seriously contested, the validity of that opinion cannot be determined, much less assumed or accepted by the court. The underlying rationale behind the basis rule remains alive today and it is this: since the court is ultimately tasked with evaluating the expert opinion, the premise on which the expert's conclusions are drawn must necessarily be before the court so as to allow the court to ascertain whether the expert's conclusions are properly founded: see for instance, *Khoo Bee Keong v Ang Chun Hong and another* [2005] SGHC 128 at [68], cited with approval in *Muhlbauer AG v Manufacturing Integration Technology Ltd* [2010] 2 SLR 724 at [44].

32 In the context of psychiatric evidence, where there is a substantial dispute over the truth of an accused person's account of the events, which has been conveyed to the psychiatrist, the basis rule would generally require that the accused person testify before the court as to the relevant factual basis. Only then can the psychiatrist's opinion can be properly assessed. This is analogous to the situation contemplated in John Andrews & Michael Hirst, *Andrews & Hirst on Criminal Evidence* (Sweet & Maxwell, 3rd Ed, 1997) at para 21-024:

> The rule that primary facts must be proved by direct evidence can also create difficulties where medical experts are called to support a defence based on the accused's state of mind at the time of the alleged offence. If, for example, the accused tells a psychiatrist that he killed whilst suffering from an uncontrollable urge or a blackout, the psychiatrist will not ordinarily be in any position to testify that this story is true. He may be able to assert that the accused displayed symptoms of mental disorder when interviewed, and would be allowed to

> express an opinion about the significance of those symptoms. He would even be allowed to relate the accused's account of the incident and to state whether this account was consistent with the form of mental abnormality manifested in the interview. If, however, there is a serious dispute as to the truth of the accused's story, it may be impossible for the defence to be established without direct evidence from some other witness. This may mean that the accused will have no choice but to testify. …

33 To be sure, psychiatrists may give evidence of what a person said to them to explain why they reached a particular medical opinion or diagnosis about that person's state of mind, because such evidence is not meant to establish the truth of what was said but merely of the fact that it was said and formed the basis of the opinion (Freckelton & Selby at para 2.20.90; Pinsler at para 8.042; *Leith McDonald Ratten v The Queen* [1972] AC 378 at 387; *R v Phillion* [1978] 1 SCR 18). Thus, I do not doubt in this case that Dr Lim and Dr Fones could give evidence of the appellant's accounts to them of her feelings of low mood as a basis for their diagnosis of MDD. However, the analysis is different when the very crux of the dispute relates to the truth of those assertions that were made to the psychiatrists, the establishment of which was the very purpose for which a Newton hearing was convened or at any rate, ought to have been the very purpose of the hearing. That is a fact to which the appellant is obliged to testify, and the psychiatrists' evidence on whether in their opinion the appellant in fact heard voices and committed the offences as a result, is of little, if any, direct relevance.

The ultimate issue rule

34 This brings me to my next point, which is that the psychiatrists' evidence, in so far as it purports to opine on the issue of whether the appellant did in fact hear voices at the time of committing the offences, comes close to contravening the ultimate issue rule. In orthodox terms, the ultimate issue rule

provides that an expert should not give evidence on the ultimate issue, which is to be decided by the court. Its rationale is that this would usurp the role of the court as the trier of fact. As the appellant argues, modern authorities suggest that the strict rule has lost much of its force, because experts are commonly permitted to opine on the ultimate issue as long as it is accepted that it is the court in the final analysis that has the responsibility to decide the matter (Pinsler at para 8.038, citing *DPP v A and BC Chewing Gum* [1968] QB 159 and *R v Stockwell* (1993) 97 Cr App Rep 260). In the context of psychiatric evidence, it is also common for the strict rule to be "daily transgressed" by psychiatrists who give evidence on an accused person's fitness to plead and on any mental disability (Freckelton & Selby at para 2.25.60; see also *R v Holmes* [1953] 2 All ER 324 at 325).

35 However, it remains abundantly clear that the ultimate issue rule, in a broader sense, remains alive and continues to be applied in local jurisprudence (see for example*, Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 at [85]; *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [45]; *Cheong Soh Chin and others v Eng Chiet Shoong and others* [2018] SGHC 131 at [35]). Thus, as the Court of Appeal cautioned in *Eu Lim Hoklai v Public Prosecutor* [2011] 3 SLR 167 ("*Hoklai*") at [44]:

> … Ultimately, all questions – whether of law or of fact – placed before a court are intended to be adjudicated and decided by a judge and not by experts. An expert or scientific witness is there only to assist the court in arriving at its decision; he or she is not there to arrogate the court's functions to himself or herself …

36 To my mind, the true ambit of the ultimate issue rule in the modern context is not that an expert is prohibited from expressing an opinion on the ultimate issue, but that the judge must discharge his responsibility as the

adjudicator to rule on the ultimate issue. In doing so, he must not simply adopt the expert's opinion on that issue without satisfying himself that this is the correct outcome. Thus, even where an expert has expressed an opinion on how she thinks the ultimate issue is to be resolved, the court must nonetheless, in the words of the Court of Appeal in *Hoklai* (at [44]), "resort to the usual methods it employs in all other cases which do not require expert evidence: that is [by] sifting, weighing and evaluating the objective facts within their circumstantial matrix and context in order to arrive at a final finding of fact".

37 In the present case, the psychiatrists' evidence that the appellant was not malingering might be relevant as an opinion that the appellant's self-reported symptoms were consistent with other observations made by the psychiatrists of the appellant, or with symptoms displayed by other similarly situated patients examined by the psychiatrists in the past. In short, it might be relevant to show that the reported symptoms were consistent with the diagnosed illness. But such consistency falls far short of establishing that *this appellant did in fact experience the symptoms in question*, and it remains the responsibility of the court in this case to ascertain that question before considering whether it in fact led to the commission of the offences. The psychiatrists' opinion that the appellant was not malingering could not displace the court's duty to make a finding as to the appellant's credibility. The problem then becomes clear: in the absence of any direct evidence from the appellant, the District Judge had no factual basis at all on which to make a finding as to the veracity of the appellant's assertions that she had in fact heard voices and acted upon them. The inadequacy of the psychiatrists' evidence in the present circumstances is a matter of particular concern because the appellant's accounts to them appear to contradict what she had said in the statements she gave in the course of the police investigations.

Conclusion on the status of the psychiatric evidence

38 Before concluding on the status of the psychiatric evidence, I pause to consider the Prosecution's argument that the psychiatric evidence was premised on admissible evidence, on the ground that the appellant's accounts to the psychiatrists fell within the definition of statements as contemplated in s 258(1) of the CPC. The provision in s 258(1) of the CPC is indeed broad and there has been some suggestion that the statement of an accused person to an ordinary person who is not a police officer or law enforcement officer could be admissible under this provision (see for example, Pinsler at para 5.004; *The Criminal Procedure Code of Singapore: Annotations and Commentary* (Jennifer Marie & Mohamed Faizal Mohamed Abdul Kadir eds) (Academy Publishing, 2012) ("*CPC: Annotations and Commentary*") at para 14.014). However, I doubt the correctness of this proposition, for two reasons.

39 First, as a matter of legislative history, s 258(1) of the CPC in 2010 was introduced primarily to standardise the test for admissibility in relation to statements made by an accused person to police officers with those made to other law enforcement officers. Prior to the introduction of s 258(1), statements recorded by police officers were admitted under s 122(5) of the old Criminal Procedure Code (Cap 68, 1985 Rev Ed), whereas statements recorded by other law enforcement agencies were admitted under ss 21 and 24 of the Evidence Act, the latter of which has since been repealed. Thus, s 258(1) was introduced to "rationalis[e] and consolidat[e] … these disparate provisions into one omnibus provision" (*CPC: Annotations and Commentary* at para 14.012). As the Minister for Law explained during the Second Reading of the Criminal Procedure Code Bill (*Singapore Parliamentary Debates, Official Report* (18 May 2010) vol 87 at col 416 (K Shanmugam, Minister for Law):

> Clause 258 extends the protection of the admissibility test to all statements made by an accused person, whether made to a Police officer, above the rank of sergeant or otherwise. This plugs a gap in the existing section 121 of the Code, which confines the admissibility test only to statements made to a Police officer, but not any other enforcement personnel.

40 The Minister also took pains to emphasise that "there is no change in the law as a result of the amendments … the main change is that the test of voluntariness is now applied to all statements and that is an extension of the rights". There is thus no suggestion in the Minister's Second Reading speech that s 258(1), broad as it might read, was intended to render any and all oral and written statements made by an accused person to any other person admissible as of right and to exclude the application of the hearsay rule altogether.

41 Secondly, as a matter of principle, I doubt it would be permissible to admit as a matter of right all statements made by an accused person to any other person. The Prosecution's contention that the appellant's statements to the psychiatrists as to her mental illness and auditory hallucinations are admissible under s 258(1) of the CPC would appear to suggest that *all* statements made by an accused person, including entirely self-serving statements made to persons other than enforcement officers, are automatically admissible. Such self-serving statements, being motivated by a desire to avoid or reduce criminal liability, are generally unreliable and can only be admitted pursuant to the narrow grounds set out in s 21 of the Evidence Act (Pinsler at para 5.084). Wholly exculpatory hearsay statements cannot in general be tendered as proof of the truth of the assertions stated therein even in criminal proceedings (*Public Prosecutor v Virat Kaewnern* [1993] 1 SLR(R) 358 at [19]; *Public Prosecutor v Adetunji Adeleye Sule* [1993] 2 MLJ 70; *R v Aziz and others* [1995] 3 WLR 53 at 60–61; *R v Sharp (Colin)* [1988] 1 WLR 7 at 11). Thus, the Prosecution's interpretation of s 258(1) would seem to me to undermine the well-established law in this area,

contrary to the Minister's assertion that no substantive change in the law was intended by the amendment.

42 In any case, the foregoing observations, on the effect of s 258(1) of the CPC, are not material to my conclusion in this case. Even if the appellant's accounts to the psychiatrists were admissible on the basis of s 258(1) of the CPC, it would not alter the fact that the best evidence of the appellant's experience ought to have come from the appellant herself, and that the District Judge was ultimately deprived of an opportunity to assess the veracity of the appellant's assertion. Furthermore, in the absence of any explanation for not giving evidence herself, the District Judge would have been entitled on this basis, indeed in my view bound, to reject those assertions to the psychiatrists. This is so because of the various admissions contained in her statements to the police and indeed in her unreserved admission to the statement of facts, on the basis of which she had pleaded guilty and been convicted.

43 In the circumstances, I find that the relevance and reliability of the psychiatric evidence was for practical purposes critically undermined by the appellant's failure to give evidence at the Newton hearing. This means that the evidence of Dr Lim and Dr Fones cannot form a satisfactory basis on which the court could arrive at a finding as to whether the appellant experienced auditory hallucinations that led her to commit the offences in question. I now consider the implications of this before returning to the issue of the statement of facts.

The appropriate order at this stage

44 Given my findings on the status of the psychiatric evidence, the next question is what the appropriate order should be in these circumstances. The Prosecution submits that I should simply deal with the appeals against sentence

and disregard the psychiatrists' evidence entirely, on the basis that the appellant deliberately elected not to give evidence and must now bear the consequences of doing so. This would presumably mean that any discount in sentence given by the District Judge on the basis that the appellant experienced auditory hallucinations, to the extent that this is discernible from his grounds of decision, ought to be reversed.

45 However, having reviewed the transcripts of the hearing below, I am not satisfied that the appellant made a clear election to this effect, with full knowledge that to do so would be to undermine the psychiatrists' evidence. Whereas the Prosecution was clear as to its position that the appellant ought to be called to testify at the Newton hearing, the closest it came to specifying the *consequence* of the appellant's failure to testify was as follows:

> Yang: … So to that end, Your Honour, we would urge Your Honour to call for a Newton hearing to resolve this issue as to whether the accused was indeed hearing voices at the material time and how these voices have affected her actions. To that end, Your Honour, it would be incumbent on the accused to actually testify as to having heard the voices at the material time and to answer her questions. Because what we have in the report by Dr Fones and Dr Lim are varying accounts of what she claimed to have heard at the material time of the offence, and these varying accounts are in fact hearsay because they're out-of-Court statements tendered to prove the truth of what is said. …

46 To be fair to the appellant, even though it appears from that extract of the Prosecution's position before the District Judge that, contrary to the position it now takes before me, the admissibility or relevance of the psychiatric reports might be called into question should the appellant choose not to testify, it does not put the point across expressly. Specifically, there is nothing there or anywhere else on the record to suggest that as far as the Prosecution was concerned, if the appellant failed to testify, the expert evidence would be

practically worthless. Further, the lack of clarity on the potential consequences of the appellant's failure to testify was compounded by the following exchanges that took place before and during the Newton hearing, which might have given the impression that as far as the District Judge was concerned, the appellant was at liberty to decide whether to testify or to simply seek to rely on the evidence of the psychiatrists, and which the Prosecution did not demur from:

> Court: ---if the defence counsel is going to have the proof that she has got auditory hallucinations, they're just going to call the two psychiatrists, tender the reports, and that's it. Because that's what is going to be stated in the two psychiatric reports.
>
> Yang: Which is why, actually, Your Honour, I have pointed out earlier that it would actually be incumbent on them to call the accused.
>
> *Court: They do not have to at that point in time, right? Because they have got two psychiatrists who confirm that she had auditory hallucinations. So---*
>
> Yang: They confirm based on her out-of-Court statements, self-reported, Your Honour. As to her fact that having---
>
> Court: Sure, but that---
>
> Yang: ---heard auditory hallu---
>
> Court: ---would be in your cross-examination to then---
>
> Yang: Yes.
>
> Court: ---say that it is not accurate for whatever it is that you wish to do. In fact, I think that we should have this in chambers, alright? I think we will vacate the Courtroom and hear this in chambers.
>
> …
>
> Bajwa: The chances are if I don't call her, I'm not gonna give any reason. I just make up my mind that I not calling her. I don't have to give a reason … but---
>
> Court: Okay.
>
> Bajwa: let me raise that tomorrow.
>
> Court: Sure, because he has the---the matter was adjourned for quite a number of months. So that if there are any developments that you wish to bring to our attention then you

> should bring it out and then the necessary application be made. Alright, otherwise we only have the last medical report to stand by and we'll just rely on that.
>
> Bajwa: Yes, Your Honour, I---I think my position at the moment is that the 2 psychiatrists that I've produced as evidence is enough for me to establish what I want to establish.
>
> Court: Alright---
>
> …
>
> Bajwa: I will decide that tomorrow, Your Honour.
>
> Court: That's right, then you let us know tomorrow morning at---
>
> Bajwa: Sure, Your Honour.
>
> [emphasis added]

47 In these circumstances, it would not be fair to the appellant for the matter to be dealt with now on the footing that she made an election not to give evidence knowing that this would or could affect the admissibility or weight of the expert evidence. This is so because (a) the District Judge seemed to suggest it would not; and (b) the Prosecution never expressly took the point that her failure to give evidence would be all but fatal to the psychiatrists' evidence. I therefore consider that the fair course, in the interest of justice, is to put the appellant to an election now as to whether she wishes to adduce evidence on the factual question of whether she in fact experienced auditory hallucinations at the relevant times that led to the commission of these offences; and if so, what evidence she wishes to adduce. Once the appellant's position is made known, I will hear the parties on any further orders to be made.

The status of the statement of facts

48 I turn finally to the statement of facts. It is evident that there are obvious inconsistencies between the appellant's present account of having committed the material offences because of the auditory hallucinations, and various

references in the statement of facts to other motivations for the appellant's acts of abuse towards the victim (see above at [3]). The question now is what ought to be the consequences of the parties' failure to resolve these inconsistencies when they arose at the hearing below.

49 The Prosecution submits that the appellant ought to be bound by the statement of facts since she had admitted to it without qualification, and that she should not be allowed to now disavow its contents (see above at [22]). I do not think that this would be fair to the appellant for two related reasons. First, *both* parties ought to have realised at the hearing below that the statement of facts and the appellant's mitigation plea which appended the psychiatric reports were inconsistent. It does not seem fair for the Prosecution to have allowed the appellant to plead guilty on the basis of the statement of facts put forth whilst asserting contrary facts in mitigation, without taking the initiative to resolve this once the inconsistencies became clear, and thereafter take the position that the appellant should not be allowed to resile from the admissions in the statement of facts. Secondly and more importantly, as the Court of Appeal recently made clear in *Public Prosecutor v Dinesh s/o Rajantheran* [2019] 1 SLR 1289 at [36], it is the continuing duty of the court to be vigilant and to ensure that the accused person maintains the intention to plead guilty throughout the plead guilty process. In my view, this extends to ensuring that the accused person is fully aware of the *material* assertions in the statement of facts, even where these may be relevant only to issues of sentencing, and that the accused person intends to plead guilty *on the basis of those assertions*. In the instant case, it is unfortunate that the District Judge did not resolve the issue of the apparent inconsistency between the statement of facts and the appellant's mitigation plea, and in fact appeared to have been of the opinion that the two were not inconsistent because "what [the appellant] told the psychiatrist is inwardly what she experienced"

whereas the statement of facts reveals "what transpired or what was perceived by the parties". As I have explained above, this is not correct. The statement of facts and the appellant's mitigation plea clearly put forth different reasons for the appellant's offences, and this is a material inconsistency even though it might not have had the effect of qualifying the appellant's plea that she was guilty of the offences she had been charged with.

50 In the circumstances, I consider that the proper course of action is this. If the appellant elects to adduce evidence on the factual question of the auditory hallucinations, I will hear the parties on the appropriate directions to be made in respect of the statement of facts and whether the parties should then proceed to a Newton hearing, and if so, on what basis. Contrary to the Prosecution's arguments, I do not think that this course of action would prejudice the Prosecution in any way. To the extent that any of the assertions in the statement of facts relating to the appellant's motivations for the offences were derived from her previous statements to the police, the Prosecution can use those statements as well as the fact of her previous admission to the statement of facts to cross-examine the appellant during any Newton hearing that may be held. To be clear, by saying that parts of the statement of facts may be excised, what I mean is that the basis on which the appellant is convicted should not include facts which she no longer wishes to admit. However, it remains open to the Prosecution to cross-examine her on the fact that she did earlier on admit to those facts and to make the appropriate submissions on that basis.

Conclusion

51 For the foregoing reasons, I set aside the finding of the District Judge that the appellant did experience auditory hallucinations. I will hear the parties before I give further directions.

Sundaresh Menon
Chief Justice

R S Bajwa (Bajwa & Co) and Sarindar Singh (Singh & Co) for the appellant in HC/MA 9358/2018/01 and respondent in HC/MA 9358/2018/02;
Tan Zhongshan, Jarret Huang & Seah Ee Wei (Attorney-General's Chambers) for the respondent in HC/MA 9358/2018/01 and appellant in HC/MA 9358/2018/02.
