IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 174

Magistrate's Appeal No 9311 of 2018

Between

Public Prosecutor

… *Appellant*

And

Low Ji Qing

… *Respondent*

GROUNDS OF DECISION

[Criminal Procedure and Sentencing] — [Sentencing] — [Principles] — [Principle of escalation]

[Criminal Procedure and Sentencing] — [Sentencing] — [Principles] — [Proportionality]

[Criminal Procedure and Sentencing] — [Sentencing] — [Mentally disordered offenders] — [Mandatory treatment order]

Public Prosecutor
v
Low Ji Qing

[2019] SGHC 174

High Court — Magistrate's Appeal No 9311 of 2018
Sundaresh Menon CJ
18 April 2019

26 July 2019

Sundaresh Menon CJ:

Introduction

1 This appeal concerns a fundamental principle of sentencing – proportionality, which requires, in essence, that "an offender should only receive a punishment that is in line with what the offence he had committed deserves, and no more": see *Public Prosecutor v Saiful Rizam bin Assim and other appeals* [2014] 2 SLR 495 ("*Saiful Rizam bin Assim*") at [29]. In 1938, Émile Durkheim observed in *The Rules of Sociological Method* that "There is no society where the rule does not exist that the punishment must be proportional to the offence": V. Prakashan (ed), (Nine Books, 2015), at p 112.

2 Although the principle is easily understood, it is not always as easily applied. Tensions can manifest, for instance, when proportionality is juxtaposed against the *seemingly* conflicting principle of specific deterrence. In particular,

where the court is faced with a habitual offender, specific deterrence might invite the invocation of another principle of sentencing – that of escalation. I have said that the principles 'seemingly' conflict, because there is a tendency in some cases, such as the present, to suggest that specific deterrence and the principle of escalation ought to eclipse or displace the quest for proportionality. But properly understood, the principles are not in conflict; rather, they are complementary to one another. The task of a sentencing court is to elicit the relevant principles in each case, and to balance them fairly, sensitive to the crime and the relevant circumstances: see *Public Prosecutor v Mohammad Al-Ansari bin Basri* [2008] 1 SLR(R) 449 at [61]–[62]. In my judgment, the district judge ("the District Judge") in the present case had balanced the principles appropriately in imposing a global sentence of 10 months' imprisonment. Accordingly, I dismissed the Prosecution's appeal against sentence. I gave a brief oral judgment at that time, and now furnish detailed reasons.

Background

3 This appeal concerned three charges of simple theft under s 379 of the Penal Code (Cap 224, 2008 Rev Ed). The offences were committed in somewhat unusual circumstances. The Prosecution proceeded against the respondent, Mr Low Ji Qing, on two of these charges, with the remaining charge taken into consideration for the purposes of sentencing. Each of these charges involved the theft of wallets from female victims. It was undisputed that part of the respondent's motivation for stealing these wallets stemmed from his fetishistic disorder, specifically an abnormal sexual preference involving the wallets of women, which he then smelt in order to get a sense of euphoria and to feel sexually aroused.

The 1st Charge taken into consideration

4 On 11 May 2017, the respondent stole a wallet from a female victim at the ION Sephora outlet. The total value of the wallet and its contents was $376.29. The respondent was later charged ("the 1st Charge") and released on court bail. This was taken into consideration for the purposes of sentencing.

5 No further details about the offence were provided in the statement of facts ("SOF"), but the respondent's counsel, Mr Chooi Jing Yen ("Mr Chooi"), drew upon a report from the Institute of Mental Health ("IMH") dated 12 October 2017, in which the respondent had recounted to Dr Christopher Cheok Cheng Soon ("Dr Cheok") that he had lost his job in March 2017 shortly before the date of the offence and was feeling stressed and depressed at the material time. The respondent had been contemplating stealing a wallet in response to his mood and circumstances. On the day in question, he noticed that the victim's wallet was unattended and he then stole it and walked away. He smelt the wallet and got an intense euphoria. The respondent told Dr Cheok that once he smelt the wallet, his stress was relieved and he immediately realised his mistake. He then returned the wallet to the information counter.

6 Dr Cheok diagnosed the respondent with an "adjustment disorder with depressed mood and fetishistic disorder" at the time of the 1st Charge. According to Dr Cheok, the respondent was "depressed around the time of the offence and he knew that his fetish for women's wallets when fulfilled would give him a temporary euphoria relieving his depressed mood [for a time]. His depressed mood affected his judgment predisposing him to stealing".

7 The Prosecution did not contest that account of the offence; nor did it dispute Dr Cheok's diagnosis. The Prosecution accepted that the wallet had

been returned to its owner.

8 In September 2017, the respondent commenced a course of 20 fortnightly sessions consisting of psychotherapy and mindfulness with Dr Cheok, and 10 further sessions with an IMH psychologist. In a follow-up report on 20 June 2018, Dr Cheok stated that the respondent had been able to control his impulse to steal, which was typically triggered by poor mood or stress.

The 2nd Charge proceeded

9 Unfortunately, despite the fact that he had begun psychotherapy sessions, the respondent stole again on 17 October 2017, giving rise to the offence in the 2nd charge which was proceeded with by the Prosecution ("the 2nd Charge"). On this occasion, the respondent loitered near a female victim who was pushing her child's pram at the Takashimaya department store. When she was momentarily distracted, he took her wallet from the pram. The total value of the wallet and its contents was $637.95. The respondent hid the wallet in his pants and moved to an adjacent shelf. He loitered there until the store's security officers arrived. The respondent struggled when confronted, and only surrendered the wallet when police officers arrived at the scene. The wallet was returned to its owner.

10 The respondent was again assessed at the IMH, this time by Dr Yeo Chen Kuan Derrick ("Dr Yeo"). Dr Yeo stated that according to the respondent, he had been mentally stable, but on 15 October 2017 he experienced multiple concurrent stressors. He told Dr Yeo that he had initially intended to take the wallet to get sexually aroused, but after taking the wallet he started to feel guilty and to regret his actions. He therefore did not leave the scene or take steps to get sexually aroused. Instead, he remained in the area for the next 15 minutes

while he contemplated returning the wallet. Before he could do so, he was confronted by the security officers. In mitigation, his counsel, Mr Chooi, elaborated that the respondent had remained in the vicinity because he was "facing an internal conflict and was trying to resist the impulse."

11 Dr Yeo's diagnosis was similar to Dr Cheok's diagnosis in relation to the 1st Charge. Dr Yeo diagnosed the respondent at the material time (of the 2nd Charge) as follows:

> The accused suffers from **Fetishism**, which is a form of abnormal sexual preference where he has recurrent sexual urges and behaviours involving the use of a non-living object (in this case, female wallets). However, his fetishism did not meet the criteria for a paraphilic disorder per se. The accused also had a secondary diagnosis of an **Adjustment Disorder with depressed mood** at the time of the index offence.
>
> Additionally, his **Fetishism** had **no substantive contributory link** to his criminal responsibility for the index offence as both his cognitive functioning and his volitional/emotional capability to break the law in order to act on his sexual desires was not significantly impaired. His tendency to opportunistically steal the female wallet, with the secondary intention to use it for his **Fetishism**, is likely a maladaptive style of coping with stress in his life.
>
> [**Emphases in original**.]

12 The Prosecution again did not dispute Dr Yeo's diagnosis. In fact, it relied on Dr Yeo's view that there was *no substantive contributory link* between the respondent's fetishism and his criminal responsibility. However, the Prosecution did contest the respondent's account to Dr Yeo of the circumstances surrounding the offence. It submitted that there was in fact nothing to indicate remorse or contrition, and contended that the respondent had only surrendered the wallet when the police officers arrived at the scene. In its view, this was an accused person who "resented being caught with his hand in the cookie-jar". I will return to this point later on, as it assumes some factual significance.

The 3rd Charge proceeded

13 On 25 July 2018, the respondent committed the third theft at the Don Don Donki store at Orchard Central ("the 3rd Charge"). A store assistant noticed the respondent closely following a female victim as she pushed a pram. When the victim was distracted, the respondent removed a wallet from her bag. Realising that he was being watched, the respondent went to the counter, handed the wallet to the cashier and left the store. The victim retrieved her wallet from the cashier counter, and found there was nothing missing. The store assistant lodged a police report and the respondent was arrested about a month later. This offence gave rise to the 3rd Charge against the respondent, which the Prosecution proceeded with.

The respondent's antecedents and psychosexual history

The respondent's prior offending

14 The respondent is traced with many theft and theft-related offences. He was 54-years-old at the time of the plead guilty mention, but his antecedents date back to when he was 21-years-old. He has been sentenced in 13 court sittings, 11 of them pertaining to property-related offences. The respondent told Dr Cheok that his various theft offences stemmed from his fetish for the wallets of women.

15 The relevant antecedents are set out in the table below. Notably, the respondent had previously been sentenced to 10 years' preventive detention for property-related offences (s/no. 7), and had breached a probation order twice (s/nos. 9 and 10).

No.	Charges	Date of Sitting	Sentence
1	One charge of theft in dwelling (s 380 of the Penal Code)	26 December 1985	**One day's imprisonment and $1,500 fine.**
2	One charge of theft	1 October 1986	**$1,600 fine.**
3	One charge of theft	10 January 1987	**$5,000 fine.**
4	Two charges of theft	30 October 1987	**Four months' imprisonment** (A sentence of two months' imprisonment running concurrently).
5	Five charges of theft; 20 charges of theft taken into consideration	13 September 1993	**Two years' and six months' imprisonment** (Five sentences of six months' imprisonment running consecutively).
6	Two charges of theft	28 August 1996	**Three years' imprisonment** (A sentence of one year's imprisonment running consecutively with a sentence of two years' imprisonment).
7	Seven charges of theft; 20 charges of theft taken into consideration; one charge of fraudulent possession (s 35(1) of the Miscellaneous Offences Act); and one charge of lurking house trespass or housebreaking by night (s	2 February 2000	**10 years' preventive detention**.

	457 of the Penal Code)		
8	Four charges of theft; five charges of theft and one charge of enhanced fraudulent possession taken into consideration	19 January 2011	**Three years' probation**.
9	Two charges of theft	30 January 2012	**Breach** of probation; **probation to continue**
10	Three charges of theft; four charges of theft taken into consideration; and one charge of misappropriation (s 403 of the Penal Code)	22 March 2013	**Breach** of probation; **13 months' imprisonment**

16 In 2014, the respondent pleaded guilty to three charges of theft, with one charge of dishonestly receiving stolen property under s 411 of the Penal Code taken into consideration for the purposes of sentencing: see *Public Prosecutor v Low Ji Qing* [2015] SGDC 9. The salient features of the 2014 offences are set out below.

No.	**Date of Offence**	**Brief Details**	**Sentence**
1	26 December 2013	The respondent was upset over an argument at his workplace and stole a wallet and mobile phone from a female victim. He threw the wallet's contents away but kept the wallet and the mobile phone.	Two years' imprisonment (consecutive).
2	December 2013	The respondent dishonestly received two mobile phones believed to be stolen property.	Taken into consideration.
3	5 August 2014	The respondent stole a wallet from a female victim. The respondent was spotted by a witness and the wallet was returned.	One year's imprisonment (consecutive).

4	12 August 2014	The respondent stole a mobile phone from a female victim at the IKEA Alexandra.	One year's imprisonment (concurrent).

17 Although the Prosecution referred to his 2014 conviction before me and in the court below, the record of appeal did not include the charges, the statement of facts, the grounds of decision, or the psychiatric reports from the IMH in relation to his 2014 conviction.

18 These are, of course, a matter of record for the court, and I have had recourse to them. However, I should stress that it is a matter of good practice for the parties to adduce such documents where they may be relevant, and especially where the parties (in this case, the Prosecution) intend to rely on those antecedents to support a sentencing position. As I will elaborate, these documents may be particularly important in sentencing where questions of specific deterrence and escalation arise.

The respondent's psychosexual history

19 The respondent told Dr Cheok that his fetish for the wallets of females had begun in his youth and with the onset of puberty. As he grew older, he began stealing wallets from female victims. The respondent would then go to a public toilet, smell the wallet and sexually gratify himself. At times, he would use the money, but not the credit cards found in the stolen wallet. He would then throw away the stolen wallets. The respondent has never harmed his victims sexually or physically. These aspects of the respondent's psychosexual history were not contested by the Prosecution.

20 In relation to his 2014 conviction, the psychiatric reports by Dr Subhash Gupta ("Dr Gupta"), who was then a consultant with the IMH and by Dr Yeo

also indicate that in 1996 the respondent had contacted the IMH and was diagnosed with fetishistic disorder. However, he then defaulted on his appointments because he felt ashamed about his condition. Since 2011, corresponding with his release after the 10-year stint of preventive detention, the respondent had begun counselling sessions with the Ministry of Social and Family Development. This might explain why after several lengthy terms of imprisonment and even of preventive detention, the respondent was sentenced to a term of probation in 2011.

21 Despite the fact that most of his adult life has been characterised by repeated offending, the respondent has managed at times to have some measure of normalcy. He graduated from a tertiary institution, and held various jobs including in the armed forces, then as a sales executive, and later as a forex trader. He subsequently worked as a restaurant manager but lost that job in March 2017. However, by the time of the plead guilty mention before the District Judge on 25 October 2018, he had secured other gainful employment.

22 The respondent is also in a long-term relationship with his female partner, and they have been living together for some time. While his partner is aware of his fetish and his history of offending involving the wallets of female victims, she still supports him emotionally.

The proceedings in the court below

23 On 25 October 2018, the respondent pleaded guilty to the 2nd and 3rd Charges before the District Judge and consented to the 1st Charge being taken into consideration for the purposes of sentencing.

24 The Prosecution sought an aggregate sentence of two years'

imprisonment (without specifying the length of the individual sentences or how the sentences ought to run). Referring to his 2014 antecedents, the Prosecution indicated that he had previously stolen two handphones, one of which had not been recovered (see s/nos. 1 and 4 at [16] above). The Prosecution suggested that two years' imprisonment was appropriate having regard to the interests of deterrence and rehabilitation. The Prosecution also adduced an email from the Prisons ("the Prisons' email"), which stated that the respondent had received psychological treatment and medication during his last stint in incarceration, but had declined his medication. The Prisons' email also indicated that if the respondent were to be incarcerated, he would receive specialised psychological intervention again. The Prosecution submitted that this showed that two years' imprisonment would facilitate rehabilitation as the Prisons had indicated it would be able to provide treatment.

25 In contrast, the respondent submitted that a high fine would suffice, or in the alternative a short custodial sentence. Although the respondent had initially cross-appealed against his sentence, the cross-appeal was subsequently withdrawn. On appeal, the respondent no longer sought a fine or a short custodial sentence. The respondent's position on appeal was simply to defend the sentence imposed by the District Judge on the basis that it was not manifestly inadequate.

26 In the court below, Mr Chooi had also submitted that the respondent should be treated as an offender with a mental disorder similar to kleptomaniacs, who suffered from impulse-control disorders; and that by reason of this, deterrence should not feature as heavily in sentencing.

The District Judge's decision

27 The District Judge noted Dr Yeo's diagnosis that the respondent maintained cognitive control and awareness. Accordingly, he did not agree that the respondent's fetishism was an impulse-control disorder, and rejected Mr Chooi's attempt to draw an analogy with kleptomania. He was therefore of the view that both specific and general deterrence remained relevant sentencing considerations: *Public Prosecutor v Low Ji Qing* [2018] SGMC 85 ("the GD") at [34].

28 The District Judge next considered that the respondent had been given an opportunity to take advantage of a more rehabilitative approach in 2011 and 2012, when a sentence of probation had been imposed. However, the respondent had breached those probation orders by re-offending. The District Judge therefore discarded probation as an option, and concluded that a substantial custodial sentence was appropriate: see the GD at [35] and [36].

29 Although he considered that the heaviest individual sentence the respondent had received on the last occasion was two years' imprisonment (s/no. 1 at [16] above), the District Judge was not persuaded this should be the benchmark on this occasion. Even though the sentences had to have a deterrent effect, the District Judge considered that in all the circumstances, the respondent "[did] deserve some leniency". In particular, he considered the following mitigating factors (see the GD at [37]–[40]):

> (a) The respondent had "put in serious effort to overcome his underlying issue" by attending regular psychotherapy sessions since September 2017;

(b) Although he had re-offended (in the 2nd and 3rd Charges), he had returned the wallet after committing the offence in the 3rd Charge;

(c) The District Judge accepted the respondent "did feel conflicted moments after commission of the acts each time"; and

(d) No loss had been caused to any of the victims. It will be recalled that the wallets were either retrieved at the scene (the 2nd Charge) or returned by the respondent to the counter (the 1st and 3rd Charges).

30 Accordingly, he thought that the principle of proportionality would militate in favour of a shorter sentence of six months' imprisonment in respect of the 2nd Charge. A lower sentence of four months' imprisonment was meted out for the 3rd Charge "as an encouragement to [the respondent] that if he continued to put in the necessary effort, he will be able to curb and manage his urges to the extent that he does not commit the offence in the first place instead of merely feeling regret later". The District Judge ordered the sentences to run consecutively for a global sentence of 10 months' imprisonment to account for the fact that the respondent had re-offended while on bail: see the GD at [39]–[42].

31 Dissatisfied with the sentence imposed by the District Judge, the Prosecution appealed.

The parties' positions on appeal

The Prosecution's submissions

32 The Prosecution contended that the sentence imposed was manifestly inadequate and that the District Judge had proceeded on the wrong factual basis.

It maintained its sentencing position in the court below, and sought a global term of two years' imprisonment.

33 First, as to the sentencing principles engaged. The Prosecution submitted that the respondent was a serial thief. Given his antecedents, specific deterrence and the principle of escalation should have primacy and should not be displaced by the principle of proportionality. These justified the imposition of a substantial custodial term. In any case, if in fact the respondent could not be deterred, then the principle of prevention would require him to be incarcerated for a lengthier time for the protection of the public. Moreover, rehabilitation was inapplicable because there was no causal link between the respondent's fetishism and the commission of the offences.

34 Second, the Prosecution suggested that the District Judge erred in finding that the respondent deserved leniency given the efforts he had made to address his "underlying issue". The Prosecution submitted that the respondent's fetishism was not the underlying cause of the offences. It neither affected his ability to control his urge to steal, nor bore any causal relationship to the offences. Accordingly, he should not be sentenced as a mentally disordered offender. Instead, the Prosecution likened the respondent "to an offender who steals money to feed an alcohol addiction – the addiction merely fuels the desire to steal" but the respondent remained in full control of his impulses. It was submitted that specific deterrence remained relevant to such offenders.

35 Third, the Prosecution submitted there had been no de-escalation in the respondent's offending pattern when comparing the present offences to his antecedents. Even if the respondent did not go on to use the wallets for sexual gratification and thought about returning them, this was said to be immaterial

because the thefts had nonetheless been carried out deliberately and purposefully.

36 The Prosecution also alleged that the respondent had, by the time of the hearing of the appeal, re-offended (on 7 December 2018 and 4 January 2019). The Prosecution adduced the fresh charges in its submissions, which alleged that the respondent had stolen a wallet and a mobile phone. The Prosecution submitted that these new charges further showed that any treatment the respondent had sought had "absolutely no rehabilitative effect on [the respondent]".

The submissions of the Defence

37 On appeal, Mr Chooi no longer sought to equate the respondent's fetishistic disorder with kleptomania. However, he submitted that the fetishistic disorder remained a *relevant consideration* because the respondent's adjustment disorder combined with his depressed mood, and this affected his judgment and predisposed him to stealing.

38 Mr Chooi stressed the active steps taken by the respondent to reduce the likelihood of his offending behaviour recurring. He reiterated that the respondent had voluntarily attended psychotherapy sessions (at [8] above), and that weight should be placed on the respondent's "concerted efforts" to seek and obtain treatment.

39 Mr Chooi submitted that compared to the offences in 2014, there had been a marked *de-escalation* in the respondent's offending behaviour. Instead of throwing away the stolen items, the respondent had returned them and had felt instantaneously remorseful. The principle of escalation ought not to apply

as severely. Given that almost no harm had been caused and having regard to his efforts to seek treatment, the District Judge was right to have imposed a lower sentence to encourage the respondent's efforts at rehabilitation.

An observation on new charges

40 As a preliminary issue, I first address the fresh charges alluded to by the Prosecution. As was made clear at the hearing, a court cannot take into account charges tendered by the Prosecution in respect of new offences allegedly committed by an accused person because by definition, he has not yet entered a plea of guilty, or elected to claim trial (which may lead to a conviction or acquittal as the case may be). Until then, the accused person is presumed to be innocent of those charges. It would be prejudicial to sentence an accused person for offences which he has not been convicted of: see my observations in *Vasentha d/o Joseph v Public Prosecutor* [2015] 5 SLR 122 at [62]; see also *Public Prosecutor v Tan Koon Swan* [1985–1986] SLR(R) 914 at [23].

41 In my judgment, those observations would apply in a context such as the present, when these were *new charges* for which the relevant facts had neither been proven nor admitted to by the respondent. When this was put to her during the hearing, the learned Deputy Public Prosecutor rightly agreed with this and did not press the point.

42 There may be nothing objectionable in referring a sentencing court to such pending charges for *administrative purposes*. For instance, the Prosecution might wish to explain to the court why an offender's bail pending appeal had been revoked. However, it may be quite another matter to rely on new charges for the purposes of *sentencing* when an accused person has not been convicted of those charges. I therefore placed no weight on the new charges that the

respondent was facing.

Structure of the analysis

43 In my judgment, the following issues had to be considered:

(a) How is the respondent's mental disorder relevant to the sentencing court?

(b) What is the ambit of the principle of escalation, and how should it be applied in the case of repeat offenders, where considerations of specific deterrence may come to the fore?

(c) What is the ambit of the principle of proportionality in sentencing an accused person, and more specifically in the context of property offences?

(d) To what extent is rehabilitation a relevant consideration here, and what would be the appropriate sentence in all the circumstances?

The relevance of the respondent's psychiatric conditions

44 The applicable principles when sentencing an offender with a mental disorder were considered in *Lim Ghim Peow v Public Prosecutor* [2014] 4 SLR 1287 ("*Lim Ghim Peow*") at [25] and *Public Prosecutor v Chong Hou En* [2015] 3 SLR 222 ("*Chong Hou En*") at [24]–[25]:

(a) The existence of a mental disorder on the part of the offender is generally a relevant factor in the sentencing process.

(b) The manner and extent of its relevance depends on the circumstances of each case, in particular, the nature and severity of the mental disorder.

(c) The element of general deterrence may be accorded full weight in some circumstances, such as where the mental disorder is not serious or is not causally related to the commission of the offence, and the offence is a serious one.

(d) In spite of the existence of a mental disorder on the part of the accused person, specific deterrence may remain relevant in instances where the offence is premeditated or where there is a conscious choice to commit the offence.

(e) If the serious psychiatric condition or mental disorder renders deterrence less relevant, where for instance the offender has a significantly impaired ability to appreciate the nature and quality of his actions, then rehabilitation may take precedence.

(f) Even though rehabilitation may be a relevant consideration, it does not necessarily dictate a sentence that excludes incarceration. The accused person could well be rehabilitated in prison.

(g) Finally, in cases involving heinous or serious offences, even when the accused person is labouring under a serious mental disorder, there is no reason why the retributive and protective principles of sentencing should not prevail over the principle of rehabilitation.

45 In relation to [44(d)] and [44(e)] above, the Court of Appeal has also elaborated in *Public Prosecutor v ASR* [2019] 1 SLR 941 ("*ASR*") at [71]–[72]

that where there is a causal link between the impairment of the mind and the commission of the offences, this might lighten an offender's culpability and attract mitigating weight. Where such a causal link affects an offender's understanding of the gravity of his offending conduct, it would correspondingly reduce the weight placed on general and specific deterrence (at [115]).

46 The Court of Appeal in *ASR* also drew a distinction between the offender's knowledge and control as an element of the offence on the one hand (at [104]–[105]), and the *degrees of culpability* that mentally disordered offenders may evince on the other, in terms of:

(a) The degree to which a mental disorder may affect an offender's *control* over his offending impulses (at [107]);

(b) The degree to which an offender's knowledge of the *legal* rightness or wrongness of his actions is impeded as a result of the mental disorder (at [108]–[109]); and

(c) The extent to which an offender's awareness of the *moral* rightness or wrongness of his offending actions is affected by the mental disorder (at [110]).

47 As a starting point, it is necessary to ascertain whether the respondent was suffering from a relevant mental disorder. In my judgment, the District Judge was correct to have rejected the analogy between the respondent's fetishism with kleptomania. The respondent's fetishism might resemble mental disorders such as kleptomania in that the respondent's fetishism would almost invariably feature in the very act that was forbidden and which constituted the crime. However, it was clear from the IMH reports that the respondent continued, for the most part, to retain cognitive control and an adequate

apprehension of the quality of his offending conduct. This much was also made clear from the respondent's own accounts to Dr Cheok and Dr Yeo, where he indicated that he had *consciously* attempted to desist in the moments prior to offending.

48 As Dr Yeo pointed out, there was no substantive contributory link to the offending as the respondent's "cognitive functioning and his volitional/emotional capability to break the law in order to act on his sexual desires was not significantly impaired". In fact, Dr Yeo described the respondent's thefts as "goal directed" and aimed at satisfying a desire. Hence, quite unlike kleptomania, which was an *impulse-control disorder* for which deterrence might be rendered less effective and for which rehabilitation might assume more importance, the respondent's cognisance and control remained sufficiently intact such that specific deterrence remained a key sentencing principle: see *Chong Hou En* at [28]–[29], and [33].

49 It follows from this that despite the existence of the fetishistic disorder, it remains meaningful to speak of ascribing culpability to the respondent for the commission of the offences: see generally *Lim Ghim Peow* at [52].

50 However, with respect, the Prosecution appears to have missed the finer points of the respondent's situation. By the Prosecution's own case, the respondent's fetishism provided the motivation for his offending. More importantly, the respondent's fetishism could not be viewed in isolation, but had to be appreciated in the context of the secondary diagnosis of an "adjustment disorder with depressed mood". In particular, Dr Cheok described the respondent as being depressed at the material time (see [6] above). His fetishism when fulfilled would provide a temporary euphoria *for the purposes of relieving his depressed mood*. This was consistent with Dr Yeo's observation that the

respondent's offending behaviour was a "maladaptive style of coping with stress in his life".

51 In a limited sense, the Prosecution was correct to point out that the respondent had knowingly committed the offences as a means of obtaining personal and sexual gratification. But this was not the end of the assessment of the respondent's psyche, because the IMH reports suggest that sexual gratification was itself a means of alleviating the respondent's depressive symptoms and stressors, which concerned a relevant mental disorder.

52 It is then necessary to consider *the extent* to which the respondent's mental disorder could be said to be relevant to the present offences. If the respondent had been committing the offence purely to satisfy his fetishistic disorder in respect of which he exercised a high degree of responsibility and self-control, then specific deterrence and retribution would apply with almost full force: see *Lim Hock Hin Kelvin v Public Prosecutor* [1998] 1 SLR(R) 37 at [31] in the context of paedophilia. But in the respondent's case, Dr Cheok opined that his "depressed mood *affected his judgment* predisposing him to stealing" [*emphasis added*]. When the respondent's mental state was viewed in its entire clinical picture, the District Judge was not wrong to have assigned *some* mitigating weight to what he termed the respondent's "underlying issue": see the GD at [37].

53 As was elaborated in *ASR* at [107], "the existence of a causal link between the respondent's intellectual disability and his offending acts represented a specific means by which his intellectual disability reduced his culpability, namely, by affecting his control over his offending impulses". In the present case, in a somewhat similar way, the respondent's adjustment disorder with depressed mood *impaired* his ability to control his desire to act on

his fetishism. Hence, the Prosecution's reliance on Dr Yeo's assessment that the respondent's fetishism had "no substantive contributory link" was correct in the sense that the psychiatric pressures acting on the respondent (depressed mood in the context of his fetishism) did not completely displace his culpability; however, it nonetheless did somewhat *diminish* it.

54 At the same time, the District Judge was correct to have held that deterrence remained relevant, and indeed was the primary sentencing consideration. The fact that the respondent had an adjustment disorder does not necessarily preclude specific deterrence from remaining a relevant consideration. After all, he was committing the offences in order to relieve his stressors. This was, all things considered, a determined and calculated choice, even if the methods of the respondent's stress-relief were atypical and against the law. His actions were a "maladaptive response to a difficult or depressive … situation": *Public Prosecutor v Kong Peng Yee* [2018] 2 SLR 295 at [66] and [72].

The principle of escalation

55 Keeping in mind that deterrence was the primary sentencing consideration, though attenuated somewhat by the respondent's psychiatric conditions, I turn to the Prosecution's reliance on the principle of escalation.

56 I employed the term when delivering the judgment of the High Court in *Sim Yeow Kee v Public Prosecutor and another appeal* [2016] 5 SLR 936 ("*Sim Yeow Kee*") at [99(a)], but this was no more than a reformulation of the longstanding principle that specific deterrence may justify a longer term of imprisonment being imposed on a persistent offender in light of his antecedents, if these reflected a tendency for repeat offending or a marked proclivity toward

criminal offending: *Tan Kay Beng v Public Prosecutor* [2006] 4 SLR(R) 10 ("*Tan Kay Beng*") at [14]–[16].

57 Although our courts have not fully explicated the principle of escalation, the essential logic is inherent within the principle of specific deterrence, which is "directed at persuading a particular offender [against] contemplating further mischief": see *Tan Kay Beng* at [32]. Harsher punishments seek to "deter the particular offender concerned from committing any further offences" and has an "aim of instilling in him the fear of re-offending": *Lim Ghim Peow* at [36].

58 Generally, the principle of escalation is invoked to *cumulatively* increase sentences. As one commentator has noted:

> **Repeat offenders and sentence escalation**. Generally, sentences for persistent offenders would be escalated on the basis that if previously imposed non-custodial penalties fail to deter, then custody must be imposed, and if one year's custody fails to deter, two years must be tried, *etc*...
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> [**Emphasis in original]**

Kow Keng Siong, *Sentencing Principles in Singapore* (Academy Publishing, 2009), at para 06.066.

59 The cumulative increase in sentences reflects the fact that prior sentences (specifically, the severity of those sentences) have failed to stop an accused person from criminality. Consideration is therefore given to whether a longer term of imprisonment might be called for to deter the accused person from committing a possible further offence: see *Public Prosecutor v Ng Bee Ling Lana* [1992] 1 SLR(R) 448 ("*Lana Ng*") at [13].

60 In order to determine whether specific deterrence may call for escalation, one factor a sentencing court naturally turns to is the accused person's antecedent history. It has been observed that:

> "If follows that when two persons are convicted together of a crime or series of crimes in which they have been acting in concert, it may be right, and very often is right, to discriminate between the two and to be lenient to the one and not to the other. *The background, antecedents and character of the one and his whole bearing in Court may indicate a chance of reform if leniency is extended, whereas it may seem that only a harsh lesson is likely to make the other stop in his criminal career.*"
>
> [*Emphasis in original.*]

R v Kenneth John Ball (1951) 35 Cr App R 164 at 166, cited by V K Rajah J (as he then was) in *Public Prosecutor v NF* [2006] 4 SLR(R) 849 ("*NF"*) at [67].

61 The assessment aims to discern whether the accused person is a "hardened offender". Where an offender with relevant antecedents carries out another offence, he would have "repeatedly committed a pattern of offences without any sign or acknowledgment of contrition or remorse. The longer the period of time over which the offences have been committed, the more irrefutable it is that the offender manifests the qualities of a habitual offender": *Public Prosecutor v Fernando Payagala Waduge Malitha Kumar* [2007] 2 SLR(R) 334 at [43]. Hence, the principle of escalation is aptly named not only because punishments meted out may escalate in severity, but also because it comes into play where the accused person's antecedents display an escalating pattern of offending.

62 In considering the offender's antecedents and the index offence, the court is inquiring into whether a cycle of offending exists, and if so, what has been the trend of offending behaviour. An escalation of sentences may be warranted where the offender's antecedents disclose a "cavalier disregard for

the law": *Tan Kay Beng* at [16]; or as the Malaysian High Court put the point in *Soosainathan v Public Prosecutor* [2001] 2 MLJ 377 at 385D, where the offender's prior criminality "demonstrate[s] that the current offence is no passing lapse, but evidence of a real unwillingness … to comply with the law".

63 Conversely, where the accused person's antecedents are irrelevant, and where the index offence was an "uncharacteristic aberration" it would be "inappropriate to mechanically enhance the sentence of an offender simply by virtue of the fact that he has a criminal record": *NF* at [66]. Similarly, where the court is persuaded that the accused person is unlikely to re-offend, perhaps because of mental disability, illness and frailty, or responsiveness to protective factors, then the principle of escalation recedes as a consideration: see *Tan Kay Beng* at [32].

64 Another factor for a court to consider is the degree of cognisance displayed by the accused person during the commission of the index offence. In particular, specific deterrence "assumes that a potential offender can balance and weigh consequences before committing an offence": *Tan Kay Beng* at [32]. Simply put, the lesson conveyed by an increasingly hefty punishment can only be learned if the accused person is capable of learning. Where an offender lacks the (or has a reduced) capacity to appreciate the nature and quality of his offending conduct, an escalation in the sentence is likely to be ineffective: *ASR* at [115]. It is for this reason that the courts have remarked that "specific deterrence may not be a relevant consideration when sentencing mentally disordered offenders" but "remains relevant in instance[s] where the offence is premeditated or where there is a conscious choice to commit the offence": *Lim Ghim Peow* at [36].

65 On the other hand, where the index offence is committed with (or the offender's current circumstances demonstrate a capacity for) premeditation, this is not only an indicator of the offender's culpability, but also a sign that the offender is capable of deterrability: see *Lana Ng* at [13]. An escalation in sentence length may in those situations be justifiable and effective.

66 In short, the appropriateness of escalation requires a scrupulous assessment of the particular factual matrix: see *Tan Kay Beng* at [34]. This is by no means a mechanical exercise. The court is required to assess whether the objective of preventing re-offending *is in fact* met by the use of escalation. It must inquire into factors such as changes in the pattern of offending behaviour, changes in the offender's circumstances, and efforts made at reform in order to determine whether further escalation is warranted. Any such decision must also be premised on the court being satisfied that the offender can be deterred by imposing a graver punishment.

Application of the principle of escalation with regard to the respondent's antecedents

67 An application of the principles elucidated above shows that this was not an appropriate case for the principle of escalation to apply. There is no doubt that the respondent has a history of similar offending. He has a long list of antecedents precisely because of his failure to control his sexually-driven desire to steal the wallets of his female victims. The fact of his re-offending alone would therefore *prima facie* weigh in favour of applying the principles of escalation and specific deterrence. However, in my judgment, it is clear that the District Judge had already accommodated the need for specific deterrence in the sentence he imposed, given that the aggregate sentence of 10 months' imprisonment was an objectively high one that could only be justified on the

basis of the respondent's antecedents and the need for such deterrence. As the learned Deputy Public Prosecutor agreed, the general starting point for a first time offender committing a similar offence would likely have been a fine: see the GD at [32] and [40].

68 Next, a comparison of the present offences with the respondent's antecedents does not show an escalating pattern of behaviour. It is common ground that for the 1st Charge and the 3rd Charge, almost immediately after stealing wallets from his victims, the respondent left the wallets with either the information counter or the cashier before leaving the scene.

69 As for the 2nd Charge, I note that the respondent's account was disputed by the Prosecution: see [12] above. Nevertheless, I was prepared to accept his account (as the District Judge did in the GD at [37]) that he had remained at the scene feeling conflicted, and intending to return the wallet. After all, the SOF states that he had moved to an adjacent shelf and "loitered around" until he was apprehended. It was undisputed that in all three instances of theft, the respondent had not, as he was wont to, proceeded to a public toilet to use the wallet to fulfil his sexual urges (see [19] above). The fact that the wallets were returned was also a departure from the respondent's usual offending conduct, which was to throw away or keep the stolen items, as he had in 2014 (see [16] above).

70 Turning to the respondent's characteristics, as I have made clear at [52] and [55] above, specific deterrence had to be attenuated somewhat given that the respondent was suffering from an adjustment disorder with depressed mood at that time. This too had to be considered in the context of the principle of escalation, because the respondent had *not* been diagnosed with an adjustment disorder or with depressive symptoms at the time of the 2014 offences unlike

the previous occasion, when the offences had evidently been committed in order to satisfy his fetishistic disorder. On this occasion, his offences were to be seen in the context of an overarching endeavour to alleviate his depressive symptoms and stressors. In other words, the current offences featured mitigating factors that were absent in his antecedents.

71 In my judgment, the District Judge was also right to have placed mitigating weight on the fact that the respondent had *voluntarily* attended the 30 psychotherapy sessions: see the GD at [37]. As Dr Cheok indicated, the respondent needs to continue "with his treatment on a long term basis to reduce the risk of reoffending". Voluntary efforts made toward what is the *only* viable hope for desistance should be acknowledged and encouraged, which is precisely what the District Judge had done. Although the respondent had re-offended while undergoing treatment, this does not mean that such treatment was wholly ineffective. After all, the respondent did feel remorse immediately after each theft, and on the third occasion, he returned the wallet even before he was apprehended. In any event, the District Judge had given effect to the need for deterrence on account of the respondent's re-offending while on bail by choosing to run the sentences consecutively: see the GD at [42].

72 In the round, I agreed with the District Judge that this was not an offender in respect of whom the principle of escalation would demand a sentence of similar, or heavier severity as compared to the last sentence he had served: see the GD at [39].

The principle of proportionality

73 I turn to the principle of proportionality, which the District Judge had alluded to at [39] of his GD. The principle has been expounded upon at some

length by our courts (see *Public Prosecutor v Law Aik Meng* [2007] 2 SLR(R) 814 at [30]; *NF* at [75]; *Tan Kay Beng* at [31]; *Lim Ghim Peow* at [19]; *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [47]–[50] and [63]; and *ASR* at [128]–[133] and [146]–[158]). It suffices for me to touch upon just two aspects of proportionality that arose in the present case.

74 First, the application of the principle of escalation in fact incorporates the safeguard of proportionality. Hence, before a court imposes an uplift on an accused person's *previous sentences*, there must be a careful comparison with the accused person's *previous offending*. And while specific deterrence may sometimes justify a stiffer sentence, the law is clear that this "cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence" (*Veen v The Queen (No 2)* (1988) 164 CLR 465 ("*Veen (No 2)*"), at 477 cited in *NF* at [66]). Were it otherwise, the offender would in effect be punished a second time for his original offence.

75 An index offence does not need to be of equivalent severity (for example, in property offences, be of equivalent value) before a heavier sentence might be imposed by virtue of re-offending. But there may be situations where the index offence is much less egregious than the accused person's last antecedent. An equivalent or heavier sentence could be disproportionate then, since it might be predicated on the wrong factual basis. Conversely, where the index offence is much more egregious, then proportionality may in fact demand a significantly heavier sentence to take account of the marked escalation in the accused person's offending. What is essential is for the sentencing court to undertake a comparison of the *gravity* of the antecedent and the index offences, and consider how this should affect the sentence to be imposed for the index offence.

76 In order to have the correct factual basis for applying the principle of escalation, a sentencing court should also be alert to the fact that reference solely to an accused person's antecedents in the form of the Criminal Records Office ("CRO") record may be insufficient. The CRO record typically indicates the offences the accused person had been charged with, and the sentences imposed in respect of those charges. In order to have a fuller comparison between the index offence and the antecedent offence, it might sometimes be helpful or necessary to have reference to, among other things, the charges, statement of facts, psychiatric reports, and grounds of decision (where available). It is not every case where this will be called for – but certainly where the principle of escalation is in play, a court should endeavour to have as complete a picture as practicable.

77 Second, the principle of proportionality also applies in the comparison between the *severity* of the sentence imposed for the index offence and the *gravity* of the index offence in the context of the offender's circumstances: see generally, *Angliss Singapore Pte Ltd v Public Prosecutor* [2006] 4 SLR(R) 653 at [25]. This consideration remains in play *even after* taking into account an accused person's antecedent record. Hence, in *ASR* at [127], the Court of Appeal considered the case of *Iskandar bin Muhamad Nordin v Public Prosecutor* [2006] 1 SLR(R) 265 ("*Iskandar*"). The Court of Appeal alluded to the High Court's decision to increase the offender's sentence to 24 months' imprisonment and nine strokes of the cane for a charge of outrage of modesty under s 354 of the Penal Code as potentially disproportionate. Given that the offender was 18 years old (with an IQ of 58), his two prior convictions for theft ought not to have displaced rehabilitation as the predominant sentencing objective. Similarly, in *Sim Yeow Kee* at [97], a special three-judge bench of the High Court had observed that the sentence in *Tan Ngin Hai v Public Prosecutor*

[2001] 2 SLR(R) 152 ("*Tan Ngin Hai*") of eight years' preventive detention was wholly disproportionate to the index offence involving the theft of $1.10. Given that considerations of proportionality are attenuated in the context of preventive detention, they should more robustly apply in cases involving regular imprisonment even after the accused person's antecedent record has been factored into the calculus.

78 The principle of proportionality is also a reflection of the principle of retribution. The "true meaning of *lex talionis* (an eye for an eye and tooth for tooth) was never retribution [as vengeance] but proportionality": *Public Prosecutor v Tan Fook Sum* [1999] 1 SLR(R) 1022 at [17], citing Tan Yock Lin, *Criminal Procedure* (1997), ch XVIII, at para 553. As was considered in *ASR* at [129] and [131], the principle of retribution emphasises the relationship between the punishment for the harm which results from the index offence and the offender's culpability. This is contrasted with the other sentencing objectives of prevention, deterrence, and rehabilitation, which are geared toward the beneficial consequences to society at large.

79 Beyond determining the appropriate sentence in the instant case, the principle of proportionality also *flows* out from the principle of retribution and exerts "a much broader influence" on the process than the other sentencing considerations: see *ASR* at [130]. As the learned commentators of "Disproportionate Sentences as Human Rights Violations" (2004) 67 MLR 541 (Dirk van Zyl Smit and Andrew Ashworth, eds), at 546 have observed, citing *S v Dodo* 2001 (3) SA 382 (CC), at 403–404:

> 38 …Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence…, the offender is being used essentially as a means to another end and the offender's dignity assailed…

80 Proportionality prevents an offender from simply being used as a means to an end: see Morris J Fish, "An Eye for an Eye: Proportionality as a Moral Principle of Punishment" (2008) 28 OJLS 57, at 68. The principle acts as a *counterweight* against the more goal-driven sentencing considerations of prevention, deterrence and rehabilitation. In essence, proportionality is a check – *pulling back* on the ***extent*** to which the other sentencing considerations weigh into the calculus.

81 Hence, in my view, decisions such as *Iskandar* and *Tan Ngin Hai* should not be followed because they do not give effect to the principle of proportionality. The point simply is this: even if the weight given to the need for incapacitation and protection of the public was pressing in those cases, this nonetheless *still* had to be assessed against the severity of the index offence. While this assessment is necessarily a fact-specific and contextual one, requiring a "judgment of experience and discernment" (*Veen (No 2)*, at 474), it cannot be disregarded. Similarly, as the High Court has observed in *Saiful Rizam bin Assim* at [41], even though the need to rehabilitate an offender may be for his and society's benefit, such a need cannot result in a disproportionate sentence. It must be situated within a consideration of whether the sentence imposed was commensurate with the wrong committed.

82 I would close my observations on this by noting that proportionality as a counterweight can also act in the opposite direction. As our courts have elaborated, where the harm occasioned by the offence and the offender's culpability is sufficiently grave, retribution may prevail against the needs of rehabilitation: see *Lim Ghim Peow* at [39] (and as considered at [44(g)] above); see also *Ng Jun Xian v Public Prosecutor* [2017] 3 SLR 933 at [36]. This understanding of proportionality as a check therefore coheres with a sentencing court's role in balancing seemingly incommensurate considerations. As I noted

at the outset of this judgment, the principle of proportionality is not in conflict with, but in fact complements the other sentencing principles.

Application of the principle of proportionality to the index offences

83 I had at [73]–[75] above assessed the principle of proportionality in the context of the respondent's antecedents. It suffices here to consider the principle of proportionality with regard to the index offences. In the present case, the District Judge considered that a sentence of two years' imprisonment would be disproportionate given that no loss had been caused to the victims: see the GD at [39]. In my judgment, he was correct to have done so. As I observed in *Gan Chai Bee Anne v Public Prosecutor* [2019] SGHC 42 ("*Anne Gan*") at [63], full restitution may substantially reduce the economic harm suffered by the victim. It bears noting that in *Anne Gan*, full restitution was effected about four years after the fraudulent scheme first began. This was to remedy the loss of a substantial sum of $77,546.40. It also bears noting that there, restitution was in fact undertaken by *another* offender, and not the offender herself. In the present case, the value of the items stolen was relatively low to begin with. The respondent had personally returned the wallets to the counter in the 1st and 3rd Charges, and had done so almost immediately. It therefore could not be said that the victims had suffered any economic loss, nor had they been deprived of their property for a substantial period of time. There was also no indication that the respondent had committed any of the offences to monetarily benefit himself.

84 I did not accept the Prosecution's submission that the lack of economic harm to the victims was at best a neutral factor because the respondent's thefts were not aimed at economic gain, but at sexual gratification. First, in the context of the offence of theft, economic harm is the most obvious proxy of harm. Furthermore, in this instance, the lack of economic harm was not merely

fortuitous, but had to do with the fact that the respondent had returned the wallets, because as the District Judge found, he was feeling conflicted over the offence in the immediate aftermath of their commission. Moreover, in neither of the proceeded charges was there evidence that the respondent had actually used the stolen wallets to fulfil his sexual urges. Although a custodial sentence was called for, considerations of proportionality with regard to his antecedents and the index offences would almost certainly weigh in favour of a lighter sentence.

The respondent's rehabilitative prospects

85 Although specific deterrence was the primary sentencing consideration, this did not in and of itself mean that rehabilitation was completely displaced as a consideration. In this regard, the Prosecution had submitted that rehabilitation was irrelevant and that efforts at rehabilitation were wholly ineffective. The respondent was a "menace to society and should be incarcerated for a substantial period of time".

86 For a start, it seems to me that the Prosecution's case was somewhat contradicted by its own sentencing position. If the Prosecution were truly of the view that the respondent was incorrigible and, as it claimed, "likely to be the very worst kind of offender" then surely it should have been seeking more than two years' imprisonment. But by its own account, its sentencing position of two years' imprisonment was "far from the maximum" of six years' imprisonment if the sentences for the two proceeded charges were to run consecutively. This seemed to me to suggest that the Prosecution itself did not seriously consider the respondent's index offences to be of such seriousness as to foreclose any redemptive prospects.

87 I was also not persuaded by the Prosecution's submission that the respondent was non-compliant with his medication, which then cast doubt on the respondent's willingness to be rehabilitated. While the Prisons' email did indicate that the respondent had "declined … medication as he reported that he did not benefit from it before coming to prison…", the following paragraph also indicated that the Prisons psychiatrist, Dr Jacob Rajesh had noted that "the role of psychiatric medications in treating fetishism is very limited…". I accept that in the ordinary case, the principle of deterrence may apply to a mentally disordered offender who consciously chooses to be non-compliant with his medication: *Public Prosecutor v Goh Lee Yin* [2008] 1 SLR(R) 824 at [95]. However, I did not accept that the respondent should be characterised in that way.

88 The Prosecution also suggested that because the respondent was not a youthful offender, this militated in favour of a longer term of imprisonment. While there is a *presumption of a capacity* for rehabilitation for youthful offenders, this does not wholly *displace* the rehabilitative principle when sentencing older offenders: see *Sim Wen Yi Ernest v Public Prosecutor* [2016] 5 SLR 207 at [40].

89 The Prosecution's alternative submission was that if rehabilitation was at all possible it should be achieved through a substantial term of imprisonment citing *Tan Yao Min v Public Prosecutor* [2018] 3 SLR 1134. The relevant passages are at [45]–[47]:

> 45 As held by the Court of Appeal in *Lim Ghim Peow* ([30] *supra*) at [38], and the High Court in *Chong Hou En* ([30] *supra*) at [67], rehabilitation is not incompatible with a lengthier term of imprisonment and can take place in prison. However, the High Court in *Chong Hou En* also cautioned that particular care must be taken when calibrating the global sentence so that it is

> not crushing and does not destroy any hope of recovery or reintegration (at [67]).
>
> 46 The appellant appeared to have benefited from his term in the juvenile home, and was assessed to have made some therapeutic progress on release. He had variously expressed that he was keen to pursue his education and stop his offending behaviour. The 2015 Psychologist's Report noted that he "expressed a desire to lead an offence-free lifestyle in the community and importantly to continue his education". In the 2017 Psychiatric Reports, the appellant told Dr Cheow that **he "wanted to be sent to prison so he could retake his O levels". It is hoped that, with a longer term of imprisonment, he will be able to make progress in his goals of rehabilitating himself, pursuing his studies and complying with therapy recommendations.**
>
> 47 The District Judge held that specific deterrence and protection of the public outweighed rehabilitation in the present case (the GD at [27]). While I agreed that specific deterrence and protection of the public necessitated a relatively lengthy imprisonment term, **rehabilitation within a structured environment would also conceivably be better achieved with an imprisonment term in the present case.**
>
> [**Emphases added**.]

90 It was clear from this that See Kee Oon J was concerned with rehabilitation within a *structured environment*, particularly with regard to compliance with therapy recommendations as well as the appellant's educational aspirations in that case. Although there was some evidence in the Prisons' email of "psychological interventions" that would be administered to the respondent during his incarceration, there was no evidence that the structured confines of imprisonment would be *more effective* in treating the respondent in this regard, and would therefore justify a longer stint of incarceration. In fact, when asked, Dr Yeo explicitly declined to make that assessment.

Observations on the Mandatory Treatment Order regime

91 On the other hand, aside from imprisonment, there was a lack of available sentencing options that could facilitate the respondent's compliance with psychotherapy. The respondent was precluded from community orders such as a Mandatory Treatment Order ("MTO") under s 339 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC 2012"). This is because ss 337 and 339 of the CPC 2012 provide:

> **Community orders**
>
> **337.**—(1) Subject to subsections (2) and (3), a court shall not exercise any of its powers under this Part to make any community order in respect of —
>
> …
>
> (*e*) **a person who had previously been sentenced to reformative training**, **corrective training or preventive detention.**
>
> (2) A court may not make a mandatory treatment order in respect of any case referred to in subsection (1) except that it may do so under section 339 even if the offender —
>
> (*a*) had previously been sentenced to a **term of imprisonment**, whether or not it is a term of imprisonment served by him in default of payment of a fine…
>
> **…**
>
> **Mandatory treatment orders**
>
> **339.**—(1) Subject to subsections (2), (3) and (4), where an offender is convicted of an offence, and if the court by or before which he is convicted is satisfied that having regard to the circumstances, including the nature of the offence and the character of the offender, it is expedient to do so, the court may make a mandatory treatment order requiring the offender to undergo psychiatric treatment for a period not exceeding 24 months.
>
> **…**
>
> [**Emphases added**.]

92 Hence, because of the stint of preventive detention that the respondent had served from 2000, the court was statutorily precluded from making an MTO as a result of s 337(1)(*e*) of the CPC 2012. Although s 337(2)(*a*) of the CPC 2012 afforded an exception for those who had previously served a "term of imprisonment", the High Court has held that "[a] sentence of preventive detention is not a "sentence of imprisonment", even though persons sentenced to preventive detention are often, in practice, detained in prison": *Nicholas Kenneth v Public Prosecutor* [2003] 1 SLR(R) 80 at [19].

93 The recent amendments to the CPC by way of the Criminal Justice Reform Act (No 19 of 2018) have reaffirmed this position. Hence, ss 337 and 339 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC 2018") prescribe:

> **Community orders**
>
> **337.—**(1) Subject to subsections (2) and (3), **a court shall not exercise any of its powers under this Part to make any community order** in respect of —
>
> …
>
> (*d*) a person who had previously been sentenced to a term of imprisonment exceeding 3 months, other than a term of imprisonment served by him in default of a fine;
>
> (*e*) **a person who had previously been sentenced to corrective training or preventive detention**;
>
> …
>
> (*g*) a person who has been admitted —
>
> (i) at least twice to an approved institution under section 34 of the Misuse of Drugs Act (Cap. 185) (called in this section an approved institution);
>
> (ii) at least twice to an approved centre under section 17 of the Intoxicating Substances Act (Cap. 146A) (called in this section an approved centre); or

> (iii) at least once to an approved institution, and at least once to an approved centre;
>
> …
>
> (2) **A court may not make a mandatory treatment order in respect of any case referred to in subsection (1)** except that it may do so under section 339 even if the offender —
>
> (*a*) is a person mentioned in subsection (1)(*d*) **or** (*g*)…
>
> …
>
> **Mandatory treatment orders**
>
> **339.**—(1) Subject to subsections (2), (3) and (4), where an offender is convicted of an offence, and if the court by or before which he is convicted is satisfied that having regard to the circumstances, including the nature of the offence and the character of the offender, it is expedient to do so, the court may make a mandatory treatment order requiring the offender to undergo psychiatric treatment for a period not exceeding 36 months.
>
> **…**
>
> [**Emphases added**.]

94 Hence, s 337(1)(*e*) of the CPC 2018 precludes a sentencing court from imposing an MTO on an accused person who had previously served a term of corrective training or preventive detention.

95 Although s 337(2)(*a*) of the CPC 2018 provides an exception to the general limitation on those who may be sentenced to an MTO, this only applies to those falling within the ambit of ss 337(1)(*d*) and (*g*) of the CPC 2018 (meaning, only those who had previously served stints of *imprisonment* above three months, or had been admitted to approved institutions in respect of drug or intoxicating substance offences could still be sentenced to an MTO). Hence, an accused person in the respondent's position would, by s 337(1)(*e*) of the CPC 2018 (meaning those who had served a term of preventive detention), remain ineligible for an MTO.

96 Given the statutory constraints, it was not necessary for me to enquire into whether an MTO would have been an appropriate sentencing option with regard to the respondent. However, I observe that one possibly unforeseen outcome of the current MTO regime is that it would preclude accused persons who had previously been sentenced to terms of corrective training or preventive detention for offences connected to a previously undiagnosed psychiatric condition. For example, an accused person suffering from kleptomania might have been previously sentenced to a term of corrective training for repeated thefts. However, his condition might only have been diagnosed subsequently. If such an accused person were to re-offend, he would not be able to benefit from an MTO even if this were thought to be the most suitable sentencing option.

97 The MTO regime would also be unavailable to individuals who had previously served terms of corrective training or preventive detention and after their stints of incarceration become afflicted with a psychiatric condition. For example, an accused person might recently have been diagnosed with depression which was causally connected to a fresh and relatively minor misdemeanour. Such an accused person would similarly be precluded from being sentenced to an MTO. Whether the persons referred to in this and the previous paragraph should be able to benefit from the MTO regime is something that Parliament might consider.

The inapplicability of probation and other options

98 The respondent was not precluded from a second stint of probation. However, I agreed with the assessment of the District Judge that that, too, was not a suitable option. As the District Judge noted, the respondent had previously been sentenced to probation in 2011, but had breached his probation order twice, ultimately leading to a term of imprisonment being imposed in 2013. As I had

noted in *Public Prosecutor v Koh Wen Jie Boaz* [2016] 1 SLR 334 at [55], re-offending while on probation is a relevant factor in determining whether a second order of probation would be appropriate.

99 In any event, despite the mitigating factors and the presence of certain protective factors in the respondent's life (such as his partner and the fact that he had re-secured employment), it was not clear that another stint of probation would be effective in helping the respondent to curb his offending behaviour in relation to his fetishistic disorder. In my judgment, the District Judge was correct to have preferred a custodial term over another order of probation.

Conclusion

100 In all the circumstances, I was satisfied that the District Judge had taken into account all the relevant factors in reaching his sentencing decision and had appropriately balanced the competing principles at play. Accordingly, there was no basis for interfering with the sentences imposed and I dismissed the Prosecution's appeal.

Sundaresh Menon
Chief Justice

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for the respondent.