Winston Lee Siew Boon *v* Public Prosecutor
[2015] SGHC 186

Case Number : Magistrate's Appeal No 111 of 2014

Decision Date : 20 July 2015

Tribunal/Court : High Court

Coram : Chan Seng Onn J

Counsel Name(s) : Davinder Singh SC, Pardeep Singh Khosa, Tham Yeying Melissa and Tony Tan Soon Yong (Drew & Napier LLC) for the appellant; Tai Wei Shyong, Sarah Ong Hui'en and Parvathi Menon (Attorney-General's Chambers) for the respondent.

Parties : Winston Lee Siew Boon — Public Prosecutor

Criminal Law – Offences

Criminal Procedure – Sentence

[LawNet Editorial Note: The appeal to this decision in Criminal Motion No 21 of 2015 was dismissed by the Court of Appeal on 30 November 2015. See [2015] SGCA 67.]

20 July 2015 Judgment reserved.

Chan Seng Onn J:

Introduction

1 After claiming trial, the appellant, Dr Winston Lee Siew Boon, was convicted on two counts of using criminal force on the complainant with the intention to outrage the modesty of the complainant under s 354(1) of the Penal Code (Cap 224, 2008 Rev Ed) and sentenced to a global term of ten months' imprisonment. The two charges stated that the appellant had inserted his hand into the complainant's left brassiere cup and touched her left breast and nipple on two different occasions. The first occasion was on 8 June 2011 ("the 8 June Incident") and the second was on 30 October 2011 ("the 30 October Incident"). The charge for the 30 October Incident also stated that the appellant had repeated his act of inserting his hand into the complainant's left brassiere cup to touch her left breast and nipple. Both incidents occurred at Thong Hoe Clinic, Block 151 Bukit Batok Street 11, #01-252.

2 The appellant now appeals against both his conviction and sentence.

Background to the appeal

3 The appellant, who was aged 67 at the time of the offences, was a general practitioner ("GP") running his own clinic. He had been operating this clinic since 1973.

4 The complainant was a 34 year-old female at the time of the 30 October Incident. In 2011, she was a Clinical Specialist Associate with [G] Pte Ltd selling surgical devices to clinics and hospitals.

5 It is undisputed that the complainant had consulted the appellant on four occasions: 8 June, 27 June, 10 July and 30 October 2011.

The trial below

6 Much of the arguments on appeal focus on the alleged events of both incidents. It is therefore useful to set out the complainant's and the appellant's respective version of events at trial before going into the decision of the trial judge.

Complainant's version of events

The 8 June Incident

7 According to the complainant, she visited the appellant's clinic for the first time on 8 June 2011 in order to have a Human Immunodeficiency Virus ("HIV") blood test conducted. As her regular GP was not open that day, the complainant went to the appellant's clinic since it was near her house.

8 Upon entering the consultation room, the complainant informed the appellant that she wanted a HIV test. The appellant then asked if there was a particular reason for wanting the test. She informed him that her boyfriend had multiple sex partners before her and she just wanted to be safe. The appellant proceeded to ask a bit more about the complainant's background. The complainant told the appellant that she was in the medical industry selling surgical devices and a conversation followed. After this the appellant drew blood from the complainant for the HIV test.

9 Thereafter, the complainant complained of "nausea and stomach wind" and the appellant instructed her to lie down on the treatment bed in the consultation room. She was wearing a normal fitting T-shirt and a pair of shorts, about 5 inches above her knee. While she was lying on the treatment bed, her T-shirt was lifted up. She could not remember who lifted it up. While the appellant was standing at the side of the bed on her right, checking her stomach for wind using his two hands, she informed him that she had a slight chest pain which she suggested could be due to over-exercise. When the complainant asked the appellant if she could continue exercising, the appellant then said, "*Yes, you can as long as…*" and at the same time, he slid his right hand underneath her T-shirt and from the top of her left brassiere, he further slid his hand in and touched her left breast, and then continued by saying, "*you don't get chest pain here*". The complainant described the touch as very fast, for one second and as a squeezing of the whole breast including the nipple. She was wearing a three-quarter cup bra at that time.

10 After this, the appellant pulled his hand out from her T-shirt and the complainant got off the bed and sat on the consultation chair. The appellant could not recall what happened after that. The entire consultation lasted about 50 minutes.

11 To a question from the court on whether the complainant felt that she was being molested when her breast was squeezed, she replied, "*No. He gave me the feeling like he was trying to tell me where my heart is*." She did not make a police report at that time because she thought that it was an appropriate way or the correct way to be touched since she had complained of chest pain. After the 8 June Incident, the complainant had a good impression of the appellant since she found him friendly and chatty and he gave good advice.

The 30 October Incident

12 After the 8 June Incident, the complainant visited the appellant's clinic a further three times, the last being on 30 October 2011. On 30 October 2011, the complainant had a sore throat and was feeling unwell. The complainant was again wearing a normal fitting T-shirt and a pair of shorts, about 5 inches above the knee.

13 Upon entering the consultation room, the appellant greeted the complainant and they engaged in a conversation. During this conversation, the complainant informed the appellant that she was going to resign from her current company and join another company selling "fillers", an equivalent of Botox. The complainant had asked the appellant for his opinion on "fillers" and whether he was using it. The appellant replied no, explaining that he was not an aesthetic doctor. At the same time this was happening, the appellant was auscultating the complainant on her chest and back underneath her T-shirt.

14 After the examination, the complainant asked the appellant if she could continue to exercise, to which the latter replied that she should be able to. The complainant then explained that she was exercising for weight management. The appellant then asked her to stand on the weighing scale in the consultation room. After her weight was taken, the complainant stepped down from the scale.

15 The appellant told her to lift up her T-shirt to reveal her abdomen. The appellant touched her abdomen and told her she was not fat. The complainant continued to ask if she could exercise and the appellant said "*yes, you can, and as long as…*", then he said, "*sorry*" and then put his right hand underneath her shirt, moved his hand towards the top of her chest, and from the top of her brassiere, he further slid his hand into her brassiere and touched her left breast. The complainant described the touch as a squeeze of the whole breast, including the nipple, which lasted less than a second.

16 After this, the appellant pulled out his hand, repeated the sentence, "*as long as…*" and "*sorry, ah*", and repeated his action by touching her left breast again. The complainant was holding on to her T-shirt during that time. The appellant had completed his sentence in both instances by saying, "*you do not get chest pain here*" while squeezing her left breast. On that day, she was also wearing a three-quarter cup bra.

17 The complainant was shocked and confused after the first time her breast was touched. She had no reaction and just froze there, not even pulling down her T-shirt. She explained that she did not pull down her T-shirt before the second touch because she was not quick enough to react. After the second touch, she did pull down her T-shirt. She was still shocked and confused as she felt violated but was not sure if the touching of her breast was necessary. The consultation lasted ten minutes with no one else being present in the room. The complainant then left the consultation room to make payment.

18 When her name was called by the nurse to make payment, she gave a 50-dollar note to the nurse. The complainant could not remember how much she had to pay. At the same time, she also asked the nurse if the dentist that was sharing the clinic with the appellant offered any Botox treatment. She left the clinic without hearing the nurse's reply and without getting her change. On the way back home, the nurse had to call the complainant to come back to collect the change. She walked back to the clinic to collect her change.

19 According to the complainant, she had asked the nurse the question on Botox even when she was shocked and confused because while waiting to see the appellant, she had intended to seek his opinion about her new company and the product she was going to sell and also about the dentist who shared the clinic with him. This had been at the top of her mind.

After the two incidents

20 On the same day as the 30 October Incident, the complainant texted her then boss, Susan Quek ("Susan"). The complainant testified that she had texted her boss, "*I think I'm molested by my GP*" and also, "*Do you need to touch the breast when telling not to get chest pain there?*". The reply

from Susan was "*of course not*" and "*why don't you check with a female doctor?*". The complainant then texted Dr Chia Yin Nin ("Dr Chia") from KK Women's and Children's Hospital, asking "*do you need to touch the breast to tell a patient not to get chest pain there*". Dr Chia replied in the negative. At the time of trial, these text messages could not be retrieved as the complainant no longer had them.

21 The complainant lodged a police report on 31 October 2011. She explained that she did not make a police report on 30 October 2011 itself because she was still confused and "*wanted to make sure that* [she] *did not make a wrong judgment*". The complainant also said that it was only after the 30 October Incident that she realised that the appellant had used the excuse of showing her where the chest pain would be to touch her breast during the 8 June Incident.

22 In September 2012, the complainant started seeing Dr Joshua Kua ("Dr Kua"), a psychiatrist from Raffles Hospital. This was because her job required her to visit doctors in their clinics and those clinics had setups similar to the appellant's clinic which caused the complainant to keep having flashbacks of the incidents. This made her unable to communicate properly with male doctors, thereby affecting her performance during work. She could not recall if she had told Dr Kua about both incidents but she was sure she told him of the 30 October Incident. The complainant saw Dr Kua a total of three times, one each in September, October and November 2012. She stopped seeing Dr Kua thereafter as she changed job and found it very expensive to attend the sessions.

23 The complainant's relationship with her children was also affected. She kept getting agitated and angry very easily at almost everything, including her children. She kept blaming herself "*for being retarded*" for not realising during the 8 June Incident that she had been violated by the appellant but had only done so after the incident happened again during the 30 October Incident.

Appellant's version of events

24 The appellant did not deny the complainant's version of events in its entirety. He accepted that the complainant had consulted him at his clinic a total of four times. However, in his oral testimony in court, he gave a version of both the 8 June and 30 October Incidents that differed in material respects from that of the complainant.

The 8 June Incident

25 According to the appellant, when the complainant entered the consultation room on 8 June 2011, he asked her what was wrong with her and she replied that she had nausea and flatulence. He then took her blood pressure and temperature. He asked her to lie down on the treatment bed and lift up her "*blouse*" slightly to expose the mid-portion of her abdomen. He then palpated and auscultated the complainant's abdomen. After this he told her to return to her seat in the consultation room and told her that she had gastroenteritis, *ie*, stomach flu.

26 As the appellant was writing down the complaints and medication to be given on the treatment card, the complainant told him that she wanted a test for HIV. This surprised the appellant since in his 40 years of practice, no female had ever asked for a HIV test on the first consultation. He then asked her why. She explained that the man she was seeing was also seeing other women. The appellant advised her to take the HIV test and Venereal Disease Research Laboratory ("VDRL") test. The complainant agreed. The appellant then proceeded to take blood from her left arm.

27 The appellant also counselled the complainant on safe sex. The complainant then asked the appellant for "*advice regarding exercise as a way of keeping fit and maintaining her weight*". He answered by explaining that exercise was a good thing but that she had to start slowly and increase

both the duration and intensity of the exercise. The complainant asked what would happen to her if she "*overstrain* [*sic*] *her heart*". She also asked how she would know if she strained her heart. The appellant placed his right fist on his own sternum, slightly to the left over his shirt to show the site and nature of his pain. The complainant asked where exactly the pain would be. The appellant then placed his clenched right fist on the complainant's sternum, slightly to the left and on top of her clothes.

28 After this, the complainant asked the appellant whether he did Botox. He asked her why and she said that there was a Botox poster at the waiting area. He told her that the poster belonged to his tenant, Q&M Dental Surgery. She then told him that she was working for a company called [G] Pte Ltd selling mainly surgical implants and appliances. She also mentioned that she might be thinking of switching to selling Botox. The appellant wrote the company's name on the complainant's treatment card.

29 The appellant thus denied that the complainant had made any complaints about chest pain while lying on the treatment bed and that he had slipped his right hand underneath her T-shirt and squeezed her left breast and nipple on 8 June 2011.

The 30 October Incident

30 According to the appellant, the complainant entered the consultation room and upon being asked, told the appellant that she had a sore throat and cough. The appellant took her blood pressure and temperature. He then auscultated her chest and back and also looked at her throat. He told her that she had upper respiratory tract infection and he would prescribe antibiotics. The complainant then said she was fat and wanted to continue exercising. The appellant asked her to step on the weighing scale so he could take her weight. After she stepped off the scale, the appellant asked her to lift up her blouse slightly over her mid-abdomen. He did a standard pinch test to measure subcutaneous fat. He did this in order to reassure the complainant that she was not fat since she was always claiming otherwise.

31 After the appellant told the complainant that she was not fat, he asked her to go back to her seat. Subsequently, the complainant asked for advice on whether she should exercise when she was not feeling well. The appellant told her no, and that it was not wise because "*sometimes in a flu… the virus can go to the heart*". He also advised her to take it easy and only go back to her normal exercise routine when she was perfectly well.

32 The complainant then asked what would happen if she over-exercised too early. The appellant told her that she would experience chest pain if she strained her heart. The appellant placed his right fist on his own sternum, slightly to the left to show the complainant where the pain would be. The complainant then asked for the actual site and nature of the pain. The appellant placed his clenched right fist on her sternum, slightly to the left and told her that she would feel a crushing pain there. She acknowledged the appellant's advice, stood up and walked towards the door.

33 The complainant paused at the door before opening it and asked, "*Doctor, do you do Botox?*" The appellant explained that he did not and the complainant asked why there was a Botox poster in the waiting area. The appellant explained that it belonged to Q&M Dental Surgery. The complainant told the appellant that she was leaving [G] Pte Ltd to sell Botox. The appellant cancelled the name of the company from the treatment card.

34 After the complainant left the consultation room, the appellant wrote on the treatment card and passed it to Linda Ang ("Linda"), one of his nurses who was waiting at the small window opening

at the wall separating the consultation room and the dispensary. The appellant's evidence was that Linda was waiting there at the material time as she had a query from a patient whom the appellant had seen immediately before the complainant.

35 The appellant thus denied that he had slipped his hand underneath the complainant's T-shirt to squeeze her left breast and nipple.

The case for the prosecution

36 To prove its case, the prosecution relied principally on the complainant's testimony as stated above (see [7]–[23]). The prosecution also called other witnesses to support its case.

37 One of the witnesses called by the prosecution was Dr Kua. Dr Kua testified that the complainant first saw him on 19 September 2012 and she told him about being molested by her GP. She had difficulties concentrating on her work and her mind would go blank at times. She told Dr Kua that she had changed job in November 2011 and that she was not doing well with her new job. She also felt angry, especially when seeing male doctors and even felt like punching them during her sales visits. She told Dr Kua of other issues like flashbacks of the incident and that she felt anxious when she read in the newspapers that someone was molested. Dr Kua diagnosed the complainant to be suffering from Post-Traumatic Stress Disorder ("PTSD") based on the criteria in the Diagnostic and Statistical Manual IV ("DSM IV"). He prescribed anti-depressant medication to the complainant to treat these symptoms. The complainant had seen Dr Kua on two more occasions (3 October 2012 and 27 November 2012) and Dr Kua maintained his diagnosis of PTSD. Dr Kua finally testified that he was aware of the possibility of the complainant malingering or faking her symptoms but he was certain that this was not the case with the complainant. Dr Kua said that the complainant's emotional display was consistent with someone who had PTSD.

38 The prosecution also called Susan, who was the complainant's boss when she was working at [G] Pte Ltd. Susan described the complainant as a very good worker and testified that they had a good working relationship. Susan also testified that she had received a text message from the complainant asking if it was normal for a doctor who examined a patient for cough or flu to touch her breast, to which she replied no. She suggested that the complainant seek another opinion from a doctor who was one of their customers to confirm if what she told the complainant was true. Susan also said that even after the complainant left [G] Pte Ltd, she still met up with the complainant from time to time. She also stated that the complainant appeared to be in her friendly and cheerful self and did not appear to be depressed. The complainant also told Susan that she was happy in her new job and doing very well. The complainant did not tell Susan that she was seeing a psychiatrist or how she was affected by the incidents. However, when they met during work shortly after the text message on 30 October 2011, the complainant did tell Susan that she was traumatised by the incident because she could not believe such a thing would happen to her.

39 Dr Chia also testified that the complainant did contact her to ask her if it was common for a GP to touch the chest. The complainant told Dr Chia that her GP placed his hand underneath her shirt and touched her chest. Dr Chia informed her that the doctor would usually auscultate the lungs.

40 The final witness for the prosecution was the Investigating Officer, Sabaran Singh ("IO Sabaran"). IO Sabaran was called for the purpose of adducing a statement made by the appellant to him during the course of investigations ("P21"). According to IO Sabaran, the appellant called him on 30 March 2012 after being subjected to a polygraph test to tell him that he had something else to tell IO Sabaran about the case. As a result, IO Sabaran recorded P21 on 3 April 2012. The defence did not object to the admissibility of the statement. The first paragraph of P21 reads:

I called you after seeing Dominique at CID for the polygraph test. I had then remembered who the actual complainant is after being told her name. *I remember that I had examined her and I had touched her breast and could have touched her nipples but it was not on purpose.* I am willing to apologise to the complainant and compensate her on agreed terms to show my sincerity or remorse. I have done wrong although unintentional and I am willing to pay for my mistake. I know the complainant is a nice person and she would not be lying. I have unintentionally touched her.

[emphasis added]

IO Sabaran also testified that it was the appellant himself who first brought up, in P21, issues of compensation and the issuance of an apology. The complainant had not asked for any compensation.

The defence

41 The appellant relies principally on his testimony as described above at [25]–[34] for his defence. Further, the appellant testified that IO Sabaran had deliberately withheld telling him the name of the complainant, the date of the incident and the details of the allegation against him when his first statement was recorded on 4 November 2011 ("P25"). He claimed that IO Sabaran did not provide him with this information during the recording of P25 even when he expressly asked IO Sabaran for it. Linda had to search through 70,000 patient treatment cards to try to find out the identity of the complainant but was unable to do so. The appellant also testified that prior to the recording of P21, there was a discussion between IO Sabaran and himself where the appellant showed IO Sabaran how he had placed his fist on his own sternum before placing it over the complainant's sternum, *ie*, slightly to the left and over the clothes.

42 Linda, who was a part time nurse and receptionist at the clinic, testified for the defence. She had been working with the appellant since 1976. At the time of trial, she was working part time at the clinic. Linda testified that she first knew of the complaint against the appellant when he was asked to go to Jurong Police Division for an interview in relation to a complaint of inappropriate behaviour. Linda said that once the appellant gave her the name of the appellant, she was able to retrieve the treatment card which jogged her memory about the events on 30 October 2011. She testified that she told the appellant that she remembered looking into the consultation room through the small window opening when the complainant was in the consultation room. She had done this because the patient before the complainant wanted to know if she should come back for a review after her medication. She needed to check this information with the appellant. Linda testified that she saw the complainant stepping up onto the weighing scale and then stepping down. After this, she saw the appellant pinching the complainant's abdomen. They immediately returned to their seats. Linda also heard the complainant asking the appellant about chest pain related to exercise. She then saw the appellant putting a clenched fist on the complainant's chest, over her clothes, and explaining to her where the pain would come from. Just before leaving the consultation room, the complainant asked the appellant if he did Botox to which the appellant replied in the negative. The appellant also explained that the poster of Botox in the waiting area belonged to the dental practice. Linda testified that before she dispensed the medication, the complainant asked her if the appellant did Botox to which she explained that he did not and that the poster belonged to the dental clinic. According to Linda, the complainant appeared to be smiling and was friendly. She was not flustered at all. Linda dispensed the medication to the complainant and she duly paid and even collected her change. Linda testified that the complainant did not forget to take her change.

43 The last witness for the defence was Dr Brian Yeo ("Dr Yeo"), a consultant psychiatrist with Brian Yeo Psychiatry Pte Ltd. In preparing his expert opinion, Dr Yeo relied on (a) the transcripts of the trial; (b) Dr Kua's clinical notes and; (c) the DSM IV. In his opinion, the complainant's reported

behaviour after the alleged 30 October Incident did not seem to display distress. Dr Yeo also stated that the evidence from Susan that she did not notice the complainant to be depressed and that the complainant had been happy in her new job and did not complain about not liking to see male GPs or even her sleeping problem were at variance with the symptoms of PTSD reported by the complainant to Dr Kua. It was Dr Yeo's opinion that the complainant did not fulfil one of the criteria for the diagnosis of PTSD, that of occupational impairment. Dr Yeo did acknowledge that he did not examine the complainant and that he did not have the benefit of observing and assessing the complainant's demeanour and psychological signs. He also conceded that patients might tell their psychiatrist things which they may not necessarily tell their friends.

The decision below

44 The trial judge first directed himself to the applicable law in cases involving sexual misconduct. Citing the cases of *Tang Kin Seng v Public Prosecutor* [1996] 3 SLR(R) 444 and *Public Prosecutor v Mohammed Liton Muhammed Syeed Mallik* [2008] 1 SLR(R) 601 ("*Liton*"), the trial judge noted that evidence of the complainant had to be "unusually convincing" before a conviction could be made out. In assessing the witnesses, the trial judge applied the approach in *Farida Begam d/o Mohd Artham v Public Prosecutor* [2001] 3 SLR(R) 592 where the trial judge can make a finding on the credibility of a witness based on some or all of the following: (a) demeanour of the witness; (b) the internal consistency (or lack thereof) in the content of the witness' evidence; and (c) the external consistency (or lack thereof) between the content of the witness' evidence and the extrinsic evidence (for example, the evidence of other witnesses, documentary evidence or exhibits).

45 In assessing the demeanour of the complainant, the trial judge noted that the complainant had given evidence in a truthful and straightforward manner. She had to compose herself by first taking a deep breath before narrating her account of the incidents. The trial judge noted that the emotion was real and not contrived. The trial judge found that the complainant had more than given the appellant the benefit of the doubt when she thought that the actions of the appellant on 8 June 2011 were appropriate because she had complained of chest pain. It was only when the appellant did it again on 30 October 2011 that she realised that she had been taken advantage of.

46 The trial judge also found internal consistency in the complainant's evidence as to why she did not complain after the 8 June Incident. Her actions after the 30 October Incident where she double checked with Susan and Dr Chia whether it was appropriate for a doctor to touch her breast in the midst of explaining where the chest pain would be before making a police report was consistent with the fact that she was unsure if the touch on 30 October 2011 was necessary and the fact that she had given the appellant the benefit of the doubt with regards to the 8 June Incident.

47 There was external consistency between the complainant's evidence and the evidence of Susan, Dr Chia and Dr Kua. Susan and Dr Chia had corroborated the complainant's evidence that she had checked the appropriateness of the appellant's actions after the 30 October Incident and before making a police report. Dr Kua's evidence was consistent with the evidence of the complainant that she had narrated the 30 June Incident to Dr Kua. The trial judge also went on to state that it was not surprising that the complainant did not tell Dr Kua about the 8 June Incident given that the incident which triggered her PTSD symptoms was the 30 October Incident. The complainant had hoped that the symptoms would go away and this explained why she did not seek treatment earlier.

48 The complainant's evidence was externally consistent with P21 in so far as the appellant did commit the physical act of touching the complainant's breast on 30 October 2011 although the appellant claimed it was unintentional. He also found that the complainant did not have any motive to falsely accuse the appellant.

49 Although observing that the demeanour of the appellant was neutral, the trial judge found that the evidence given by the appellant was internally inconsistent. He noted that the appellant had first claimed that in the recording of P25, IO Sabaran had told him that there was a complaint against him for inappropriate behaviour and that the appellant might have touched the complainant's breast. Later, he claimed that at the time P21 was recorded, which was some 5 months later, IO Sabaran did not tell him how he had molested the complainant and he was under the impression that he was being accused of inappropriate behaviour and that behaviour was placing his fist on the complainant's sternum. However, under cross-examination the appellant prevaricated as to whether IO Sabaran had indeed told him, at the time of P25, that the allegation against him involved touching of the breast.

50 The trial judge also found that there was a lack of external consistency in the appellant's evidence. First, in P21, the appellant stated that he touched the complainant's breast and could have touched her nipple but it was not on purpose. In court, the appellant claimed he was referring to the placing of his fist over the complainant's sternum. The judge found that this did not make logical sense. The court accepted IO Sabaran's evidence, which was given when IO Sabaran was recalled by the prosecution as a rebuttal witness, that the appellant did not demonstrate to IO Sabaran the alleged act of placing his right fist on his own sternum and then placing his fist on the sternum of the complainant over her clothes.

51 The credit of the appellant was also impeached by the prosecution under s 157(*c*) of the Evidence Act (Cap 97, 1997 Rev Ed). The prosecution relied on P25 to show that what the appellant said in court, *ie*, that IO Sabaran had refused to tell him the date and nature of the allegations against him was clearly contradictory to P25 where it was clearly stated that IO Sabaran had told him the date and nature of the allegations. When confronted with this, the appellant claimed that it did not register in his mind because he was shocked and confused by the allegation. The trial judge did not accept his explanation and found that his response to IO Sabaran's question, which stated the date and nature of the allegation, was coherent and in detail. The judge did not believe that he was so shocked and confused that this did not register in his mind.

52 The trial judge found that Linda's evidence was an afterthought and not worthy of belief. The trial judge observed that she was an evasive witness and that her evidence lacked internal consistency. According to the trial judge, it did not accord with ordinary reasonable human behaviour for Linda to remain standing at the sliding window, leaning forward and looking through for about five to six minutes just waiting for the appellant to finish with the complainant's consultation. An adverse inference was also drawn against the appellant for failing to mention Linda in his statements.

53 The trial judge noted that the finding of PTSD would not have a deciding effect on whether the appellant committed the offences. Nevertheless, he went on to make a finding on the issue because such a finding would amount to corroboration of the complainant's evidence that she did suffer a traumatic event. The trial judge accepted the evidence of Dr Kua and found that the complainant did indeed suffer from PTSD. Dr Kua's evidence was more reliable given that he had examined the complainant. Furthermore, he was aware of the possibility of the complainant malingering and faking her symptoms. Dr Yeo's submission that the occupational impairment limb of PTSD was not made out was based mainly on the fact that the complainant did not tell Susan that she was having problems at work. However, Dr Yeo had conceded patients might tell their psychiatrists things that they do not tell their friends. The trial judge then went further to apply the rule in *Brown v Dunn* [1984] 6 R 67 ("*Brown v Dunn*") against the defence for failing to put this fact to the complainant to give her a chance to explain why she did not mention to Susan the things she told Dr Kua. In the light of this failure to recall the complainant, which the trial judge invited counsel for the defence in the trial below to consider, the trial judge applied the rule in *Brown v Dunn* to prevent the defence from making the submission that the complainant was not suffering from occupational impairment given

what the complainant told Susan.

54 In the light of all his findings, the trial judge concluded that the complainant's evidence was unusually convincing, reliable and adequately corroborated by other independent evidence. He thus found the appellant guilty on both charges and convicted him accordingly.

55 On the appropriate sentence, the trial judge noted the relevant aggravating and mitigating factors. He also referred to *Public Prosecutor v Chow Yee Sze* [2011] 1 SLR 481 ("*Chow Yee Sze*") where the benchmark of nine months' imprisonment and three strokes of the cane was established for an offence under s 354 of the Penal Code which involved intrusion on a victim's private parts or sexual organs. The trial judge also referred to the case of *Public Prosecutor v Ho Ah Hoo Steven* [2007] SGDC 162 ("*Steven Ho*") in arriving at a sentence of ten months' and nine months' imprisonment for the 30 October Incident and 8 June Incident respectively. He also ordered both terms of imprisonment to run concurrently making it a global term of ten months' imprisonment. As the appellant was above 50 years of age, no caning was ordered.

Issues before the court

56 On appeal, counsel for the appellant, Mr Davinder Singh SC ("Mr Singh") raises various arguments to show that the trial judge was in error in finding that the charges against the appellant were proved beyond a reasonable doubt. I will not summarise his arguments, but deal with them in the course of my judgment when I revisit various aspects of the trial judge's findings. It suffices at this juncture to state the issues which have to be determined in this appeal.

57 The issues that arise for my determination in this appeal are:

(a) Is the evidence of the complainant unusually convincing such that the charges against the appellant are proved beyond a reasonable doubt?

(b) Is there independent corroboration of the complainant's evidence?

(c) Does the prosecution have to disclose the complainant's statements to the police to the defence?

(d) If the charges are proved beyond a reasonable doubt, is the sentence imposed by the trial judge manifestly excessive?

My decision on the appeal against conviction

The applicable legal principles

The threshold for appellate intervention

58 The grounds for appellate intervention when it comes to findings of fact made by the trial judge are well-established. In *Liton*, the Court of Appeal ("CA") explained at [32]–[33]:

> 32 First, it is established law that an appellate court will not disturb the findings of fact of the trial judge unless they are clearly arrived at against the weight of the evidence. In *Jagatheesan s/o Krishnasamy v PP* [2006] 4 SLR(R) 45 ("*Jagatheesan*") at [34], [37] and [38], V K Rajah J (as he then was) summarised the position thus:
>
> > ... In *Yap Giau Beng Terence v PP* [1998] 2 SLR(R) 855 ("*Terence Yap*") Yong Pung How CJ

noted at [24]:

> It is trite law that *an appellate court should be slow to overturn the trial judge's findings of fact, especially where they hinge on the trial judge's assessment of credibility and veracity of witnesses, unless they can be shown to be plainly wrong or against the weight of the evidence*.

…

That said, it must be noted that the position apropos the proper inferences to be drawn from findings of fact is quite different. Yong Pung How CJ in *Terence Yap* observed in this context (at [24]):

> [W]hen it comes to inferences of facts to be drawn from the actual findings which have been ascertained, a different approach will be taken. In such cases, it is again trite law that an appellate judge is as competent as any trial judge to draw any necessary inferences of fact from the circumstances of the case.

In short, intervention by an appellate court is justified when the inferences drawn by a trial district judge are not supported by the primary or objective evidence on record ...

…

33 Given that the acquittals in this case by the trial judge were based largely on findings of fact as opposed to questions of law, this court should be slow to disturb the trial judge's conclusions. It needs only to be clarified that these principles apply equally to an appeal from an acquittal as they do to an appeal from a conviction. …

[emphasis in original]

59 Recently, the CA in *Public Prosecutor v Muhammad Farid bin Mohd Yusop* [2015] 3 SLR 16 made further observations on the threshold of appellate intervention. The CA stated:

> 52 This leads us to our final point, which is that despite our reservations, we dismissed the appeal because the threshold for appellate intervention had not been crossed. This appeal was primarily against the findings of fact made by the Judge, and in this regard, it bears repeating the principles governing appellate intervention *vis-à-vis* findings of fact by a trial judge. …
>
> 53 … [W]e have now come to recognise a difference between findings of fact based on the veracity or credibility of witnesses and inferences of fact. Going one step further, it has also been accepted by this court (see *Thorben Langvad Linneberg v Leong Mei Kuen* [2013] 1 SLR 207 at [13], affirming the decision of the Singapore High Court in *PP v Wang Ziyi Able* [2008] 2 SLR(R) 61) that an appellate court is in as good a position as a trial judge to assess a witness's credibility if his assessment is based on inferences drawn from:
>
> (a) the internal consistency in the content of the witness's testimony; and
>
> (b) the external consistency between the content of the witness's evidence and the extrinsic evidence.

54 In view of the principles set out above, when faced with an appeal against a judge's findings of fact, an appellate court should first seek to discern whether the finding of fact appealed against is one based on the credibility of the witness, or an inference of fact based on objective evidence. In the latter scenario, an appellate court should look at the objective evidence before the court and then question whether the trial judge's assessment was *plainly against the weight of the objective evidence*. In the former scenario, the appellate court should assess whether the trial judge's findings on the credibility of the witness, and hence any acceptance of that particular witness's evidence, are *plainly wrong*. This can be done by examining the internal and external consistency of the witness's evidence as mentioned in the two categories above.

[emphasis in original]

60 In this case, the trial judge's findings are primarily based on the credibility of the complainant and not on inferences drawn from primary objective facts. This means that I have to assess whether the trial judge's findings on the credibility of the complainant and the acceptance of her evidence are *plainly wrong* based on the internal and external consistency of the complainant's own evidence. Given that this is an appeal against conviction, it has to be shown that the trial judge is *plainly wrong* in arriving at his conclusion that the prosecution has proved its case against the appellant beyond a reasonable doubt.

Cases involving sexual misconduct and the law on corroboration

61 The proverbial golden thread which runs throughout the web of our criminal law is the fundamental principle that the prosecution bears the legal burden of establishing the guilt of an accused beyond a reasonable doubt (see *Woolmington v The Director of Public Prosecutions* [1935] AC 462 at 481; *AOF v Public Prosecutor* [2012] 3 SLR 34 ("*AOF*") at [2]; and *XP v Public Prosecutor* [2008] 4 SLR 686 ("*XP*") at [35]). There is possibly no principle more trite in our law.

62 When it comes to sexual misconduct cases, which usually involve the word of one person against another, the CA has also provided guidance on the proper approach to be taken before it can be said that the prosecution's ultimate burden is satisfied. In *Liton*, the CA said:

37 The rule as to corroboration in so far as sexual offences are concerned was laid down in the local context in the Singapore High Court decision of *Khoo Kwoon Hain v PP* [1995] 2 SLR(R) 591 ("*Khoo Kwoon Hain*"), where Yong Pung How CJ held that while there was no rule of law in this country that in sexual offences, the evidence of the complainant must be corroborated, it was nonetheless unsafe to convict in cases of this kind unless the evidence of the complainant was "unusually convincing"… Further, in *Tang Kin Seng*, Yong CJ clarified (at [43]) that this did not amount to a legal requirement for a judge to warn himself *expressly* of the danger of convicting on the uncorroborated evidence of a complainant in a case involving a sexual offence (see also *Kwan Peng Hong* at [33]).

38 As to what "unusually convincing" means, Yong CJ, in *Teo Keng Pong v PP* [1996] 2 SLR(R) 890, clarified (at [73]) that this simply meant that the witness's testimony must be "so convincing that the Prosecution's case was proven beyond reasonable doubt, solely on the basis of the evidence"… Rajah J in *Chng Yew Chin* ([37] *supra*) also adopted this meaning, holding thus (at [33]):

> 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…*

39 Given that the standard of proof required in a criminal case is already that of "beyond a reasonable doubt" (see [34]-[35] above), the expression "unusually compelling" must mean something more than a mere restatement of the requisite standard of proof. Indeed, Prof Michael Hor notes, in "Corroboration: Rules and Discretion in the Search for Truth" [2000] SJLS 509 at 531, that the expression must clearly mean something apart from the standard of proof. If, in fact, one scrutinises closely the observations of Rajah J in *Chng Yew Chin* ([37] *supra*) quoted in the preceding paragraph, it will be seen that the true emphasis is not on the standard of proof in the abstract, but, rather, on the *sufficiency* of the complainant's testimony. By its very nature, the inquiry is a *factual* one. It is also a question of *judgment* on the part of the trial judge that is *inextricably linked* to the *high* standard of proof, *ie*, "beyond a reasonable doubt". In our view, therefore, the "extra something" implied by the word "unusually" must refer to the need for the trial judge to be aware of the dangers of convicting solely on the complainant's testimony as well as of the importance of convicting only on testimony that, when weighed against the overall backdrop of the available facts and circumstances, contains that ring of truth which leaves the court satisfied that no reasonable doubt exists in favour of the accused. Since a mandatory warning from the judge to himself is not required, the implication is that the appellate courts will scrutinise the trial judge's grounds of decision to see whether the trial judge was indeed aware of the danger of convicting on the bare word of the complainant as well as whether the quality of the testimony itself was consistent with the high standard of proof beyond a reasonable doubt.

[emphasis in original]

63 In *Liton*, the CA did not find it necessary to lay down a definitive ruling on the meaning of the expression "unusually convincing" given that the trial judge in that case had implicitly found that corroboration was required. In this respect, the CA also stated that an appellate court will not readily overturn a trial court's finding that corroboration was or was not required (at [40]). But the one thing that remains clear is that the finding of "unusually convincing" is part of the analysis in determining the final question: *has the prosecution's case been proven beyond a reasonable doubt*? This ultimate question, which does not change even in cases involving sexual misconduct, has to be borne in mind when approaching the evidence.

64 This is also borne out by the CA decision of *AOF* which states *that the requirement of unusually convincing does not change the ultimate rule that the prosecution must prove its case beyond a reasonable doubt* (see *AOF* at [113] citing with approval *XP* at [31]). The CA expounded on the law as follows:

111 It is well-established that in a case where no other evidence is available, a complainant's testimony can constitute proof beyond reasonable doubt… but only when it is so "unusually convincing" as to overcome any doubts that might arise from the lack of corroboration. …

112 The need for "fine-tooth comb" scrutiny in so far as allegations of sexual abuse are concerned is particularly acute, "given both the ease with which allegations of sexual assault may be fabricated and the concomitant difficulty of rebutting such allegations"…

…

114 … Rajah JA further elaborated on what "unusually convincing" entails (see *XP* at [29]-[35]). Rajah JA's pronouncements can be distilled into the following propositions:

(a) First, subsequent repeated complaints by the complainant cannot, in and of themselves, constitute corroborative evidence so as to dispense with the requirement for "unusually convincing" testimony. As Yong Pung How CJ noted in the Singapore High Court decision of *Khoo Kwoon Hain v PP* [1995] 2 SLR(R) 591 ("*Khoo Kwoon Hain*") at [51]:

> If the complainant's evidence is not 'unusually convincing', I cannot see how the fact that she repeated it several times can add much to its weight.

(b) Secondly, the "unusually convincing" reminder should not be confined to categories of witnesses who are supposedly accomplices, young children or sexual offence complainants.

(c) Thirdly, a conviction will only be set aside where a reasonable doubt exists and not simply because the judge did not remind himself of the "unusually convincing" standard.

(d) Fourthly, an "unusually convincing" testimony does not overcome even materially and/or inherently contradictory evidence to prove guilt beyond a reasonable doubt. The phrase "unusually convincing" is not a term of art; it does not automatically entail a guilty verdict and surely cannot dispense with the need to consider the other evidence and the factual circumstances peculiar to each case. Nor does it dispense with having to assess the complainant's testimony against that of the accused, where the case turns on one person's word against the other's.

(e) Fifthly, even where there is corroboration, there may still not be enough evidence to convict.

115 Moving from the level of scrutiny to the elements of what an unusually convincing testimony consists of, it is clear that a witness's testimony may only be found to be "unusually *convincing*" by weighing the *demeanour* of the witness alongside both the *internal and external consistencies* found in the witness' testimony. Given the inherent epistemic constraints of an appellate court as a finder of fact, this inquiry will *necessarily* be focussed on the internal and external consistency of the witness's testimony. However, this is *not* to say that a witness's credibility is *necessarily* determined *solely* in terms of his or her demeanour. As Rajah JA observed in *XP* ([111] *supra* at [71]-[72]):

> I freely and readily acknowledge that a trial judge is usually much better placed than an appellate judge to assess a witness's credibility, having observed the witness testifying and being cross-examined on the stand. **However, demeanour is not invariably determinative; contrary evidence by other witnesses must be given due weight, and if the witness fails to recall or satisfactorily explain material facts and assertions, his credible demeanour cannot overcome such deficiencies.** As I explained in *PP v Wang Ziyi Able* [2008] 2 SLR(R) 61 at [92]-[96], an appellate judge is as competent as any trial judge to draw necessary inferences of fact not supported by the primary or objective evidence on record from the circumstances of the case.
>
> *While an appellate court should be more restrained when dealing with the trial judge's assessment of a witness's credibility, there is a difference between an assessment of a witness's credibility based on his demeanour, and one based on inferences drawn from the internal consistency in the content of the witness's testimony or the external consistency*

> *between the content of the witness's evidence and the extrinsic evidence. In the latter two situations, the trial judge's advantage in having studied the witness is not critical because the appellate court has access to the same material and is accordingly in an equal position to assess the veracity of the witness's evidence* (see *Jagatheesan s/o Krishnasamy v PP* [2006] 4 SLR(R) 45 ('*Jagatheesan*') at [40], citing *PP v Choo Thiam Hock* [1994] 2 SLR(R) 702 at [11]).

[emphasis in original]

65 It is at once apparent that the analysis of whether a witness' testimony is unusually convincing at the trial level is similar to the analysis that an appellate court engages in when assessing a trial judge's finding on the credibility of a witness (*ie*, the assessment of the internal and external consistency of the evidence). The only additional factor that the trial judge assesses is the demeanour of a witness which undoubtedly places him in a more advantageous position. It is because of this that appellate intervention is only warranted to disturb a finding of the trial judge that the witness was unusually convincing if the trial judge is *plainly wrong* (see [60] above). In this regard, while it has been held that a credible demeanour cannot overcome deficiencies (which include inconsistencies) in the evidence (see *XP* at [71]), the converse must also be true in that minor or insignificant inconsistencies in the evidence similarly cannot overcome a demeanour which is credible. In other words, where a trial judge bases his findings on, *inter alia*, the demeanour of a witness, the appellate court has to be satisfied that the inconsistencies and deficiencies, both internal and external, are sufficiently material and significant such that it can be said that the trial judge is *plainly wrong* in finding the witness unusually convincing and therefore *plainly wrong* in finding that the prosecution's case is proven beyond a reasonable doubt. Minor or insignificant inconsistencies will not suffice to meet the threshold required for appellate intervention.

66 To illustrate this point, in *AOF* the CA had found various material inconsistencies in the victim's testimony in relation to alleged sexual acts done on her by her father. These included, *inter alia*, a vital external inconsistency in the frequency of the alleged rapes found in the victim's trial testimony, the medical reports and her earlier statements to the police. There were other material internal inconsistencies in the testimony of the victim that the CA pointed out before holding that the victim's testimony, contrary to what the trial judge found, was not unusually convincing.

67 In the present case, the trial judge had made an express finding on the demeanour of the witness noting that she had been truthful and straightforward in her testimony. He also stated that he very carefully observed the complainant and was of the opinion that the emotion she displayed was real and not contrived (see [45] above). In the light of this express finding, it is all the more necessary that the internal and external inconsistencies in the complainant's testimony be shown to be material and significant such that the trial judge can be said to be *plainly wrong* and appellate intervention is thereby warranted.

68 Where the evidence of the complainant is not unusually convincing, corroborative evidence would then be required to secure a conviction (*Sivakumar s/o Selvarajah v Public Prosecutor* [2014] 2 SLR 1142 ("*Sivakumar*") at [41], *AOF* at [173]). This means that if the evidence from the complainant is *per se* not unusually convincing, the prosecution's case cannot be said to be proved unless there is sufficient corroborative evidence to help establish the prosecution's case beyond a reasonable doubt. In *Sivakumar*, the CA provided the following guidance (at [41]):

> … If such corroborative evidence is required, the trial judge should first identify the aspect of the evidence which is not so convincing before looking for supporting evidence and ask whether, in taking the weak evidence together with the supporting evidence, he is convinced that the

Prosecution's case is proved beyond a reasonable doubt…

69 This passage clearly establishes a holistic approach to all the evidence before the court to determine if the prosecution's case is proved beyond a reasonable doubt.

70 As to what constitutes corroboration, the CA in *Sivakumar* briefly explained at [42] as follows:

> 42 Our approach to corroborative evidence is a liberal one. In determining whether a particular piece of evidence can amount to corroboration, one has to look at the substance as well as the relevance of the evidence, and whether it is supportive or confirmative of the weak evidence which it is meant to corroborate: see *Liton* at [43] (for the English common law definition of corroborative evidence, see *R v Baskerville* [1916] 2 KB 658).

71 In *AOF*, the CA had explained principles of corroboration in the local context as follows:

> 173 … The [Evidence Act] did not, at its inception, provide a definition of corroboration and still does not do so. In *Liton* ([111] *supra*), this court (at [43]) preferred Spencer-Wilkinson J's more liberal approach to corroboration ("liberal corroboration") as opposed to the stricter traditional common law definition laid down in *The King v Baskerville* [1916] 2 KB 658 at 667 ("*Baskerville*") of independent evidence implicating the Appellant in a material particular ("*Baskerville* corroboration"):
>
> > ... [I]t is clear that the Baskerville standard ... does not apply in its strict form in Singapore since Yong CJ, in *Tang Kin Seng* ([37] supra), advocated a liberal approach in determining whether a particular piece of evidence can amount to corroboration. This is so, notwithstanding Yong CJ's apparent allusion to the whole or part of the *Baskerville* standard in *B v PP* [2003] 1 SLR(R) 400 (at [27]); *Lee Kwang Peng* ([38] supra) at [71]; and *Kwan Peng Hong* ([37] supra) at [37] as being 'essential' in nature. In our view, to adopt a stringent definition of what constitutes corroborative evidence goes against the liberal approach which Yong CJ himself alluded to as a broad principle of law in the other cases. In *Kwan Peng Hong* (at [36]), Yong CJ held that our courts 'have left behind a technical and inflexible approach to corroboration and its definition', and alluded to similar pronouncements in *Tang Kin Seng* (at [53]-[68]) and *Soh Yang Tick* ([37] supra at [43]). The principle of law which emerges from these cases is that the local approach to locating corroborative evidence is *liberal*, thus ensuring that the trial judge has the necessary flexibility to treat relevant evidence as corroborative. **What is important is the substance as well as the relevance of the evidence, and whether it is supportive or confirmative of the weak evidence which it is meant to corroborate.**
>
> …
>
> 175 Indeed, it would be wholly misconceived to think that so-called "liberal corroboration" does not possess its own inherent conceptual constraints. For instance, s 159 of the [Evidence Act] states that former statements of witnesses may be proved to corroborate later testimony as to the same fact so long as the former statements was made "*at or about the time when the fact took place, or before any authority legally competent to investigate the fact*"…
>
> 176 In the Singapore High Court decision of *Lee Kwang Peng v PP* [1997] 2 SLR(R) 569 ("*Lee Kwang Peng*") (at [80]), Yong CJ applied s 159 of the [Evidence Act] to the facts in that case and found that:

> ... the complaints made by the first and second complainants did not even fall within the ambit of s 159, *because they were made so long after the alleged incidents.* Even if that difficulty could be circumvented, I would still have to conclude, as did the High Court in *Khoo Kwoon Hain* that such corroboration, not being independent, could only be of 'little additional evidential value'. …
>
> In *Lee Kwang Peng*, the complaints by the first and second complainants were made one year and six months respectively after the alleged incidents.
>
> 177 As Yong CJ noted in the passage cited in the preceding paragraph, such "corroboration", not being independent, could only be of "little additional evidential value". In other words, whilst the failure to meet the strict standards of *Baskerville* corroboration does not rule out the *relevance* of evidence, this deficiency is likely to adversely affect the *weight* of the evidence which the court concerned may accord to it. In the final analysis, to reiterate the words of this court in *Liton* (at [43]), "[w]hat is important is the substance as well as the relevance of the evidence, and whether it is supportive or confirmative of the weak evidence which it is meant to corroborate".
>
> [emphasis in original]

72 The last passage is of particular relevance. In our law, the approach to corroboration is a liberal one which concentrates on the substance as well as the relevance of the evidence and whether it is supportive or confirmative of the weak evidence it is meant to corroborate (referred to as "liberal corroboration" in *AOF*). This provides the judge with sufficient flexibility in analysing whether relevant evidence is corroborative. However, the weight attached to corroborative evidence depends ultimately on the factual circumstances and the nature of the evidence. In the usual course, the strongest form of corroboration is independent evidence implicating the accused in a material particular, generally known as *Baskerville* corroboration. If the corroborative evidence is not of this nature, it may affect the weight attached to the evidence. However, it should also be borne in mind that the ultimate question at the end of the day is whether, in considering all the relevant evidence (including the complainant's testimony and the liberal corroborative evidence), the prosecution's case is proved beyond a reasonable doubt.

73 The entire discussion above can be summarised for the current appeal in the following manner:

(a) The legal burden on the prosecution remains to prove guilt beyond a reasonable doubt. This is the ultimate question that the court has to determine after a holistic examination of all the relevant evidence.

(b) In the absence of corroboration, this burden may be satisfied if the trial court finds the complainant's evidence to be unusually convincing such that it is safe to convict solely on her evidence. In making this assessment, the trial court assesses the complainant's credibility by weighing the *demeanour* of the complainant alongside both the *internal and external consistencies* found in the complainant's testimony.

(c) On an appeal against a conviction where the trial judge has found the complainant's evidence to be unusually convincing, appellate intervention is only warranted where the internal and external inconsistencies of the complainant's evidence show that the trial judge is *plainly wrong* in arriving at his conclusion that the evidence of the complainant is unusually convincing. This is because an appellate court does not have the benefit of assessing the demeanour of the complainant, unlike the trial judge.

(d) Even where the evidence of the complainant is not unusually convincing, the legal burden of the prosecution may still be discharged if there is sufficient corroboration. The trial judge should identify which aspect of the evidence is not so convincing before looking for supporting evidence and ask whether, in taking the weak evidence together with the supporting corroborative evidence, he is satisfied as a whole that the prosecution's case is proved beyond a reasonable doubt. In this regard, corroboration is approached in a practical manner. The court looks at the substance and relevance of the evidence to determine if it is supportive or confirmative of the weak evidence which it is meant to corroborate.

(e) As indicated above, the question at the end of the day, after a holistic examination of all the relevant evidence before the court, remains whether the prosecution has proved its case beyond a reasonable doubt.

74 In the present case, trial judge found that the complainant's evidence was unusually convincing. In addition, he also found that the complainant's evidence was adequately corroborated by other independent evidence (which I assume to mean *Baskerville* corroboration). He then concluded that the prosecution's case was proved beyond a reasonable doubt. I will similarly begin by assessing the trial judge's finding that the complainant's evidence was unusually convincing before considering the trial judge's findings on corroboration. This will then assist me in determining the question that must ultimately be answered: is the trial judge *plainly wrong* when he found that the charges against the appellant had been proved beyond a reasonable doubt after having considered all the evidence before him.

75 At this point it is also pertinent to note that Mr Singh submits that the manner in which the case was run at the trial below requires a holistic assessment of the complainant's evidence. I must first point out that the assessment of all relevant evidence in determining whether the prosecution's case is proved beyond a reasonable doubt is not limited only to the complainant's evidence. A holistic assessment of the evidence must encompass the entirety of the evidence before the trial judge which includes the evidence of the other prosecution witnesses, the appellant and all the other evidence adduced by the defence that had been properly admitted at the trial (see *XP* at [34] where V K Rajah JA similarly explained the need to consider evidence other than the complainant's testimony and factual circumstances peculiar to each case).

76 Mr Singh further submits that if sufficient doubt has arisen in respect of one of the incidents, this taints the entire account of the complainant such that an acquittal for both charges would be in order. This submission is not entirely correct. In general, I agree that in this particular case, given how the trial below was run and the similarity between the complainant's account of what happened in both incidents (the appellant's account of what happened in both incidents was also largely similar to each other), if sufficient inconsistency is shown as to one incident, it can taint the entire evidence of the complainant such that it may not be possible to find the complainant's evidence to be unusually convincing for both incidents. However, that does not end the analysis given that corroborative evidence of one particular incident may be present, which when weighed together with the complainant's not so convincing account of that incident may well be sufficient to constitute proof beyond a reasonable doubt such that a conviction for that incident is still safe. Further, when there is sufficient corroborative evidence extending to *both* incidents, it may well be sufficient when taken together with the complainant's not so convincing account to enable the trial judge to be satisfied that *both* charges in respect of both incidents have been proved beyond a reasonable doubt. In any event, as will be seen, this difficult position does not arise on the facts of this case.

Is the complainant's evidence unusually convincing?

Internal consistency of the complainant's evidence

The 8 June Incident

77 Mr Singh first submits that there are deficiencies in the evidence of the complainant since she could not remember many details of the 8 June Incident. These include where she was initially seated in the consultation room, whether her temperature was taken, whether the appellant had her treatment card in his hand, whether the appellant suggested that she not only have the HIV test done but also the VDRL test, whether the appellant counselled her on safe sex, from which arm the appellant drew blood for the test and whether the appellant told her of the diagnosis for her stomach complaint. The complainant also could not remember the reasons for consulting the appellant on 27 June and 10 July, which were relatively close in time to the 8 June and 30 October Incident.

78 I have no hesitation in concluding that these are indeed minor deficiencies, if indeed they can be labelled as such. A patient may not necessarily remember all the details which are of a relatively minor and insignificant nature such as whether it was the right or left arm from which the blood was taken, where the patient's chair was initially placed within the room, whether the treatment card was at any point of time in the doctor's hand or remained always on the doctor's table throughout the whole duration of the medical consultation. If the cross-examination descends into such minor and non-prominent details just to test the power of a patient's ability to recall details which a patient would not ordinarily be expected to remember, and the patient is truly unable to remember those details months after the event, I do not think that the inability to recall should be treated as an inconsistency.

79 I share the view of the trial judge that the complainant's account surrounding the alleged acts of the appellant is detailed and sufficiently clear. Her account features significant and prominent parts of the incidents that one would not ordinarily expect the complainant to forget. It is not likely that the complainant would forget how her breast and nipple were touched in the course of a medical examination if that in fact had happened. Having said this, I do bear in mind that a complainant who has a reason or a motive to frame her own doctor can just as easily fabricate the details of how the doctor had allegedly touched her breast. However, as was correctly pointed out by the trial judge, there was no motive for the complainant to falsely accuse the appellant. Furthermore, the actions of the complainant after the incident, which include checking with both her boss and another doctor on the appropriateness of the appellant's actions shortly after the 30 October Incident, makes it unlikely for the complainant to have fabricated her evidence in order to get the appellant in serious trouble with the law (see also [143] below).

80 Mr Singh submits that the complainant's account of the 8 June Incident is highly improbable. First, he submits that there is clearly no reason for the appellant, who has an unblemished record stretching 40 years, to do what is alleged by the complainant. Furthermore, there is no reason to do those acts when the sliding window was open and the nurse on duty could look in and see him do those acts. Finally, he also submits that the account of the complainant is not probable because there was no auscultation done by the appellant even though there was a complaint of chest pain. Again, I do not think these submissions go very far in establishing that the complainant's account is highly improbable or even that it made the account improbable. There are various other plausible explanations as to why the appellant would do it despite having an unblemished record or despite the risk of the nurse looking inside the consultation room. It is some stretch to say that these made the account highly improbable, to the extent that a reasonable doubt arises as to whether the complainant's account is true. Mr Singh also submits that for the 30 October Incident, the sheer description of how the appellant inserted his hand into the complainant's brassiere would mean that

the hand of the appellant would have to contort into a weird angle, which is not possible. I do not think this is the case as the complainant had explained that the appellant moved his hand underneath her T-shirt from the bottom, moved his hand upwards towards her chest and then inserted his hand inside her three-quarter cup brassiere from her cleavage to touch her breast.

81 Mr Singh also submits that it is incredible for the complainant, a divorcee in a sexual relationship with her boyfriend, to think that the squeezing of her breast was an acceptable response to a complaint of chest pain. He further submits that her response that she felt like the appellant was trying to tell her where her heart was is inconsistent with her response in cross-examination that she knew where her heart was. I do not agree.

82 First, the complainant did not testify that she thought that the squeezing of her breast was an acceptable response. According to the complainant, she did not feel like she was being molested at that time because the appellant had given her the "*feeling*" like (or as if) he was trying to tell her where her heart was. She was trying her best to describe a kind of "*feeling*" that she was experiencing at that time, and to describe this "*feeling*" in words is not that easy. A person may thus resort to describing it metaphorically. But her description of the "*feeling*" given to her by the appellant should not be misconstrued to mean that she was also stating, in the same breath, that she did not in fact know where her heart was. Neither was she saying that the doctor was, by his actions, telling her exactly where her heart was because she did not already know the position of her own heart and therefore needed the doctor to tell her where her heart was.

83 I do not find her evidence that she did not feel that she was molested at that time to be incredible because a patient would least expect to be molested during a medical examination by her own doctor. What must be further appreciated is that in this case, she had mentioned some chest pains which she suggested could be due to over-exercise and the fleeting touch of the breast and nipple done by the appellant was at the same time when he was saying "*as long as …you don't get chest pain here*". By not thinking that the appellant was molesting her at that time, she was giving him the benefit of doubt. The touching took place under peculiar circumstances whereby the appellant had set up the opportunity to touch the complainant inappropriately by apparently indicating to her where the chest pain would be so as to throw her off-guard as to his real motive for touching her breast and nipple.

84 During cross-examination the complainant denied that she had ever asked the appellant "*What is chest discomfort?*". Next, when counsel essentially put to her that the appellant then said that there would be a crushing pain on the sternum, more to the left, she responded by saying that she was very sure that he never said that. According to counsel, the next thing that happened in the exchange between the appellant and complainant during the 8 June Incident was that the appellant demonstrated to the complainant by putting his clenched right fist on his own chest telling her there would be a crushing pain on the chest nearer to the left, to which the complainant answered during cross-examination with apparent indignation:

> No, I don't need him to tell me that. I know where my heart is, I know where my chest is, I know how a chest pain feel [*sic*] like.

85 There is no inconsistency as submitted by Mr Singh because her metaphorical description of her "*feeling*" *as if* he was trying to tell her where her heart was had nothing to do with her indignant answer that she knew where her chest and heart were, and that she knew how a chest pain felt like. As I have explained, her indignant answer was given in the context of her denial of having asked the appellant what was chest discomfort and also her implied denial that she needed the appellant to demonstrate to her how chest plain felt like with his clenched fist over his own clothes, telling her

that there would be a crushing pain at the site he indicated with his fist.

86 Finally to the more subtle point Mr Singh raises, that if she did not need anyone to show her where her heart was, how could she possibly think that the appellant's excuse of trying to show her the location of her heart was appropriate. I must emphasise that there is a clear distinction between the fact that she herself knew where her heart was (and thus needed no one to show her the location of her heart) as opposed to the "*feeling*" given to her by the appellant, which is a metaphorical description of what she thought the doctor might be thinking of or was trying to do. She felt *as if* he was trying to show her where her heart was when he touched her chest fleetingly. In this regard, I am in full agreement with the trial judge who found that the complainant had more than given the benefit of the doubt to the appellant. He was a doctor and she genuinely but wrongly believed at that time that the doctor was not molesting her when he touched her chest fleetingly while saying the words "*as long as … you do not get chest pain here*" during a consultation session in which she had complained of chest pain due to over-exercise.

87 In fact, this was consistent with her actions after the 30 October Incident. She did not immediately lodge a police report and create a scene. She was confused and had to clarify with two people before lodging a police report the next day. A criminal offence of molest is a serious matter which she rightly had to be extremely careful about before lodging such a complaint against a doctor. This explains the extra caution she took by first checking with two others as to the appropriateness of the manner in which the appellant had touched her. Her evidence during cross-examination is worth setting out in full:

> Q: Even after the 2nd time, did you not ask him: what is the need for you to press my breast?
>
> A: As I said, I was confused. I'm not sure whether it's necessary. I do not want to embarrass myself by asking all these questions and making a big hoo-ha.
>
> …
>
> Q: Surely you will not like any men [sic] to squeeze your breast, Ms [complainant's name]?
>
> A: Yes, not any men [sic] but he's a doctor.

Her testimony is completely consistent internally. At first, she thought it was not molestation when the appellant touched her breast during the 8 June Incident. However, she became confused and unsure after the 30 October Incident. She wanted to be very sure that there was no reason for the appellant to touch her breast before she reported the matter. This was her state of mind and it was internally consistent over both incidents.

88 Mr Singh also submits that the complainant's account of the 8 June Incident was an afterthought given how late in the day it arose and how the events appeared to have evolved.

89 It is undisputed that there was no mention of this incident in the First Information Report of 31 October 2011 ("FIR") nor was it mentioned to Susan or Dr Chia when the complainant contacted them on 30 October 2011. Furthermore, there was also no mention of this to Dr Kua when she saw him almost a year after the FIR. The complainant herself admitted that she could not recall if she told Dr Kua about the 8 June Incident.

90 In the trial below, IO Sabaran testified that he told the appellant on 4 November 2011, when P25 was recorded, that there were allegations made by the victim that the appellant had touched her

on two different occasions. However, the questions posed by IO Sabaran to the appellant in P25 do not, on the face of it, reveal that IO Sabaran had told him of the two incidents.

91 In my view, there is no reason to doubt IO Sabaran's evidence that he did tell the appellant of the two incidents. IO Sabaran had candidly admitted when giving evidence that he did not tell the name of the complainant to the appellant on their first meeting when P25 was recorded due to an oversight. A further reason why the 8 June Incident was not an afterthought is to be found in P21, which was recorded about 7 months after the FIR. The first question IO Sabaran posed to the appellant referred to *two different occasions*. This was clearly a reference to two separate dates as part of the appellant's answer was that he did not remember about any earlier incident though he remembered the last date when he touched the complainant's breast when examining her about exercise. In addition, it is entirely explicable why the complainant only told Susan and Dr Chia of the 30 October Incident. The context of the conversation was a query on the appropriateness of the appellant's actions of that very day. It is not surprising that she did not mention the 8 June Incident. By the time P25 was recorded, four days after the FIR, IO Sabaran said he had mentioned two different occasions to the appellant. The 8 June Incident is therefore not an afterthought. With respect to Dr Kua, the complainant could not remember if she told Dr Kua about the 8 June Incident. Dr Kua's clinical notes also only make reference to the 30 October Incident. However, I do not think that the failure to mention the 8 June Incident to Dr Kua is a material deficiency in her evidence. The trial judge had rightly pointed out that the trigger point for her symptoms of PTSD was the 30 October Incident and found that it was not surprising that she had only mentioned this incident as she hoped that her symptoms would go away. Given that the 8 June Incident is not an afterthought, her failure to mention it to Dr Kua is not a material deficiency in her evidence.

92 As to the evolutions of the account of the complainant in respect of the 8 June Incident, Mr Singh points to the differences in the framing of the actions of the appellant in the original second charge and amended second charge. These differences included a change from "*sliding* your hand into" [emphasis added] to "*inserting* your hand into" [emphasis added]. Furthermore, Mr Singh points to a difference in the wording of the original first charge and original second charge. Besides the date and time of the offence, there was one difference in the actions of the appellant in the charges. The original first charge stated that the appellant had touched the complainant's left breast and nipple "*while pressing down*". The italicised phrase is absent in the original second charge. Mr Singh submits that this strongly suggests the complainant told the police that there was a difference in the way she was touched on both incidents. The charge was amended on the first day of trial to read in identical terms that the appellant did use criminal force on the complainant by "*inserting your hand into the said* [complainant's name] *left brasserie cup and touching her left breast and nipple*". The only material difference between the two charges now is that the charge for the 30 October Incident stated that the complainant repeated the act of touching her left breast and nipple. Furthermore, Mr Singh points out that the complainant had testified in court that on both occasions, the appellant had *squeezed* her left breast. Mr Singh submits these changes and shifts show that there were inconsistencies in the complainant's testimony. This submission leaves no favourable impression on me simply because the evolutions referred to were not material or significant. They did not alter the very essence of what the complainant claimed had happened. In this regard, there is no material inconsistency.

93 Considering the above, the complainant's evidence as to what happened during the 8 June Incident is internally consistent.

The 30 October Incident

94 Mr Singh also argues that there are various improbabilities in the complainant's account of the

30 October Incident so much so that it renders it highly unreliable. First, it is inherently improbable that the complainant was chatting with the appellant during auscultation because it is "common knowledge" that it is not possible to auscultate a person when they are speaking because it would make it difficult to hear heart or chest sounds. I do not think this submission assists in showing that the account of the complainant is inherently improbable. The reference to the fact that a doctor cannot hear clearly when a patient speaks during auscultation as "common knowledge" is nothing more than a bald assertion, which I am unable to accept as being true in fact. No expert was called by the defence to testify on this fact. For the sake of argument, one can just as easily assert another bald assertion based on "common sense" that as the tone and frequencies of the sounds (*eg* irregular heart beat and other chest sounds) that the doctor is looking out for during auscultation are likely to be different from that of a human voice in conversation, the human ear will be capable of differentiating between those sounds and the human voice just as the human ear is capable of distinguishing between the melodies produced by the violin and the piano at a symphonic orchestral performance and hear both distinctly at the same time. As such, without an expert to verify the truth of Mr Singh's bald assertion, I do not accept Mr Singh's submission that there is inherent improbability arising from the complainant's evidence because the auscultation had taken place in the course of a conversion between the appellant and the complainant.

95 Mr Singh also raises improbabilities similar to those raised in respect of the 8 June Incident. They are that there was no reason for the appellant with an unblemished record spanning 40 years to do such an act and that it was also possible for Linda to look through the sliding window into the consultation room at the material time. These make the complainant's account highly improbable. Again for reasons I have expressed (see [80] above), I do not think this submission goes very far.

96 Mr Singh next argues that the complainant's response to the appellant's act is again improbable. The complainant should have immediately withdrawn when the appellant touched her breast the first time during the 30 October Incident. According to Mr Singh, the natural and instinctive thing to do is to withdraw and back away from the appellant and then complain. The reason given by the complainant for not doing so was that she was shocked and confused. When asked to explain why she felt shocked and confused, the complainant answered that it was because she "*felt* [she] *was being violated but … wasn't sure if* [the touch was] *necessary*". This adequately explains why she did not pull away after the first touch and why she was not quick enough to react before the second touch. As mentioned above, it is entirely consistent with the fact that she had to check with Susan and Dr Chia after the 30 October Incident on the very same day and the fact that she was wary of not creating an unnecessary fuss. It is also highly consistent with the complainant having felt violated but was just unsure if the touch was necessary. As I have previously mentioned, the line of consistency even traces back to the 8 June Incident where she had given the benefit of the doubt to the appellant that the touch was necessary because she complained of chest pain.

97 Mr Singh further claims that her reaction of shock and confusion as she felt like she had just been violated but was unsure if it was necessary does not square with her reaction when she left the consultation room. She had engaged Linda in a discussion on Botox and asked her if the dentist sharing the premises with the appellant did Botox. When it was put to the complainant in cross-examination that she asked the question in a smiling manner, she replied by saying "*I am in sales… I smile all the time*". When asked by the court if she was smiling at the time she asked Linda the question, the complainant shifted slightly by claiming that she could not really remember. To begin with, I am of the view that it would not be inconsistent for her to have indeed asked that question in a smiling manner since at that point she was still relatively unsure of the appropriateness of the appellant's actions. For this same reason, it would not have been inconsistent of her to ask Linda whether the dentist did Botox. At that point, though the incident was fresh, the entire gravity of the episode had not yet dawned upon her. It was only subsequently upon further reflection and after

verification from Susan and Dr Chia that the full brunt of the incident set in. Be that as it may, Dr Kua did testify that *if* the complainant suffered a traumatic situation, she would want to leave the situation as soon as possible, and he found it unusual that she had asked about Botox so soon after the traumatic incident occurred. Again, this assumes that it was already a fully traumatic incident for her at that point in time which may not have been the case at all. It must be remembered that although she felt violated, she was still unsure whether she was molested as she had not yet sought confirmation from Susan and Dr Chia that the touch was indeed unnecessary for the purpose of the medical examination. Had the touch been necessary, then she would not have come to the conclusion that she had been molested. This was the frame of mind she was in at that point of time. The full implications stemming from the knowledge of having been molested and hence the trauma arising therefrom would not have fully set in at the time she was asking Linda the question whether the dentist did Botox.

98 Additionally, Dr Kua did also say that the fact the complainant asked Linda about Botox is not necessarily mutually exclusive with the fact that she displayed characteristics of a victim of a traumatic event. It must be noted that she left without collecting her change after paying for the consultation fees, which shows that she was not exactly her usual self after the consultation. This again is entirely consistent with the frame of mind she was in at that time – feeling violated yet unsure if she had been molested by her own doctor.

99 Another inconsistency that Mr Singh alludes to is the fact that while the complainant claimed she had problems meeting male doctors during her work and at times felt like punching them, she apparently had no qualms consulting Dr Kua, who was himself a male doctor. However, the complainant did testify that she wanted to see a female psychiatrist in Raffles Hospital. She however, forgot what happened which resulted in her seeing Dr Kua instead. In fact, even Dr Kua testified that the complainant had symptoms of anxiety, was teary at times and very hesitant in divulging information. He said he had to ask her very carefully since he was a male doctor and wanted his session to go at a pace that was comfortable for her. Again, I do not see any inconsistency. It bears mentioning that the complainant's evidence was externally consistent with Dr Kua's evidence.

100 Mr Singh also argues that if the complainant did indeed suffer a traumatic event on 30 October 2011 which resulted in her having flashbacks of the incident or that would cause her to avoid going to clinics which were run by male doctors, the fact that she changed jobs after the 30 October Incident from one which required her to meet surgeons in hospitals to one in which she had to meet GPs in their own clinic was a glaring inconsistency. At first blush, this submission has some force. However, it must be remembered that when the complainant went to see the appellant on 30 October 2011, she had already been considering changing her job. That was why she asked the appellant (prior to him touching her breast and nipple) for his opinion on the product which was an alternative to Botox that she was going to sell later on. Further, the fact that she changed job after the 30 October Incident can hardly be said to be an inconsistency given the fact that the complainant had testified, when asked why she took almost over a year to see a psychiatrist, that she was trying not to think about the incident but the recollections kept coming back. She would therefore have expected her symptoms to go away with the passage of time and not affect her performance in her new job.

101 Therefore, apart from the fact that it could be seen as unusual for the complainant to ask Linda about Botox in a smiling manner so soon after the 30 October Incident, the complainant's evidence was largely internally consistent.

External consistency of the complainant's evidence

Treatment card

102 The words "*nausea*", "*flatulence*", "*VDRL/HIV*" and the names of medication prescribed appear on the complainant's treatment card for the 8 June 2011 consultation. The consultation card also has the name of the company the complainant worked for with the word "*surgical*" there but they were both crossed out. This corresponds to the fact that the complainant wanted a HIV test and had complained of nausea and stomach wind. On both the complainant's and appellant's account, she had told him she was leaving [G] Pte Ltd. The only difference was that the complainant said this happened at the beginning of the consultation on 30 October 2011 while the appellant said it happened at the end. Mr Singh argues that, crucially, there was no record of chest pain on the treatment card. This according to him supports the account of the appellant and is inconsistent with the complainant's account. Mr Singh also submits that the treatment card is an objective piece of contemporaneous evidence from which the court below should have drawn inferences in coming to its decision as opposed to relying heavily on the oral testimonies of the parties when it made its findings (*Ng Chee Chuan v Ng Ai Tee (administratrix of the estate of Yap Yoon Moi, deceased)* [2009] 2 SLR(R) 918 ("*Ng Chee Chuan*") at [19]).

103 The complainant's testimony was that while she was lying down on the treatment bed and her T-shirt was lifted up to reveal her abdomen, she complained that she had a slight chest pain which she suggested could be due to over-exercise. She then asked if she could still exercise. The appellant then did the acts which formed the subject of the charge for the 8 June Incident. Mr Singh submits that if this were indeed true, there would be a record of chest pain on the treatment card. The appellant had testified that he would take a complaint of chest pain very seriously. He would take a detailed history regarding chest pain and would auscultate the heart carefully to listen for abnormal heartbeat or abnormal sounds. He would record the complaint of chest pain on the treatment card. None of this had happened here, even on the complainant's account. The treatment card contains no reference to chest pain and Mr Singh argues that this is inconsistent with the complainant's testimony.

104 The appellant's evidence was that there was no complaint of chest pain. What had happened was that after palpating and auscultating the abdomen of the complainant, the complainant returned to her seat in the consultation room and had asked for "*advice regarding exercise as a way of keeping fit and maintaining her weight*". The appellant explained that exercise was a good thing but that she had to start slowly and increase both duration and intensity. The complainant then asked what would happen to her if she "*overstrain* [*sic*] *her heart*". The appellant thus placed his fist on his own sternum to demonstrate the site and nature of the pain and when the complainant further asked "*where exactly is the pain*", he placed his right fist on the complainant's sternum on top of her T-shirt. There had been no complaint of chest pain, but merely a discussion on exercise, which was why it was not recorded on the treatment card. I have certain reservations about this aspect of the appellant's evidence (which I shall discuss in greater detail below at [134]). For instance, I find it rather odd that a doctor would not ask a patient if there were any problems with her when she suddenly changed the subject from exercising as a way of keeping fit, which is a rather innocuous subject, to overstraining of the heart. In my view, a discussion of overstraining of the heart is unlikely to just end and would naturally lead to the topic of possible chest pain. Moreover, according to him, she was very keen on finding out the exact location of the pain, as seen by her further question inquiring where exactly the pain would be. Even though she did not complain of chest pain, the fact that she brought this up should have led the appellant to ask more about any actual problems she was facing given that he takes issues of chest pain seriously. On his account, he showed not only how the pain was like but decided to use his fist to touch her chest just to show the location of the pain. This is somewhat bizarre as I can find no good reason to touch her on her chest even if it was to be on top of her T-shirt as that would be where her breast would be. The appellant could have easily shown her the location of the pain by many other ways without having to touch her at all, be it with his hands or with his clenched fist. For instance, he could have used a pencil to pin point the

location without touching her at all. What is most detrimental to the argument of the appellant is that his own voluntary cautioned statement in relation to the second charge reads as follows:

> [The complainant] consulted me on 8 June for a HIV/VDRL test. During the consultation, we discussed the importance of keeping fit and weight management. I stressed to her the actual weight was not as important as keeping fit and exercising regularly.
>
> *She mentioned about chest discomfort*. I explained to her that *chest pain* related to heart problems was typically crushing in nature and was typically retrosternal and slightly to the left.
>
> …
>
> [emphasis added]

In his cautioned statement, he stated that she did mention about chest discomfort. This severely brings into question whether his account that she never complained of or mentioned any chest pain is true.

105 In addition, I find that the absence of a reference to chest pain or chest discomfort for that matter on the treatment card is neutral in itself and not supportive of either account. In this particular case, there is a difference in the probative value of an entry on the treatment card and the absence of an entry on the treatment card. To illustrate this point, the fact that a complaint of nausea is written down has strong probative value of the fact that the complaint of nausea was in fact made. However, the same cannot be said of a complaint of a chest pain that is not written down. In other words, on the particular facts of this case, the lack of an entry on a treatment card is not *ipso facto* of similar probative value of the fact that it was not said. This is especially so where the contemporaneous record is one which is not detailed nor meant to record everything that was said. In *Ng Chee Chuan*, the contemporaneous documents referred to by the CA in deciding whether an oral agreement was present were the deeds which were signed, records of payment in the form of cheques, a signed statement and written letters after the alleged oral agreement. Some 14 years had elapsed between the time by which the oral agreement would have been made and the commencement of trial. In this regard, much more reliance had to be placed on objective contemporaneous records as opposed to memories of the witnesses which might fade over time.

106 In general, when evaluating a contemporaneous record for probative value, the entire context must be borne in mind. This would include careful attention to the nature of the document (including how detailed it is or meant to be), the purpose for which it is created, the circumstances in which it is created and how it is subsequently to be used. The factors mentioned are not meant to be exhaustive but merely to underscore the importance of adopting a contextual approach. To further illustrate, minutes of meetings are, in general, sufficiently probative of the matters discussed or not discussed if the maker of the minutes testifies that he has diligently recorded all matters discussed at the meeting. The treatment card here had hardly a few words in relation to the 8 June Incident. Although it is indeed a contemporaneous document, it was not detailed nor was it meant to be a record of all that was said or discussed as opposed to it being more of a record of the appellant's diagnosis and treatment of the complainant. Therefore, it is neutral as to whether a complaint of chest pain was made. I come to this view despite the appellant's claim that he took chest pain seriously as I find serious difficulties with his evidence given his own cautioned statement where he expressly stated that "*she mentioned about chest discomfort*".

Susan's evidence

107 Susan's evidence that the complainant had sent her an SMS text message in 2011 asking if it was normal for a doctor who examined a patient for cough or flu to touch her breast and that she had suggested to the complainant to seek another opinion from a doctor who was one of their customers is clearly consistent with what the complainant had said. Her evidence that the complainant told her when they met during work, shortly after the text message the complainant sent, that she was traumatised by the incident as she could not believe such a thing would happen to her is also externally consistent with the complainant's evidence.

108 However, Susan also stated that the complainant appeared to be in her friendly and cheerful self and did not appear to be depressed. The complainant told her that she was happy in her new job and doing very well. The complainant did not tell Susan that she was seeing a psychiatrist or how she was affected by the incidents. This appears to be at odds with the symptoms displayed by the complainant and which she described to Dr Kua.

109 Nonetheless, I do not think this can be said to be an inconsistency. Even if it can be regarded as an inconsistency, I do not consider it to be material. Dr Yeo, who was the psychiatrist called by the defence, had candidly and rightly admitted that patients may tell their psychiatrist things they do not tell their friends. Furthermore, when Dr Kua was told about Susan's evidence and was asked in cross examination whether it was contrary to what she told him, he testified that the complainant did not have to appear distressed all the time and to everyone she came into contact with.

110 After the complainant left [G] Pte Ltd, she and Susan met up about once every three months for lunch. Susan also testified that they did not share thoughts and feelings on a frequent basis, only doing so a few times. This coupled with the fact that symptoms of PTSD need not be felt and displayed at all times does not make what the complainant told Susan inconsistent with the rest of her evidence.

Dr Chia's evidence

111 Dr Chia confirmed that the complainant did contact her to ask if it was common for a GP to touch the chest of a patient in examination. This is clearly consistent with the complainant's evidence. Any suggestion that Dr Chia had testified that the word "chest" was used instead of "breast" is wholly without merit as the main thrust of the communication was the same.

112 It also bears repeating that both Susan and Dr Chia were contacted on the very same day after the events of the 30 October Incident. It is highly consistent with the complainant claiming that she felt violated but was just not sure of the necessity of the touch. This is why she had to verify with Susan and thereafter Dr Chia. She then lodged the FIR the very next day. The contemporaneity of her follow-up actions lends great weight to her overall credibility.

The diagnosis of PTSD

113 Turning next to the diagnosis of PTSD, the trial judge astutely pointed out that the decision on this issue "would not have a deciding effect on whether [the appellant] did outrage the [c]omplainant's modesty on 30 October 2011, it was nevertheless relevant for [him] to make a finding on the issue". For the present purpose, this diagnosis would have an effect on the consistency of the complainant's evidence as it would show the extent to which she was traumatised and shed light on her state of mind and how she perceived the touch by the complainant.

114 The trial judge accepted Dr Kua's evidence over Dr Yeo's for the following reasons:

(a) Dr Kua had made his diagnosis after carefully examining the complainant over three separate consultations and therefore had the opportunity of observing her. Dr Kua had also given cogent reasons as to how he arrived at his finding.

(b) Dr Kua had experience in assessing accused persons remanded at the Institute of Mental Health and Changi Prison and was aware of the possibility of patients malingering or faking their symptoms. Dr Kua was certain that this was not the case with the complainant. Her emotional display was consistent with someone who had PTSD.

(c) Dr Yeo did not examine the complainant and his opinion was based on Dr Kua's clinical notes and the transcripts of the hearing. He based his finding on the fact that the complainant did not mention to Susan that she was having problems at work and was very happy and doing very well at her new job.

115 Mr Singh argues that the trial judge erred in accepting Dr Kua's evidence because his opinion was based on untrue facts. Dr Kua admitted that it would be unusual for the complainant to be smiling when she came out of the consultation room after the 30 October Incident. He also said he was not aware that she had switched jobs to one where she would have greater contact with GPs as opposed to surgeons in hospital. However, despite these reservations expressed by Dr Kua, there was no change in his diagnosis. The fact remained that he examined her and had the benefit of observing her in making his diagnosis. Dr Yeo simply did not have this benefit.

116 Mr Singh also refers to Susan's evidence that the complainant told her she was very happy and doing well in her job. This, according to Mr Singh was at odds with what she told Dr Kua. Even if the trial judge did not apply the rule in *Brown v Dunn* and allowed the defence counsel below to submit that the occupational limb of PTSD was not fulfilled based on what Susan had testified, this submission would not have gone very far for the reasons I have expressed (see [109]–[110] above). It is not inconsistent in the circumstances of this case that Susan and Dr Kua were told different things. In fact, after applying the rule in *Brown v Dunn*, the trial judge had indeed made this very finding. In the light of this, it also becomes unnecessary for me to decide if the trial judge had applied the rule in *Brown v Dunn* correctly.

117 Given the above, the trial judge had correctly accepted Dr Kua's evidence that the complainant did suffer from PTSD. This therefore shows external consistency of the complainant's evidence as to how she was affected by the incidents and how she perceived the touches of the appellant after verifying with two persons that the touches were inappropriate.

The appellant's voluntary statement – P21

118 I turn next to P21, which is a crucial piece of evidence. The defence did not challenge the admissibility of this statement. P21 was recorded on 3 April 2012 by IO Sabaran and reads:

> I called you after seeing Dominique at CID for the polygraph. I had then remembered who the actual complainant is *after being told her name*. **I remember that I had examined her and I had touched her breast and could have touched her nipples but it was not on purpose.** I am willing to apologise to the complainant and compensate her on agreed terms to show my sincerity or remorse. I have done wrong although unintentional and I am willing to pay for my mistake. I know the complainant is a nice person and would not be lying. I have unintentionally touched her.
>
> Sabaran Singh posed me the following questions and my answers as follows: -

Q1. **The victim had said that you had touched her on two different occasions.** Do you have anything to say to this?

Ans.I do not remember about any **earlier incident** but **I remember the last date where I had touched her breast when examining her about exercising**. I should not have done that but I had no sexual intent. *My intention was to show her the site and nature of pain if she had a heart problem and exercised.*

Q2. Would you say that examining a patient in the manner as has been alleged by the complainant is an established and correct practise?

Ans.No, except to illustrate to a patient the site and type of pain you would have if you had a heart problem and exercised. In this case we were just discussing *about exercise and chest pain* and that is when I touched her to show.

Q3. Do you have anything else to add or say?

Ans.The main ~~thing~~ *reason* I came here today is to let her know that I am sincerely sorry for causing her embarrassment by behaviour which she deems inappropriate and as a measure of my sincerity I am willing to compensate her.

I affirm that the above statement is true and correct and that it has been read and explained to me in English.

[handwritten amendments in italics, strikethrough in original]

[emphasis added in bold]

119 This statement was recorded from 4.57pm to 5.14pm. Before, this statement was recorded, the appellant had given another statement, P25. In P25, the appellant was told that the nature of the allegations against him involved sliding his hand into the complainant's brassiere and touching her left breast and nipple. In court, the appellant had first said that he was not told the nature of the allegations, but when he was later confronted with P25, he claimed he was so shocked and confused that the nature of the allegation did not register in his mind. The trial judge did not accept his explanation and for reasons which I shall explain (see [132] below), he was not wrong in doing so. As a result, by the time P21 was given, the appellant had known the nature of the allegations against him which involved sliding his hand into the complainant's brassiere.

120 It is in this context that the emphasised part of the statement must be read. It clearly reads like a confession of the physical act of touching the complainant's breast and possibly her nipple. The appellant had not mentioned that this was touching above the clothes despite knowing the nature of the allegations against him. The appellant's confession in P21 that he remembered the physical act of touching the complainant's breast and possibly her nipple on one occasion is clearly externally consistent with the complainant's testimony.

121 In court however, he tried to explain away P21 by claiming that when this statement was recorded he had shown IO Sabaran a demonstration of what he meant when he wrote that sentence. He claimed he showed IO Sabaran that he had placed his clenched fist on his sternum and later on her sternum over her clothes. That was what he meant in P21. He claimed that if he were to write everything down it would take three to four pages.

122 There are a few problems with the appellant's explanation. First, he made quite clear and detailed amendments to the statement which shows that he had applied his mind carefully and checked the accuracy of what was recorded down in his statement. It is most surprising that he would have allowed such an important fact, *ie*, that he had touched her over her clothes, to be omitted. Second, the mention of "nipples" possibly being touched does not accord at all with any notion that the touching was in fact on top of her clothes and her brassiere beneath. On the contrary, it strongly suggests that his hand had slid beneath her brassiere when he was touching her. As to the fact that it would take three to four pages to write out the explanation, the appellant has shown that he could do it in less than a paragraph in his cautioned statement to the first charge. His cautioned statement reads as follows:

> I did not slip my hand into her brassiere. She had asked me what sort of pain or sensation [*illegible*] heart problem while exercising.
>
> I placed my hand on her chest (on top of her clothes) and showed a "closed fist" to show the crushing sort of pain if there was a problem with her heart during exercises. [*sic*]
>
> …

The above calls into serious doubt his claim that he showed IO Sabaran the demonstration when P21 was recorded.

123 IO Sabaran had also denied this in his evidence. Mr Singh argues that the trial judge had stopped the questioning of IO Sabaran when he should not have. He points to the following during the cross-examination of IO Sabaran:

Q:	He did not tell you that he placed his hands underneath her blouse to touch her breast and---
Court:	No---no---
Q:	nipples.
Court:	Mr Selvaraj---
Selvaraj:	Yah.
Court:	I think we have to take the statement on its face value---
Selvaraj:	Yah.
Court:	it's not there, it's not there alright? So it's not going to have any useful purpose for you to go into what's not stated in the statement. I mean, you may wish to leave that to submission---

Mr Singh submits that the learned trial judge prevented the defence counsel below from cross-examining the investigating officer on a material point. However, it is worth pointing out that when the appellant was cross-examined on P21, the trial judge was astute to the possibility of a recall:

Q:	Dr Lee, I put it to you that the absence of all these things that you claim you told IO Sabaran Singh---
Court:	Yes

Q: only goes to show that you did not actually tell him these things.

Court: Yes.

A: I do not agree at all. We have been discussing over and over again about chest pain exercise demonstration---

…

Court: Alright.

Q: Dr Lee, I put it to you that you did not tell IO---

Court: Alright. Now---

Ong: Yes, Your Honour.

Court: do you intend to call Mr. Sabaran Singh as a rebuttal witness?

Ong: We may---we may---

Court: Then---

Ong: do so.

Court: perhaps Mr. Sabaran should then step out of the Courtroom, alright?

124 IO Sabaran was recalled and then cross-examined on this very issue. He denied that the appellant had done any demonstration. In giving evidence IO Sabaran stated the following:

A: Your Honour, all that the accused told me I recorded down---

…

Witness: I recorded down in the statement. And all that is in this statement is exactly what he told me.

…

Q: The accused also said that during the recording of the statement, he demonstrated to you what he meant by placing his own fist over his chest on the sternum, slightly to the left.

…

A: Your honour, he did not demonstrate any such thing to me.

…

Witness: Your Honour, if he had---

…

Witness: I would have asked his permission to take a snapshot of that, printed it out---

…

Witness: and got him to sign on it.

…

Witness: Your Honour, I would also have inserted a recorder's note---

…

Witness: in the statement, making reference to that particular description and the photograph.

In cross-examination IO Sabaran maintained his evidence:

Q: Mr Singh, I put it to you that the additional words that the accused wrote under question 1 is to show that there was actually---

Court: No---no---no, not is to show, he won't know what's in the mind of your client, alright.

Selvaraj: That---alright, I'll put the purpose of his writing it [sic] is to show---is to say that what transpired between him and [the complainant] on the day in question. That's simple straightforward question, Your Honour.

Court: Do you understand the question?

Witness: No, Your Honour (clears throat).

Court: Alright, Counsel is putting to you that the fact that there were additional words added in by hand by---by the accused in his answers to your question 1, alright, show that there was a narration by the accused to you of what transpired between him and the victim, or---

Witness: Not that I know, Your Honour.

Court: complainant before the commencement of the recording of this statement.

Witness: No, Your Honour.

125 Mr Singh points out that IO Sabaran had previously stated that he told the appellant when P25 was recorded that there were two different occasions in which he allegedly touched the complainant but this was not reflected in the statement. IO Sabaran had also admitted that he did not tell the complainant's name to the appellant on that day due to an oversight. Mr Singh questions whether his evidence is really believable given that he had 19 years' experience. He also questions whether it is safe to rely on IO Sabaran's evidence regarding P21.

126 I do not think the trial judge was in error for accepting IO Sabaran's evidence. He had candidly admitted that it was oversight that led him to not giving the name of the complainant. Furthermore, when this is considered with the other difficulties the appellant's explanation had, it leaves no doubt that there was no discussion or any demonstration by the appellant of him placing his clenched fist first on his own sternum and then on the complainant's sternum on top of her clothes either before or during the recording of P21.

127 As mentioned above, P21 is clearly externally consistent with the complainant's evidence.

128 Before I leave this point, Mr Singh also submits that the appellant was not told of his right against self-incrimination before P21 was recorded and this is a procedural irregularity. It bears repeating that "a suspect or an accused need not be expressly informed of a right to remain silent [or

right to self-incrimination] whenever any statement is recorded from him pursuant to [s 22(2) of the [CPC]" (*Public Prosecutor v Mazlan bin Maidun and another* [1992] 3 SLR(R) 968 at [37]).

The appellant's evidence

129 I turn now to the appellant's evidence. The appellant's testimony has to be assessed together with the rest of the evidence before it can be said that the charges have been proved beyond a reasonable doubt (*XP* at [34], see [75] above). I have already alluded to certain difficulties and inherent contradictions in his evidence. Before I elaborate on them, it is relevant to point out that the trial judge found that the credit of the appellant was impeached since he alleged that IO Sabaran failed to tell him the date and nature of the allegations against him on 4 November 2011. The appellant's own statement, P25, was shown to him in court where it clearly showed that IO Sabaran had told him the date and nature of his allegations. When confronted with this, he claimed that it did not register in his mind because he was shocked and confused. The trial judge did not accept this reason and rightly so. The appellant had made many amendments to P25 which showed that he maintained clarity of thought. This is further demonstrated by his answer to IO Sabaran's question in P25. The relevant part of P25 reads:

> Q6. A patient that you saw at about 11am on 30 Oct 2011 has said taht she saw you for flu-like symptons and that after you had examined her, she had asked you if she was fit enough to exercise as she wanted to reduce weight. You had then told her to go on the weighing scale and after that you had asked her to lift up her top. She had then done so and you had then placed your hand on her abdomen and rubbed it. Therefater, you had slid your hand into her bra and touched her left nipple and breast. She also alleged that you had then pressed down gently on the breast and told her not to exercise too much to avoid chest pain. Do you wish to say anything to this?
>
> A. I ~~rember~~ *remember* that I had touched her stomach *after she had lifted her blouse partially to expose her abdomen* ~~and~~*. I* pinched the skin to show she is not flabby. I had then told her not to exercise until she is well and then to exercise as much as he can unless she has chest pain. I had then said sorry and pressed on the sternum and told her that if she had pain *constantly* here on exertion ~~constantly thenjh~~ then she must come and see me for~~v~~ referral to cardiologist. Although she had not told me about any pain I was advising her as she had asked me if she was fit to exercise. I felt it was my duty to advise just as I will tell everybody who asks about exercise. But I want to stress that I did not touch her breasts under her bra as alleged. While touching the sternum one will definitely touch the outer part of the breast and what I ~~toiuched~~ *touched* was over her clothes.
>
> [errors and strikethrough in original; handwritten amendments in italics]

130 His answer was detailed and clear with significant amendments. The appellant had claimed that when he gave this answer, he did not have the complainant in mind but had another woman whom he described as the lady in white. It was after he was given the name of the complainant during the polygraph test that he called IO Sabaran to give a further statement.

131 The trial judge had found that his credit was impeached. It is unnecessary for me to decide whether or not the trial judge was correct in finding that the credit of the appellant was impeached. It suffices for the present purpose to point out the inconsistencies in the appellant's evidence when assessing it against that of the complainant.

132 First, while I accept that the appellant could have forgotten the exact date mentioned by IO

Sabaran, I find it difficult to believe that he could forget the nature of the allegations told to him by IO Sabaran, which were both striking and damning if in fact true and would naturally cause him to be very concerned, if not worried. IO Sabaran clearly said that the appellant had slid his hand into the complainant's bra. Therefore, to claim in court that he was not told at all of the nature of the allegations against him on 4 November 2011 was clearly inconsistent with his own statement in P25.

133 Another inconsistency which I have earlier pointed out is the difference in his cautioned statement for the second charge and his testimony in court that the complainant did not complain of any "chest pain" on her first visit on 8 June. His cautioned statement stated that the complainant mentioned about "chest discomfort" during the consultation on 8 June. This is another inconsistency if "chest discomfort" is to be treated as being somewhat synonymous with "chest pain" just as the appellant had himself apparently done so in his own cautioned statement. He claimed in his statement that he had tried to explain the nature of the "chest pain" immediately after the complainant mentioned about "chest discomfort". I have also expressed difficulty with his testimony in court that if no complaint of "chest pain" but only "chest discomfort" was made as per his cautioned statement, why were no questions asked about the state of the complainant and whether she also experienced "chest pain" when she changed the subject from a rather innocuous conversation on exercise to enquire about the site and nature of the possible "chest pain". According to the appellant, she was very keen on knowing exactly where the possible "chest pain" would be (see [104] above).

134 The similarity in the appellant's accounts of the two incidents also strikes me as odd. First, during the 8 June Incident, the complainant had been so intent on finding out the exact location of the possible pain in her own chest (see [104] above). The appellant had placed his fist on his own sternum and it was only upon being asked by the complainant where "*exactly*" the pain would be that the appellant placed his fist on her sternum. During the 30 October Incident, the appellant had again placed his right fist on his own sternum to tell her where she would experience chest pain if she over-exercised too early. Again according to the appellant, the complainant asked for the actual site and nature of the pain which caused the appellant to place his fist on her sternum. The complainant had denied in cross-examination that was what had happened and retorted that she did not need him to tell her where her heart and her chest was, and how a chest pain felt like. I find her evidence to be entirely believable and in any case, far more believable than that of the appellant. For her to ask *twice* for the exact site of the possible "chest pain" from exercising is most peculiar. If in fact he had placed his fist on her sternum on top of her clothes on the first occasion on 8 June to indicate where her possible "chest pain" would be, it would be most unlikely that she would have forgotten that remarkable demonstration of the location of the pain and enquire about the very same thing again on 30 June and be shown a repeat of that remarkable demonstration by the appellant. Furthermore, to demonstrate the site of the pain by placing his own fist on her sternum would not add very much after he showed her visually where the pain would be on his own sternum. For this purpose, using a pointed object would also have sufficed (as I have noted at [104] above) if a pin point identification of the location of the pain was intended to be shown to the complainant. Mr Singh says that placing the fist on the sternum is termed "Levine's Sign". I was invited to do an Internet search. Initially, I thought it was some accepted medical procedure. Though there is no expert testimony on this, it turns out from my own Internet search that a "Levine's Sign" is a clenched fist held over the chest used by patients to describe to their doctors the ischemic chest pain that they are feeling. It is not a term meant to describe an acceptable medical procedure where a doctor places his clenched fist directly on a patient's sternum to describe the chest pain and to point out the location of the pain to a patient.

135 Still on the point of similarity of accounts, the appellant's evidence is that the complainant also seemed to be fixated on asking the appellant if he did Botox. On both occasions before leaving the consultation room, the complainant had asked the same question whether the appellant did Botox and

after he replied no, she asked why there was a poster in the waiting area. In fact, if taken with Linda's evidence, it would mean that she asked whether the appellant administered Botox a total of three times, the last two times being barely minutes apart. This again strikes me as extremely odd and rather unbelievable.

136 On his evidence, it seems like the complainant did not remember where chest pain would be such that she needed to ask the same question on two separate occasions (*ie* 8 June and 30 October) and she also could not remember if the appellant did Botox and had to ask him the same question again on both occasions. I find it hard to accept that this could be due to her poor memory. The appellant's evidence appears to me to be rather contrived. The complainant's evidence on the other hand is inherently far more credible. The complainant testified that she had never asked where the chest pain would be. Moreover, she had only asked the appellant about "fillers", not Botox, on the 30 October Incident. She did not ask the appellant anything about "fillers" during the 8 June Incident. The complainant explained that on 8 June 2011, she did not yet have any offer from the company which she eventually joined in November 2011 to sell "fillers". Before that, she was selling surgical instruments. Only after she got this job offer in October 2011 to sell "fillers" did she decide to ask the appellant for his opinion on the product on 30 October 2011. She asked for his opinion at the commencement of the consultation before her breast was touched. The complainant offered this logical explanation to show why she could not possibly have asked the appellant for his opinion about either "fillers" or Botox on 8 June 2011. She only asked for his opinion *once*, not on Botox, but on "fillers" and that was on 30 October 2011. On the appellant's account, she had asked the same question on whether the appellant did Botox twice (on 8 June and 30 October 2011). Taken with Linda's evidence, it would mean that she asked Linda this same question just minutes after she asked the appellant on 30 October 2011. I therefore found the appellant's account beset with these oddities and peculiarities and that the complainant's evidence made far more logical sense and was much more believable.

137 The appellant's testimony is also clearly inconsistent with P21 where he admitted to the physical act of touching the complainant's breast and possibly her nipple. Having disbelieved his evidence that he had meant in P21 to say that he was placing a clenched fist over her clothes, P21 is clearly inconsistent with his evidence in court.

Linda's evidence

138 The trial judge did not accept Linda's evidence for a few reasons. First, he found her to be an evasive witness. As an appellate court, I would not be in a position to evaluate this finding made by the trial judge.

139 The trial judge also drew an adverse inference for the appellant's failure to mention Linda in his cautioned statement. It is unnecessary for me to decide if this was proper in the circumstances because he also found inherent difficulties with her evidence. The trial judge explained that it did not accord with reasonable human behaviour for Linda, during the 30 October Incident, to stand leaning forward and looking through the sliding window for five to six minutes just to wait for the appellant to finish with the complainant's consultation just because she had a non-urgent query from another patient. I am in agreement with the trial judge that this evidence is inherently not credible.

140 Linda's evidence is also inconsistent with P21 where the appellant stated he touched the complainant on her breast and could have touched her nipple. Linda claimed no such thing had happened.

141 In the light of this, I do not think the trial judge was in error in holding that Linda's evidence

was not worthy of belief.

Conclusion on this issue

142 From the above, the only inconsistency present is the fact that the complainant had been smiling when she came out of the consultation room on 30 October 2011. I do not find this to be a material inconsistency warranting appellate intervention. The trial judge is therefore not *plainly wrong* in holding that the complainant's testimony was unusually convincing. On the other hand, the testimony of the appellant is beset with inconsistencies and is on the whole far less logical than that of the complainant. In these circumstances, even without corroboration, I find that the trial judge is not *plainly wrong* in finding that the charges against the appellant had been proved beyond a reasonable doubt and that the testimony of the complainant is unusually convincing.

143 Importantly, as I pointed out above at [79], the trial judge found that there was no motive for the complainant to falsely accuse the appellant. In this regard, I agree with the prosecution that without any such motive, it is highly unlikely that the complainant would go to the following extreme lengths to falsely accuse the appellant:

(a) Engineer an elaborate set-up which involved contacting Susan and Dr Chia to check on the appropriateness of the appellant's touch before making her FIR and going to a psychiatrist almost a year later and spending almost $900 in medical fees; and

(b) Wait for 2 years for the matter to proceed to trial and give evidence of her being molested, and expose the fact that she wanted a HIV test because her boyfriend had multiple sex partners before her.

144 This finding makes it unnecessary for me to comment on the trial judge's findings of corroboration because the trial judge was plainly right to find that the charges were proved beyond a reasonable doubt on the basis of the complainant's testimony alone and weighed against the appellant's testimony. However, since the trial judge made certain findings as to independent corroborative evidence, I would give my views. In doing this, I will not touch on whether the evidence constituted liberal corroboration.

Is there independent corroboration?

145 According to the trial judge, Susan's and Dr Chia's testimony that the complainant had contacted them to ask about the appropriateness of being touched by a GP was independent corroborative evidence of the complainant's testimony. I do not think this can be considered independent corroborative evidence or *Baskerville* corroboration of the fact that the appellant had committed the acts as opposed to the mere fact that the complainant had made those statements. In *Khoo Kwoon Hain v Public Prosecutor* [1995] 2 SLR(R) 591, Yong Pung How CJ said at [51]:

> … If the complainant's evidence is not unusually convincing, I cannot see how the fact that she repeated it several times can add much to its weight. …

In *AOF*, the victim ("C1") had, on one occasion, told her younger sister ("C2") that the accused had touched her vagina and body ("the third episode") (at [50(c)]). The CA said at [182]:

> As should be apparent, C2's testimony on the third episode does *not* constitute corroboration in the *Baskerville sense* since it is merely, on C2's own account, a repetition of what C1 told her. This inevitably diminishes its probative value. [emphasis in original]

In a similar vein, Dr Kua's evidence on what the complainant told him happened is not *Baskerville* corroboration of the fact that the appellant had committed the acts. Dr Kua's evidence on what the complainant told him poses another difficulty as under s 159 of the Evidence Act, the former statement relating to the fact must be at or about the time when the fact took place or before any authority legally competent investigates the fact. Be that as it may, it is apparent that the evidence of Susan, Dr Chia and Dr Kua on what the complainant told them is not independent corroborative evidence in the *Baskerville* sense of the fact that the appellant had touched the breast and nipple of the complainant.

146 With respect to the diagnosis of PTSD, the trial judge had opined that this would corroborate the complainant's evidence that she experienced a traumatic event. This is correct. The diagnosis of PTSD also shows the extent to which the complainant was mentally traumatised. However, for the sake of clarity, the diagnosis of PTSD is not *Baskerville* corroboration of the fact that the appellant had indeed touched the breast and nipple of the complainant in the manner she described. The diagnosis of PTSD in and of itself does not reveal the real source of the trauma, and does not reveal whose account is in fact true. In this regard, it is pertinent to refer to *AOF* where the CA dealt with whether hymenal tears in the victim amounted to corroborative evidence. The CA explained as follows:

> 197 In the Singapore High Court decision of *B v PP* [2003] 1 SLR(R) 400 , Yong CJ found (at [28]) that a medical report of a victim confirming a tear in her hymen was only relevant in establishing the fact that the victim had sustained injuries to her vagina. It was certainly not corroborative of the victim's allegation that the injuries had been caused by the accused in that case. On the unique facts of that case, Yong CJ found this particular piece of corroborative evidence sufficient to sustain the accused's conviction.
>
> 198 While we would agree that Yong CJ's statement in the preceding paragraph, viz, that hymenal tears while evidencing sexual penetration, do not point to a specific perpetrator, is unimpeachable as a matter of logic, the evidence of C1's hymenal tears cannot, in contrast to the facts in *B v PP*, be sufficient corroboration to sustain the Appellant's conviction. Indeed, there are two critical distinguishing factors between the facts in *B v PP* and those in the present case.
>
> 199 First, the victim in *B v PP* was three years old when she was medically examined meaning that there was next to no possibility that the victim in *B v PP* had been penetrated by someone else. In contrast, C1 was 16 year-old at the time of her examination. C1's age *per se* would have been a neutral factor had it not been for the revelation of the school report and school counsellor's statement that suggested that she had been sexually active by the time of her medical examination (see above at [165]-[171]). Secondly, the medical examination in *B v PP* was a contemporaneous report since the victim was examined a day after the sexual penetration had taken place. In contrast, C1 was medically examined close to four years after the last alleged rape.
>
> 200 In this respect, the Judge rightly highlighted the limited probative value of such evidence and we respectfully adopt the same findings he made at [68] of the GD ([11] *supra*), as follows:
>
> > ... while the hymenal tears indicated previous sexual penetration of the vagina, *they did not point to the Appellant being the perpetrator.*
>
> [emphasis in original]

Hymenal tears indicative of the nature and extent of the injuries suffered by the victim in *AOF* can be likened to a diagnosis of PTSD. However, it must be recognised that hymenal tears are physical injuries as opposed to PTSD which is psychological. Nevertheless, the principles in *AOF* are applicable here. Thus, the diagnosis of PTSD is not *Baskerville* corroboration of the fact that the appellant did the physical act of touching her breast and nipple.

147 I now turn to P21, which the trial judge found to be independent corroborative evidence of the fact that the appellant did touch the complainant's breast and possibly her nipple. P21 is a former statement of the appellant himself and is therefore an independent source. It also implicates the appellant in a material particular, which is the physical act of touching the complainant's breast and possibly her nipple. Thus, P21 is *Baskerville* corroboration of the fact that the appellant did the physical act of touching the complainant on her breast. However, it must be pointed out that in P21 itself, the appellant had stated that his touching of the complainant was unintentional. However, this does not change the fact that P21 is *Baskerville* corroboration of the fact that the appellant did the physical act of touching the complainant's breast and possibly her nipple.

The application for the complainant's statements to the police

148 Before disposing with the appeal against conviction, I turn to one last argument made by Mr Singh. Mr Singh argues that at the trial below, the trial judge had wrongly applied the law relating to the prosecution's duty of disclosure as was laid down in the eponymous case of *Muhammad bin Kadar and another v Public Prosecutor* [2011] 3 SLR 1205 ("*Kadar I*"). I shall herein refer to the prosecution's duty of disclosure established in that case as the "*Kadar* obligation". After *Kadar I*, the CA also made a clarification order in *Muhammad bin Kadar and another v Public Prosecutor and another matter* [2011] 4 SLR 791 ("*Kadar II*") pursuant to a criminal motion filed by the prosecution.

149 Mr Singh points to the following exchange in the court below which happened on the first day of trial:

Selvaraj:	Your Honour, I found this morning that my learned friend has not tendered any statement made by [the complainant] to IO Sabaran Singh. Therefore, I'm entitled to see that based on---I---Court of Appeal decision.
Ong:	No, Your Honour. I---I certainly do not agree.
Selvaraj:	There is a Court of Appeal decision, Your Honour.
Court:	No, I think---
Selvaraj:	Case of Mohammad---
Court:	to the extend---correct me if I'm wrong, it's only to the extended if, you know, you were to enhance your case or to weaken the Prosecution's case.
Ong:	Yes, Your Honour. If there's an inconsistency or---
Court:	To that extent is---
Selvaraj:	I have to---
Court:	not all---is not all---
Selvaraj:	but I got to know, Your Honour, what was the statement she made then there's any inconsistency or not. If they are not using it, then they must tender it to the course of Defence.

Ong: No, Your Honour. I---

Court: I think that's not the decision in (Kalla?)'s case---

Ong: Yah.

Court: right. (Kalla?)'s case is---I think the Prosecution has to make a judgement call, you know, whether this evidence will either improve your case or weaken your case. If that's the case then they have a duty to disclose to the Defence. Do you see?

Selvaraj: My understanding is that, Your Honour, whatever documents which they are not using, when they must tender it to the Defence or---or---or---

Court: Alright.

Selvaraj: in all---

Court: So do---

Selvaraj: reasonable---

Court: you want to point to me which part of the decision that say is that.

Selvaraj: Is there somewhere in this case, Your Honour. (Mohammad Bin?) [inaudible] Prosecutor---

Court: Yes---

Selvaraj: for the---

Court: that's my understanding of the ruling, you see. It's---it's---It's a subject to that caveat. Unless you can, I mean, show me otherwise I may be wrong. No, unless you are saying you have no further question, because perhaps what you could can do is to ask other question that you may have for [complainant's name] and then you may vi---revisit this issue at the appropriate juncture.

Selvaraj: Alright, Your Honour, that is the case, Sir. That's okay. I have no further questions, at this stage, Your Honour.

150 Mr Singh argues that the trial judge wrongly applied the law relating to the *Kadar* obligation because the trial judge was of the opinion that it was for the prosecution to determine whether the complainant's statement(s) to the police ought to be disclosed to the defence. Mr Singh submits that the application by counsel in the court below was not frivolous or a fishing expedition as there were legitimate grounds for believing that there were differences in what the complainant said in court and what she told the police. This would have allowed the defence counsel an opportunity to cross examine the complainant on her previous inconsistent statement with a view to impeaching her credit. According to Mr Singh, this failure by the trial judge denied the appellant the elementary right to a fair trial and thus occasioned a failure of justice. This is sufficient to render the appellant's convictions unsafe.

151 The deputy public prosecutor, Mr Tai Wei Shyong ("Mr Tai") however points out that the defence counsel was invited by the trial judge to make the application at a more appropriate juncture, which he chose not to do. Mr Tai points to the following exchange which occurred just before the end of the first day of trial:

Court:	Alright. But are you---are you still exploring the question of---
Selvaraj:	On the---
Court:	the statement?
Selvaraj:	That i---I think I would check-ups further authorities.
Court:	Sure.
Selvaraj:	Maybe know tomorrow morning.
Court:	Alright. I will stand down at this stage and you may wish to address me on---on the question of the (Kalla?) brothers' case. Alright.
Selvaraj:	Sure, Your Honour. Thank you.

The defence counsel in the trial below did not raise this issue again. In the light of this, I am of the view that the trial judge did not make an error given that counsel for the defence did not raise the point again. However, in *AOF*, the CA reiterated at [152] that the prosecution has a "*continuing obligation of disclosure* that '*only ends when the case has been completely disposed of, including any appeal*'" [emphasis in original] (citing *Kadar I* at [113]). Accordingly, I allowed Mr Singh to submit on the grounds that he is seeking disclosure of the complainant's statement(s) to the police. It should be stated at the outset that if I were to agree with Mr Singh that the statement(s) should be disclosed, it would mean that the prosecution is and has been in breach of its *Kadar* obligation. It is also crucial that Mr Tai had disclosed on the first day of hearing before me that the complainant had provided two statements to the police on 31 October and 17 November 2011.

152 Mr Singh's submissions on why disclosure of the complainant's statements is warranted can be broadly summarised in the following manner:

(a) According to Mr Singh, the 8 June Incident was first put to the appellant when he was charged on 12 April 2013. Given that the 8 June Incident appeared to have arisen very late in the day (see [88]–[89] above for details of the submission), the complainant's statements to the police would assist the defence in showing that the 8 June Incident was an afterthought. Mr Singh submits that if the first statement of the complainant recorded on 31 October 2011 had made no mention of the 8 June Incident, the defence would have been deprived of the opportunity to show in cross-examination that the 8 June Incident was indeed an afterthought. And if the complainant only mentioned it later in her second statement to the police, Mr Singh submits that a further question as to why the complainant suddenly remembered the 8 June Incident would arise. It would also raise questions as to why Dr Kua was not told of the 8 June Incident.

(b) Mr Singh also submits that the complainant's account of what transpired on 30 October 2011 had gone through various permutations. According to Dr Chia, the complainant told her that a GP "*touched*" her "*chest*". In the original first charge, it was stated that the appellant had *slid* his hand into her left brassiere cup to touch her left breast *while pressing down*. The charge was amended to read that the appellant had *inserted* his hand into the complainant's left brassiere cup and *touched* her left breast and nipple. In court, the complainant said that the appellant *squeezed* her breast. This all pointed to inconsistencies in the complainant's testimony. If there were indeed differences in what the complainant told the police, it would be relevant for the defence because, according to Mr Singh, one of the central issues in the case was the

complainant's changing versions of the alleged incidents and this would have affected the trial judge's assessment on whether the complainant was unusually convincing. Mr Singh also likened this case to that of *AOF* where an external inconsistency was discovered upon disclosure of the victim's statements to the police to the defence.

(c) Mr Singh also submits that the complainant's statements to the police would have a direct bearing on the credibility of IO Sabaran. IO Sabaran claimed that he told the appellant on their first meeting on 4 November 2011 that there were two alleged incidents on different dates against the appellant. If the 31 October 2011 statement reveals that the complainant did not mention the 8 June Incident, it would be impossible for IO Sabaran to have known of the 8 June Incident then and he would have essentially lied to the court when he said that he told the appellant of both incidents on 4 November 2011.

153 At the end of the first hearing before me, I invited parties to make further submissions on the prosecution's duty of disclosure as they pertained to this case. I now turn to the cases of *Kadar I* and *Kadar II* before setting out the principles which govern this case.

The decision in Kadar I and Kadar II

154 In *Kadar I*, the CA reviewed the existing law in Singapore on the disclosure of unused material by the prosecution (see *Kadar I* at [76] for what unused material comprises) and the common law principles on prosecutorial disclosure in other jurisdictions and concluded "that there is indeed a duty on the Prosecution to disclose a limited amount of unused material in Singapore" (*Kadar I* at [110]). The CA further explained at [110]:

> … This duty is based on the general principles in the common law and supported by parliamentary intention (see [102] above), the wide scope of s 5 of the CPC and the even wider scope of s 6 of the CPC 2010, which permits the court to adopt "such procedure as the justice of the case may require" where no provision is made in the CPC 2010 or other law and where that procedure is not inconsistent with written law. Although this duty has its basis in an ethical duty (as the Prosecution has recognised in its further submissions), it is not a "mere" ethical duty (such as the duty of courtesy) the breach of which attracts censure but has no effect on the substantive outcome of the trial. Because of its significance to the legal outcome of the trial, this duty is accompanied by a substantive legal obligation which can be enforced by the court. To hold that there is no such legal obligation would be to effectively sanction unscrupulous methods of prosecution with the court's stamp of approval. …

155 The CA also stated that the court had the power to compel prosecutorial disclosure. The CA referred to the case of *Selvarajan James v Public Prosecutor* [2000] 2 SLR(R) 946 ("*Selvarajan James*") where the court, basing its reasoning entirely on statutory grounds, had stated in absolute terms that it could not direct the prosecution to produce witnesses' statements to the defence. The CA explained that in *Selvarajan James*, "the authorities and principles relating to the common law on prosecutorial disclosure, which had by that time been well-developed in England and adopted in other mature common law jurisdictions, were not considered" (at [82]). For this and other reasons, the CA stated that *Selvarajan James* should not be followed on this particular point. The CA explained that the power of the court to compel prosecutorial disclosure was based on the common law. The relevant passage from *Kadar I* reads:

> 111 The proposition in *Selvarajan James* that the court lacks *power* to compel prosecutorial disclosure will now be considered in brief. In *Tan Khee Koon v PP* [1995] 3 SLR(R) 404 at [61]-[62], Yong CJ held that the court had the power under s 58(1) of the CPC (now s 235(1) of the

CPC 2010) to compel the production of any document or thing necessary or desirable for the purposes of trial, although an application could only be made "to the court before which the actual trial was taking place and ... only ... after the recording of the prosecution evidence had commenced". Notably, s 58(1) cannot be used in relation to a "general demand" for an unspecified class of documents; an applicant must be precise in specifying the documents that are desired (see *PP v IC Automation (S) Pte Ltd* [1996] 2 SLR(R) 799 at [63]). …

112 … For present purposes, recognising the limitations on s 58(1) of the CPC imposed by its wording, we are inclined to say that any power necessary for enforcing the Prosecution's common law duty to disclose unused material may have to be itself based on the common law as applied through s 5 of the CPC or s 6 of the CPC 2010. It would be an absurd result if, having found that a common law disclosure duty exists, we hold that a trial court is unable to enforce that duty because of the lack of a relevant statutory power even in a case of grave and deliberate breach. We cannot see why it should be left to an appellate court to correct a miscarriage of justice in such a situation. In the final analysis, we would say that the necessary power arises from the inherent jurisdiction of the court to prevent injustice or an abuse of process (see *PP v Ho So Mui* [1993] 1 SLR(R) 57 at [36], *Salwant Singh s/o Amer Singh v PP* [2005] 1 SLR(R) 632 at [11] and *Evidence and the Litigation Process* ([52] *supra*) at paras 10.24-10.29 (albeit in a different context)).

[emphasis in original]

156 Turning to the scope of the prosecution's duty of disclosure, the CA said:

113 … It suffices for us to say that we agree with the Prosecution that the duty of disclosure certainly does not cover all unused material or even all evidence inconsistent with the Prosecution's case. However, the Prosecution must disclose to the Defence material which takes the form of:

> (a) any unused material that is likely to be admissible and that might reasonably be regarded as credible and relevant to the guilt or innocence of the accused; and
>
> (b) any unused material that is likely to be inadmissible, but would provide a real (not fanciful) chance of pursuing a line of inquiry that leads to material that is likely to be admissible and that might reasonably be regarded as credible and relevant to the guilt or innocence of the accused.

This will not include material which is neutral or adverse to the accused - it only includes material that tends to undermine the Prosecution's case or strengthen the Defence's case. To ensure congruence with the statutory scheme for disclosure this material should initially be disclosed no later than seven days before the date fixed for the committal hearing for High Court trials or two weeks from the CCDC for Subordinate Court trials (corresponding to the timelines in ss 176(3)(*b*) and 161(2) of the CPC 2010 respectively). Where under s 159 of the CPC 2010 the statutory criminal case disclosure procedures do not apply, the common law disclosure described here should take place at the latest before the trial begins. The obligation of disclosure (as the Prosecution has correctly acknowledged in its further submissions) is a continuing one and only ends when the case has been completely disposed of, including any appeal. Throughout this period, the Prosecution is obliged to continuously evaluate undisclosed material in its possession to see if it ought to be the subject of further disclosure.

114 When we use the phrase "material ... that might reasonably be regarded as credible and

relevant", we refer to material that is *prima facie* credible and relevant. This is to be determined on an *objective* test. We reject the Prosecution's submission that it should have an exclusive and an unquestionable right to assess an item of inconsistent evidence alongside other evidence available to it, *which may never be seen by the court*, and in that way *unilaterally* decide on its credibility and/or relevance (and therefore disclosability) based on its own *bona fide* exercise of *subjective* discretion. *Such a procedure provides an unacceptably low level of accountability.* The Prosecution has curiously relied on Diplock LJ's speech in *Dallison* ([95] *supra*) at 375 to justify its position. Diplock LJ, as pointed out in *Brown* ([83] *supra*) at 375, was relying on the earlier case of *Rex v Bryant and Dickson* (1946) 31 Cr App R 146. This case was overruled by the House of Lords in *Regina v Mills* [1998] AC 382 ("*Mills*") at 402-404 in so far as it stood for the proposition that the Prosecution should disclose statements of witnesses regarded as credible but need not do so for witnesses not regarded as credible. The House of Lords emphatically disapproved of this distinction on the basis that it gave too much discretion to the Prosecution, and that this could lead to injustice.

[emphasis in original]

157 In *Kadar II*, the CA "clarified that the [p]rosecution's duty of disclosure as stated in [113] of [*Kadar I*] certainly does not require the [p]rosecution to search for additional material" (*Kadar II* at [14]). The relevant passage from *Kadar II* is as follows:

14 … [N]one of the authorities we referred to from various common law jurisdictions suggested that the Prosecution's common law duty of disclosure extended to material outside of the Prosecution's knowledge. *Surely, the Prosecution cannot be expected to disclose what it does not know of?* Where such an issue has been addressed, it has been addressed outside the scope of judge-made law: see for example the English Crown Prosecution Service Disclosure Manual <http://www.cps.gov.uk/legal/d_to_g/disclosure_manual/> (accessed on 25 August 2011) at ch 2, para 2.2 (describing the duty of the investigator to inform the prosecutor as early as possible whether any material weakens the case against the accused) and ch 3 (containing detailed roles and responsibilities for investigators in relation to disclosure as set out in the relevant statutory Code of Practice). We do not know of a power under Singapore law that empowers a court to *compel* investigative agencies (which are executive bodies) to adopt a code of practice purely by way of judicial pronouncement.

15 We also clarified that where material falls within the scope of s 196 or 166 of the CPC 2010, such material should be disclosed within the timelines provided for in those sections, while all other disclosable material should be provided in accordance with the timings set out in [113] of the judgment in *Kadar*.

…

17 Although our actual clarification was confined to the matters set out at [14] and [16] above, we also took note of a further point mentioned in the Prosecution's submissions. The Prosecution submitted that the disclosure obligation should be subject to public interest requirements for confidentiality, such as statutes requiring non-disclosure of certain types of information. These include s 23 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA") and s 127 of the Evidence Act (Cap 97, 1997 Rev Ed), both of which contain regimes for non-disclosure of information relating to the commission of certain criminal offences. Also mentioned were ss 125 and 126 of the Evidence Act: these restrict the giving of evidence as to affairs of State and communications made in official confidence respectively.

> 18 It is a trite proposition a court does not have the power to depart from or vary the requirements of statute law. We therefore state, purely for the avoidance of doubt, that our judgment in *Kadar* does not affect the operation of any ground for non-disclosure recognised by any law (*eg*, the MDA or Evidence Act). The procedure for such non-disclosure will be as contemplated in the respective laws, and where the procedure requires it, the Prosecution will have to make the necessary application to the court to show that the case falls within the scope where non-disclosure applies.
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> …
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> 20 For the sake of clarity, we observe that if a prosecutor cannot be expected to disclose material that he *does not know of* in a *known case* (see [15] above), he also cannot be expected to disclose material if he *does not know* of a *case* where it should be disclosed. However, if a prosecutor knows of material *and* knows of a case where it should be disclosed, he is under a duty to arrange for the disclosure of that material even if he is not directly assigned to conduct that case. This is included in the Prosecution's institutional duty of disclosure, which at its most basic level is a duty to comply with the spirit of the Prosecution's disclosure obligation rather than the mere letter. We are heartened that the Prosecution seems willing to fulfil this institutional duty.
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> [emphasis in original]

158 A few observations are apposite at this juncture. First, the material that the prosecution has to disclose does not include material which is neutral or adverse to the accused. In the words of the CA in *Kadar I*, "it only includes material that *tends* to undermine the [p]rosecution's case or strengthen the [d]efence's case" (at [113]; above at [156]).

159 Second, the prosecution has both an institutional and a personal duty of disclosure (*Kadar II* at [20]) of unused material in its *possession* (*Kadar I* at [113]). In respect of the personal duty of disclosure, if a prosecutor knows of material or a case which should be disclosed, he is under a duty to arrange for the disclosure of that material. This is despite the fact that he is not directly assigned to conduct that case (*Kadar II* at [20]).

160 Third, in *Kadar II*, the CA clarified that its decision in *Kadar I* does not affect the operation of *any* ground for non-disclosure recognised by *any* law (*Kadar II* at [18]).

161 Fourth, the timings for the disclosure are aligned to provisions in the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC") depending on which scheme governs the case (see *Kadar I* at [113] and *Kadar II* at [15] for exact timings, which are all before the start of trial). Where no statutory procedure applies, disclosure should take place at the *latest before trial begins*. Therefore, generally speaking, all disclosable material should have been given to the defence at the beginning of trial.

162 Fifth, the scope of the *Kadar* obligation is defined by the *admissibility* of the unused material and its *credibility* and *relevance*. Limb (a) refers to unused material which is *likely* to be admissible and which might *reasonably* be regarded as *credible* and *relevant* to the guilt or innocence of the accused (see *Kadar I* at [113]). Limb (b) refers to unused material which is *likely* to be inadmissible but would provide a *real (not fanciful) chance* of pursuing a line of inquiry that leads to material that satisfies limb (a) (see *Kadar I* at [113]). The phrase "*material … that might reasonably be regarded as credible and relevant*" was expounded on by the CA to mean material that is *prima facie* credible and relevant. This is to be determined on an objective test (*Kadar I* at [114]). The relevant passage is as follows:

115 … That having been said, in the area of criminal law, where the life or liberty of an individual is at stake, it is axiomatic that there must be accountability in the process of assessing the weight of apparently-credible, relevant and admissible evidence. **Where the Prosecution finds material objectively prima facie credible and relevant, it should be disclosed to the Defence. Any dispute or uncertainty that the Prosecution wishes to raise regarding the credibility and relevance of the disclosed evidence should be the subject of examination and submissions before the court, not of an opaque, purely internal and subjective exercise of discretion.** It is true that prosecutors will still have to apply their minds as to whether material objectively falls under the disclosure obligation. However, where there is any doubt about whether a piece of unused evidence is credible, the court should be allowed to make the final decision. Counsel for the appellant in *Mills* argued (at 387A) that "[c]redibility cannot be determined in advance". We prefer to say that credibility may be *difficult* to determine in advance, and the **critical question of whether exculpatory evidence is true ultimately resides within the domain of the court and not within that of the Prosecution. Similarly, if the Prosecution has any doubt about the relevance of a piece of unused evidence, it should be drawn to the attention of the court so the court can rule on it** (see, also, *Keane* at 752 and *Lee Ming Tee* ([88] *supra*) at [152]).

[original emphasis in italics; emphasis added in bold]

At this point, it is clear that the court is the ultimate arbiter of the credibility and relevance of exculpatory evidence. It should not be subject to an opaque, purely internal and subjective exercise of discretion. However, not all unused material which appears on its face to be exculpatory irrespective of the extent of its credibility would have to be placed before the court by the prosecution. Only material which qualifies under the *Kadar* obligation is disclosable. Should there be a dispute between the prosecution and the defence or uncertainty by the prosecution over disclosability of the unused material, it is for the court ultimately to determine disclosability in accordance with the standard of disclosure required by the *Kadar* obligation. The court may in its discretion order the material to be produced before it so that it can examine the material to determine disclosability pursuant to the *Kadar* obligation.

163 The CA in *Kadar I* amply demonstrated the standard and limited extent of the prosecution's disclosure obligations:

116 By limiting disclosure to material that is *prima facie* relevant (as opposed to *possibly* relevant) and adding a threshold of *prima facie* credibility to the Prosecution's consideration, this reasonably limits the amount of material to be disclosed and thereby avoids some of the practical difficulties of the common law regime as it evolved in England. Some examples of unused material that the Prosecution is not obliged to disclose might include:

(a) an anonymous letter mailed to investigators stating that the accused is not guilty (this would not be admissible and *prima facie* credible, nor would it provide a real prospect of a relevant line of inquiry);

(b) the statement of a person saying that he himself had committed the crime instead of the accused, except that it is incontrovertible that the person was not at the place of the crime at the time (this would not be *prima facie* credible, nor would it provide a real prospect of a relevant line of inquiry); and

(c) a photograph of the scene of the crime a long time after it was committed (this in most cases would not be *prima facie* relevant, although it *may* become relevant in the

course of the trial and may then have to be disclosed).

> 117 For a related reason, the duty of disclosure is limited to material that would likely be admissible in evidence or provides a real chance of leading to such "likely-admissible" material. This is a departure from the English position. Our statutory rules of admissibility as governed by the CPC, the CPC 2010 and the EA impose a certain minimum standard of credibility and materiality. …
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> …
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> For this reason, it appears to us that obligatory disclosure is primarily limited to such material as is likely to pass the standard of legal admissibility, in addition to an exceptional category of material providing a *real chance* of leading to such evidence by a line of inquiry. However, we would expect (as the court has always expected) investigators and the Prosecution to pursue inquiries arising from non-disclosed material as far as practicable, and where these produce material falling under the disclosure obligation, the Prosecution should consider whether to make further disclosure.
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> [emphasis in original]

Disclosure is thus limited to exculpatory material which is *likely to be admissible and objectively prima facie credible and relevant* or *material providing a real chance of leading to such evidence by line of inquiry* (which the CA described as an exceptional category). I shall refer to the requirements and the standard of disclosure set out in the preceding sentence as the "Preliminary Thresholds to Disclosure". Thus whether the material has met the Preliminary Thresholds to Disclosure only goes towards the question of disclosure of the exculpatory material. This, however, is separate and entirely different from the ultimate question of whether exculpatory evidence voluntarily disclosed by the prosecution or ordered to do so by the court in accordance with the "Preliminary Thresholds to Disclosure" and subsequently admitted into evidence at the instance of the defence, is determined by the court to be factually true or sufficiently relevant and credible when considered together with the rest of the evidence adduced by the defence, such that it creates a reasonable doubt in the prosecution's case. A court may very well conclude or find at the conclusion of the trial that the material disclosed by the prosecution to the defence and admitted in evidence by the defence is ultimately not credible or factually untrue. Of course, if the defence later chooses not to admit into evidence the material that is disclosed or ordered to be disclosed to it, the court will not be able to consider the disclosed material as part of the overall evidence when deciding whether the defence has succeeded in raising a reasonable doubt in the prosecution's case.

> 164 What then is the appropriate procedural approach where the defence claims that the prosecution has certain material in its possession which should be disclosed as part of the *Kadar* obligation but the prosecution asserts that the unused material in its *possession* has not fulfilled the Preliminary Thresholds to Disclosure and therefore, the prosecution is under no duty to disclose the material? This question has directly arisen in this case.
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> 165 In *Kadar I*, the CA pointed out that it did not lay down "a comprehensive statement on what the law of Singapore should be in this area" and that there was "still ample scope for the development of the fine details in subsequent cases or by legislative intervention" (at [113]). The submissions by Mr Singh call for the finer details to be clarified. However, before attempting to lay down any approach, a preliminary question arises as to whom the duty of disclosure is owed to – the court or the defence?

166 In *Kadar I*, the CA said:

> 118 The Prosecution has taken the position that its duty of disclosure is owed "*to the Court*" [emphasis in original]. Its submissions firmly reject any duty that involves discovery by or disclosure to the Defence. While the duty has also been expressed in the authorities as being owed to the *court* (see the passage from *Brown* at [83] above (quoting *Ward* ([84] *supra*) at 645)), the authorities agree that in practice, it is fulfilled by disclosure to the *Defence* (see, *eg*, *Lee Ming Tee* at [155]). We believe that the reason for this is two-fold. First, to the extent that there is an obligation to disclose some material not admissible in evidence, it stands to reason that such material should not be placed before the court.
>
> 119 The second reason is as follows. To oblige the Prosecution to present material for disclosure directly to the court rather than to the Defence seems tantamount to compelling the Prosecution to present part of the Defence case. This would not be correct (see [85](i) above). The Prosecution will be placed in a situation of conflict by having to explain to the court why the material (which it may well subjectively regard as untrue or immaterial) is objectively *prima facie* credible and relevant to the case, especially since this disclosed material supports the Defence case or undermines the Prosecution's case (see [113] above). The Prosecution also should not be obliged to pursue further inquiries concerning the material on behalf of the Defence, nor is it in a position to make tactical decisions about when, how and whether to use the material in court. These all support the practice that disclosure should generally be made to the Defence, which will then decide what to do with the material.

This passage shows that the prosecution's duty of disclosure is in theory owed to the court. This is also the English position at common law (see *Kadar I* at [85(a)]). But in practice it is fulfilled by disclosing material directly to the defence. This, however, rests on the assumption that the material is required to be disclosed. With this in mind, I turn now to the appropriate approach in this case.

The appropriate approach in the present case

167 I start with a rather incontrovertible proposition. The office of the Attorney-General as the Public Prosecutor is a high constitutional office and in this regard there is a presumption of legality or regularity. In *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 (at [46]) ("*Ramalingam*"), the CA expressed the view that there is a presumption of constitutionality in the context of prosecutorial decisions. Prosecutorial decisions are part of prosecutorial power which is expressed in Art 35(8) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint). I do not think that the presumption of legality or regularity applies only to acts done in relation to prosecutorial power. In fact, the CA in *Ramalingam* stated it was really applying "the established principle that the acts of high officials of state should be accorded a presumption of legality or regularity, *especially* where such acts are carried out in the exercise of constitutional powers" [emphasis added] (at [46]). This presumption is thus not limited to the exercise of constitutional powers. This was also the view expressed in *Cheong Chun Yin v Attorney-General* [2014] 3 SLR 1141 by Tay Yong Kwang J where he held at [37]:

> In the present case, the Applicant failed to provide any evidence that the PP deliberately and arbitrarily discriminated against him in making the negative substantive assistance determination and the non-certification decision. Therefore, the Applicant had not even established a *prima facie* case of breach of Art 12 of the Constitution. Although the discretion to issue the certificate of substantive assistance is a power conferred by statute (*ie*, s 33B(2)(*b*) of the MDA) as opposed to one conferred by the Constitution, in view of the high constitutional office of the Attorney-General as the PP, the courts should proceed on the basis that the PP exercises his

power in accordance with law unless shown otherwise (*ie*, there is a presumption of constitutionality and/or legality): *Ramalingam Ravinthran v AG* [2012] 2 SLR 49 ("*Ramalingam*") at [45]-[47]. The burden is on the Applicant here to show that there is a *prima facie* case of a breach of constitutional rights: see *Ramalingam* at [70]. As stated earlier, he has failed to discharge this burden.

Similar views were expressed by Tay J in *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2014] 4 SLR 773 at [72].

168 I am of the view that a similar presumption of legality or regularity applies in relation to the prosecution's duty of disclosure under its *Kadar* obligation. What this essentially means is that when trial begins (which is the latest that disclosure is to be given depending on the legislative scheme that governs the case), the court proceeds on the assumption that the prosecution has fulfilled its *Kadar* obligation. Nothing said here should be taken as altering the timings of disclosure as stated in *Kadar I* and *Kadar II*.

169 This basic presumption of legality or regularity accords with the position of the Public Prosecutor in the administration of criminal justice in Singapore. In *Kadar I*, the CA explained the role of the prosecutor as follows (at [109]):

> There are, however, also duties inherent to the role of the prosecutor which apply whether or not a prosecutor is an advocate and solicitor. In *Lee Ming Tee* ([88] *supra*) at [144], Sir Anthony Mason NPJ (citing *R v Banks* [1916] 2 KB 621 at 623) stated that prosecutors, in conducting a criminal trial, "should 'regard themselves' rather 'as ministers of justice' assisting in its administration than as advocates". Similar sentiments were expressed in *Mallard* at [82] (see [87] above), *Stinchcombe* at 333 (see [90] above), *Sheshrao* at [26] (see [91] and [92] above) and *Sukma* at [10] (see [93] above). The duty of prosecutors is not to secure a conviction at all costs. It is also not their duty to timorously discontinue proceedings the instant some weakness is found in their case. Their duty is to assist the court in coming to the correct decision. Although this assistance often takes the form of presenting evidence of guilt as part of the adversarial process, the prosecutor's freedom to act as adversary to defence counsel is qualified by the grave consequences of criminal conviction. The certainty required by the court before it will impose these consequences is recognised in the presumption of innocence enjoyed by the accused. *For this reason, a decision to prosecute in the public interest must be seen as compatible with a willingness to disclose all material that is* prima facie *useful to the court's determination of the truth, even if it is unhelpful or even detrimental to the Prosecution's case*.
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> [emphasis in original]

The prosecutor's role in the administration of criminal justice is in assisting the court in coming to the correct decision, even in an adversarial process. Prosecutors have also been described as "ministers of justice" when conducting a trial. In my opinion, for the efficient functioning of the criminal justice system, trust must be reposed in the prosecutor and part of this is reflected through the presumption that the prosecutor has complied with its *Kadar* obligation when the trial begins.

170 However, this presumption that the prosecutor has complied with its *Kadar* obligation owed to the court may be displaced in appropriate circumstances. The court will not look to the prosecutor to show that it has complied with its *Kadar* obligation unless there are sufficient reasons to do so. It is in this regard that the defence comes in to assist the court. Mr Singh argues that the defence must have a *right* to seek disclosure. There is some academic support that "the jural correlative of the Prosecution's *duty* must be an *enforceable right* on the part of the Defence to obtain the documents

that should be disclosed and to obtain an order from the court to compel such disclosure should it not be forthcoming (and *vice versa*)" [emphasis in original] (Denise Huiwen Wong, "Discovering the Right to Criminal Disclosure" (2013) 25 SAcLJ 548 at para 32 ("*Denise Wong*")). It may well be that these are semantic differences but I would prefer not to refer to a right of the defence to compel disclosure. The duty of disclosure by the prosecution stems from its duty to assist the court in coming to a correct decision, and is a duty owed by the prosecution to the court. The court may thus call for disclosure even without an application or assistance from the defence. I prefer to merely refer to the defence's role as assisting the court.

171 The next question is when is the presumption that the prosecutor has complied with its *Kadar* obligation displaced such that the prosecutor has to show compliance? Mr Tai submits that the threshold should be set at reasonable grounds for belief that the Prosecution has failed to comply with its *Kadar* obligations. On the other hand, Mr Singh submits that the threshold should be set at some doubt, dispute or uncertainty as to whether the unused material in the possession of the Prosecution is credible and/or relevant to the guilt or innocence of the accused. I do not think Mr Singh suggests that the doubt, dispute or uncertainty can be based on something merely fanciful and in this regard there is some congruence between the standard advocated by Mr Singh and Mr Tai. I reject the second part of Mr Singh's submission which is that material which is credible *and/or* relevant should be disclosed. In *Kadar I*, it was made clear that the material has to be *both* credible and relevant to the guilt or innocence of the accused.

172 I agree that the standard should be set at reasonable grounds for belief (based on some reasonable doubt, dispute or uncertainty) that the prosecution has failed to comply with its *Kadar* obligation. This approach finds some support in s 8(2) of the Criminal Procedure and Investigations Act 1996 (c 25) (UK) ("CPIA") which reads:

> (2) If the accused has at any time *reasonable cause* to believe that there is prosecution material which is required by section 7A to be disclosed to him and has not been, he may apply to the court for an order requiring the prosecution to disclose it to him. [emphasis added]

This approach also has some academic support (see Michael Hor, "The Future of Singapore's Criminal Process" (2013) 23 SAcLJ 847 at para 29). More importantly, I agree with Mr Tai that this standard sets the appropriate balance between the reasons for disclosure and non-disclosure. The reasons for non-disclosure, as articulated in Parliament, are encapsulated in the following excerpt (*Singapore Parliamentary Debates*, *Official Report* (19 May 2010) vol 87 at cols 563–564 (K Shanmugam, Minister for Law)):

> Ms Lee asked why witness statements are not provided to the defence. Witness statements are not provided to the defence for public policy reasons. The police rely quite substantially on the assistance of the public to solve crimes. If witnesses know that statements that they have given in the course of investigations may be supplied to the accused for his counsel, they may not be inclined to come forward. We also cannot rule out the possibility that threats may be made to witnesses or that they may be otherwise suborned.

Mr Tai submits that setting the standard at reasonable grounds for belief serves as a sieving mechanism to prevent vexatious and groundless applications. This approach creates an inherent checking mechanism against a floodgate of frivolous applications for witness statements based on pure speculation. In this regard, it has been observed that "an accused person has a significant incentive to go on a fishing expedition and try his luck to see what he can obtain from the Prosecution … [and] [t]here is a distinct possibility that the time and resources of the Prosecution and the courts will be wasted on unmeritorious discovery applications" (see *Denise Wong* at para 40).

While the author in that article advocates pre-trial applications for compelling disclosure, I am of the view that for the present, such applications have to be made during trial. Any implementation of pre-trial procedures should be done by Parliament.

173 The next question which arises is whether a different standard should apply on appeal. Mr Singh submits that there should be no difference in the standard at trial and on appeal. Mr Tai on the other hand submits that the defence must show that there are good reasons why such an application was not made during the trial stage. Mr Tai submits that this is in line with the position taken in respect of applications to admit fresh evidence at the appeal stage (citing *Juma'at bin Samad v Public Prosecutor* [1993] 2 SLR(R) 327).

174 I do not agree with Mr Tai. For one, the admission of fresh evidence has nothing to do with a breach of duty by the prosecution. For the *Kadar* obligation, the court is concerned with policing a duty owed by the prosecutor to the court. In this regard, failure by the defence to raise this at the trial below cannot be a ground for absolving the prosecution of the breach of its own duty to the trial court. However, I do see force in the concern of Mr Tai that parties should not be allowed to fill the lacunae in their cases by afterthoughts or by reconstruction of their case after it has failed at trial. Furthermore, given that there may be differences in the outcome of the case where the breach is discovered at trial or on appeal (see [193]–[203] below), the defence may take a strategic position and only choose to raise this at the appeal stage in the hope of getting an acquittal. However, I do not think the appropriate way to guard against this is by imposing a different standard on appeal in respect of when the court requires the prosecution to show that it has not breached its *Kadar* obligation. Rather, the reasons why the defence did not seek disclosure at trial below can be taken into account and considered later as a factor when deciding the appropriate consequences which ought to flow from the prosecution's breach of its *Kadar* obligation (see [202] below).

175 If the court is satisfied that there exist reasonable grounds to believe that the prosecution has in its possession material which should be disclosed, then the presumption is displaced and the prosecution has to show or prove to the court that it has not in fact breached its *Kadar* obligation. However, before even being called to prove its compliance with its *Kadar* obligation, the prosecution has to re-evaluate its position with regards to resisting disclosure. This is in line with the fact that the *Kadar* obligation is a continuing one which only ends when the case has been completely disposed of, including any appeal and during this period "the [p]rosecution is obliged to continuously evaluate undisclosed material in its possession to see if it ought to be the subject of further disclosure" (*Kadar I* at [113]). It is at this point as well where the prosecution can inform the court that it is not required to make disclosure due to operation of *any* ground for non-disclosure recognised by *any* law (*Kadar II* at [18]) if it has not previously done so.

176 If the prosecution still resists disclosure, it can show the court that it has satisfied its obligation in whatever way it chooses but the most obvious way in cases such as this, where the defence asserts that witnesses' statements should be disclosed, is to tender it to the court for the court to examine the statements. Even if the prosecution chooses not to, the court has the power under s 235(1) of the CPC (since it is a specific demand and not a general demand) or at common law to call for the witnesses' statements (see *Kadar I* at [111]–[112]). Mr Singh submits that at this point, the defence should be allowed to examine the statement and make arguments on whether it should be disclosed according to *Kadar I*. If the court after listening to arguments rules that it need not be disclosed, the defence would return the material to the prosecution. On the other hand, Mr Tai submits that the statement is placed before the court only, whereupon the court makes a ruling on whether it satisfies the test in *Kadar I* such that it ought to be disclosed. Mr Tai further submits that the procedure used in relation to impeachment under s 122(2) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("Old CPC") set out in *Muthusamy v Public Prosecutor* [1948] MLJ 57

("*Muthusamy*") should be imported here. Mr Tai submits that this procedure is preferable since there are public policy reasons why materials like witnesses' statements are not to be immediately given to the defence to enable it to argue on the disclosability of the material whenever the prosecution and the defence dispute the disclosability of the materials in question. It should only be done after the court has satisfied itself, perhaps by its own examination of the very material in question, that that material falls within the *Kadar* obligation.

177 No authority on point, local or foreign, has been cited to me on the appropriate approach. In UK, it appears that the procedure provided by s 8 of the CPIA and r 22.5 of the Criminal Procedure Rules 2013 (SI 2013 No 1554) is that once reasonable cause is shown, the court orders disclosure (see generally *DPP v Wood* [2006] ACD 41, where the English High Court reversed the lower court's decision ordering disclosure, but there was no mention of the court inspecting the document itself before disclosure was ordered). However, orders for disclosure have to be focused and not disproportionate (see *The Queen v MO and others* [2011] EWCA Crim 2854 at [60]). In *R v H* [2004] 2 AC 134 ("*R v H*"), the House of Lords said (at [35]):

> … The trial process is not well served if the defence are permitted to make general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good. Neutral material or material damaging to the defendant need not be disclosed and should not be brought to the attention of the court. *Only in truly borderline cases should the prosecution seek a judicial ruling on the disclosability of material in its hands.* If the material contains information which the prosecution would prefer that the defendant did not have, on forensic as opposed to public interest grounds, that will suggest that the material is disclosable. If the disclosure test is faithfully applied, the occasions on which a judge will be obliged to recuse himself because he has been *privately shown material* damning to the defendant will, as the Court of Appeal envisaged (paragraphs 31 and 33(v)), be very exceptional indeed.
>
> [emphasis added]

The references to the paragraphs in the Court of Appeal's decision concerns the prosecution resisting on grounds of public interest immunity and are therefore not on point (*Regina v H and others* [2003] 1 WLR 3006). Generally, the position in the UK falls on the side of disclosure especially where the prosecution opposes on forensic grounds. It is also pertinent that the grounds as to when material should be disclosed under the CPIA (the position was even broader at common law (see *Kadar I* at [104])) are broader than the position in Singapore.

178 Proceeding from a matter of policy, I am in agreement with Mr Tai that the approach in Singapore should be similar to the practice in the impeachment procedure. The court itself will determine if the material indeed satisfies the Preliminary Thresholds to Disclosure on an objective standard without the material first being shown to the defence in the event of a dispute on disclosability. To allow the defence to examine the undisclosed material on a preliminary basis simply because there is a dispute on disclosability has a similar practical effect to disclosure and this would in essence be going further than the situations of disclosure envisaged in *Kadar I*. Mr Singh submits that if the material does not meet the Preliminary Thresholds to Disclosure, the material can be returned to the prosecution without any prejudice or risk. In my view, the public policy reasons to non-disclosure of material would have been, in practical terms, overridden in a situation where there exist no countervailing reasons. This would be tantamount to extending the *Kadar* obligation to material beyond what was provided by the CA in *Kadar I*.

179 Having said that, it must be remembered that the standard for the Preliminary Thresholds to

Disclosure is not high. The court has to decide, on an objective test, whether the material is *likely to be admissible and objectively prima facie credible and relevant to the guilt or innocence of the accused (or there is a real chance of leading to such material by a train of inquiry)*. The court should, in the usual course, be able to do this without protracted arguments. The following passage in *R v H* is instructive:

> 35 If material does not weaken the prosecution case or strengthen that of the defendant, there is no requirement to disclose it. For this purpose the parties' respective cases should not be restrictively analysed. But they must be carefully analysed, to ascertain the specific facts the prosecution seek to establish and the specific grounds on which the charges are resisted. …

Generally, if the court finds difficulty in deciding whether disclosure should be ordered, it would usually point towards ordering disclosure. Put another way, the prosecutor would have failed to show the court that it has not breached its *Kadar* obligation owed to the court. The court should also not over scrutinise or restrictively analyse the parties' respective cases since in doing so, it may amount to over anticipating the case that the defence is going to run. Nevertheless, the court should carefully examine both the parties' positions and the material in deciding whether the Preliminary Thresholds to Disclosure have been met.

180 Turning to one final point, which is that this approach may seem at first blush to be inconsistent with the approach taken in *Kadar I* at [118]–[119] (see [166] above). The reasons expressed in that passage as to why disclosure is given to the defence rather than the court alone relate to the prosecution's argument that material which met the Preliminary Thresholds to Disclosure should nevertheless be only placed before the court so it can decide. The court reasoned that inadmissible material should not be placed before the court. Although that is a concern which resonates here, it is, as the court noted, an exceptional category which should not arise often (*Kadar I* at [117]). Even then, if Mr Singh's position is taken and the material is given to the defence to make submissions, inadmissible material will be still put before the court for it to rule if it should be disclosed. As for the second reason, that the prosecution would have to present part of the defence's case and would therefore be placed in a position of conflict having to argue that the material it subjectively regarded as untrue is *prima facie* relevant and credible, it simply does not apply here where the question is whether the material has met the Preliminary Thresholds to Disclosure. The prosecution would be tendering the document to court precisely to prove what it subjectively believes, *ie*, that the material has not met the Preliminary Thresholds to Disclosure. There is no inherent conflict. If disclosure is ordered, the material will be handed over to the defence who can decide what to do with the material which is exactly the position highlighted by *Kadar I* (at [119]).

181 If after examining the document, the court finds that disclosure is not warranted, the material is returned to the prosecution without the defence ever examining it. On the other hand, if the court orders disclosure, it would mean that the prosecutor has been in breach of its *Kadar* obligation. I express the hope that this invidious position should sparingly arise in practice because the prosecution is expected to comply with its *Kadar* obligation according to the respective timings as provided in *Kadar I* and *Kadar II*. Nevertheless, as acknowledged by the CA in *Kadar I* (at [120]) and *Kadar II* (at [21]) "not all non-disclosures will be attributable to fault on the part of the Prosecution (or lack of *bona fides*)". And if the prosecution has doubts on whether material should be disclosed, it should of its own volition disclose the material (unless any grounds for non-disclosure exists under any law) without seeking a ruling from the court. A ruling from the court should be seen as a measure of last resort in contested applications where the defence seeks disclosure but the prosecution *bona fide* believes that disclosure is not required. The court is not meant to clear doubts that the prosecution has in relation to its disclosure obligations. The following passage from *Regina v Keane*

[1994] 1 WLR 746 (at 752) neatly describes the situation:

> We also wish, in passing, to endorse the observations of the judge in that case as to the scope of the Crown's duty. It would be an abdication of that duty for the prosecution, out of an over-abundance of caution, simply to dump all its unused material into the court's lap and leave it to the judge to sort through it all regardless of its materiality to the issues present or potential. The prosecution must identify the documents and information which are material, according to the criteria set out above. Having identified what is material, the prosecution should disclose it unless they wish to maintain that public interest immunity or other sensitivity justifies withholding some or all of it. Only that part which is both material in the estimation of the prosecution and sought to be withheld should be put before the court for its decision. *If in an exceptional case the prosecution are in doubt about the materiality of some documents or information, the court may be asked to rule on that issue.* [emphasis added]

182 There is also the possibility of another vexed situation where the defence has shown reasonable grounds that the prosecution has in its possession certain disclosable material but the prosecution maintains that it is unable to provide disclosure because it does not have possession of that material due to the material being non-existent. In these unique situations, I recognise that it may be difficult for the prosecution to show that the material is non-existent. Therefore, unless there is strong evidence to the contrary, a clear indication from the prosecutor that he does not have possession of those documents because the materials are non-existent or not available anymore would usually suffice. However, as that situation has not arisen in the present case, I will say no more about it.

183 Finally, Mr Tai submits that a trial court's decision in relation to whether it should examine the material would not be appealable in the middle of trial, as it would not constitute an "order" under s 374(1) of the CPC. Mr Tai instead submits that this ruling may be contested and raised as a ground for appeal after the conclusion of trial. In my view, it suffices to quote what is established authority on s 374(1) of the CPC and its predecessor s 241 of the Old CPC that an "order" has to have an element of finality it. In *Azman Bin Jamaludin v Public Prosecutor* [2012] 1 SLR 615, Chan Sek Keong CJ summarised the principles in relation to s 241 of the Old CPC when deciding whether the term "order" has the same meaning under s 263 of the Old CPC:

> 42 The same collocation of words (*viz*, "judgment, sentence or order") is also found in s 241 of the CPC, and it is not disputed that it is established law that that section applies only to judgments, sentences and orders which have an element of finality in them. In *Knight Glenn Jeyasingam v PP* [1998] 3 SLR(R) 196, Yong CJ said at [14] apropos s 247(1) of the CPC:
>
> > There was no question that this appeal arose out of a criminal case or matter. The concern was with whether the district judge's order was appealable on the basis that it was not a final order. *Although not expressly stipulated by statute, case law has yielded the overriding requirement of finality in the judgment, sentence or order appealed against to qualify for a right of appeal*. The court in *Maleb bin Su v Public Prosecutor* [1984] 1 MLJ 311 applied the *ejusdem generis* rule in interpreting s 307(i) CPC (*in pari materia* to our s 247(1) CPC) and held, at 312B of the judgment:
> >
> > > *The order must therefore be a final order in the sense that it is final in effect as in the case of a judgment or a sentence*. The test for determining the finality of an order is to see whether the judgment or order finally disposes of the rights of the parties.
> >
> > …

It may also be noted that in *Public Prosecutor v Hoo Chang Chwen* [1962] MLJ 284 ("*Hoo Chang Chwen*"), Rose CJ gave the same interpretation to these words in the predecessor provision of s 241 of the CPC. At 284, Rose CJ said (with respect to a Magistrate's order that the Prosecution supply to the Defence certain statements made by the complainants to the police):

> Such a ruling is ... not an appealable order. ...
>
> I would add that to arrive at any other conclusion would seem to me to open the door to a number of appeals in the course of criminal trials on points which are in essence procedural. The proper time, of course, to take such points would be upon appeal, after determination of the principal matter in the trial court.
>
> [emphasis in original]

184 For ease, I have reproduced a succinct summary of the applicable procedure in cases where the prosecution *bona fide* believes that disclosure is not required since the Preliminary Thresholds to Disclosure have not been met but the defence contends otherwise. The procedure, which is only applicable when a trial or an appeal begins, is as follows:

(a) When a trial or an appeal begins, there is a presumption that the prosecution has complied with its *Kadar* obligation. This would mean that the court presumes that all material which should be disclosed has been disclosed.

(b) This presumption will only be displaced if the court has sufficient reason to doubt that the prosecution has complied with its *Kadar* obligation. In this regard, once the defence satisfies the court that there are reasonable grounds for belief that the prosecution has failed to comply with its *Kadar* obligation, the court will look to the prosecution to show that it has complied with its obligation. The prosecution must then establish to the satisfaction of the court that it has fulfilled its *Kadar* obligation since the court will no longer simply presume that there is compliance.

(c) At this point, the prosecutor in charge of the case should re-evaluate his or her position having regard to the contentions raised by the accused at trial or at the appeal which has caused the presumption of compliance to be rebutted. It is at this point that the prosecution may inform the court that it is not required to give disclosure due to the operation of any ground under any law.

(d) Where the prosecution itself after re-evaluation has doubts whether to disclose, disclosure to the defence should be the usual course.

(e) If after re-evaluation, the prosecutor still resists disclosure, it can choose whatever method it wishes to satisfy the court that it has complied with its *Kadar* obligation owed to court. In cases such as this, where contents of the witness' statement are in question, the prosecution can tender the statement to court without it being shown to the defence. The court will decide whether the objective test for disclosure as laid down in *Kadar I* is satisfied. In other words, the court will objectively decide if the Preliminary Thresholds to Disclosure have been crossed.

(f) The court will examine the material and evidence tendered to the court by the prosecution to prove its compliance and also examine the parties' positions carefully but not restrictively in deciding if disclosure should nevertheless be ordered. Generally, if the court finds difficulty in deciding whether disclosure should be ordered, it would lean towards ordering disclosure.

(g) If the court finds that disclosure is not required, the material is returned to the prosecution without the defence ever having looked at it.

(h) On the other hand, if the court finds that disclosure is required, it would make an order that the prosecution disclose the material to the defence. This would also mean that the prosecution would have been in breach of its *Kadar* obligation.

(i) Finally, an order from the trial judge in relation to the procedure above is one which is not appealable under s 374(1) of the CPC as it lacks the element of finality.

(j) The above (a) to (h) are the same whether it is a trial or an appeal. There is no additional requirement on appeal that the defence must show good reasons why the application for disclosure was not made during the trial stage.

185 I will now apply the above framework to the facts of the present case.

Application of framework to the present case

186 After hearing the submissions from Mr Singh at the hearing, I expressly asked Mr Tai if he had fulfilled his *Kadar* obligation, thereby giving him another opportunity to review his position in good faith. Mr Tai categorically maintained that the prosecution has fulfilled its *Kadar* obligation.

187 Having considered the grounds relied on by Mr Singh, I am of the view that there are no reasonable grounds for belief that the prosecution is in breach of its *Kadar* obligation such that the presumption of compliance by the prosecution has been rebutted. I therefore did not require Mr Tai to show the court that he has complied with his *Kadar* obligation.

188 The first ground Mr Singh relies on is that there is evidence before the court which suggests that the 8 June Incident was an afterthought. Having found no force in this argument (see [88]–[91] above), it stands to reason that there is similarly no reasonable ground for contending that what the complainant told the police would show some form of material inconsistency or show it was an afterthought. In any event, Mr Tai has disclosed that the complainant's statements were recorded on 31 October and 17 November 2011 and no further statements were recorded thereafter. There is no suggestion that Mr Tai is being untruthful in this regard. This would mean that the latest the 8 June Incident would have come up was 17 November 2011 (*ie* 18 days after the 30 October Incident). Mr Singh's submission that the evidence before the court shows that the 8 June Incident surfaced only on 12 April 2013 (*ie*, about 18 months later) is therefore without merit and factual basis in the light of Mr Tai's disclosures. I do not think I have any reasonable ground for belief that the prosecution has failed to comply with its *Kadar* obligation in respect of the complainant's two statements. The presumption of compliance by the prosecution remains unrebutted.

189 I find the third ground, which is closely related to the first, to be more of a fishing expedition and a bare assertion. Mr Singh submits that the statement from the appellant, which was recorded by IO Sabaran, does not on the face of it show that IO Sabaran had told the appellant of the 8 June Incident. If the first statement from the complainant makes no mention of the 8 June Incident, it would mean that IO Sabaran had lied to the court when he said he told the appellant of both incidents on 4 November 2011. After hearing all this, Mr Tai still resisted disclosure on the ground that the statement need not be disclosed pursuant to his *Kadar* obligation. Mr Singh did not show reasonable grounds for belief that Mr Tai was in breach of his *Kadar* obligation in this regard. There was just the bare assertion of the *possibility* that the first statement from the complainant made no mention of the 8 June Incident and consequently, another *possibility* that IO Sabaran had lied to the

court. This is clearly a fishing expedition and in the absence of more, there is no reasonable ground for me to believe that Mr Tai has breached his *Kadar* obligation.

190 Turning to the second ground, I do not think that the submissions of Mr Singh have much merit. The "shifts" from *touching*, to *pressing down* to *squeezing* are not material nor do they alter the main thrust of the complainant's version of events. In a similar vein, the use of the word *chest* and *breast* are not sufficiently material to raise reasonable grounds for belief that the complainant had told differing versions about the incidents to the police. This case is nowhere close to *AOF* where the statements of the victim revealed discrepancies in, *inter alia*, the frequency of the alleged rapes (at [152]) and alleged acts of fellatio (at [157]–[160]). In *AOF*, the prosecution had initially resisted disclosure of, *inter alia*, the victim's statements as it was of the view that it did not fall within its *Kadar* obligation (at [148]). The prosecution later on disclosed those statements during the second CA hearing (at [150]). The CA expressed its puzzlement at the prosecution's initial decision to resist disclosure of the victim's statement (at [148]). The CA did, however, acknowledge that *Kadar I* was released admittedly close to the first hearing but noted that it was well before the second hearing.

191 Since I do not find reasonable grounds for belief that the prosecution has not complied with its *Kadar* obligation, it is not incumbent on the prosecution to show me that they have not breached its *Kadar* obligation. There is also no need for me to examine the complainant's statements.

192 Having made this finding, it is not strictly relevant to consider the consequences of a breach of the *Kadar* obligation. Since parties have submitted on it, I will nevertheless give my preliminary views.

Consequences of discovery of breach

At trial

193 The CA in *Kadar I* said:

> 121 Where disclosure, for whatever reason, is made after the beginning of trial, the court may have to grant an adjournment of sufficient duration to allow defence counsel time to consider the effect of the disclosed material and to incorporate it into their case if necessary.

194 Mr Singh submits that the general guiding principle is that the defence should be given sufficient time such that the defence is generally in a position that is no worse off than if the prosecution had properly discharged its duties. I see much sense in this, and as far as practicable, it should be the guiding principle.

195 Mr Tai also submits that as with the statutory regime of disclosure, the trial court may draw any inferences it thinks fit following the prosecution's non-compliance with its *Kadar* obligation (see for example ss 169(1) and 209 of the CPC). At this juncture, I have no reason to disagree.

196 I must also add that the above is not meant to be an exhaustive list of the courses of action open to a trial judge to take when it discovers a breach of the *Kadar* obligation. The fine details should be considered in an appropriate case after full ventilation of arguments.

On appeal

197 When breach of the *Kadar* obligation is discovered on appeal, the situation is more complicated. In *HKSAR v Lee Meng Tee & Securities and Futures Commission (Intervener)* (2003) 6 HKCFAR 336, the Hong Kong Court of Final Appeal made the following observations:

142. Although breach of the prosecutor's duty of disclosure may result in the setting aside of a conviction, the law relating to the duty of disclosure was not developed in tandem with the principles governing the grounds on which a conviction will be set aside. *The two areas of law intersect, however, when non-disclosure by the prosecutor results in an unsafe or unsatisfactory conviction, a material irregularity or miscarriage of justice. Non-disclosure to the defence of relevant material, even if not attributable to any breach by the prosecutor of his duty to disclose, can result in material irregularity and an unsafe conviction*, as it did in *R v. Maguire* [1992] QB 936 and *R v. Ward* [1993] 1 WLR 619, where forensic scientists called by the prosecution failed to disclose to the prosecution information which tended to weaken their expert evidence. An understanding that these two areas of law do not necessarily co-extend and correspond is essential to an appreciation of the cases. [emphasis added]

198 In *Kadar I*, the CA made similar observations:

120 In our view, there is no reason why a failure by the Prosecution to discharge its duty of disclosure in a timely manner should not cause a conviction to be overturned if such an irregularity can be considered to be a material irregularity that occasions a failure of justice, or, put in another way, renders the conviction unsafe (see, also, *Lee Yuan Kwang v PP* [1995] 1 SLR(R) 778 at [40]). The usual rules and procedures for the adducing of fresh evidence in appellate proceedings would be applicable. It should be pointed out that not all non-disclosures will be attributable to fault on the part of the Prosecution (or a lack of *bona fides*); nevertheless, as pointed out in *Lee Ming Tee* ([88] *supra*) at [142] (see [89] above), where such non-disclosures result in a conviction being unsafe the result will still be the overturning of that conviction. In considering whether to order a retrial, the following passage from *Beh Chai Hock* ([63] *supra* at [38]) should be noted:

> When exercising its discretion whether to order a retrial, the court must have regard to all the circumstances of the case. The court must also have regard to two competing principles. One is that persons who are guilty of crimes should be brought to justice and should not be allowed to escape scot-free merely because of some technical blunder by the trial judge in the course of the trial. The countervailing principle is one of fairness to the accused person. The Prosecution has the burden of proving the case against the accused person; if the Prosecution has failed to do so once, it should not ordinarily get a second chance to make good the deficiencies of its case. These principles are summarised in *Chee Chiew Heong v PP* [1981] 2 MLJ 287 .

199 In short, where the breach of the *Kadar* obligation is not material such that it does not occasion a failure of justice, the conviction may not be unsafe. Where, on the other hand, it amounts to a material irregularity, it may result in a failure of justice which is another way of saying the conviction is unsafe. In those circumstances, the appellate court will have to consider whether an acquittal, retrial or a remittance to the trial judge to consider the new material should be ordered after setting aside the conviction.

200 The law in this regard was comprehensively discussed in *AOF*, though not specifically in the context of the breach of the *Kadar* obligation (at [270]–[298]). The CA summarised the position after discussing the various cases including the oft-cited Privy Council case of *Dennis Reid v The Queen* [1980] AC 343 ("*Dennis Reid*") as follows:

296 To summarise, from the cases referred to above, it is clear that where the evidence adduced at the original trial was insufficient to justify a conviction, such as in *Dennis Reid* ([274] *supra*), an acquittal, as opposed to a retrial, should ordinarily be ordered ("category one cases").

At the other end of the extreme, where the evidence adduced at the original trial was so strong that a conviction would have resulted, the more appropriate course would be to dismiss the appeal and affirm the conviction ("category two cases").

297 Between the two extremes, the residual category of cases would include the following, non-exhaustive situations ("category three cases"):

(a) critical exculpatory evidence is no longer available (see, for example, *R v B* ([288] *supra*); *Khalid Ali* ([288] *supra*));

(b) the fairness of the trial below is compromised by the trial judge's conduct (see, for example, *Roseli* ([281] *supra*); *Ng Chee Tiong Tony* ([279] *supra*); and *Beh Chai Hock* ([279] *supra*)); and

(c) the length of time before the putative retrial is disproportionate to the appellant's sentence and/or ongoing period of incarceration (see, for example, *Roseli*; *Ng Chee Tiong Tony*).

298 In so far as "category three cases" are concerned, the appropriate course would be for the appellate court to weigh the non-exhaustive factors enunciated by Lord Diplock in *Dennis Reid* (see above at [276]), while at all times exercising its "collective sense of justice and common sense", in order to determine whether a retrial should be ordered. With the above principles in mind, we now turn to consider the parties' submissions on this particular point.

201 The non-exhaustive factors enunciated by Lord Diplock listed by the CA in *AOF* (at [277(d)]), include, *inter alia*, the seriousness and prevalence of the offence, the nature and length of the sentence imposed, whether the original trial was prolonged and complex, the expense and length of time for a fresh hearing, the long lapse of time to the retrial which might affect the availability of the witnesses and the accuracy of their recollection of the events, whether the evidence which tended to support the appellant at the original trial would no longer be available at the new trial. As the CA pointed out, Lord Diplock made sure that an exhaustive list was not laid down. His Lordship's words in *Dennis Reid* were (at 349D):

… Their Lordships would be very loth to embark upon a catalogue of factors which may be present in particular cases and, where they are, will call for consideration in determining whether upon the quashing of a conviction the interests of justice do require that a new trial be held. *The danger of such a catalogue is that, despite all warnings, it may come to be treated as exhaustive or the order in which the various factors are listed may come to be regarded as indicative of the comparative weight to be attached to them; whereas there may be factors which in the particular circumst*ances of some future case might be decisive but which their Lordships have not now the prescience to foresee, while the relative weight to be attached to each one of the several factors which are likely to be relevant in the common run of cases may vary widely from case to case according to its particular circumstances. …

202 Without in any way limiting the additional factors to be considered when deciding the appropriate course after a conviction is quashed due to a material irregularity in disclosure which renders the conviction unsafe, I would include in the non-exhaustive list of factors the reasons why the defence did not or chose not to seek disclosure in the lower court but chose to do so only at the appeal. By way of an example, if the defence makes a strategic choice of only raising the breach of the *Kadar* obligation on appeal in the hope of securing an acquittal, the court may take this into account in deciding whether to acquit, order a retrial or remit the matter to the trial judge with the

additional evidence. Another additional factor to be considered is whether the breach of the *Kadar* obligation is due to a lack of *bona fides* on the part of the prosecutor.

203 I stress again that the fine details should be considered in an appropriate case, after full ventilation of arguments. As this has not arisen in the particular case, all I will do is echo the following words of Lord Diplock in *Dennis Reid* (at 349F):

> The recognition of the factors relevant to the particular case and the assessment of their relative importance are matters which call for the exercise of the collective sense of justice and common sense…

Conclusion on the appeal against conviction

204 Having found that the trial judge was not plainly wrong in finding that the complainant was unusually convincing and that both charges against the appellant were proved beyond a reasonable doubt, there being no other grounds on which the conviction can be said to be unsafe since the prosecution has not breached its *Kadar* obligation, I dismiss the appeal against conviction.

My decision on the appeal against sentence

205 I turn now to the appeal against sentence. The trial judge sentenced the appellant to ten months' imprisonment and nine months' imprisonment for the charges in relation to the 30 October Incident and the 8 June Incident respectively. He ordered that the sentences run concurrently such that the global term of imprisonment was 10 months.

206 Mr Singh argues that this sentence is manifestly excessive. In *Public Prosecutor v Siew Boon Loong* [2005] 1 SLR(R) 611, Yong Pung How CJ explained that manifestly excessive meant that the sentence was unjustly severe and "requires substantial alterations rather than minute corrections to remedy the injustice" (at [22]).

My decision

207 Mr Singh submits that the following mitigating factors should be taken into account when calibrating the appropriate sentence:

(a) The appellant has no antecedents;

(b) The appellant was co-operative throughout the entire proceedings;

(c) There is a long lapse of time between the commission of the offences and the imposition of the sentence;

(d) The appellant has been sufficiently punished since the start of investigations; and

(e) The appellant has serious medical problems and is in poor health. These include extremely high blood pressure and "intraventricular conduction abnormalities". He also displays symptoms of "occasional diaphoresis and exertional breathlessness".

208 Mr Singh relies on the case of *Chan Kum Hong Randy v Public Prosecutor* [2008] 2 SLR(R) 1019 for the proposition that if there has been an inordinate delay in prosecution, the sentence imposed should "reflect the fact the matter has been held in abeyance for some time" (at [23]). In that case, the delay in prosecution was six to ten years (at [43]). Here the appellant committed the offences on

11 October 2011 and was charged on 12 April 2013. I do not consider this to be an inordinate delay in the circumstances of this case.

209 As for the serious medical problems of the appellant, I agree with the trial judge that they are not of such severity as to warrant the exercise of judicial mercy (*Chng Yew Chin v Public Prosecutor* [2006] 4 SLR(R) 124 at [50]).

210 The prosecution submits that the following factors are aggravating:

(a) The appellant abused his position of trust;

(b) The appellant made direct contact with the complainant's breast and nipple;

(c) The complainant suffered from PTSD as a result of the appellant's actions; and

(d) The appellant has shown no remorse.

211 I agree with the prosecution that what is particularly aggravating in the circumstances of this case is the fact that the appellant had abused his position of trust as a medical practitioner. In fact, he committed the act on one more occasion after the complainant had given him the benefit of the doubt the first time. I further note that he was particularly cunning in disguising his act of molestation as if it was part of his explanation of a potential medical problem to his patient in the course of a medical examination to reduce the likelihood of the patient perceiving it as molestation and therefore minimise the risk of the patient complaining or reporting to the police. The prosecution also points me to an instructive passage in *Chow Dih v Public Prosecutor* [1990] 1 SLR(R) 53. While in that case the doctor was charged with cheating for deceiving his patients into believing that they had ailments so that they would become his regular customers, the observations expressed by Chao Hick Tin JC (as he then was) at [58] are relevant to the present case:

> I have given this matter the most anxious consideration as it involves a member of one of the noble professions. The charges relate to six patients and they stretched over a period of more than three months; it is not just an isolated instance of indiscretion. … Taking advantage of their ignorance and trust, the appellant made them attend at his clinic regularly. … These patients trusted him and did not suspect anything was awry. He had no regard whatsoever for the fears and anxieties which his dishonest representations had caused to his patients. He had no qualms in creating misery for them. *He has abused a position of trust. Such conduct cannot be tolerated without the public's confidence in the medical profession being undermined. What he has done is mean and despicable. He has brought shame to the profession which has always been held in high esteem by the public.* [emphasis added]

212 The complainant trusted the appellant and even gave him the benefit of the doubt after the 8 June Incident. It is loathsome that he did not relent and tried it again by molesting her twice on the second occasion. He violated the dignity of the complainant on more than one occasion and in the conduct of his noble and professional duty. He clearly abused the trust that the complainant had placed in him as her doctor.

213 The trial judge referred to the case of *Steven Ho* as a guide for the appropriate sentence in this case. In that case, the accused, who was a medical doctor, was sentenced to 10 months' imprisonment for one charge of outraging the modesty of a patient by squeezing and pressing her breasts and left nipple in the course of a medical examination. The trial judge observed that in *Steven Ho*, the defence blatantly besmirched the repute of prosecution witnesses (at [84]). Mr Singh submits

that the trial judge failed to give adequate discount to the fact that the appellant here had not run a defence which blatantly besmirched the repute of the prosecution's witnesses. The trial judge however noted that the appellant here had two charges which were for incidents about four months apart.

214 In *Chow Yee Sze*, Steven Chong J stated that the well-established benchmark for molest or outrage of modesty cases under s 354 of the Penal Code where the victim's private parts or sexual organs were intruded is nine months' imprisonment with caning (at [9]). In this case, the appellant had made direct contact with the complainant's breast and nipple.

215 In the light of the aggravating and mitigating factors highlighted by the prosecution and defence, and the benchmark sentence stated in *Chow Yee Sze*, I am of the view that the sentences imposed by the trial judge for each of the two charges are not manifestly excessive. They are not out of line with the established benchmark and the trial judge had adequately taken into account the aggravating and mitigating factors present in the case. As the trial judge did not order the two sentences to run consecutively, I fail to see how the global sentence of 10 months imprisonment can be said to be manifestly excessive. Accordingly, I dismiss the appeal against sentence.

Conclusion

216 In conclusion, I find that the trial judge is not plainly wrong in finding that the complainant was unusually convincing and that the charges against the appellant were proved beyond a reasonable doubt. I also find that there are no reasonable grounds for belief that the prosecution has breached its common law disclosure obligation. Finally, I also find that the global sentence imposed by the trial judge is not manifestly excessive. I therefore dismiss both the appeals against conviction and sentence.

217 In closing, I would like to thank both Mr Singh and Mr Tai for their detailed and helpful submissions on all the issues before the court.

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