Chng Yew Chin v Public Prosecutor
[2006] SGHC 138

Case Number : MA 152/2005

Decision Date : 08 August 2006

Tribunal/Court : High Court

Coram : V K Rajah J

Counsel Name(s) : Harbajan Singh (Daisy Yeo & Co) for the appellant; Hay Hung Chun (Deputy Public Prosecutor) for the respondent

Parties : Chng Yew Chin — Public Prosecutor

Criminal Procedure and Sentencing – Sentencing – Principles – Appellant sentenced to term of imprisonment and caning for one of three charges for offences of outrage of modesty – Appellant suffering from nasopharyngeal cancer – Whether court should exercise judicial mercy on account of appellant's ill health and vary sentence of imprisonment and caning to fine

Evidence – Weight of evidence – Complainant sole witness to and victim of sexual offences committed by appellant – Whether complainant's testimony unreliable because of inconsistencies – When inconsistencies in testimony undermining witness's credibility

8 August 2006

V K Rajah J:

1 The appellant, Chng Yew Chin, a 43-year-old former supervisor with an air-conditioning company, was tried by a District Court on four amended charges pursuant to s 354 read with ss 73(1)(*c*) and 73(2) of the Penal Code (Cap 224, 1985 Rev Ed) ("PC") in District Arrest Cases Nos 44265 of 2005 to 44268 of 2005 ("DAC 44265/2005" to "DAC 44268/2005"). He was accused of outraging the modesty of his family's domestic helper, Aminah, who was employed by his 82-year-old mother. The amended charges are set out below:

(a) DAC 44265/2005:

> You, … are charged that you, sometime in August 2005, in a bedroom of block 12 Taman Ho Swee, unit #08-65, Singapore, did use criminal force on one Aminah, female aged 28, a domestic maid employed by your mother, one Ang Kuan, and working for your household at the said address, knowing it to be likely that you would thereby outrage the modesty of the said Aminah, to wit, by squeezing both her breasts and you have thereby committed an offence punishable under Section 354 read with Sections 73(1)(c) and 73(2) of the Penal Code (Chapter 224).

(b) DAC 44266/2005:

> You, … are charged that you, on 21 August 2005, in a bedroom of block 12 Taman Ho Swee, unit #08-65, Singapore, did use criminal force on one Aminah, female aged 28, a domestic maid employed by your mother, one Ang Kuan, and working for your household at the said address, knowing it to be likely that you would thereby outrage the modesty of the said Aminah, to wit, by touching and stroking her left buttock and your have thereby committed an offence punishable under Section 354 read with Sections 73(1)(c) and 73(2) of the Penal Code (Chapter 224).

(c) DAC 44267/2005:

You, … are charged that you, sometime in August 2005, in a bedroom of block 12 Taman Ho Swee, unit #08-65, Singapore, on another occasion, did use criminal force on one Aminah, female aged 28, a domestic maid employed by your mother, one Ang Kuan, and working for your household at the said address, knowing it to be likely that you would thereby outrage the modesty of the said Aminah, to wit by touching and patting her buttocks and you have thereby committed an offence punishable under Section 354 read with Sections 73(1)(c) and 73(2) of the Penal Code (Chapter 224).

(d) DAC 44268/2005:

You, … are charged that you, sometime in August 2005, in the kitchen of block 12 Taman Ho Swee, unit #08-65, Singapore, on another occasion, did use criminal force on one Aminah, female aged 28, a domestic maid employed by your mother, one Ang Kuan, and working for your household at the said address, knowing it to be likely that you would thereby outrage the modesty of the said Aminah, to wit, by slapping her buttocks and you have thereby committed an offence punishable under Section 354 read with Sections 73(1)(c) and 73(2) of the Penal Code (Chapter 224).

2 At the conclusion of the trial, the learned district judge convicted the appellant on the first, second and fourth charges (DAC 44265/2005, DAC 44266/2005 and DAC 44368/2005), but acquitted him of the third charge (DAC 44267/2005). The appellant was sentenced to four months' imprisonment and three strokes of the cane on the first charge and fined $3,000 per charge for the second and fourth charges.

3 This is an appeal by the appellant against all the convictions. In addition, the appellant appealed against the sentence for DAC 44265/2005. There was also a cross-appeal by the Prosecution against the sentences meted out in respect of DAC 44265/2005, DAC 44266/2005 and DAC 44268/2005. This cross-appeal was subsequently withdrawn when the Prosecution was informed of the appellant's present medical condition.

4 Upon hearing the appeal on 11 May 2006, I dismissed the appeal against the convictions. However, noting that the appellant continued to suffer from nasopharyngeal cancer, I adjourned the appellant's appeal against sentence, directing his counsel to obtain an updated medical report of his current state of health.

5 On 28 June 2006, I admitted into evidence Dr Leong Swan Swan's ("Dr Leong") medical report dated 29 May 2006, which records her current assessment of the appellant's health ("the medical report"). Dr Leong is a senior consultant at the Department of Medical Oncology at the National Cancer Centre, Singapore. I had prior to this adjourned hearing also requested Dr Leong to appear in person to clarify the medical report. After considering the circumstances of the case, the testimony of Dr Leong, as well as the medical report, I ordered that the appellant's sentence for DAC 44265/2005 be set aside and substituted a fine of $5,000 in lieu thereof. I now set out the reasons for my decision.

Factual matrix

6 The complainant, 28 years of age, an Indonesian national, was employed by the appellant's mother, Ang Kuan ("Ang"), as a domestic maid. Her work permit was valid from 28 June 2005 to 15 June 2007. She worked at an apartment where Ang stayed with her husband, Chng Bock Lim ("CBL") and her son, the appellant. Her duties included looking after CBL and the general household chores. It was not contested that instructions given by Ang in Hokkien to the complainant were often

translated by the appellant into the Malay language for the complainant because she did not have an adequate grasp of Hokkien.

The complainant's evidence

7 The complainant testified that about a month into her employment, she was instructed by Ang to massage the appellant's neck. These massage sessions would take place in the evenings in the bedroom occupied by the appellant.

8 According to the complainant, when she first started massaging the appellant, the latter did not use his hands to indicate when the massage should cease. He would simply tell her to stop by saying "*sudah*", which means "finished" in Malay. After some time, the appellant began using his hand to touch her buttocks in order to indicate that she could stop the massage. She testified that on each occasion that the accused touched her buttocks, she told him not to do so as she had a husband and children in Indonesia. The complainant also added that these incidents occurred on ten separate occasions in the month of August. The last incident took place on 21 August 2005.

9 The complainant also testified that on a Sunday afternoon in August 2005, the appellant squeezed her breasts during a massage session. On that day, CBL had been hospitalised and the appellant did not go to work. When the complainant told the appellant not to touch her, the appellant retorted that there were many women in Batam who liked him to do this. The complainant replied that she was not from Batam. The appellant then produced a 50,000 Indonesian rupiah note to show her. When the complainant asked if the appellant had been to Indonesia, the latter replied that he had been to Batam.

10 The complainant added that on five further occasions, the appellant touched and squeezed her buttocks while she was washing dishes at the sink in the morning. However, she admitted that she did not say anything to the appellant, thinking it was pointless and hoping he would stop.

11 The last incident of molest occurred on the evening of 21 August 2005. On that occasion, the appellant asked for a neck massage in his bedroom. The bedroom door remained open. After about eight to ten minutes of massage, the appellant touched her buttocks, saying, "it's already done". The complainant claims that when she told the appellant not to touch her, he remained silent.

12 The next day at about 7.00am, the complainant decided to file a police report ("the complainant's police report"). She left the flat not knowing where the nearest police station was until she met another Indonesian maid who directed her to the Radin Mas Neighbourhood Police Post. There, she filed her complaint lamenting that "almost everyday, he touched my buttocks, my body and one occasion, he touched my breasts also". The officer who recorded her statement, one Sergeant Chiang Kin Sun, testified that the complainant was crying. Another police officer, Sergeant Sabrina bte Mohamed, who assisted in the translation of the complainant's statement, also testified that the latter was "crying, sobbing" when she first saw her.

The appellant's statement recorded on 23 August 2005

13 The appellant's statement to the police was recorded on 23 August 2005 pursuant to s 121 of the Criminal Procedure Code (Cap 86, 1985 Rev Ed) ("the appellant's police statement"). In it, the appellant stated that:

(a) He did most of the communicating with the complainant because his mother, Ang, could not speak Malay or English.

(b) He was a frequent traveller to Batam, Indonesia and that he travelled there on weekends.

(c) He tapped the complainant's buttocks with his palms open and he could not remember if he did so gently or not.

(d) He did not have any intention of molesting her and that whenever he touched her buttocks, she did not say anything to him, and therefore he thought it was acceptable to do so.

The appellant's testimony

14 The appellant denied that he had touched the complainant in his bedroom and in the kitchen on her buttocks with the intention of outraging her modesty. He testified that when he touched her, it was to indicate that she should stop the massage or that she should move aside because she was blocking his passage to the toilet.

15 According to the appellant, it was his mother, Ang, who asked the complainant to massage him. This was to alleviate the stiffness in his neck following radiotherapy treatment for a relapse of cancer in his left neck in 2003. On each occasion, the appellant would ask the complainant to apply balm with her fingers to his neck from the back of his left ear to the left top shoulder. He said that whenever he felt pain during the massage, he would wave his right hand to signal her to stop:

> While she was applying medicine to me, I did do this [witness waves] it touched her body. I do not know if I touched her buttocks.

The appellant claims not to have known if he had touched her. He claims that even if he did, he did not stroke the complainant's buttocks.

16 The appellant further adds that the reason he did not verbally instruct the complainant was because his mouth would be dry due to a lack of saliva.

17 In relation to the alleged molestations in the kitchen en route to the toilet, the appellant said that he could not verbally ask the complainant to move out of his way because of phlegm in his throat which prevented him from speaking properly. Therefore, he touched her by waving his hand.

18 The appellant further testified that he had never touched or squeezed the complainant's breasts.

19 Finally, with reference to the last occasion on which he was alleged to have touched the complainant's buttocks, *ie* 21 August 2005, the appellant stated that he had gone out that night. To prove this, he produced records of calls made on his handphone to show that at 7.23pm, he had used the SingTel service on his handphone to ask for 4D results. He claimed he would not have used this service had he been at home, since he could have checked the results on the Teletext.

The defence

20 To support the testimony of the appellant, the Defence made the following arguments. First, the Defence argued that the complainant had fabricated allegations of molestation in order to leave the employment of Ang and return to Indonesia without having to either repay her agent or procure her own air ticket. Second, it was submitted that the appellant's police statement was inaccurately recorded. In particular, it was contended that his admission to touching the complainant's buttocks

(see [13] above) was inserted by the recording officer even though he had informed the officer that he was not aware which part of the complainant's body he had touched; also in this connection, he had been promised that no charges would be pressed against him if he agreed to such an admission. It was alleged that the recording officer did not interpret his statement to him (the interpreter having come into the interview room only after the appellant had signed the statement) and that he was simply instructed to sign the statement once it had been typed.

21 It was also pointed out that Lina, the wife of the appellant's neighbour, was an Indonesian, from the same village as the complainant. Thus, it was argued, the fact that the complainant did not confide in Lina suggested that she had fabricated the allegations to the police.

22 The Defence also relied on Ang's statements, that the complainant had been continuously borrowing money, to undermine her credibility. It bears mention that Ang's testimony in court was inconsistent with her earlier statement to the police on 26 August 2005. The inconsistency related to the following portion of Ang's police statement:

> Q: How long does the massage usually last?
>
> A: It's very fast about 5 to 10 minutes and my son has the habit of saying loudly, "HO" (meaning good in Hokkien) and will thrust his hands sideward but I have never seen his hand hitting [the complainant].

When cross-examined, Ang sought to disavow any association with the above statement. Instead, she blamed the interpreter for having translated her statement wrongly.

The trial court's decision

23 Having considered the entirety of the evidence before her, the learned district judge was of the view that the Prosecution's case in respect of DAC 44265/2005, DAC 44266/2005 and DAC 44268/2005 had been proved beyond reasonable doubt: see *PP v Chng Yew Chin* [2006] SGDC 36 ("the GD"). However, she found that DAC 44267/2005 did not disclose a specific offence and that, in any event, the Prosecution had not led evidence to support this charge. The appellant was accordingly acquitted on DAC 44267/2005.

24 The district judge's findings may be briefly summarised as follows. First, she was satisfied with the complainant's testimony during cross-examination. The complainant was able to provide "clear evidence" as to the incidents of molest and was also able to furnish "vivid" and "pertinent" details. This, she reasoned, would not have been possible had the complainant concocted the allegations. The district judge also found the complainant's police report on 22 August 2002 to be consistent with her testimony in court. Such consistency, according to the district judge, provided "effective corroboration" of the substance of the complainant's evidence: see [38] and [39] of the GD.

25 Second, the district judge was impressed by the complainant's knowledge of the appellant's frequent visits to Batam. She reasoned that the complainant could not have known about such visits unless the appellant had told her himself. Such information constituted an important detail in the complainant's account of how the appellant had responded to her after touching her breasts (see [9] above). That the appellant frequently visited Batam is undisputed.

26 Third, the district judge dismissed the Defence's suggestion that the complainant would have told Lina of the molestations if they had indeed occurred; according to Lina's own testimony, the two

were hardly close friends and never ventured beyond conversation about the mundane: see [51] of the GD.

27 Fourth, the district judge dismissed the appellant's testimony that he was unable to instruct her because his health condition was affecting his salivary glands. Such a rejection stemmed from the district judge's own observation during the trial that the appellant had no problems testifying in court without having to drink on a regular basis. Therefore, given that each massage lasted for only five to ten minutes at the most, it was improbable that his speech would have been so severely impaired: see [59] of the GD. There was also evidence that he was able to give oral instructions to his subordinates at his workplace with little difficulty; he would not have been able to do this if his condition was as serious as he had alleged: see [60] of the GD. Furthermore, his testimony in court that he did not know which part of her body he had touched, either in the bedroom or in the kitchen, was plainly contradicted by his earlier statement to the police that he had "tapped" the complainant on her buttocks in order to signal that she should stop massaging him or that she should move aside so that he could go to the toilet: see [61] and [62] of the GD. As for the appellant's allegation that the statement was not recorded properly and that he had been induced into admitting that he touched the complainant's buttock, the district judge noted that the Defence itself had waived its right to cross-examine the recording officer: see [64] of the GD. Indeed, the district judge felt that if the appellant had been induced into admitting that he had touched the complainant's buttock, there was no reason why the recording officer would not also have "forced" the appellant to admit to squeezing the complainant's breasts: see [65] of the GD.

28 Fifth, the district judge rejected the alibi offered by the appellant for the incident on 21 August 2005. She held that even if the appellant had been out at 7.23pm that evening, this did not exclude the possibility of his returning later in the evening for a massage: see [70] of the GD.

29 Sixth, the district judge did not accept the Defence's contention that the complainant had a motive to lie: see [73] and [74] of the GD.

30 Finally, she found Ang's credibility to be sorely lacking given her inclination to modify her testimony to redress all discrepancies: see [21] above; and [75] to [79] of the GD.

The appeal against conviction

31 The appeal against conviction is based on the following contentions:

(a) The complainant's testimony is unreliable because she had confused the dates of certain events and she had exaggerated the frequency of the molestations by alleging that she had been molested "everyday".

(b) With respect to the incident when the appellant allegedly squeezed the complainant's breasts, there was a discrepancy between the evidence she first gave and the evidence she gave when she was queried by the court.

(c) It was clear to the complainant that the object of touching her was to indicate to her (when in the bedroom) to stop the massage and (when in the kitchen) to make room for him to pass through.

(d) The appellant had an alibi on the evening of 21 August 2005 and could not have molested her on that day.

(e) The complainant failed to complain to her neighbour about the molestations despite her neighbour being from the same village in Indonesia.

(f) The complainant would have known, having accompanied Ang to the market, that there was a neighbourhood police post at Havelock and thus her story about not knowing where to go and how she ended up at the Radin Mas Neighbourhood Police Post was contrived.

(g) There was little opportunity for the appellant to have molested the complainant given that his father, CBL, had been hospitalised on 31 July 2005 and died on 9 August 2005. The appellant was away for four days after CBL's demise and there were visits by relatives and friends to the house for a period of two to three weeks after CBL's demise.

32 Given the earlier narration of the district judge's decision, it is amply apparent that all submissions made by counsel for the appellant on appeal had already been addressed both scrupulously and comprehensively at first instance. Having examined the evidence available, I see no reason to question the learned district judge's findings of fact. However, out of deference to the spirited efforts of counsel for the appellant, I will deal with these submissions.

33 As the complainant was the only witness to the alleged offences, it is natural that counsel for the appellant sought to undermine her credibility by consciously pointing out various inconsistencies in her statement. I am, of course, acutely aware that the complainant was not only the sole witness to the alleged molestations, she was in addition the alleged victim of these molestations. In this context, *dicta* in case law abound cautioning judges to scrutinise the evidence before them with a fine-tooth comb, given both the ease with which allegations of sexual assault may be fabricated and the concomitant difficulty of rebutting such allegations: *Ng Kwee Piow v Regina* [1960] MLJ 278. Therefore, it is necessary that the testimony of such complainants be "unusually convincing", which is to say, it must be sufficient to establish guilt beyond reasonable doubt: *Teo Keng Pong v PP* [1996] 3 SLR 329 at 340, [73].

34 That said, the alleged inconsistencies in the complainant's testimony that counsel for the appellant so tenuously relies on do not constitute material discrepancies by any stretch of the imagination. It is trite law that minor or immaterial inconsistencies are not fatal to a witness's credibility: *Ng Kwee Leong v PP* [1998] 3 SLR 942 at [17]; *Jagatheesan s/o Krishnasamy v PP* [2006] SGHC 129 at [82] and [83]. Therefore, the fact that the complainant's recollection of dates was not perfectly precise is not a sufficient reason to disbelieve her. Indeed, the district judge found that while the complainant had mixed up her dates, she was both resolute and consistent in stating that the molestations occurred within approximately one month of her employment. The complainant's only error was to make the mistake that July came before June: see [41] of the GD. As for her supposed exaggeration that she had been molested "everyday" in her police report on 22 August 2005, I wholeheartedly agree with the district judge (see [44] of the GD) that one must approach this with a degree of realism and common sense. This characterisation of a continuum of molestations over a period of just 30 days is nowhere close to being an embellishment; rather, it reflects both the complainant's state of mind and the fact that the molestations continued over that period of time. I would qualify the learned district judge's opinion that the complainant's police statement was "effective corroboration" (see [24] above) only by cautioning that not every prior consistent statement should be accorded corroborative weightage: see *Khoo Kwoon Hain v PP* [1995] 2 SLR 767 at 777, [48].

35 As for the submission that the complainant had given inconsistent versions of her story, I found this to be an untenable argument. The supposed inconsistency was that, in response to questions from the court, the complainant failed to mention that she had an exchange with the

appellant after he had touched her breasts, pertaining to his frequent visits to Batam. In this connection, it bears mention that this exchange was elicited during examination-in-chief. In my view, the complainant was merely responding directly to what she thought the court was asking her. To that extent, she had not shown herself to be unreliable. Counsel for the appellant might be accused of making a mountain out of a molehill in suggesting that the complainant should be discredited simply because she failed to mention one single exchange in the course of an unhappy experience.

36 Next, counsel for the appellant sought to suggest that the complainant was well aware that the appellant's gesture of touching her buttocks was not intended to outrage her modesty but rather to signal that she should stop the massage or move aside. Is this not stretching the truth too far? The complainant testified clearly:

> I know he has difficulty in speaking. At times when he speaks, it was not clear. I didn't understand. If he needs to use his hands or body to indicate that I stop, why must he use his hands to touch my buttocks? Even with hand signals, I understand that I can stop or he can just tap my hand. Why must he touch my buttocks?

37 In respect of the appellant's alibi on 21 August 2005, I also accept the learned district judge's reasoning that this by no means excluded the possibility of the appellant returning after 7.23pm, asking for a massage and opportunistically molesting the complainant again (see [28] above). In fact, the complainant testified that she started her massage around 8.30pm that evening. To that extent, there is no inconsistency in the complainant's evidence on this point.

38 Next, counsel for the appellant then proceeded to raise what can only be described as a red herring: If the complainant had been molested, why then did she not complain to the neighbour who, coincidentally, was also from the same village in Indonesia as she was? Here, I accept the general proposition in *Tang Kin Seng v PP* [1997] 1 SLR 46 at [79] that:

> The evidential value of a prompt complaint often lay not in the fact that making it renders the victim's testimony more credible. The evidential value of a previous complaint is that the failure to make one renders the victim's evidence less credible.

However, in that very same paragraph, the learned Yong Pung How CJ also cautioned in the following terms:

> [A]s in all cases where common human experience is used as a yardstick, *there may be very good reasons why the victim's actions depart from it*. It would then be an error not to have regard to the explanation proffered. *All these merely illustrate the fallacy of adhering to a fixed formula*. [emphasis added]

In the present appeal, the evidence is clear that the reason the complainant did not confide in Lina was because, as Lina herself testified, they were not very close. In my view, a victim of molest ought not to be penalised or her credibility prejudiced merely because shame, discomfort or fear has prevented her from telling her story immediately or soon thereafter. Any reason that impedes such disclosure will always be a question of fact that can be explained or clarified plausibly by the temperament and/or character of a complainant. To suggest, as a general proposition, that a victim of molest must immediately report her situation even if it is to a mere acquaintance, is totally unrealistic and reflects a patent lack of appreciation for the plight and dilemma of victims of sexual abuse. In fact, such a submission by counsel has unsheathed a sword that could cut both ways. It might also be contended quite plausibly on the other hand that if the complainant was indeed bent on ensuring that the allegations she had fabricated would stick, she *would* have told Lina about the

incidents so as to establish a prior and consistent pattern of molestation by the appellant.

39 Counsel for the appellant then submitted that the complainant's story that she had drifted helplessly around before locating the Radin Mas Neighbourhood Police Post with the advice of another maid is contrived. Counsel claimed she should have known of the existence and location of the Havelock Neighbourhood Police Post given that she had accompanied Ang to the market (which was near the police post) on a couple of occasions. Such an argument is entirely without merit. The complainant was a foreigner and a newly-arrived one at that. There is no evidence that she had even left the flat by herself prior to 22 August 2005. At best, counsel's point demonstrates that the complainant has a poor sense of direction. It does not and should not detract from the substance of her testimony.

40 Finally, it was argued that the appellant, at the material juncture, had little opportunity to molest the complainant because of his father's hospitalisation and the subsequent funeral rites upon his demise. Once again, this argument holds no water. As the district judge perceptively noted, this did not prevent the appellant from asking for massages and molesting her: see [49] and [50] of the GD. Indeed, the appellant himself admitted having requested for massages during this period; furthermore, he did not deny either touching the complainant during the massage sessions or in the kitchen to ask her to move aside. The only denials the appellant made in respect of the charges he faced were, first, that he did not intend to outrage her modesty on the occasions when he touched her buttocks; and second, that he did not squeeze her breasts. To that extent, counsel for the appellant appeared to be clutching at illusory straws by even raising such an argument.

41 The appellant's appeal against his conviction lacked both substance and merit. Significantly, counsel for the appellant never attempted to explain the appellant's and Ang's own discrepancies in their statements. Nor did counsel address the district judge's observation that the appellant was perfectly able to testify without constantly requiring a drink of water. This, if anything, seriously undermined the appellant's story that his dry throat prevented him from verbally instructing the maid on so many occasions over a period of 30 days. Most tellingly, counsel for the appellant was unable to dispel or dispute the testimonies of the complainant and Ang, both of whom stated that the appellant *did* in fact speak to the complainant immediately after the massage sessions: see [8], [11] and [22] above. I found that the learned district judge's findings in respect of the charges were amply supported by evidence. The learned district judge's grounds of decision were admirably detailed and cogent. There was absolutely no basis to justify a departure from her findings. The convictions were accordingly affirmed.

The appeal against sentence

42 I now turn my attention to the appeal against the sentence for DAC 44265/2005. The only issue in respect of the sentence was whether this case was an appropriate one for the exercise of judicial mercy on account of the appellant's ill health.

43 The district judge, at [100] of the GD, made the following observation while passing sentence:

> In considering this issue, I was aware that ill-health is not a mitigating factor except in the most exceptional cases when judicial mercy may be exercised: *PP v Ong Ker Seng* [2001] 4 SLR 180. The Accused in this case is a cancer patient and has been since 1997. Cancer is an insidious disease that can be terminal even with early diagnosis and treatment and it is always possible for new cancers to form or for the previously treated cancer to recur during remission as it occurred with the Accused in 2003. *In light of the fact that he was on regular follow-up with National*

Cancer Centre, I was prepared to take into account his medical condition in deciding on the appropriate sentence. However, in light of the aggravating factors (the victim was a domestic helper and he did [squeeze] her breasts), I [am] of opinion that his condition only warranted some discount in the term of the length of the imprisonment and not the sentence of caning. All considered, I was of the view that a sentence of 4 months' imprisonment and 3 strokes of the cane would serve the ends of justice for this offence. [emphasis added]

It will be noted that the district judge did in fact take into account the appellant's ill health in assessing the quantum of punishment. Therefore, she must have found that, to some extent, this was a case where judicial mercy ought to be exercised. However, she felt that while the appellant's ill health warranted a discount in the length of the imprisonment, the sentence of caning should still prevail. I find this incongruous because caning is ordinarily a far more severe sentence for most persons than a moderate term of imprisonment. If judicial mercy were properly exercised, one would imagine it would mandate a discount in the caning sentence as well.

44 In any event, I find that it was inappropriate for the learned district judge to have taken into account the appellant's ill health given that there was no actual medical evidence before the District Court. Granting that the appellant did contract cancer in 1997, suffering a relapse in 2003, no evidence was tendered prior to sentencing by the trial court that he was at that juncture suffering medical problems to a degree that compelled the exercise of judicial mercy. This discount appears to have ensued more from a combination of conjecture and sympathy rather than from concrete medical evidence. This is incorrect. Judges should address facts before them and duly make logical inferences. The currency of the court is the law applied to proper factual considerations and not mere sympathy. However, as will be duly explained, judicial mercy is recognised in exceptional cases as constituting another facet of the administration of justice. A decision to exercise mercy must be made only after the relevant facts have been vigilantly and rigorously sieved and appraised. The exceptional nature of this judicial discretion demands strict proof of facts and not sympathetic conjecture. In a case such as this, the current medical condition of the appellant has to be precisely clarified.

45 I therefore adjourned the appeal against sentence on 11 May 2006 and directed counsel for the appellant to furnish an updated medical report. On receiving the medical report I requested Dr Leong to testify on 28 June 2006. She was then cross-examined by the deputy public prosecutor ("DPP").

The medical report

46 Dr Leong's medical report states:

Mr Chng [the appellant] is a 44-year-old Chinese male with recurrent nasopharyngeal cancer. He was treated with radiotherapy in 1997 for localized nasopharyngeal cancer. He relapsed in 2003 with disease in his left neck nodes. Resection of the lymph nodes (left radical neck dissection) and brachytherapy (local radiotherapy) was done in October 2003. *In November 2005, MRI scan of the post-nasal space (21.11.05) showed a deep-seated recurrence of the tumour on the left side, deep to the pectoralis flap and involving the left paravertebral muscles, with extension into the left intervetebral foramen of C2-3. [His] disease is no longer curable by surgery or radiotherapy (advanced disease). After discussion at tumour board, palliative chemotherapy was recommended.* CT scan (2.2.06) showed no distant metastasis to the chest or abdomen. Chemotherapy using gemcitabine and carboplatin was started in February and is currently still ongoing. This regimen requires him to come weekly to the cancer centre for a 2-hour intravenous treatment but does not require him to be hospitalised. *Suppression of blood cell counts are known side-effects of most chemotherapy including this regimen and individuals may be more prone to*

bleeding if his blood platelet counts are low.

In summary, Mr Chng has nasopharyngeal cancer which has relapsed locally and his disease is not curable. The role of palliative chemotherapy is to shrink the cancer, control the pace of disease and reduce symptoms. *However, it only works for a proportion of individuals and even if it works, the effect is short-lasting. He may need further treatment when the cancer progresses*.

[emphasis added]

Dr Leong's testimony in court

47 Dr Leong confirmed that the appellant's cancer should be characterised as "recurrent cancer". It was also a cancer that was "not curable" in the sense that while further treatment was necessary, this treatment was merely palliative. She also confirmed that he was suffering from pain in the neck region but that this pain was tolerable *with medication*. In response to a query from the DPP, Dr Leong pessimistically observed that while the appellant was not facing imminent death, his condition was not curable and that he had a "small window of life" ahead of him.

48 Dr Leong explained the context of the appellant's condition. According to her, cancer is a dynamic affliction in the sense that it can spread unpredictably and rapidly at any time. If the cancer spreads, the appellant's remaining life span would be short. Responding to a query from the court as to how likely it was that the appellant's cancer might spread, she clarified that "statistically there is a *real probability* of the cancer spreading beyond the neck and accelerating his demise … the cancer could spread beyond the neck at *anytime*" [emphasis added]. She further added that "once it spreads beyond the neck, statistically speaking, [such patients] die within a year".

49 Finally, Dr Leong added that the appellant required treatment on a weekly basis and that if he missed the treatment, it would reduce the efficacy of the drugs used and the chemotherapy regime. While Dr Leong acknowledged that the appellant's daily activities would not for the moment be severely hindered by his condition provided that medication was properly administered, she pointedly declined to speculate whether or not a term of imprisonment or caning would adversely affect the appellant's condition. She did however venture to caution that based on her experience and anecdotal observations, cancer patients with an optimistic outlook on life tended to respond better to treatment.

The law on judicial mercy

5 0 Judicial mercy is expressed and exercised only in exceptional cases. In *Leaw Siat Chong v PP* [2002] 1 SLR 63 at [13], Yong Pung How CJ held that "ill-health is not a mitigating factor except in the most exceptional cases when judicial mercy may be exercised": see also *PP v Ong Ker Seng* [2001] 4 SLR 180 at [30]. In *Lim Teck Chye v PP* [2004] 2 SLR 525 ("*Lim Teck Chye*") at [82], Yong Pung How CJ did however remark that an instance where judicial mercy may be exercised is when the offender suffers from a terminal illness:

> The appellant raised two new matters in mitigation for my consideration. First, he asked me to consider the fact that he was diagnosed with an acute eye disease sometime in 2003. Sufferers of this disease experience pain and visual impairment due to inflammation, and the disease may eventually cause blindness. The appellant also suffers from secondary diseases and low vision. The ill health of the offender is only considered as a mitigating factor in exceptional cases as an act of mercy: *PP v Ong Ker Seng* [2001] 4 SLR 180. *An example is where the offender suffers*

from a terminal illness. The present status of the appellant's ailment was not sufficiently serious for me to consider it an exceptional case. [emphasis added]

In an earlier decision in *PP v Lim Kim Hock* [1998] SGHC 274 ("*Lim Kim Hock*"), Tay Yong Kwang JC (as he then was) sentenced the accused, a drug trafficker, to the minimum allowable under the law as he had been found to be HIV-positive. Tay JC, at [11], stated:

> However, since the Accused is facing a potential death sentence of another sort by virtue of his medical condition, I think, in the words of Shakespeare, "the quality of mercy is not strained" by reducing the punishment to the absolute minimum for each charge. He deserves no sympathy for being a purveyor of drugs but *deserves some sympathy for his medical condition irrespective of whether his medical condition was self-inflicted or otherwise. Indeed, if it was not self-inflicted, he would deserve a greater measure of sympathy*. [emphasis added]

5 1 These cases pronounce in no uncertain terms that it *is* open to a court to exercise mercy. *Lim Kim Hock* also illustrates that the exercise of mercy is neither novel nor unprecedented in Singapore. These decisions unequivocally provide a conclusive answer to the principal concern raised by the DPP, that granting mercy to a convicted offender is an executive rather than a judicial prerogative, and that allowing judicial intervention would to that extent result in a violation of the separation of powers. In my view this contention is without substance as the courts have always had the residuary discretion to exercise mercy in appropriate cases.

52 However, it is crucial to appreciate that the discretion to grant judicial mercy is one that is exercised with the utmost care and circumspection. I pause here to emphasise this important qualification by highlighting some cases on point, where the plea for judicial mercy has not succeeded:

(a) In *Leaw Siat Chong v PP*, the appellant suffered from high blood pressure and a pain in his right eye. This was not found to be exceptional.

(b) In *Viswanathan Ramachandran v PP* [2003] 3 SLR 435, the High Court held that the appellant's condition of chronic hypertension and diabetes was not exceptional.

(c) In *PP v Thavasi Anbalagan* [2003] SGDC 61, the court did not accord significance to the accused's history of heart problems.

(d) In *Md Anverdeen Basheer Ahmed v PP* [2004] SGHC 233, the appellant had complained of a "host of medical problems and ailments". Yong Pung How CJ reiterated, at [68], that "the cases have stated that ill-health would only be a mitigating factor in exceptional cases as an act of mercy, such as where the offender suffers from a terminal illness".

(e) In *Lim Teck Chye*, the appellant was diagnosed with secondary diseases and low vision due to an acute eye disease. Even though this disease might potentially cause blindness, it was not found to be exceptional enough.

(f) *In PP v Lee Shao Hua* [2004] SGDC 161, the court did not attach any weight to the accused's health difficulties, which included tuberculosis, asthma and heart problems.

(g) In *PP v Shaik Raheem s/o Abdul Shaik Shaikh Dawood* [2006] SGDC 86, the appellant was diagnosed as suffering from high blood pressure, diabetes, and bilateral knee osteoarthritis. The pain in his right knee was permanent and likely to worsen. Though his disability was sufficient to

qualify as a handicap under the Automobile Association of Singapore's guidelines, this did not move the court to exercise mercy.

In each of these cases, the plea for mercy was disregarded simply because the illness complained of was not of a sufficient severity.

53 That judicial mercy may be exercised in very limited circumstances is also settled law in England. The English Court of Appeal in *R v Bernard* [1997] 1 Cr App R (S) 135 distilled the following principles from the existing corpus of sentencing precedents applicable to offenders with serious medical problems (at 138):

> (i) a medical condition which may at some unidentified future date affect either life expectancy or the prison authorities' ability to treat a prisoner satisfactorily may call into operation the Home Secretary's powers of release by reference to the Royal Prerogative of mercy or otherwise but is not a reason for this Court to interfere with an otherwise appropriate sentence …;
>
> (ii) the fact that an offender … has a reduced life expectancy, is not generally a reason which should affect sentence …;
>
> (iii) a serious medical condition, even when it is difficult to treat in prison, will not automatically entitle an offender to a lesser sentence than would otherwise be appropriate …;
>
> (iv) an offender's serious medical condition may enable a court, as an act of mercy in the exceptional circumstances of a particular case, rather than by virtue of any general principle, to impose a lesser sentence than would otherwise be appropriate.

54 In an earlier case, the English Court of Appeal in *R v Green* (1992) 13 Cr App R (S) 613 was faced with a case where the appellant suffered from sickle cell anaemia. Despite the fact that his health had been a consideration in sentencing in the court below and his sentence of 18 months (imposed for supplying heroin) was already lenient in the light of the offence committed, the court ordered the appellant's immediate release so that he could be cared for outside the prison environment. Laws J, at 615, reasoned that:

> It must be obvious to any person of ordinary sensibility that subjection to so painful and life-threatening a disease is one of the most powerful mitigating factors which can be put forward by a defendant.

There was also evidence before the court that the appellant was unlikely to repeat his offence.

55 A similar position was adopted in Hong Kong, when the Court of Appeal followed the approach adopted in *R v Bernard* in *R v Chan Kui Sheung* [1996] 3 HKC 279 ("*Chan Kui Sheung*"). Such an approach was again endorsed in *HKSAR v Tsang Wai Kei* [2003] HKEC 1056. In the former case, the appellant was a paraplegic and in the latter, the appellant suffered from thyroid cancer.

56 The seminal Australian case of *R v Smith* (1987) 44 SASR 587 ("*Smith*") is particularly instructive. King CJ, at 589, said:

> Generally speaking ill health will be a factor tending to mitigate punishment only when it appears that imprisonment will be a greater burden on the offender by reason of his state of health or when there is a serious risk of imprisonment having a gravely adverse effect on the offender's

health.

In that case, the appellant was afflicted with AIDS. It was also found that there was a substantial risk that the stress associated with a further period of imprisonment could cause some deterioration in the appellant's condition. When *Smith* was recently interpreted in *R v Boyes* (2004) 8 VR 230, the Court of Appeal of the Supreme Court of Victoria held that the first limb of *Smith*'s test (*viz*, whether there will be a greater burden on the offender by reason of his state of health) did not mean that there should be a comparison between the difficulty suffered by the appellant in prison as opposed to that faced by an ordinary inmate. Instead, the test was whether the burden of imprisonment *on the offender* would be increased because of his disability. In my view, while an offender who suffers an increased burden on account of his health may not always be viewed sympathetically, it does not preclude taking into account in exceptional cases the fact that an offender's disability would result in a burden considerably greater than the ordinary inmate: *Chan Kui Sheung* at 285.

57 Naturally, one should not view the hardship on the offender in isolation from the other circumstances of the case. Thus, in *R v Bailey* (1988) 35 A Crim R 458, the New South Wales Court of Criminal Appeal held that the question in every case in which the ill health of the appellant is raised as a sentencing factor is a matter to be assessed with all the other usual sentencing considerations, such as the seriousness of the offence, the prisoner's record, the age of the offender, demonstration of remorse and so on. In *Director of Public Prosecutions v Natale* [2001] VSCA 13, the Court of Appeal of the Supreme Court of Victoria considered the fact that the appellant's days of growing marijuana were over, coupled with the fact that he no longer presented a threat to the community as a result of his poor health, as an important justification for affirming the leniency of the sentence meted out in the court below.

58 Finally, because the court exercises its mercy on the basis of the offender's health, any indication that he is not likely to be better off outside prison (for example, if there is no reason to believe that he would properly submit himself to regular treatment) will militate against the exercise of judicial mercy: *R v Veiga* [2003] EWCA Crim 2420 at [14].

59 Extracting the principles from these cases, I am of the view that the following framework of factors may be considered in cases where the offender raises extreme ill health as a factor bearing upon the sentence:

(a) the nature of the offence;

(b) the circumstances of the offence;

(c) whether the offender will seize the opportunity given to him to submit to regular treatment or rehabilitation and whether he is able to avail himself of the necessary financial support to maintain his medical treatment; and

(d) public interest in ensuring that the full and proper sentence be meted out. This would necessarily include the court's assessment of whether the accused is likely to re-offend. The court's assessment of the offender's proclivity to re-offend is important, and may include, *inter alia*, an appraisal of the accused's criminal record and whether the accused is likely to be placed in the same or similar situational or environmental circumstances which engendered the offence in the first place. It may well be that considerations of compassion must yield to those of public interest.

60 These factors ought to be assessed, analysed and balanced against:

(a) the severity of the ill health of the accused;

(b) the likelihood of the term of imprisonment or other punishment increasing the burden on the accused and the impact that the accused's ailment will have on his ability to cope with the prison system;

(c) the likelihood of the term of imprisonment or other punishment exacting a hardship either manifestly excessive of what a prisoner without his health condition would suffer or patently disproportionate to his moral culpability or both; and

(d) the probable aggravation of the accused's health due to his term in prison. This does not necessarily entail an assessment of the prison's medical facilities; rather it requires an assessment of whether the stress, anxieties and hardship associated with a term in prison would exacerbate the accused's condition. The fact that the accused may not be able to receive adequate (though not necessarily perfect) care in prison is, however, relevant.

61 These considerations ought to be analysed holistically and not in isolation. In any event, they constitute neither a comprehensive nor conclusive catalogue of all the factors that the court may take into account in deciding whether or not to exercise mercy. In the final analysis, the sentence meted out to a seriously ill offender must not only embrace all relevant considerations, it must also strike the right balance between the administering of an appropriate sentence on the one hand and allowing a very seriously ill person to live out his remaining days with dignity and in peace on the other. The exercise of mercy calls for sound but finely-tuned discretion.

62 I should add two further observations. First, the medical condition of an offender is not, strictly speaking, a mitigating factor. A mitigating factor is a circumstance for which an offender can be given credit: *Krishan Chand v PP* [1995] 2 SLR 291 at 294, [7]. The quiddity of judicial mercy lies in the prerogative to depart from what would otherwise be the proper sentence, given the exceptional circumstances the court is faced with. Second, it would be wrong to assume that recourse to judicial mercy can afford a safe harbour for criminals who might use their serious medical condition consciously and purposefully to commit a crime thinking that leniency will be granted by dint of their peculiar circumstances. There is no latitude for the mercy of our courts to be cynically abused in this fashion. It should not lie in the mouths of such offenders to plead for the court's mercy.

The sentence

63 There is no suggestion from the Prosecution that the appellant either poses a risk to the public or is likely to repeat similar offences. In fact, neither he nor his mother will be permitted to hire domestic help again. It is relevant that the appellant did not commit the offences labouring under the delusion that he could or might subsequently use his medical condition as a crutch. Indeed, no medical evidence had been adduced at first instance before the learned trial judge at that juncture to indicate that he had only a "small window" of life. Dr Leong's evidence was only adduced during the appeal hearing and even then, only at my behest.

64 Dr Leong confirmed that there is a "real probability" of the cancer conflagrating "anytime". The road ahead for the appellant appears to be nothing short of uncompromisingly painful. His medical condition is irreversible and the medical treatment currently administered is of a purely palliative nature. He now faces a far harsher sentence that will at some point in the near future inexorably take away his life. I also accepted that his expressions of remorse, eloquently articulated through his counsel, are genuine and heartfelt. His rapidly debilitating illness compounded by an ever-increasing need for pain management medication indicated that his illness has substantially reduced his ability to

cope with day-to-day issues. He had just ceased to work as a consequence of his illness. Counsel informed the court that the appellant does not intend to seek any further employment in the light of his illness. He intends to spend his remaining days with his family who will support him financially if necessary. Counsel has even submitted that incarceration might plausibly accelerate the appellant's demise. The appellant has been attending his sessions at the National Cancer Centre regularly, suggesting that an exercise of mercy in his favour, as opposed to incarceration, will not be wasted. It is also abundantly clear that the illness could take a sudden and irreversible turn for the worse "anytime", as Dr Leong has starkly put it. I am satisfied that in this case the stress, anxiety and hardship associated with incarceration (and certainly with caning) may aggravate the appellant's existing medical condition and *accelerate his demise*. Incarceration itself, let alone caning, could well have very much harsher consequences for him than what is intended for the ordinary offender.

65 In this case a balance had to be struck between the interests of ensuring that all like offenders are similarly punished on the one hand and the critical need to take into account the deteriorating medical condition of the appellant on the other hand. This is never an easy task. It cannot be gainsaid that the appellant's conduct in outraging the modesty of the domestic helper has resulted in the commission of offences with aggravating features. I was, however, satisfied that if mercy was exercised primarily on the basis of his disturbing medical condition, this would not and cannot be interpreted as signalling a sympathetic judicial attitude to this genre of offences. In appraising the critical need to mete out the appropriate sentence for offences of this nature, granting always that deterrence and retribution are indeed crucial considerations, it must nevertheless be acknowledged and recognised that an appropriate sentence in this case could not and must not ignore the appellant's medical plight. While public confidence will be sapped if offenders are not usually dealt with consistently, justice in a case like this should be neither blind nor shackled. A narrow straitjacket approach in dealing with these rare and troubling cases will, in my view, diminish the public's confidence in the Judiciary as a scrupulously fair and sensitive institution, always intent on balancing its functions with appropriate sentencing considerations. Fairness, in exceptional cases such as this, must encompass an element of mercy. It has been correctly observed that a people confident in its laws and institutions should not be ashamed of mercy (*per* Anthony M Kennedy, Associate Justice, Supreme Court of the United States, in a speech at the American Bar Association Annual Meeting on 9 August 2003, at <http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html> (accessed 31 July 2006)).

66 Given both the incontrovertible medical evidence and all other pertinent circumstances, this strikes me as an appropriate case for the exercise of judicial mercy. The terminal illness of the appellant in this case qualified as an exceptional circumstance in the sentencing equation.

67 I also noted that the medical report had influenced and prompted the Prosecution to withdraw its cross-appeal against sentence in respect of DAC 44265/2005, DAC 44266/2005 and DAC 44268/2005. In other words, the Prosecution had itself accepted that the medical condition of the appellant justified a departure from the usual practice of meting out custodial sentences for such offences, *ie*, of nine months. This was only appropriate in these circumstances. Granting that DAC 44265/2005 is the more serious charge, I had nevertheless determined, upon an evaluation of the competing sentencing considerations and facts as adverted to earlier, that there should be no differentiation in the type of sentence meted out. I must stress with the utmost emphasis that this decision does not by any means indicate that all future offenders with a terminal illness will invariably be treated with kid gloves. It is axiomatic that myriad considerations, some of which I have already identified above at [59]–[60], must be factored into each sentencing equation as and when it arises for evaluation. Though this is not an area of sentencing that can be condensed into a few hard and fast constitutive rules, the exercise of judicial discretion should never be arbitrary or whimsical. I conclude by emphatically reiterating that the exercise of judicial mercy will continue to be resorted to

only in limited and exceptional circumstances.

68 In the result, I set aside the sentence imposed by the District Court for DAC 44265/2005 and substituted it with a fine of $5,000 and in default thereof a term of imprisonment of six weeks.

69 It remains for me to express my gratitude to counsel for their helpful submissions on sentencing considerations.