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

[2021] SGHC 182

Magistrate's Appeal 9754 of 2020

Between

Public Prosecutor

… *Appellant*

And

Chong Chee Boon Kenneth

… *Respondent*

Magistrate's Appeal 9755 of 2020

Between

Public Prosecutor

… *Appellant*

And

Nazhan bin Mohamed Nazi

… *Respondent*

Magistrate's Appeal 9818 of 2020

Between

Nazhan bin Mohamed Nazi

… *Appellant*

And

Public Prosecutor

… *Respondent*

GROUNDS OF DECISION

[Criminal Law] — [Appeal]
[Criminal Law] — [Offences] — [Causing death by rash or negligent act]
[Criminal Procedure and Sentencing] — [Sentencing] — [Appeals]

TABLE OF CONTENTS

Public Prosecutor
v
Chong Chee Boon Kenneth and other appeals

[2021] SGHC 182

General Division of the High Court — Magistrate's Appeal Nos 9754 of 2020 and 9755 of 2020 and 9818 of 2020
See Kee Oon J
10 March, 5 April, 26 April 2021

23 July 2021

See Kee Oon J:

Introduction

1 The appeals before me arose from the unfortunate events which culminated in the untimely death of a full-time National Serviceman, Corporal Kok Yuen Chin ("Cpl Kok"). Lieutenant Chong Chee Boon Kenneth ("Lta Chong") and Senior Warrant Officer Nazhan bin Mohamed Nazi ("SWO Nazhan") (collectively, "the accused persons") were jointly tried before a Senior District Judge ("SDJ") on charges of abetment by intentionally aiding the servicemen from ROTA 3 of Tuas View Fire Station ("the Fire Station") to commit an offence of causing grievous hurt to Cpl Kok by doing a rash act which endangered human life.

2 Specifically, the charges averred that the accused persons had illegally omitted to prevent the said servicemen from making Cpl Kok enter a 12-metre

deep pump well at the Fire Station. Cpl Kok drowned after he was pushed inside the pump well. They had thereby committed offences punishable under s 338(*a*) read with s 109 of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code").

3 At the conclusion of the joint trial, the SDJ acquitted the accused persons of the s 338(*a*) charges, but convicted them on reduced charges under s 336(*b*). The Prosecution appealed against the acquittals on the s 338(*a*) charges and the convictions on the substituted s 336(*b*) charges. SWO Nazhan in turn appealed against his conviction and sentence under the substituted s 336(*b*) charge. The SDJ's grounds of decision are reported as *Public Prosecutor v Chong Chee Boon Kenneth and another* [2020] SGDC 228 ("the GD").

4 I allowed the Prosecution's appeals against the acquittals of Lta Chong and SWO Nazhan on the original s 338(*a*) charges and dismissed SWO Nazhan's appeal against conviction and sentence. In this grounds of decision, I set out the full reasons for my decision, incorporating the oral remarks I had delivered previously on 5 and 26 April 2021.

Facts

The undisputed facts

5 Lta Chong and SWO Nazhan were Singapore Civil Defence Force ("SCDF") officers. They were the Commander and Deputy Commander respectively in charge of the men of ROTA 3 based at the Fire Station (collectively "the servicemen") at all material times. Cpl Kok was then serving his National Service ("NS") with the SCDF at the Fire Station.

6 The factual background was largely undisputed. Much of what had transpired was substantially captured on mobile phone video footage as well as CCTV footage from the Fire Station. On 13 May 2018, the servicemen had gathered in the watch room of Tuas View Fire Station to celebrate Cpl Kok's impending completion of full-time National Service. Lta Chong and SWO Nazhan were both present at his pre-Operationally Ready Date ("ORD") celebration, where Cpl Kok was presented with a plaque and a cake. After the celebration ended at about 9 pm, Cpl Kok was carried by four of the servicemen to the pump well to perform a "kolam" activity ("kolam"). This essentially involved Cpl Kok being submerged inside a 12-metre-deep pump well with a diameter of 1.8 metres. At the material time, the water in the pump well was filled to 11 metres.

7 Lta Chong remained in the watch room and saw the servicemen at the pump well from his window. He shouted at the servicemen not to film what they were doing. SWO Nazhan was with the servicemen at the pump well initially, but he walked away as Cpl Kok was removing his polo T-shirt, boots and socks, as well as his handphone and wallet.

8 After SWO Nazhan left the scene, Cpl Kok sat on the edge of the pump well, while the remaining servicemen continued goading him to get inside the well. It was at this time when Staff Sergeant Mohammad Nur Fatwa bin Mahmood ("SSgt Fatwa") suddenly pushed Cpl Kok from behind into the pump well. Cpl Kok was a non-swimmer. When Cpl Kok failed to surface, a few servicemen entered the well but were unable to locate him. They only managed to do so after a sufficient amount of water was pumped out of the well. Cpl Kok was brought to a hospital where he was pronounced dead at 11.02 pm on 13 May 2018.

Summary of the Prosecution's case at trial

9 In the proceedings below, the Prosecution contended that there was evidence adduced to show that the servicemen had committed a rash act by making Cpl Kok enter the pump well either by himself or through the use of physical force. The servicemen expected and intended for this to happen, as demonstrated by their conduct in carrying him to the pump well and taunting him and egging him on to enter the pump well.

10 The intended act of making Cpl Kok enter the pump well was an act of ragging which was achieved through SSgt Fatwa's push. As a result, grievous hurt was caused to Cpl Kok. Even if Cpl Kok had entered the pump well himself, there was undisputed expert evidence from the forensic pathologist, Dr George Paul, who had opined that there was a substantial risk of drowning since Cpl Kok was a non-swimmer.

11 By omitting to intervene when the servicemen were carrying out the "kolam", the accused persons had therefore abetted by intentionally aiding the servicemen in their commission of the rash act, as they had been subjectively conscious of the risk associated with the "kolam". Alternatively, it was argued that the risk was so obvious that they ought reasonably to have known of it, adopting the test in *Jali bin Mohd Yunos v Public Prosecutor* [2014] 4 SLR 1059 ("*Jali*") at [32].

12 As Cpl Kok's commanders, the accused persons had breached their legal obligation to keep him safe. They ought to have intervened to put a stop to the "kolam" and would have been able to do so. However, they intended that the rash act should be committed or were at least indifferent as to whether it was

committed or not, through their conscious decision not to intervene and to allow the ragging to continue.

Summary of the Defences' cases at trial

13 Both Lta Chong and SWO Nazhan were familiar with previous "kolam" activities, which were undertaken as a welcome or celebratory ritual. They themselves had personally experienced the "kolam" as a rite of passage in the SCDF.

14 Lta Chong knew that the "kolam" was a prohibited as a form of ragging in the SCDF. He knew that what the servicemen was doing was wrong, but he did not want to spoil their celebratory mood. His defence was that the servicemen had not intended any malice, and had only meant to tease and "scare" Cpl Kok as part of his pre-ORD celebration. The servicemen had not planned to do anything to Cpl Kok at the end of the celebration in the watch room. He himself had not heard any mention of "kolam" in the watch room.

15 Lta Chong had also not expected that Cpl Kok would be pushed into the pump well, and the "kolam" was not deemed by most of the servicemen to be a form of ragging or a dangerous activity. He believed that Cpl Kok would enter the pump well on his own, in which case it would have been a voluntary act and the risk of harm would be "very low". If Cpl Kok had resisted, Lta Chong did not expect that the servicemen would have persisted and resorted to physical force. The push by SSgt Fatwa was the cause of the grievous hurt suffered by Cpl Kok, which broke the chain of causation. The push was sudden and unanticipated by the servicemen, and much less by Lta Chong himself as he was not at the scene. As Lta Chong's failure to prevent the "kolam" was not an illegal

omission amounting to a rash act, the charge under s 338(*a*) was not made out and a more probable offence would be one under s 336(*b*) of the Penal Code.

16 SWO Nazhan's defence was similar in many respects to Lta Chong's. However, he denied that "kolam" was forbidden in the SCDF as a form of ragging. He thought that the servicemen were only teasing Cpl Kok about entering the pump well. They had not actually intended to make him enter the pump well if he was unwilling to do so. In SWO Nazhan's view, Cpl Kok was observed to be smiling and laughing and he did not look nervous. SWO Nazhan felt that the servicemen were only playing a prank as "boys will be boys" and they often played pranks on each other.

17 After joining the servicemen at the pump well, SWO Nazhan had left them there and returned to his office as he thought Cpl Kok would not be going into the pump well and the servicemen were not doing anything to force him inside. SSgt Fatwa's subsequent act of pushing Cpl Kok was unexpected and not reasonably foreseeable. As SWO Nazhan had been absent when this occurred, he could not have intentionally aided the commission of the rash act. From his own experience, not a single "kolam" activity had resulted in any fatalities and thus no grave risk was involved. In any event, he himself had undergone a "kolam" as a non-swimmer without any risk.

The decision below

18 At the conclusion of the joint trial, the SDJ found that there was no general consensus as to what the "kolam" activity would involve, and that the reasonable expectation of the servicemen was for Cpl Kok to enter the pump well voluntarily. The SDJ also found that SSgt Fatwa's sudden push of Cpl Kok into the pump well was the proximate and efficient cause of the grievous hurt

suffered by Cpl Kok, applying the substantial cause test laid down in *Ng Keng Yong v Public Prosecutor and another appeal* [2004] 4 SLR(R) 89 ("*Ng Keng Yong*"). In this connection, the SDJ found that SSgt Fatwa's act constituted the primary offence under s 338(*a*). Consequently, he found that both Lta Chong and SWO Nazhan did not have the necessary *mens rea* for the abetment charge. There was "no concrete plan" to carry out any "kolam" activity on Cpl Kok, and the accused persons did not expect that Cpl Kok would be pushed or physically forced into the pump well against his wishes.

19 The SDJ found that most crucially, at the time of the push, Lta Chong and SWO Nazhan were not physically present at the pump well. They did not witness SSgt Fatwa's push, and had no opportunity to intervene or actively prevent the push from happening. As such, the SDJ concluded that there was insufficient evidence to prove that the accused persons had knowledge of the essential circumstances of the primary offence (*ie*, the pushing of Cpl Kok into the pump well). He found that there was nonetheless a dereliction of duty on the part of the accused persons in failing to ensure that Cpl Kok's life and safety was not endangered when he was on duty. Their failure to prevent the "kolam" activity from taking place was an illegal omission.

20 As there was sufficient evidence to establish a charge under s 336(*b*) against each of the accused persons, the SDJ framed amended charges against them pursuant to s 128 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC"). The amended charges averred that by their illegal omissions to prevent the servicemen from carrying out the "kolam", they had done a negligent act which endangered human life.

21 Lta Chong pleaded guilty to and was convicted on the amended charge. SWO Nazhan pleaded not guilty and elected not to recall any witnesses. The

SDJ found that SWO Nazhan was in a position of command and remained responsible for ensuring the safety of the servicemen under him, irrespective of whether he was the highest-ranking officer at the Fire Station. As he had failed to stop the "kolam", the SDJ found him guilty of the amended charge under s 336(*b*).

22 Citing the dominant sentencing principle of general deterrence and the high degree of harm caused, the SDJ sentenced both the accused persons to ten weeks' imprisonment. At the conclusion of the trial, the Prosecution and SWO Nazhan indicated their intention to appeal against the SDJ's decision. However, Lta Chong elected to serve his sentence, having acknowledged the possibility that the sentence might be enhanced on the Prosecution's appeal, and undertook not to raise the argument that he would be prejudiced should he have to serve any additional prison term.

The parties' submissions on appeal

The Prosecution's case

23 On appeal, the Prosecution contended that the SDJ had erred in finding that the servicemen had left the choice of entering the pump well up to Cpl Kok. In addition, while the push by SSgt Fatwa was a proximate and efficient cause of the grievous hurt, it was not the sole proximate and efficient cause. The SDJ had erred in failing to find that the push was consistent with the servicemen's aim of making Cpl Kok enter the pump well.

24 The Prosecution argued that the SDJ had erred in not finding that the accused persons had intended to abet the rash act committed by the servicemen when they made the conscious and deliberate decision not to intervene in the "kolam". In the alternative, the Prosecution argued that should the acquittal on

the original charges be upheld on appeal, the amended charges for both accused persons should be reframed under s 336(*a*) for having committed a rash act, instead of under s 336(*b*), the "negligent" limb of s 336.

Lta Chong's case

25 In response to the Prosecution's appeal, Lta Chong submitted that the original charge under s 338(*a*) could not stand as the grievous hurt sustained by Cpl Kok was the result of the intention and actions of SSgt Fatwa alone which was not shared by the rest of the servicemen.

26 In relation to the Prosecution's position that Lta Chong had been rash even under the amended charge, Lta Chong submitted that as the amended charge was not premised on abetment, his failure to prevent the "kolam" would have fallen more appropriately within the definition of negligence which was added to the Penal Code in 2020 under a new s 26F. He rightly conceded however that the definition would not apply to him as the offences were committed in 2018.

27 Lta Chong had served his sentence and did not appeal against his conviction or sentence in respect of the amended charge.

SWO Nazhan's case

28 In response to the Prosecution's appeal and in his cross-appeal against his conviction on the amended charge, SWO Nazhan submitted that there was no evidence that the "kolam" was a form of ragging activity which was banned by the SCDF, and that he was not in a position to contradict Lta Chong's failure (as his superior officer) to stop the "kolam". In addition, SWO Nazhan argued that he had left the scene after he "decided" that the "kolam" activity had ceased,

and that he had "exercised the caution incumbent on him not to leave the scene" if he thought that the "kolam" would continue.

29 SWO Nazhan further alluded to the fact that SSgt Fatwa's actions had broken the chain of causation, and that it was not proven that he knew or ought to have known what either Cpl Kok or SSgt Fatwa were going to do. He could not have stopped SSgt Fatwa's act as he was not present when Cpl Kok was pushed into the pump well. Finally, SWO Nazhan also submitted that Cpl Kok had volunteered himself with knowledge of the potentially dangerous situation, and that the harm occasioned to Cpl Kok would have fallen under the exception of consent found under s 87 of the Penal Code.

The appeals against acquittal and conviction

The issues for determination

30 The following key issues arose before me at the hearing of the appeals:

(a) Was Cpl Kok a willing participant in the "kolam"?

(b) Was the "kolam" prohibited as a form of ragging which entailed foreseeable risk?

(c) Was the chain of causation broken by the actions of SSgt Fatwa?

(d) Was abetment by illegal omission established on the facts?

(e) Were the actions of the accused persons rash or merely negligent?

A preliminary point

31 As emphasised by the Court of Appeal in *ADF v Public Prosecutor and another appeal* [2010] 1 SLR 874 ("*ADF*"), the appellate court has a limited role in reviewing findings of fact made by the trial court. In relation to the areas where an appellate court might intervene, the following principles bear repeating:

(a) Where the trial judge's finding of fact hinges on an assessment of witness credibility based on the witness's demeanour, the appellate court will interfere if the finding is plainly wrong or against the weight of the evidence (see *ADF* at [16(a)]);

(b) Having considered all the evidence and having regard to the advantage of the trial judge's position in being able to see and hear the witnesses, the appellate court may intervene if it concludes that the verdict is wrong in law and therefore unreasonable (see *ADF* at [16(a)]);

(c) Where the finding of fact by the trial judge is based on the inferences drawn from the internal consistency in the content of witnesses' testimony or the external consistency between the content of the witnesses' testimony and the extrinsic evidence, an appellate court is in as good a position as the trial court to assess the witnesses' evidence. A decision inconsistent with the material objective evidence would warrant appellate intervention (see *ADF* at [16(b)]);

(d) An appellate court is as competent as any trial judge to draw any necessary inferences of fact from the circumstances of the case (see *ADF* at [16(c)]).

32 The present appeals were primarily concerned with principles (b), (c) and (d) above pertaining to the reasonableness of the trial judge's decision and how necessary inferences of fact ought to have been drawn. In addressing the arguments raised in the present case, the factual context had to be fully appreciated and the textures of the objective evidence had to be carefully evaluated. In this connection, the CCTV and mobile phone video footage (together with the audio recordings and accompanying transcripts of the recordings) which documented the interactions of Cpl Kok with the servicemen in the moments both preceding and encompassing the "kolam" were highly material.

Was Cpl Kok a willing participant in the "kolam"?

33 SWO Nazhan had argued that by reason of Cpl Kok having voluntarily placed himself in the potentially dangerous situation and consented to the "kolam", the harm occasioned to Cpl Kok was not an offence as it fell within the general defence of consent under s 87 of the Penal Code.

What amounts to consent for the purposes of the Penal Code?

34 Section 87 of the Penal Code provides:

> Nothing, which is not intended to cause death or grievous hurt, and which is not known by the doer to be likely to cause death or grievous hurt, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, to any person above 18 years of age, who has given consent, whether express or implied, to suffer that harm; or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm.

35 Section 90 of the Penal Code further provides:

> A consent is not such a consent as is intended by any section of this Code —
>
> (*a*) if the consent is given by a person —
>
> (i) under fear of injury or wrongful restraint to the person or to some other person; or
>
> (ii) under a misconception of fact,
>
> and the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception;
>
> …

36 As observed by Tay Yong Kwang J (as he then was) in *Public Prosecutor v Iryan bin Abdul Karim and others* [2010] 2 SLR 15 ("*Iryan*") at [121], consent is not defined in positive terms in the Penal Code. Rather, it is described in terms of when consent is vitiated (see also Stanley Yeo, Neil Morgan and Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (LexisNexis, 2018) ("*Yeo, Morgan & Chan*") at para 19.12). While there have been attempts to define what consent is (see *Yeo, Morgan & Chan* at para 19.12), the Penal Code Review Committee had made the specific recommendation not to provide a statutory definition of consent, as it was deemed unlikely to assist the courts in practice and it was felt that s 90 of the Penal Code already provided sufficient clarity on what consent was not (see Penal Code Review Committee, *Report* (August 2018) at section 23.6).

37 Consequently, based on s 90 of the Penal Code, consent is *not* made out when:

(a) Consent is given under fear of injury or wrongful restraint to the person or some other person (s 90(*a*)(i));

(b) Consent is given under a misconception of fact (s 90(*a*)(ii));

(c) Consent is given by a person who is unable to understand the nature and consequences of that to which consent is given, because of unsoundness of mind, mental incapacity, intoxication, or the influence of any drug or other substance (s 90(*b*));

(d) Consent is given by a person under 12 years of age (s 90(*c*)).

38 In *Balakrishnan S and another v Public Prosecutor* [2005] 4 SLR(R) 249 ("*Balakrishnan*"), two senior commanders in the Singapore Armed Forces overseeing survival training were charged under s 304A and s 338 of the Penal Code (Cap 224, 1985 Rev Ed) ("Penal Code 1985") for causing the death of a trainee and grievous hurt to another trainee during a dunking session conducted during the course to simulate prisoner-of-war treatment. The supervising officer, Captain Pandiaraj ("Capt Pandiaraj"), was charged with abetment by instigation, while the course commander, Warrant Officer S Balakrishnan ("WO Balakrishnan"), was charged with abetment by illegal omission. On appeal, one of the arguments raised by Capt Pandiaraj was that the trainee who had been grievously hurt had consented to the treatment, and that the harm caused was not an offence by application of s 87 of the Penal Code 1985. However, Yong Pung How CJ held that the defence of consent did not apply as the survival training was a compulsory activity that the trainee was required to participate in, and even if he had volunteered to attend the training, he would have had to consent with the knowledge of the treatment he would have been subjected to. There was no evidence that the trainee had possessed such knowledge (see *Balakrishnan* at [104]–[105]).

39 In this regard, I note that in the context of sexual offences, the Court of Appeal in *Pram Nair v Public Prosecutor* [2017] 2 SLR 1015 ("*Pram Nair*") at

[93] had stated that whether or not there was consent is a question of fact, and, citing *Iryan* at [123], had accepted the concept of consent as encompassing:

> (a) Voluntary participation on the part of the person at the receiving end of the conduct, after having exercised his/her intelligence, based on the knowledge of the significance and moral quality of the act;
>
> (b) Agreement to submission while in free and unconstrained possession of his/her physical and moral power to act in a power he/she wanted;
>
> (c) The exercise of a free and untrammelled right to forbid or withhold what is being consented to;
>
> (d) Voluntary and conscious acceptance of what is proposed to be done by a person and concurred in by the person at the receiving end of the conduct.

40 While I do not propose to set out a definition of what amounts to consent for present purposes, in my view, the essential elements which would make up valid consent are fundamentally similar irrespective of whether the court is dealing with sexual or non-sexual offences. With the exception of the offence of murder for which consent can only provide a partial defence under Exception 5 to s 300 of the Penal Code, I am of the view that in order for consent to operate as a complete defence, the following threshold requirements should be satisfied at the minimum:

> (a) There must be voluntary participation on the part of the "victim" after he/she had been able to appreciate the significance and the moral quality of the act proposed to be done (see *Pram Nair* at [93]);

(b) There must be some element of agreement as to what is proposed to be done to the "victim". In this regard, it is a question of fact whether there was an agreement, which can be implied or express and there is no requirement for any conventional contractual analysis. What is important is that the "victim" must know the nature of the act proposed to be done and the reasonably foreseeable consequences of the act (see *Balakrishnan* at [104]–[105]);

(c) There must not be any fact which calls into question whether consent was given voluntarily. In this regard, the presence of any of the vitiating factors in s 90 of the Penal Code would be *prima facie* evidence of a lack of voluntariness. It is also clear from the definition of "injury" in s 44 of the Penal Code, that "injury" for the purposes of s 90(*a*)(i) of the Penal Code would encompass any harm "illegally caused to any person, in body, mind, reputation or property" (see *Yeo, Morgan & Chan* at para 19.19).

Was there consent on Cpl Kok's part?

41 The following commentary which was endorsed by the High Court in *Iryan* (at [123]) is highly instructive, notwithstanding that it pertains to the element of consent in relation to the offence of rape under the Indian equivalent of the now amended s 375 of the Penal Code 1985. This is drawn from *Ratanlal & Dhirajlal's Law of Crimes: A Commentary on the Indian Penal Code 1860* vol 2 (C K Thakker & M C Thakker eds) (Bharat Law House, 26th Ed, 2007) at p 2061 (see *Ratanlal & Dhirajlal's The Indian Penal Code (Act XLV of 1860)* (Y V Chandrachud & V R Manohar eds) (Wadhaw and Company Nagpur, 31st Ed, 2006) at pp 1921–1922 and Sri Hari Singh Gour's *The Penal Law of India*

(Law Publishers (India) Pvt Ltd, 11th Ed, 2000) vol 4 at pp 3611–3614 for similar points):

> A mere act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance or passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be 'consent' as understood in law.

42 Bearing the relevant legal principles on consent in mind, I turn to the facts. My observations in this regard were based primarily on the undisputed facts as well as the objective evidence in the form of the mobile phone video and CCTV footage. There were also accompanying transcripts of the audio recordings from the mobile phone video footage.

43 While in the watch room for his pre-ORD "celebration", Cpl Kok appeared to be smiling and cheerful while being filmed as he was made to give a farewell speech before cutting the cake that was presented to him. Based on the available transcripts of the audio extracts, he had expressed gratitude to his superiors for taking care of him, while he also sought forgiveness for perceived mistakes. The transcripts however also show that Cpl Kok was being mocked, teased and taunted. From the video footage, one could reasonably interpret his demeanour differently as projecting nervous unease and trepidation since he had already been made aware in no uncertain terms that the "kolam" was impending and inevitable despite not being able to swim. At one point, he appeared to be crying even while ostensibly keeping up a cheerful outlook. For this, he was teased as well. It would not have been possible to tell whether these were tears of joy or fear, or a mixture of both.

44 Two of the servicemen (Staff Sergeant Al-Khudaifi Chang and Lance Corporal Mohamed Rabik Atham Ansari) testified that after the celebration in the watch room ended, Cpl Kok had attempted to leave the watch room but he

was prevented from doing so. As the CCTV footage revealed, Cpl Kok was then carried to the pump well. He did not choose to go to the well on his own volition; he was manhandled and carried there by four persons. Others then joined in along the way. The taunting and mocking continued relentlessly as they surrounded him at the pump well. Removing some of his personal items may seem to reflect a possible willingness on his part to enter the pump well, but it was equally if not more conceivable that he only did so since he was being given Hobson's choice. It was also pertinent to note that Cpl Kok did not remove all his clothing. He had in fact kept his T-shirt and trousers on, after removing his handphone, wallet, polo T-shirt, boots and socks. If he had really had no qualms entering the pump well, it was odd that he would keep his remaining clothes on and get them wet.

45 Cpl Kok was constantly surrounded by up to as many as eight to ten other servicemen, including various higher-ranking senior officers like SWO Nazhan, Warrant Officer Mohamed Farid bin Mohd Saleh ("WO Farid") and SSgt Fatwa. They continued to put pressure on him and persisted in goading him and egging him on. Cpl Kok's reluctance to participate in the "kolam" was palpable and clear. He protested not only once but three times, to no avail each time.

46 On my evaluation of the primary facts, two critical irresistible inferences ought to have been drawn. First, the servicemen were intent on making sure that Cpl Kok would undergo the "kolam" and get wet by going into the pump well. This was the expected outcome and the highlight of their pre-ORD celebration. The second inference was that Cpl Kok was not being given any choice in the matter. The expected outcome would be achieved by making him go inside the pump well one way or another.

47 The weight of the evidence fully supported the inference that Cpl Kok was *never* a willing participant. He had never given any express or implied consent to the "kolam". Tellingly, not a single witness testified that he had said he consented. As the Prosecution pointedly submitted, there was no way for Cpl Kok to simply stand up and walk away in a highly regimented and hierarchical uniformed organization. It does not require someone to have even experienced NS to appreciate that it would take an unusually bold and defiant NS man, whether full-time or operationally ready, to directly disobey a superior officer's orders or demands. Few if any NS men would be prepared to do so and risk the prospect of immediate punishment or formal disciplinary action.

48 As demonstrated from the irrefutable evidence, Cpl Kok could not defy his superior officers' demands but only plead with them, albeit weakly and meekly, "Don't lah, Encik", "Belum, Encik" (meaning "not yet, Encik") and "Cannot, Encik". All this was fully captured in the audio extracts and the accompanying transcripts. All his protestations were ignored. The SDJ made no reference in the GD to any of these crucial pieces of objective evidence. This suggested that he had overlooked them in their entirety or somehow found them irrelevant. Indeed, it would appear from the GD that there was scarcely any attention paid to the totality of the video and CCTV footage, resulting in little or no assessment of important aspects of objective evidence and how they cohered with the evidence adduced, both undisputed and contentious.

49 The chain of events that evening must be viewed holistically and in its full and proper perspective. From the undisputed facts and the video and CCTV footage, it was completely implausible that Cpl Kok was a ready, willing and able participant, and that the servicemen could have reasonably perceived that he had given consent to the "kolam". In my view, the general defence of consent did not avail either SWO Nazhan or Lta Chong for two reasons. First, this was

not a situation where Cpl Kok was allowed to exercise his own free will. He was constantly being harassed and pressured to conform and comply, with the active involvement of various superior officers, inclusive of SWO Nazhan. According to SSgt Fatwa, whose evidence on this score was not challenged in cross-examination, SWO Nazhan helpfully "advised" Cpl Kok to jump nearer to the edge of the pump well if he could not swim. Then he simply walked away. If Cpl Kok's consent was not completely vitiated, he would at least have been acting under overwhelming duress. This was quintessentially a situation where Cpl Kok was placed squarely in a situation of "helpless resignation in the face of inevitable compulsion" (see [41] above).

50 Second, under s 90(*a*) of the Penal Code, an accused person is required to know or have reason to believe that the consent was not given under fear of injury, wrongful restraint or misconception of fact. This is an objective inquiry, and the defence of consent will not be available if the accused person knew or ought to have known that any purported consent was obtained due to fear of injury (see *Iryan* at [125]). As I had noted above (at [47]), Cpl Kok never gave any express or implied consent to the "kolam". He was carried to the pump well against his will. Both SWO Nazhan and Lta Chong knew or ought to have known that even if Cpl Kok had entered the pump well on his own, there was no valid consent on his part to speak of in the circumstances.

51 Furthermore, none of the witnesses who testified at the trial would be able to tell the court what exactly was Cpl Kok's state of mind. Each of the witnesses had a vested interest in some form to downplay their own roles, including claiming that they were just playing a prank on Cpl Kok to scare him and asserting that there was an expectation that he would enter the pump well voluntarily at some point. In my view, all this was not much more than an

attempt to conveniently distance themselves from SSgt Fatwa's act of pushing Cpl Kok into the pump well.

Was the "kolam" prohibited as a form of ragging which entailed foreseeable risk?

52 This was an issue of fact that was disputed by the parties in the proceedings below. Although Lta Chong had acknowledged in his first statement to the police that "kolam" activities were banned about ten years ago, during his examination-in-chief, he had attempted to differentiate activities of "kolam" into ragging or non-ragging on the basis of whether malice was involved. On the other hand, SWO Nazhan maintained on appeal that the "kolam" was not considered to be a form of ragging. SWO Nazhan argued that the Prosecution had failed to adduce any evidence that the "kolam" was considered ragging, and that while ragging was prohibited, neither of the accused was specifically instructed to prevent the "kolam".

53 In my view, it is immaterial that other than a general prohibition of ragging, there was no express prohibition of "kolam" within the SCDF. Whether one chooses to label it more innocuously as horseplay or a send-off prank since "boys will be boys", it is still ragging in substance. The evidence showed that both accused persons undoubtedly knew that "kolam" fell well within the definition of ragging, contrary to their attempts to redefine what "kolam" entailed. Both of them knew that it was banned; this was why they had specifically instructed the servicemen not to film or post videos of the acts.

54 The accused persons did not dispute that they owed Cpl Kok a duty to keep him safe from any form of ragging, and more so where ragging involved dangerous or risky activity. They also appreciated that "kolam" was banned because it was a dangerous and risky activity. They were advertent to the risks.

The Prosecution had not suggested that the accused persons had any malicious intent but accepted that Lta Chong had allowed the "kolam" to proceed so as not to spoil the celebratory mood. The Prosecution also accepted that the accused persons may not have subjectively viewed the activity as dangerous. Nevertheless, these considerations had no bearing on the charges. No harm may have been known to have previously resulted to any of the witnesses when they themselves underwent or saw others experiencing the "kolam", but this did not mean that the obvious risks or danger could be dismissed or disregarded.

55 Lta Chong had ultimately acknowledged that "kolam" was prohibited as a form of ragging and conceded that it was an inherently dangerous activity. As for SWO Nazhan, there was absolutely no justification for his assertion that a voluntary decision to enter the pump well would not constitute ragging if no force was used. It was artificial to draw a distinction between physical and psychological coercion in the present circumstances. As I have already explained, Cpl Kok had never volunteered, consented or shown any willingness to participate in the "kolam".

Was the chain of causation broken by the actions of SSgt Fatwa?

Test for causation in negligence

56 A central argument canvassed by both Lta Chong and SWO Nazhan in the proceedings before me and below was that the actions of SSgt Fatwa had broken the chain of causation.

57 In *Lim Poh Eng v Public Prosecutor* [1999] 1 SLR(R) 428 ("*Lim Poh Eng*"), a traditional Chinese medicine practitioner was charged under s 338 of the Penal Code 1985 after administering colonic washout treatments to the victim. He had negligently failed to attend to the victim and refer her to a

hospital after she started experiencing complications from the treatment. In setting out the standard of care for criminal negligence, Yong Pung How CJ ruled that the standard is similar to that for civil negligence (see *Lim Poh Eng* at [20], [28]–[30]). With specific reference to s 338 of the Penal Code 1985, Yong CJ stated that "in addition to proving negligence, the Prosecution has to prove grievous hurt to a person and that the act endangered human life or the personal safety of others", and that the standard of proof on the prosecution would be that of proof beyond reasonable doubt (see *Lim Poh Eng* at [27]).

58 In *Ng Keng Yong*, two naval officers were charged under s 304A of the Penal Code 1985 for negligently causing the death of several servicemen, when they had altered their ship's course, resulting in a collision with another vessel. It was not disputed that the actions of the other vessel's crew had contributed to the collision. In response to arguments that the other vessel's negligent manoeuvre had broken the chain of causation, Yong CJ held that the adoption of the civil standard of care in criminal negligence did not allow for the importation of principles of causation from civil negligence, such as the "but for" test and the doctrine of *novus actus interveniens* into the operation of criminal law, and that "the entire law of civil negligence" should not be transplanted into the criminal sphere (*Ng Keng Yong* at [63]). Rather, *the test was whether the negligence of the accused contributed significantly or substantially to the result* (see *Ng Keng Yong* at [66]; *Balakrishnan* at [76]). In addition, CJ Yong also stated that the chain of causation was not necessarily broken whenever another party's negligence intervenes. Instead, the real enquiry should be directed at the "relative blameworthiness" of the parties (see *Ng Keng Yong* at [65] and [66]).

59 In this regard, CJ Yong's rejection of the principles of causation from civil negligence in *Ng Keng Yong* has been subject to academic scrutiny,

amongst which the criticisms are that there were no detailed reasons given for the rejection of the "but for" test and the doctrine of *novus actus interveniens*, and that it would be self-contradictory to require a stricter test for causation yet reject such established principles (see Stanley Yeo, "Causation in Criminal and Civil Negligence" (2007) 25 Sing LR 108 at pp 115–117).

60 I note that an alternative test for causation premised on foreseeability has been mooted by academics, which requires the court to consider the question: "when D acted in the way they did, did they actually foresee or could they have reasonably foreseen V's death [or injury] as a likely consequence of such conduct?" (see *Yeo, Morgan and Chan* at para 5.30).

61 In my view, the issues that were engaged in the present case did not necessitate the adoption or endorsement of a different test for causation premised on foreseeability. The "substantial cause" test as stated in *Ng Keng Yong* (see above at [58]) has already been well-accepted in Singapore as well as other parts of the Commonwealth. As Sundaresh Menon CJ in *Guay Seng Tiong Nickson v Public Prosecutor* [2016] 3 SLR 1079 ("*Nickson Guay*") stated at [38]:

> Hence, *in order to escape liability, it is not sufficient for the accused to point to the fact that there are other contributing causes. All the prosecution has to show is that the accused is a substantial cause of the injury even if there were other contributing causes.* I should add that I use the term "substantial cause" because it was the expression used in *Ng Keng Yong* ([34] *supra*) at [71]. *The test for causation has been variously articulated in other parts of the Commonwealth, with expressions such as "not insignificant", "more than de minimis", or "significant contribution" having been used to convey the same notion that an accused's act must be a significant cause of death in order for liability to attach* (see *R v Nette* [2001] 3 SCR 488 at [4]; *R v Smithers* [1978] 1 SCR 506; *Royall v The Queen* [1991] 100 ALR 669; *R v Pagett* (1983) 76 Cr App R 279 at 288 *per* Robert Goff LJ; *R v Cato* [1976] 1 All ER 260 at 266d *per* Lord Widgery CJ; *R v Cheshire* at 852A). I also note that there

> are some who consider that these are not merely semantic differences (see Stanley Yeo, "Causation in Criminal and Civil Negligence", (2007) 25 Sing L Rev 108 and see also the observations of Lord Sumner in *British Columbia Electric Railway Company, Limited v Loach* [1916] 1 AC 719 at 727–728) but as none of this is in issue before me, I say no more on this.
>
> [emphasis in original omitted, emphasis added in italics]

62 However, even if the inquiry in relation to causation is directed at whether the actions of the offender had been the substantial cause of the injury (or death) which resulted even if there were other contributing causes, it does not mean that the doctrine of *novus actus interveniens* has no practical application whatsoever in the context of criminal negligence. As stated by Menon CJ in *Nickson Guay* at [33]:

> It has thus often been said that the ***common law approaches the question of causation on a common-sense basis*** (see *McGhee v National Coal Board* [1973] 1 WLR 1 at 5B per Lord Reid and *Alexander v Cambridge Credit Corp Ltd* (1987) 12 ACLR 202 at 244 per McHugh JA). ***The underlying inquiry is always whether there is a sufficient nexus between the negligent conduct and the damage to justify the attribution of responsibility to the actor.*** If the nexus is not sufficient, liability will not attach to the negligent actor in respect of that damage. Actions of third parties or the victim *may* serve to so weaken the nexus between the actor's conduct and the eventual damage that he cannot be said to be a *legal cause* of the damage even if, on a scientific and objective analysis, his act was a *factual cause* of the damage.
>
> [emphasis in original in italics; emphasis added in bold italics]

63 It would not be wrong to adopt the doctrine of *novus actus interveniens* (or other principles of civil negligence) as practical guidance for the court's inquiry into the existence of a sufficient nexus between the negligent conduct sought to be punished and the harm (or damage) caused. In other words, the doctrine of *novus actus interveniens* could assist the court to decide if the act of the accused was a substantial cause of the harm such that it can be said to be a

sufficiently proximate and efficient cause of the harm. After all, it is trite that liability will not attach where the harm (or damage) is caused by some "overwhelming supervening act" by a third party perpetrator which no one in the accused's shoes could have reasonably foreseen would happen (see *R v Anderson*; *R v Morris* [1966] 2 All ER 644 at p 648E; *R v Jogee*; *Ruddock v The Queen* [2017] AC 387 at [97]).

64 In this regard, *Ng Keng Yong* had rightly rejected the applicability of the doctrine of *novus actus interveniens* in criminal negligence, to the extent that it cannot be taken to be the sum total of the inquiry as to whether causation was made out. As pointed out by Prof Glanville Williams, the doctrine of accessorial liability was developed to deal with a situation which would otherwise have been considered as a *novus actus interveniens* (Glanville Williams, "*Finis* for *Novus Actus*?" [1989] CLJ 391 at pp 397–398):

> The *novus actus* doctrine is at the root of the law of complicity. If one person instigates another to commit murder, the philosophy of autonomy teaches that the instigator does not cause the death, responsibility for causation being confined to the person who does the deed, and who is therefore the latest actor in the series. In order to bring in the instigator and helpers, bypassing this restriction on the law, the judges invented the doctrine of complicity, distinguishing between principals and accomplices. Principals cause, accomplices encourage (or otherwise influence) or help. If the instigator were regarded as causing the result he would be a principal, and the conceptual division between principals (or, as I prefer to call them, perpetrators) and accessories would vanish. Indeed, it was because the instigator was not regarded as causing the crime that the notion of accessories had to be developed. This is the irrefragable argument for recognising the *novus actus* principle as one of the bases of our criminal law. The final act is done by the perpetrator, and his guilt pushes the accessories, conceptually speaking, into the background. Accessorial

> liability is, in the traditional theory, "derivative" from that of the perpetrator …

The references to the "helpers" and "accomplices" in the passage cited above would of course include abettors, accessories and co-conspirators as well.

65 In a similar vein, while I declined to adopt the foreseeability test as the test for causation, having regard to the observations of the High Court in *Ng Keng Yong* and *Nickson Guay*, a finding of actual or reasonable foreseeability (or its absence) would be useful in helping the court to determine if a sufficient nexus had existed between the act of the accused and the harm or damage caused.

Did SSgt Fatwa's actions break the chain of causation?

66 The SDJ had found that SSgt Fatwa's sudden push of Cpl Kok into the pump well was the "primary offence", *ie*, the sole proximate and efficient cause of the grievous hurt suffered by Cpl Kok. With respect, however, it could not be said that SSgt Fatwa's act of pushing Cpl Kok was completely unforeseen and unexpected and had thus broken the chain of causation. In any case, the act of pushing Cpl Kok was not an ingredient of the s 338(*a*) charges, when the charges had specified that the relevant intent was to *make* Cpl Kok enter the pump well.

67 Properly evaluated, the evidence plainly and cogently led to the compelling inference that both the accused persons, like all the other servicemen, knew or ought to have known that it was virtually inevitable that Cpl Kok would have been thrown or pushed into the pump well if he had not voluntarily entered it. It would be highly artificial to insist, as the SDJ appeared to have done (at [33] of the GD), that there ought to have been "concrete

evidence of a common consensus" among the servicemen or evidence of "any discussion as to the means [to be employed]" to make Cpl Kok enter the pump well. With respect, it was implausible that there would have been any precise plans or serious discussion amidst the spontaneity of the situation.

68 To be clear, the "kolam" was not a wholly impromptu event that simply came up on the spur of the moment. SWO Nazhan had in fact confirmed that the servicemen had raised the idea of a "kolam" during a briefing by Lta Chong at least two or three duties before that fateful day. SWO Nazhan himself had said the word "kolam" along with many other servicemen while inside the watch room, together with a number of unrelenting calls for Cpl Kok to take off his clothes and go straightaway to the pump well and "bathe" or "shower". Sergeant Mohammad Hazwan bin Hassan ("Sgt Hazwan") had even told Cpl Kok while in the watch room that if he did not go inside the pump well by himself, he would bring him in. With the repeated calls in the watch room for the "kolam", it was inconceivable that Lta Chong and SWO Nazhan could not have known that the "kolam" was inevitable. Whether Cpl Kok would consent to it or not was irrelevant to the servicemen.

69 Ultimately, whether there was any common consensus was a matter of inference to be discerned from an examination of the totality of the evidence. From the transcripts of the audio recordings, while Cpl Kok was at the pump well, Sgt Hazwan told Cpl Kok thrice that he would "tolak" (*ie*, push) him. Sgt Hazwan claimed that he was only "teasing and playing" with Cpl Kok. At any rate, Cpl Kok ended up being pushed into the pump well within 45 seconds of seating himself at the edge of the well. Once again, from the transcripts of the audio recordings, it would appear that this came about due to WO Farid's and SSgt Fatwa's mounting impatience with Cpl Kok's constant hesitation and apparent reluctance to get inside the pump well. It may not have been intended

that he should be hurt or drown, but these were not wholly unforeseeable outcomes.

70 When Cpl Kok was pushed into the pump well, even if the push was sudden and unexpected, no one present seemed to have expressed any shock or surprise, much less any immediate concern for Cpl Kok. Instead, there was only smiles and laughter among the servicemen present, as if to celebrate the ultimate achievement of their goal of getting Cpl Kok wet. It was obvious that this was their common purpose. That said, it would be fair to note that no one had expected him to fail to surface either.

71 In the circumstances, the only appropriate inference was that, like each and every one of the servicemen involved that evening, both accused persons knew exactly what the "kolam" entailed. It made no difference how Cpl Kok ended up inside the pump well. Cpl Kok would end up in there one way or another. Lta Chong in fact conceded in cross-examination that he knew that this would be the outcome. Thus, it was not merely that the servicemen had "hoped or desired" to see Cpl Kok get wet and would back off if he declined to enter the pump well. The common purpose was simple and straightforward. It was evident in the escalating actions from the moment the "kolam" idea was mentioned repeatedly in the watch room, to when Cpl Kok was carried to the pump well and thereafter made to remove his personal items and sit on the edge of the well.

72 In my view, SSgt Fatwa's push did not amount to a *novus actus interveniens* which broke the chain of causation. It was the means through which the servicemen's common purpose was achieved. The fact that SSgt Fatwa's push may have been sudden and perhaps unexpected was irrelevant. It was not unforeseeable but more importantly, it was wholly consistent with their

common purpose. Equally, it was reasonably foreseeable that an omission to put a stop to the "kolam" could have led to Cpl Kok suffering grievous injury. Thus whether on the application of the "substantial cause" test in *Ng Keng Yong* or alternatively on the application of a test for causation premised on foreseeability, I would have arrived at the same conclusion in relation to the issue of causation. By omitting to stop the "kolam", both Lta Chong and SWO Nazhan had substantially contributed to Cpl Kok's eventual demise.

Was abetment by illegal omission established on the facts?

The law on abetment by illegal omission

73 There is no general duty in criminal law to prevent a crime, and criminal liability is typically premised on some positive act rather than a failure to act (see *Yeo, Morgan & Chan* at paras 3.8–3.9). However, under s 32 read with s 43 of the Penal Code, omissions can be treated as positive acts where they are regarded as illegal. These include the following situations (see also *Yeo, Morgan & Chan* at paras 3.9–3.17):

(a) Where the law renders the omission illegal. For example, under s 187 of the Penal Code, where persons are bound by law to render assistance to public servants in the execution of their duty but intentionally omit to do so;

(b) Where the law provides that the person is under a legal duty to act. For example, under s 68 of the Women's Charter (Cap 353, 2009 Rev Ed), where parents are required to maintain and provide for their children;

(c) Where the omission would attract civil liability.

74 In *Balakrishnan* at [112]–[115], Yong CJ stated:

> 112 To prove abetment by illegal omission, it has to be shown that the accused intentionally aided the commission of the offence by his non-interference, and that the omission involved a breach of legal obligation: Ratanlal & Dhirajlal, *The Indian Penal Code* (Wadhwa Nagpur, 29th Ed, 2002), citing *Khadim Sheikh* (1869) 4 Beng LR (Acr J) 7.
>
> 113 Used in connection with the definition of abetment, the phrase "illegal omission" refers to the intention of aiding the doing of the thing. ***It is therefore not enough to establish that the accused took no steps to prevent the commission of the offence if no guilty knowledge or conspiracy is proven***. In other words, WO Balakrishnan's mere presence at or near the water tub without awareness that an offence was being committed would not in itself amount to abetment by aiding. Hence, the judge went on to find that by omitting to stop the conduct of water treatment on Capt Ho and Sgt Hu, WO Balakrishnan *intended* to aid the commission of the offences against them. WO Balakrishnan contested this finding on appeal.
>
> 114 WO Balakrishnan was familiar with the "Do's" and "Don'ts" in the CST lesson plan and had even constructed a new board for display of the "Do's" and "Don'ts" list when the old one was torn. He testified that he thought the procedure was safe as long as the instructors dunked each trainee up to three times, for five to ten seconds each time …
>
> 115 The only reasonable inference that I could draw from WO Balakrishnan's failure to intervene was that he intended for the treatment to continue …
>
> [emphasis in original in italics; emphasis added in bold italics]

75 In order to prove abetment by illegal omission, it has to be cumulatively shown:

(a) that there was a legal obligation on the part of the accused person;

(b) that there was an omission which was in breach of the legal obligation; and

(c) that there is either guilty knowledge or conspiracy on the part of the accused person to allow the wrongful act(s) to occur.

Application to the facts

76 The SDJ had at [40] of the GD made reference to *Balakrishnan* at [64], for the proposition that "the Prosecution must prove an intention on the part of the abettor to aid in the offence, as well as a knowledge of the circumstances constituting the offence". The SDJ further went on to note the following facts at [43] of the GD: the accused persons were not physically present at the pump well, they did not witness the push by SSgt Fatwa, and they did not "have the opportunity to intervene or to take any steps to prevent the primary offence from being committed". He found these facts to be crucial to the difficulty in proving the charges as framed by the Prosecution.

77 Yong CJ's holdings in [64] and [112] of his judgment in *Balakrishnan* appear to bear some similarities, but closer examination will show that the respective remarks were made in respect of different forms of abetment. The remarks at [64] were made with reference to the acts of Capt Pandiaraj for having abetted *by instigation* the actions which led to injury and death of the victims. In contrast, the remarks at [112] were made with reference to the acts of WO Balakrishnan for having abetted the relevant actions *by illegal omission* which is the substance of the charges against the accused persons in the present case. From the facts of *Balakrishnan*, there had demonstrably been a palpable difference in the conduct of the two officers which justified this differentiation in the forms of abetment. Capt Pandiaraj had taken an active role in the acts which resulted in the victims' injuries and death, by instructing that the victims were to be dunked in water, while WO Balakrishnan was imputed for his inaction in failing to stop the dangerous acts which led to injury and death.

78 In my view, this palpable differentia in the actions of the offenders in *Balakrishnan* led Yong CJ to state at [64] that the offender subject to a charge of abetment *by instigation* had to have "knowledge of the circumstances constituting the offence". With respect, the SDJ had erred in apparently having taken into account (at [43] of the GD) the fact that the accused persons were not physically present at the pump well, that they did not witness the push by SSgt Fatwa, and that they had no opportunity to intervene or to take any steps to prevent the primary offence from being committed. These considerations were irrelevant in relation to the present case, and they were premised on a misapprehension of [64] of *Balakrishnan*. They would not pose any difficulty in proving the charges as framed by the prosecution.

79 Applying the test for abetment by illegal omission as restated at [75] above, it was not disputed by either accused person that they owed a duty of care to Cpl Kok. The inescapable inference was that they had consciously chosen not to stop the "kolam", thus giving a clear sanction for the activity to continue, with knowledge of the risks associated. Both accused persons knew that the "kolam" was prohibited but they chose to ignore the risks. They purportedly did not even know whether Cpl Kok could swim. It was entirely foreseeable that in all likelihood Cpl Kok would have been thrown or pushed into the pump well had he not voluntarily entered the well.

80 By asking the other servicemen not to film or post any videos on social media and then remaining in the control room (in the case of Lta Chong) and walking away (in the case of SWO Nazhan), the only reasonable inference to be drawn from the accused persons' failure to intervene was that they had intended for the "kolam" to continue. There was thus an illegal omission in breach of their legal duty to ensure Cpl Kok's safety. The accused persons had abetted the servicemen by intentionally aiding them to commit the offence of

grievous hurt to Cpl Kok through their illegal omissions to prevent them from seeing the "kolam" through to its intended outcome.

SWO Nazhan's absence from the scene

81 SWO Nazhan had also argued that he should not be held liable for any of the events that transpired after he had left Cpl Kok at the pump well. He sought to distinguish *Balakrishnan* at [110] where Yong CJ had cited the case of *Public Prosecutor v Gerardine Andrew* [1998] 3 SLR(R) 421 ("*Gerardine*") at [35] for the proposition that "there is no requirement that an abettor must be present at the immediate scene of the crime in order for there to be liability for abetment", on the ground that *Gerardine* had concerned a finding of common intention under s 34 of the Penal Code, which was not a finding made in the present case.

82 In my view, SWO Nazhan's arguments did not take his case very far. They appeared to have been premised on a basic misapprehension of both *Gerardine* and *Balakrishnan*. In *Gerardine* at [35], Yong CJ in explaining the *difference* between joint liability (which is criminalised under s 34 of the Penal Code) and accessory liability (which is criminalised under s 107 of the Penal Code), had stated that because of the closer association required under joint liability, for an offender to be liable under s 34 of the Penal Code, the offender had to be physically present when the crime took place. Yong CJ had further stated, *obiter*, that there was "therefore no requirement that an abettor must be present at the immediate scene of the crime in order for there to be liability for abetment". Accordingly, it was the latter *obiter* statement in *Gerardine* that had been cited by Yong CJ in *Balakrishnan* at [110]. Contrary to SWO Nazhan's contentions, the reference to [35] of *Gerardine* was therefore not made in connection with the question of common intention under s 34 of the Penal Code.

83 For completeness, it should also be noted that the holding in *Gerardine* (at [35]) that the offender had to be physically present at the place of the crime for the purpose of proving common intention under s 34 was overruled by the Court of Appeal in *Lee Chez Kee v Public Prosecutor* [2008] 3 SLR(R) 447 ("*Lee Chez Kee*"), where VK Rajah JA had held at [147] that:

> As has been noted, in this regard, the Malaysian position is much clearer because the requirement of presence has not been imposed. In the Malaysian Court of Appeal case of *Sabarudin bin Non v Public Prosecutor* [2005] 4 MLJ 37, Gopal Sri Ram JCA said (at [31]):
>
> > In our judgment, presence in every case is not necessary for s 34 to apply. In our judgment, *s 34 should be interpreted having regard to modern technological advances.* The early decisions on the section, admittedly by the Privy Council, that held presence to be essential for s 34 to bite were handed down at a time when modes of communication were not as advanced as today. It would, in our judgment, be a perversion of justice if we are required to cling on to an interpretation of the section made at a time when science was at a very early stage of development.
>
> I respectfully accept the wisdom behind the pronouncement and hold that presence at the scene of the criminal act, primary or collateral, need no longer be rigidly insisted on for s 34 of the Penal Code to apply. *I repeat that the crux of the section is participation, and presence may or may not provide evidence of participation; this is a question of fact to be decided in each case.*
>
> [emphasis added]

84 In my view, the principle stated in *Lee Chez Kee* in the preceding paragraph is equally applicable in the context of abetment under s 107(1)(*c*) of the Penal Code. Adopting Rajah JA's reasoning, the crux of the matter is whether the criminal act was intentionally aided by the participation of the offender, and presence at the scene of the criminal act is only one aspect of the evidence that may go towards supporting such a finding. This is all the more so in the modern context, where the ubiquity of mass communications devices may

allow the abetment of a criminal act through an act or illegal omission notwithstanding the absence of the abettor at the scene of the crime.

SWO Nazhan's "superior orders" defence

85 Next, I shall briefly address SWO Nazhan's "superior orders" defence. Essentially, SWO Nazhan claimed that having been an officer junior in rank to Lta Chong, he was not in a position to countermand or override Lta Chong's (tacit) endorsement of the "kolam". This argument was patently unmeritorious and was also rightly rejected by the SDJ.

86 To begin with, there was no direct order from Lta Chong to countermand. SWO Nazhan was the most senior officer on the ground after Cpl Kok was carried to the pump well. He could have directed the servicemen to stop the "kolam". It would not be an act of insubordination to do so if wrong or unlawful orders which may endanger a person had been given in the first place, whether directly or otherwise. Instead, SWO Nazhan sealed the endorsement for the "kolam" to continue. As noted above (at [49]), SSgt Fatwa's unchallenged evidence was that SWO Nazhan had "advised" Cpl Kok to jump nearer to the edge of the pump well if he could not swim.

Were the actions of the accused persons rash or merely negligent?

87 Rashness connotes heedlessness or indifference towards risk, and there is no reason why an omission to do something could not constitute rashness (see *Jali* at [21]). The test for culpable rashness encompasses situations where there is in fact subjective appreciation of risk by the accused and situations of obvious risk where the accused ought as a reasonable person to have been conscious of the risk (see *Jali* at [32]).

88 Lta Chong rationalised that he had personally experienced a "kolam" and did not think it was dangerous. SWO Nazhan similarly reasoned that he himself had emerged unscathed from a "kolam" even though he was a non-swimmer. These attempts to justify their inaction were devoid of any merit. They were self-serving and blinkered applications of the "Golden Rule" to do to others as you would have them do to you. In their minds, what had been done to them could be done to others as well as they had personally undergone the "kolam" without incident, and thus it should not be considered risky or dangerous for anyone else.

89 As I have explained above at [71], both accused persons had full knowledge of the servicemen's intent and the expected outcome. Their conscious and deliberate inaction was a clear sanction for the servicemen to carry on with the "kolam" activity. Having regard to their evidence, it was clear that there was advertence to the obvious risks associated with the "kolam". They chose to ignore the risks or to trivialise the possible dangers. Their illegal omissions would constitute rashness under s 338(*a*).

90 Consequently, the SDJ's decision to amend the charges to s 336(*b*) was made in error since all the ingredients of the s 338(*a*) offence had been satisfied. Lta Chong and SWO Nazhan's omissions to stop the "kolam" from being taken to its expected conclusion (*ie*, getting Cpl Kok inside the pump well) amounted to criminal rashness endangering human life.

Conclusion on appeals against acquittal and conviction

91 To recapitulate, it is well-established that an appellate court should be slow to disturb a trial judge's findings of fact where they are premised on his assessment of the witnesses' credibility and demeanour, unless the findings are

found to be plainly wrong or against the weight of the evidence (see *ADF* at [16(a)]; *Public Prosecutor v Mohammed Liton Mohammed Syeed Mallik* [2008] 1 SLR(R) 601 at [32]; *Sandz Solutions Sandz Solutions (Singapore) Pte Ltd and others v Strategic Worldwide Assets Ltd and others* [2014] 3 SLR 562 at [38]). The SDJ's findings in the present case however did not turn on any specific assessments of the witnesses' candour or demeanour.

92 While having a limited role in assessing findings of fact, an appellate court is nevertheless in as good a position as a trial court to determine the appropriate factual inferences that ought to be drawn having regard to the internal and external consistency of the evidence. This is particularly important when the factual inferences are tested against material objective evidence (see *Yap Giau Beng Terence v Public Prosecutor* [1998] 2 SLR(R) 855 at [24];*Tan Chin Seng and others v Raffles Town Club Pte Ltd* [2003] 3 SLR(R) 307 at [54]; *Jagatheesan s/o Krishnasamy v Public Prosecutor* [2006] 4 SLR(R) 45 at [37]–[38]; *Ho Soo Fong and another v Standard Chartered Bank* [2007] 2 SLR(R) 181 at [20]).

93 The extensive CCTV and mobile phone video footage in the present case, while by no means exhaustive, did serve as crucial aids in the visualisation and understanding of the factual context. They enabled the court to objectively discern the nuanced details and comprehend the "big picture". While the SDJ chose to place more weight on the oral testimonies of several of the servicemen who had suggested that they did not intend to compel Cpl Kok to do anything against his will, careful scrutiny and proper appreciation of the undisputed evidence along with the available video footage showed that what the servicemen suggested was plainly contrary to the weight of the evidence. It did not cohere with the context of what was taking place.

94 Having examined the totality of the evidence, with great respect, I was drawn to conclude that the SDJ's findings and inferences of fact were not supported on the evidence. For the reasons stated above, the SDJ had erred in finding that the Prosecution had failed to prove the s 338(*a*) charges against the two accused persons. The charges had been proved beyond reasonable doubt. Accordingly, the Prosecution's appeals against the acquittals on the original charges were allowed and SWO Nazhan's appeal was dismissed. I convicted both accused persons on the s 338(*a*) charges as originally framed. I turn next to consider the appropriate sentences.

The appropriate sentence

Parties' submissions on sentence

95 The Prosecution submitted for a sentence of 12 months' imprisonment based on the available sentencing precedents. General deterrence was the predominant sentencing principle. The Prosecution also highlighted the facts that both accused persons had demonstrated a high degree of rashness in omitting to intervene in the "kolam", that the series of events had taken place over a sustained period, and that both accused persons had breached the authority and the trust reposed in them. In addition, the Prosecution submitted that the sentence of 12 months' imprisonment was justified, having regard to the parity principle, as the other offenders involved were sentenced to similar sentences. In the case of SSgt Fatwa, he was sentenced to 12 months and four weeks' imprisonment after pleading guilty to a charge under s 304A(*a*) of the Penal Code, in addition to a charge under s 204A read with s 109 of the Penal Code. In the case of WO Farid, he was sentenced to 13 months' imprisonment after claiming trial to a charge under s 304A(*a*) read with s 109 of the Penal Code.

96 The Prosecution also submitted that there were no significant mitigating factors, that the fact that Lta Chong pleaded guilty to the amended charge under s 336(*b*) was of limited value, and that SWO Nazhan should not be entitled to a sentencing discount on the ground that he was an officer junior in rank to Lta Chong.

97 Lta Chong submitted in mitigation that an appropriate sentence would be ten weeks' imprisonment in view of his good character and lack of antecedents, and that *Balakrishnan* should be distinguished as it concerned far more serious circumstances. Lta Chong further submitted that as he had already served a term of ten weeks' imprisonment, this could offset the sentence to be imposed either wholly or at least in part.

98 SWO Nazhan submitted that the court should consider his rank relative to Lta Chong in sentencing, in addition to his good character and lack of antecdents. Additionally, SWO Nazhan submitted that his culpability could not be equated to either Capt Pandiaraj's or WO Balakrishnan's culpability in *Balakrishnan*, and that he should be sentenced to either a $6,000 fine or a sentence of a few weeks' jail.

Degree of rashness

99 No two cases are identical and comparisons across precedents may not always be helpful. The factual circumstances in *Balakrishnan* bore the closest analogies to the present case, as that case also involved the dereliction of duty by a superior officer who was entrusted with the safety of a serviceman, whose death was caused by the direct actions of another person.

100 However, there are also some pertinent differences between the facts in *Balakrishnan* and those in the present case. First, the offences in *Balakrishnan*

took place during a training exercise, which the accused persons were supervising. In contrast, the events in the present case took place in an "off-duty" setting. Second, the deceased in *Balakrishnan* had voluntarily placed himself in the situation even though he had not consented to the criminal offences being committed, while Cpl Kok did not willingly enter into the situation wherein the criminal offences occurred. Third, since *Balakrishnan*, pursuant to amendments to the Penal Code in 2008, s 338 of the Penal Code has been bifurcated into two limbs to differentiate between rashness and negligence, with the "rash" limb being punishable with a maximum term of imprisonment of four years compared to two years at the time of *Balakrishnan*.

101 In evaluating the offence-specific considerations, I was mindful that the court should avoid "double counting" aggravating elements which are already essential and inherent elements of the s 338(*a*) charge. Advertence to the risk is a necessary element of the *mens rea* for the offence, and I had found that there was actual advertence to the obvious risks in the present case.

102 The main assessment at the outset is in relation to the degree of rashness. This is the primary measure of the accused persons' culpability and blameworthiness. There was serious disregard for the risks and danger involved in the present case. In addition, the accused persons had breached their duties as NS commanders to enforce the prohibition against ragging and to ensure the safety and well-being of men under their charge. They could have ordered a halt to the "kolam" at various points, but they chose not to do so. There was clearly a breach of the trust reposed in them as commanders, which is the necessary corollary of their breach of duty.

103 The aggravating factors demonstrably showed at least moderate if not higher culpability. The eventual harm caused to Cpl Kok was not unforeseeable,

though certainly unexpected by all the witnesses' accounts. Regrettably, the harm that resulted was the most serious imaginable consequence: death.

104 I found that there were no relevant mitigating factors. The accused persons' past contributions to public service, good character and good service record were not weighty given the context of the offending, where the offences reflected a serious dereliction of their duties. They are unlikely to reoffend, but general deterrence outweighed specific deterrence considerations in the present case.

Relative culpability of the offenders

105 Finally, I considered the appropriate calibration of the sentences. It was necessary at this juncture to have regard to SSgt Fatwa and WO Farid's sentences. In my view, there was no strict requirement to observe sentencing parity with their sentences given that the relative culpabilities and charges were different from those in the present case. SSgt Fatwa faced a s 304A charge and he was sentenced to 12 months' imprisonment. This might appear light but it should be noted that he had pleaded guilty at an early stage. If he had been convicted after trial, a substantially higher sentence would have been justifiable. WO Farid's sentence of 13 months' imprisonment perhaps also leaned towards leniency given that he had been convicted after trial.

106 In my view, Lta Chong and SWO Nazhan were not distinctly more culpable than SSgt Fatwa and WO Farid. They had sanctioned the continuance of ragging in the form of the "kolam" activity through their inaction, but this was ultimately still a step removed from actively encouraging ragging and making sure that the "kolam" happened, as SSgt Fatwa and WO Farid did. If the accused persons had played an active role in instigating and directing the

ragging, I would have had little hesitation in finding them to be more culpable. The sentences were thus calibrated below SSgt Fatwa and WO Farid's sentences, notwithstanding that the sentences in SSgt Fatwa and WO Farid's cases may have been somewhat lenient.

107 However, I did not agree with the Prosecution that Lta Chong and SWO Nazhan should be deemed to be equally culpable. In *Balakrishnan* at [138], Yong CJ made the following observation:

> *The principle of sentencing parity provides that where the roles and circumstances of the accused persons are the same, they should be given the same sentence unless there is a relevant difference in their responsibility for the offence or their personal circumstances*: *PP v Ramlee* [1998] 3 SLR(R) 95; *PP v Norhisham bin Mohamad Dahlan* [2004] 1 SLR(R) 48. The judge held that Capt Pandiaraj did not bear the same degree of culpability or play the same role as Lta Jeff Ng and Lta Diva. I did not concur. Although Capt Pandiaraj did not physically carry out the act of dunking on the victims, he gave Lta Jeff Ng and Lta Diva instructions for dunking, witnessed their manhandling of the trainees and did nothing to stop them. This was an egregious abuse of his power as their superior officer, and I was of the view that he was more morally culpable than Lta Jeff Ng and Lta Diva.
>
> [emphasis added]

108 In my view, there was a relevant though not a very significant difference in the respective responsibilities of Lta Chong and SWO Nazhan. Lta Chong was, at all times, the superior officer of SWO Nazhan, as well as the most senior commanding officer on site. Consequently, there ought to be a palpable difference in the sentences of the two accused persons.

Should time served be taken into consideration?

109 In *Public Prosecutor v Kwong Kok Hing* [2008] 2 SLR(R) 684 ("*Kwong Kok Hing*") at [46], the Court of Appeal had enhanced the sentence of the

offender from one year to three years' imprisonment, and in so doing had held that "some discount to the final sentencing question" was required as the offender had already finished serving his prison term by the time the appeal was decided. Similarly in *Public Prosecutor v Rosman bin Anwar and another appeal* [2015] 5 SLR 937 ("*Rosman*") at [57], the High Court had agreed with *Kwong Kok Hing* that as the offender would have to "now undergo a further prison sentence all over again for the same offence", a downward calibration in the sentence was called for.

110 In *Public Prosecutor v Adith s/o Sarvotham* [2014] 3 SLR 649 ("*Adith*"), the offender was sentenced to probation. On the Prosecution's appeal against the sentence, Menon CJ had held that a sentence of reformative training was more appropriate, but ultimately dismissed the appeal as the offender had already completed his sentence by the time of the appeal. However, Menon CJ stated, *obiter*, that where the Prosecution is appealing a sentence that entails some loss of liberty, a stay of execution may be appropriate so as not to curtail or affect the appellate court's discretion (see *Adith* at [25]–[30]).

111 Having considered the various authorities above, it is clear that in general, where the accused person has completed serving his sentence, the appellate courts have generally exercised restraint in enhancing the imprisonment sentence (see Kow Keng Siong, *Sentencing Principles in Singapore* (Academy Publishing, 2nd Ed, 2019) at para 35.074). However, whether or not a "discount" in sentencing should be given for time already served is ultimately a matter of discretion, and much would depend on the facts of the case.

112 In the present case, Lta Chong had already served ten weeks' imprisonment by the time the appeal was heard, after pleading guilty to the

reduced charge in the proceedings below. That may reflect, at best, a very limited measure of remorse and acceptance of responsibility on his part. However, he was sentenced on the basis of a lesser offence, and on appeal had been convicted on the original s 338(*a*) charge, which he had originally claimed trial to.

113 While it is undesirable for an offender to be made to serve two separate imprisonment terms in relation to the same offence, Lta Chong had elected to serve his ten-week sentence immediately *in spite of* the Prosecution seeking a stay pending appeal. He made the decision to do so while fully conscious that he could have readily avoided the present situation of having to serve a further imprisonment term. I saw no principled basis to consider any sentencing discount on account of him having already served ten weeks' imprisonment. To his credit, in keeping with his undertaking in the proceedings below, he did not ask for any such consideration to be given to him.

Conclusion on sentence

114 From their mitigation pleas setting out their contributions to the SCDF and their character references, I had no doubt that Lta Chong and SWO Nazhan are good men. But when good men in their position as commanders do nothing, resulting in a serviceman dying after being ragged in what the Prosecution characterised as a "pointless prank" which went horribly wrong, this was a real tragedy which could easily have been averted but for their inaction.

115 I found it extremely disquieting that there may be NS commanders who appear to condone ragging as mere harmless horseplay since "boys will be boys" and will have their high-spirited moments of jocularity. The sentences I imposed were substantial as they aimed to drive home a clear message: that

there is no place for ragging in NS, or in any other situational context, for that matter. Prohibitions against ragging must be enforced, and NS commanders must take their responsibilities to stamp out ragging seriously. Most importantly, NS commanders must discharge their duties to ensure the safety of their servicemen vigorously and with full commitment.

116 It was beyond dispute that the accused persons owed a duty of care to Cpl Kok. They failed to keep him safe from ragging. They had full knowledge of the servicemen's intent and the expected outcome of the "kolam" activity. Their deliberate omission to enforce the prohibition against ragging was a clear sanction for the servicemen to carry on with the "kolam". They were clearly advertent to the obvious risks and dangers which they chose to ignore or to trivialise.

117 The accused persons failed abjectly in their duties by intentionally and illegally omitting to stop the "kolam". If only they had acted as they ought to have, a young man's life might not have been lost. Their punishments therefore had to be sufficiently deterrent to adequately reflect the full gravity of their offences. Accordingly, I enhanced the sentences for Lta Chong and SWO Nazhan to 11 months and ten months' imprisonment respectively. As Lta Chong had already served ten weeks' imprisonment, he was sentenced to an additional eight months and two weeks' imprisonment.

See Kee Oon
Judge of the High Court

Kumaresan Gohulabalan and Sheryl Yeo (Attorney-General's Chambers) for the appellant in MA 9754/2020 and MA 9755/2020, and for the respondent in MA 9818/2020;
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Singa Retnam and Ashwin Ganapathy (M/s IRB Law LLP), Josephine Iezu Costan (David Nayar and Associates) for the respondent in MA 9755/2020 and for the appellant in MA 9818/2020.