**IN THE GENERAL DIVISION OF**
**THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

**[2025] SGHC 38**

Magistrate's Appeal No 9153 of 2023/01

Between

GII

… *Appellant*

And

Public Prosecutor

… *Respondent*

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# JUDGMENT

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[Criminal Law — Appeal]
[Criminal Law — Offences — Outrage of modesty — Whether the complainant's testimony was unusually convincing]

# GII
# v
# Public Prosecutor

**[2025] SGHC 38**

General Division of the High Court — Magistrate's Appeal No 9153 of 2023/01
Sundaresh Menon CJ
4 December 2024

6 March 2025 Judgment reserved.

**Sundaresh Menon CJ:**

## Introduction

1 This is an appeal against conviction and sentence brought by a man, whose name has been redacted as "GII" (the "appellant"). The appellant claimed trial to one count of aggravated outrage of modesty under s 354A(1) of the Penal Code (Cap 224, 2008 Rev Ed) (the "Penal Code"). The District Judge (the "DJ") found him guilty and sentenced him to 50 months' imprisonment and six strokes of the cane.

2 Having considered the parties' submissions, I dismiss the appeal because, in my judgment, there is no reason to interfere with the DJ's decision, whether in respect of the conviction or sentence. This appeal also raises some questions concerning the treatment of evidence in criminal cases, as well as the application of the "unusually convincing" standard in situations where the

accused person maintains that he does not remember the events surrounding the alleged offence and so does not advance a competing account of what transpired.

**Background facts**

3 I will adopt all the redacted names used by the DJ in his decision (see *Public Prosecutor v GII* [2024] SGDC 30 (the "GD") at [5]–[6]).

4 The appellant is the husband of the complainant's cousin, Ms Sharon. At the material time, Ms Sharon was in Malaysia, having just given birth.

5 On 14 March 2019, the complainant who also lived in Malaysia came to visit some relatives in Singapore. On 15 March 2019, she had dinner at the home of her cousin, Mr Henry. The following persons were also present: the appellant, Ms Karen (Mr Henry's wife) and Mr Paul (the appellant's nephew). After dinner, the appellant, the complainant, Mr Henry and Mr Paul visited a nightclub, where they were joined by Mr Harold (another nephew of the appellant) and two other friends. There they consumed significant amounts of alcohol.

6 At around 3.30am on 16 March 2019, the appellant and the complainant left the club. The complainant initially intended to return to Mr Henry's home where she planned to stay during her visit to Singapore, but because Mr Henry had already left the nightclub at around 2.00am, arrangements were made for the complainant to stay at the appellant's residence instead (the "Unit"). The appellant, the complainant and Mr Harold shared a taxi. The appellant and the complainant alighted from the taxi when it was near the Unit, while Mr Harold continued on his journey home. The foregoing facts are undisputed.

7 However, the account of what transpired thereafter at the Unit stemmed solely from the complainant's testimony, because the appellant claimed that he was unable to remember anything due to alcohol-induced amnesia. According to the complainant, when they reached the Unit, the appellant showed her to the guest room. As the complainant was experiencing some pain in her ankle, the appellant, with her consent, massaged her ankle with some ointment. She then asked him to leave so she could rest. However, instead of leaving the guest room, he sexually assaulted her in the following manner:

(a) The appellant joined the complainant on the bed she was sitting on and then lay down and refused to leave, saying he wished to smell her.

(b) The appellant then tried to kiss the complainant on her lips. She tried to push him away but as she turned away, he kissed and smelt her neck. She protested, saying, "[w]hat's wrong with you? You just had a baby, you're a father. [Ms Sharon] is my sister". In response, he said, "[n]o one needs to know" and that he was "sick in the head".

(c) The appellant put his hand on the complainant's breast over her jumpsuit and also unhooked her bra from the back. The complainant kept telling him to stop and tried pushing him away.

(d) The appellant took the complainant's left hand and forced it down his pants, where she felt his erect penis. She tried to pull her hand out, but he held her forearm down.

(e) After the complainant managed to extricate her hand from the appellant's pants, she repeatedly pleaded with him to stop. She also told him of an incident that she had experienced in her younger days

involving another relative ("Mr Nathan"), and said, "it's happened to me before when I was younger" and "[t]his is something that's [*sic*] happened before … when I was very young". The complainant also asked if the appellant had feelings for her, and if so, why he married Ms Sharon. In response, the appellant hit his own forehead and again said that he was "sick in the head".

(f) The appellant tried to kiss the complainant again and also pulled her jumpsuit down to her waist. She tried to lift it back up. He then put his hand into her panties and touched her vagina. She tried to pull his hand out and he eventually removed his hand.

(g) The appellant then got on top of the complainant. He had one hand on her shoulder and used the other hand to pull her jumpsuit down. She kicked to try to get him off but was not able to do so. He also tried to kiss her lips and neck and grabbed her exposed breasts.

8 The appellant then "got off" the complainant and told her that he would stop. He indicated that he was going to sleep on the bed in the guest room (which is where they were). The complainant said she wanted to leave for Mr Henry's home, but the appellant would not let her. When the appellant eventually fell asleep and started snoring, the complainant gathered her belongings and ran out to the living room. She could not open the grille at the entrance doorway to the Unit but eventually found a set of keys in a backpack in the living room, which she used to open the grille in order to leave.

9 The complainant decided not to head directly to Mr Henry's home because she was afraid the appellant would try to find her there. Instead, she booked a room at a hotel (the "Hotel Chancellor"). Before making her way

there, she tried to call three friends; only one, Ms Paula, answered her call, and the complainant told her what had happened. When she reached the Hotel Chancellor, the hotel receptionist, PW6, noticed that she was visibly upset and asked if she was "okay". PW6 also noticed that the clasp on the complainant's jumpsuit was undone and helped to fasten it.

10 The complainant then received a call from Ms Karen (whom Ms Paula had earlier called, telling her to reach out to the complainant because she was in some distress). Ms Karen urged her to return to Mr Henry's home. As a result, instead of staying at the Hotel Chancellor, the complainant went to Mr Henry's home, where she told Ms Karen what had transpired. The complainant wanted to return to Malaysia that day and booked a flight though, as it transpired, she made a mistake as to the date of her booking.

11 Later that day, the complainant's parents arrived in Singapore. The complainant told her mother, another friend, Ms Alice, and Ms Karen what had happened to her. This conversation was recorded by Ms Karen. I will refer to the recording of this conversation as the "Audio Recording".

12 At about the same time, the complainant's father (Mr Kenneth) and Mr Henry arranged to meet the appellant at a coffee shop along Zion Road (the "Zion Road Meeting"). What transpired at the Zion Road Meeting is disputed:

(a) Mr Kenneth's account was that upon arriving, the appellant immediately apologised and kept saying "I'm sorry for what I did … I don't know what overcame [*sic*], I must have been mad".

(b) Mr Henry's account was that after Mr Kenneth said "[y]ou have destroyed the lives of not one, but two women in our families", the appellant apologised and left.

(c) On the other hand, the appellant's account was that after being scolded by Mr Kenneth for "misbehav[ing]" with the complainant, he had some inkling that Mr Kenneth was referring to something sexual which had taken place. However, he did not seek clarification. The appellant claimed he responded to Mr Kenneth by saying "I'm sorry, uncle. I don't know what happen [*sic*]" and then left.

13 The complainant returned by car to Malaysia with her parents later in the night of 16 March 2019. While in Malaysia, she did the following:

(a) On 18 March 2019, she met with her psychiatrist, PW9, to whom she related her account of the assault. She had previously consulted him in or around August to September 2018 for mild depression. He subsequently diagnosed her on 26 November 2019 with post-traumatic stress disorder ("PTSD").

(b) On 27 March 2019, she made a statutory declaration setting out the events that had transpired (the "Statutory Declaration"). She made another statutory declaration on 5 April 2019 to correct some typographical errors in the first declaration.

14 On the complainant's next visit to Singapore on 28 November 2019, she lodged a police report against the appellant. This was about eight months after the incident.

15 On 11 December 2019, the appellant made a statement to the police, which was recorded by the investigation officer, PW10 (the "Police Statement"). I discuss the Police Statement at [33]–[34] below.

**Decision below**

16 The DJ accepted the complainant's account of the events. He observed that her account was internally consistent and was also consistent with the contents of the Audio Recording, the Statutory Declaration and her testimony at trial in July 2021 and January 2022 (see the GD at [122]). The DJ also noted the following:

(a) The complainant's description of the progression of the sexual assault and the utterances made by the appellant were internally consistent (see the GD at [124]).

(b) The complainant's actions after the assault were consistent with her frenzied state of mind, which was also corroborated by several witnesses and the documentary evidence, such as the record of the series of calls she made and the booking record of the Hotel Chancellor (see the GD at [126]–[132]).

(c) The encounter between the appellant, Mr Kenneth, and Mr Henry was consistent with the complainant's account, especially because the appellant did not immediately raise his "defence" of alcohol-induced amnesia when Mr Kenneth mounted the accusations against him (see the GD at [133]–[138]).

(d) The complainant's delayed reporting to the police was consistent with the agreement between the family members not to report the matter to the authorities immediately given that Ms Sharon had just given birth (see the GD at [139]–[147]).

(e) The complainant's evident distress was consistent with the observations and diagnosis of PW9 (see the GD at [159]–[160]).

17 In contrast, the DJ found the appellant's case was not cogent. The DJ rejected the four main arguments advanced by the appellant:

(a) That the appellant suffered from alcohol-induced amnesia: this was rejected because it was not supported by any evidence, and was also not supported by his own actions when he apologised to Mr Kenneth (see the GD at [164]–[176]).

(b) That the appellant's Police Statement was not reliable: this was rejected because it was the appellant himself who sought to adduce that statement, and in any event, PW10 did not apply any pressure on the appellant when recording the statement (see the GD at [177]–[185]).

(c) That the complainant had a motive to frame the appellant: all three possible motives which were canvassed by Ms Sharon – (i) jealousy; (ii) seeking attention; and (iii) career advancement – were not supported by the evidence that had been led and were, in any event, contrary to the objective facts (see the GD at [188]–[194]).

(d) That the complainant could not have been sexually assaulted because her subsequent public social media posts suggested that she was in good spirits: this was rejected because victims of sexual assault cannot be expected to react in any particular manner, and, in any event, her private social media account revealed a rather different picture of the complainant's mental state after the assault (see the GD at [195]–[200]).

18 The DJ was therefore satisfied that the Prosecution had proved its case beyond a reasonable doubt, and that the complainant's testimony was unusually convincing (see the GD at [201]).

19 Turning to sentence, the DJ applied the framework laid down in *Public Prosecutor v BDA* [2018] SGHC 72 ("*BDA*"). This required a consideration of offence-specific and offender-specific factors. After considering the extent of intrusion, the abuse of trust, and the harm caused to the complainant, as well as the lack of premeditation, the DJ placed the offence at the lower end of Band 2. He sentenced the appellant to 50 months' imprisonment and six strokes of the cane. This was just two months above the threshold for Band 2 in respect of which the starting point was four years' imprisonment and six strokes of the cane (see the GD at [202]–[228]).

## The parties' cases on appeal

### *The appellant's case*

20 The appellant submits that the DJ erred in convicting him despite the Prosecution not having proved its case beyond a reasonable doubt. The appellant makes the following points:

(a) The DJ ignored the deoxyribonucleic acid ("DNA") evidence which exculpated the appellant, given that the appellant's DNA was *not* found on the complainant's clothes.

(b) There were numerous inconsistencies in the complainant's account of the events before, during, and after the sexual assault.

(c) The evidence of the appellant was met with unfair scepticism by the DJ. This was evident in the DJ's treatment of: (i) the appellant's "defence" of alcohol-induced amnesia, (ii) the effect of the combination of the medication and alcohol that the complainant had ingested on her testimony, (iii) the DJ's unfair interpretation of the appellant's Police Statement, and (iv) the inconsistent accounts of the Zion Road Meeting.

21 The appellant also submits that in any event, the DJ imposed a manifestly excessive sentence.

***The Prosecution's case***

22 The Prosecution submits that the appeal should be dismissed. The Prosecution contends:

> (a) As regards conviction, the DJ correctly found that (i) the complainant was an unusually convincing witness whose account was cogent and consistent, (ii) there were no plausible reasons why she would fabricate her account, and (iii) any inconsistencies were not material or relevant. The DJ also correctly rejected the appellant's arguments regarding his alcohol-induced amnesia and the alleged mis-recording of the appellant's statement by the investigation officer.
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> (b) As to sentence, the DJ applied the correct sentencing framework and correctly considered the relevant factors.

23 Additionally, the Prosecution highlights that the charge framed at trial required amendment. The charge stated that "in order to facilitate the offence, [the appellant] wrongfully restrained [the complainant], by using force to pin her down and prevent her from getting off the bed". However, the appellant had already committed acts of sexual assault *before* pinning the complainant's shoulders down. It therefore could not be said that the appellant pinned the complainant down *in order to* facilitate the commission of the acts of sexual assault. The Prosecution therefore invited me to exercise my power under s 390(4) of the Criminal Procedure Code 2010 (2020 Rev Ed) (the "CPC") to amend the charge to remove the reference to the complainant being pinned down, which it submits will not prejudice the appellant.

**Issues before the court**

24 The following issues arise for my consideration:

(a) whether the complainant's evidence was unusually convincing;

(b) the significance of the DNA evidence;

(c) whether the charge should be amended; and

(d) if I am satisfied that the conviction is safe, whether the DJ erred in sentencing.

**Whether the complainant's evidence was unusually convincing**

***Understanding the "unusually convincing" standard***

25 The "unusually convincing" standard is typically invoked where the uncorroborated evidence of a witness forms the sole basis for a conviction (see *Public Prosecutor v GCK and another matter* [2020] 1 SLR 486 ("*GCK*") at [87]). As I elaborate below, it can be misleading to refer to this as a standard because it is not a standard of proof at all. Rather, it is a qualitative description of the overall calibre of the testimony of that sole witness. Its use stems from the recognition that while there is no formal legal requirement for corroboration under the law (see s 136 of the Evidence Act 1893 (2020 Rev Ed) (the "Evidence Act")), it may be unsafe to convict an accused person on the basis of the uncorroborated evidence of a witness unless such evidence is unusually convincing (see *XP v Public Prosecutor* [2008] 4 SLR(R) 686 ("*XP*") at [27]–[28]).

26 The abiding inquiry remains whether any reasonable doubt exists as to the accused person's guilt (see *XP* at [30]). As the Court of Appeal observed in *GCK* (at [91]), the "unusually convincing" standard is not a test at all, or even a

standard, but rather a *heuristic* tool designed to remind the adjudicator of the need for the sole evidence on which a conviction will rest to be sufficiently compelling in and of itself, leaving no room for any reasonable doubt (see *GCK* at [88] and [90]).

27 The matter is typically approached from two angles. First, there must be proof beyond a reasonable doubt *within* the Prosecution's case (see *GCK* at [134]). This means that the Prosecution's case must itself be internally and externally consistent, such that there is sufficient evidence to establish the accused person's guilt beyond a reasonable doubt at least on a *prima facie* basis (see *GCK* at [136]–[137]). If there are weaknesses or inconsistencies in the Prosecution's case that are sufficient to generate a reasonable doubt, the Defence may not even be called, and if it were called, weaknesses in the case for the Defence cannot ordinarily be called in aid to shore up what is lacking in the Prosecution's case (see *GCK* at [136] and [140]).

28 Second, there must be proof beyond a reasonable doubt on the *totality* of the evidence. This necessarily includes a consideration of the case mounted by the Defence, comprising both the assertions put forth by the accused person as well as the evidence he has adduced. The analysis at this stage is *comparative* in nature, given the usual context of competing testimonies (see *GCK* at [144]). This involves a contest between the account offered by the Prosecution and that by the Defence, with the Prosecution prevailing if after considering the entirety of the evidence there remains no reasonable doubt as to the accused person's guilt.

29 The question whether the uncorroborated evidence of the Prosecution's witness is "unusually convincing" will almost always arise when the totality of the evidence is assessed by the finder of fact after evidence has been led by both

the Prosecution and the Defence (see *GCK* at [143]). As the court noted in *GCK,* uncorroborated evidence can sustain a conviction only if it is "unusually convincing" because it will thereby be capable of overcoming any concerns arising from a lack of corroboration and the fact that *such evidence will typically be controverted by that of the accused person* (see *GCK* at [89]). In a similar vein, V K Rajah JA observed in *XP* that the "unusually convincing" standard "sets the threshold for the complainant's testimony to be preferred over the accused's evidence where it is a case that boils down to *one person's word against another's*" [emphasis added] (see *XP* at [31]). The point is that the complainant's evidence must be "unusually convincing" even in light of the accused person's competing account and evidence, such that proof beyond a reasonable doubt is established.

30 The present appeal presents an unusual situation because the appellant does not advance his own account of events. His case is simply that he does not remember the events surrounding the offence. He does not assert that he did not commit the acts complained of; nor that he had no intention to commit the offence; nor that the complainant consented to the acts of sexual intimacy. Instead of an archetypal "he said, she said" scenario, this appeal therefore concerns only the reliability of what "she said". The question which arises is how the analysis of whether the complainant's evidence is "unusually convincing" should apply in such a situation.

31 Where the accused person does not advance a countervailing version of events, the court is left to consider whether the complainant's testimony is "unusually convincing" in and of itself in the light of whatever has been raised in the course of cross-examination. That will mostly hinge on the consistency of the complainant's account, both internally and externally when viewed against the objective facts. Thus, barring major problems within the confines of

the complainant's evidence whether as a result of cross-examination or otherwise (for an example of such problems, see *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2019] 2 SLR 490 ("*Ariffan*") at [81]–[96]), if the finder of fact believes the witness and entertains no reasonable doubt as to the essential elements of that testimony and its sufficiency to establish the offence, that will be the end of the inquiry. Such evidence may be described as "unusually convincing" just because, when all has been said and done, it is believed to be true beyond any reasonable doubt. But this is not a case of finding the evidence to be so convincing that it outweighs a competing account to such a degree that it eliminates doubts that may otherwise have arisen from the latter, taken by itself. In that sense, in my judgment, there is a subtle difference in the application of that heuristic tool that is designed to aid in the approach to evaluating the complainant's testimony.

***The complainant's account***

32 In that light, I consider the complainant's evidence. In my judgment, the complainant's account of the events (detailed at [7]–[15] above) was both internally and externally consistent. It was detailed and clear especially in relation to the material facts surrounding the commission of the offence. There was broad and evident consistency across the three occasions on which the assault was recounted, namely in the Audio Recording, the Statutory Declaration and the evidence the complainant gave at trial. These were spread out temporally, ranging from being almost contemporaneous with the incident (the Audio Recording) to more than two years later (the evidence at trial). The complainant's version of events was also consistent with the evidence of those who met her right after the incident, including PW6, the hotel receptionist who saw and tended to the complainant in her distressed state, as well as her family members, who met her thereafter at Mr Henry's apartment.

33 Further, the Police Statement made by the *appellant* on 11 December 2019 was consistent with the broad narration by the complainant of the events. The relevant paragraphs read as follows:

> 9. I wish to state that on 16 Mar 2019 when I got up from the bed inside the guest room, I was shocked. I also did not see [the complainant] therein the apartment. I remember alighting the grab car with [the complainant] and hence I am very sure that [the complainant] should have come into my apartment. Moreover it is very unusual for me to be waking up from the bed in the guest room as I do not sleep therein. I have my own master bedroom and that gives no explanation for me to be seen in the guest room.
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> 10. I messaged [the complainant] twice to her mobile but to no avail. I do not know what happened to [the complainant] but I assume that something bad should have happened. *I assume that there could be some sexual engagement taken place* [*sic*] between me and [the complainant] as I was seen waking up in the guest room and [the complainant] was missing from the apartment then. I am very closely associated with [the complainant] and I am well aware of her behavior. *She is not the sort of women who simply leaves the apartment without even telling me or bidding me good-bye.*
>
> [emphasis added]

34 The appellant attempted to explain these paragraphs away by contending that the investigation officer had initially asked him "[d]on't you think there could have some [*sic*] sexual engagement between you and [the complainant]", to which he said he did not. However, since he had been *told* in the days following the assault that he had "misbehaved" with the complainant, he clarified with the investigation officer that there was a possibility of some sexual misconduct. In my judgment, this is unconvincing and at odds with the clear import of the Police Statement, which linked the assumption that some sexual engagement could have taken place to the appellant's *own observations* of the complainant's behaviour that morning, and his own belief that the complainant's absence without taking her leave suggested something out of the

ordinary had occurred. Notably, the appellant had the opportunity to read and amend the Police Statement.

35 The appellant's *own* account of the Zion Road Meeting also reinforced the fact that he recognised something of a sexual encounter had likely occurred between him and the complainant. As detailed above at [12(c)], after being scolded by Mr Kenneth for "misbehav[ing]" with the complainant, the appellant's own account was to the effect that he realised that Mr Kenneth was referring to something of an improper sexual nature that had taken place between him and the complainant. However, he neither sought any clarification from Mr Kenneth nor denied the accusation. Rather, the appellant testified that he simply responded saying "I'm sorry, uncle. I don't know what happen [*sic*]" and then left. Thus, both the Police Statement and the appellant's account of the Zion Road Meeting appeared to support the complainant's evidence that contact of a sexual nature had taken place. The key remaining inquiry was whether this was consensual. This was never suggested by the appellant. And everything in the complainant's conduct after the contact had taken place flies in the face of such a conclusion.

36 The appellant's case focused on raising seeming inconsistencies in the complainant's evidence which was said to render it not "unusually convincing".

37 However, several of the alleged inconsistencies were *not* in fact inconsistencies. I list some examples:

(a) The complainant testified that upon entering the Unit, the appellant gave her a tour of the Unit and showed her the area where Ms Sharon did her work. The appellant argued that these claims were contradicted by the fact that (i) the complainant had allegedly been in

pain from her injured ankle, and (ii) Ms Sharon was unemployed at the material time. There is in fact no apparent inconsistency in this regard because the appellant was not injured to the point of being immobile, a fact that was evident also in her subsequent movements during the night. Further, the complainant explained that by "work", she was not referring to Ms Sharon's "employment", but rather the area where she did her activities such as painting.

(b) As mentioned above at [7(e)], during the assault, the complainant mentioned an incident she had experienced in her younger days involving Mr Nathan, stating "it's happened to me before when I was younger" and "[t]his is something that's happened [*sic*] before when I was very young". The appellant contended that this episode was not mentioned in the Statutory Declaration and was described differently in the Audio Recording as compared to at trial. In the Audio Recording, the complainant said that the appellant backed off after she raised this episode, whereas at trial, the complainant testified that the appellant continued with other acts after she raised this episode. However, it is clear from the context of both the Audio Recording and the Statutory Declaration that these were intended to cover the main aspects of the assault and were therefore quite brief as compared to the complainant's evidence at trial. The complainant also explained that several details of the assault were omitted in the Audio Recording in order to present a less distressing account to her mother and friends. This was also the reason for the omission of the episode from the Statutory Declaration and the truncated version presented in the Audio Recording. In any event, a victim of a sexual assault cannot be expected to provide an identical account every time she discusses an offence with another

person (see *Ariffan* at [79]). The search rather is for broad consistency in the core elements.

(c) The appellant submitted that the complainant's testimony in respect of whether the appellant had in fact pinned her down was incoherent. The appellant noted that in the Audio Recording, the complainant only mentioned in response to a question from Ms Karen that the appellant was "like trying to" pin her down. In her Statutory Declaration, the complainant claimed that the appellant "ignored what [she] was saying and pinned [her]". At trial, she testified that the appellant "got on top of" her and had one hand on her "upper shoulder to hold [her] down". In my judgment, there is neither incoherence nor any material inconsistency in the complainant's accounts in this regard. She consistently averred that the appellant had pinned her down.

38 More importantly, the vast majority of the alleged inconsistencies raised by the appellant were not *material* inconsistencies relating to the facts surrounding the commission of the offence. Rather, they were minor discrepancies which could legitimately be attributed to human fallibility in observation, retention and recollection (see *Jagatheesan s/o Krishnasamy v Public Prosecutor* [2006] 4 SLR(R) 45 ("*Jagatheesan*") at [82]). Some examples include:

(a) Whether there were stairs leading up to the lift lobby of the block where the Unit was: the complainant testified that she had climbed stairs in order to get to this lift lobby, but when confronted with photographic evidence that there were in fact no such stairs, she conceded that there must have been no such stairs. In any event, it was not contested that the complainant was at the Unit that night and must have passed through the

lift lobby. Hence, the fact that she was mistaken as to whether there were stairs there or not was wholly irrelevant to any issue in the case.

(b) Whether Mr Harold had been in the taxi with the appellant and the complainant: the complainant could not recollect Mr Harold being in the taxi, although the objective evidence was that Mr Harold had paid for the ride.

(c) Whether the complainant had to unlock the metal grille at the entrance doorway of the Unit before leaving: the complainant consistently maintained that she searched the Unit for the keys to the metal grille in order to unlock it before leaving, whereas the appellant and Ms Sharon testified that the metal grille would not have been locked.

39 These were all wholly tangential to the issues of the case and pointed at the most to possible errors in recalling insignificant details. In no way could these discrepancies undermine the core elements of the complainant's evidence as to the sexual assault. There was only one apparent inconsistency which the appellant raised in relation to the complainant's evidence of the assault itself. The appellant submitted that the complainant was inconsistent on the nature of the contact when she described how the appellant had touched her vagina. In the Audio Recording, the complainant described the appellant as having "put his hand in [the complainant's] pants", with no mention of intruding into her underwear or her vagina. However, in her Statutory Declaration, the complainant stated that the appellant "put his hands in my panties and his fingers into my vagina". At trial, the complainant stated that the appellant only "touched [her] vagina". However, there was a significant difficulty for the appellant to pursue this at this stage.

40 First, as counsel for the appellant, Mr Paul Loy, acknowledged at the hearing before me, any such inconsistency was not put to the complainant during cross-examination. Thus, the complainant was not afforded the chance to explain the seeming differences in her three accounts on this point. This engaged the rule in *Browne v Dunn* (1893) 6 R 67 ("*Browne v Dunn*"), which is that "where a submission is going to be made about a witness or the evidence given by the witness which is of such nature and of such importance that it ought fairly to have been put to the witness to give him the opportunity to meet that submission, to counter it or to explain himself, then if it has not been so put, the party concerned will not be allowed to make that submission" (see *Hong Leong Singapore Finance Ltd v United Overseas Bank Ltd* [2007] 1 SLR(R) 292 at [42]). It has been acknowledged repeatedly that the rule in *Browne v Dunn* is not a rigid one and has to be applied with due regard to the totality of the evidence (see *Chan Emily v Kang Hock Chai Joachim* [2005] 2 SLR(R) 236 at [15] and *Arts Niche Cyber Distribution Pte Ltd v Public Prosecutor* [1999] 2 SLR(R) 936 at [48]). Nevertheless, submissions going to the "very heart of the matter" must generally be put to the witness (see *Lo Sook Ling Adela v Au Mei Yin Christina and another* [2002] 1 SLR(R) 326 at [40]).

41 As I indicated to Mr Loy during the hearing, the submission that the appellant's account of the assault should be rejected on the basis of an inconsistency lay at the very heart of this case and clearly engaged the rule in *Browne v Dunn*. It was therefore not open to the appellant to contend that by reason of the apparent inconsistency, I should reject the complainant's testimony. Of course, the veracity of the complainant's evidence must nonetheless be assessed for its overall consistency. However, in conducting that assessment, the court would be entitled to consider all plausible possibilities for

reconciling the alleged inconsistency, given that the complainant was not afforded the chance to provide her own explanation.

42 In my judgment, in the present case, the alleged inconsistency was plainly explicable. As observed above at [37(b)], the complainant did explain in a different context that the Audio Recording omitted the more distressing details of the assault for that reason. This was a plausible explanation for the lack of any mention of intrusion of the complainant's vagina. As for the Statutory Declaration in which she stated that the appellant "put … his fingers into my vagina", that did not necessarily reference penetration as opposed to substantial contact with the surface of the vagina. In any event, it was clear from the appellant's evidence at trial and the Prosecution's case that no case on penetration was being pursued. Even if the complainant had intended to reference penetration rather than touching in the Statutory Declaration, it was difficult to see how this affected either her evidence that the appellant had touched her vagina or her evidence regarding the assault as a whole.

43 In any event, it is also important to consider how any alleged inconsistencies may give rise to a reasonable doubt as opposed to an insubstantial or theoretical or fanciful doubt. A reasonable doubt is a *reasoned* doubt – a doubt for which one can give a reason, that is logically connected to the evidence (see *Jagatheesan* at [53], citing Wood JA in *R v Brydon* (1995) 2 BCLR (3d) 243 at [44]). This means that where a reasonable doubt is found *within* the Prosecution's case, the judge must be able to *particularise* the specific weakness in the Prosecution's own evidence that results in a failure to meet the threshold of proof beyond a reasonable doubt (see *GCK* at [137] and [146]).

44 The application of these principles invites scrutiny of the precise conclusions which the Defence submits the alleged inconsistencies support. In the present case, there were three possibilities: (a) the complainant had fabricated her account of events, (b) the complainant had hallucinated that the events took place, or (c) the complainant was genuinely mistaken as to what had happened.

45 There was little evidence to suggest that the complainant had fabricated her account of events. When asked at trial why the complainant would make such allegations against him, the appellant initially replied that he "wouldn't know". It was only after this question was repeated several times that the appellant alluded to the fact that he and Ms Sharon, as well as Mr Henry and Ms Karen, had children. Even then, the appellant qualified his statement by saying "I'm not sure whether there is anything to do with that". In so far as the Defence was attempting to rely on this testimony as evidence that the complainant had fabricated her evidence because of jealousy, that struck me as fanciful.

46 Other evidence relating to the possibility of fabrication came from Ms Sharon. She sought to impute three possible motives for the complainant to frame the appellant: (a) the appellant was jealous of Ms Sharon conceiving a child and attaining motherhood; (b) the appellant was seeking attention and wanted her family's sympathy; and (c) the appellant was involved in working against sexual violence directed at women for a non-governmental organisation and believed that making such allegations would advance her career. However, these allegations were made in a notably tentative and qualified fashion, with Ms Sharon stating "[w]hether she was lying or not, that is a question that I wouldn't know"; "I can only think of theories as to why she might do something like this but then again it's just my own feelings and my own theories"; "I

wouldn't say that she was faking"; and "it's not for me to say whether she had lied or not, I wouldn't know". These supposed motives were plainly in the nature of theoretical surmises and conjectures rather than concrete allegations that the complainant had fabricated her evidence. In any event, the suggested motives were not plausible ones which could explain the complainant's detailed and grave allegations against the appellant, especially given the evidence that their relationship prior to the incident had been affectionate and close. Moreover, the very fact that this was an opportunistic event rather than a premeditated one, a point made by the appellant in aid of his submissions on sentence before the DJ, completely cuts against the idea of the complainant, on the spur of the moment developing a grand scheme to fabricate the entire incident driven by a sense of animus.

47 There was also little to support the appellant's submission that the complainant could have hallucinated that the events took place. It was undisputed that the complainant was diagnosed with mixed anxiety depressive disorder in August 2018 and had taken the prescribed Lexapro anti-depressant on the evening of 14 March 2019, which was the day before the assault. Under cross-examination, the complainant's psychiatrist, PW9, testified that (a) hallucinations could very rarely be a side effect of taking Lexapro; (b) if Lexapro interacts with alcohol, it could worsen the former's side effects; and (c) Lexapro takes one to two weeks to completely clear out from the body's system. However, he elaborated that while taking Lexapro could "theoretically" cause hallucinations, he had never seen that happen in practice and the complainant had never exhibited any psychotic symptoms whilst under the medication. I find it highly implausible that the effects of Lexapro caused the complainant to hallucinate the assault.

48 The remaining possibility is that the complainant was simply mistaken in her recollection of the events. However, this possibility only matters if the complainant was mistaken as to material details involving the assault itself. As discussed above, the inconsistencies raised by the appellant were either not inconsistencies in any real sense or could only be described as potential inconsistencies that concerned peripheral details and could easily be attributed to the usual deficiencies in human observation, retention and recollection. And even if there was an inconsistency in relation to the extent of the intrusion and whether it extended to vaginal penetration, this was ultimately immaterial to the charge, which referred only to the touching of the complainant's vagina, and this affords no basis at all for concluding that every other part of the complainant's evidence was to be rejected. Indeed, the complainant's testimony in respect of the assault itself was detailed and highly consistent, and I find it wholly implausible that the complainant was mistaken with respect to the assault itself having taken place as she described it.

49 Having examined and addressed the implausibility of the three possibilities offered by the Defence, I find that no *reasoned* doubt arises in respect of the complainant's evidence and the Prosecution's case. Given the consistency in the complainant's evidence and the lack of any countervailing account, I am satisfied that the complainant's evidence was "unusually convincing" and that the Prosecution has discharged its burden of proof beyond a reasonable doubt.

50 I note for completeness that the appellant raises a "defence" of alcohol-induced amnesia. In my judgment, this does not raise a reasoned doubt. The appellant contends that the DJ erred in rejecting this "defence" on the basis that he did not adduce medical evidence in support. He submitted that he had not sought medical treatment for these episodic lapses of memory because it was

clear they were due to alcohol, and the DJ should have decided this issue as a factual matter that did not require expert assistance. To begin with, the legal relevance of this position is unclear, since the appellant is not relying on his intoxicated state to invoke a *legal* defence. Indeed, as the Defence acknowledged before the DJ, the fact that there was memory loss after an event does not mean that the event did not happen or that the requisite knowledge or intention in relation to the relevant actions was absent during the event. Thus, even taking the appellant's case at its highest, his inability to remember anything about the assault does not absolve him of liability for the offence.

**The significance of the DNA evidence**

51 Other than challenging the complainant's testimony, the appellant also relies on the DNA evidence from the appellant's clothing in his effort to bolster his case. The items of clothing in question are the complainant's jumpsuit, bra, and panties, which were placed in a plastic bag and then in a closet after she returned to Malaysia. The plastic bag was not opened until it was handed over to the police. Tests were conducted by PW4, who was a forensic scientist with the Health Sciences Authority, on the interior and exterior of the bra, the interior and exterior of the front of her panties, as well as the exterior front chest area and exterior back area of her jumpsuit. DNA belonging to an unidentifiable female was obtained from the bra and panties. However, no interpretable DNA profiles were obtained from the jumpsuit. PW4 explained at trial that this was possibly "due to insufficient DNA being detected or simply the presence of too many persons being present in the DNA profile".

52 The appellant contends that the *absence* of his DNA on the complainant's clothing undermines the allegation of sexual assault. He relies on *Mervin Singh and another v Public Prosecutor* [2013] SGCA 20 ("*Mervin*

*Singh*") at [44], where the Court of Appeal found it significant that the first appellant's DNA was not found on any of the exhibits, including a pink box containing the drugs. The court on that occasion observed that the absence of the first appellant's DNA supported his case that he did not open the pink box. The appellant before me relies on the same point and suggests that the DJ erred in two related aspects. First, the DJ erred in stating that forensic analysis failed to produce any results of value. In so far as it showed the *absence* of the appellant's DNA, the appellant submitted that it was relevant in appearing to contradict the complainant's version of events. Second, the DJ erred in concluding that the DNA evidence had been substantially degraded. To the contrary, great care had been taken by the complainant and her mother in respect of the items of clothing to preserve the DNA evidence.

53 In response, the Prosecution relies on *Mui Jia Jun v Public Prosecutor* [2018] 2 SLR 1087 ("*Mui Jia Jun*") at [62], where the Court of Appeal noted that the absence of DNA may be *neither conclusive nor even necessarily probative*, whereas the presence of DNA is generally probative in establishing that the subject did in fact come into contact with the surface or object on which his DNA was found. In any event, given that the appellant and the complainant had spent hours in close proximity before the sexual assault, the inability to identify any of the appellant's DNA on the jumpsuit cannot bear any evidential significance since they certainly did have some physical contact during the evening.

54 At the hearing, both parties sought to persuade me of the probative value (or lack thereof) of the absence of the appellant's DNA on the items of clothing, primarily by arguing over the persuasiveness of *Mervin Singh* and *Mui Jia Jun*. With respect, I think they missed the point. The significance of DNA evidence in every case is fact-sensitive and cannot be resolved by a contest of legal

authorities. Instead, attention should be directed to *what* the results suggest. In this connection, I think it is helpful to draw a distinction between a positive finding of DNA and a negative finding of DNA.

55 A positive finding of DNA will generally be probative in establishing that the party in question did come into contact with the item. Although this was a point made in *Mui Jia Jun* at [62], that is so not as a matter of legal principle but just of viewing the physical evidence as a matter of fact and of common sense. It follows that such evidence alone may not establish *beyond a reasonable doubt* that the party in question committed the offence, if there are other reasonable explanations for the presence of DNA. To illustrate, in *Haliffie bin Mamat v Public Prosecutor and other appeals* [2016] 5 SLR 636 at [49], the Court of Appeal accepted the appellant's argument that while his DNA was found in the complainant's fingernail clippings, this did not *inevitably* mean that he had been scratched by the complainant. The DNA evidence was of limited probative value because there was no evidence as to whether the appellant's DNA could *only* have gotten into the complainant's fingernails if she had scratched him, or if mere contact between the parties was sufficient.

56 On the other hand, the inability to find DNA of the accused person will often be a neutral fact in and of itself (see *Beh Chew Boo v Public Prosecutor* [2020] 2 SLR 1375 at [65]). It is not necessarily probative in establishing that the party did not come into contact with the item, because such inability may arise from any of several possible causes (see *Gopu Jaya Raman v Public Prosecutor* [2018] 1 SLR 499 at [82]). For instance, it may be so because the party in question indeed did not come into contact with the item. It may also be a false negative, such as where the party came into contact with the item but: (i) was a low shedder and therefore left too little DNA behind; (ii) the DNA left behind was degraded due to the conditions in which the item was stored; and/or

(iii) the item had been cleaned to remove traces of DNA (see, for instance *Public Prosecutor v Omar bin Yacob Bamadhaj* [2021] SGHC 46 at [138]). Hence, absence of proof, in this context, is not proof of absence. It follows that if a party wishes to rely on a negative finding of DNA to support its case, sufficient evidence should be led to establish whether this was probative of the absence of contact or if it was a false negative, and if it is the latter, the possible reasons for this.

57 I do not think any of this was done in this case. It was the appellant who sought to rely on the absence of any positive identification of his DNA as being probative of the fact that he did not commit the offence. But there was limited evidence as to the reasons why it had not been possible to identify the DNA of the appellant. Both the examination and cross-examination of PW4, who was the expert on this issue, was conducted in a manner that did not ultimately get to the heart of this issue. I highlight the following two examples. First, no interpretable DNA profiles were obtained from the jumpsuit, despite multiple people having come into contact with the exterior of the jumpsuit, including the appellant, the complainant and PW6. As mentioned above, PW4 explained at trial that this could be due to insufficient DNA being detected or the presence of too many persons in the DNA profile. He also explained that factors that could affect the deposit of DNA on a piece of clothing included: (a) the kind of touch, and whether this was gentle or forceful, (b) the duration of touch, and (c) characteristics of the person performing the touch, and whether that person was a "low or high shedder". This point could have been taken further in the following aspects:

(a) Questions could have been asked as to whether tests could have been and/or were conducted to determine whether the appellant or the complainant (or, for that matter, PW6) were low or high shedders. This

might have provided some explanation for the results obtained. For instance, if there was evidence that all three of the aforementioned persons were low shedders, this might explain why none of their DNA was found on the jumpsuit. On the other hand, if the appellant was a low shedder, this might provide one possible explanation for why the appellant's DNA was not found on the jumpsuit.

(b) Similarly, questions could have been asked as to whether one explanation for why the complainant's DNA was found only on her undergarments and not on the jumpsuit might plausibly be due to degradation of any such DNA.

(c) Questions could have been asked as to why tests had been conducted only on the exterior front chest area and exterior back area of the jumpsuit, and not the interior of the jumpsuit. It was conceivable that no interpretable DNA profiles could be extracted due to too many persons having come into contact with the exterior of the jumpsuit. But questions could have been asked as to whether it was standard protocol for only the exterior of clothing to be tested, and how the test results may have differed had the interior of the jumpsuit been tested.

58 Second, there was limited evidence as to whether the DNA on the items of clothing might have substantially degraded with the passage of time. Most of the evidence on this was led by the Prosecution. At trial, the Deputy Public Prosecutor ("DPP") asked about the factors affecting the longevity or the degradation of DNA that has been deposited on a surface. PW4 testified that these included "a high temperature, a high humidity in the presence of ultraviolet, and … the presence of microbial activity". The DPP also asked whether the conditions of storage in the present case would have affected the

DNA. PW4 was unable to specifically comment on it, but he accepted that exhibits stored in an indoor environment without any air-conditioning were more likely to experience a higher degree of the breakdown of DNA, as opposed to an environment where the temperature and humidity were well controlled. Despite it being the appellant's case that the absence of his DNA *could not* have been due to degradation, counsel for the appellant at trial did not ask PW4 any questions on this.

59 In these circumstances, I am not satisfied that the inability to positively identify the appellant's DNA on the jumpsuit and undergarments was ultimately probative. Given the limited evidence elucidated from PW4 at trial, there were various plausible explanations for the results, such that it failed to raise a reasonable doubt as to whether the appellant had committed the offence. Aside from all this, the appellant's position also strikes me as inherently untenable. I say this because it is notable, as the appellant himself submits, that the complainant had taken great care to preserve the DNA evidence on her clothes. But it would make no sense at all for the complainant to have done so if, as the appellant implicitly contends, the correct inference to be drawn from the inability to positively identify his DNA is that assault did not take place. To put it simply, such care would not have been taken unless the complainant believed it would support her allegation.

**Whether the charge should be amended**

60 I turn to the proposed amendment of the charge. In its written submissions, the Prosecution applied to amend the charge. During the hearing, it was observed that this was the second application for amendment, with the first being on 15 June 2022 by the Prosecution at the close of its case. That application had been granted by the DJ.

***The first application for amendment***

61 I briefly recount the first application for amendment because some points were raised as to the inferences that I should draw from this fact. The original charge dated 1 February 2021 was as follows, with the amendment being to remove the words "and breast" which are emphasised in bold below:

> You are charged that you, on 16 March 2019, sometime between 3.00am and 7.00am, at [address redacted], Singapore, did use criminal force on [the complainant], then a 26-year-old female, *to wit*, by removing the top half of her jumpsuit and bra and touching her bare breasts, inserting your hand beneath her underwear and touching her vagina, pulling her hand to touch your penis, and kissing her face, lips, neck **and breast**, thereby intending to outrage her modesty, and, in order to facilitate the offence, you wrongfully restrained [the complainant], by using force to pin her down and prevent her from getting off the bed, and you have thereby committed an offence under s 354A(1) of the Penal Code (Cap 224, 2008 Rev Ed).

62 The Prosecution explained that the words "and breast" were included in the original charge because the complainant stated in the Statutory Declaration at para 9 that the appellant "had his face near [her] breast", which the Prosecution had mistakenly understood to mean that the appellant had kissed her breast. The appellant on the other hand urged me to infer from this amendment that the complainant had been inconsistent in her account of the events surrounding the offence. According to the appellant, this was supported by *XP*, where Rajah JA observed that the first complainant's statement that his nipples had been rubbed in the original charge and the Prosecution's application to amend the charge to remove that reference subsequently was "a very disturbing development that severely compromised [the complainant's] credibility and the overall strength of the charge" (see *XP* at [50]):

> This account was conspicuous for the glaring and deeply troubling absence of a crucial particular in the original charge: the allegation that the appellant had rubbed E's nipples. As the Judge noted at [99], the Defence mounted no less than four

> challenges to the validity of the original charge during the course of the trial: first, when E was testifying; second, after he had finished testifying; third, when the Prosecution closed its case; and fourth, during closing submissions. At the close of the Prosecution's case the charge was amended pursuant to an application by the Prosecution and only then was the reference to the rubbing of E's nipples removed. The Judge found (at [100]) that:
>
> > [T]here was some evidence in support of the said charge under section 354 [of the Penal Code] albeit the description of the actual nature of the criminal force applied on E needed to be amended. In any event, I held that this was not the appropriate time to consider such an application.
>
> She thought (at [104]) that:
>
> > [C]onsidering where the massage was conducted, the manner in which it was conducted and the reaction of E, it was extremely difficult to infer that the [appellant] only intended a regular massage …
>
> Surprisingly, the Judge did not subsequently consider the significance of E's failure to state specifically that his nipples had been rubbed; she seemed to have ignored this preliminary issue in reasoning that E's allegations were "not inherently incredible" (GD at [110]), notwithstanding that there was no single clear account of the incident to be discerned from the evidence. This was plainly wrong. The original charge could only have been formulated on precisely what the complainant had originally disclosed to the investigating officer ("IO"). The complainant's failure to repeat such a fundamental allegation that formed the essence of the original charge, on the stand, despite some rather pointed and lengthy questioning by the Judge herself was, and should have been recognised as, a very disturbing development that severely compromised E's credibility and the overall strength of the charge.

63 In my judgment, *XP* does not stand for the proposition that any application to amend the charge must necessarily suggest that the complainant had been inconsistent in his or her account of the events. Although Rajah JA was of the view in *XP* that the original charge "could only have been formulated on precisely what the [first] complainant had originally disclosed to the investigating officer", and therefore any amendment to the charge must affect the credibility of that complainant, this is not always so and it may be the case

that the amendment results from causes that have nothing to do with the complainant. Indeed, in his earlier decision in *Jagatheesan* at [87], Rajah JA observed that while retracted statements are "an instance of inconsistency in the witness's testimony", whether this affects the credibility of the witness depends on whether a reasonable and reliable explanation can be furnished for the retraction. Taking this one step further, if the amendment of the charge was due to circumstances outside the complainant's control, such as a mistake on the investigating authorities' part, there would be no basis for drawing any inference from this that is adverse to the complainant or to his or her credibility.

64 In this case, the first application for amendment did not appear to arise from any inconsistency on the complainant's part. In the Audio Recording, she did not positively assert that the appellant kissed her breast. Subsequently, in the Statutory Declaration at para 10, she said that the appellant's face was near her breast. In the First Information Report dated 28 November 2019, her statement was short: "On the above mentioned date and time, I was being molested by [the appellant]. That is all". Finally, during the trial, she testified that the appellant "kissed my neck … then, he proceeded to go to my breast area" and "his face was near my breasts". At no time did she say that the appellant kissed her breast. Accordingly, I am satisfied that this amendment does not adversely impact the complainant's credibility.

***The second application for amendment***

65 The second application for amendment, which was made before me, was to remove the words "pin her down and" to reflect the fact that the appellant's pinning of the complainant down happened *after* he had already committed several acts of sexual assault:

> You are charged that you, on 16 March 2019, sometime between 3.00am and 7.00am, [address redacted], Singapore, did use criminal force on [the complainant], then a 26-year-old female, *to wit*, by removing the top half of her jumpsuit and bra and touching her bare breasts, inserting your hand beneath her underwear and touching her vagina, pulling her hand to touch your penis, and kissing her face, lips and neck, thereby intending to outrage her modesty, and, in order to facilitate the offence, you wrongfully restrained [the complainant], by using force to **pin her down and** prevent her from getting off the bed, and you have thereby committed an offence under s 354A(1) of the Penal Code (Cap 224, 2008 Rev Ed).
>
> [emphasis added in bold]

66 It is not disputed that the appellate court has the power under s 390(4) of the CPC to frame an altered charge – whether or not it attracts a higher punishment – if it satisfied, based on the evidence before the court, that there is sufficient evidence to constitute a case reflected in the altered charge that the accused person has to answer. Pursuant to s 390(7), if the accused person intends to offer a defence to the altered charge, the appellate court may order a retrial (see s 390(7)(*a*)) or convict the accused person on the altered charge if there is sufficient evidence to do so (see s 390(7)(*b*)).

67 I allow this amendment because I agree with the Prosecution that the charge as it stands suggests that the appellant pinned the complainant down *in order* to facilitate the commission of the acts of sexual assault. This is contrary to the sequence of events, which suggests that it was *after* committing several acts of sexual assault (including trying to kiss her, forcing her hand onto his penis, and touching her vagina) that the appellant pinned the complainant down. As the element of pinning the complainant down occurred *after* several acts of sexual assault, it could not have been done "in order to commit or to facilitate the commission" of the offence (see *GDC v Public Prosecutor* [2020] 5 SLR 1130 ("*GDC*") at [2]).

68 In *GDC* at [29], I observed that the power under s 390(4) of the CPC should be exercised cautiously, subject to the safeguards against prejudice to the accused person. The court must be satisfied that the evidence led below would have been the same had the amended charge been presented at trial. In my view, the amended charge does not change the complexion of the case brought by the Prosecution, which was that the appellant had prevented the complainant from leaving the bed where the assault was taking place. This is supported by the complainant's testimony during cross-examination that each time she tried to "get up from the bed or walk away", she would be held back down or pushed back down onto the bed by the appellant. This occurred several times throughout the course of the offence. The removal of any mention of the appellant's act of pinning the complaint down on the bed does not materially change the nature of the charge, because that is only one *example* of how the appellant prevented the complainant from leaving the bed. Neither would the evidence led below have been different even if the amended charge had been presented at trial.

69 This may be contrasted with *GDC*, where the Prosecution proposed replacing the original aggravating element of causing hurt by slapping the complainant with a different element of wrongful restraint by pulling the complainant's hair. The Prosecution also proposed amending the charge to remove reference to the touching of the complainant's breast, and instead focusing solely on the appellant's act of forcing the victim's head towards his groin. That proposed amendment changed the complexion of the case. The zeroing in on the single act of forcing the complainant's head towards his groin meant that the evidence pertaining to this had to be scrutinised. But it was unclear whether the appellant's penis was exposed at that time, and if it was not

exposed, then it was unclear whether an offence of outrage of modesty could even be said to have been made out (see *GDC* at [29]–[30]).

70 Although s 390(7)(*a*) of the CPC empowers me to order a retrial, this is unnecessary given that it is clear the evidence would have been the same had the amended charge been presented at trial. This is because, as I have already noted, the fact of the appellant pinning the complainant down is but one example of him generally preventing her from leaving the bed. There is sufficient evidence of the latter to make out the charge that he restrained her to outrage her modesty.

71 Pursuant to s 390(6) of the CPC, I am required to ask the appellant to indicate whether he intends to offer a defence to the amended charge. I have since done so and obtained confirmation from the appellant that his defence to the amended charge would remain the same as his defence to the original charge. In the circumstances, I alter the charge by deleting the words "pin her down and". The charge accordingly reads as follows:

> You are charged that you, on 16 March 2019, sometime between 3.00am and 7.00am, [address redacted], Singapore, did use criminal force on [the complainant], then a 26-year-old female, *to wit*, by removing the top half of her jumpsuit and bra and touching her bare breasts, inserting your hand beneath her underwear and touching her vagina, pulling her hand to touch your penis, and kissing her face, lips and neck, thereby intending to outrage her modesty, and, in order to facilitate the offence, you wrongfully restrained [the complainant], by using force to prevent her from getting off the bed, and you have thereby committed an offence under s 354A(1) of the Penal Code (Cap 224, 2008 Rev Ed).

72 Having considered the nature of the defence and having satisfied myself that there is no prejudice to the appellant, I affirm the conviction based on the amended charge.

**Whether the DJ erred in sentencing**

73 I turn finally to sentence. The appellant submits that the sentence imposed (50 months' imprisonment and six strokes of the cane) is manifestly excessive for two reasons: (a) the DJ failed to make a holistic assessment of the harm caused to the complainant, especially since her social media posts suggested that she was in good spirits and therefore "not behaving in the manner of a victim of a supposed sexual assault", and (b) the DJ erred in stating that the appellant intruded on the complainant's vagina twice, when on the evidence, it appeared he had only touched her vagina once if at all.

74 The first point is without merit since it is trite that victims of sexual assault react in different ways. No reliable inference can or should be drawn from the complainant's social media posts on her public account. In any event, the social media posts made by the complainant on her private account revealed that her mental state had suffered after the sexual assault. I also note the diagnosis of PW9 some months after the assault that the complainant suffered from PTSD.

75 In respect of the second point, it does appear that the DJ mistakenly stated that the appellant intruded into the complainant's vaginal area twice (see the GD at [29]–[30]). Based on the complainant's evidence, it appears that the appellant only touched her vagina once. Nevertheless, this did not feature in the DJ's assessment of the appropriate sentence. In his analysis of the extent of intrusion, the DJ simply referred to the fact that the appellant intruded into the

victim's private parts multiple times over the course of a prolonged assault, including placing his hand on her breast over her clothes, pulling down her jumpsuit, touching her vaginal area under her underwear and grabbing her breasts (see the GD at [211]). Thus, the DJ's mistake did not appear to influence his decision on sentence. In any event, the sentence imposed, which was two months' imprisonment above the lowest end of Band 2 of the sentencing framework laid out in *BDA*, could not be said to be excessive even taking into account the fact that the complainant's vagina was touched once and not twice.

76 Having considered all the circumstances of the case in respect of both conviction and sentence, I dismiss the appeal.

**Observation: cross-examination of the complainant in sexual offence cases**

77 I observed recently in *Thangarajan Elanchezhian v Public Prosecutor* [2024] 6 SLR 507 ("*Thangarajan*") that given the heightened sensitivities at play when a complainant of a sexual offence gives evidence in court, the process of cross-examination must be approached with greater care. The court ought to assess the permissibility of each question or line of questioning based on the following two-stage framework (set out in *Thangarajan* at [65]–[74]). First, does the question or line of questioning relate to facts in issue or matters that need to be dealt with: in other words, is it relevant? Second, where the question or line of questioning is found to be relevant, is it nevertheless prohibited, for instance, by virtue of the Evidence Act, the Evidence (Restrictions on Questions and Evidence in Criminal Proceedings) Rules 2018, or because it perpetuates harmful stereotypes (otherwise known as "rape myths")?

78 The application of this framework to the facts of *Thangarajan* suggested to me that some lines of questioning had been impermissible. There, the accused

person was charged with an offence under s 354(1) of the Penal Code for outraging the modesty of the complainant on a public bus. His defence, which he maintained on appeal, was that the contact was purely accidental. Under the first stage of the framework, a line of questioning, pertaining to why the complainant did not seek help on the bus immediately, might have been impermissible. There was no indication that the complainant viewed the touching as accidental; nor was it suggested that the touching was consensual. And under the second stage of the framework, this line of questioning would likely have been caught under the prohibition in s 154 of the Evidence Act, as it sprang from the assumption that victims of sexual offences would report the offence immediately and/or necessarily react in a particular or predictable manner (see *Thangarajan* at [79]–[82]).

79 This exercise takes on a different complexion when the main "defence" advanced is that the accused person does not remember the relevant events at all, which is the appellant's case in this appeal. In this situation, the lines of questioning that are permissible at the first stage of the framework must necessarily be broader. Given that there is no affirmative defence advanced by the Defence, some room must be afforded to counsel to explore whether the complainant's version of the events is sufficiently cogent to meet the standard of proof beyond a reasonable doubt. I contrast this with a situation where the Defence advances various affirmative defences, where if lines of questioning are pursued that stray beyond these defences, that may tend to be impermissible for lack of relevance. This is, of course, subject to the safeguard at the second stage of the framework, which is that regardless of whether the Defence advances an affirmative defence, the questions or lines of questioning must not

be statutorily prohibited or perpetuate harmful stereotypes about victims of sexual offences.

Sundaresh Menon
Chief Justice

Paul Loy Chi Syann, Calvin Ong Yik Lin, and Tan Darius (WongPartnership LLP) for the appellant;
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