IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 47

Magistrate's Appeal No 9089 of 2016 and Criminal Motion 43 of 2016

Between

Chong Yee Ka

…Appellant

And

Public Prosecutor

…Respondent

JUDGMENT

[Criminal Law] — [Offences] — [Hurt] — [Domestic maid abuse]

[Criminal Procedure and Sentencing] — [Appeal] — [Adducing fresh evidence]

TABLE OF CONTENTS

Chong Yee Ka
v
Public Prosecutor

[2017] SGHC 47

High Court — Magistrate's Appeal No 9089 of 2016 and Criminal Motion 43 of 2016
See Kee Oon J
2 November 2016; 20 January 2017

10 March 2017 Judgment reserved.

See Kee Oon J:

Introduction

1 This is an appeal against sentences imposed by the District Court in respect of two charges under s 323 read with s 73(2) of the Penal Code (Cap 224, 2008 Rev Ed). The offences in question involved the abuse of a foreign domestic worker, Ms Aye Moe Khaing ("the victim"), a 27-year-old Myanmar national who had worked in the appellant's household since March 2013.

2 The appellant was charged with three counts of voluntarily causing hurt to the victim. It is significant to note that the offences were committed over a duration of nearly 20 months, with the first offence taking place in August 2013 and the other two taking place much later, on consecutive days in early April 2015 ("the April 2015 incidents").[1]

3 The Prosecution elected to proceed with two charges which pertained to the April 2015 incidents. The other charge relating to the earlier offence in 2013 was taken into consideration ("the TIC charge"). The appellant pleaded guilty and admitted to the Statement of Facts ("SOF") without qualification and the District Judge sentenced her to three weeks' imprisonment in each charge, ordering the imprisonment terms to run concurrently. The appellant filed the present appeal against sentence and also filed a criminal motion ("CM") seeking to admit additional evidence in support of her appeal.

The District Judge's decision

4 Before the District Judge, the Prosecution submitted that the appropriate sentence was a global term of four weeks' imprisonment, emphasising that there were no reasons to warrant a departure from the norm of a custodial term for maid abuse, as laid down by the Court of Appeal in *ADF v Public Prosecutor and another appeal* [2010] 1 SLR 874 ("*ADF*").[2] The Defence argued that a fine would suffice. In particular, it submitted that, having regard to Chao Hick Tin JA's decision in *Soh Meiyun v Public Prosecutor* [2014] 3 SLR 299 ("*Soh Meiyun*"), the custodial threshold was not crossed because the appellant had suffered from depression and obsessive-compulsive disorder ("OCD"), which were found by her psychiatrist to have a causal link to her offences.[3]

5 The District Judge's Grounds of Decision can be found at *Public Prosecutor v Chong Yee Ka* [2016] SGMC 17, which I will refer to as the

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[1] Record of Proceedings ("ROP") pp 10-11 at paras 6-11.

[2] ROP p 79 at para 4.

[3] ROP pp 352-353 at paras 25-26

"GD". He reasoned that the offences were serious, and both specific and general deterrence required custodial sentences to be imposed, notwithstanding the appellant's psychiatric conditions: GD at [61]. He agreed with the Prosecution's submissions on the various aggravating factors, including the manner in which injury was caused. In each offence in the proceeded charges, the assault did not comprise a singular act of violence, but involved various acts, and the appellant had viciously targeted the victim's face and head, which were vulnerable parts of her body: GD at [21]. The victim as a result sustained head and eye injuries, including a bruise below her right eye which remained clearly visible five days after the assault.

6 The District Judge also highlighted the "prolonged period of physical and mental abuse and the TIC charge", noting from the SOF that the appellant had started physically abusing the victim from August 2013, which was "*about 5 months into her employment*". In his assessment, at [31] of the GD,

> These facts meant that the Victim suffered a prolonged period of abuse, rather than just "*…a case of a one-off spontaneous incident…*" (see V K at [105] of *ADF*). In all, the abuse appears to have taken place over a significant period starting from August 2013, with the frequency increasing from December 2014 onwards.
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> [emphasis in original]

7 The District Judge further noted at [32] of the GD that the abuse included "demeaning and hurtful words directed at the Victim by the Accused who used "*her finger to push the side of the victim's head saying that she had 'no brains'*" (emphasis in original). He opined that the two proceeded charges had to be considered in the context of the prolonged period of abuse, and other episodes of assault suffered by the victim at the hands of the appellant.

8 The District Judge was however also cognisant that the injuries caused were relatively superficial, with no evidence of any permanent damage suffered: GD at [23]. The appellant was remorseful, had pleaded guilty, and was otherwise of good character.

The background facts

9 The SOF is set out in full at [5] of the GD. As reflected in the SOF, the police were informed on 8 April 2015 by the Ministry of Manpower of the victim's allegations of abuse. The following paragraphs in the SOF provide an account of the abuse suffered by the victim, encompassing the April 2015 incidents. I have retained the District Judge's emphases in the GD:

> 6. The victim reported that in August 2013, ***about 5 months into her employment, the accused began physically abusing her*** whenever she was unhappy at her performance or when she made mistakes. The accused would abuse the victim ***by slapping her, knocking her on the head, or using her finger to push the side of the victim's head saying that she had "no brains***". According to the victim, the ***abuse became more frequent after the accused gave birth to her second child in December 2014***.
>
> **Facts relating to the charges**
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> 7. On 3 April 2015, in the morning, the victim was cleaning the master bedroom when the accused came in and told her that she had 20 minutes to finish cleaning. The victim asked the accused for more time but this angered the accused. The accused then ***used her fist to punch the victim on her face and used her palms to slap the victim on both cheeks until the victim fell down***. ***As the victim tried to get up, the accused kicked her in the face causing her to fall backwards***. The accused ***then grabbed hold of the victim's hair and pulled the victim up before knocking the victim's head against the wall twice.*** Thereafter, the ***accused punched the victim in the face again*** and finally left the bedroom. The incident was partially witnessed by the accused's husband, who did not try to stop the assault and simply closed the bedroom door.
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> ….

> 9. On 4 April 2015, in the afternoon, the victim was filling up water bottles in the kitchen sink when she accidentally knocked over one of the bottles. The victim bent down to pick up the bottle without realising that she had left the tap running. On seeing this, the accused came over and ***punched the victim on the right side of her face and then slapped the victim on both sides of her face. The accused also pulled the victim's right ear and scolded her***.
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> …
>
> [emphasis in original]

10 The victim was seen at Khoo Teck Puat Hospital on 9 April 2015. She was diagnosed with eye and head injury secondary to alleged assault, and she was discharged with medication.[4] Photographs taken of the victim showed a clearly visible bruise below her right eye.[5]

Evidence of the appellant's psychiatric conditions

11 Before the District Judge, a total of six reports relating to the appellant's psychiatric conditions were furnished. Three of these were prepared by Dr Ung Eng Khean ("Dr Ung"), the appellant's psychiatrist; two by Dr Kenneth G W W Koh ("Dr Koh"), a psychiatrist with the Institute of Mental Health ("IMH"); and one by Dr Douglas Ong ("Dr Ong"), the appellant's obstetrician.

12 The Defence tendered Dr Ong's report to show that he had treated the appellant for post-natal depression after the birth of her first child in 2012 following a miscarriage in 2011.[6] He had followed up with treatment in 2014 after the appellant gave birth to her second child.

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[4] SOF at para 12.

[5] Annex B to the SOF.

[6] ROP pp 60-65.

13 In his first report dated 23 September 2015 ("Dr Ung's first report"),[7] Dr Ung opined that the appellant was suffering from major depressive disorder of moderate severity, as well as a mild form of obsessive-compulsive disorder ("OCD"), secondary to her depressive disorder.[8] He also stated his opinion that the appellant's mental condition had a "direct and causal relationship" to her commission of the offences.[9] In his second report dated 24 November 2015 ("Dr Ung's second report"), Dr Ung maintained the conclusions and recommendations in his first report.[10]

14 In Dr Koh's report dated 20 January 2016 ("Dr Koh's first report"), he opined that the appellant was suffering from agitated depression of moderate severity at the time of the offences and her psychiatric condition contributed to her offending.[11] Dr Koh recognised that depression does cause increased agitation and reduced impulse control in some people.

15 In Dr Koh's report dated 24 February 2016 ("Dr Koh's second report"), Dr Koh did not think that Dr Ung had correctly diagnosed the appellant with OCD but agreed with the finding of major depressive disorder of moderate severity.[12] Dr Koh affirmed his original view that the appellant's depression was *only* contributory to the commission of the offences. He stated that it would be best that Dr Ung clarify the statement in the first report regarding the "direct and causal relationship" between the appellant's illness

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[7] ROP pp 464-482.

[8] ROP p 475 at paras 41-42.

[9] ROP p 461 at para 43.

[10] ROP pp 383-384.

[11] ROP pp 172-175.

[12] ROP pp 178-179.

and her offending behaviour. Dr Koh felt that this opinion was "difficult to defend as depression and OCD do not routinely and frequently cause persons to assault others, unlike, say a fall directly causing a bruise".

16 The last in chronology of the six reports before the District Judge was from Dr Ung and it was dated 14 April 2016 ("Dr Ung's third report").[13] The Defence tendered it after the appellant had pleaded guilty on 11 April 2016. It traversed recommendations regarding the appellant's ongoing treatment and the role the appellant's husband can play to reduce her risk of recidivism. However, Dr Ung did not clarify in his report why he found a "direct and causal relationship" between the appellant's illness and her offending behaviour.

17 In its submissions before the District Judge, the Prosecution contended that Dr Koh's opinion ought to be preferred to that of Dr Ung since:

(a) The abuse inflicted by the appellant could not be written off as an exceptional one-off incident or a single momentary loss of self-control, and

(b) Despite being queried by Dr Koh in his clarification report, Dr Ung did not explain *how* increased irritability and anger directly caused the appellant to physically assault the Victim.

18 The District Judge preferred Dr Koh's views. At [8] of the GD, he noted in this respect that:[14]

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[13] ROP pp 582-586.

[14] GD at [58].

> (a) Dr Koh had come to his opinion AFTER he had the benefit of studying Dr Ung's reports, and also after he had interviewed the [appellant] and her husband. In other words, his assessments, made in January and February 2016, were arrived at after he had considered Dr Ung's opinions, and presumably 'tested' them against his own examination results of the [appellant], and the input from the [appellant's] husband. In sharp contrast, Dr Ung did not have the benefit of Dr Koh's professional views, before he (Dr Ung) came up with his September and November 2015 reports.
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> (b) More importantly, Dr Koh had effectively thrown down the gauntlet when, after he expressly disagreed with Dr Ung, Dr Koh had suggested (in his clarification medical report dated 24 February 2016) that "*it would be best if you clarify with Dr Ung as to this statement of his regarding the "direct and causal relationship" between Ms Chong's illnesses and her offending".* However, there was no clarification provided from Dr Ung to rebut Dr Koh's differing opinion, or anything else produced to elaborate on, or to corroborate, Dr Ung's views. In other words, there was nothing to back up or to explain why Dr Ung had stated that there was a "*direct and causal relationship" between Ms Chong's illnesses and her offending",* or to cast doubt on Dr Koh's contrary expert opinion that the Accused did not suffer from OCD.
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> [emphasis in original]

19 In the light of the above, and having regard to the observations of Chan Seng Onn J in *Chong Hou En v Public Prosecutor* [2015] 3 SLR 222 (at [29]), the District Judge was of the view that there was certainly nothing on the facts to suggest that the appellant "[is] *not able or is substantially not able to control or refrain [herself] from committing the criminal acts because of the mental disorder*..." [emphasis in original]: GD at [59]. In the same paragraph, the District Judge held that even if he accepted that the appellant was really suffering from depressive disorder and OCD (as diagnosed by Dr Ung) at the material time, there was nothing to suggest that "*punishment is unlikely to be effective in instilling fear in [her] and to deter [her] from committing the same criminal acts in future because of the mental disorder*..." [emphasis in original]: GD at [59].

20 The District Judge thus concluded at [57] of the GD that:

(a) It had not been shown that the appellant actually suffered from OCD; and

(b) It had also not been established that her psychiatric condition(s) was the direct cause(s) of her offences, as opposed to being a contributory factor(s).

The criminal motion

21 In her appeal before me, the appellant also filed a CM to admit additional evidence in the form of a supplementary medical report dated 22 June 2016 prepared by Dr Ung ("Dr Ung's supplementary report"). The CM was filed ostensibly in an attempt to provide clarification from Dr Ung on his own opinion.

22 In his supplementary report, Dr Ung explained why he thought that the appellant's mental illness was "causally linked" to the commission of the offences and suggested that she would not have committed the offences in the absence of her psychiatric conditions.[15] He also maintained his position that the appellant had suffered from OCD.

23 In *Iskandar bin Rahmat v Public Prosecutor and other matters* [2017] SGCA 9, the Court of Appeal recently affirmed (at [72]) the principles for the admission of fresh evidence in a criminal appeal as set out in *Soh Meiyun* ([4] *supra*). In *Soh Meiyun* at [16], Chao JA held that although the three conditions of non-availability, relevance and reliability as laid out by Lord Denning in

[15] Dr Ung's supplementary report p 10 at para 36.3.

Ladd v Marshall [1954] 1 WLR 1489 ("*Ladd v Marshall*") are applicable, the first condition of non-availability is less "paramount" than the other two conditions in the context of criminal appeals. Consequently, "an appellate court exercising criminal jurisdiction should generally hold that additional evidence which is favourable to the accused person and which fulfils the *Ladd v Marshall* conditions of relevance and reliability is 'necessary' and admit such evidence on appeal": *Soh Meiyun* at [16]. I hasten to add that this does not mean that the "non-availability" condition can be conveniently jettisoned. It remains a relevant consideration which requires careful examination.

24 At the outset, I was not entirely persuaded that the threshold requirement of "non-availability" in *Ladd v Marshall* for the admission of fresh evidence had been met in the present case. The appellant contended in her affidavit filed in support of the CM that she was "not aware of Dr Koh's suggestion for clarification by Dr Ung". Beyond this bare assertion, she did not explain why she was not aware. There was also no suggestion that the appellant did not have access to Dr Koh's second report. Had she perused it, it would have been quite clear to her that Dr Koh did not agree entirely with Dr Ung's assessments and had suggested that the latter should clarify the basis of his opinion.

25 The "invitation" to Dr Ung to clarify the basis of his stated opinion was apparently not taken up by the appellant in the court below. It would appear that the appellant only seriously considered it, almost as an afterthought, after receiving an adverse sentencing outcome in the form of a custodial sentence. I was of the view that clarification from Dr Ung was not unavailable or unobtainable earlier but that no effort was made to procure it.

The District Judge appeared to have assumed that this must have been a conscious and deliberate choice on the appellant's part.

26 However, when I examined the context more carefully, I considered that this may or may not have been a deliberate decision. Had the appellant fully appreciated the importance of having Dr Ung clarify his opinion, she would reasonably have wanted to obtain that clarification prior to being sentenced. Hence, there was some force in the Defence's contention that the importance of obtaining that clarification may well not have been brought home to her. Equally, had Dr Ung been made aware of Dr Koh's suggestion in Dr Koh's second report, he would reasonably not have hesitated to furnish the necessary clarification. These considerations were relevant but did not fundamentally alter my view that the clarification could and ought to have been obtained earlier, with the exercise of reasonable diligence.

27 The more crucial requirement was whether the fresh evidence sought to be adduced was relevant and reliable and would have a potentially important influence on the outcome of the matter: *Soh Meiyun* at [16]. In this connection, I noted that there was extensive material contained in the existing six reports before the court (see [11] to [16] above).

28 In my assessment, Dr Ung does provide relevant information and clarification in the supplementary report on why he previously concluded that there was a "direct and causal relationship" between the appellant's condition and her commission of the offences. Dr Ung's supplementary report articulates the grounds for his belief that the appellant's condition had a "causal link" to her offences. The report seeks to support his earlier reasoning and includes new corroborative accounts from the appellant's friends and

relatives which suggest that her depressive disorder led to major behavioural and mood changes and a hitherto unseen predisposition towards violent and aggressive behaviour. Certain aspects of these observations already surfaced in the first report through the accounts of the appellant and her husband. The additional accounts helped to demonstrate the extent of the appellant's behavioural changes and provided fuller insight into her conduct.

29 I accepted that Dr Ung sought to provide additional clarification and substantial elucidation for how he had arrived at his previous conclusions. He ventured to state categorically in his supplementary report that the appellant "would not have committed the offences if she had not been suffering from depressive disorder". He also sought to further explain his assessment that the appellant was suffering from OCD at the material time, to which Dr Koh had expressed a contrary view. I saw no reason why Dr Ung's supplementary report cannot be considered "reliable", and therefore the report would to my mind satisfy the "relevancy" and "reliability" criteria. I therefore allowed the CM. The weight to be attached to Dr Ung's supplementary report will be separately determined, having regard to all the available evidence.

30 Having admitted the supplementary report for the purposes of the appeal, I was of the opinion that it would be in order to invite Dr Koh to provide his response should he deem it necessary to do so. The supplementary report was brought to the attention of Dr Koh and he was informed that should he desire to provide any response, he was to do so by 10 February 2017. The parties were also given liberty to file further written submissions limited to addressing aspects of Dr Koh's response by 24 February 2017. I indicated that I did not propose to hear further oral submissions. Consequently, the appeal was further adjourned to 10 March 2017 for judgment.

Dr Koh's third report

31 In a supplementary report dated 2 February 2017 ("Dr Koh's third report"), Dr Koh provided further clarification for the court's consideration. He maintained his disagreement with Dr Ung's view of the "causal link" not so much in its entirety, but as a matter of degree. He clarified that there was broadly no disagreement between them on the clinical features in the appellant's case. Both of them found that she was depressed to a moderately severe degree at the time of the alleged offences, and that she had an increased need for cleanliness.

32 Dr Koh stated that they were "fully in agreement" with regard to the nature and extent of the appellant's depressive disorder. With regard to her obsessiveness (or OCD), they differed, "but not to a large degree". The following observations are pertinent:[16]

> … Depression, however, is a complex condition of mood. It is not a psychiatric condition where the principal clinical feature is assaultive behaviour of others. Indeed, assaultive behaviour, when it does happen in persons who are depressed, is not frequent. Depression cannot therefore be the 'direct cause' of her having hit the maid; if this were so, she would have hit the maid far more frequently and assaults of others in the general population would be rampant given the high prevalence of depressive disorder in the community.
>
> That being said, depression does cause disordered cognitive effects such as impairment of judgment and impulse control, and these, having been present in Ms Chong, may have, as I had stated in my 24/2/16 report, contributed to her offending behaviour.

33 In summary, Dr Koh reiterated that he agreed with Dr Ung in respect of the finding that her depression had contributed to her offending. However,

[16] Dr Koh's third report p 2.

he was not satisfied that Dr Ung had convincingly explained why he said that her OCD had directly caused her offending.

Further submissions

34 On 24 February 2017, the Defence filed further written submissions. The Prosecution did not file any further written submissions. In her further submissions,[17] the appellant contends that Dr Ung's conclusions should be preferred to Dr Koh's in the light of Dr Ung's supplementary report and Dr Koh's third report on two issues, namely:

(a) Whether the appellant suffered from OCD; and

(b) Whether the appellant's major depressive disorder and OCD are causally linked to her offences.

35 On the issue of the appellant's alleged OCD, the appellant submits that Dr Koh failed to refute Dr Ung's opinion that there was a "discernible peak in the intensity" of the appellant's OCD after childbirth, which had coincided with the time of the offences. The appellant further argues that Dr Koh has not cast doubt on the corroborative evidence in Dr Ung's supplementary report, which revealed a "100% change" in the appellant as observed by the appellant's family and friends – from being a very messy and untidy person to having an intolerable obsession for cleanliness. The appellant also submits that Dr Koh failed to rebut Dr Ung's reference to medical literature that post-partum OCD co-occurs with depressive disorder with 70.6% of those diagnosed with post-partum OCD also having depressive disorder.

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[17] Appellant's Further Submissions dated 24 February 2017.

36 With regard to whether the appellant's psychiatric conditions were causally linked to her offences, the appellant contends that Dr Koh did not address or refute Dr Ung's explanations. Dr Ung's supplementary report considered three factors in analysing whether the appellant's psychiatric conditions were causally linked to her offences:

(a) The medical literature on mechanisms whereby the condition causes the action;

(b) Precedent cases in which similar conditions have been accepted by local courts to have a causal link to the offending conduct; and

(c) The available information from both the person and informants as to whether the offending conduct occurred during a period when the person was suffering from the condition, and whether it was absent prior to the condition and on full recovery of the condition.

37 The appellant submits that Dr Koh did not directly address or refute the explanations proffered by Dr Ung in his supplementary report:

(a) On the available medical literature, the appellant submits that while Dr Koh's supplementary report correctly explains that aggression is not a principal clinical feature of depression, it does not address or rule out the occurrence of assaultive behaviour in depressed patients.

(b) The appellant submits that Dr Koh did not respond to Dr Ung's reference to cases where a depressive disorder had been found to be causally linked to serious crimes such as murder.

(c) The appellant submits that Dr Koh did not dispute the corroborative testimony from Dr Ong, her family members and two friends that there was a marked change in the appellant's mood and behaviour after the birth of her two children which was consistent with the victim's evidence on the appellant's change of behaviour around the same time.

38 Finally, the appellant submits that Dr Koh in his third report conceded that his analogy of a "fall causing a bruise" was possibly inappropriate and overly simplistic in the present circumstance. The appellant relies on the following passage in Dr Koh's third report to establish this:

> Dr Ung in his 23/9/15 report had stated his opinion that there was a "direct and causal relationship between her psychiatric disorder(s) and the incident." I had disagreed with that statement not so much in its entirety, but once again in degree. As an illustration, I had given an example of a fall from a bicycle directly being the cause of a bruise on one's knee. *Depression, however, is a complex condition of mood.*
>
> [emphasis added]

39 Accordingly, the appellant submits that Dr Ung's opinion should be preferred to Dr Koh's on the basis that the former has not been sufficiently refuted.

My decision

The aggravating factors

40 On appeal, the Defence did not seriously dispute that custodial terms are ordinarily warranted for offences involving abuse of domestic workers. This was all the more so where there were aggravating factors which would point to the need for a custodial sentence of substantial duration.

41 I do not propose to delve into a review and assessment of all the sentencing precedents involving maid abuse. These cases seem to suggest that even where an accused has been found to be suffering from depression, a custodial term may be appropriate. On the other hand, there are a handful of cases, including *Soh Meiyun* notably, where the court held that the custodial threshold had not been crossed, having regard *inter alia* to the evidence of depression adduced.

42 I concur broadly with the District Judge's reasoning in relation to the aggravating factors as set out above at [5]. However, I do not agree with his finding that the "prolonged period of physical and mental abuse" (see [30] to [35] of the GD) was an aggravating factor. The SOF referred to additional matters which did not form the subject-matter of any charge. The District Judge took these additional matters into account as aggravating factors in concluding that there had been sustained abuse, which he considered to have spanned August 2013 to April 2015.

43 The appellant was charged with three offences, and for that reason alone, these were not "one-off" offences. She readily admitted to paragraph 6 of the SOF (see [9] above), which generally relates how she would physically abuse the victim by slapping her, knocking her on the head, or using her finger to push the side of the victim's head saying that she had "no brains". She admitted to having done so "whenever she was unhappy at her performance or when she made mistakes" and the abuse became more frequent after the birth of her second child in December 2014.

44 The appellant therefore acknowledged that there had been offending conduct over a period of time, which can give rise to the inference of past

instances of physical and mental abuse. What is problematic in this case is that there are no specific details or particulars, for example, pertaining to what had taken place, whether any injuries were suffered, or how frequently the abuse was carried out. All we have is what is contained in paragraph 6 of the SOF. That being said, any additional details or particulars might well be prejudicial to the appellant, when all she faced in these proceedings was the three charges in question.

45 I take the view that as a matter of fairness to the accused person, the sentencing court ought to disregard the particulars of other possible offences for which she has not been charged, unless the inclusion of such particulars is intended solely for the purpose of negating any assertion in mitigation that these were "one-off" or "first-time" offences. By analogy, this operates as a "shield" and not a "sword". The unfairness arises from stretching the four corners of a charge to include facts that do not pertain to the elements of the charge or to the immediate background to the offence at hand. I have set out my views on this at some length in *Public Prosecutor v Tan Thian Earn* [2016] 3 SLR 269 ("*Tan Thian Earn*")(at [58] to [66]). I do not propose to repeat them here. It will suffice to say that to treat these facts as an aggravating factor, *ie* as a "sword", would be tantamount to enhancing sentence for the accused person having regard to offending conduct for which she had not been charged.

46 There were only three offences for which the appellant had been charged. To the extent that there are no specific particulars of "other episode(s) of assault" (see [35] of the GD), there is no clarity (let alone any concession by the Defence, and rightly so) as to *how* prolonged, frequent or unrelenting the abuse was. Despite this, the District Judge appeared to have

attached considerable weight to paragraph 6 of the SOF and taken the "prolonged period of abuse, and other episode(s) of assault" into account as an aggravating factor.

47 With respect, I differ from the District Judge's assessment. Although the appellant has admitted to prior offending conduct for which she has not been charged, this should not be treated as an aggravating factor *per se*. Adopting the reasoning of Sundaresh Menon CJ in *Vasentha d/o Joseph v Public Prosecutor* [2015] 5 SLR (at [62]), I decline to punish the appellant for conduct which is not the subject of any charge brought against her. Logically, this means I will not consider instances of past offending conduct as an aggravating factor when no charges in respect of such conduct have been brought.

48 In addition, the Defence rightly pointed out that the victim had continued working for the appellant for well over two years. There is some evidence to suggest that the victim felt constrained to do so as she had owed money to her agent and had pleaded to be retained to work for the appellant (see [18] of Dr Ung's supplementary report). Even as I accept that there were instances of past abuse, and even as these acts certainly should not be condoned, they appear to have involved far less serious infractions. No doubt there is a TIC charge in the present case, but it is clear that the two proceeded charges were much more serious in nature. The TIC charge should not add significantly to the calibration of the sentence in the final analysis.

Assessment of the psychiatrists' evidence

49 It is well-accepted that a psychiatrist is a medical professional who can provide an expert opinion for the court's consideration. Whether appointed by

the Prosecution or the Defence, he ought to do his utmost to assist the court. He should state his opinion as definitively as possible to the best of his ability, avoiding ambiguity and minimising room for subjectivity in interpretation. Otherwise, his opinion may be unhelpful and unreliable.

50 In the present case, there is controversy between the parties on the medical evidence perhaps because of the use of the phrases "contributory factor" and "causal link" (and "direct and causal relationship"). On the one hand, Dr Koh thought that the appellant's psychiatric condition (*ie*, major depressive disorder) was only a contributory factor in her offending conduct. In the absence of her psychiatric conditions, she might well not have committed the offences, but they were not the direct cause of her conduct.

51 On the other hand, Dr Ung opined that the appellant's depressive disorder and OCD had a "causal link" with her offences. He went on to state that he had found a "direct and causal relationship" between her disorder and the commission of the offences. In his supplementary report, he confirmed that her mental condition was "causally linked" to the commission of the offences.

52 In the light of the disagreement between the psychiatrists, the appellant highlighted in her Petition of Appeal that the District Judge ought to have called for a Newton hearing.[18] I disagree. The respective reports of Dr Ung and Dr Koh make it clear why each of them has come to a different conclusion. I see no reason why a Newton hearing would have provided further assistance to the court. The respective psychiatrists have already been afforded full opportunity to explain their differing conclusions. It falls to the court to decide

[18] ROP p 18 at para 3(b).

which opinion accords best with the factual circumstances and is consistent with common sense and objective experience and understanding of the human condition. As Choo Han Teck J put it in *Public Prosecutor v Juminem and another* [2005] 4 SLR(R) 536 ("*Juminem*") at [24]:

> … Where the court is confronted by a conflict of opinion of such learned professionals, it will have to turn to its own judgment in choosing which it is inclined to favour …

53 I should reiterate that a Newton hearing should generally be a measure of last resort. In the words of Sundaresh Menon CJ in *Ng Chun Hian v Public Prosecutor* [2014] 2 SLR 783 at [24]:

> … a Newton hearing is the *exception* rather than the norm and should not ordinarily be convened unless the court is satisfied that it is necessary to do so in order to resolve a difficult question of fact that is material to the court's determination of the appropriate sentence …
>
> [emphasis added]

54 In the case of conflicting psychiatric evidence, a Newton hearing is not always a requirement every time there is a difference of opinion or disagreement stated in the respective reports; there can be cases where the differences turn on semantics or matters of expression. There will also be instances where the disagreement relates to matters of no real consequence. It is understandable that differences of opinion may sometimes stem from subtle variances in the manner of description or nuances in language.

55 It should also be reiterated that, as psychiatrists themselves have often acknowledged, psychiatry is an inexact science. In *Juminem* ([52] *supra*), Choo J observed (at [23]) that psychiatry is "that branch of medical science least amenable to precise and objective diagnosis". Dr Ung himself agreed in his supplementary report that there is a "lack of an objective test that would

prove that a person's depression caused a certain action" and "[p]roving direct causation is at present beyond the realms of psychiatric science".[19]

56 It may be perfectly acceptable for a psychiatrist to opine, with cogent supporting reasons, that a psychiatric condition is a direct "cause" of offending conduct. In this regard, I have reviewed Dr Ung's reasoning and clarifications carefully. With respect, I think Dr Ung's opinion stretches the concept of cause and effect too readily and expansively in the present case. Having regard to the factual background, I am firmly of the view that the District Judge was correct in accepting Dr Koh's opinion. I shall explain my reasons for this view.

57 I begin by noting the compelling logic of Dr Koh's statement to the effect that depression (whether coupled with OCD or not) does not "routinely or frequently" *cause* persons to assault others.[20] This point is reinforced in Dr Koh's third report.[21] However, one might reasonably contemplate, as Dr Koh accepts, that a person in a state of moderately severe depression, who feels stressed, disaffected and is in a low mood, might be self-absorbed, withdrawn or likely to cause harm to himself and possibly others. Of course, different persons may react differently when they encounter the same stressors.

58 In its further written submissions, the Defence points out that Dr Koh did not refute Dr Ung's opinion that there was a "discernible peak" in the intensity of the appellant's OCD after childbirth. This may be so, but it does not change the fact that Dr Ung found that the appellant's OCD to be a mild

[19] ROP p 6 at para 27.

[20] ROP p 179.

[21] Dr Koh's third report p 2.

condition. It is difficult to accept that a (mild) obsession with cleanliness can be a "cause" of violent behaviour. In that regard, Dr Ung has not pointed to any literature or other material suggesting that a combination of depression of moderate severity and mild OCD would invariably catalyse violent or aggressive conduct.

59 I am not prepared to accept as a general rule that depression in whatever form, whether or not coupled with OCD, will "cause" one to commit violence. I accept that it can contribute to various behavioural manifestations of maladjustment such as irritability or idiosyncratic conduct or impulse control. But I do not accept that it will directly and inevitably "cause" violence. There may be exceptional cases where such an opinion might be credibly proffered. Equally, there are exceptional cases where the courts have accepted that severe depression can give rise to violent conduct and thus support a special defence of diminished responsibility, such as where the accused faces a murder charge. Two such case precedents (including *Juminem* ([52] *supra*)) were cited by Dr Ung in his supplementary report. It should be noted that these cases are specific to their context, where the courts were considering the special defence of diminished responsibility to a charge of murder (Exception 7 to s 300 Penal Code). The court in those cases found that the accused persons' depressive disorders amounted to an abnormality of mind which significantly impaired their mental responsibility. The present case was not such a case. No statutory defence of diminished responsibility applies. The court is not being called upon here to address its mind to the gulf between capital punishment and the alternative prospect of a lesser sentence.

60 In Dr Ung's supplementary report, he effectively suggests that the appellant's moderately severe depression coupled with mild OCD was the

direct cause of her conduct. Dr Koh's third report explains cogently why this should not be so. In particular, he explains persuasively (as I have set out at [32] above) that assaultive behaviour is not frequent in persons who are depressed, and if depression were the direct cause of her violent behaviour, she would have assaulted the victim far more frequently. I would adopt this view: one would have expected more repeated acts of gratuitous violence within a given time span rather than what appears to have been two distinct sets of incidents separated by almost 20 months. It would be reasonable to have expected even more reported accounts of routine and frequent acts of violent abuse if her depression was indeed so serious as to readily trigger or "cause" her violent conduct. In my view, this strongly suggests that the appellant still retained some degree of control over her violent acts against the victim, even if she was not completely in control of her emotions and impulses.

61 Further, the facts before me strongly corroborate Dr Koh's assessment that "depression and OCD do not routinely and frequently cause persons to assault others". Although the appellant conceded that there were other previous acts of abuse, it may be reasonable to infer that those acts were relatively minor as they were not the subject of any charges. Alternatively, it may reasonably be assumed that there might have been difficulties with specific proof of such acts. On the other hand, it could be argued that the appellant's acts of violence might conceivably have continued unabated and perhaps even intensified but for the victim deciding to leave the household on 7 April 2015. This was three days after the last assault took place on 4 April 2015. For the next two days after 4 April 2015, however, it would appear that there were no reported incidents of any physical or mental abuse. As noted above, while there were other admitted instances of abuse prior to the April

2015 incidents, in all likelihood they did not involve conduct of the same degree of egregiousness. In my view, these facts, taken together, support the view that even if the appellant suffered from depression and OCD, she did not assault the victim on a regular basis. This in turn supports Dr Koh's assessment of the limited extent to which depression and OCD may contribute to assaultive behaviour.

62 Nevertheless, I am prepared to accept Dr Ung's opinion that the abuse would not have occurred *but for* the appellant's psychiatric conditions. Such a characterisation is not in itself dispositive, in the sense that it does not inexorably equate to accepting that these were the sole cause of her offences. It is clear that she was not habitually or unremittingly violent and aggressive *as a consequence* of her depression; indeed to suggest otherwise would contradict the Defence's assertions (which I am inclined to accept) that there was no evidence of a pattern of serious abuse over a prolonged period of 20 months.

63 I note that in Dr Ung's supplementary report, he provided accounts of his interviews with the appellant's friends and family. They spoke of the appellant never having *previously* manifested violent or aggressive behaviour, with her depressed mood, irritability and OCD symptoms only becoming perceptible after childbirth. They did not, however, say that her post-natal behavioural changes included any predisposition towards aggression or violence. If this had been observed, Dr Ung would undoubtedly have made note of it in his supplementary report.

64 Viewed together with the uncontroversial assessments of both psychiatrists that the appellant's depression was of moderate severity, it is far

more plausible and reasonable in my view to conclude as the District Judge did that the appellant's major depressive disorder and mild OCD did not *directly* cause her to commit the acts of violence. I agree that her psychiatric conditions would have caused her to have difficulties controlling her emotions and impulses and would have contributed to her loss of self-control that led to the commission of the offences. However I am not prepared to accept Dr Ung's clinical opinion that her depressive disorder and OCD are "causally linked" to her offences. This does not lead to the conclusion that Dr Ung's opinion is of no value and should be wholly disregarded in assessing the appellant's culpability, as I shall explain below.

Soh Meiyun's case

65 Much reliance was placed in both the lower court and at the hearing of the appeal on Chao JA's judgment in *Soh Meiyun* ([4] *supra*). In his supplementary report, Dr Ung also suggests that the appellant's case bears close similarity to *Soh Meiyun*.

66 At [27], [28], [30] and [51] of *Soh Meiyun*, Chao JA sets out his observations on the degree of severity of the appellant's major depressive disorder. Having read these paragraphs closely, I respectfully observed perceptible shifts in the IMH's psychiatrist's explanations and understanding of how severe the appellant's depression really was in that case. At [27] of *Soh Meiyun*, it was described by the psychiatrist, Dr Yao Fengyuan ("Dr Yao"), as "fairly severe". At [28], Dr Yao then describes the depression as "quite severe", but he nonetheless found the condition to have "no direct relation" to the commission of the offences. The court understood this to mean that the condition did not necessarily make a person violent.

67 I am unable to see a material difference between the following descriptions of the severity of major depressive disorder: (a) "moderately severe": as in the present appellant's case, on which both Dr Koh and Dr Ung agree; (b) "fairly severe": *Soh Meiyun* at [27]; and (c) "quite" severe: *Soh Meiyun* at [28]. The three terms appear to shade into each other quite readily and indistinguishably. This is not a criticism of the expertise of the relevant psychiatrists. The fluidity of these terms is probably inherent in the nature of the field of forensic psychiatry.

68 Dr Yao's evidence was not challenged and no contrasting expert opinion was put forward in *Soh Meiyun*'s case. As the judgment was not entirely clear on what Dr Yao's clinical findings were, I took the liberty to examine the appeal records. Mr Quek Mong Hua, counsel for the appellant in this case, will no doubt be familiar with them as he had acted for the appellant in that appeal as well. The psychiatric report prepared by Dr Yao which was admitted into evidence on appeal specifically states that he found that the appellant's depressive disorder fell into the "severe" category.

69 I also note that the term "contributory cause" was also used by Dr Yao in *Soh Meiyun* and this was accepted by Chao JA at [30]. Thus, even without a definitive finding by Dr Yao of any "causal link" or "direct relationship" between the appellant's psychiatric condition and her offending conduct, the appeal was allowed. Chao JA's conclusion at [51] was that the severity of the appellant's disorder was "within the highest end of the scale". In his view, the "extraordinary" facts, which included the appellant having herself been a victim of physical abuse as a child, did not warrant a custodial term.

70 Before Chao JA, evidence was adduced of the appellant having directed her anger at her husband. In Dr Yao's psychiatric report, he noted that they quarrelled almost daily. From my perusal of the appeal transcript,[22] Dr Yao also went on to testify that the marital relationship was affected "quite badly" and she had even scratched her husband, "so her anger is not merely directed at the maid".

71 The full range of "extraordinary" facts considered by Chao JA in *Soh Meiyun* does not feature in the present case. The District Judge rightly sought to distinguish the case on various grounds (see [62] to [64] of the GD), which I adopt for present purposes. I shall only highlight four points. First, the appellant in the present appeal was *not* found to be suffering from depression at the most severe end of the scale. Second, in *Soh Meiyun*, the appellant's violence and aggression were directed not merely at the maid but *also* at her husband. Third, the appellant's condition in *Soh Meiyun* apparently did not improve even after treatment. Finally, unlike the appellant in *Soh Meiyun*, the appellant in the present appeal did not have the misfortune of undergoing a traumatic experience of physical abuse during childhood.

The mitigating factors

72 The appellant pleaded guilty and demonstrated her remorse. The District Judge found this to be a strong mitigating factor in her favour. She also sought treatment for her condition and is cognisant of her wrongdoing. She did not seek to challenge the victim's assertions of any past offending conduct. While this is not a mitigating factor *per se*, it reflected her willingness to accept responsibility and face the consequences that might

[22] Certified transcript of *Soh Meiyun*, Day 2, p 16.

follow. She also paid $5,000 as compensation to the victim prior to her plea of guilt.

73 The District Judge noted that the victim was subjected to serious abuse on the two consecutive days in April 2015. He was conscious of the severity of the assaults on her as well as the sustained and prolonged nature of the abuse she suffered. The assaults were not one-off or isolated in nature but constituted a persistent course of violent conduct. However, the acts in question appeared to be impulsive and spontaneous outbursts on the appellant's part. This did not make them significantly less aggravated in any event. It should nonetheless be emphasised that they do not point to a pattern of calculated and systematic abuse. No weapons were used, but this is not a mitigating factor. Rather, if weapons had been used, this would have been aggravating.

74 It was not disputed that the appellant was suffering from postnatal depression linked to caregiver stress and multiple family-related stressors. In determining her overall culpability, I accept that her difficult personal circumstances rendered her more prone to impulsive, unpredictable and irrational acts including those involving violence on the victim as well as the acts of self-harm noted by Dr Ung.

75 In my view, the District Judge assessed the respective psychiatrists' opinions objectively and appropriately before arriving at his decision to accept Dr Koh's opinion. That said, having admitted Dr Ung's supplementary report, I take his further views into account and I am grateful for his clarifications and his commitment to continue assisting the appellant with appropriate treatment

and counselling. I am equally grateful for Dr Koh's clarifications in the third report he had prepared.

76 I should add in passing that I do not agree with the District Judge that the one transaction rule should apply in the present case (see [69] of the GD). Even though the two charges proceeded with involved abuse of the same victim, they took place on two different dates. They cannot be said to be sufficiently proximate in time. Hence it would not be appropriate in principle to consider them to be part of "one transaction". It would have been sufficient for him to say (if this was what was intended) that the totality principle did not require him to impose consecutive sentences: see *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [81(i)]. Nonetheless, as there were no submissions made on this issue on appeal, I see no need to belabour this point.

Determining the appropriate sentence

77 Evidently, the District Judge attached considerable weight to his finding of the "prolonged period of physical and mental abuse" sustained by the victim. As I have explained above at [45]-[47], evidence of (admitted) past offending could operate to negate any assertion that the offences were "one-off" or "first-time" offences. But it should not be used by the Prosecution as a "sword" to justify a higher sentence in the present circumstances. The District Judge had clearly accepted the Prosecution's submission on this point and taken this aspect into account as an aggravating factor. In my view, he ought not to have done so. For this reason, *inter alia*, I am of the view that the sentence ought to be reduced.

78 I would however agree with the District Judge that deterrence is necessary for such cases, and as a general rule, a custodial sentence would be justified, particularly in view of the seriousness of the assault on 3 April 2015. It was probably wholly fortuitous that the victim did not suffer more severe visible injury beyond a bruised left eye.

79 The question is whether the present case should be treated as an exception to the sentencing norm in view of the appellant's psychiatric conditions. The relevant sentencing precedents suggest that there is no hard and fast rule that a diagnosed psychiatric condition of major depressive disorder must be found to fall within the "severe" category of depression before non-custodial sentencing options for an offender charged with maid abuse can be considered. Similarly, there is no fixed requirement for an expert to opine that there must be a "causal link" between the disorder and the commission of the offences, as opposed to being a "contributory factor" as was held in *Soh Meiyun* ([4] *supra*). The Defence cited two cases illustrating this, namely *Public Prosecutor v Cheah Yow Ling* [2009] SGDC 385 ("*Cheah Yow Ling*") and *Public Prosecutor v Ng Tong Kok* [2016] SGMC 52 ("*Ng Tong Kok*"). In *Cheah Yow Ling*, the accused was diagnosed to have a major depressive disorder of moderate severity during her pregnancy, at the time of the offences. The District Judge imposed a $6,000 fine after taking into account the mental state of the accused. In *Ng Tong Kok*, the accused was similarly diagnosed with major depressive disorder of moderate severity and was found to be under "caregiver stress" at the time of the offences. In the light of the accused's psychiatric conditions and given that the injuries were not serious, the District Judge found a custodial sentence to be inappropriate in that case. I understand that in both instances, the appeals filed by the Prosecution against sentence were withdrawn.

80 It is not practicable to attempt to specify precisely how substantial the impairment of the appellant's mental state ought to be – the task of making this determination and arriving at the appropriate sentencing outcome, onerous as it is, is further complicated when two medical experts appear to disagree. Hence I must emphasise again the importance of appreciating that no two cases are wholly similar, and sentencing norms, benchmarks and even case precedents do not necessarily always provide a clear guide in sentencing of cases which are highly fact-specific.

81 I note that the appellant accepts that not all persons with depression display assaultive behaviour, but this does not rule out the occurrence of depressed patients who exhibit assaultive behaviour. I agree with the Defence submission along the following lines – that "it is in such instances that the specific facts will come into play in determining whether the offender would have exhibited such assaultive behaviour in the absence of the depression".[23]

82 Ultimately, each case must be carefully considered on its factual matrix. The crucial issue is whether the disorder(s) in question can be said to have contributed so significantly to the offending conduct that it diminishes the offender's capacity to exercise self-control and restraint, and hence reduces her culpability in the circumstances. From the reports of both Dr Koh and Dr Ung, it would appear that notwithstanding their areas of disagreement, they agree that there was a substantial diminution in the appellant's ability to exercise self-control, and there was an impairment of her consciousness in the light of her psychiatric conditions. In my judgment, this shows on a balance of probabilities that the appellant's psychiatric conditions had contributed

[23] Appellant's Further Submissions, at [17].

significantly to her commission of the offence. This is a weighty consideration in mitigation. In the overall analysis, I think there is sufficient reason in the present case to afford the appellant the benefit of doubt and to allow her case to be treated as an exception to the sentencing norm.

83 There is no concern of specific deterrence as the appellant is unlikely to reoffend provided she continues to seek treatment. She has demonstrated sufficient resolve and commitment to do so. Further, this is clearly not a case of an offender who has acted in a calculated and deliberate manner, with full consciousness of the consequences of her conduct, and whose criminal rationality attracts a specifically deterrent sentence: see *PP v Loqmanul Hakim bin Buang* [2007] 4 SLR(R) 753 at [26]. Thus, I would adopt the observations of Chao JA in [43] of *Soh Meiyun* ([4] *supra*), as I am satisfied that her experience of the process of criminal prosecution and conviction would sufficiently deter her from reoffending.

84 As for general deterrence, I would also echo Chao JA's sentiments in *Soh Meiyun* (at [43]):

> … if general deterrence is addressed to persons who, like the appellant, have psychiatric conditions that make it difficult for them to control their emotions and behaviour, I think that object would be little served by a custodial sentence. General deterrence assumes persons of ordinary emotions, motivations and impulses who are able to appreciate the nature and consequences of their actions and who behave with ordinary rationality, for whom the threat of punishment would be a disincentive to engage in criminal conduct. But persons labouring under such mental disorders as the appellant do not possess ordinary emotions, motivations and impulses. For such persons, at the time of their criminal acts, they would be so consumed by extraordinary emotions or impulses that the threat of punishment features hardly, if at all, in their cognition and hence has little if any effectiveness as a disincentive.

85 To focus purely on general deterrence as a justification for a custodial sentence is in my view unhelpful in the present case. The appellant cannot fairly be said to represent people of ordinary impulses and rationality for whom the threat of punishment would be a disincentive to engage in criminal conduct. It is therefore hardly likely that the outcome of this case will embolden would-be offenders to take their chances and assault their maids in the hope of being let off scot-free or obtaining a light sentence upon conviction.

Conclusion

86 For exceptional cases such as this where there is a diagnosis of psychiatric disorder of sufficient severity as to significantly diminish the offender's culpability, there can justifiably be a departure from the sentencing norm. The appeal is therefore allowed and the appellant's imprisonment sentences are set aside and substituted with the maximum fine of $7,500 per charge, in default two weeks' imprisonment in respect of each charge. Her total fine is thus $15,000 in default four weeks' imprisonment.

See Kee Oon
Judge

Quek Mong Hua and Jacqueline Chua (M/s Lee & Lee) for the appellant;
Bhajanvir Singh and Stephanie Koh (Attorney-General's Chambers) for the respondent.
