IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 140

Magistrate's Appeal No 9240 of 2018/01

Between

Low Song Chye

… *Appellant*

And

Public Prosecutor

… *Respondent*

Magistrate's Appeal No 9240 of 2018/02

Between

Public Prosecutor

… *Appellant*

And

Low Song Chye

… *Respondent*

JUDGMENT

[Criminal Procedure and Sentencing] — [Sentencing]
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6 June 2019 Judgment reserved.

See Kee Oon J:

1 The accused claimed trial in a Magistrate's Court to a charge of voluntarily causing hurt under s 323 of the Penal Code (Cap 224, 2008 Rev Ed). He was convicted and sentenced to 12 weeks' imprisonment and ordered to pay $800 in compensation to the victim. The Magistrate's grounds of decision can be found in *Public Prosecutor v Low Song Chye* [2018] SGMC 68 ("GD").

2 The accused has appealed against conviction, sentence and the compensation order imposed. The Prosecution has appealed against sentence only. Both the sentence of imprisonment and the compensation order were stayed pending the appeal.

3 Having considered the submissions of both parties, I dismiss the accused's appeals and allow the Prosecution's appeal, enhancing the sentence imposed to four months' imprisonment. I now give the reasons for my decision.

Evidence adduced at trial

4 The accused was the manager of KG Pearl, a karaoke pub at which the victim worked as a singer. On 12 July 2016, at about 2.36 am, the victim had gone into the office at KG Pearl to collect her salary as it was her last day of work there. As she was dissatisfied with the amount that was offered to her, she refused to accept the money.

5 When the victim exited the office, she picked up balls from a pool table and threw them around in an apparent tantrum. There was some dispute as to where these balls landed, and whether any danger arose from this. While the victim testified that she had thrown the balls onto the floor, the accused testified that he had seen one of the balls hit "Ben Ge". "Ben Ge" was also referred to as "Ping Ge" during the trial.

6 The events that followed thereafter were also disputed even though there was CCTV footage of most, but not all, of the relevant events in the pub.

7 According to the victim, the accused then pointed at her and asked whether she believed he would hit her. He went towards her, grabbed her hand, and pushed her towards the wall before grabbing her neck with his right hand. He then changed hands, used his left hand to grab her neck, and slapped her with "very great force" on the left side of her face and left ear with his right hand. The accused also told her to stop throwing tantrums. The victim was very agitated and wanted to retaliate.

8 The Prosecution's case was that the accused continued to advance towards the victim when she moved away, pointing his finger at her aggressively before grabbing her neck again. The victim pushed him away immediately, but the accused lunged forward and swung his hand at the victim's face, hitting her on the left cheek. Subsequently, the victim fell to the floor and threw a pool ball at the accused, which missed him. Despite being restrained by others, the accused continued to advance towards the victim.

9 On the other hand, the accused stated that he approached the victim in an attempt to stop her from throwing more pool balls around. He did this by grabbing her wrists and telling her to cool down and go into the singers' room. The victim struggled and attempted to kick the accused, who dodged the kick. As the victim attempted to move towards the pool table again, the accused used his right hand to push her chest area, below her neck, and used his left hand to grab the victim's shoulder. By doing so, the accused managed to push the victim towards the wall. He did this because he did not want the victim to be within reach of the pool table. The victim then kicked the accused, who released her.

10 The accused's case was that while other singers tried to intervene, the victim continued to be aggressive, pushing him away twice. He pushed her as well, in an attempt to push her towards the singers' room and wake her up from her "alcohol-induced delirium". His right hand then came into contact with the victim's left cheek with "not that great" force as the victim had moved away. The victim then attempted to retaliate, but missed and fell to the floor. She then threw a pool ball towards the accused.

11 It was not disputed that an altercation between "Ping Ge", his friend, and the victim followed. During this altercation, the victim hit her head against a pillar at KG Pearl.

12 The victim later realised that there was discomfort in her ear and that her hearing in her left ear had become poorer than her right. On medical examination, she was found to have sustained:

(a) A left anterior central tympanic membrane perforation that was about 50% in size,

(b) Multiple scratch marks over her bilateral upper limb,

(c) Minimal swelling over the dorsum of the lateral side of the right wrist,

(d) Circular abrasion over her right anterior knee, and

(e) Redness over the anterior distal neck.

13 The victim had no other visible facial injuries. The hearing test conducted on her showed that she suffered mild conductive hearing loss. Two days' medical leave was given.

14 On 15 July 2016, the victim was examined again. By this time, she had developed left ear tinnitus and dizziness with nausea. When her condition was reviewed on 30 September 2016, the eardrum perforation was marginally smaller than it was initially. A pure tone audiogram showed mild to moderate conductive hearing loss. On 6 December 2016, the victim underwent a left onlay tympanoplasty to close the eardrum perforation. However, she continued to

suffer from mild conductive hearing loss in her left ear, together with persistent left sided tinnitus. Dr Ho Eu Chin ("Dr Ho") stated that the only effective treatment available for these conditions would be a hearing aid.

Decision below

15 The Magistrate convicted the accused and found that he had caused the victim to sustain, amongst other injuries, a left anterior central tympanic membrane (or eardrum) perforation that was about 50% in size with mild conductive hearing loss (GD at [6]).

16 In reaching this conclusion, the Magistrate preferred the victim's account. He found her evidence to be cogent, consistent, precise and corroborated in the material aspects by the medical evidence as well as the First Information Report ("FIR"). The Magistrate also set out a detailed description of the events captured by the CCTV footage at [12] of his GD, and concluded that the victim's evidence was substantially consistent with the CCTV footage, even if some ancillary and non-material details might have been forgotten over time (GD at [41]–[42]). This substantial consistency was demonstrated by the Magistrate's comparison of the accounts of the victim, the accused and the CCTV footage at [44] of the GD.

17 On the other hand, the Magistrate found that the accused had given the impression of an intense struggle with an overpowering victim, which was "bereft of particularity and precision", and also grossly understated his hostility towards the victim (GD at [43]). The accused's acts of grabbing the victim's neck on two separate occasions and swinging his right hand towards the victim's face was at odds with his purported desire to "talk things through nicely".

18 The Magistrate further found that the justifications of private defence and necessity (referred to as "good faith") did not apply in the present case, for reasons set out at [52] to [57] of his GD, and discussed in more detail from [47] below.

The appeal against conviction

The accused's submissions

19 The accused submitted that the Magistrate erred in his assessment of the victim's credibility. The accused argued that the victim's evidence was not cogent and was internally and externally inconsistent.

20 The alleged internal inconsistencies were broadly that:

(a) The victim's evidence as to where the slap had landed was inconsistent with the original charge (D1), which stated that the accused had slapped the victim's face, without any mention of her ear or the grabbing of her neck.

(b) The victim was inconsistent as to when she had pointed to the accused and raised her voice at him for making things difficult for her: during Examination-in-Chief, she said she did so when she came out of the office, before reaching the pool table, but later said she did so after throwing the pool balls.

(c) While the victim testified that she was certain she had used her right hand to point at the accused, she later said she could not recall whether or not she had pointed at him when she was confronted with the CCTV footage.

(d) The victim had claimed that she had "no strength to resist" the accused. She also initially denied she had pushed the accused, but later had to accept that she did so when confronted with the CCTV footage.

(e) The victim initially claimed that the accused "swung" her, causing her to fall, then that he pushed her down, before finally admitting she had fallen on her own.

21 The alleged external inconsistencies were that:

(a) The First Information Report ("FIR") did not corroborate the victim's account. The Prosecution did not clarify with the victim who the "boss" referred to therein was or what the victim had meant by "hit". Further, the alleged grabbing of her neck was not mentioned in the FIR or in any of the medical reports.

(b) The victim's testimony that the pool balls she had thrown merely landed on the floor was inconsistent with the testimony of the Investigating Officer ("IO") that a stern warning had been administered for a s 337(a) Penal Code offence. Further, the IO's evidence was that the victim admitted to having been heavily intoxicated, which the victim denied having told him.

(c) The accused made six points in respect of the CCTV footage. First, the victim's suggestion that she had thrown the pool ball at the accused because he "kept chasing [her] around" was not corroborated by the footage. Second, the Prosecution's case that the offending acts occurred during the two second "freeze" in the footage was a convenient coincidence that cast serious doubt. Third, the victim's claim that she

had no strength to resist the accused was inconsistent with the footage. Fourth, the victim's evidence that the pool balls she had thrown landed on the floor was also not supported by the footage. Fifth, the footage was not conclusive as to whether the accused's hand had been on the victim's neck. Finally, while the victim claimed that she had not thrown a pool ball at the accused but instead at the floor or at the side of his leg, the footage showed that she threw a ball directly at the accused.

22 The accused further submitted that the Magistrate had erred in finding that he had the requisite *mens rea* for the offence. His body posture and gestures were insufficient grounds for the Magistrate's finding that he had intended to cause hurt to the victim. The context in which his actions took place was relevant: as KG Pearl's manager, he was responsible for safety and security at the pub. His intention was to prevent the victim from causing harm to the people or property at the pub with the pool balls and not to cause hurt to the victim. This was purportedly corroborated by the victim's account of what the accused had said as he allegedly grabbed her neck: "what are you trying to do? You cannot just throw your tantrums here".

23 In addition, the accused submitted that the Magistrate's reliance on the fact that there was no evidence of any other hard slap was erroneous. Instead, the focus of the inquiry should have been whether there had been evidence of any blunt force trauma. The accused argued that the medical evidence was neutral at best, and that there were other instances which could have caused the injury sustained by the victim.

24 Lastly, the accused argued that the Magistrate conflated the defences of private defence and necessity (referred to by the accused as "good faith"), and

thereby failed to provide proper reasons as to why he rejected each defence. In relation to private defence, the accused again asserted that he reasonably apprehended an attempt or continued threat by the victim to commit an offence and that his intention was to prevent her from causing further harm to the people and property at KG Pearl. In context, the accused's actions were reasonable. The accused similarly argued that the Magistrate had erred in rejecting the defence of necessity under s 81 of the Penal Code, and that the accused had acted in good faith and exercised "due care and attention in his attempts to prevent [the victim] from causing further harm".

The Prosecution's submissions

25 The Prosecution submitted that the Magistrate had not erred in convicting the accused.

26 The Prosecution argued that the victim was a truthful and candid witness. This was illustrated by her various admissions, including that she had wanted to retaliate by hitting the accused, that she managed to "very quickly break free" from the accused's grip the second time, and that she had fallen on her own when she tried to hit the accused. She had also readily admitted that she had been administered warnings by the police following the incident. Further, the Prosecution submitted that the victim's account was internally and externally consistent: it was corroborated by the FIR, the account the victim had given to the doctor, the CCTV footage, and the injuries she had suffered.

27 The Prosecution also submitted that the Magistrate was right in dismissing the suggestion that there were other causes for the eardrum perforation. This was because Dr Ho's evidence suggested that it was not likely that the perforation was occasioned by a very loud noise or by a fall: the

perforation was present in only one ear and there was no bruising around the victim's ear or any other parts of her head.

28 In contrast, the Prosecution submitted that the accused was an unreliable witness whose testimony was externally inconsistent, particularly with the CCTV footage and the statement given to the police (P7). For example, the Prosecution pointed out that the accused had made disparate and inconsistent claims as to why he had hit the victim on the left cheek a second time (P1A at 02:37:09). His evidence in court was that he had acted intentionally to "push her face", while he had said in P7 that this slap was accidental and unintentional. He also embellished the account he provided in P7 by claiming that the victim had kicked at his penis. His claim that he was seeking to de-escalate the situation was contradicted by the video evidence.

29 The Prosecution further submitted that the defences of private defence and necessity were inapplicable. The accused's attack on the victim was not induced by any reasonable apprehension of danger. The victim had already desisted before the accused went up to confront her. Even on the accused's own case, any danger posed by the victim would have been defused after he shoved her against the wall and away from the pool table. There would have been no need to grab the victim's neck or to slap her. He could also have pushed her away from the pool table by her arms or other less vulnerable parts of her body. Similarly, the defence of necessity was not available to the accused as any danger was not of such a nature or imminence as to justify his actions.

My decision

30 I find that the Magistrate did not err in holding that the elements of the charge had been proven beyond reasonable doubt. I address the accused's arguments in turn.

Credibility of the victim

31 I am not persuaded that the Magistrate erred in preferring the account of the victim. This is primarily due to the medical evidence adduced as well as the fact that the victim's testimony is substantially, even if not entirely, consistent with the CCTV footage.

32 The internal inconsistencies referred to by the accused have been overstated. For example, while the accused asserts that the victim initially denied having pushed the accused, and only later admitted to having done so when confronted with the video evidence, it is apparent from the NEs that this is not entirely accurate. The victim's initial denial appears to have been because she felt she had pushed the accused in self-defence.

> Q: My question is, do you agree you pushed him away twice?
> A: I disagree.
> Court: What did she say again? Can she repeat that?
> Witness: It was in to---self-defence.

33 Further, the inconsistencies regarding the sequence of events, such as whether she had pointed to the accused before throwing the pool balls or afterwards, or in fact, whether she had pointed at the accused at all, are immaterial. These were minor details that were peripheral to the offence, and do not reflect on the victim's credibility. I note that the Magistrate

acknowledged that the victim could not accurately recall "some ancillary and non-material details". Insofar as the offence was concerned, the victim's testimony remained clear and consistent.

34 I note, further, that the Medical Report prepared by Dr Ho dated 24 October 2016 (P2) indicated that the victim had informed him that she had been slapped on the left side of her face and ear. This account, which she had given shortly after the incident, was corroborative of the victim's evidence in court. The FIR was also corroborative of the victim's account, albeit to a more limited extent. I accept that there was some ambiguity as to whom the victim was referring to when she reported that her boss had hit her. This was particularly since the victim's evidence was that there had also been a scuffle with 'Ping Ge', whom the victim had testified was one of the bosses at KG Pearl as well. I note that the FIR did suggest, however, that the victim had suffered hearing loss in one ear following the incident, and is corroborative of the victim's account to this extent.

35 The fact that the victim had not referred to the grabbing of her neck in any of the medical reports or in the FIR was, to my mind, not such a material discrepancy that it would affect her credibility. As I had held in *Koh Jing Kwang v Public Prosecutor* [2015] 1 SLR 7 ("*Koh Jing Kwang*") at [27], the court can take into account the circumstances in which the FIR was made. In the present case, this included the fact that the victim had then been suffering from hearing loss in her ear, which could reasonably be seen as her main grievance. While there was no reference to the grabbing of her neck in the medical report, or in the initial charge, these were not significant omissions that impinged on the victim's credibility.

36 The accused further argued that the CCTV footage does not corroborate the victim's evidence, and is instead inconsistent with it at points. I agree that there may have been some embellishment by the victim. For example, while the accused repeatedly approached the victim throughout the course of the altercation, it is a stretch to say that the accused "kept chasing [her] around". At the same time, this should be balanced against the candid admissions by the victim that she wanted to retaliate by hitting the accused and that she managed to break away from the accused's hold very quickly.

37 The accused has made much of the fact that the IO testified that a stern warning was administered to the victim for causing hurt by a rash act involving the throwing of the pool balls. However, it was not clear from the IO's evidence that this pertained to a rash act which occurred before the accused allegedly committed the offence. The CCTV footage shows the victim throwing pool balls both before and after the accused was said to have committed the offence. At the hearing of the appeal, the accused drew my attention to the fact that his evidence had been that one of the balls the victim had thrown before the offence was allegedly committed had hit somebody. The implicit suggestion was therefore that the warning had been administered for the victim's act of throwing the pool balls before the offence had allegedly been committed. Nevertheless, it appears that the IO's evidence on the stern warning was equivocal as to exactly when the offence had been committed by the victim. In any event, I do not think the stern warning has any effect on the victim's credibility. The stern warning is not in itself evidence that the victim had hit somebody with the pool ball, or that she knew or admitted that she had done so. I note that the victim had also readily admitted that she had been given a warning when asked under cross-examination.

38 Further, the victim's account of what had happened during the two-second "freeze" in the CCTV footage is corroborated by the medical evidence. The Magistrate found that the accused's hard slap caused the victim's hearing loss, amongst other injuries (GD at [6]). I agree with his assessment. The medical report dated 7 December 2017 states that the eardrum perforation was consistent with blunt force trauma such as slapping on the face and ear. While Dr Ho testified that eardrum perforations can generally be caused by blunt force trauma to an area of the head resulting from a fall to the ground, he also said that it is likely that there would have been visible signs of injuries to the parts of the head that took the impact if this was in fact what had occurred. Pertinently, Dr Ho did not in fact observe any injuries on the victim's head. If the eardrum perforation had been caused by a fall to the ground or the victim hitting her head against the pillar, it is likely that other parts of the victim's head would also have taken some impact and therefore sustained injury. Hence I do not agree that the medical evidence was "neutral at best", contrary to what was suggested by the accused.

39 Assessing the evidence as a whole, I agree that the victim was a credible witness. Whether or not the victim had been intoxicated, I see no reason to interfere with the Magistrate's finding that this was not determinative of her ability to accurately remember what had transpired.

40 I therefore do not agree that the Magistrate erred in preferring the evidence of the victim over that of the accused. He had done so after a thorough analysis of the evidence before him. He had carefully assessed the accounts of the accused and the victim alongside the CCTV footage (GD at [44]) and concluded that the victim's account was more consistent with the footage than the accused's. I agree with his conclusion. Pertinently, the footage shows the

accused's hand over the victim's neck region, which corroborates to an extent the victim's evidence that he had grabbed her by the neck. I note that the accused's account also does not satisfactorily explain how the eardrum perforation was caused.

41 Finally, while the accused argued that the two-second "freeze" in the CCTV footage was a "convenient coincidence" that cast "severe doubt" on the Prosecution's case, as noted by the Prosecution at the appeal before me, this footage had in fact been provided by the accused to the police. Similarly, the accused's repeated references to the Prosecution's failure to call other eye-witnesses to corroborate the victim's account was, to my mind, irrelevant. Neither of these two arguments raised any reasonable doubt.

42 For the above reasons, I am of the view that the Magistrate was correct in preferring the victim's account over that of the accused.

The requisite mens rea

43 Before the Magistrate, the Prosecution argued that if the accused is found to have either slapped the victim or grabbed her neck, it must follow that he did so with the requisite *mens rea* given that these are "typical acts of aggression". The Magistrate found that the accused's hostility, evidenced by his body posture and forceful gesticulation, was contrary to the accused's purported desire to "talk things through nicely".

44 On appeal, the accused asserted that he had merely been concerned about the danger posed by the victim's throwing of the pool balls. He allegedly had only wanted to stop her and did not intend to harm her. I find this difficult to accept given the aggressive manner in which the accused had acted.

45 The accused need not have intended the exact form of hurt suffered by the victim, and the charge is made out as long as he intended to cause some form of hurt. The Magistrate did not err in finding that the accused had slapped the victim, and Dr Ho's evidence was that this slap must have been hard to generate enough force to cause the eardrum perforation. Given the force with which the accused slapped the victim, the inference that he must have intended to cause some form of hurt was amply justified on the evidence before the Magistrate.

46 For completeness, I note that the accused's alleged intention to stop or merely restrain the victim is not inconsistent with an intention to hurt the victim. He had clearly acted with the primary purpose of bringing about the latter consequence.

Defences raised by the accused

47 I turn now to the defences raised by the accused. I agree with the Magistrate that the defences of private defence and necessity did not apply on the facts.

48 As set out in *Tan Chor Jin v Public Prosecutor* [2008] 4 SLR(R) 306 at [46], the defence of private defence requires that the accused show:

(a) An offence affecting the human body has been committed or is reasonably apprehended (s 97 of the Penal Code);

(b) There was no time to seek the protection of the authorities (s 99(3) of the Penal Code);

(c) At the time of acting in private defence, he reasonably apprehended danger due to an attempt or threat by the victim to commit an offence affecting the body (s 102 of the Penal Code); and

(d) The harm caused to the victim was reasonably necessary in private defence, with due allowance given to the dire circumstances under which he was acting (s 99(4) of the Penal Code).

49 In my opinion, the Magistrate was right to find that private defence did not apply on the facts. Even if it is accepted that there was a reasonable apprehension of danger, which was in itself questionable on the facts, I would agree with the Magistrate's finding that there were more appropriate ways of restraining the victim. In essence, the harm caused to the victim was not reasonably necessary, having due regard to the circumstances under which the accused had been acting.

50 As noted above at [38] and [45], the accused slapped the victim hard enough for her to suffer an eardrum perforation. This occurred after the accused had pushed her against the wall and grabbed her neck. I do not accept the suggestion that any danger posed by the victim's earlier act of throwing the pool balls, or the fact that she was struggling, made it reasonable for him to grab her by the neck, or slap her with such force. This was particularly since, as the Magistrate had noted, at the time the offence was committed, the victim had in fact stopped throwing the pool balls. The harm caused to the victim was therefore disproportionate in the circumstances, and the accused cannot rely on private defence in the present case.

51 I turn now to the defence of necessity. Section 81 of the Penal Code reads:

> **Act likely to cause harm but done without a criminal intent, and to prevent other harm**
>
> **81.** Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property.

52 Section 81 would not apply to exculpate the accused if he is found to have "criminal intention" to cause hurt. As I have indicated at [45] above, the Magistrate's finding that the accused intended to hurt the victim was correct. and hence s 81 of the Penal Code finds no application in this case.

53 I should add that s 81 of the Penal Code would not have been relevant even if the *mens rea* had been knowledge of the likelihood of causing harm rather than criminal intention. The accused would not have been able to satisfy the additional requirement of having acted "in good faith", having regard to s 52 of the Penal Code which requires that he must have acted with due care and attention. Further, the illustrations to s 81 of the Penal Code suggest that the defence of necessity is intended to cover situations in which far greater harm would have occurred had the offending act not been done. This can be seen from illustration (a) which compares 20 or 30 passengers' lives being at risk to two lives, or illustration (c), which compares 100 lives to six. The present case was not a comparable situation by any measure. There is no indication that greater or even substantial harm would have occurred if the accused had not assaulted the victim in the manner he did. As such, it is clear to me that s 81 of the Penal Code would not have applied even if the *mens rea* was one of knowledge.

54 I therefore dismiss the accused's appeal against conviction.

The appeal against sentence

The accused's appeal

55 The accused submitted that the sentence imposed by the Magistrate was manifestly excessive. According to the accused, the Magistrate failed to distinguish the cases of *Koh Jing Kwang*, *Public Prosecutor v Tey Kok Peng* (District Arrest Case No 912220 of 2014) ("*Tey Kok Peng*") and *Public Prosecutor v Feng Zhangao* (Magistrate's Arrest Case No 903682 of 2015) ("*Feng Zhangao*"), and instead wrongly found them to be "useful reference points" (GD at [65]).

56 The accused also submitted that the Magistrate erred in failing to properly consider the cases of *Public Prosecutor v Cheng Tai Peng* [2012] SGDC 121 and [2012] SGDC 104 ("*Cheng Tai Peng*") and *Public Prosecutor v Wong Jiaxin* [2010] SGDC 23 ("*Wong Jiaxin*"), which the accused argued would be more suitable reference points. The accused also argued that the Magistrate failed to consider *Public Prosecutor v AOB* [2011] 2 SLR 793 ("*AOB*"), in which Chan Sek Keong CJ had referred to *Sim Yew Thong v Ng Loy Nam Thomas and other appeals* [2000] 3 SLR(R) 155 ("*Sim Yew Thong*") as suggesting that a custodial sentence is not imposed for a s 323 offence where the injuries are minor, there is a lack of premeditation, and the altercation is short (at [11]). According to the accused, there was no premeditation in the present case, the entire altercation lasted only 12 seconds, and the medical memorandum dated 14 May 2018 ("the 14 May memorandum") did not state that the hearing loss was permanent.

57 Further, the accused argued that the Magistrate erred in considering the accused's purported "sustained aggression" as an aggravating factor. This was

not part of the charge and the accused had voluntarily stopped any purported aggression towards the victim. Similarly, the accused argued that undue weight was placed on his antecedents for unlawful assembly and rioting, since two of these offences took place more than 16 years ago. With regard to the accused's 2014 conviction under s 143 of the Penal Code, the accused argued that he had not been the aggressor in that case, and that the facts were entirely different from those in the present appeal.

58 In contrast, the accused argued that the Magistrate placed insufficient weight on the accused's evidence that he had been trying to restrain the victim, despite the fact that the Magistrate had found that the altercation was triggered by the victim's initial act of throwing the pool balls, and that it was reasonable for the accused to "[take] it upon himself to quell the disturbance".

59 The accused further submitted that weight should be placed on the fact that he was only charged on 18 May 2017 even though the incident took place on 12 July 2016. He argued that there was no intelligible reason for the delay in charging him.

60 The accused therefore urged the court to reduce his sentence to a fine.

The Prosecution's appeal

61 The Prosecution appealed against the sentenced imposed by the Magistrate on the basis that the Magistrate failed to:

(a) utilise the maximum penalty prescribed for an offence under s 323 of the Penal Code, which is two years' imprisonment;

(b) apply his mind to determine precisely where the accused's conduct and the resulting harm fell within the spectrum of punishment devised by Parliament despite finding that he had caused "serious injury to the victim", demonstrated "sustained aggression", and "targeted the vulnerable parts of the victim's body"; and

(c) give due weight to the aggravating factors, in particular, that Low was a recalcitrant offender with a record of violence.

62 In its submissions, the Prosecution applied the approach adopted in *Public Prosecutor v BDB* [2018] 1 SLR 127 ("*BDB*"), which pertained to the offence of voluntarily causing grievous hurt under s 325 of the Penal Code. This approach has been set out below, at [67] to [69]. The Prosecution extrapolated from the starting points set out by the Court of Appeal in *BDB* to proportionately deduce indicative starting points under s 323.

	Voluntarily causing grievous hurt under s 325 of the Penal Code (*BDB* at [56])	**Voluntarily causing hurt under s 323 of the Penal Code** (proposed by the Prosecution)
Death	Eight years' imprisonment	19 months' imprisonment
Multiple fractures of the type and gravity as in the sixth charge in *BDB*	Three years' and six months' imprisonment	Eight months' imprisonment

63 The Prosecution then argued that the indicative starting point in this case should be four months' imprisonment. This was apparently derived through a

comparison with the case of *Public Prosecutor v Holman, Benjamin John* [2018] SGHC 237 ("*Holman Benjamin John*").

64 In *Holman Benjamin John*, a first-time offender who pleaded guilty to a s 323 charge was sentenced to two months' imprisonment on appeal. This involved an altercation at an MRT platform, in which the accused pushed the victim, slapped him on the cheek, and punched him multiple times on his face. Some of these punches were inflicted while the victim was crouching on the ground. The victim pushed the accused away twice and punched him once during the scuffle, which lasted a minute or two. The parties were eventually separated by passers-by. The victim suffered a nasal bone fracture, two 2-cm lacerations over the nasal bridge and bruising over the left temple. He was also given seven days' medical leave. At the material time, the accused was intoxicated and there were many other commuters at the platform.

65 The Prosecution then argued that as the injuries suffered by the victim in the present case were more serious than those in *Holman Benjamin John*, the appropriate indicative starting point in the present case would be four months' imprisonment. Given the accused's "sustained aggression" and antecedents, the Prosecution argued that the appropriate sentence would be at least five months' imprisonment. According to the Prosecution, this would also be in line with the sentencing precedents, namely, *Cheng Tai Peng*, *Tey Kok Peng*, *Feng Zhangao* and *Koh Jing Kwang*.

Sentencing guidelines for s 323 offences

66 I begin by considering the application of the two-step approach in *BDB* to s 323 cases.

67 In *BDB*, the Court of Appeal set out a two-step sentencing approach for cases involving charges under s 325 of the Penal Code. The first step is to determine an indicative starting point for sentencing based on the seriousness of the injury. The seriousness of the injury caused to the victim should be assessed along a spectrum, having regard to considerations such as the nature and permanence of the injury. The Court of Appeal also stated that, in determining the indicative starting point, courts ought to have regard to the full breadth of the permitted sentencing range, while allowing room for the sentencing judge to make adjustments based on the offender's culpability and other relevant circumstances (*BDB* at [55], [57] to [59]).

68 Having reviewed precedents in which serious injuries were caused, the Court of Appeal identified indicative starting points for offences under s 325 of the Penal Code, as follows (at [56]):

(a) Causing death: around eight years; and

(b) Causing multiple fractures of the type and gravity as in the sixth charge in *BDB*: around three years and six months.

69 At the second step, the indicative starting point should be adjusted either upwards or downwards based on an assessment of the offender's culpability and the presence of relevant aggravating and/or mitigating factors (*BDB* at [55]). The Court of Appeal identified a non-exhaustive list of aggravating factors at [62]. Of relevance to the present case is the manner and duration of the attack, and the offender's relevant antecedents. Typical mitigating factors were also identified at [71] of *BDB*.

70 The Prosecution argues that the application of the *BDB* approach to s 323 offences is justified because the mischief which both s 323 and s 325 seek to address, as well as their elements, are the same. I note that in *BDB* at [56], the Court of Appeal had explained why the hurt caused is a good indicator of the gravity of a s 325 offence by stating that:

> In our judgment, given the inherent mischief that underlies the offence under s 325, and considering that **a more severe sentencing range is prescribed for this offence (compared to the offence of voluntarily causing simple hurt under s 323) precisely because *grievous* hurt has been caused**, the factor that should guide the court's determination of the indicative starting point for sentencing should be the *seriousness of the hurt caused* to the victim. … [emphasis in original in italics; emphasis added in bold]

71 The Court of Appeal had also said (at [55]) that the seriousness of the injury underscores the inherent mischief targeted by s 325. This is inapplicable to s 323 offences. Where less serious hurt is concerned, it may fairly be said that other factors, including those going towards culpability, may carry greater weight. To an extent, this is consistent with the approach taken by the courts thus far in setting out sentencing guidance in specific categories of s 323 offences identified on the basis of factors other than the severity of hurt. This includes offences against public transport workers (*Wong Hoi Len v Public Prosecutor* [2009] 1 SLR(R) 115) and domestic helpers (*Tay Wee Kiat and another v Public Prosecutor and another appeal* [2018] 4 SLR 1315).

72 While s 325 encompasses a broad spectrum of different forms of grievous hurt ranging from a simple fracture to death ([56] of *BDB*), s 323 encompasses an even broader one ranging from transient bodily pain to death (s 319 of the Penal Code). This can be contrasted with the lower maximum permissible punishment provided for under s 323. Under s 323, the

imprisonment term ordered may only extend to two years, while under s 325 it may extend to ten years. In short, s 323 carries a narrower sentencing range for a wider spectrum of hurt.

73 I therefore do not think it would be principled to proportionately deduce indicative starting points for s 323 in the mathematical manner suggested by the Prosecution. This is underscored by the fact that what would be a relatively serious injury under s 323 (*eg*, a simple fracture) would not necessarily be equally so under the scope of s 325. Fundamentally, the severity of the hurt must be assessed against the spectrum of offending behaviour captured by the offence, as well as the full range of sentencing options.

74 Further, to my mind, there is also a degree of artificiality involved in setting out indicative starting points for death and multiple fractures as suggested by the Prosecution. As the accused noted at the appeal before me, the Court of Appeal had determined the starting points after having reviewed the relevant precedents. There is greater difficulty in doing so for such grievous injuries in the s 323 context as it appears that such cases are usually prosecuted under aggravated versions of this offence, such as s 325 or s 326.

75 I also do not agree with the manner in which the Prosecution has derived its indicative starting point for the injuries sustained in the present case, where there is similarly a dearth of closely analogous precedents. As a matter of principle, it is not appropriate to attempt to derive an indicative starting point on the basis of a single case. This is particularly where the case that the Prosecution relied upon involved vastly different facts. The case of *Holman Benjamin John* involved a nasal fracture which was sustained as a result of an altercation which took place on an MRT platform at rush hour, and which

caused a degree of disruption. The offender in that case was a first-time offender who had pleaded guilty. It would be inappropriate to attempt to derive an indicative starting point by analogising solely from *Holman Benjamin John*.

76 Given the considerations I have outlined above, a more principled way of approaching the sentencing of s 323 offences would be to devise sentencing bands. This would not only give due regard to the full range of sentencing options, but also allow sufficient room for the sentencing judge to make adjustments based on the offender's culpability and other relevant circumstances (*BDB* at [59]). The latter consideration is key in s 323 offences particularly because of the relatively circumscribed sentencing range compared to the wide spectrum of hurt encapsulated. The sentencing band approach would also minimise the possible arbitrariness of determining indicative starting points for specific types of hurt without the assistance of comparable precedents.

77 I now turn to describe the sentencing framework. In my judgment, it is appropriate to prescribe three broad sentencing bands providing indicative sentencing ranges based on the hurt caused by the offence. As a considerable number of s 323 cases are uncontested, the following bands are for a first-time offender who pleads guilty:

Band	**Hurt caused**	**Indicative sentencing range**
1	Low harm: no visible injury or minor hurt such as bruises, scratches, minor lacerations or abrasions	Fines or short custodial term up to four weeks
2	Moderate harm: hurt resulting in short hospitalisation or a substantial	Between four weeks' to six

	period of medical leave, simple fractures, or temporary or mild loss of a sensory function	months' imprisonment
3	Serious harm: serious injuries which are permanent in nature and/or which necessitate significant surgical procedures	Between six to 24 months' imprisonment

78 Appropriate calibrations can be made in situations where offenders have claimed trial. In sentencing an offender under s 323 of the Penal Code, the court should therefore undertake a two-step inquiry:

(a) First, the court should identify the sentencing band and where the particular case falls within the applicable indicative sentencing range by considering the hurt caused by the offence. This would allow the court to derive the appropriate indicative starting point.

(b) Next, the court should make the necessary adjustments to the indicative starting point sentence based on its assessment of the offender's culpability as well as all other relevant factors. This may take the eventual sentence out of the applicable indicative sentencing range. The aggravating and mitigating factors identified in *BDB* at [62] to [70] and [71] to [75] respectively are relevant at this step.

79 For clarity, I should state that at the first step of this inquiry, the court should only have regard to the actual, and not potential, harm caused by the offence. This would ensure greater consistency in identifying the appropriate sentencing band since the potential harm that may be caused must be inferred from the circumstances of the offending. In contrast, the actual harm caused is usually readily ascertainable. Further, the factors relating to harm and

culpability often affect both considerations, as the High Court acknowledged in *Public Prosecutor v Yeo Ek Boon Jeffrey and another matter* [2018] 3 SLR 1080 at [60]. In determining the potential harm caused by an offender, a court must often make an inference on the basis of factors which would otherwise go to culpability, such as the numbers of offenders involved, the use or attempted use of a dangerous implement and so on. The risk of double-counting therefore arises where potential harm is concerned. For analytical clarity, therefore, it would be preferable for these factors to be considered at the second step of this inquiry. As always, the sentencing court should guard against double-counting any factor.

Band 1

80 The first band pertains to "non-aggravated" offences. This includes offences where even if there is visible injury, the hurt caused is minor, such as bruises, scratches, minor lacerations or abrasions. In the majority of these cases, a fine may be appropriate where the offender's culpability is found to be low. This is consistent with *Sim Yew Thong*, which was interpreted in *AOB* at [11] as suggesting that a custodial sentence is generally not imposed for a s 323 offence when (a) the offender's actions were not premeditated; (b) the victim's injuries were minor; and (c) the altercation lasted for only a short time.

81 I reiterate that the indicative ranges provided are merely starting points. There may be cases in which minor harm is caused, but where the custodial threshold is crossed such that a sentence up to or even in excess of four weeks' imprisonment may be warranted. This may be due to, for example, a particular need for deterrence resulting from the offender's antecedents, the need to protect a specific category of victim, or where there are factors indicating a high

level of culpability, such as the use of a weapon, or a premeditated or group attack.

82 The accused cited *Wong Jiaxin*, in which a fine had been imposed. In that case, the accused, along with two others, had assaulted the victim, causing the victim to suffer a perforated right tympanic membrane, a contusion over the right zygomatic arch, and a swollen right ear with bruising. The victim was given two days' medical leave. The accused pleaded guilty and was sentenced to a fine of $4000. It appears that this was on the basis that the accused had only hit the victim once, and had apparently done so spontaneously in an attempt to help his friend. On the specific facts of that case, the District Judge had concluded at [14] that the perforated ear drum was not a serious injury because the Prosecution made no mention of it and the medical report presumably did not indicate otherwise. There is no indication from the District Judge's Grounds of Decision that the victim suffered any hearing loss from this injury. As such, the District Judge observed that the case was "on the borderline of the custody threshold". This case therefore fell within Band 1 of the framework.

Band 2

83 This band includes cases in which moderate harm was caused. This would include simple fractures, temporary or mild loss of hearing or sight. It would also include injuries that result in hospitalisation for a short time and/or a substantial period of medical leave.

84 The cases of *Cheng Tai Peng*, *Tey Kok Peng*, and *Holman Benjamin John*, discussed below, are examples of cases which would fall into Band 2 of the framework. As I shall explain in due course, the present case falls within Band 2 as well.

Band 3

85 The third band covers cases in which serious hurt has been caused to the victim. This would generally include serious injuries of a permanent nature, or which necessitate significant surgical procedures. For example, this may include the permanent scarring of the face, permanent loss of sight or hearing, paralysis, and the loss of life or limb. This would generally be accompanied by extended periods of hospitalisation or medical leave. Where there are factors that increase culpability, sentences should be calibrated upwards from the starting point identified.

86 An example of a case which would fall into Band 3 is *Abdul Aziz bin Omar v Public Prosecutor* (Magistrate's Appeal No 145 of 2000/01), cited in *Sentencing Practice in the Subordinate Courts* (LexisNexis, 3rd Ed, 2013) at p 194. In this case, the offender was unhappy with the victim, his brother, for revealing information about their family to other people. The offender confronted the victim and an argument ensued. A struggle took place and the victim began to kick the offender on his legs. The offender punched the victim on the face and neck a few times. The victim collapsed, lost consciousness, and later died in the hospital from "vaso-vagal inhibition due to blow to the neck". On appeal, the offender was sentenced to six months' imprisonment.

87 *Koh Jing Kwang* was a case which would have fallen within Band 3 given that the victim had sustained a skull fracture. On appeal, I imposed a sentence of 12 weeks' imprisonment, which would be outside the indicative sentencing range for Band 3. This reflected his significantly lower culpability, since I had held that the accused could not be held to account for the full extent of the consequences suffered by the victim (at [62]).

My decision

88 The present case falls within Band 2 of the sentencing framework I have set out above as it involves mild loss of hearing and tinnitus. The next question is where this case is situated within the applicable indicative sentencing range. This should be determined with regard to the relative severity of the hurt sustained as compared to other forms of hurt that would fall within this band. Regard should also be had to relevant sentencing precedents.

89 The Prosecution argued that, generally, "the impairment of a sensory function for an indeterminate period is more serious than a simple fracture which one can recover from". The Prosecution therefore submitted that an appropriate starting point would be four months' imprisonment, higher than the two months' imposed in *Holman Benjamin John*.

90 A nasal bone fracture such as that sustained by the victim in *Holman Benjamin John*, would fall within the definition of grievous hurt in s 320(g) of the Penal Code. On the other hand, given that non-permanent hearing loss is not a form of grievous hurt, a simple fracture is, generally speaking, more serious than non-permanent hearing loss. This would accord with the legislative structure of the Penal Code.

91 The medical reports in this case do not state that the hearing impairment was permanent. While the hearing impairment was not transient, any doubt as to the permanence of the harm suffered should be resolved in favour of the accused. Further, in the present case, the hearing loss suffered was mild. I accept, however, that the hearing impairment in the present case is not significantly less severe than the nasal fracture in *Holman Benjamin John*. This is on the basis that the hearing loss, while mild, appears irremediable and for an

indeterminate period. In addition, the tinnitus suffered by the victim appears to have affected her quality of life: for example, by affecting her sleep. This may be weighed against the fact that a nasal bone fracture such as that in *Holman Benjamin John* may be said to be a less severe form of grievous hurt. That said, as stated above (at [75]), I have reservations about how useful *Holman Benjamin John* is as a reference point, given the vastly different circumstances under which the offence had taken place.

92 *Tey Kok Peng*, which the Magistrate described as a relevant precedent, was a case that would have fallen within the middle of Band 2. This case involved two co-accused persons who punched and kicked the victim on his back and head while the latter was on the ground. The victim suffered a left orbital fracture as a result of the accused's punch, amongst other injuries (see GD at [61]). The accused in *Tey Kok Peng* pleaded guilty, had no similar antecedents, and was sentenced to three months' imprisonment. In my opinion, this was a more serious injury than the hearing impairment in the present case as the fracture had been sustained in a particularly vulnerable part of the body (*ie*, the eye).

93 In *Cheng Tai Peng*, the offence occurred on an MRT train. The accused had pushed the victim aside with the intention of occupying a seat which was going to be vacated. The victim expressed his unhappiness at having been pushed. The accused then slapped the victim on the face, over the left ear, suddenly and forcefully. He also hit the victim on the eye and nose. After a short pause, in which the victim moved to another part of the railway carriage, the accused again assaulted the victim by kicking and punching him. The victim suffered a perforation of the left ear drum, a haematoma over the left cartilaginous portion of the victim's left ear, some retinal bleeding and abrasions

over the nose. The accused, who was a first offender, claimed trial and was sentenced to 10 weeks' imprisonment. In view of the hurt caused as well as the level of violence used, with respect, I do not think the sentence imposed was adequate.

94 Having regard to the precedents considered above as well as the range of hurt encapsulated within Band 2, this case falls within the bottom half of Band 2. The indicative starting point in this case would be between two to three months' imprisonment. This would appropriately reflect the fact that the victim's hearing impairment, while persistent, was also mild. It appears the victim had no problems giving evidence at the trial without the assistance of a hearing aid. On the other hand, the victim also suffered from persistent tinnitus, and there was evidence that this had affected her sleep, at least at one point.

95 For completeness, I should state that I did not find the cases of *Feng Zhangao, Koh Jing Kwang or Wong Jiaxin* particularly helpful in the present case. *Feng Zhangao* was a case which involved unique facts: the accused had bitten off the victim's left ear lobe. As the court did not furnish reasons for its decision in that case, its utility is rather limited. Further, *Koh Jing Kwang* and *Wong Jiaxin* were cases that fell into Bands 3 and 1 respectively, and were therefore also not relevant reference points.

96 I turn now to the second step of the framework I have set out above. At this stage, the indicative sentence should be adjusted having regard to the offender's culpability, as well as all relevant aggravating and mitigating factors.

97 First, I consider the manner and duration of the attack, which was identified as a relevant aggravating factor in *BDB* at [64]. Here, the injury had

been caused by a single (albeit hard) slap. The Prosecution argued that the accused's "sustained aggression" was part of the immediate circumstances of the offence, and therefore had sufficient nexus to the commission of the offence (*Chua Siew Peng v Public Prosecutor and another appeal* [2017] 4 SLR 1247 at [81] and [84]). It was therefore submitted that this should be taken into account in sentencing.

98 On the other hand, the accused submitted that any purported sustained aggression *cannot* be given weight because this would essentially be to take into account uncharged offending. I am of the view that the accused's subsequent acts of aggression, including the second time he grabbed the victim's neck, can be taken into account. This is because they took place shortly after the offence had been committed, and can properly be seen as part of the same altercation. Further, the accused's subsequent aggressive behaviour did reflect on the accused's culpability in so far as it indicated that the offence took place within a longer episode of aggressive behaviour. I am also aware, however, that these acts need to be seen in their proper context. In this case, the victim had also acted in an aggressive manner. Indeed, the victim admitted that she wanted to retaliate against the accused. The CCTV footage also clearly shows that the victim had thrown a pool ball in the accused's direction. Therefore, while the accused's actions were certainly disproportionate and unwarranted, there was also an element of provocation by the victim.

99 Moreover, while the accused had grabbed the victim's neck twice throughout the entire altercation, it was not disputed that the victim was able to break free. She also testified that she was able to do so quite quickly the second time. Assessed as a whole, the level of violence used by the accused, while disproportionate on the facts, was not exceedingly high, especially when

compared to *Cheng Tai Peng*, *Tey Kok Peng* and *Holman Benjamin John*, cited above.

100 Another aggravating factor is the accused's violence-related antecedents (*BDB* at [69]). The only recent one occurred in 2014, where he had been convicted of an offence under s 143 of the Penal Code and sentenced to three weeks' imprisonment. The accused had argued that his antecedents should not be given significant weight because the facts in the present appeal were unique, and he had intervened only because of the perceived aggression of and danger from the victim. I do not agree. To my mind, the accused's antecedents demonstrated a propensity for violence. The facts of the present case were not so unique as to displace the relevance of his antecedents, which demonstrated a heightened need for specific deterrence. As the s 143 conviction dated merely two years before the present offence, a substantial uplift from his last sentence of three weeks' imprisonment would be appropriate.

101 I note that while the Prosecution had not challenged the accused's claim to have reimbursed the victim for all her medical expenses before he was even charged, this would in any event not be a significant mitigating factor. This was because any restitution would have been weak evidence of remorse, particularly since the accused had gone on to claim trial. The accused has not suggested otherwise.

102 Finally, while the accused suggested that there had been a delay in prosecution, any such delay was not inordinate: less than a year elapsed between the time the offence took place and the preferring of charges.

103 Balancing these factors, I agree with the Prosecution that the sentence imposed was manifestly inadequate. I conclude that a more appropriate sentence would be four months' imprisonment.

104 I therefore allow the Prosecution's appeal and enhance the accused's sentence accordingly.

The appeal against the compensation order

105 The Magistrate had exercised his discretion under s 359 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC") in imposing a compensation order in the sum of $800. This was to provide for the possibility that the victim might procure a hearing aid. The accused has appealed against this order on the basis that it was wrong in law.

106 The law in this area is clear. Section 359 CPC imposes an obligation upon a court before which an offender is convicted to consider whether or not to order compensation and to make such an order if it considers it appropriate to do so (*Tay Wee Kiat and another v Public Prosecutor and another appeal* [2018] 5 SLR 438 ("*Tay Wee Kiat*") at [6]).

107 The relevant principles for the exercise of the court's discretion were set out in *Tay Wee Kiat* at [6] to [11] and *Soh Meiyun v Public Prosecutor* [2014] 3 SLR 299 at [56] to [60]. First, compensation orders are not intended to punish offenders but instead to allow a victim to recover compensation where a civil suit is an inadequate or impractical remedy. This includes, but is not confined to, cases where the victim is impecunious. Second, compensation should only be ordered in clear cases where the fact and extent of damage are either agreed, or readily and easily ascertainable on the evidence. Third, the court should adopt

a broad common-sense approach in assessing whether compensation should be awarded, and not allow itself to be enmeshed in "refined questions of causation" (*Tay Wee Kiat* at [9], citing *Public Prosecutor v Donohue Enilia* [2005] 1 SLR(R) 220 ("*Donohue Enilia*") at [22]). The court should be able to say, with a high degree of confidence, that the damage in question has been caused by the offence under circumstances which would ordinarily entitle the victim to damages. Fourth, the amount of compensation ordered should not exceed what would be reasonably obtainable in civil proceedings, and the order should only be made in respect of the injury which results from the offence for which the offender is convicted. Fifth, the order should not be oppressive, and the court must be satisfied that the accused will have the means to pay it within a reasonable time.

108 The accused submitted that the Magistrate had erred in law in imposing the compensation order. His arguments were threefold.

109 First, the quantum of compensation was derived based on the figures as set out in the 14 May memorandum by Dr Ho. However, the 14 May memorandum did not provide any estimate of the actual cost of treatment for the victim, but merely provided an illustrative figure for the estimated cost of a mid-range hearing aid. This is inadequate as the type of hearing aid which would be suitable was not determined.

110 Second, it is uncertain whether a hearing aid is necessary. The victim's hearing loss is "very mild". The victim had had no problems testifying in court without the hearing aid, and had not obtained a hearing aid in the two years following the offence. As such, the accused submits that the extent of the

victim's injuries and her likely expenses are speculative, and that the compensation order was made arbitrarily and without sufficient evidence.

111 Third, the accused urged the court to consider the fact that he had, with the assistance of KG Pearl, reimbursed the victim for all medical expenses incurred before he had even been charged.

112 On the other hand, the Prosecution argued that the Magistrate had not erred in making the order. First, the Prosecution argued that the victim belongs to a class of victims for whom it is impractical to commence a civil suit. This is because the victim is not resident in Singapore, and there is some evidence of her impecuniosity. Second, the damage suffered by the victim was readily and easily ascertainable: the Magistrate was entitled to consider the typical cost of treatment which the victim would have to undergo to treat her condition. This was particularly since the use of the hearing aid was the only effective treatment for the victim's conditions. Third, the compensation order was not oppressive on the accused, who was not impecunious.

My decision

113 In my opinion, the Magistrate did not exercise his discretion on demonstrably wrong principles and appellate intervention in relation to the compensation order is not warranted in this case: *Donohue Enilia* at [40], citing *Kee Leong Bee and another v Public Prosecutor* [1999] 2 SLR(R) 768 at [21].

114 The main issue for consideration in the present case is whether the extent of damage is readily and easily quantifiable. The 14 May memorandum only provides estimates as to how much a mid-range hearing aid would cost on average, and the type of hearing aid suitable for the victim can only be

determined with a Hearing Aid Evaluation appointment with an audiologist. The use of a hearing aid may be the only effective treatment for the victim's conditions, but there is no suggestion that a hearing aid was strictly necessary, or even desired by the victim. The Magistrate appears to have accounted for any uncertainty in this regard by ordering a lower quantum than that which was suggested in the 14 May memorandum. While the memorandum suggests that the cost of operating a mid-range hearing aid for five years is approximately $2,751, the Magistrate only made a compensation order for $800. In my opinion, this amount was somewhat arbitrarily derived, and the Magistrate did not provide reasons for how he came to award this sum.

115 Before the Magistrate, the Prosecution submitted that "the cost of treatment could be a useful proxy to quantify the victim's loss of amenity". While I accept that compensation is often ordered on a rough-and-ready basis, I am not persuaded that it was correct in principle for compensation to be justified in this manner in the present case, where treatment may not be undertaken, and where the cost of such treatment is also uncertain. It would have been more appropriate, in my view, to account for the victim's hearing loss and tinnitus by ordering compensation on the grounds of pain and suffering. This would also be consistent with the approach of the court in *Tay Wee Kiat*.

116 In *Tay Wee Kiat*, the court had regard to the *Guidelines for the Assessment of General Damages in Personal Injury Cases* (Academy Publishing, 2010) and the *Practitioners' Library – Assessment of Damages: Personal Injuries and Fatal Accidents* (LexisNexis, 3rd Ed, 2017). The former publication recommends $4,000 to $8,000 for "slight or occasional tinnitus with slight hearing loss" (at p 12). This is not inconsistent with the sums awarded by

the courts for loss of hearing (ranging from $3,000 to $20,000) and a perforated eardrum ($5,000, agreed by the parties), indicated in the latter at p 148.

117 Even taking the lower end of the range, at $4,000, particularly since the tinnitus is described as "persistent", the order of $800 would seem to be much too modest. However, I note that the Prosecution has not appealed against the compensation order made by the Magistrate, and had further left the matter to his discretion in the proceedings below, making no reference to any other materials for guidance in quantifying the compensation amount.

118 In the circumstances, putting aside any disagreements I may have with the basis for the compensation order and the actual quantum, I do not think it necessary to interfere with the order made in the present case. I therefore dismiss the accused's appeal against the compensation order made by the Magistrate.

Conclusion

119 For the above reasons, I dismiss the accused's appeals. I allow the Prosecution's appeal and enhance the accused's imprisonment term to four months.

See Kee Oon
Judge

Ngiam Hian Theng, Diana, Sunil Sudheesan and Joel Ng for the appellant in MA 9240/2018/01 and the respondent in MA 9240/2018/02;
Hay Hung Chun and Sheryl Yeo for the respondent in MA 9240/2018/01 and the appellant in MA 9240/2018/02.
