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

[2025] SGHC 102

Magistrate's Appeal No 9045 of 2024/01

Between

Haji Muhammad Faisal Bin Johar

… *Appellant*

And

Public Prosecutor

… *Respondent*

JUDGMENT

[Criminal Law — Appeal]
[Criminal Law — Offences — Outrage of modesty]
[Criminal Procedure and Sentencing — Sentencing]

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v
Public Prosecutor

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28 May 2025 Judgment reserved.

See Kee Oon JAD:

Introduction

1 The appellant claimed trial to two charges under s 354(1) of the Penal Code (Cap 224, 2008 Rev Ed) of outraging the modesty of the complainant. The two alleged incidents took place on 7 February 2018 within minutes of each other, in a staff locker room adjoining the gym in the Singapore Island Country Club (the "SICC").

2 At the material time, the appellant was working as an instructor at the SICC gym. The complainant was then 20 years old. As her father was a SICC member, she used the gym facilities and had trained under the appellant as her personal trainer since sometime in October 2016. The complainant alleged that she was molested in the course of a "hot oil" massage which the appellant had given her after her workout.

3 The complainant filed a police report about the alleged incidents almost 11 months later, on 4 January 2019. The first charge (the "Bench Charge") alleged that the appellant had used both hands to touch and press against her breasts over her bra, while the second charge (the "Mat Charge") alleged that he had touched her vaginal area several times. The learned district judge (the "DJ") convicted the appellant on both charges and imposed a global sentence of 20 months' imprisonment and three strokes of the cane. The DJ's grounds of decision are set out in *Public Prosecutor v Haji Muhammad Faisal bin Johar* [2024] SGMC 92 ("GD").

4 HC/MA 9045/2024/01 is the appellant's appeal against conviction and sentence. Having considered the submissions on appeal, I am of the view that the DJ correctly found the complainant to be a credible and unusually convincing witness. Notwithstanding certain difficulties with her evidence, they do not materially affect the gravamen of the charges. I am satisfied that the charges were proven beyond a reasonable doubt and the sentence was not manifestly excessive. Accordingly, I dismiss the appeal. I set out my reasons for doing so below.

The proceedings below

5 The evidence led at trial is set out comprehensively in the GD. I shall only summarise the material aspects for present purposes.

6 The Prosecution's case was that the complainant had met the appellant at the SICC gym at around 3.35pm on 7 February 2018 for a personal training session. Towards the end of the session, he had offered to give her a full body massage with hot oil, and she accepted his offer. He thus led her after the session into the staff locker room, where they were alone throughout the relevant time.

There, the appellant first gave the complainant an upper body massage while she was seated on an exercise bench. While doing so, he repeatedly asked her to remove her T-shirt and she eventually obliged. He also asked her to remove her bra and, despite her refusal to do so, went ahead to unhook it himself. He later hooked her bra back on at her request before grabbing her breasts from the back over her bra. This formed the subject of the Bench Charge. After the appellant had withdrawn his hands, the complainant put her T-shirt back on and lay face down on an exercise mat while he gave her a lower body massage of her calves, thighs and "butt cheeks" (or *gluteus maximus*). While he was rhythmically moving his hands up and down her inner thighs, the complainant felt his hand making contact on her *labia majora*. This formed the subject of the Mat Charge. In response, the complainant told the appellant: "I think you are too close". The massage ended shortly thereafter and the complainant left the gym and returned home.

7 To prove its case, the Prosecution relied for the most part on the complainant's testimony. In addition, the Prosecution referred to the contemporaneous accounts which she had provided to her schoolmate (the "Schoolmate") and godsister (the "Godsister") shortly after the incidents.

8 The appellant's defence to both charges was a bare denial. Although he accepted that he had massaged the complainant in the staff locker room, he denied having touched her breasts or her vaginal area in the course of that massage. He also disputed multiple other aspects of the complainant's account. For example, he maintained that her T-shirt had only been lifted up, rather than removed, during the upper body massage. He also denied having unhooked her bra without her permission.

9 The appellant submitted that the complainant was far from being an unusually convincing witness on account of multiple alleged inconsistencies in her evidence, including on the issue of whether she had been touched on her vaginal area over or under her panty. He also argued that her evidence could not be safely relied upon because it had been influenced in significant respects by certain exchanges with her junior college schoolmate ("Ms M"). Further, he submitted that she had not adequately explained her delay in lodging a police report. More broadly, the appellant submitted that it would have been "audacious", and thus implausible, for him to have committed the offences in the circumstances. This was especially because another on-duty gym instructor, Ms Noor Azmah Binte Ahmad ("Ms Azmah"), had repeatedly entered the gym office which connected the gym to the staff locker room, and had even had a short conversation with the appellant, while the massage was ongoing.

The decision below

10 The DJ convicted the appellant of both charges, finding that no reasonable doubt had arisen either in the Prosecution's case or on the totality of the evidence. In the DJ's view, the alleged inconsistencies in the complainant's evidence were not in fact genuine inconsistencies and/or had been satisfactorily explained by her. Her reasons for the delay in reporting the incident were also consistent and believable. The DJ was therefore of the view that the complainant's evidence was unusually convincing. In particular, he found it incredible that she would not only concoct false allegations against the appellant but then go to great lengths, over the course of more than four years, to maintain these falsehoods, especially when she had no reason to falsely implicate him. In contrast, the appellant's case was peppered with belated assertions which suggested that facets of his case were afterthoughts and should not be believed. The DJ also found that Ms Azmah's credit was impeached.

11 The DJ sentenced the appellant to nine months' imprisonment for the Bench Charge and 11 months' imprisonment and three strokes of the cane for the Mat Charge. He ordered both sentences to run consecutively, yielding a global sentence of 20 months' imprisonment and three strokes of the cane (GD at [418]).

The parties' cases on appeal

12 In relation to his appeal against conviction, the appellant submitted that the DJ erred in finding that no reasonable doubt had arisen within the Prosecution's case or on the totality of the evidence. His primary argument on appeal, as it was below, was that the complainant was not a credible witness, let alone an unusually convincing one.[1] He also submitted that the DJ was wrong to disbelieve his defence and to find that Ms Azmah's credit was impeached.[2] In relation to his appeal against sentence, the appellant submitted that the DJ erred in calibrating the individual sentences for the Bench Charge and Mat Charge[3] and also in ordering the sentences to run consecutively. In the result, the global sentence imposed by the DJ was manifestly excessive and also in breach of the totality principle.[4]

13 The Prosecution submitted that the complainant was rightly found to be an unusually convincing witness in view of her honest and consistent evidence on the material issues.[5] The DJ was also correct to reject the appellant's defence,

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1 Appellant's Written Submissions dated 18 March 2025 ("AWS") at paras 4–5.

2 AWS at paras 287–315.

3 AWS at paras 386–413.

4 AWS at paras 419–423.

5 Respondent's Written Submissions dated 18 March 2025 ("RWS") at paras 25–80.

which comprised various belated and inconsistent claims.[6] More broadly, the Prosecution submitted that it was not open to the appellant to rehash, on appeal, the submissions which he had already advanced below without showing that the DJ's findings were plainly against the weight of the evidence.[7] The Prosecution also submitted that the appeal against sentence should be dismissed because the individual and global sentences were justified on the facts and in principle.[8]

The appeal against conviction

14 As there were no other witnesses to the incidents, this case turned on the word of the complainant against that of the appellant. The DJ recognised that the complainant's evidence would, in the circumstances, have to be unusually convincing (GD at [152]). It bears repeating the Court of Appeal's observation in *Public Prosecutor v GCK and another matter* [2020] 1 SLR 486 ("*GCK*") (at [91]) that the "unusually convincing" standard is not strictly a legal test but a heuristic, to remind judges that the standard of proof must be met beyond a reasonable doubt.

15 The primary issue on appeal relates to the complainant's credibility, which in turn bears on whether the DJ was justified in accepting her evidence. The main points relate to the internal and external consistency of her account and the quality of her recollection. Linked to these is the question whether her evidence may have been influenced by third parties, in particular, Ms M.

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6 RWS at paras 81–88.

7 RWS at para 99.

8 RWS at paras 101–105.

The complainant's contemporaneous accounts

16 The starting point is to assess whether the complainant's initial and contemporaneous accounts to the Schoolmate and especially to the Godsister were likely to be accurate and reliable. I am of the view that these initial and immediate post-incident accounts during the period spanning 7 to 8 February 2018 were spontaneous and reflective of the complainant's immediate reaction. Taken together, they were also largely consistent and sufficiently detailed to be credible. This is of course distinct from finer questions of detail such as the exact chronology of events or the precise manner in which she was touched. Parenthetically, although these accounts are previous statements which serve as corroboration of the complainant's allegations pursuant to s 159 of the Evidence Act 1893 (2020 Rev Ed), at least in their broad contours, they did not amount to independent corroboration. As such, the unusually convincing standard in assessing the complainant's testimony remained applicable.

17 The complainant first exchanged a series of text messages with the Schoolmate from 5.29pm to 5.42pm on 7 February 2018,[9] immediately after leaving the gym.[10] Although she declined in her messages to provide details of the incidents, explaining that she "[d]on't [really know] how to start" and "[i]t's kinda embarrassing",[11] it is significant that she distinctly raised the possibility that she had been molested. Specifically, she told the Schoolmate that "[I don't know] whether … Ive been … Molested [I don't know]".[12] The complainant's turbulent emotional state at the time was also plainly evident. She mentioned,

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9 P9 - Screenshots of the complainant's Telegram Chat messages with the Schoolmate on 7 February 2018 (Record of Proceedings ("ROP") at pp 3102–3108).

10 Notes of Evidence ("NEs") (4 March 2021) at p 53 lns 1–5 and 13–14 (ROP at p 169).

11 NEs (4 March 2021) at p 59 lns 23–24 (ROP at p 175).

12 NEs (4 March 2021) at p 56 lns 5–8 (ROP at p 172).

for example, that "I feel stupid" and declined his offer of a phone call, saying that "I dont think i can handle haha" and "I think [just now] was the worst".[13] In totality, these messages strongly indicate, at minimum, that the complainant was in a state of distress at the time arising from what she perceived as a possible case of molestation.

18 The complainant also exchanged a series of text messages with the Godsister later that day from 7.24pm to 7.44pm.[14] During the course of this exchange, she specifically stated that "i think i just got assaulted by my gym trainer" and replied in the affirmative when asked "[d]id he touch you". The complainant then informed the Godsister over a phone call that she really needed to speak about what had happened.[15] This prompted the Godsister to go over to the complainant's apartment that night. The Godsister gave evidence that, during their meeting, the complainant had related an assault by her gym trainer somewhere at her vaginal area and recounted an incident surrounding the unhooking of her bra and touching of her breast.[16] The complainant also appeared "rather visibly distraught" at the time.[17] After the Godsister had left the apartment, the complainant sent a further series of text messages to her soon after from 12.41am to 12.44am early the next morning, including the following: "and like when he was massaging the glute area also like im pretty sure his fingers touched my vj".[18] The complainant explained in her testimony that the

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13 NEs (4 March 2021) at p 62 lns 10–12 (ROP at p 178).

14 P10 - Screenshots of the complainant's Telegram Chat messages with the Godsister on 7 February 2018, 8 February 2018, and 10 February 2018 (ROP at pp 3109–3111).

15 NEs (4 March 2021) at p 65 lns 9–17 and p 66 lns 4–10 (ROP at pp 181–182).

16 NEs (6 January 2022) at p 117 lns 4–11 (ROP at p 662).

17 NEs (6 January 2022) at p 117 lns 11–13 (ROP at p 662).

18 P10 - Screenshots of the complainant's Telegram Chat messages with the Godsister on 7 February 2018, 8 February 2018, and 10 February 2018 (ROP at p 3111).

term "vj" referred to her vagina.[19] Viewed in totality, these communications with the Godsister are significant because they contain key details such as the identity of the perpetrator and specifically refer to distinct incidents of molestation involving her vaginal area and breast.

The Bench Charge

19 I examine the Bench Charge first, as this allegedly took place before the incident that was the subject of the Mat Charge. Although there were several possible inconsistencies in the complainant's evidence in relation to the Bench Charge, these are less serious than those I will highlight in due course in relation to the Mat Charge. In my view, the inconsistencies have been satisfactorily resolved.

20 One such inconsistency which the appellant relies on is that the complainant had apparently informed the Godsister that the appellant had touched her breasts under her bra.[20] The Godsister testified that her "impression", from their meeting in the complainant's apartment, was that "[the appellant's] hands went underneath … her bra".[21] This, however, was inconsistent with the complainant's testimony that the appellant had grabbed her breasts over her bra,[22] and with the Bench Charge which similarly alleged that the appellant had touched and pressed against her breasts "over her bra".

21 The DJ resolved this inconsistency by reasoning that the Godsister's impression was inconclusive in view of her general caveat that she was unable

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19 NEs (4 March 2021) at p 70 lns 30–32 (ROP at p 186).

20 RWS at paras 73–76.

21 NEs (7 January 2022) at p 23 lns 17–20 (ROP at p 700).

22 NEs (3 March 2021) at p 80 ln 29 (ROP at p 105).

to recall the "details" or "specifics" related by the complainant during their meeting[23] (GD at [242] and [253]). The appellant took issue with the DJ's reasoning, observing that the Godsister had specifically confirmed her recollection on this point. The appellant thus submitted that there remained an unresolved material inconsistency in the complainant's account which raised serious doubts as to its truth.[24]

22 I am conscious that the Godsister had indeed confirmed that it was her recollection, based on the complainant's account during their meeting, that "the gym trainer's hands were underneath her bra".[25] Indeed, the Godsister had elaborated that, on her recollection of the complainant's account, the appellant's hands were able to go underneath the complainant's bra because it was unhooked at the time.[26] Thus, notwithstanding her general caveat, the Godsister appeared to have been quite certain of her recollection on this particular issue. Nonetheless, the point remains that the Godsister may have been mistaken, even if she may have been confident, in her recollection. There being no direct or conclusive evidence that the complainant had indeed provided this inconsistent account to the Godsister, I would not place too much weight on the alleged inconsistency, at least when it is considered on its own. I would also avoid overstating the disparity between the two different accounts. Even while testifying that the appellant had touched her breasts over her bra, the complainant added that her bra "[didn't] cover her entire breast", with the result that the appellant had "made contact with the cloth, [her] bra, as well as the

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23 NEs (7 January 2022) at p 9 lns 2–4 (ROP at p 686).

24 AWS at para 66.

25 NEs (7 January 2022) at p 24 ln 32 to p 25 ln 9 (ROP at pp 701–702).

26 NEs (7 January 2022) at p 24 lns 9–22 (ROP at p 701).

skin". This included skin-to-skin contact with the "top of [her] breast".[27] It was thus the complainant's account, even in her testimony, that the appellant had made skin-to-skin contact with her breasts.

23 The appellant also cites certain inconsistencies relating to the complainant's chronology of events. One of these relates to the point in time at which the complainant had adopted a "bracing position" with her arms crossed over her chest. The complainant testified that she had done so after the appellant first asked her to remove her bra, but before he went on to unhook it without her consent.[28] The appellant observes that this was inconsistent not only with the complainant's apparent account to the Godsister during their meeting but also with her investigative statement.[29]

24 I am not persuaded that these alleged inconsistencies have any material bearing on the complainant's credibility:

(a) Beginning with the complainant's account to the Godsister, the latter recalled the former saying that she had adopted the bracing position because her bra had been unhooked by that time and she was "attempting to hold on to it to prevent it from falling off".[30] The DJ resolved this inconsistency by reasoning that the complainant was explaining to the Godsister *why* she was attempting to hold on to her bra and not *when* she had adopted the bracing position (GD at [246]). I do not see why this explanation should be rejected. Contrary to the

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27 NEs (3 March 2021) at p 82 lns 9–19 (ROP at p 107).

28 NEs (3 March 2021) at p 77 ln 5 to p 78 ln 15 (ROP at pp 102–103).

29 AWS at para 110.

30 NEs (7 January 2022) at p 11 lns 17–22 (ROP at p 688).

appellant's suggestion,[31] it is not an artificial distinction to draw. In any event, as I explain below, this alleged inconsistency relates to a peripheral point of detail which is ultimately inconsequential.

(b) In her investigative statement recorded on 4 January 2019, the complainant stated as follows: "… Then he told me to remove my bra but I refused. However he unclasped my bra and claimed that he needed to remove the bra to massage properly. I was feeling uncomfortable *and then I crossed my arms to ensure that he can't remove the bra …*" [emphasis added].[32] The DJ accepted the complainant's explanation that she was not providing a strictly linear chronology of events here but was using the words "and then" in a "colloquial" way (GD at [194]). I see no reason to disagree with the DJ. Even if, as the appellant points out, the complainant was able elsewhere in her statement to use the same words to indicate a linear progression of time,[33] it does not follow that this must also have been her intended meaning here. Given that the complainant's concern was primarily to provide the "key milestones on the key things that happened",[34] she was certainly not expected to be precisely and unwaveringly symmetrical in her use of certain expressions throughout her statement. The alleged inconsistency relates only to a peripheral point of detail and has no bearing on the overall evidence as to the commission of the alleged offence itself.

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31 AWS at para 69.

32 D6 - Statement of the complainant recorded on 4 January 2019 at 2301 hrs at A1 (ROP at p 5340).

33 AWS at paras 119–122.

34 NEs (4 January 2022) at p 37 lns 22–27 (ROP at p 369).

25 The appellant draws attention to another inconsistency in the complainant's chronology of events, relating to whether the appellant had touched her breasts before or after hooking her bra back on.[35] The complainant testified that the appellant had done so after hooking her bra back on. She elaborated that she felt relieved after her bra was hooked back on. This led her to exit her bracing position and relax her arms, and it was at this juncture that the appellant had touched her breasts.[36] The complainant similarly stated in her investigative statement that "he clasped the bra back *and then he suddenly touched and pressed my breasts*" [emphasis added].[37] Referring to this part of her statement, the complainant confirmed in court that "the sequence is right whereby … he did touch and press against my breast after he clasp my bra back".[38] However, the Godsister's recollection from their meeting was that the appellant had touched the complainant's breasts while her bra was still unhooked. Indeed, the Godsister's recollection was that this explained why the appellant was able to touch her breasts under her bra (see [22] above).

26 Again, the DJ opined that this inconsistency was ultimately immaterial in view of the Godsister's general caveat that she was unable to recall the specific details related by the complainant during their meeting (GD at [255]). The appellant similarly took issue with the DJ's reasoning, observing that the Godsister specifically recalled being told by the complainant that the appellant had touched her breasts while her bra was unhooked.[39] I am unpersuaded that

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35 AWS at paras 77–78.

36 NEs (3 March 2021) at p 79 lns 27–31 (ROP at p 104).

37 D6 - Statement of the complainant recorded on 4 January 2019 at 2301 hrs at A1 (ROP at p 5340).

38 NEs (4 January 2022) at p 37 (ROP at p 369).

39 AWS at para 78.

this alleged inconsistency has any substantial impact on the complainant's credibility. Once again, there was no definitive evidence of what the complainant had told the Godsister during their meeting. Even if the Godsister professed to have a clear recollection on this point, it remained possible that she was confident but in fact mistaken in her recollection. This possibility may dilute the corroborative effect of the Godsister's testimony, but it is not fatal to the Bench Charge especially considering that the complainant had made another contemporaneous complaint to the Schoolmate.

27 I accept that both the complainant's and the Godsister's recollection of the precise sequence of actions may not have been perfect. Taking the evidence relating to the Bench Charge as a whole, however, I do not find any material contradiction in the complainant's accounts. Even assuming the existence of the alleged inconsistencies, there is no material difference in my view between: (a) the appellant having touched the complainant's breasts underneath her bra skin-to-skin; and (b) the appellant having touched the complainant's breasts over her bra with some skin-to-skin contact with the top of her breasts. The DJ had carefully examined the discrepancies and I accept his reasons for finding that the complainant's evidence on the crucial aspects remained consistent and believable.

The Mat Charge

28 I turn next to the Mat Charge. Upon careful consideration, I conclude that while there are aspects of the complainant's evidence that do not stand up to closer scrutiny, they ultimately do not affect the core of her testimony. They do not have the effect of casting doubt upon her credibility overall. As such, the evidence in support of the gravamen of the charge remains intact.

The complainant's initial account – touching her vagina over her panty

29 At the outset, I am conscious that the complainant did not seem to have specified in her initial accounts to the Schoolmate and Godsister whether she had been touched over or under her panty. For example, her message to the Godsister in the early morning of 8 February 2018 simply stated "im pretty sure his fingers touched my vj" (see [18] above). Similarly, she did not discuss this in her investigative statement, in which she stated without elaboration that "I felt him touching my vaginal area".[40] However, sometime around 6 February 2020, the complainant participated in an interview with the investigating officer and an unnamed prosecutor (the "DPP") from the Attorney-General's Chambers. During this interview, the complainant affirmatively stated that the appellant had touched her over the panty. Specifically, the complainant's testimony was that she "[remembered] … telling [the DPP] that I was touched over my panty several times".[41] Consistent with this, an earlier version of the Mat Charge alleged that the appellant had "[touched] her vagina over her panty several times".[42]

The complainant's change in evidence after 27 May 2020

30 The complainant's account shifted after 27 May 2020. In the course of an exchange of text messages with Ms M on 27 May 2020, the complainant agreed with Ms M's suggestion that the appellant had "gone "[p]ast [her]

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40 D6 - Statement of the complainant recorded on 4 January 2019 at 2301 hrs at A1 (ROP at p 5340).

41 NEs (4 March 2021) at p 97 lns 21–23 (ROP at p 213).

42 P14 - Amended 2nd Charge (MAC-902883-2020) filed on 11 January 2021 (ROP at p 3184).

underwear" when touching her vagina.[43] The complainant must have subsequently communicated her revised position to the Prosecution. This in turn prompted the Prosecution to amend the Mat Charge which, in its amended form dated 2 March 2021 at the commencement of the trial, merely stated that the appellant had "[touched] her vaginal area several times" without specifying whether this was over or under the complainant's panty. At trial, the complainant maintained her revised position, testifying that the appellant had moved her panty to the side and made direct skin-to-skin contact with her vaginal area using his fingers.[44]

Whether influence or suggestion led to the change in the complainant's evidence

31 This shift in the complainant's position after 27 May 2020 was the primary difficulty with her evidence. Specifically, as the shift in her position appeared to have been precipitated by her exchange with Ms M on 27 May 2020, the question arose whether the complainant's testimony had been influenced by Ms M.

32 The DJ was largely untroubled by the alleged inconsistency. In the first place, he was unpersuaded that any such inconsistency had been shown to exist. This was because the complainant was unable to recall her "exact words" during the interview. There was therefore no certainty as to the words she had used during her interview (GD at [277]). However, as the appellant observes, the complainant herself admitted to saying during the interview that the appellant

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43 P19 - Screenshots of Telegram chatlog between Ms M and the complainant (from Ms M's phone) (ROP at p 3512).

44 NEs (4 March 2021) at p 44 ln 26 to p 45 ln 14 (ROP at pp 160–161); NEs (5 January 2022) at p 92 lns 6–10 (ROP at p 530).

had touched her over her panty.[45] Her exact words were therefore beside the point. Whatever those words might have been, by the complainant's own admission,[46] there was a genuine inconsistency in substance between her account during the interview and her testimony in court.

33 The DJ also accepted the complainant's explanation[47] that she was nervous during the interview and believed that she would be able to clarify her account over subsequent discussions (GD at [271] and [278]). The appellant observes[48] that the complainant only cited her alleged nervousness to explain her inability to specify exactly where in her vaginal area she was touched.[49] To my mind, this is not a separate issue from whether she was touched skin-to-skin or over her panty. However, even if the complainant was nervous, and even if she was only advancing a tentative account which she was open to revising in the future, the inconsistency still remains largely unresolved. Had the appellant indeed moved the complainant's panty to the side and touched her vaginal area skin-to-skin, as she later testified, these would have constituted significant details going to the manner of commission of the alleged offence. In my view, it may legitimately be asked why the complainant was only able to recount these details after the lapse of some time and not in her earlier accounts.

34 In view of this unexplained inconsistency, the appellant's submission that the complainant's evidence was influenced by her exchange with Ms M on

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45 AWS at para 187.

46 NEs (4 March 2021) at p 96 ln 29 to p 97 ln 1 (ROP at pp 212–213).

47 NEs (4 March 2021) at p 97 ln 5 to p 98 ln 4 (ROP at pp 213–214).

48 AWS at paras 189(1)–(2).

49 NEs (5 January 2022) at p 93 ln 30 to p 94 ln 25 (ROP at pp 531–532).

27 May 2020 requires serious attention.[50] On a close examination of their messages, it was Ms M who first ventured the suggestion that the appellant had "gone "[p]ast [her] underwear" when touching the complainant's vagina,[51] even though the latter did not appear to have said anything to Ms M up to this point to suggest or imply this. Yet, the complainant readily agreed with Ms M's suggestion by replying "Yeah".[52] Ms M subsequently offered the following summary of events to the complainant: "His hand went past my shorts and my underwear and he rubbed my vulva from the bottom (near the vagina area, but no penetration) upwards, but did not touch my clit". To this, the complainant replied with an emphatic: "Yes!"[53]

35 The complainant later testified in terms mirroring the account upon which she had agreed with Ms M. Referring to the above summary of events provided by Ms M, the complainant accepted under cross-examination that "what [Ms M] wrote here is the same as what I have been conveying to the Court".[54] As earlier mentioned, the complainant also specifically testified that the appellant had touched her vaginal area under the panty skin-to-skin (see [30] above).

36 The DJ did not accept that the complainant had been influenced in her evidence by her exchange with Ms M. This was chiefly because, prior to their

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50 AWS at paras 191–193.

51 P19 - Screenshots of Telegram chatlog between Ms M and the complainant (from Ms M's phone) (ROP at p 3512).

52 P19 - Screenshots of Telegram chatlog between Ms M and the complainant (from Ms M's phone) (ROP at p 3511).

53 P19 - Screenshots of Telegram chatlog between Ms M and the complainant (from Ms M's phone) (ROP at p 3512).

54 NEs (30 May 2022) at p 70 lns 11–12 (ROP at p 1301).

exchange on 27 May 2020, the complainant had already stated in her investigative statement recorded on 4 January 2019 that she "felt [the appellant] touching [her] vaginal area".[55] To the DJ, this offered the "clearest indication" that her testimony was uninfluenced by Ms M (GD at [316]). With respect, the complainant's investigative statement does not go very far to allay the present concerns. The complainant's account in her statement was broad and unparticularised and, as the appellant points out,[56] did not specify whether she had been touched skin-to-skin or over her panty. Accordingly, on its own, it cannot demonstrate that the complainant's subsequent evidence was given independently, free from Ms M's influence.

37 I agree with the appellant that the complainant's exchange with Ms M is troubling and warrants careful consideration. It is particularly concerning, in my view, that the complainant so readily accepted Ms M's suggestions even though they were inconsistent with her earlier account during the interview only three to four months prior. As earlier discussed (see [33] above), the complainant claimed that she was nervous during the interview and believed that she would be able to subsequently clarify her account. However, taken at its highest, this only indicates that the complainant was not entirely certain that the appellant had touched her vaginal area over her panty. This still cannot be easily reconciled with the complainant's unhesitating agreement with Ms M's suggestions to the opposite effect.

38 In my judgment, the complainant's initial and more contemporaneous accounts to the Schoolmate and Godsister and in the interview appear likely to

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55 D6 - Statement of the complainant recorded on 4 January 2019 at 2301 hrs at A1 (ROP at p 5340).

56 AWS at paras 200–202.

have been subsequently coloured by Ms M's guided (or leading) questions. To be clear, this observation does not equate to a finding that the complainant had perjured or lied in court. In addition, I do not think there was any sinister motive on Ms M's part; she was no doubt well-intentioned in offering to help the complainant recall the incident. But it does seem reasonably likely that the details that the complainant recalled only much later were not retrieved from an existing "encoded" memory but embellished *ex post*.

39 I would not entirely exclude the possibility that Ms M's influence and suggestions had jogged the complainant's memory, prompting a genuine recollection on her part. However, the real question is whether a reasonable doubt has arisen in all the circumstances as to whether the complainant was touched under her panty. In my view, for the following reasons, a reasonable doubt has indeed arisen. This issue should accordingly be resolved in favour of the appellant, meaning that the complainant's initial version of events (which involved touching over rather than under the panty) should be accepted.

40 As a starting point, *Sandz Solutions (Singapore) Pte Ltd and others v Strategic Worldwide Assets Ltd and others* [2014] 3 SLR 562 suggests that, generally, a witness's ability to recollect the material events and the accuracy of his recollections are inversely proportional to the length of time that has elapsed (at [50]). Relatedly, witnesses are also particularly vulnerable and susceptible to suggestion and misinformation where the passage of time has allowed the original memory to fade (at [54]). Bearing these observations in mind, the complainant's earlier accounts, which were either silent on the issue or affirmatively stated that the touching was over her panty, should presumptively be given more weight. Again, the possibility cannot be excluded that the complainant's exchange with Ms M had triggered a genuine recall, with the result that her subsequent accounts were in fact more accurate than her

earlier accounts. However, if this was the complainant's position, it was incumbent upon her at the least to explain how Ms M's prompts and suggestions had had this effect and why she had not previously been able to recall that the touching was under her panty.

41 What renders this possibility of genuine recall less likely is that the complainant's exchange with Ms M was not the first occasion on which she had been required to recall and describe the incidents in detail. By this time, the complainant had not only provided her investigative statement on 4 January 2019 but also participated in the interview with the DPP and investigating officer sometime around 6 February 2020. The complainant testified that, during the latter session, she had been requested "to recount in as much detail as [she] could" and was specifically asked by the DPP "for more details of how and exactly where and how [she] was touched in [her] pelvic region", with the DPP "saying that it was important to remember".[57] Indeed, the complainant described this interview in the following terms during a separate exchange with Ms M:[58]

Ms M:	Did you get like
	Any kind of date?
	For a court hearing
Complainant:	No
Ms M:	Or anything like that
Complainant:	*Because I was supposed to follow up with the clothes*
	And also an answer to their probing questions

[57] NEs (4 March 2021) at p 97 lns 7–8 and 15–21 (ROP at p 213).

[58] P18 - Screenshots of Instagram chatlog between Ms M and the complainant (from Ms M's phone) (ROP at pp 3302–3303).

Ms M:	What did they ask…?
Complainant:	But I was feeling quite resistant
Ms M:	I'm so confused what do they want the clothes for
Complainant:	*Whether he touched my vulva / vagina and till where*
	Evidence!
	To see if he could've slipped his hands

[emphasis added]

Thus, according to the complainant, the interview had specifically explored "till where" the appellant had touched the complainant's vaginal area and whether the nature of her clothing would have allowed him to "[slip] his hands". These lines of questioning must surely have impressed upon the complainant the importance of accurately recalling how she was touched and, in particular, whether this was over or under her panty. If it is true, as the complainant testified, that the appellant had moved her panty to the side and made direct skin-to-skin contact with her vaginal area,[59] it is hard to understand why the complainant was not prompted by the interview to recall these significant details, even allowing for the fact that she may have felt nervous during the interview. Moreover, this was not the first time she had spoken to the authorities as she had already given her investigative statement more than a year ago on 4 January 2019. In my view, it is unlikely and perhaps too coincidental that the complainant's memory was only subsequently jogged by Ms M's pointed suggestions, prompting her to recall the incidents in terms mirroring those suggested to her by Ms M. Again, if there was some reason why the exchange with Ms M had been uniquely effective in triggering a genuine recall on the

[59] NEs (4 March 2021) at p 44 ln 26 to p 45 ln 14 (ROP at pp 160–161); NEs (5 January 2022) at p 92 lns 6–10 (ROP at p 530).

complainant's part, some explanation of why and how this was so should minimally have been offered.

42 Although I reject the complainant's account that the appellant had made direct skin-to-skin contact when he touched her vaginal area, I do not think that she deliberately confabulated or was improperly motivated by any sinister or collateral agenda. I agree with the DJ that she had no motive to lie (GD at [413]). It made no sense for her to do so when she had enjoyed a good relationship with the appellant as her personal trainer all along.[60] There was initially some suggestion by the appellant[61] that the complainant had gone on a "witch-hunt" against him by posting on Instagram that she had "a very bad and uncomfortable experience with [him] at SICC" and asking "if anyone's had a negative experience with him and is willing to share about it".[62] The appellant also cited a message sent by the complainant to the Godsister asking whether she should "text [the appellant] to instigate and see if [she] can get evidence".[63] Drawing upon these, the appellant submitted that the complainant "was willing to contrive evidence to support her allegations where such evidence did not actually exist".[64]

43 However, in my assessment, these instances simply showed the complainant attempting to gather evidence against the complainant. They certainly did not go so far as to show that she was prepared to "contrive" or fabricate evidence against him. Further, her evident dislike of the appellant was

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60 NEs (3 January 2022) at p 56 ln 8 to p 57 ln 4 (ROP at pp 275–276).

61 AWS at paras 365–367.

62 D11 - Screenshots of the complainant's Instagram account and stories (ROP at p 5355).

63 P11B - Screenshots of relevant Telegram Chat messages between the complainant and the Godsister from 3 January 2019 to 4 January 2019 (ROP at p 3158).

64 AWS at para 367.

equally consistent with her sense of affront and indignation at being at the receiving end of offences which had actually taken place. Ultimately, counsel for the appellant conceded before me that there was no basis to allege that the complainant had fabricated her evidence or that she had any motive to lie. His primary challenge on appeal was instead that her evidence was not credible, let alone unusually convincing.

44 The messages exchanged with Ms M also clearly show that the complainant refused to willfully embellish or fabricate her account. For example, when Ms M raised the question "[w]hether he penetrated", the complainant responded thus: "I'm sure he didnt go in".[65] The complainant also firmly declined to take up Ms M's suggestion that the touching of her vagina had taken place for at least five seconds:[66]

Ms M:	So let's say it was
	At least
	5 seconds
	At least
	Because they'll want to know the seconds for like
	The charge
Complainant:	Oh
	What
	Honestly I know this is not integrous if I say a timing when I'm not sure

45 No evidence was specifically led from the complainant as to why she stopped returning to the gym after the date of the incident. That being said, she

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65 P19 - Screenshots of Telegram chatlog between Ms M and the complainant (from Ms M's phone) (ROP at p 3510).

66 P19 - Screenshots of Telegram chatlog between Ms M and the complainant (from Ms M's phone) (ROP at pp 3513–3514).

was also not cross-examined on this. While it would seem logical and consistent with the fact that she was deeply affected by the incident and wished to avoid seeing or to stop communicating with the appellant and had thus stopped going to the gym, I would be slow to draw such an inference. It is not the only inference available; there may well have been other undisclosed but equally valid reasons. As the complainant was not asked to provide any explanation, this remains a neutral point.

46 I should clarify, however, that I do not regard the absence of any proven motive to lie as positively adding to the complainant's credibility. The law is that the burden lies on the Prosecution to prove the absence of a motive on the part of the complainant to concoct fabrications against the accused, although this burden only arises where the defence raises sufficient evidence of a motive to fabricate so as to raise a reasonable doubt in the Prosecution's case. Further, while the presence of motive to fabricate may raise reasonable doubt as to the guilt of the accused person, that there is an absence of such motive is not sufficient for the case against the accused to be proved beyond reasonable doubt (see *Public Prosecutor v Yue Roger Jr* [2019] 3 SLR 749 at [48] and [50]). In the present case, the Prosecution's burden strictly did not even arise in view of the appellant's eventual position that the complainant had no motive to lie. It would therefore be incorrect to place positive weight on the apparent absence of such a motive. Further, as a matter of principle, if the presence of such a motive may raise a reasonable doubt, its absence should properly only be regarded as a neutral factor.

47 In my judgment, the most likely explanation for the inconsistency in the complainant's accounts is as follows. The complainant described the panty she wore on the day of the incidents as "V-shaped", by which she meant that they

did not cover her "butt cheeks".[67] It was not disputed that her panty covered only the bare minimum, such that the appellant was able to massage the whole of her "butt cheeks" skin-to-skin.[68] The panty itself was not produced as a case exhibit nor was a photograph of the item produced in court. However, based on the complainant's description and the undisputed evidence, a reasonably clear picture of the type of panty she wore can be discerned.

48 A very real possibility is that the complainant's "original perception of the event or detail may have been defective" (*Sandz Solutions* at [48]) to begin with. It is consistent with the complainant's initial accounts that she was not entirely certain in the first place whether there was actual skin-to-skin contact or only contact over her panty. Owing to the "V-shaped" type of panty she wore, she may have thought that she felt skin-to-skin contact when in fact there was none. Put another way, what she wore may well have resulted in the sensation of the appellant's fingers coming into contact with her vaginal area over her panty being virtually indistinguishable from skin-to-skin contact. In my view, this is a highly plausible scenario and indeed the most likely explanation for her uncertainty and the consequential shifts in her recollection. It is also telling that even though the complainant affirmatively testified that she felt her panty being moved to the side, she later qualified this by saying she "cannot tell if it was purely to the side, or whether even underneath, but it moved".[69] This strongly coheres with the likelihood that she could not properly distinguish between whether there was indeed skin-to-skin contact or contact over her panty, and may also help explain why she had serious difficulty recalling precisely how and where she was touched at her vaginal area. On this last-mentioned point,

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67 NEs (4 March 2021) at p 21 lns 11–12 and p 45 lns 7–9 (ROP at pp 137 and 161).

68 NEs (4 March 2021) at p 20 lns 19–28 (ROP at p 136).

69 NEs (4 March 2021) at p 44 ln 26 to p 45 ln 14 (ROP at pp 160–161).

the complainant conceded that, during her interview with the DPP and investigating officer in February 2020, she "wasn't able to pinpoint exactly where" in her "pelvic region" she was touched.[70] Referring to this interview, she also admitted in her messages to Ms M that:[71]

> But they were
> Trying to get me to remember
> If it was near the vulva and which aprt [*sic*]
> I'm like I really dk
> The spot

49 It was only in her oral testimony that the complainant identified the location of contact as her *labia majora*.[72] Having considered the evidence in the round, I find it more likely that the complainant's testimony that the touching was under her panty had been influenced by Ms M. She mistakenly gave a different account under Ms M's influence, but did not seek to actively tell untruths. Critically, however, her evidence as a whole does not suggest that she was hell-bent on implicating the appellant at all costs; rather, it is more consistent with innocent embellishment as a consequence of confabulation.

Does the conviction on the Mat Charge remain valid despite the unreliability of the complainant's recollection?

50 I turn next to examine whether it is possible to uphold the DJ's finding that the complainant was an unusually convincing witness with respect to the Mat Charge, notwithstanding the unreliability of her recollection on whether the appellant had indeed made direct skin-to-skin contact with her vaginal area. I

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70 NEs (4 March 2021) at p 97 lns 17–19 (ROP at p 213).

71 P19 - Screenshots of Telegram chatlog between Ms M and the complainant (from Ms M's phone) (ROP at p 3510).

72 NEs (5 January 2022) at p 92 lns 6–10 (ROP at p 530).

do not see cogent grounds to doubt the other core aspects of her evidence which are largely coherent and consistent. The DJ's finding that she was an unusually convincing witness on these aspects remains unaffected. For the reasons I shall explain below, I do not think that the complainant's evidence should be rejected entirely and the appellant acquitted on the charge.

51 In *Public Prosecutor v Wee Teong Boo and other appeal and another matter* [2020] 2 SLR 533 ("*Wee Teong Boo*"), the accused claimed trial to a first charge of outraging the complainant's modesty and a second charge of raping her by penetrating her vagina with his penis. The High Court judge (the "Judge") convicted the accused of the outrage of modesty charge and acquitted him of the rape charge. However, the Judge exercised his power under s 139 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) and convicted the accused of the offence of sexual assault by digital penetration without framing a charge.

52 On appeal, the Court of Appeal affirmed the Judge's acquittal of the accused on the rape charge, acquitted him of the outrage of modesty charge and overturned his conviction on the digital penetration offence. Amongst other things, the court observed that it was the complainant's persistent assertion that the accused had penetrated her with his penis, even to the extent of saying that she had seen his penis in her vagina. Accordingly, once the Judge had found on the basis of other evidence that this "central aspect of her account" was not credible, it was incumbent on him to reappraise the entirety of the victim's credibility in that light (at [63]). The court was further of the view that the accused's conviction on the digital penetration offence was highly prejudicial because, according to the complainant and the Prosecution's case, digital penetration did not take place. Indeed, on the complainant's account of the events, digital penetration could not have taken place, since at all times, the

accused was using both his hands to support different parts of her legs (at [122]). Further, had the accused been charged with the digital penetration offence, it was clear that he would have conducted his defence differently (at [124]).

53 I have not accepted the complainant's evidence that the touching of her vaginal area took place under her panty skin-to-skin. Applying the principles articulated in *Wee Teong Boo*, it is necessary to reappraise her credibility in that light. In *Wee Teong Boo*, the complainant repeatedly claimed to have actually seen the accused's penis in her vagina. She also specifically denied that he had penetrated her vagina with his finger, elaborating that his hands were always on her legs throughout the incident. The complainant's evidence that her vagina had been penetrated by the accused's penis and not his finger was therefore described as a "central aspect of her account" (at [63]), and its rejection naturally had the effect of casting serious doubts on her credibility (at [62]). In the present case, it can fairly be said that whether the complainant was touched over or under her panty, while by no means insignificant, was far less central to her evidence. Unlike in *Wee Teong Boo*, it certainly had no bearing on whether the offence could have been committed as alleged.

54 Two other considerations are apposite. First, as mentioned earlier (see [42]–[44] above), there is no evidence to suggest that the complainant had deliberately lied or was wilfully untruthful such as to cast doubt on her creditworthiness more generally. Indeed, her exchange of messages with Ms M indicates that she had refused to do so. Second, from a reading of the messages, there is no indication that the complainant's exchange with Ms M had any more wide-ranging influence on her evidence. In addition, and importantly, the complainant had by this time already provided the broad contours of her account to the Godsister and in her investigative statement. It therefore possible to "ring-fence" the affected areas without rejecting the entirety of her evidence.

Put another way, her evidence can still be considered unusually convincing even if certain details she gave in relation to the Mat Charge are unreliable. It is settled law that a witness can be believable and credible on some, even if not necessarily all, aspects of her evidence. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all (see *Chai Chien Wei Kelvin v Public Prosecutor* [1998] 3 SLR(R) 619 at [72], citing *Public Prosecutor v Datuk Haji Harun Bin Haji Idris (No 2)* [1977] 1 MLJ 15 at 19).

55 In *Wee Teong Boo*, the court also observed that it would be intolerably unfair to an accused person to be confronted with one case theory advanced by the Prosecution and to meet that case only to find that the judge convicts him of an unframed charge involving a different offence resting on a wholly different and incompatible theory of the facts (at [92]). Thus, where s 139 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) is concerned, the court must be satisfied that there is no prejudice to the accused person, and in particular, that the same issues of fact were in fact raised and ventilated as would have been the case had the unframed charge been framed (at [98(c)]). On the facts, the court was troubled that the accused person had been prejudiced by his conviction on the digital penetration offence because he would have conducted his defence differently had he been so charged.

56 In my view, these concerns apply generally whenever the court is minded to convict an accused person on a different theory of the facts from that advanced by the Prosecution, whether this is in a situation involving s 139 of the Criminal Procedure Code 2010 (2020 Rev Ed) (the "CPC"), an amendment of the charge by the court (see *Wee Teong Boo* at [98(c)], referring to *Public Prosecutor v Koon Seng Construction Pte Ltd* [1996] 1 SLR(R) 112) or even in situations where no amendment of the charge is necessary.

57 In the present case, I do not consider that it is necessary to amend the Mat Charge under s 390(4) of the CPC, let alone to introduce a new or unframed charge. The Mat Charge, as framed, is silent on whether the touching of the complainant's vaginal area was over or under her panty and is broad enough to accommodate both possibilities. Parenthetically, there is no suggestion by the appellant that the charge fails to give sufficient notice of what he is charged with as required under s 125 of the CPC. In addition, and importantly, the appellant cannot be said to be prejudiced by a conviction premised on the touching having taken place over rather than under the complainant's panty. Given that his defence at trial and on appeal was a bare denial of any contact with the complainant's vaginal area,[73] he would not have conducted his defence any differently had it been the Prosecution's case that the touching was over the complainant's panty.

58 All in all, there is sufficient evidence in support of the Mat Charge as framed going towards proving the charge beyond reasonable doubt. The conviction on the Mat Charge should thus be upheld, albeit subject to the finding that the act of touching in relation to the Mat Charge was over the complainant's panty.

The independence of the complainant's evidence more generally

59 I have found that Ms M had influenced the complainant's testimony in respect of the Mat Charge, on the specific issue of whether the touching was over or under her panty, in the course of their exchange of messages on 27 May 2020. In my view, however, the evidence does not go so far as to

[73] AWS at para 51.

indicate that Ms M may have influenced the complainant's testimony more generally.

60 In advancing this submission, the appellant relies on: (a) a lunch meeting involving the complainant, Ms M and another friend on or after 20 December 2020;[74] (b) a call between the complainant and Ms M on 2 March 2021, a day before the complainant took the stand;[75] and (c) other messages exchanged between the complainant and Ms M on Instagram and Telegram between 11 December 2018 and 1 March 2022 and between 5 January 2019 and 24 May 2022 respectively.[76]

61 In my view, absent clear evidence about what was discussed, the DJ was correct not to make much of the lunch meeting between the complainant and Ms M. Although the complainant admitted that "[d]efinitely [she] did touch on [the appellant] touching me",[77] as the DJ observed, there was no suggestion that she had been trained, coached or questioned on her testimony (GD at [334]–[335]). It was therefore ultimately speculative for the appellant to submit, without more, that there was a "reasonable chance" that Ms M had influenced the complainant's recollection to that extent.[78]

62 The call between the complainant and Ms M on 2 March 2021 perhaps raised more questions. The purpose of the call, as described by Ms M in a

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74 AWS at paras 240–243.

75 AWS at paras 244–246.

76 AWS at paras 247–253.

77 NEs (30 May 2022) at p 86 ln 17 (ROP at p 1317).

78 AWS at para 243.

message on 27 February 2021, was to "practice or prep for you [*sic*] case".[79] The complainant also admitted that she had "probably" answered questions posed by Ms M "about the case".[80] In the circumstances, it does not seem entirely correct for the DJ to have reasoned that "there was no clear evidence as to what [Ms M's] questions had in fact been about" (GD at [343]). Even if there was no evidence about the specific nature of Ms M's questions, by the complainant's own admission, these were questions relating to her "case" and preparing her for it. Yet, even so, there was no indication that Ms M had gone further to coach the complainant in giving her evidence. In the absence of any such indication, it was again speculative for the appellant to submit that "this 'question and answer' session is *itself* sufficient to raise the reasonable chance of contamination" [emphasis added].[81] The appellant attempted to fortify this submission by relying on the complainant's "tendency to accept, without any reservation, [Ms M's] hypothesis as the truth", referring to their exchange of messages on 27 May 2020 in support of this claim.[82] However, as I have explained earlier (see [44] above), the evidence shows that the complainant was not generally uncritical or undiscriminating in her acceptance of Ms M's suggestions. Leaving aside the issue of whether she had been touched over or under her panty, about which she appeared to be unsure and was perhaps therefore more suggestible, there was no reason to believe that the remainder of her evidence had been influenced in any more general way.

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79 P19 - Screenshots of Telegram chatlog between Ms M and the complainant (from Ms M's phone) (ROP at p 3650).

80 NEs (30 May 2022) at p 81 lns 6–22 (ROP at p 1312).

81 AWS at para 244(3).

82 AWS at para 244(3).

63 The appellant also referred generally to the exchanges of messages between the complainant and Ms M. In particular, he took issue with the fact that some of these messages had been deleted because the complainant wanted to conceal the fact that she had discussed her evidence in court with Ms M,[83] which she knew she was not supposed to do.[84] He submitted that, "[w]ithout sighting the substantive content of the actual deleted messages, it could not be safely concluded that communications between [the complainant] and [Ms M] could not have tainted the former's account of events".[85] Again, I disagree. Although the complainant should not have discussed her evidence with Ms M, or deleted these messages in an attempt to conceal this, it did not inevitably follow that her evidence had been influenced by these discussions. In the absence of clear evidence as to the precise contents of these messages, it would not be appropriate to draw an adverse inference purely for the reason that the messages had been deleted.

64 Assessing the evidence in its totality, I am not persuaded that the complainant's evidence in respect of the material aspects of her case was so lacking in independence as to be inherently unreliable or unworthy of credit.

The complainant's delay in reporting the case to the police

65 I am also satisfied that the complainant had satisfactorily explained her delay in reporting the case to the police. The reasons offered by the complainant included the following:

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83 NEs (30 May 2022) at p 46 ln 22 to p 47 ln 11 (ROP at pp 1277–1278).

84 NEs (30 May 2022) at p 42 lns 6–21 (ROP at p 1273).

85 AWS at para 253.

(a) The complainant found it "really hard to get over" her "emotional turmoil".[86] She also felt "deeply embarrassed" and "didn't want to draw any attention to the case".[87]

(b) The complainant "was just being considerate to what's [*sic*] how [the appellant] would feel and how his family would feel".[88] In particular, she knew that the appellant had a wife as well as daughters of the same age as her and "did not want to cause anything in his family".[89]

(c) The complainant was fearful of having to inform her father about the incidents because he was "very traditional" and "very misogynistic".[90]

66 However, the complainant continued to grapple with "the sense of having something bugging me" and "[wanting] to be free of this … guilt of not speaking out and … not wanting other people to fall prey".[91] Ms M was the eventual "catalyst" for the complainant's decision to make a police report.[92] In the course of an exchange of messages on Instagram on 3 January 2019, Ms M encouraged the complainant to report the case.[93] Ms M's encouragement was particularly impactful from the complainant's perspective because Ms M had

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86 NEs (4 March 2021) at p 92 lns 7–10 (ROP at p 208).

87 NEs (3 January 2022) at p 11 lns 26–31 (ROP at p 231).

88 NEs (3 January 2022) at p 11 lns 21–25 (ROP at p 231).

89 NEs (4 March 2021) at p 93 lns 5–12 (ROP at p 209).

90 NEs (4 March 2021) at p 92 lns 18–30 (ROP at p 208); NEs (3 January 2022) at p 13 lns 8–10 and p 16 lns 11–21 (ROP at pp 234 and 236).

91 NEs (4 March 2021) at p 93 lns 19–23 (ROP at p 209).

92 NEs (6 January 2022) at p 36 ln 18 (ROP at p 581).

93 NEs (6 January 2022) at p 105 ln 24 to p 108 ln 17 (ROP at pp 650–653).

herself been a victim of molestation and had reported the case to the police.[94] The complainant thus lodged a police report on 4 January 2019.

67 The appellant drew attention to the "significant delay" by the complainant in lodging the police report and described her reasons for the delay as "specious".[95] This was primarily on the basis that her reasons for not immediately filing a police report continued to apply when she eventually did so on 4 January 2019.[96]

68 In my view, this submission is unmeritorious. The short point is that there were a variety of factors and considerations operating on the complainant's mind, some pointing in different directions, in relation to her decision whether to report the case. Although the reasons for her initial reluctance to do so may have continued to apply, they could very plausibly have been outweighed by the empowering effect of her exchange with Ms M. Thus, as the DJ reasoned, the fact that the complainant was able eventually to lodge a report did not undermine the credibility of these reasons, which were "sound and credible" (GD at [291]).

Weaknesses in the appellant's defence

69 I note as well that the appellant's defence was not entirely free from difficulty. To be clear, when determining whether a reasonable doubt has arisen from within the case mounted by the Prosecution, the court should consider whether the Prosecution's evidence on its own is sufficient to meet the standard

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94 NEs (4 March 2021) at p 93 lns 24 to p 94 ln 10 (ROP at pp 209–210); NEs (6 January 2022) at p 36 lns 18–22 (ROP at p 581).

95 AWS at paras 267–277.

96 AWS at para 280.

of proof beyond a reasonable doubt. If it is not, weaknesses in the defence's case would not ordinarily operate to bolster the Prosecution's case because the Prosecution has simply not been able to discharge its burden of proof beyond a reasonable doubt (see *GCK* at [142]). However, when assessing the totality of the evidence, the court's evaluative task is not just internal to the Prosecution's case but is also comparative in nature. Thus, by this stage of the inquiry, regard may be had to weaknesses in the case mounted by the defence (*GCK* at [144]).

70 In the present case, I am satisfied that a reasonable doubt has not arisen within the case mounted by the Prosecution, and it is therefore relevant when assessing the totality of the evidence to have regard to the weaknesses in the appellant's defence. Some of these were as follows. In respect of the Bench Charge, the appellant testified that he had not, contrary to the complainant's evidence, asked her to take off her shirt during her upper-body massage, but had instead only lifted her shirt to shoulder level.[97] However, this was inconsistent with the account in his investigative statement recorded on 9 January 2019, in which the appellant stated: "I told her that normally when I massage clients back, they need to take off their top because I will be using heat oil (lemongrass oil). *She agreed and took off her top*." [emphasis added][98] Under cross-examination, the appellant initially appeared to deny any inconsistency between the two versions[99] before attributing the inconsistency to his "not that good" command of English and his state of confusion at the time of the recording of his statement.[100] I agree with the DJ that this explanation was

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97 NEs (1 June 2022) at p 64 ln 26 to p 67 lns 23 (ROP at pp 1472–1475).

98 D17 - Statement of Haji Muhammad Faisal Bin Johar recorded on 9 January 2019 at 11.30am at A6 (ROP at p 5374).

99 NEs (22 September 2022) at p 48 lns 21 to p 49 ln 14 (ROP at pp 1843–1844).

100 NEs (22 September 2022) at p 50 ln 4 to p 52 ln 12 (ROP at pp 1845–1847).

entirely implausible. In particular, in view of the appellant's demonstrated level of English proficiency, it strained credulity that he could not appreciate the distinction between expressions as simple as "take off" and "lift up" (GD at [393]–[394]).

71 The appellant also testified that he had engaged in a conversation with another on-duty gym instructor, Ms Azmah, while he was massaging the complainant. He claimed that this conversation had lasted about 40 to 50 seconds and that Ms Azmah was "right outside the door of the staff locker room" while speaking with him.[101] This formed a significant plank of the appellant's defence that it would have been "audacious" for him to have committed the offences in the circumstances.[102] Yet, as the DJ observed, the appellant failed to mention his alleged conversation with Ms Azmah in his investigative statement, nor was this put to the complainant in cross-examination (GD at [388]).

72 The appellant also relied[103] on Ms Azmah's testimony that she had repeatedly entered the gym office adjoining the staff locker room[104] and had even seen the complainant being massaged while speaking to the appellant.[105] However, Ms Azmah was clearly not a credible witness and I agree with the DJ's conclusion that her credit was impeached (GD [412]). As the DJ observed, there were several material discrepancies between her testimony and her investigative statement recorded on 20 January 2021 that she simply could not explain (GD at [410] and [412]). For example, Ms Azmah claimed in her

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101 NEs (2 June 2022) at p 51 ln 23 to p 52 ln 22 (ROP at pp 1531–1532).

102 AWS at para 339.

103 AWS at para 315.

104 NEs (5 January 2023) at p 79 lns 16–26 (ROP at p 2316).

105 NEs (5 January 2023) at p 81 lns 10–17 (ROP at p 2318); NEs (18 April 2023) at p 34 lns 18–25 (ROP at p 2424).

statement that she had seen the appellant massage the complainant's calves, hamstring and back while she lay face down on the exercise bench.[106] However, in her oral testimony, Ms Azmah's account was that she had only seen the complainant sitting on the exercise bench before her massage began and, subsequently, the complainant lying face down on the floor having her left hamstring massaged.[107] She admitted that she had not in fact seen the complainant lying face down on the exercise bench[108] or the appellant massaging her back.[109] She was unable to offer any satisfactory explanation for the discrepancies, beyond claiming for example that she "wasn't thinking hard enough" and just wanted to get the recording of her statement "done and over with quickly".[110] As the DJ observed, Ms Azmah's claim in her testimony that she had spoken to the appellant was also nowhere to be found in her investigative statement (GD at [411]).

73 For the above reasons, the DJ's decision to convict the appellant of the Bench Charge and Mat Charge was not plainly wrong or against the weight of the evidence. I therefore uphold the appellant's convictions, subject to my finding in respect of the Mat Charge that the touching of the complainant's vaginal area was over rather than under her panty.

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106 P25 - Noor Azmah Bte Ahmad statement recorded under s 22 CPC at A7 (ROP at p 3938).

107 NEs (5 January 2023) at p 81 lns 18–22 and p 83 lns 10–15 (ROP at pp 2318 and 2320).

108 NEs (18 April 2023) at p 70 lns 1–4 (ROP at p 2460).

109 NEs (18 April 2023) at p 35 lns 11–15 (ROP at p 2425).

110 NEs (18 April 2023) at p 70 ln 5 to p 72 ln 2 (ROP at pp 2460–2462).

The appeal against sentence

74 The DJ sentenced the appellant to nine months' imprisonment for the Bench Charge and 11 months' imprisonment and three strokes of the cane for the Mat Charge. Both sentences were ordered to run consecutively. At the time of the appeal hearing, the appellant was above 50 years of age and therefore will not be liable to be caned.

75 There is no basis to interfere with the sentence of nine months' imprisonment for the Bench Charge as it is in line with the sentencing precedents.

76 Next, I proceed to consider whether there should be any adjustment to the sentence of 11 months' imprisonment and three strokes of the cane for the Mat Charge. This question arises because I have found, contrary to the DJ's finding, that the touching of the complainant's vaginal area was over rather than under her panty.

77 As a starting point, one of the main categories of offence-specific aggravating factors in respect of outrage of modesty offences is the degree of sexual exploitation, and relevant to this is how the accused touched the victim (see *Kunasekaran s/o Kalimuthu Somasundara v Public Prosecutor* [2018] 4 SLR 580 ("*Kunasekaran*") at [45] and [48], referring to *GBR v Public Prosecutor and another appeal* [2018] 3 SLR 1048 ("*GBR*") at [28]). Thus, all else being equal, an offence involving skin-to-skin contact will generally be regarded as more aggravated than an offence not involving such skin-to-skin contact. This explains why, for example, the lower end of Band 2 of the sentencing framework involves cases where the private parts of the victim are intruded but there is no skin-to-skin contact, while the higher end of the band

involves cases where there is skin-to-skin contact with the victim's private parts (see *Kunasekaran* at [45(a)(ii)], referring to *GBR* at [33]–[36]).

78 However, the applicable sentencing band in respect of a given offence will ultimately depend on all the circumstances. In this regard, how the accused touched the victim is only one of the considerations going to the degree of sexual exploitation. Also relevant are the part of the victim's body the accused touched and the duration of the outrage of modesty (see *Kunasekaran* at [45(a)(i)], referring to *GBR* at [28]). In addition, the degree of sexual exploitation is only one of the main categories of offence-specific aggravating factors, which also include the circumstances of the offence and the harm caused to the victim (see *Kunasekaran* at [45(a)(ii)] and [45(a)(iii)], referring to *GBR* at [29]–[30]). The authorities also do not suggest that caning will generally only be imposed where the contact was skin-to-skin. They focus instead on whether the offence involved an intrusion upon the victim's private parts or sexual organs (see *Kunasekaran* at [50], referring to *Public Prosecutor v Chow Yee Sze* [2011] 1 SLR 481) and more generally on the applicable sentencing band.

79 Notwithstanding my finding that the factual premise for the Mat Charge did not involve skin-to-skin contact, I am of the view that this does not warrant any reduction in the sentence, much less setting aside part or all of the caning sentence. As I have noted above (at [48]), the nature of the intrusion and the contact with the complainant's vaginal area over her panty was virtually indistinguishable from one where there was in fact skin-to-skin contact. From the appellant's perspective, he would no doubt have experienced a similar sensation. Given the "V-shaped" type of panty that the complainant wore, he would have been able to closely simulate skin-to-skin contact even if he did not actually slide his fingers underneath her panty. I see no reason therefore to disturb the sentence in respect of the Mat Charge, especially in view of the other

offence-specific aggravating factors correctly identified by the DJ, including the abuse of trust, the presence of some element of deception and the evidence of harm caused to the complainant (GD at [427], [430] and [431]). The sentence imposed cannot be regarded as manifestly excessive even if the touching of the complainant's vaginal area was not skin-to-skin.

80 As to whether the sentences should run consecutively, I agree with the DJ that the one-transaction rule would not apply in the present case. The two instances of outrage of modesty involved separate and distinct acts and were also separate acts in time.

81 Finally, on the totality principle, I do not think that the aggregate sentence is manifestly excessive or disproportionate.

Conclusion

82 For the reasons I have set out above, I dismiss the appeal against conviction and sentence.

See Kee Oon
Judge of the Appellate Division

Jason Chan SC and Megan Chua (Allen & Gledhill LLP) for the appellant;
Marcus Foo and Huo Jiongrui (Attorney-General's Chambers) for the respondent.