Public Prosecutor *v* Chong Hou En
[2015] SGHC 69

Case Number	: Magistrate's Appeal No 290 of 2013
Decision Date	: 16 March 2015
Tribunal/Court	: High Court
Coram	: Chan Seng Onn J
Counsel Name(s)	: Wong Kok Weng and Tang Shangjun (Attorney General's Chambers) for the appellant; Narayanan Vijay Kumar (Vijay and Co) for the respondent.
Parties	: Public Prosecutor — Chong Hou En

Criminal Procedure and Sentencing – Sentencing – Mentally Disordered Offenders

16 March 2015 Judgment reserved.

Chan Seng Onn J:

Introduction

1 This appeal highlights the challenging task faced by the courts when sentencing an offender diagnosed with a psychiatric condition. The condition is insufficient to constitute a full defence to the criminal conduct perpetrated by the accused but is nevertheless relevant when the particular individual is sentenced. The multi-faceted task of tailoring the sentence to the offender becomes further vexed by the complexities of the human mind. It is most certainly an unenviable task.

2 The respondent, Chong Hou En, a 29-year-old male, pleaded guilty to five charges under s 509 of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code") and a single charge under s 30(1) of the Films Act (Cap 107, 1998 Rev Ed) ("Films Act"). The district judge ("the Judge") was of the view that a probation order was appropriate and ordered accordingly. The Prosecution successfully applied for a stay of sentence and now appeals against the sentence on the ground that it is manifestly inadequate.

The Facts

3 The respondent admitted without qualification to the following facts. [note: 1] The respondent graduated from Royal Melbourne Institute of Technology (Singapore Institute of Management) in 2008 and worked as a labour relations officer. He was arrested on 6 January 2011 at IMM shopping mall at Jurong East Street 21. The respondent had gone to the shopping mall with the purpose of capturing "Up Skirt" videos. To facilitate this, he had purchased a mini-camera costing about $40 from an online store. He attached the mini-camera to the tip of his shoe with Blu-Tack.

4 The victim and her husband were at the Giant Hypermarket of the same shopping mall. While they were at the Fresh Fruits section, the respondent came up from behind the victim and placed his foot underneath the skirt of the victim in order to film an "Up Skirt" video. The respondent attempted to flee the scene after he was noticed by the husband of the victim. He was detained by the victim's husband with the help of a passer-by after a brief struggle. He was subsequently arrested by the police.

5 In the course of investigations, the respondent's computers, laptops, mobile phone, flash drives, memory cards, hard drive and pinhole cameras were seized. A few thousand videos were found in his computer and hard drive. The Board of Film Censors of the Media Development Authority certified that 10,574 video films were obscene.

6 Further investigations of his computer equipment also revealed videos of females showering in his girlfriend's parents' home. The respondent had, from August 2010, through a series of carefully planned episodes, recorded his girlfriend's family members in the shower. The respondent knew that they would take a shower once they had switched on the water heater. He would then enter the toilet to place a digital camera (that was cleverly disguised as a lighter to avoid detection) there. After the family members of his girlfriend had finished their showers, the respondent would retrieve the camera and access the videos.

7 Through these steps, the respondent filmed the older sister of his girlfriend (aged 30 at the time of the offence) and his girlfriend's two young nieces (aged 12 and ten at the time of the offence). His girlfriend's sister-in-law (aged 31 at the time of the offence), who was the mother of the two nieces, was also filmed. These obscene videos captured the victims fully nude with moving images of their breasts and vulvas. The respondent would watch these videos and masturbate to them.

8 The respondent was thus charged and convicted of five counts of insulting the modesty of a woman by intruding upon her privacy under s 509 of the Penal Code with respect to the victim at IMM shopping mall and the four victims in his girlfriend's parents' home. He was also charged and convicted of one count of possession of 10,574 obscene films under s 30(1) of the Films Act. The respondent consented to ten other charges of insulting the modesty of a woman under s 509 of the Penal Code and one charge of possession of 578 video films without a valid certificate under s 21(1)(*a*) of the Films Act to be taken into consideration for sentencing.

The decision of the Judge

9 The Judge was of the view that the main sentencing consideration should be rehabilitation. Noting that the maximum penalty prescribed was one years' imprisonment and a fine for an offence under s 509 of the Penal Code and that an offence under s 30(1) of the Films Act brought a maximum punishment of six months' imprisonment and a $20,000 aggregate fine, the Judge concluded that the offences were not serious offences. The Judge also placed considerable weight on the medical evidence which stated that the accused was suffering from voyeurism. He concluded that deterrence "should not take precedence over rehabilitation as the offender was labouring under a serious psychiatric condition or mental disorder at the time of the incident".

10 The Judge also concluded that the aggravating factors highlighted by the Prosecution, which included the use of recording devices, multiple victims including children, premeditation and elaborate planning, and the fact that the private parts of the victims were captured, should "be given little weight in light of the fact that the accused was suffering from a psychiatric condition at the material time."

11 According to the Judge, imprisonment would hamper the treatment programme of the respondent. Furthermore, the Judge was persuaded by the "exceptional support" of the respondent's loved ones, including his girlfriend, whose family had also stood by and forgiven him, and his commitment to secure his own recovery and rehabilitation. The Judge also attached weight to the fact that the respondent had voluntarily undergone treatment for three years and that he had not reoffended since the commission of these offences. The Judge opined that there was no need to

punish the respondent further in the light of the fact that he was "currently suffering from significant depressive and anxiety symptomatology" related to the shame and stress from his commission of the offences.

12 With all of the above factors in mind, the Judge ordered the respondent to undergo 30 months' split probation (three months' intensive and 27 months' supervised) with the following conditions:

(a) to undergo psychiatric and psychological follow-up as required by the Institute of Mental Health ("IMH'), psychiatrist Dr Tommy Tan and psychologist, Mr James Tan, and to take medication as prescribed;

(b) to attend counselling with a qualified counsellor to address his relationship difficulties with his girlfriend and his parents;

(c) to be prohibited from possessing any electronic devices with camera facilities and to be supervised closely when accessing websites; and

(d) his parents and girlfriend to be bonded for $5000 to ensure his good behaviour.

Arguments of the parties

The appellant's arguments

13 In arguing that a custodial sentence is warranted, the Prosecution does not challenge the diagnosis of voyeurism and fetishism. Instead, they argue that the starting point for offences under s 509 of the Penal Code which involve the use of recording devices should be custodial. The Prosecution relies on the case of *PP v Tay Beng Guan Albert* [2000] 2 SLR(R) 778 ("*Albert Tay*") in support of this proposition. I shall return to this case later.

14 The Prosecution also submits that the severity of the offences and the aggravating factors point towards a strong public interest in imposing a custodial sentence. The Prosecution submits that the learned Judge erred in finding that the offence under s 509 was not a serious offence. The prosecution also highlights the following facts, which it argues are aggravating:

(a) there was a high degree of intrusion into the privacy of victims since some victims were recorded fully naked;

(b) there were multiple victims;

(c) some of the victims were young;

(d) a video-camcorder was used; and

(e) there was a high degree of planning and premeditation.

15 The Prosecution also points to an observation that there has been an annual increase in the number of offences under s 509 of the Penal Code ("Dealing with Mentally Ill Offenders", *The Straits Times*, (7 July 2012)). The prosecution submits that the offences under s 509 of the Penal Code are a concern to public safety since camera phones are now ubiquitous and it is not uncommon to find miniature cameras disguised as smoke detectors, pens, cigarette lighters, mirror clocks, car alarm key chains or even clothing hooks. A deterrent sentence is therefore warranted to send a stern message to potential offenders.

16 The Prosecution submits that rehabilitation should not override the other penal objectives of deterrence and retribution. According to the Prosecution, the Judge had placed excessive weight on the causal link between the respondent's condition of voyeurism and his commission of the offences. The concept of general deterrence should also feature as an important sentencing consideration, while the concept of retribution is also relevant. The Prosecution points out that the intrusion into the privacy of the victims by the respondent was grave. There is also a high degree of culpability displayed by the significant degree of planning and premeditation. Furthermore, some of these offences involved the recording of victims in their very own homes thus violating the safety and security that the victims would expect from being in their own home.

17 Given all these factors, the Prosecution submits that the sentence of probation is manifestly inadequate and seeks a custodial sentence of more than four weeks' imprisonment per charge in respect of the offences under s 509 of the Penal Code.

The respondent's arguments

18 Counsel for the respondent argues that the Prosecution has failed to show how the sentence of probation, which was imposed after a very careful consideration of all the circumstances of the offences and the offender, is either wrong in principle or manifestly inadequate. Counsel submits that there is a causal link between the mental condition of voyeurism and fetishism and the commission of the offences. Accordingly, the sentencing principle that assumes central importance must be rehabilitation. Counsel points to the following facts in aid of this submission:

(a) The respondent was 28 years old at the time of the offences, had no antecedents and has not reoffended.

(b) The respondent comes from a good family and has a bachelor's degree in business management. He has put his further education on hold because of this episode.

(c) The respondent is truly remorseful and has made a full confession. Most of the offences were only discovered because of his cooperation with the police and his confessions.

(d) The respondent was arrested more than three years ago and has successfully sought medical treatment for his condition in the interim period.

(e) There were no adverse effects on any of the victims. The children affected did not know about the incident and their pictures have not been circulated in any way. Furthermore, the respondent's girlfriend's family has been forgiving and supportive of the respondent.

(f) The whole episode has taken its toll on the respondent. However, he has continued with his treatment and was cooperative with the probation officer before his sentence of probation was stayed.

19 Counsel for the respondent also argues that the Prosecution's reliance on *Albert Tay* is inappropriate because it was decided in 2000, before the introduction of community-based sentencing. Furthermore, *Albert Tay* did not involve an accused with a mental disorder. On this basis, counsel seeks to distinguish *Albert Tay* from the present case. Furthermore, counsel argues that if the court establishes a norm that a custodial sentence is warranted in cases under s 509 of the Penal Code, it would "come very close to legislating a mandatory minimum sentence". Counsel also relies on the case of *PP v Tan Huat Heng* (Magistrate's Appeal 25 of 2012 (unreported)) ("*Tan Huat Heng*")

where the court set aside a custodial sentence and imposed a term of probation on the appellant who was convicted of four counts under s 509 of the Penal Code.

20 Counsel submits that the Judge did not err in holding that rehabilitation was the dominant principle in this case. Counsel points to the fact that the respondent has been diligent in his treatment and has taken a lot of corrective steps to ensure that he will not be tempted or inclined to commit these kinds of offences again in the future. Imposing a term of imprisonment will ruin the efforts taken by the respondent to secure his rehabilitation. No significant public interest will be served by sending the respondent to prison. Accordingly, he submits that the sentence imposed by the Judge is not manifestly inadequate and that this appeal should be dismissed.

The need for expert testimony

21 The Prosecution relies on diagnostic criteria to show that voyeurism and fetishism are classed separately from impulse control disorders which include disorders such as kleptomania and pyromania. The Prosecution submits that the present case is different, given the high level of planning and premeditation; it is not a situation where the acts were done on the spur of the moment. The underlying suggestion of the Prosecution appears to be that a person diagnosed with a voyeurism disorder is nevertheless able to control his acts of voyeurism. However, in my view, this must be substantiated by expert evidence. The Prosecution then applied under s 392(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC") for further evidence to be taken by this court in respect of expert evidence in relation to the nature of voyeurism and whether it deprives a person suffering from the disorder of control over his actions. I granted the application. Both the Prosecution and the respondent called expert witnesses to testify on the nature of voyeurism. I will deal with the expert testimonies and my findings in relation to them below.

My decision

Overview

22 The principles with regards to appeals on sentence are trite. In *Public Prosecutor v UI* [2008] 4 SLR(R) 500 ("*PP v UI*"), the Court of Appeal reiterated the principles in the following manner:

> 12 It is, of course, well established (see, *inter alia*, *Tan Koon Swan v PP* [1985-1986] SLR(R) 976 and *Ong Ah Tiong v PP* [2004] 1 SLR(R) 587) that an appellate court will not ordinarily disturb the sentence imposed by the trial court except where it is satisfied that:
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> (a) the trial judge erred with respect to the proper factual basis for sentencing;
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> (b) the trial judge failed to appreciate the materials placed before him;
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> (c) the sentence was wrong in principle; or
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> (d) the sentence was manifestly excessive or manifestly inadequate, as the case may be.
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> 13 For the purposes of the present appeal, it will be sufficient for us to elaborate briefly on what is meant by a sentence which is "manifestly excessive" or "manifestly inadequate", the latter being the main contention raised by the Prosecution. A succinct explanation can be found in *PP v Siew Boon Loong* [2005] 1 SLR(R) 611 , where Yong Pung How CJ stated (at [22]):
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> When a sentence is said to be manifestly inadequate, or conversely, manifestly excessive, it

> means that the sentence is unjustly lenient or severe, as the case may be, and *requires substantial alterations rather than minute corrections* to remedy the injustice ...

Similar sentiments were expressed in *Liton* ([9]*supra*), where Andrew Phang Boon Leong JA, who delivered the judgment of this court, stated the following (at [84]):

> [I]t bears repeating that an appellate court should only intervene where the sentence imposed by the court below was "manifestly" inadequate - that in itself implies a *high threshold before intervention is warranted*. In the light of the highly discretionary nature of the sentencing process and the relatively circumscribed grounds on which appellate intervention is warranted, the prerogative to correct sentences should be tempered by a certain degree of deference to the sentencing judge's exercise of discretion.

[emphasis in original]

Sentencing principle of individuals diagnosed with psychiatric conditions

23 The Court of Appeal has recently dealt with the relevant principles when sentencing an offender with a mental disorder falling short of unsoundness of mind. In *Lim Ghim Peow v Public Prosecutor* [2014] 4 SLR 1287 ("*Lim Ghim Peow*"), Chao Hick Tin JA neatly summarised the principles at play as follows:

> 25 [T]he existence of a mental disorder on the part of the offender is always a relevant factor in the sentencing process. The manner and extent of its relevance depends on the circumstances of each case, in particular, the nature and severity of the mental disorder. In fact, the existence of a mental disorder often gives rise to contradictory sentencing objectives. As V K Rajah JA noted in *PP v Goh Lee Yin* [2008] 1 SLR(R) 824 ("*Goh Lee Yin (2008)*") at [1], "the paradox of sentencing the mentally ill" is that "[s]uch illnesses can be a mitigating consideration or point towards a future danger that may require more severe sentencing". This echoes what was stated by the High Court of Australia in *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 476-477 (cited with approval by the Singapore Court of Appeal in *PP v Aniza bte Essa* [2009] 3 SLR(R) 327 ("*Aniza*") at [70]):
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> > ... The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions. *And so a mental abnormality which makes an offender a danger to society when he is at large but which diminishes his moral culpability for a particular crime is a factor which has two countervailing effects: one which tends towards a longer custodial sentence, the other towards a shorter.* ...
>
> 26 In sentencing a mentally disordered offender, there is generally a tension between the sentencing principles of specific and general deterrence on the one hand, and the principle of rehabilitation on the other. The approach which our courts have adopted is that the element of *general* deterrence *may* be given considerably less weight if the offender was suffering from a mental disorder at the time of the offence, particularly if the mental disorder was causally related to the offence. This was stated by Yong Pung How CJ in the Singapore High Court case of *Ng So Kuen Connie v PP* [2003] 3 SLR(R) 178 ("*Connie Ng*") at [58] as follows:
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> > ... [T]he element of general deterrence can and should be given considerably less weight if

> the offender was suffering from a mental disorder at the time of the commission of the offence. This is particularly so if there is a causal link between the mental disorder and the commission of the offence. In addition to the need for a causal link, other factors such as the seriousness of the mental condition, the likelihood of the [offender] repeating the offence and the severity of the crime, are factors which have to be taken into account by the sentencing judge. In my view, general deterrence will not be enhanced by meting out an imprisonment term to [an offender] suffering from a serious mental disorder which led to the commission of the offence.

…

2 8 ***That said, we should clarify that the element of general deterrence may still be accorded full weight in some circumstances, such as where the mental disorder is not serious or is not causally related to the commission of the offence, and the offence is a serious one*** . …

…

36 Similarly, the sentencing principle of *specific* deterrence *may* be of limited application in cases involving mentally disordered offenders. Whereas general deterrence is directed at educating and deterring other like-minded members of the general public by making an example of the particular offender concerned, specific deterrence is directed at discouraging that particular offender from committing offences in future (see *PP v Tan Fook Sum* [1999] 1 SLR(R) 1022 at [18]). The reason why specific deterrence may not be a relevant consideration when sentencing mentally disordered offenders is that specific deterrence is premised on the assumption that the offender can balance and weigh consequences before committing an offence (see *Tan Kay Beng v PP* [2006] 4 SLR(R) 10 at [32]). The aim of specific deterrence is to deter the particular offender concerned from committing any further offences. ***It follows that where that offender's mental disorder has seriously inhibited his ability to make proper choices or appreciate the nature and quality of his actions, it is unlikely that specific deterrence will fulfil its aim of instilling in him the fear of re-offending. Conversely, specific deterrence may remain relevant in instances where the offence is premeditated or where there is a conscious choice to commit the offence*** (see *PP v Law Aik Meng* [2007] 2 SLR(R) 814 at [22]). ***This remains the case notwithstanding the existence of a mental disorder on the part of the particular offender concerned.***

37 Rehabilitation may take precedence where the sentencing principle of deterrence is rendered less effective by virtue of a serious psychiatric condition or mental disorder on the part of the offender (see *Goh Lee Yin v PP* [2006] 1 SLR(R) 530 at [29]). Rehabilitation, however, has both a public and an individual dimension (see *Goh Lee Yin (2008)* ([25] *supra*) at [99]). On the one hand, the courts are concerned about the welfare of the offender and the manner of reform and treatment which is most suitable, particularly if the offender suffers from a psychiatric illness or other special psychiatric condition. On the other hand, the underlying aim of rehabilitation is to advance the greater public interest by reducing the risk of recidivism.

38 It is, moreover, erroneous to assume that rehabilitation necessarily dictates that a lighter sentence be imposed on a mentally disordered offender. This again depends very much on the nature of the offence as well as the nature and severity of the offender's mental disorder. The case of *PP v Kwong Kok Hing* [2008] 2 SLR(R) 684 serves as a useful illustration. In that case, the respondent was charged with attempting to commit culpable homicide by pushing the victim into the path of an oncoming train at a train station. He was diagnosed as suffering from a mental

disorder at the time of the offence. In the Prosecution's appeal against sentence, the Court of Appeal observed (at [37]) that " ***[w]hile the respondent's rehabilitation was a relevant consideration, there was no suggestion that he could not be similarly rehabilitated in prison", and that "even if one were to place considerable weight on rehabilitation as a sentencing principle, it did not necessitate a light sentence in the current case".***

39 In cases involving serious offences, there is no reason why the retributive and protective principles of sentencing should not prevail over the principle of rehabilitation, notwithstanding the offender's mental disorder. As Rajah JA stated in *Goh Lee Yin (2008)* at [107]:

> ... [T]his is not to say that in *all* offences committed owing to a psychiatric disease, rehabilitation must be the foremost consideration. Indeed, assuming that an offender suffers from a psychiatric disease which causes him to commit a particular heinous offence, it would surely not be correct to say that such an offender ought to be rehabilitated to the exclusion of other public interests. Rehabilitation may still be a relevant consideration, but such rehabilitation may very well have to take place in an environment where the offender is prevented from recommitting similar offences. [emphasis in original]

We also note with approval the commentary in Kow Keng Siong, *Sentencing Principles in Singapore* (Academy Publishing, 2009) at para 18.125 that "the retributive principle features prominently in the sentencing of mentally disordered offenders or intellectually challenged offenders where the offence is *particularly serious or heinous*" [emphasis in original]. The principle of retribution will be particularly relevant if the offender's mental disorder did not seriously impair his capacity to appreciate the nature and gravity of his actions. Protection of the public will also be a relevant consideration in cases involving serious offences and "dangerous" offenders, notwithstanding the fact that at the material time, the offender was suffering from a psychiatric disorder which caused the commission of the very offence concerned (see *Goh Lee Yin (2008)* at [108]). Indeed, there is no reason why the public interest of protecting society should necessarily cease to be a relevant consideration when dealing with a mentally disordered offender. Ultimately, the court must balance the interests of society against those of the offender. In every case, it is often this search for the right balance which poses the greatest difficulties.

[emphasis in original in italics; emphasis added in bold italics]

24 While the court will always be cognisant of the need for rehabilitation in cases where the accused person is suffering from a mental disorder, the principles with regards to sentencing an accused with a mental disorder can be distilled, for present purposes, as follows:

(a) The existence of a mental disorder on the part of the offender is always a relevant factor in the sentencing process.

(b) The manner and extent of its relevance depends on the circumstances of each case, in particular, the nature and severity of the mental disorder.

(c) The element of general deterrence may still be accorded full weight in some circumstances, such as where the mental disorder is not serious or is not causally related to the commission of the offence, and the offence is a serious one.

(d) In spite of the existence of a mental disorder on the part of the accused, specific deterrence may remain relevant in instances where the offence is premeditated or where there is

a conscious choice to commit the offence.

(e) If the serious psychiatric condition or mental disorder renders deterrence less effective, where for instance the offender has a significantly impaired ability to appreciate the nature and quality of his actions, then rehabilitation may take precedence.

(f) Even though rehabilitation may be a relevant consideration, it does not necessarily dictate a light sentence. The accused could also be rehabilitated in prison.

(g) Finally, in cases involving particularly heinous or serious offences, even when the accused person is labouring under a serious mental disorder, there is no reason why the retributive and protective principles of sentencing should not prevail over the principle of rehabilitation.

25 Given that the presence of a diagnosis of a mental disorder is in most cases a mitigating factor which the court *may* take into account when sentencing the offender, its significance in terms of mitigating value depends on the factors and principles enumerated above. These include specifically factors such as the causal link, the nature and severity of the mental disorder and the offender's ability to make conscious choices and to appreciate the nature and quality of his actions. As explained at length, these are particularly important when determining the appropriate sentencing principles which should be engaged in the sentencing exercise.

26 In fact, the court must pay particular attention to the *nature* of the mental disorder when the disorder is one which invariably manifests itself in the doing of the very act which is criminalised. If the very diagnostic criteria include the invariable manifestation of an act which is criminalised, a causal link, *however tenuous*, would almost certainly be present. It may even be circular to speak of causation, simply on that premise – the diagnosis is based on the acting out of the criminal behaviour while the criminal behaviour is explicable by the presence of the mental disorder. The prosecution ably demonstrates the difficulty in such cases since it would mean the more a person engaged in the criminal behaviour, the more serious the disorder is and the greater the mitigating value the disorder carries. This cannot be correct.

27 Therefore, in this particular genus of mental disorders, the concept of a causal link may not be particularly useful, or even that relevant for determining the mitigating value to be ascribed to the mental disorder. In my view, where the "severity" of the mental disorder in an individual is assessed with respect to the "frequency" of the criminal act and there is a positive correlation between the "severity" and the "frequency", then the severity and nature of the individual's mental disorder ought not to be regarded as a mitigating factor without first examining in detail the *nature* of the mental disorder, in terms of how it has affected the individual's ability or capacity to control or refrain himself from committing the criminal acts and whether punishment will be able to instil fear in him and deter him from committing the same criminal acts in future.

28 If the nature of the mental disorder is such that the individual retains substantially the mental ability or capacity to control or refrain himself when he commits the criminal acts but he instead chooses not to exercise his self-control, and if it is also shown that punishment will be effective in instilling fear in him and thereby deter him from committing the same criminal acts in the future, I will attribute very little or no mitigating value to the presence of the mental disorder.

29 If there is evidence to show that the individual is not able or is substantially not able to control or refrain himself from committing the criminal acts because of the mental disorder and similarly, punishment is unlikely to be effective in instilling fear in him and to deter him from committing the same criminal acts in future because of the mental disorder, then the principle of deterrence may be

given less weight and rehabilitation may well take precedence provided that the treatment mandated as part of his rehabilitation is going to be effective in treating the mental disorder and in reducing the risk of recidivism. Nevertheless, if the criminal offences committed are just too serious in nature, the principle of rehabilitation may well have to give way to the principle of retribution and protection of the public at large. Ultimately, the factual circumstances will govern how all these different factors, pulling in different directions, are going to interact. The court must judiciously weigh these various factors and arrive at a fair and just sentence that is appropriate in all the circumstances of the case.

30 A few illustrations of the judicial treatment of different mental disorders will be useful to elucidate the appropriate approach to take in the present case.

31 In *Public Prosecutor v Goh Lee Yin* [2008] 1 SLR(R) 824 ("*Goh Lee Yin*") V K Rajah JA dealt with the applicable principles when sentencing a person diagnosed with kleptomania. Rajah JA in his analysis examined the nature of kleptomania as follows:

> **The psychiatric disorder of kleptomania**
>
> *The nature of kleptomania*
>
> 61 Kleptomania (Greek: , kleptein, "to steal", , "mania") is an impulse control disorder characterised by the inability to resist impulses to steal objects that are not generally acquired for personal use or monetary gain. The individual concerned describes a compulsive urge to steal. The behaviour is classically accompanied by an increasing sense of tension before, and a palpable sense of relief immediately after and during the act.
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> …
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> 64 As to the peculiar features of kleptomania, the essential diagnostic criterion is the recurrent failure to resist the impulse to steal items that are not needed for personal use or that have little personal value. The individual concerned may experience a rising sense of tension before the theft, and then experience gratification and/or anxiety reduction afterwards. Typically, the objects stolen usually have little value, and the person sometimes offers to pay for them, or may give them away, or sometimes hoards them. What is especially cogent in this respect is perhaps the absurdity of the act - what is stolen is not generally needed. For example, Dr Phang testified in court that he had experience dealing with kleptomaniacs who stole such items as eggs or even soap and tissue rations while in prison.
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> 65 Further, whereas the thefts of most shoplifters have personal gain as the typical motivation for the act, the acts of thefts of kleptomaniacs do not. In this regard, the "gain" there is the relief obtained from the sense of the unbearable anxiety and tension prior to each episode of theft. Goods are not generally stolen for their material value, although Dr Phang took pains to point out that valuable objects may also on occasion be stolen by genuine kleptomaniacs. This would, however, be the exception rather than the norm. In court, Dr Phang stated that this would happen if the kleptomaniac concerned felt his or her irresistible urges when in the vicinity of a valuable item - the urge to steal would then be relieved by the taking of such objects, and the taking is not motivated by the material cost of the object taken.
>
> 66 Finally, kleptomania is now thought to have a biological basis, a deduction supported by the efficacy of treatment with long-term medication. Elaborating in court, Dr Phang said that kleptomania is thought to be associated with the deficiency of some neurological function of the brain. It is more prevalent among women. The behaviour may be sporadic with long intervals of

remission, or may persist for years despite repeated prosecutions. In short, it is an enigmatic condition, the diagnosis of which must necessarily be made after the exclusion of all other causes of the repeated thefts.

In the context of the appropriate place for specific deterrence when sentencing kleptomaniacs, Rajah JA said:

> 79 In my view, the theory of "undeterribility", as canvassed by Nigel Walker and Nicola Padfield in *Sentencing: Theory, Law and Practice* (Butterworths, 2nd Ed, 1996) at p 99, is of keen relevance to the present case. As the learned authors point out, there are some afflictions or ailments which render deterrence specific to the offender futile. In particular, they state that "[m]ental illnesses can preoccupy or mislead sufferers to an extent that makes the consequences of their actions irrelevant".
>
> 80 Kleptomania can rightly be considered one such ailment. By definition, it is an *impulse control disorder* which subjects the sufferer to an intense and almost unbearable desire to steal. Further, kleptomania is thought to have a biological cause - this only serves to substantiate the point that the sufferer may not be fully able to control his or her actions prior to and while committing the offence. Accordingly, once kleptomania is properly established, it must be accepted that the deterrence specific to the offender must necessarily be limited, because his or her future *actual commission of the offence concerned* is not primarily deterred.
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> [emphasis in original]

Dealing with general deterrence, Rajah JA said at [92]:

> … Perhaps one could argue that the prevalence of the offences by the respondent and the difficulty of detection and/or apprehension in shoplifting cases could warrant the imposition of a sentence which properly reflects the need for general deterrence, but given the general "undeterribility" of kleptomania (see [79] above), any general deterrence would be futile.

32 In *Lim Hock Hin Kelvin v Public Prosecutor* [1998] 1 SLR(R) 37 ("*Kelvin Lim*"), Yong Pung How CJ, dealing with paedophilia, stated at [31]:

> There were no significant mitigating factors in this case. The learned judge had found, rightly in our opinion, that paedophilia is not a disease or a physical illness but is a disorder. According to the *American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders* (3rd Ed, 1980), paedophilia is a condition where there is recurrent and intense sexually-arousing fantasies, sexual urges or sexual activities involving prepubertal children. Even if paedophilia is an illness, we reject any suggestion that the sufferer cannot help it and therefore carries only a diminished responsibility for his actions. There is no evidence that paedophiles cannot exercise a high degree of responsibility and self-control. The learned judge found that the appellant had a choice of whether to commit paedophilic offences against the victims, and chose to do so. The psychiatrist who examined the appellant expressed the opinion that treatment of paedophilia was difficult. Given the high recidivism rate of offenders, the learned judge took the view that the appellant had to be removed from society for a long period of time.

33 From the foregoing, it is clear that both *Goh Yee Lin* (explicitly) and *Kelvin Lim* (implicitly) had examined the *nature* of kleptomania and paedophilia respectively before deciding on the mitigating value to be attached to the disorder. Both kleptomania and paedophilia manifest themselves in the very act criminalised. The High Court in *Goh Yee Lin* and the Court of Appeal in *Kelvin Lim* came to

different conclusions on the *nature* of kleptomania and paedophilia respectively and thus ascribed differing mitigating values to each of the mental disorders. The High Court attached significant mitigating value to the diagnosis of kleptomania because of the "undeterribility" of the disorder given that it is an impulse control disorder and the "sufferer may not be fully able to control his or her actions prior to and while committing the offence". In the light of this, deterrence was rendered less effective and rehabilitation formed the primary focus. The Court of Appeal, on the other hand, attached little or no weight to the disorder of paedophilia since it rejected any "suggestion that the sufferer cannot help it and therefore carries only a diminished responsibility for his actions". The Court of Appeal further concluded that there was "no evidence that paedophiles cannot exercise a high degree of responsibility and self-control". Both the High Court and Court of Appeal were focused on the self-control or lack thereof of the sufferer of the disorder. This to my mind is also the correct inquiry. In addition, if a significant lack of control is established, the circularity discussed above at [26], in the context of the causal link for disorders which invariably manifest themselves in criminalised conduct, disappears. A proper causal link, free from circularity, from the disorder to the commission of the offence, is thus established.

34 However, I must add that these observations should generally be confined to cases where the disorder is one which invariably manifests itself in criminal conduct (psychiatric descriptive labels of criminal/deviant conduct). Where the disorder is one which may manifest itself in different ways, some of which are criminal and others perhaps not, the concept of a causal link is still relevant and useful. In *Lim Ghim Peow*, the appellant who was suffering from major depressive disorder at the time of the offence, had doused his girlfriend with petrol and set her ablaze with a lighter. The appellant was charged and convicted of a charge of culpable homicide not amounting to murder under s 304(*a*) of the Penal Code and sentenced to 20 years' imprisonment. In dismissing the appeal against conviction the Court of Appeal made the following observations:

> 50 … While Dr Goh did state in the 2nd Psychiatric Report that the Appellant's major depressive disorder would have impaired his degree of self-control and his decision-making capacity with regard to the offence, Dr Goh also opined in that report that the Appellant did not appear to lack "the capacity to comprehend the events or the capacity to appreciate the wrongfulness of his actions" (see [42] above). Dr Goh's opinion was that the Appellant's major depressive disorder, coupled with his violent and impulsive personality, led him to decide on the course of action that resulted in the death of the Deceased. This, however, did not mean that the Appellant could not comprehend the gravity of his actions or the wrongfulness of his conduct. As both Dr Goh and the Judge noted, the Appellant formed the intention to kill the Deceased some time before the commission of the offence, and carried out his plan in quite a meticulous manner.
>
> 51 The Judge therefore did not err in drawing a distinction between, on the one hand, the present case and, on the other hand, cases where the mental disorder had completely dispossessed the offender of his awareness of the nature and illegality of his actions or where the offender had committed the offence on impulse due to his mental disorder. Here, the Appellant had carefully planned his moves - he had decided to take the Deceased's life and his own too, reasoning that if he could not have the Deceased, then no one else should have her. We should clarify at this juncture that there is an erroneous statement of fact at [60] of the Judgment (quoted at [49] above). The Appellant was first diagnosed as having a major depressive disorder in December 2011, *before* the commission of the offence, and not (as the Judge stated) after his arrest for the offence. However, this error was not material and does not detract from what we have said in the previous paragraph.
>
> 52 In the light of the nature of the Appellant's major depressive disorder and its effect on the commission of the offence, we were of the view that the Judge did not err in considering

> retribution and prevention instead of rehabilitation to be the primary sentencing principles that were applicable in this case. A mental disorder, even if it substantially impaired the offender's mental responsibility for the commission of the offence and thereby reduced the offence (in the context of the offence of culpable homicide under s 299 of the Code) from that of murder to that of culpable homicide not amounting to murder, cannot be invoked as a blanket excuse for every aspect of the offender's criminal conduct. In every case, it is imperative that the sentencing court examine the nature and gravity of the offender's mental disorder and its impact on the commission of the offence before arriving at a sentence that takes into account and balances the relevant sentencing objectives. …
>
> [emphasis in original]

The major depressive order in *Lim Ghim Peow* amounted to an abnormality of mind and there was a significant impairment of his decision-making capacity with regard to the offence (at [42]). This, coupled with the appellant's already violent and impulsive propensity related to his personality attributes, resulted in him committing the offence. It would be meaningful to speak of a causal link here to determine the correlation between the disorder and the commission of the offence since it is not riddled with the same circularity issues mentioned above at [26]. However, as seen from the above passage, the presence of the causal link in *Lim Ghim Peow* was not a sufficient condition to the disorder being given significant mitigating value in the light of the particularly heinous nature of the crime.

35 With the above in mind, I now turn to the expert evidence on the nature of voyeurism.

Expert evidence on "voyeurism"

36 The Prosecution's expert is Dr Stephen Phang Boon Chye ("Dr Phang"). He is currently a senior consultant at the Department of General and Forensic Psychiatry at Institute of Mental Health, Woodbridge Hospital. He is also an adjunct assistant professor at Duke-NUS Graduate Medical School and was until July 2013, a clinical senior lecturer at the Yong Loo Lin School of Medicine, National University of Singapore. [note: 2]

37 Dr Phang refers primarily to the diagnostic criteria contained in both the *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Publishing, 5th Ed, 2013) ("DSM-5") and *The ICD-10 Classification of Mental and Behavioural Disorders* (World Health Organisation, 1993) ("ICD-10") to form his opinion. [note: 3] Dr Phang also produces various secondary materials in support of his expert opinion. Dr Phang's expert opinion is summarised neatly in his medical report dated 13 June 2014 as follows: [note: 4]

> In summary, I am of the considered opinion that while Voyeuristic Disorder is indeed a diagnostic category described in DSM-5 ('Voyeurism' in ICD-10), it merely represents a clinical description of what is essentially a perverse behavioural option, principally characterized by the deviant desire to repeatedly observe/record unsuspecting others in various compromising states/behaviours, primarily for the purpose of self-sexual gratification. The behaviours associated with this entity are usually deliberate, planned and well within the self-control of the individual concerned. It does not deprive the individual of the requisite *mens rea*, and should not, therefore, exculpate or exonerate.

38 Dr Phang testifies that voyeurism forms part of a general family known as paraphilias. Paraphilias include, for example, paedophilia, voyeurism and exhibitionism. According to Dr Phang:

> The term 'paraphilia' denotes … any intense and persistent sexual interest **other than** sexual interest in genital stimulation or preparatory fondling with phenotypically normal, physically mature and consenting human partners. A 'paraphilic disorder' is a paraphilia which has caused distress and/or impairment to the individual, or a paraphilia whose satisfaction has entailed personal harm, risk of harm to others." [note: 5] [emphasis in original]

There are three general characteristics common to all paraphilias. Firstly, there is a longstanding, unusual and highly arousing erotic preoccupation which is dehumanised for most of the adolescent and adult life of the person. The fantasy is often associated with preoccupying arousal and relies heavily on the image of a partner who does not possess personhood. The paraphilic fantasies are conscious and clearly known to the individual. Secondly, there is an urge to act out the fantasy or "to play out the imagined erotic scenario, which in more intense forms is described as an urge to act out the imagined fantasy in sexual behaviour", usually in masturbation. The acting out of the sexual fantasy is fundamentally motivated by a sexual behavioural aberration and is not driven by any form of irresistibility. "[T]he mental capacity to effect a behavioural choice always remains intact. It is basically a disordered sexual preference, or, in simple layman parlance, a sexual deviancy." [emphasis in original]. Thirdly, there is often significant, or even severe sexual dysfunction involving normal desire, arousal or orgasm with a partner, especially so in married individuals. "Paraphilias are sexual identity disorders that render normal eroticism and sexual love unattainable." [emphasis in original]. [note: 6]

39 Dr Phang attests that the diagnostic criteria for voyeurism (based on the ICD-10 and DSM-5) are:

> (a) Over a period of at least six months, recurrent and intense arousal from observing an unsuspecting person who is naked, in the process of disrobing, or engaging in sexual activity, as manifested by fantasies, urges, or behaviours.
>
> (b) The individual has acted on these sexual urges with a non-consenting person, or the sexual urges or fantasies cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.
>
> (c) The individual experiencing the arousal and/or acting on these urges is at least 18 years of age.

40 Dr Phang also states that the diagnostic criteria for voyeurism apply if the disclosing individual "also reports subjective distress (guilt, shame, intense sexual frustration, loneliness), psychological problems, *sexual impulsivity*, or hypersexuality as a consequence of their voyeuristic sexual preferences". [emphasis added]. [note: 7] Although Dr Phang states that there is some form of sexual impulsivity, he clarifies that this impulsivity is a symptom and the presence of some form of impulsivity on the part of the person diagnosed with voyeurism does not make voyeurism a form of impulse-control disorder. Dr Phang explains that the " **inability to resist** the impulse is by definition the common core of all impulse-control disorders." [emphasis in original]. [note: 8] The impulsivity is defined as the rapid and sudden expression of unplanned behaviour and the primary connotation of impulsivity is the irresistibility of the urge to act. [note: 9] According to Dr Phang, the mental faculties of a person diagnosed with voyeurism are "often extremely nimble, with the unfettered ability to cogitate and plan coherently and deliberately" and in fact, in "order to successfully carry out the voyeuristic fantasy, the individual is generally obliged to plan quite extensively, such as purchasing the requisite paraphernalia, and then carefully (and often creatively) facilitating the filming, or recording of

voyeuristic images". [note: 10]

41 The following exchange also helps illuminate Dr Phang's expert opinion [note: 11] :

Q:	Now, further down in paragraph (b), you state that "the drive-ness to act out this fantasy and---it's not driven by any form of irresistibility. In fact, the mental capacity to effect the behavioural choice always remains intact". Can you elaborate on that, please?
A:	Yes, indeed, Your Honour. In the simplest possible terms, the ability to effect a freewill choice is not taken away from the individual who has a paraphilia. The urge and the desire may be there, but that is another matter altogether. Fundamentally, there is still a choice to say, "No" to the aberrant sexual behaviour or the abnormal paraphiliac behaviour. And that's exactly what it means.
Court:	But is the choice one that is controllable or so uncontrollable that it's impulsive and therefore not within his self-control?
Witness:	It is not clinically impulsive, Your Honour. It is---in other words, it is still controllable. It may be difficult to exercise control or to resist the urge, but the ability to take ow---to---to contain these urges and these impulses remain unfettered.
Court:	It's unfettered---of course the choice is there.
Witness:	Yes, Your Honour.
Court:	The critical question is whether it's beyond his control.
Witness:	It is not, Your Honour. There is another diagnostic category for that kind of issue, that kind of entity and tho---those are subsumed under the rubric of "impulse control disorders". And that, by definition, is an impulse that comes out of the blue, it is unplanned, it is unpremeditated, and it just happens. And the individual finds it impossible or almost impossible to resist those impulses.
…	
Court:	… Is the diagnostic criteria of lack of control dependent on it being an impulse? Can it be something which is non-impulsive but is uncontrollable?
Witness:	Er, no, I do not think so, Your Honour. Not from a clinical perspective.

42 Therefore, Dr Phang is clear that voyeurism does not deprive a person of self-control. Any impulsivity a person feels as a result of his voyeuristic tendencies is a symptom. This does not, however, make voyeurism an impulse-control disorder which is the specific diagnostic umbrella in the DSM-5 for disorders which deprive a person of self-control. The following disorders are listed, *inter alia*, in the DSM-5 under the umbrella of impulse-control disorder: oppositional defiant disorder, intermittent explosive disorder, conduct disorder, antisocial personality disorder, pyromania and kleptomania.

43 Dr Phang then concludes in his report that voyeurism is merely a descriptive diagnostic label for what is basically a perversion, or perverse form of behaviour which deliberately and wilfully intrudes into the inviolable sanctity and privacy of others. He stresses that it is not a mental illness which is

beyond the conscious voluntary control of the individual concerned. [note: 12]

44 The expert for the defence is Dr Tommy Tan Kay Seng ("Dr Tan"). He is currently a consultant psychiatrist in Novena Psychiatric Clinic, Novena Medical Centre. He was previously a senior consultant at Woodbridge Hospital. He was also a visiting consultant at the Department of Psychiatry, Changi General Hospital, between 2012 and 2014. [note: 13]

45 Dr Tan agrees with Dr Phang on several aspects including the diagnostic criteria for voyeurism and the fact that it is not classified as part of the family known as impulse-control disorders. However, Dr Tan states in his expert report that patients "with paraphilias are compelled to plan and to execute these acts." [note: 14] [emphasis in original]. According to his report, the patient is compelled to plan and execute his acts in order to obtain sexual arousal. He specifically states in his report that the respondent "was in a position that he was not able to control his actions due to his mental disorder" and that he "was compelled to buy the equipment or else he would not be able to obtain his sexual arousal and satisfaction." [note: 15] Dr Tan also opines that the "causal link between a mental disorder and an offence need not necessarily be an inability to control an impulse such as in kleptomania or pyromania"; it could also be a compulsion. [note: 16]

46 Dr Tan also refers to psychiatric literature which alludes to the impulsivity associated with those diagnosed with paraphilias. Dr Tan finally disagrees with Dr Phang's description of voyeurism as a perverse behavioural option in that, according to him, Dr Phang's analysis seems to suggest that voyeurism is not a mental disorder "but a behaviour that a person can choose to have or not to have." [note: 17]

47 Having had the benefit of reading the expert reports and hearing both experts give oral testimony in court on 4 and 5 November 2014, I prefer the expert opinion of Dr Phang as I find that it is more logical, and is corroborated by psychiatric literature and by another doctor who examined the respondent. I also find that Dr Tan and Dr Phang are in agreement in many respects.

48 In choosing between the two experts, I am aware that Dr Phang did not at any point examine the respondent but Dr Tan has had the benefit of examining the respondent. However, this point is irrelevant since the prosecution does not seek to challenge the diagnosis of voyeurism. The experts were engaged in order to assist the court in shedding light on the nature of voyeurism – specifically whether it deprives a voyeur of his exercise of self-control at the various stages of preparation to the stage when he acts out his fantasies.

49 Dr Phang has also stated the following in his evidence-in-chief which demonstrates his clinical expertise when it comes to paraphilias in general: [note: 18]

> Q: Thank you, Dr Phang. Dr Phang, in paragraph 6 of your report, you state that your expert---
>
> A: Mm.
>
> Q: ---opinion is also based on your clinical experience. Can you tell the Court how often you treat people with paraphilias?
>
> A: Your Honour, it would be a very difficult question to answer because it happens constantly, Your Honour. It's---I have been in forensic psychiatry for 16 years now and even before that---

Q: Yes.

A: ---in my earlier psychiatric career, I encountered individuals with paraphilias or (*sic*) one kind or another. So it would be impossible to put a number, if that is what the learned prosecutor is---but, er, it happens on a regular basis, Your Honour. It is, in a manner of speaking, bread and butter. One of the bread and butter issues of forensic psychiatry.

50 In terms of credentials and relevant experience, both Dr Phang and Dr Tan have impressive *curricula vitae* with vast clinical experience in their fields and have held high-level appointments. They have appeared as experts to assist the court in psychiatry-related matters over the years.

51 Dr Phang has emphasised that a person with voyeurism remains in full control of his actions. Dr Phang however acknowledges that there could be symptoms of impulsivity on the part of the person diagnosed with voyeurism but the person at all times retains control over his actions. Dr Phang explains the concept of impulsivity in his evidence-in-chief as follows: [note: 19]

Q: Would you agree that someone suffering from voyeuristic disorder would have some problems with impulsivity?

A: Of course, Your Honour, but that is impulsivity in the layman understanding of the term. And here I emphasise that the difference is vital because the layman understanding of impulsivity is one issue and the clinical understanding of impulsivity as an impulse control disorder is another matter altogether.

Q: So does the presence---

…

---of impulsivity as a symptom equate to any disorder being an impulse control disorder?

A: No, Your Honour, not at all. It is settled psychiatry that many psychiatric disorders will have impulsivity as a symptom and I have actually explained this in my subsequent report, I believe dated 28th October. You know, for example, a schizophrenic may act impulsively because he's disturbed by hearing voices. A person with mania who has got abnormally elated and elevated mood, Your Honour, may spend excessively, may make faulty judgments and embark upon---such as, er, an individual I know who ordered three Jaguars---three Jaguar cars when he was in a manic state … Of course, a depressed individual may be impulsive and in the moment of impulse may commit suicide and jump off a building.

So---so there are various aspects to impulsivity as a symptom versus the impulsivity of impulse control disorders, which are specific diagnostic umbrella entity in---in DSM, Your Honour.

…

Your Honour, an impulse---an individual suffering from an impulse control disorder is, to put it very simply, a sick person. All right, he---he experiences clinically significant impulses which he cannot resist. You know, he may---he may pull out---or she or more often may pull out hair, which is---which is not a normal activity - pull out his own hair from his head which is not a normal activity and they try their best to resist it because they recognise the harmfulness of such behaviour. But they cannot resist it by definition; that is inherent in a

definition of an impulse control disorder. Whereas in voyeuristic disorder, there is usually no attempt to resist it because it is enjoyable; it is ego-syntonic. It fulfils a purpose, Your Honour. One common observation, Your Honour, is that an individual with voyeuristic disorder may be undergoing a period of stress, so they then engage in a voyeuristic behaviour, or paint the voyeuristic images in one way or another through deliberate and meticulous planning. After which, they then masturbate to---while watching these obtained images and thereby obtain their sexual gratification, and the release of tension from their original stressor. And then they move on in life, until the next stressor comes along.

So that---it is---it's just basically a mild adaptive response very often to---to stress, or it may not even be that at all. That is being rather kind to a---to the---to a individual with voyeuristic disorder. Some individuals with voyeuristic disorders simply just wish that is, in a nutshell, their sex life, Your Honour. They do not engage in a normal sex life with normal consenting human partners and that has supplanted their sex life. In other words, it is---becomes what we call "exclusive". Every paraphilia has a---carries a qualifier, Your Honour. It could be exclusive, it could be non-exclusive. If it is non-exclusive, it means that they engage in a paraphilic behaviour, whatever it may be, but they also have a normal sex life. But---or it may be sub-par because for the simple reason that, you know, it is basically---erm, they are also basically preoccupied. Or it may be completely exclusive in a sense that they have no normal sex life and they con---and their sex life consist of the voyeuristic behaviour or the paraphilic behaviour. And they do not resist the impulse simply because it operates, as I stated earlier, on a pleasure principle and nothing more.

52 Dr Tan, as mentioned above, has stated that a person suffering from voyeurism is compelled to perform the acts to relieve the intense urges to perform sexual acts and feel a release of tension after the act. However, when questioned further, Dr Tan seems to accept the distinction between impulsivity and a loss of control which characterises an impulse-control disorder: [note: 20]

Witness: Well, the person what with a---with a cross-dresser fetishism could stop himself from buying a dress when he, you know, feels that, you know, he shouldn't do it. As such it's not an absolute thing, Your Honour, nothing in life is absolute.

Court: So relatively speaking---

Witness: Relatively speaking he have this impulse to go and get it.

Court: Yes, this impulse at the initial stages is much less.

Witness: Yes, much less of course.

Court: That you agree?

Witness: Yes.

Court: And then it builds up as he goes.

Witness: It---it builds up, yes.

Court: Okay, fine. I---from there I can understand.

…At least that's logical---

…Court: ---if you tell me the im---that the uncontrollable part is as much as the latest stages then I find that hard to accept.

Witness: I---I agree with you, but he already make that plan already, is---that is all's---

Court: Of course you can plan.

Witness: ---it's all part of that disorder.

…

Court: I don't think Dr Phang would disagree with you on that maybe.

Witness: I hope not.

Court: That is gradually initially, you know---

Witness: Yah.

Court: ---it's low, you know, it's not so---then you can stop it, towards the end maybe you can't stop.

Witness: Yah.

Court: Right?

Witness: He can stop, in fact, Your Honour, the honest truth is they can stop anytime.

Court: Are you telling me towards the end he can also stop anytime in the sense---

Witness: Yes, for example---

Court: ---that he can still pull back.

Witness: ---a patient with pyromania has this intense urge to set the fire---

…

---but the moment he realised that his act cannot be completed because there are policemen hanging around the warehouse.

Court: He can stop.

Witness: He will stop.

Court: Okay. Ah, then I throw to the other side which is the im---real impulse explosive type.

Witness: Ah.

Court: That one you cannot stop.

Witness: Okay. First of all---

Court: Will you agree with that, that's the major distinction I'm looking for.

Witness: Yes. That one is---okay, that one the---it doesn't have, okay, the intermitted (*sic*) explosive disorder; it's a bit different from your usual type---

Court: No, the question is those kind of disorder or the real explosive type, one cannot stop it, right, it comes---the impulse comes, he just explodes. He very---is uncontrollable.

Witness: He---he is quite uncontrollable.

Court: Ah, so there lies the major distinction---

Witness: Yes.

Court: ---which Dr Phang is talking about.

Witness: Yah.

…

Witness: *That one is really uncontrollable, I agree*. …

[emphasis added]

53 This shows that both Dr Phang and Dr Tan are in general agreement about what a proper loss of control entails and that voyeurism does not amount to this. In so far as Dr Tan is speaking about a person being compelled to act in a certain way, including the preparatory phases to facilitate the commission of the voyeuristic act, Dr Phang accepts this impulsivity as a symptom. I am convinced by the explanation given by Dr Phang that the compulsion here is not used in the strict clinical sense to mean a loss of control. In his report, Dr Phang states: [note: 21]

> Dr Tan has also apparently confused impulsivity as a symptom, versus impulsivity as manifested in Impulse-Control Disorders. It is settled psychiatry that impulsivity is, in fact, a symptom which is frequently associated with almost any psychiatric disorder – or, for that matter, it may not even be necessarily associated with any formal disorder at all, but merely manifest as an expression of the individual's underlying personality and constitution, and of the specific frustrations in his current social context.

54 I find greater logical force in the opinion by Dr Phang. I find it difficult to accept that a person remains in a constant state of arousal due to voyeurism even throughout the preparatory phases which include the purchasing of the paraphernalia and the attaching of a recording device to his body or placement of the recording device in an inconspicuous location to avoid detection. Such elaborate planning over a relatively long period of time cannot be said to be done under compulsion, in the sense that it entails a total or even a significant and continuous loss of control throughout the preparatory stages to the eventual voyeurism acts that constitute the offences in question. Dr Phang convincingly states during cross-examination: [note: 22]

Q: All right. And---so wouldn't---

…

Q: ---those with impulsive behaviour, when they do preparation work or purchasing to commit voyeurism, would---wouldn't they be compelled by this impulse control disorder to do that? Or if---oh, sorry, you said impulse behaviour.

…

A: ---when you put the hypothetical situation to me about an individual who goes and purchases the cameras and so on and so forth to perform the voyeuristic act, to facilitate rather the voyeuristic act---

…

A: ---then, of course, at a 100% agreement I would say---I would concur that that person is in full control of his actions, and this thoughts and his actions at that point in time. You know, and I think most psychiatrist would disagree with that because it is simply premeditated. It is pre-planned, it is deliberate, it is not something that happens out of the blue, you know, and therefore it---it must---that individual who does---

…

A: ---must be 100% in control of his thoughts and actions. So in that sense, that's what I meant.

Q: And you say that's in all cases with---you can say that without---

A: Yes.

Q: ---treating or examining the patient involved or the person involved?

A: ***Your Honour, if there is a significant amount of premeditation, deliberate action, then it is clearly settled psychiatry that it cannot be an impulse control problem. It is a contradiction in terms, in concepts, in fact*** . In psychiatric concepts. So, I disagree.

[emphasis added in bold italics]

55 Dr Phang reiterates that voyeurism is not a mental illness and is only a mental disorder insofar as it is included in the pages of the DSM-5. [note: 23] According to Dr Phang, it is a disorder insofar as it represents a clinical description of an individual who is seriously irresponsible, and who repeatedly transgresses against societal norms, rules and regulations. [note: 24] Dr Phang repeats in his report that voyeurism is merely a descriptive diagnostic label for what is basically a perversion, or perverse form of behaviour which deliberately and wilfully intrudes into the inviolable sanctity and privacy of others. Basically, acts of voyeurism are the result of conscious choices made by the voyeur to satisfy a deviant desire. He stresses that it is not a mental illness nor it is a disorder beyond the control of the individual concerned. [note: 25]

56 Dr Phang accepts that voyeurism is mentioned in the ICD-10 and DSM-5 but further explains that the ICD-10 and DSM-5 are operationalised diagnostic criteria developed to meet the needs of clinicians and research investigators, rather than the technical needs of the courts and legal professionals. He derives support for this from the following excerpt from the "Cautionary Statement for Forensic Use of DSM-5" (reproduced in his report as follows) [note: 26] :

> …the use of DSM-5 should be informed by an awareness of the risks and limitations of its use in forensic settings. When DSM-5 categories, criteria, and textual descriptions are employed for forensic purposes, there is a risk that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between questions of ultimate concern to the law and the information contained in the clinical diagnosis.

57 Dr Tan states in his report in reply to Dr Phang that psychiatrists and other mental health professionals can still use the DSM-5 and/or ICD-10 to diagnose mental disorders. With the aid of the diagnostic criteria, psychiatrists can confidently diagnose a person and also communicate that diagnosis to another health professional. However, he alleges that Dr Phang has chosen to quote a

limited portion from the cautionary statement of the DSM-5 and this may result in a reader being misled to conclude that psychiatrists should not use the DSM-5 or ICD-10 in diagnosing a mental disorder but only as a clinical guide when writing a forensic report. [note: 27]

58 I think this is hardly the case. In fact, Dr Phang and Dr Tan are again in agreement. Dr Phang is essentially saying that the DSM-5 and ICD-10 are primarily used for the purpose of diagnosis which is in complete congruence with what Dr Tan is saying. Dr Phang is not saying, as Dr Tan alleges, that the DSM-5 and ICD-10 should not be used for purpose of diagnosis. What Dr Phang does say is that one must be aware and cognisant of the fact that DSM-5 and ICD-10 are developed to primarily aid clinicians in diagnosis. Therefore, Dr Phang warns that care must be taken before these diagnostic labels are applied in a court of law. To me this is only logical. When a clinician diagnoses, he does so primarily for the purpose of treatment of the individual. A court of law, when sentencing an individual, is concerned with the appropriate punishment to be imposed given all the circumstances of the case, including the psychiatric condition of the individual. Since there is a difference of purpose, Dr Phang warns against the direct importation of these diagnostic criteria into a court of law for forensic purposes. What this essentially means is that just because a disorder is stated or described in DSM-5 or ICD-10 does not *automatically* lead to it being a mitigating factor. This point, Dr Tan does not address. Moreover, Dr Tan has constantly referred to voyeurism as a disorder because it is referred to in the DSM-5 and ICD-10. He seems to have taken it for granted that just because voyeurism is mentioned in the DSM-5 and ICD-10, it is *automatically* a mitigating factor *per se* without the need to further establish whether or not the voyeur is able to control himself when he plans, takes preparatory steps and eventually commits the acts of voyeurism. This is not correct. Counsel for the respondent has also missed this point. In his written submissions, counsel argues that "if Dr Phang is not prepared to hold Voyeuristic Disorder as a mental disorder, then it follows that all other disorders classified under the DSM would also not be disorders, and this would include 'impulse control disorder[s]'". At the risk of repetition, I must stress that just because a disorder is included within the pages of the DSM-5 and ICD-10 does not *automatically* mean a court of law will attribute weight to the disorder as a substantial mitigating factor for the reasons stated above. The diagnosis must be supported by a clinical expert's opinion on the *nature* of the disorder and how it affects an individual.

59 It follows that even if a disorder is not included in the DSM-5 or ICD-10 but a clinical expert explains the nature and seriousness of the mental disorder, and how it affects the individual and causes him to commit the offences, *and if the court accepts the expert's testimony*, then the court can ascribe the appropriate weight to the disorder as a mitigating factor. This should not be seen as a licence for counsel to raise reports pertaining to all sorts of disorders because the Prosecution will always be entitled to challenge the expert report by calling its own expert, which is exactly what has happened in this case. It is also apposite at this juncture to note that the court is entitled to reduce the weight attributed to remorse as a mitigating factor if unmeritorious Newton hearings are done such that time and costs are wasted (see *Public Prosecutor v Azuar Bin Ahamad* [2014] SGHC 149 at [120]).

60 Finally, Dr Phang's opinion is supported by Dr Ravichandran Nigila ("Dr Nigila") of the Institute of Mental Health, Woodbridge Hospital who had interviewed the respondent. Dr Nigila opines in her report dated 15 July 2014 that the respondent was diagnosed with paraphilia but that he "did not have any mental disorder and was not in a position where he could not control his actions at the time the events happened". [note: 28] This undergirds Dr Phang's opinion that voyeurism (although mentioned in the DSM-5 and ICD-10) is merely a descriptive label for a perverse form of behaviour. Counsel for the respondent claims that Dr Nigila's report is contradictory to the previous two reports prepared by Dr Nigala (dated 21 December 2012 and 7 February 2013). I do not agree. Dr Nigila's report on 15 July 2014 merely clarifies her earlier reports. Dr Nigila has maintained that the respondent was diagnosed

with voyeurism but in the report dated 15 July 2014 explains that voyeurism is not a mental disorder nor does it deprive the person diagnosed with voyeurism control over his actions.

61 In sum, I accept Dr Phang's testimony that voyeurism is merely a clinical description of what is essentially a perverse behavioural option and that it does not deprive a person of his self-control in the way that an impulse control disorder does. I am thus satisfied that the respondent had full control over his actions in the light of his high degree of planning and premeditation when committing the offences.

62 Before I leave this point, counsel for the respondent has made much of the fact that Dr Phang did not produce literature in support of his opinion when Dr Phang was giving his oral testimony. Dr Phang explained that these principles were to his mind elementary but could nevertheless produce the literature in support of his opinion. Dr Phang produced 13 secondary materials in support of his opinion on the very next day. Counsel did not raise any more questions in relation to the literature produced by Dr Phang. However in his written submissions, counsel has taken issue with Dr Phang's reliance on some of his literature. On the assumption that counsel is now allowed to challenge the reliance on the literature when he did not raise these questions to Dr Phang during cross-examination, I find that his individual nit-picking at the literature that Dr Phang has produced does not detract from my assessment of his evidence. I agree that the literature produced does not unequivocally support Dr Phang's view but it also does not unequivocally support Dr Tan's view. Counsel has tried to show that Dr Phang is the *only one in the world* to hold his view. I find that this is not borne out by his submissions. The literature shows that there is some support for both Dr Phang's and Dr Tan's view when it comes to the nature of paraphilias. However it must be remembered that when the court assesses expert evidence, the court is scrutinising the expert witness as a whole including his credentials, relevant experience, bases for the opinion and the consistency and logic of his opinion (see *Sakthivel Punithavathi v Public Prosecutor* [2007] 2 SLR(R) 983 at [74]–[76]). It is a holistic assessment of the expert witnesses and their evidence and it is on this basis that I prefer Dr Phang's evidence.

Appropriate sentence to impose

Sentencing principles

63 It is pertinent to note that my conclusion on the nature of voyeurism, *ie*, it is merely a clinical description of what is essentially a perverse behavioural option and it does not deprive a person of his self-control, is in line with the Court of Appeal's assessment of paedophilia as a mitigating factor in *Kelvin Lim*. As mentioned above at [38], voyeurism and paedophilia are both paraphilias.

64 In the light of this, I am of the view that the Judge had erred in attributing significant weight to the fact that the respondent was suffering from voyeurism such that the principles of deterrence were overridden. The Judge had also erred in finding that the aggravating factors present should be accorded little weight in the light of the respondent's diagnosis of voyeurism. Before dealing with the relevant aggravating and mitigating factors, I turn first to the two most relevant sentencing principles – deterrence and rehabilitation.

65 Both general and specific deterrence are principles which should feature in the final sentence to be meted out. For the reasons submitted by the prosecution (see above at [15]), I am in agreement that general deterrence is particularly relevant. Given the fact that mobile phones with camera functions are now ubiquitous and that cameras with recording functions come in all shapes, sizes and disguises and are getting cheaper to acquire, the perverse now find it easier to prey on unsuspecting women almost anywhere. As this case has demonstrated, even a home, which is often considered a

sanctuary, is not free from the machinations of one determined to satisfy his deviant sexual fantasies. As shall be observed, these were considerations that the court in *Albert Tay* took into account when allowing the Prosecution's appeal against sentence. The need for general deterrence is even more pressing now than during the time that *Albert Tay* was decided, given how far technology has advanced. Cameras have shrunk remarkably in size while the clarity with which images are captured has improved. The miniaturisation of cameras has made it increasingly easier for them to be concealed and harder for victims to detect, thereby encouraging voyeurs to take more risks. This may in part explain why voyeurism offences are rapidly on the rise. In addition, the ease with which videos can be uploaded onto the Internet for dissemination in this day and age further warrants the need for general deterrence. Unimaginable shame and distress to the victims may be caused if the videos are disseminated worldwide via the Internet. Although in this case no videos were uploaded and disseminated, the danger, which is not fanciful but very real, that it could have happened is sufficient to warrant a deterrent sentence. I am in full agreement that a strong message should be sent to those who harbour thoughts of abusing these advancements in technology.

66 Specific deterrence is also relevant given that I have found that voyeurism merely represents a descriptive label for a perverse behavioural option and that it does not deprive the person diagnosed of his self-control. In any event, even Dr Tan has stated in cross-examination that those diagnosed with voyeurism can be deterred by the threat of punishment. [note: 29]

67 Rehabilitation is also relevant given that even Dr Phang has testified that a person diagnosed with voyeurism can be treated. Dr Phang explains the treatment methods as follows [note: 30]:

> Q: Dr Phang, my final---my final question is with regards to treatment. Can you turn to paragraphs 15 and 16?
>
> A: Yes.
>
> Q: Now, you talk---in fact, you gave the evidence earlier that a lot of the treatment involves counselling and envisioning of life goals.
>
> A: Yes.
>
> Q: But how about medication? Is there any medication to treat such conditions of voyeuristic disorder?
>
> A: Yes, indeed, Your Honour, and I myself prescribe such medication for similar disorders. But I emphasize that we do not have medication which is specific for voyeurism, or voyeuris---or paraphilic disorders. What we use are selective serotonin reuptake inhibitors, very commonly, Your Honour, or SSRIs for short, er, as it is commonly referred to in the profes---in our professional parlance. SSRIs are anti-depressants. They are not anti-paraphilic, or anti-perversion drugs. Far from it. But what they are doing, Your Honour, is leveraging on the side effects of SSRIs, of these medications, to temporarily cut down the intensity of these deviant urges until more definitive management can be introduced. …

Dr Tan has also testified that the respondent has responded well to medical and psychological treatment and has not re-offended since his arrest. The Judge was of the opinion that incarceration would be detrimental to the rehabilitation of the respondent and would "destroy the very last hope of… recovery". I do not quite agree for the same sentiments expressed by the Court of Appeal in *Public Prosecutor v Kwong Kok Hing* [2008] 2 SLR(R) 684 at [37] (see [23] above). There is similarly no suggestion here that rehabilitation cannot take place in prison and continue even after

imprisonment. Therefore, even though rehabilitation is a relevant sentencing principle, it does not automatically mandate a lighter sentence. However, particular care must be taken when the global sentence imposed is calibrated such that it is not such a crushing sentence that may destroy any hope of recovery and reintegration of the respondent.

Aggravating and mitigating factors

68 I agree with the prosecution that the factors listed above at [14] are aggravating factors. It is trite that the presence of multiple and young victims are aggravating factors. Prof Andrew Ashworth explains succinctly in the following passage why planning and premeditation is considered an aggravating factor (Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 5th Edition, 2010) at p 164):

> … A person who plans a crime is generally more culpable, because the offence is premeditated and the offender is therefore more fully confirmed in his criminal motivation than someone who acts on impulse, since he is more considered in his lawbreaking … Planned lawbreaking betokens a considered attack on social values, with greater commitment and perhaps continuity than a spontaneous crime.

The respondent had gone to great lengths in order to commit these offences. He had to purchase paraphernalia including mini-cameras and Blu-Tack. He then attached the camera to his shoe and came up from behind the unsuspecting victim at "Giant Hypermarket" in order to capture the "Up Skirt" video. To commit the offences at his girlfriend's home, he had to purchase a camera which was cleverly disguised as a lighter to avoid detection. He would wait for them to switch on the water heater before planting the camera in the toilet and would later retrieve the camera after they showered. His commitment to the criminal conduct was demonstrated by the fact that he did this on more than one occasion and was also keen on avoiding detection. In fact, he attempted to abscond when the husband of the victim at Giant Hypermarket shouted at him. The level of consideration and planning to commit the offences and to avoid detection is clearly an aggravating factor. The high degree of intrusion is also aggravating. Not only did the respondent record some of the victims fully nude with moving images of their breasts and vulvas, it was done in the victims' home, where he was a guest and where the victims would least expect to have their modesty violated. This conduct constitutes a gross intrusion into the privacy of the victims and should be given its due weight as an aggravating factor.

69 As for the use of a recording device, I have noted earlier that the advancements in technology warrant a deterrent sentence because of the ease with which such offences may be committed and the ever present danger of the dissemination of the videos. The use of a recording device is an aggravating factor here for a different reason; mainly that the videos can be replayed and the "fruits" of the criminal conduct can be constantly revisited by the respondent. This again is clearly aggravating.

70 The mitigating factors highlighted by the counsel for the respondent are listed above at [18]. I agree that the lack of antecedents is a mitigating factor. The fact that the respondent comes from a good family, has a bachelor's degree in business management and has put his further education on hold because of this episode is neither mitigating nor aggravating.

71 I do not agree that the lack of adverse effects on any of the victims and the fact that there was no circulation of the videos are mitigating. While adverse effects on the victims and circulation of the videos are definitely aggravating, the lack of these factors is not mitigating but neutral at best. The respondent also relies on the fact that his girlfriend's family has been forgiving. The Court of

Appeal in *PP v UI* has stated that forgiveness expressed by the victim is a private matter between the offender and the victim and generally should not affect the appropriate sentence to be imposed by the court (see *PP v UI* at [56]–[57]). Therefore, I do not consider the forgiving attitude of the respondent's girlfriend and her family as mitigating.

72 The most significant mitigating factor in favour of the respondent is the remorse that he has shown since the commission of the offences. The respondent has made a full confession and has cooperated with the police in the course of their investigations. He has also pleaded guilty to the charges. I also note that the Judge had stated that the respondent was suffering from significant depressive and anxiety symptomatology related to the shame and stress from his commission of the offences (see [11] above). While I do not agree with the Judge that this means that there is no need to punish the respondent further, I am of the opinion that the degree of shame and stress suffered is indicative of the extent of the remorse shown by the respondent. Furthermore, the respondent has shown commendable commitment towards securing his own rehabilitation by seeking treatment and counselling since his arrest. As the Judge noted, he had undergone regular treatment for three years since his arrest and has been responding well to treatment. This is part of the reason why the respondent has not reoffended since his arrest (the other reason as noted above was the threat of legal proceedings). In the light of this, I attach significant weight to the high degree of remorse shown by the respondent.

Sentencing precedents

73 In *Albert Tay*, the respondent pleaded guilty to two charges of intruding upon the privacy of a woman under s 509 of the Penal Code. He placed a video camcorder in his bathroom to film, on separate occasions, the private moments of two female colleagues while they used the bathroom. The respondent was convicted and a fine was imposed for each of the two charges by the magistrate. The magistrate had referred to the earlier case of *Tan Pin Seng v PP* [1997] 3 SLR(R) 494 ("*Tan Pin Seng*") where a fine was imposed on an offender who was convicted of an offence under s 509 of the Penal Code for peeping at a lady taking a bath through a hole he had made in the bathroom door. In *Tan Pin Seng*, Yong CJ had reduced the one-month jail term imposed by the district court to a fine of $2000. In *Albert Tay*, Yong CJ distinguished his earlier decision of *Tan Pin Seng* and allowed the Prosecution's appeal against sentence. In addition to the fine imposed by the magistrate, Yong CJ sentenced the respondent to one month's imprisonment per charge to run consecutively. In his decision, Yong CJ explained as follows:

> 19 It seemed very clear to me that the degree of culpability in the present case was very much greater than that in *Tan Pin Seng*'s case for the peeping offence. In the present case, there must have been a lot of meticulous planning on the respondent's part in order to commit the offences. The respondent had to hide the video camcorder in the basket of soft toys in the toilet and then carefully position the lens to point at the toilet door. Furthermore, the respondent had to switch the video camcorder to recording mode quickly and discreetly before he allowed each of [B] and [C] to use the bathroom. Such a *modus operandi* surely required more planning and premeditation than peeping through a hole in the bathroom door.
>
> 20 I was therefore of the opinion that the magistrate erred by likening the present situation to that in *Tan Pin Seng*'s case. I felt that the high degree of planning needed for the commission of the present offences rendered the situation here more aggravating than that in *Tan Pin Seng*'s case.
>
> …

22 Unlike other "peeping tom" cases where the offender peeps at the victim in person at one moment in time, the respondent here did not actually observe [B] and [C] in their private moments in person. He chose to record their private moments on tape, so that he could watch them again and again for his own perverted pleasure. The potential for repeated viewings made the nature of the offences in the present case wholly distinguishable from that in *Tan Pin Seng*'s case.

23 … Video camcorders are available freely in this age of modern technology and policy considerations dictate that a deterrent sentence has to be imposed to indicate that offences of this nature will not be tolerated. I cannot send a message to the public that it is acceptable to make recordings of others without their knowledge as long as one has the financial resources to pay a fine. It was fortunate that the video tape in the present case was discovered by [B]. Should the tape have fallen into the hands of other third parties, the trauma and embarrassment that the victims would have had to endure would have been unimaginable. The fact that a victim's private moments could be recorded without the victim's knowledge and replayed over and over again for another's perverted pleasure coupled with the risk of possible circulation of such tapes to other people compelled me to impose a custodial sentence in this case to make it clear that the court does not condone such behaviour or treat it lightly.

As was alluded to above, the court in *Albert Tay* noted the need for a deterrent sentence given the ready availability of video camcorders then. I have already found that the need for a deterrent sentence is even more pressing today given the advancements in modern technology. The court was also of the view that a custodial term was more appropriate given the high degree of planning involved.

74 In *Public Prosecutor v Mohammed Liton Mohammed Syeed Mallik* [2008] 1 SLR(R) 601 ("*Liton*"), the respondent was convicted of, *inter alia*, a charge of insulting the modesty of a woman under s 509 of the Penal Code by taking four photographs of her in the nude. The trial judge had sentenced the respondent to three months' imprisonment for that particular charge. In dismissing the appeal against sentence brought by the Prosecution in respect of that particular charge, the Court of Appeal noted as follows:

87 The authors of *Sentencing Practice in the Subordinate Courts* (LexisNexis, 2nd Ed, 2003) ("*Sentencing Practice*") note (at p 329) that for the offence under s 509 in general, a fine of $1,000 to $2,000 is the norm: see, for example, *Raveendran v PP* Magistrate's Appeal No 125 of 1992 (unreported) and *Tan Pin Seng v PP* [1997] 3 SLR(R) 494 . On the other hand, imprisonment is appropriate where aggravating factors are present: see *Mohd Raus bin Othman v PP* Magistrate's Appeal No 17 of 1993 (unreported), where the offence was committed in a lift; *Ramakrishnan s/o Ramayan v PP* [1998] 3 SLR(R) 161 , where there were multiple charges and the victims were young; and *PP v Johari bin Samad* Magistrate's Appeal No 69 of 1999 (unreported), where the offender had a previous conviction for a sexual offence.

8 8 *However, more relevantly for the present case, imprisonment is also appropriate where the offence was carried out using modern technology to record a victim's private moments without her knowledge*. In *PP v Tay Beng Guan Albert* [2000] 2 SLR(R) 778 ("*Albert Tay*"), it was said that such an offence differed from other "Peeping Tom" cases as the recording on a tape could be replayed and there was also a risk of circulation of the tape to third parties. …

…

89 Comparing the previous sentencing precedents with the sentence imposed by the trial

> judge, we were of the view that the sentence of three months' imprisonment was not manifestly inadequate. The facts of the present case were similar to those in *Albert Tay* … in so far as modern technology (the digital camera function of a mobile telephone in this case) was used to record the complainant's private moments. The policy considerations that such recordings (digital photographs in this case) can be replayed and may be circulated to third parties were reflected in the trial judge's imposition of a term of imprisonment in lieu of the norm of a fine of $1,000 to $2,000. Compared to the one-month imprisonment imposed in *Albert Tay* for the video recording of the victim bathing, and bearing in mind the circumscribed manner in which an appellate court will decide whether or not to interfere with the sentence imposed by a court of first instance, the three months' imprisonment imposed by the trial judge in the present case could not be said to be plainly out of line with an *established benchmark* so as to be excessively inadequate…
>
> [emphasis added]

A few observations are apposite. The Court of Appeal referred to *Albert Tay* as an established benchmark. The Court of Appeal also accepted that imprisonment is appropriate where the offence was carried out with the use of modern technology in order to record a victim's private moments.

75 In *Tan Huat Heng*, the accused person pleaded guilty to four charges under s 509 of the Penal Code with four other charges consented to being taken into consideration for the purpose of sentencing. The accused had used his camera in his iPhone to take an "Up Skirt" video of a woman but was spotted by an off-duty police officer. The victim was apparently unaware of what happened and had left the scene. The mobile telephone was seized and the "Up Skirt" video clip was found. Another mobile phone was seized from the accused and more "Up Skirt" videos were found which formed the basis for the other charges. The magistrate considered the cases of *Albert Tay* and *Liton* and imposed a sentence of two weeks' imprisonment for each of the four proceeded charges and ordered that the sentences for two charges run consecutively. On appeal to the High Court, Chan Sek Keong CJ set aside the sentence imposed by the magistrate and imposed a 12-month term of probation with certain conditions. However, no written grounds were issued by the court.

76 Counsel for the respondent argues that *Tan Huat Heng* has signalled a change in the sentencing philosophy when it comes to offences under s 509 of the Penal Code. I do not agree. There was no evidence of a high degree of planning and premeditation in *Tan Huat Heng*. Furthermore, the videos did not involve the same degree of intrusion into the privacy of the victim as compared to *Albert Tay* and *Liton* where the victims were captured fully naked. The aggravating factors present in *Albert Tay* and *Liton* were absent in *Tan Huat Heng* which may explain why the court imposed a term of probation and not a custodial sentence.

77 On the other hand, the Prosecution submits that the starting point for offences under s 509 of the Penal Code involving the use of a recording device should be a custodial sentence. I am of the opinion that establishing a custodial benchmark along such lines may not be appropriate given the myriad of ways that offences under s 509 of the Penal Code may be committed with a recording device. *Albert Tay* involved planning and premeditation in the commission of the offence. Both *Albert Tay* and *Liton* had a high degree of intrusion into the privacy of the victim. While I am generally in agreement that a custodial sentence is warranted where the aggravating factors such as multiple victims or young victims or the aggravating factors in *Albert Tay* or *Liton* are present, I would be chary in concluding that a custodial sentence should be the starting point the moment a recording device is used. While I note that the use of a recording device allows the repeated viewing of the victim's private moments, all other factors should be considered before the final sentence is calibrated. Therefore, where there is no planning and premeditation and the intrusion upon the privacy is not as grave as in *Albert Tay* and *Liton*, and where multiple victims or young victims are not

involved, such as in *Tan Huat Heng*, a custodial term may not be warranted. At the end of the day, each set of facts must be considered as a whole by the judge in determining the appropriate sentence to be imposed.

78 On the facts of the present case, due to the presence of the aggravating factors mentioned above at [14], especially the fact that (a) there was a high degree of planning and premeditation; (b) the intrusion into the privacy of some victims was grave and at the home of the victims; (c) there were multiple victims and young victims; and (d) a miniature recording device was used, and given that the need for general deterrence is greater now than before due to the advancements in technology (see above at [15]), I am of the opinion that a term of four months' imprisonment (which is approximately 18 weeks' imprisonment) per charge under s 509 of the Penal Code is appropriate. However, because of the mitigating facts (see above at [72]) and in particular the fact that he had pleaded guilty and has shown considerable remorse with a keen desire not to commit the offences again and to be fully rehabilitated, I impose a sentence of **12 weeks' imprisonment per charge** . I now deal with the conviction under s 30(1) of the Films Act.

79 In *Lui Chang Soon v Public Prosecutor* [1992] 1 SLR(R) 229, the appellant pleaded guilty to, *inter alia*, one charge of possession of 14 obscene videotapes under s 29(1)(*a*) of the Films Act (Cap 107, 1985 Rev Ed). The magistrate had sentenced the appellant to a fine of $500 per tape ($7000 fine in total). The High Court dismissed the appeal against sentence in respect of above charge. The High Court also found that punishment should be related to the number of films involved and not the number of tapes containing the films.

80 The following passage from *Practitioners' Library*: *Sentencing Principles in the Subordinate Courts* (LexisNexis, 3rd Ed, 2013) at page 627–628 is useful:

> The primary concern in sentencing is the protection of the public from moral corruption, and in particular young persons who may be tempted to view such films. As pointed out by the Minister for Information and the Arts in moving the Films (Amendment) Bill in Parliament, a disturbing trend in these offences is the proliferation of sale in public places. Examples cited were the incidences of flyers being stuffed into HDB letterboxes offering pornographic video tapes for sale to residents; and uncensored and obscene VCDs sold at pasar malams, trade fairs and other places. Technological advances have made the production of such films relatively cheap. The illegal profits are very high. Detection and apprehension, on the other hand, is (*sic*) difficult as such operators usually operate from make-shift stalls or through pager/mobile phone contacts. Even after raids, the sellers would sometimes return the next day, selling the same obscene VCDs.
>
> The type and quantum of the sentence would depend on the circumstances. In particular, the quality, nature and quantity of the films would be relevant. The issue of whether there is any commercial gain should also be considered.
>
> A non-custodial sentence is reserved for isolated offences where the number of films is small (usually less than 20), they are for personal use, where there is no commercial element, and the accused (a first offender) has pleaded guilty.
>
> Where there is evidence of commercial exploitation, a custodial sentence can be expected. In such cases, the prosecution usually prefers a charge of carrying on a business of distributing films without a licence in contravention of s 6(1)(*a*) in addition to the charge of distributing or having possession for the purposes of distributing in contravention of s 29(3)(*a*). In cases where obscene VCD inlays are exhibited for purposes of advertisement, another charge under s 292(1)(*a*) of the Penal Code is also usually preferred. The length of the custodial sentence will depend

on the scale of the operation, the quantity and nature of the films, whether there has been a plea of guilt coupled with co-operation in the investigation or a contested case, and the character of the offender.

81 In *Public Prosecutor v Tan Hiap Hua* [2010] SGDC 322 ("*Tan Hiap Hua*"), the accused pleaded guilty to a single charge of possession of 38 obscene films under s 30(1) of the Films Act. The 38 obscene films were found in his mobile phone. In sentencing the accused to three months' imprisonment, the district judge noted that the number of films was large and that it was "certainly unusual to store 38 obscene films in a handphone for private viewing". The district judge also considered that the long list of antecedents of the accused including offences of possession of obscene films for which he was sentenced to five years of corrective training. On appeal, V K Rajah JA allowed the appeal against sentence and reduced the sentence to one of six weeks' imprisonment. No written grounds were issued.

82 In *Public Prosecutor v Yang Qiuyu* [2010] SGDC 51, the accused pleaded guilty to one charge of possession of 204 digital video discs containing 179 films without a valid certificate approving the exhibition of the films under s 21(1)(*a*) and one charge of possession of 96 films which were obscene under s 30(1) of the Films Act. The accused had various antecedents including a conviction under s 29(3)(*a*) of the Films Act (for distributing obscene films or having them in possession for the purposes of distributing). In sentencing the accused to the minimum specified penalty of $100 for each film without a valid certificate ($17,900 in total) and $500 for possession of each obscene film (amounting to $20,000 as capped by law), the court noted that the number of films was certainly not on a small or low scale and that a custodial sentence for the offence under s 30(1) of the Films Act would ordinarily be meted out. Nevertheless, the court was minded not to impose a custodial sentence as the obscene DVDs "were not on display blatantly but contained in a haversack".

83 In *Public Prosecutor v Mohamad Hanafi Bin Abdol Hamid* [2007] SGDC 247, the accused, who was a police officer, had pleaded guilty to four charges including one charge under s 30(1) of the Films Act for possession of two digital discs containing two obscene films and one charge under s 30(2)(*a*) of the Films Act for possession of nine films known by him to be obscene. The district judge noted that the number of films involved was small and that a fine would be appropriate in the circumstances. The sentenced imposed was the minimum specified sentence of $500 per film ($1000 in total) under s 30(1) and $1000 per film ($9000 in total) under s 30(2)(*a*) of the Films Act.

84 Finally, in the case of *Public Prosecutor v Chandran s/o Natesan* [2013] SGDC 33, the accused pleaded guilty to various charges including one charge of possession of 291 obscene films under s 30(1) of the Films Act. Initially, the accused was found suitable for a mandatory treatment order ("MTO") and thus ordered to undergo a MTO for psychiatric treatment for one year. However, the MTO was revoked by the district judge who found that the accused had breached the requirement of attending before the IMH doctor as required under the MTO and that the accused was not compliant with his medication. The district judge then considered the accused's delusional disorder, his plea of guilt and discounted his antecedents as they were dated and not of a similar nature, before sentencing the accused to a $500 fine per film (capped at $20000). The sentences for all the other offences were fines as well.

85 In the instance case, it is unclear from the statement of facts, whether the 10,574 obscene films were merely short video clips or full-length obscene movies. The fact that they were all on his computer and hard drive suggests to me that they were more likely to be short video clips as I doubt that 10,574 full-length obscene movies could be stored on the computer hard disk and one external hard drive. Having 10,574 short obscene video clips would be much less serious than having the same number of full-length obscene films.

86 Giving the respondent the benefit of the doubt that they were all short video clips and taking into account his plea of guilt, the extent of the remorse that he has shown and the fact that he did not exploit them for any commercial gain, I am of the view that the appropriate sentence for the charge under s 30(1) of the Films Act is an **imprisonment term of four weeks** . A fine would not be adequate because of the very large number of video clips involved. If the respondent had not pleaded guilty and shown the degree of remorse that he did, a stiffer custodial sentence of six weeks' imprisonment would have been meted out. It may be pertinent to note here that had I sentenced the respondent to a fine for this charge under the Films Act instead of a term of imprisonment, the respondent would be worse off as his total imprisonment sentence would be much higher as I would have no alternative but to order, pursuant to s 307 of the CPC, that at least two sentences for the offences under s 509 of the Penal Code to run consecutively (see [88] below). These are heavier imprisonment sentences than the sentence I have imposed for the Films Act offence. On top of the extended global term of imprisonment, the respondent would also have to pay a fine, which would not have been insubstantial.

87 I also note that the accused in *Tan Hiap Hua* had been sentenced to an imprisonment term of six weeks for possession of 38 obscene films. However, the accused in *Tan Hiap Hua* had been previously convicted of offences of possession of obscene films for which he was sentenced to five years of corrective training. The respondent here had no such related antecedents.

88 Having decided that the appropriate sentence for the each of the offences under s 509 of the Penal Code and s 30(1) of the Films Act is 12 weeks and four weeks respectively, I now consider which sentences should run consecutively. I am bound to order at least two terms of imprisonment to run consecutively pursuant to s 307 of the CPC. In *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998, Sundaresh Menon CJ explained that the "sentencing judge is vested with considerable discretion, but this must be exercised judiciously and with regard to two principles in particular, namely, the one-transaction rule and the totality principle, as well as a number of ancillary principles" (at [25]). In this case, I am of the view that there is no need to order more than two sentences to run consecutively, or to order two sentences under s 509 to run consecutively, which would then have raised the total sentence to 24 weeks. I therefore order that one charge under s 509 of the Penal Code (namely MCN 686 of 2012) and one charge under s 30(1) of the Films Act (namely MCN 692 of 2012) are to run consecutively. The remaining sentences will run concurrently. The global sentence imposed on the respondent is a **term of imprisonment of 16 weeks** .

The sentence is wrong in law

89 Finally, I also note that both the Prosecution and the respondent have submitted in the court below that the punishment prescribed under s 30(1) of the Films Act is not one which is fixed by law, nor a mandatory minimum sentence or a specified minimum sentence. However, this was before the case of *Mohamad Fairuuz bin Saleh v Public Prosecutor* [2015] 1 SLR 1145 ("*Fairuuz*") where the High Court explained the proper interpretation of those phrases as they appear in s 5 of the Probation of Offenders Act (Cap 252, 1985 Rev Ed) ("POA").

> Section 5 of the POA provides as follows:
>
> **Probation**
>
> **5.**—(1) Where a court by or before which a person is convicted of an offence (not being an offence the sentence for which is fixed by law) is of the opinion that having regard to the circumstances, including the nature of the offence and the character of the offender, it is expedient to do so, the court may, instead of sentencing him, make a probation order, that is to

say, an order requiring him to be under the supervision of a probation officer or a volunteer probation officer for a period to be specified in the order of not less than 6 months nor more than 3 years:

Provided that where a person is convicted of an offence for which a specified minimum sentence or mandatory minimum sentence of imprisonment or fine or caning is prescribed by law, the court may make a probation order if the person —

(*a*) has attained the age of 16 years but has not attained the age of 21 years at the time of his conviction; and

(*b*) has not been previously convicted of any such offence referred to in this proviso, and for this purpose section 11(1) shall not apply to any such previous conviction.

In *Fairuuz*, Menon CJ explained the proper interpretation of s 5 of the POA:

9 In summary, pursuant to the opening paragraph of s 5(1) of the POA (which we shall refer to as the principal part of s 5(1)), where an accused person is convicted of an offence which is punishable by a sentence that is fixed by law, probation is generally not available as a sentencing option for the court. However, pursuant to the Proviso, where a person is convicted of an offence for which *a specified minimum sentence or mandatory minimum sentence* is prescribed, probation may be ordered if the two conditions in the Proviso as encapsulated in subsection (a) and (b) are satisfied.

…

17 Having carefully considered the various arguments in the round, we concluded that the terms "sentence fixed by law", "mandatory minimum sentence" and "specified minimum sentence" carry the following meanings:

(a) A "mandatory minimum sentence" means a sentence where a minimum quantum for a particular type of sentence is prescribed, and the imposition of that type of sentence is mandatory.

(b) A "specified minimum sentence" means a sentence where a minimum quantum for a particular type of sentence is prescribed, but the imposition of that type of sentence is not mandatory.

(c) A sentence "fixed by law" is one where the court has absolutely no discretion as to the type of sentence (which is mandatory) and the quantum of the prescribed punishment.

[emphasis in original]

90 At this juncture it would be useful to set out s 30(1) of the Films Act:

30.—(1) Any person who has in his possession any obscene film shall be guilty of an offence and shall be liable on conviction to a fine of not less than $500 for each such film he had in his possession (but not to exceed in the aggregate $20,000) or to imprisonment for a term not exceeding 6 months or to both.

In my opinion, s 30(1) of the Films Act has a specified minimum sentence. The court when sentencing under s 30(1) of the Films Act has the discretion to choose between a fine, a term of imprisonment or

both. Thus, the imposition of a fine is not mandatory but if the court does choose to impose a fine, there is a minimum quantum of $500 which is prescribed and which must be imposed by the court. Therefore, probation can only be ordered if the two conditions encapsulated in subsections (a) and (b) of s 5 of the POA are satisfied. The respondent in this case was 29 years old at the time of his conviction. He has therefore not satisfied subsection (a) of s 5 of the POA and probation is not available as a sentencing option. In this regard, the sentence imposed by the Judge was also a sentence which was wrong in law.

91 This leads to a final question of whether probation is nevertheless available as a sentencing option for the respondent for the other five charges under s 509 of the Penal Code. This pertains to a more general question – if a person is convicted of multiple charges in which one of the offences does not allow for probation as a sentencing option, can the court nevertheless order probation for the rest of the convictions where probation is available. However, since I have not had the benefit of argument on this issue and I have found that a sentence of probation for the charges under s 509 of the Penal Code is manifestly inadequate in this case, I leave the question open for reconsideration at a more appropriate juncture.

Conclusion

92 In sum, I allow the prosecution's appeal against sentence. The sentence of probation meted out by the Judge is manifestly inadequate. I substitute the sentence of probation with a term of imprisonment of 16 weeks.

[note: 1] ROP Vol 1 Page 12.

[note: 2] Annex B of Dr Phang's Report dated 13 June 2014 ("Dr Phang's First Report").

[note: 3] Dr Phang's First Report paragraph 3.

[note: 4] Dr Phang's First Report paragraph 7.

[note: 5] Dr Phang's First Report Annex A paragraph 3.

[note: 6] Dr Phang's First Report Annex A, paragraph 4.

[note: 7] Dr Phang's First Report Annex A paragraph 8.

[note: 8] Dr Phang's First Report Annex A paragraph 12.

[note: 9] Dr Phang's First Report Annex A paragraph 12.

[note: 10] Dr Phang's First Report Annex A paragraph 13.

[note: 11] Notes of Evidence Day 2 Page 10 Line 13 onwards.

[note: 12] Dr Phang's First Report Annex A paragraph 17.

[note: 13] Exhibit D1.

[note: 14] Respondent’s Bundle of Medical Reports page 62 paragraph 5.

[note: 15] Respondent’s Bundle of Medical Reports page 63 paragraph 9.

[note: 16] Respondent’s Bundle of Medical Reports page 63 paragraph 12.

[note: 17] Respondent’s Bundle of Medical Reports page 5 paragraph 22.

[note: 18] NE 4 November 2014 page 7 line 27 – page 8 line 8.

[note: 19] NE 4 November 2014 page 24 line 32 – page 27 line 10.

[note: 20] NE 5 November 2014 page 27 line 30 – page 29 line 31.

[note: 21] Dr Phang’s Report dated 28 October 2014 (“Dr Phang’s Second Report”) at paragraph 6.

[note: 22] NE 4 November 2014 page 81 line 16 – page 85 line 18.

[note: 23] NE 4 November 2014 page 29 line 8-10. Dr Phang’s Second Report paragraph 12.

[note: 24] Dr Phang’s Second Report paragraph 12.

[note: 25] Dr Phang’s Second Report paragraph 17.

[note: 26] Dr Phang’s First Report paragraphs 4 and 5.

[note: 27] Respondent’s Bundle of Medical Reports page 3 paragraph 5.

[note: 28] Respondent’s Bundle of Medical Reports page 53.

[note: 29] NE 5 November 2014, Page 113, Line 3-10.

[note: 30] NE 4 November 2014, Page 32, Line 11-28.