AOF
v
Public Prosecutor

[2012] SGCA 26

Court of Appeal — Criminal Appeal No 25 of 2010
Andrew Phang Boon Leong JA, V K Rajah JA and Steven Chong J
29 July 2011; 8 February; 18 April 2012

Criminal Law *— Offences — Outrage of modesty — Whether evidence established that offender committed outrage of modesty — Section 354(1) Penal Code (Cap 224, 1985 Rev Ed)*

Criminal Law *— Offences — Rape — Whether evidence established that offender committed rape — Section 376(2) Penal Code (Cap 224, 1985 Rev Ed)*

Criminal Law *— Offences — Unnatural offences — Carnal intercourse against order of nature by engaging in fellatio — Whether evidence established that offender committed fellatio — Section 377 Penal Code (Cap 224, 1985 Rev Ed)*

Criminal Procedure and Sentencing *— Appeal — Prosecution at trial below failed to prove its case beyond reasonable doubt — Principles governing whether retrial, remittal to the trial judge or acquittal should be ordered — Section 54(2) Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) — Section 390(1)*(b)*(i) Criminal Procedure Code 2010 (Act 15 of 2010)*

Criminal Procedure and Sentencing *— Disclosure — Complainant had made a number of statements to police — Statements giving inconsistent details of frequency and nature of alleged offences — Prosecution disclosed statements at hearing of appeal — Whether Prosecution was under duty to disclose statements at earlier stage of proceedings*

Evidence *— Proof of evidence — Standard of proof — Complainant's testimony uncorroborated — Whether Prosecution's case proved beyond reasonable doubt — Whether complainant's testimony was unusually convincing*

Evidence *— Witnesses — Collusion — Appellant alleged that complainant colluded to bring false complaint — Onus of proof when collusion alleged — Whether collusion disproved beyond reasonable doubt*

Evidence *— Witnesses — Corroboration — Complainant's testimony not corroborated — Whether corroboration required for cases involving sexual offences — Principles governing identification of corroborative evidence where corroboration was required — Section 159 Evidence Act (Cap 97, 1997 Rev Ed)*

Facts

The appellant ("the Appellant") was arrested by the police after his daughter ("C1") alleged that she had been repeatedly raped by her father over a period of ten years. The rapes allegedly took place at the one bedroom rental flat where the Appellant's family resided. In the High Court, the Prosecution proceeded against the Appellant on five out of a total of nine charges (*ie*, two charges of

fellatio under s 377 of the Penal Code (Cap 224, 1985 Rev Ed) ("PC"), three charges of rape under s 376(2) PC and one charge of outrage of modesty under s 354(1) PC). The trial commenced with the Appellant conducting his own defence and speaking through an interpreter. After 12 prosecution witnesses had testified, including C1, the Appellant engaged legal representation. The trial judge acceded to Appellant's counsel's request to recall four prosecution witnesses: PW6 (SSSGT Mohamed Lathiff) ("Lathiff"), PW9 (Dr Cindy Pang), PW10 (the ex-wife of the Appellant and mother of C1) ("the mother") and PW12 ("C1"). The Appellant's defence consisted in a complete denial that any sexual contact had taken place. The Appellant also alleged that the mother and Lathiff, the Duty Investigation Officer who first attended to the mother and C1 at Ang Mo Kio Police Division Headquarters when the alleged rapes by the Appellant were reported, were in a romantic relationship and that they had colluded to bring false allegations against him.

The trial judge found C1 to be a forthright person, not given to exaggerations and embellishments. It was held that C1's trial testimony was corroborated by: (a) her younger sister's ("C2") account that C1 had confided in C2 about the sexual assaults; and (b) the previous accounts that C1 had given to the two doctors (*ie*, Dr Cindy Pang and Dr Lim Choon Guan) who had examined her. The trial judge agreed with the Prosecution that the Appellant's subsequent evidence, which emerged after he was represented by counsel, about all the possible reasons why C1 could be fabricating evidence against him, invited scepticism. The trial judge did not make any reference to, or findings on, the veracity of the Appellant's testimony or the witnesses that were called by the Appellant. The trial judge also rejected the case by the defence that C1 had colluded with her mother, and possibly Lathiff, to bring a false complaint against the Appellant. Consequently, the trial judge convicted the Appellant of all five proceeded charges and sentenced him to 29 years' imprisonment and 24 strokes of the cane. The Prosecution withdrew the remaining four charges and the Appellant was granted a discharge not amounting to an acquittal on those charges.

Two preliminary issues took centre stage at the first hearing before the Court of Appeal. First, the Appellant, who was unrepresented, confirmed that he wished to appeal against his sentence and conviction. Secondly, owing to a number of evidential gaps which arose from a perusal of the *Official Transcript* and exhibits in the court below, the Court of Appeal ordered that the appeal be adjourned for: (a) *pro bono* counsel to be appointed; and (b) the Prosecution to reply to the court's request for further information.

The Court of Appeal reserved its judgment after the second and final hearing.

Held, allowing the appeal:

(1) The importance of granularly examining the facts in determining the outcome of contested criminal proceedings could not be overstated where sexual offences without any objective corroboration were in question. In such situations, a complainant's testimony could still constitute proof beyond reasonable doubt – but only when it was so "unusually convincing" as to overcome any doubts that might arise from the lack of corroboration: at [1] and [111].

(2) The requirement that an alleged victim's evidence, in the absence of objective corroboration, ought to be "unusually convincing" did nothing to change the ultimate rule that the Prosecution had to prove its case beyond a reasonable doubt. This requirement entailed the following propositions. First, subsequent repeated complaints by the complainant could not, in and of themselves, constitute corroborative evidence so as to dispense with the requirement for "unusually convincing" testimony. Secondly, the "unusually convincing" reminder should not be confined to categories of witnesses who were supposedly accomplices, young children or sexual offence complainants. Thirdly, a conviction would only be set aside where a reasonable doubt existed and not simply because the judge did not remind himself of the "unusually convincing" standard. Fourthly, an "unusually convincing" testimony did not overcome even materially and/or inherently contradictory evidence to prove guilt beyond a reasonable doubt. Fifthly, even where there was corroboration, there might still not be enough evidence to convict: at [114] and [115].

(3) The evidence of C1 in the court below was not "unusually convincing" and therefore could not, in and of itself, constitute sufficient evidence to establish the charges against the Appellant beyond a reasonable doubt. Moreover, this assessment was confirmed by the new material that was disclosed by the Prosecution after the first hearing before the Court of Appeal ("the new material"): at [120] to [146].

(4) One particularly vital external inconsistency in C1's testimony, which was of major significance, related to the frequency of the alleged rapes found in C1's trial testimony, the medical reports and her earlier statements to the police. This was a key point that went to the heart of C1's allegations against the Appellant which the trial judge did not resolve. In this regard, C1's statements to the police, which formed part of the new material, only served to confirm the same external inconsistency between C1's trial testimony and the medical reports, which were exhibited and subjected to cross-examination in the trial below: at [147].

(5) C1's statements to the police were by all accounts *prima facie* credible and relevant to the Appellant's guilt or innocence in so far as they revealed, *inter alia*, significant discrepancies in the frequency of the alleged rapes. This had to have been tacitly accepted by the Prosecution as evidenced by its position that the new material should be remitted before the trial judge. Accordingly, this should been engaged the Prosecution's continuing obligation of disclosure: at [148] to [152].

(6) Where the evidence of a complainant was not "unusually convincing", an accused's conviction was unsafe unless there was some corroboration in either the liberal or *Baskerville* sense. Whilst the failure to meet the strict standards of *Baskerville* corroboration did not rule out the relevance of evidence, this deficiency was likely to adversely affect the weight of the evidence which the court concerned might accord to it: at [173] and [177].

(7) C1's trial testimony was not corroborated, in either the liberal or *Baskerville* sense, by C2's trial testimony or the medical evidence. C2's evidence concerned incidents which did not form the basis for any of the proceeded charges in the court below and did not disclose incidents of rape or fellatio. Both medical reports did not constitute *Baskerville* corroboration of the alleged rapes in so far as they were mere repetitions of a complaint made by C1. Further, the

medical reports could not corroborate, in the liberal sense, incidents which had taken place between three to five years ago: at [180] to [209].

(8) The word "collusion" could take two different forms. Where the allegation was one of innocent infection, the court had to always be alive to the possibility, even if it considered it to be slight, for contamination arising, for example, from the transfer of recollections between witnesses leading to an unconscious elision of the differences between their accounts. When the allegation was one of collusion properly so called, the Prosecution ultimately bore the legal burden of disproving beyond a reasonable doubt the fact of collusion. However, the defence had first to establish that the complainant had a plausible motive to falsely implicate the accused: at [211] to [216].

(9) There was insufficient evidence for the court to decide on the issue of alleged collusion – whether stemming from a pre-existing romantic relationship between Lathiff and the mother which led to the manipulation of C1 to make a false complaint against the Appellant or from a relationship existing after C1's complaint had been made which led Lathiff to tutor the mother, C1 and C2 as to how to prepare for the police statements and their testimony at the trial itself. However, it was troubling that the trial process might have been compromised by the development of familial relationships among Lathiff, C1 and the mother: at [269].

(10) The powers which the Court of Appeal might exercise upon quashing a conviction were previously found in s 54(2) Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed). This had been repealed (with effect from 2 January 2011) and replaced by s 390(1)(*b*)(i) Criminal Procedure Code 2010 (Act 15 of 2010): at [271] to [273].

(11) It was clear that where the evidence adduced at the original trial was insufficient to justify a conviction, an acquittal, as opposed to a retrial, should ordinarily be ordered ("category one cases"). At the other end of the extreme, where the evidence adduced at the original trial was so strong that a conviction would have resulted, the more appropriate course would be to dismiss the appeal and affirm the conviction ("category two cases"). Between the two extremes, the residual category of cases would include the following, non-exhaustive, situations ("category three cases"): (a) critical exculpatory evidence was no longer available; (b) the fairness of the trial below was compromised by the trial judge's conduct; and (c) the length of time before the putative retrial was disproportionate to the Appellant's sentence and/or ongoing period of incarceration. In so far as "category three cases" were concerned, the appropriate course would be for the appellate court to weigh the non-exhaustive factors enunciated by Lord Diplock in *Dennis Reid v The Queen* [1980] AC 343 in order to determine whether a retrial should be ordered: at [276] and [296] to [298].

(12) In the present case, remitting the new materials to the trial judge would be inappropriate and redundant. Neither should a retrial before a different trial judge be ordered. It was clear that the Prosecution at the trial below had failed to prove its case against the Appellant beyond a reasonable doubt, thus rendering it a "category one case". Even if this was considered to be a "category three case", three factors militated against ordering a retrial. First, close to three years had elapsed since the Appellant's arrest. Should the Appellant be acquitted after a

retrial, he would have been unjustifiably detained for a prolonged period of time. Moreover, the delay was not of the Appellant's own doing. Secondly, the Appellant would be irretrievably prejudiced because crucial potentially exculpatory evidence was no longer available. Thirdly, to order a new trial would be to give the Prosecution a second chance to make good the evidential deficiencies in its case: at [299] to [311].

Case(s) referred to

Au Pui-kuen v AG of Hong Kong [1980] AC 351 (refd)

B v PP [2003] 1 SLR(R) 400; [2003] 1 SLR 400 (refd)

Beh Chai Hock v PP [1996] 3 SLR(R) 112; [1996] 3 SLR 495 (refd)

Chee Chiew Heong v PP [1981] 2 MLJ 287 (refd)

Chng Yew Chin v PP [2006] 4 SLR(R) 124; [2006] 4 SLR 124 (refd)

Dennis Reid v R [1980] AC 343 (refd)

DPP v Boardman [1975] AC 421 (refd)

Goh Han Heng v PP [2003] 4 SLR(R) 374; [2003] 4 SLR 374 (refd)

Jagatheesan s/o Krishnasamy v PP [2006] 4 SLR(R) 45; [2006] 4 SLR 45 (refd)

Khalid Ali Mohammed Altaf v The Crown Prosecution Service, West Midlands [2007] EWCA Crim 691 (refd)

Khoo Kwoon Hain v PP [1995] 2 SLR(R) 591; [1995] 2 SLR 767 (refd)

Lee Kwang Peng v PP [1997] 2 SLR(R) 569; [1997] 3 SLR 278 (refd)

Muhammad bin Kadar v PP [2011] 3 SLR 1205 (refd)

Ng Chee Tiong Tony v PP [2008] 1 SLR(R) 900; [2008] 1 SLR 900 (refd)

PP v Mardai [1950] MLJ 33 (refd)

PP v Mohammed Liton Mohammed Syeed Mallik [2008] 1 SLR(R) 601; [2008] 1 SLR 601 (refd)

R v B [2003] 2 Cr App R 13 (refd)

R v Baskerville [1916] 2 KB 658 (refd)

R v H [1995] 2 AC 596 (refd)

Roseli bin Amat v PP [1989] 1 SLR(R) 346; [1989] SLR 55 (refd)

Woolmington v DPP [1935] AC 462 (refd)

XP v PP [2008] 4 SLR(R) 686; [2008] 4 SLR 686 (refd)

Legislation referred to

Criminal Procedure Code (Cap 68, 1985 Rev Ed) ss 122(2), 177

Criminal Procedure Code 2010 (Act 15 of 2010) ss 390(1)(*b*)(i) (consd)

Evidence Act (Cap 97, 1997 Rev Ed) s 159 (consd); s 136

Penal Code (Cap 224, 1985 Rev Ed) ss 182, 354, 354A(1), 376(2), 377

Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 54(2) (consd); s 54

Code of Criminal Procedure 1861 (Act No 25 of 1861) (India)

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[Editorial note: This was an appeal from the decision of the High Court in [2010] SGHC 366.]

18 April 2012 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 The importance of granularly examining the facts in determining the outcome of contested criminal proceedings cannot be overstated. Certainly, the importance of such intense scrutiny needs no reiteration where sexual offences without any objective corroboration are in question. This was indeed the case here and this will also explain the need for meticulous attention to the detailed facts that constitute the core of the present judgment. As a consequence of this scrutiny, significant evidential gaps were revealed. This resulted in the present appeal having to be heard in two tranches whilst further evidence was sought. As we shall see, this exercise was not a wholly successful one although the new facts that were unearthed were significant in *confirming* the inadequacy of the evidence before this court that (in turn) led to our decision. This, then, was one central strand in the present appeal. It was inextricably connected with a second.

2 The second central strand consisted in that precious and indispensable "golden thread" which runs "[t]hroughout the web of the English Criminal Law" (see *per* Viscount Sankey LC in the leading House of Lords decision of *Woolmington v The Director of Public Prosecutions* [1935] AC 462 at 481) – and, we might add, Singapore Criminal Law as well. That "golden thread" is, of course, the fundamental principle that the Prosecution bears the legal burden of proving its case against the accused (here, the appellant ("the Appellant")) *beyond a reasonable doubt*. This principle has been stated in the local context in far too many cases to be enumerated here. More importantly (and as already mentioned), it is inextricably connected to the first central strand simply because the *facts* are an *integral* part of the process by which the court ascertains whether or not the legal burden just referred to has been discharged.

3 Given the crucial importance of the facts in the context of the present appeal and (in particular) the detailed analysis that follows, it would be helpful to first set out a table of contents to guide the reader, as follows:

Table of contents **Paragraphs**

4 Before proceeding to consider the salient facts in the detail that is required, a little by way of preliminary background is appropriate. Close to three years ago on 30 April 2009, the Appellant was arrested by the police after his daughter ("C1") dramatically alleged that she had been repeatedly and systematically raped by her father over a period of 10 years. She was then 16 years old. The rapes allegedly took place at a one bedroom rental flat where the Appellant's family resided ("the flat").

5 In the High Court, the Prosecution proceeded against the Appellant on the following five charges (out of a total of nine charges), which will henceforth be referred to as the first to fifth charges, respectively:

> That you, [Appellant],
>
> (1) sometime in 1999, in [the flat], voluntarily had carnal intercourse against the order of nature with [C1] (DOB: xx March 1993), to wit, by having the said person perform fellatio on you, and you have thereby committed an offence punishable under section 377 of the Penal Code, Chapter 224 (1985 Rev Ed).
>
> (2) on one occasion in the period from March 2003 to May 2003, in [the flat], committed rape on [C1], while she was under the age of 14 years, and you have thereby committed an offence punishable under section 376(2) of the Penal Code, Chapter 224 (1985 Rev Ed).

> (3) sometime in June 2003, in [the flat], committed rape on [C1], while she was under the age of 14 years, and you have thereby committed an offence punishable under section 376(2) of the Penal Code, Chapter 224 (1985 Rev Ed).
>
> (4) sometime in 2004 (1st occasion) which was after 11 March 2004, in [the flat], committed rape on [C1], while she was under the age of 14 years, and you have thereby committed an offence punishable under section 376(2) of the Penal Code, Chapter 224 (1985 Rev Ed).
>
> (5) on 29th day of April 2009 at about 2.30pm, in the flat, used criminal force on [C1] intending to outrage her modesty, to wit, by undoing one button at the front of her blouse, and further, in order to facilitate the commission of the said offence, you voluntarily caused wrongful restraint to the said complainant, to wit, by grabbing her right wrist with your hand, and you have thereby committed an offence punishable under section 354A(1) of the Penal Code, Chapter 224.

6 Four other charges for fellatio in 2000 and rape in 2004, July 2006 and November 2006 were stood down by the Prosecution at the start of the trial. The last charge was amended by the trial judge ("the Judge") at the conclusion of the Prosecution's case by deleting "undoing" and substituting the words "attempting to undo".

7 The trial commenced with the Appellant conducting his own defence and speaking through a Malay interpreter. On 27 August 2010, after 12 prosecution witnesses had testified, including C1, at the first tranche of the trial ("the first tranche of the trial"), the Appellant informed the court that his family wished to engage legal representation for him. The Appellant's father confirmed that the family would be instructing lawyers to represent the Appellant. The trial was thus adjourned for the family to do so.

8 On 30 August 2010, newly-appointed counsel confirmed that they had been instructed to act for the Appellant and applied for time to study the notes of evidence and to take further instructions. They asked the Judge if they could recall, for the purpose of cross-examination only, four prosecution witnesses: PW6 (SSSGT Mohamed Lathiff) ("Lathiff"), PW9 (Dr Cindy Pang), PW10 (the ex-wife of the Appellant and mother of C1) ("the mother") and PW12 ("C1"). The Prosecution had no objection to the recall of these witnesses. Accordingly, the Judge acceded to Appellant's counsel's request and adjourned the trial.

9 The trial resumed on 3 November 2010 and took place over seven days spanning the period of 3 November 2010 to 22 November 2010 ("the second tranche of the trial"). On the same day, the Judge convicted the Appellant of all five charges that had been proceeded with. The Prosecution then withdrew the remaining four charges pursuant to s 177 of the previous Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("CPC

(Cap 68)") and the Appellant was granted a discharge not amounting to an acquittal on those charges.

10 On 23 November 2010, the Appellant was sentenced as follows:

The section 377 charge (*ie*, the first charge)	5 years' imprisonment
The section 376(2) charges (*ie*, the second, third and fourth charges)	12 years' imprisonment and 12 strokes of the cane for each of the three charges
The section 354A(1) charge (*ie*, the fifth charge)	2 years' imprisonment and 1 stroke of the cane.

11 The Judge ordered the imprisonment terms for the s 377 charge and two of the s 376(2) charges to run consecutively with effect from the date of the arrest, *ie*, 30 April 2009, with the other two imprisonment terms to run concurrently with them. The total imprisonment term was therefore 29 years. The Appellant was given the maximum of 24 strokes of the cane. The grounds for the Judge's decision, which were released on 21 December 2010, are to be found in *Public Prosecutor v AOF* [2010] SGHC 366 ("the GD").

Facts

Background

12 Given the crucial importance of the facts, a detailed recitation of the factual background is necessary.

The relevant parties

13 The Appellant was born in November 1975. He is now 37 years old. Prior to his arrest, he was residing in the flat with the wife and three children. He married the wife in 1992. Their three children comprise two daughters and a son. The eldest child, C1, is the complainant in the present charges against the Appellant. She was born in March 1993 and is now 19 years old. The second daughter ("C2") was born in 1997 and is now 15 years old. The son ("C3") was born in 2001 and is now 11 years old. The marriage appears to have been an unhappy one with the mother having made at least one police report concerning an alleged assault by the Appellant. On that occasion, the Appellant was warned by the investigation officer ("IO") that his wife could have obtained a Personal Protection Order as a result. By the Appellant's own admission, he continued to assault his wife even after this police report was made (see below at [30] and [227]).

14 In February 2010, the Appellant divorced his wife by consent in the Syariah Court through matrimonial proceedings commenced by her. The

Appellant was in custody in respect of the present case at that particular point in time.

15 Shortly after, on 12 July 2010, the mother and Lathiff travelled to Batam together with the mother's brother where the couple apparently married. Coincidentally, Lathiff, was the Duty Investigation Officer ("DIO") who attended to the mother and C1 at Ang Mo Kio Police Division when they reported the alleged rapes by the Appellant on 29 April 2009.

The Prosecution's case at the trial below

16 The Judge has set out comprehensively the Prosecution's case in the GD ([11] *supra* at [7]–[42]). We therefore set out a summarised version as follows.

C1's testimony at the first tranche of the trial

The first charge

17 C1 told the court that the Appellant started engaging in sexual acts with her in 1999 when she was 6 years old and still in kindergarten. The first alleged incident occurred at around midnight in the living room of the flat when C2 was asleep in the bedroom and the mother was on night shift work. C3 was not yet born. C1 was sleeping with C2 in the bedroom when the Appellant came to wake her up. The Appellant then pulled her up and she followed him to the living room. He told her to sit next to him on the mattress in the living room. C1 was in her pyjama dress. The Appellant lay down on the mattress, wearing only his shorts. The television was on but the house lights were off. A while later, the Appellant pulled down his shorts and told C1 to hold his penis. When she did so, the penis was erect. He then asked her to suck his penis. She complied for a few minutes and noticed "white liquid" coming out from the penis.

18 C1 did not tell anyone, including her mother, about the incident as she did not know at the time that what had happened was wrong and how to tell her mother or anyone about it.

The second charge

19 One night, sometime after C1's tenth birthday, between March 2003 and June 2003, the Appellant asked her to follow him to watch television in the living room. C1 was watching television in the bedroom at the time and both her siblings were asleep. The mother was not at home as she was on night shift work.

20 When C1 went out to the living room, the television screen was showing a naked man on top of a naked woman. C1 did not understand

what they were doing. She sat down next to the Appellant while he lay on the mattress, wearing only shorts. C1 was in her pyjama dress. The Appellant then exposed his penis and told her to hold it. As she did so, she felt the Appellant insert his finger into her vagina. She felt pain and tried to push his hand away. He then told her to suck his penis and she complied. After a while, he made her lie down on the mattress and removed her panties. He then held her legs apart and inserted his penis into her vagina. She felt him moving back and forth. She felt a lot of pain and tried to push him away but he was too strong. After he ejaculated on her stomach, he told her to wash up and go to sleep. She followed all the instructions given as she was afraid of the Appellant.

The third charge

21 During the school holidays in June 2003, much the same things happened in the living room as in the second charge. C2 and C3 were sleeping in the bedroom and the mother was working the night shift. In the living room, the Appellant got C1 to hold his penis while he inserted his finger into C1's vagina. He then asked her to suck his penis before inserting his penis into her vagina. C1 tried to resist by pushing him away but he was too strong. He then ejaculated on her stomach and told her to wash up and go to sleep.

The day incident

22 C1 also testified about another incident that took place in the flat in 2004 (which was not, however, the subject of any charge). She claimed that one day when she and C2 were in the bedroom, the Appellant went in and asked C2 to go out as he wanted to help massage C1's back. After C2 left the bedroom, the Appellant closed the room door and latched it. He then asked C1 to perform fellatio on him. She recalled this incident as it happened a few months after her puberty and she was having cramps at that time.

The fourth charge

23 After her eleventh birthday in March 2004, the Appellant raped C1 twice that year. She reached puberty around May that year. Consequently, one incident of rape took place *before* her puberty, which was the subject of the fourth charge, and the other occurred *after* her puberty, this was the subject of one of the charges that was stood down by the Prosecution and eventually withdrawn at the end of the trial. Both rapes happened in much the same sequence as the earlier ones described above at [19]–[21].

24 In 2004, C1 attended sex education classes at school. She claimed that it was then that she had realized that what had happened between her and the Appellant was wrong. She contemplated telling the mother about what the Appellant had done but decided against it as she did not want

the mother to be unhappy. This was because she was afraid that the mother would confront the Appellant and that he would beat the mother up, as he had done on other occasions when they quarrelled. C1 also did not know how to explain to the mother about the incidents. She also did not tell her teachers or her classmates as she did not know how to do so and was afraid that they would not believe her.

Events in 2006

25 In 2006, when C1 was in secondary one, the Appellant raped her again. In April 2006, she ran away from home. During the three days away from home before the mother found her, she stayed with her friend's god-sister. She had hoped that her running away from home would show the Appellant that she did not want to continue having sex with him. However, she kept this reason to herself. As a result of this incident, the Appellant punished C1 by having her "grounded" and did not permit her to go to school for some time.

26 C1 also tried to avoid further sexual incidents with the Appellant after the last rape which occurred in 2006. She would return to the flat after school only if the mother was at home. Otherwise, she would go to the Ang Mo Kio library and remain there until 8pm to 10pm. When she went to bed, she would lie next to C2 so that, if the Appellant attempted to pull her away, she would hug C2 and cause her to wake up.

27 C1 affirmed unequivocally that she did not have sex with any other person besides the Appellant. This is an issue that goes to her credibility that we will address below (see Issue 1 below, at [111]–[172]).

C1's diary

28 C1 claimed that she used to keep two diaries while she was in primary school. The yellow one was for her general matters while the purple one, bought when she was in primary four or five, was to record the sexual abuse by the Appellant up to 2006. She recorded the dates of the incidents, what happened on those days and her feelings about them and would refer to the diary two or three times every fortnight. Both diaries were supposedly lost while she was in secondary two or three, allegedly thrown away with other books by the mother during spring cleaning of the flat.

C1's disclosure of the sexual assaults to C2

29 C1 further testified that she had told C2 about the sexual abuse while they were staying with their grandmother during the school holidays sometime in 2007 or 2008. One night, she asked C2 whether she knew the meaning of "sex". C2 said that it meant the penis was inside the vagina. C1 then asked her whether she believed that "daddy" had done

that to her. C2 appeared shocked and was a little incredulous at first. She asked C1 why she had not informed "mummy" about it. C1 replied that it was not the right time to tell her yet as their parents were quarrelling and she did not want to add to the mother's problems. C2 asked her whether she would like her to help in telling the mother but C1 said that she would tell the mother when it was time to do so.

The fifth charge

30 The fifth charge, along with the arrest of the Appellant, came about in the following manner. A few days before 29 April 2009, the mother and the three children moved out of the flat after the mother and the Appellant had quarrelled over their finances. They went to stay with the children's maternal grandmother in Yishun. Moving out with the mother after their parents had quarrelled was not something new to the children. In fact, the mother and the Appellant quarrelled frequently over money and the Appellant's alleged extra-marital affairs with various "Indonesian ladies". These quarrels would often turn violent with the mother having to make a police report more than two to three years ago. On that occasion, the Appellant was warned by the IO that his wife could have obtained a Personal Protection Order as a result. These bouts of violence went on even after the police report.

31 Sometime after 2pm on 29 April 2009, C1 returned to the flat alone to collect some items which she needed for school. According to C1, the Appellant later returned to the flat and, noticing that C1 was in the bedroom, went in to talk to her and sat a few feet away from her. He grabbed her right wrist with his left hand and tried to undo the first button (the one just below the collar button) of her school blouse. During the struggle, C1 managed to use her mobile phone to call the mother to inform her that she was leaving the flat to meet the mother at Ang Mo Kio Central for shopping as had been arranged. The mother recalled that C1 was speaking in a trembling voice and had sounded sad. As a result of this call, the Appellant stopped his actions. C1 then left the flat quickly and went to meet the mother.

32 When they met, the mother noticed that C1 looked like she had been crying although she had earlier sounded delighted to go shopping. C1 burst out in tears when C3 asked her why she was crying. She managed to utter only the words, "daddy, daddy" when the mother asked why she was crying. The mother then asked her whether the Appellant had scolded her or had beaten her up. She told the mother in Malay that the Appellant "wanted to do it again". When the mother asked her to elaborate, she used the Malay word "*main*" (meaning "play") to explain that he had wanted sex. The mother asked her whether the Appellant had put his penis into her vagina and she confirmed that he did. The mother then asked her to swear upon God that what she was telling her was true. When C1 did so,

the mother brought her to Ang Mo Kio South Neighbourhood Police Centre ("the NPC") in a taxi. In the taxi, the mother asked C1 to re-affirm that everything she said was the truth and C1 did so. According to the mother's testimony, she asked C1 whether it was "*sedap*" (or nice) and C1 replied that it was not. She asked this question to determine whether C1 was a willing participant in the sex acts.

33 At the NPC, they approached a female officer who observed that C1 was crying. The female officer tried to calm her down. C1 informed the female officer that she had been raped by her father and wanted to lodge a police report. The female officer then telephoned Senior Staff Sergeant Lathiff, who was the DIO of Ang Mo Kio Police Division that evening. Lathiff instructed the female officer to lodge a police report for C1 and to ask the mother and C1 to go to the Ang Mo Kio Police Divisional Headquarters ("the DHQ") to meet him. Before leaving for the DHQ, a male police officer at the NPC typed out C1's First Information Report ("FIR") which C1 signed. The section, entitled "Brief details" in the FIR, reads as follows:

> Sometime in year 2006, I was raped by my father one [name of Appellant and his NRIC no] at [the flat].

34 Under the heading, "Date/Time of Incident", it was stated, "12/07/2006 23:55 – 12/07/2006 23:55". The date and time of the said report were stated as "29/04/2009 16:48".

35 At the DHQ, Lathiff interviewed C1 and her mother separately and recorded their contents in his investigation diary. Later that evening, Station Inspector Chandra Seakeran ("SI Chandra") of the Serious Sexual Crimes Branch ("SSCB") arrived and interviewed C1. The next day, the police arrested the Appellant at the flat. He has been in custody since.

C1's testimony at the second tranche of the trial

36 C1 was one of four prosecution witnesses recalled for cross-examination. C1 agreed that she was not angry with the Appellant for quarrelling with the mother over money matters but was angry over the Appellant's alleged extra-marital affairs. C1 agreed that while she had three boyfriends since secondary one, she did not have had sexual intercourse with any of these boys.

37 The Appellant's defence counsel ("defence counsel") suggested to C1 that her allegations about the incidents of sex were all false. In particular, defence counsel suggested to C1 that she was fabricating the allegations against the Appellant in order to send him to prison, as he was a strict father, had treated C2 better than she, had extra-marital affairs and had beat up the mother. C1 denied that she was lying about the sexual assaults and disagreed with the suggestions made by defence counsel.

38 However, C1 conceded under cross examination that she had lied to the mother on two occasions. On the first occasion, when she ran away from home in 2006 and was located by the mother subsequently, C1 lied that she had been staying outdoors when she was actually in a friend's home. C1 explained that she did not want to get the friends who sheltered her into trouble as the mother had made a police report about her disappearance. On the second occasion, when the mother told her to return home and not stay in the library, she lied that she had to look for materials there. C1 explained that she did not want to return to the flat earlier as she was afraid of being alone with the Appellant.

39 In respect of her relationship with Lathiff, C1 denied having addressed him as "*Baba*" or father in Malay. She said that Lathiff had only advised her about school work and her future.

C1's HSA statement

40 In re-examination, the Prosecution brought to the attention of the court the statement C1 had given to Health Sciences Authority ("HSA") officers ("the HSA statement") regarding a separate, ongoing police investigation into the mother's and Lathiff's alleged involvement in the theft of cough syrup from the clinic where the mother used to work as a nurse ("the theft of cough syrup investigation"). It should be noted that Lathiff is the same person who was the DIO in C1's rape investigation. Of relevance is the fact that this statement was recorded on 22 September 2010, between the first tranche and the second tranche of the Appellant's trial. It was commendably brought to the court's attention during the Prosecution's re-examination of C1 when she was recalled as a witness on 15 November 2010. When questioned by the Prosecution, C1 denied giving the answers recorded in the HSA statement. In contradiction to what the HSA statement recorded, she denied telling the HSA officers that she believed that the mother had married Lathiff in Batam and that, at first, she called the mother's new husband "uncle" but subsequently called him "*Baba*". The HSA statement also recorded C1 as stating that the mother had known Lathiff since June 2009, this was shortly after he had been the (initial) investigating officer looking into C1's police report. She maintained her position that she did not say those things about the mother and Lathiff despite being repeatedly warned by the Prosecution and the Judge about the consequences of giving false testimony.

41 C1 claimed that she was working as an event coordinator for a fast food outlet and was in the midst of a client's birthday party at the client's home when some HSA officers telephoned her and requested to meet her for five minutes. She agreed and went down to the ground floor of the block of flats where she had hurriedly answered some questions and then signed a statement after it was read to her as she had to rush back to the party. She signed that statement (*viz*, the HSA statement) as the HSA

officers had told her that the HSA statement could be of assistance to the mother. She adamantly maintained in court that the contents of the statement were untrue and that she had merely called Lathiff "uncle" and not "*Baba*".

42 Both defence counsel and the Prosecution agreed initially that the HSA officers who recorded C1's statement be called to testify. However, the next day, the Prosecution informed the court that it was not calling the officers but would take the position that the HSA statement was indeed made by C1. The Prosecution did not wish to have the whole statement admitted in evidence as it was the subject of ongoing investigations. On that basis, defence counsel accepted the Prosecution's position and agreed to confine their questioning to the portion of the HSA statement already on the record. Nonetheless, the Prosecution's submission was that whether C1 had addressed Lathiff as "*Baba*" "*is clearly a collateral matter, a matter that is not central to the issue before the Court*". Defence counsel disagreed and submitted that it was relevant to discredit C1's testimony and demonstrate whether there had been any form of collusion among Lathiff, C1 and the mother. When C1 returned to the witness stand, she explained that she was sad and concerned that the investigators were alleging that her mother was involved in the alleged theft of cough syrup. She maintained that she had called Lathiff "uncle" and not "*Baba*" and that she did not know whether calling him "*Baba*" would be damaging to her mother's case or not. She also maintained that she had no reason to fabricate the charges of rape and sexual abuse by the Appellant and that she had not discussed the case with Lathiff.

The medical reports

43 On 5 May 2009, the Appellant was examined by a doctor from Changi General Hospital and found not to have been suffering from erectile dysfunction. On 18 and 25 May 2009, the Appellant was examined by Dr Seng Kok Han, a psychiatrist from the Institute of Mental Health, and was found to have had no mental illness. The Appellant informed the psychiatrist that he had never had sexual intercourse or any other sexual activity with C1. He also told the psychiatrist that, although he was not close to C1, they did not have major conflicts and he did not know why C1 had accused him of rape. During the second session with the psychiatrist, the Appellant was tearful when he said that he might plead guilty in order not to get C1 into trouble.

44 On 3 June 2009, C1 was examined by Dr Cindy Pang ("Dr Pang") of the Department of Obstetrics and Gynaecology, Singapore General Hospital. C1 informed Dr Pang that she had her menarche at age 11 and provided a general history of the alleged sexual acts between the Appellant and her. Dr Pang noted that C1's hymen "… was deficient posteriorly, with old tears at the 2 and 9 o'clock position, suggestive of

previous penetration". Dr Pang explained that when she interviewed C1, she had focused on the history pertaining to penetration and not on non-penetrative episodes. She opined that it was unlikely that the tears were caused by sports or dancing and that they could not have occurred unless there had been penetration by some object. In her view, a posteriorly deficient hymen was not more susceptible to tears compared to a normal one.

45 C1 was examined by Dr Lim Choon Guan ("Dr Lim"), a psychiatrist in the Department of Child and Adolescent Psychiatry, Institute of Mental Health, on 5 June 2009. C1 gave Dr Lim a general history of the sexual acts allegedly committed by the Appellant on her. Dr Lim noted that C1 was able to give a clear and detailed account of the alleged events. He also noted that she would become teary-eyed at times but was still able to hold her composure, that her mood was not depressed and that her thoughts were coherent and logical. C1 was assessed to be in the average range of intellectual functioning. The psychiatrist opined that C1 was not suffering from any major mental illness and did not exhibit any symptom of post-traumatic stress disorder, was fit to testify in court, and was aware of the nature and quality of the acts she had alleged against the Appellant. Dr Lim also interviewed the mother on the same day. He recorded that she had declined the institute's request to obtain a report on C1 from her school. C1 was referred for counselling with the Child Guidance Clinic's medical social worker but did not turn up for the appointment on 25 June 2009. When cross-examined, C1 claimed that her mother did not inform her about this further appointment. When further questioned on why her mother did not accede to Dr Lim's request for C1's school report, C1 agreed with defence counsel's suggestion that the report would perhaps expose her disciplinary problems at school. However, when it was put to her later in cross-examination, C1 denied having discipline problems before and after April 2009.

The mother's testimony

46 In respect of her divorce from the Appellant, the mother testified that she had commenced proceedings in the Syariah Court because she could not tolerate the abuse by the Appellant and his financial irresponsibility towards their family, and also because of the allegations that he had raped their daughter. However, she agreed that the divorce was granted without the court requiring her to prove her allegations and that the Appellant had merely pronounced the "*talak*" in order to effect the divorce.

47 The mother explained that she had left the flat around 4pm to 5pm for her night shift work during the marriage. She testified that she had changed primary schools for C1 not because C1 had disciplinary problems in the former school but purely because the former school was

further away from the flat and that travelling to and from school cost money while the new school was within walking distance. When C1 was missing from home, the mother took leave to search for her and, when someone finally told her where C1 was, her only concern was to bring her home and not to question her about why she had run away from home.

48 The mother was cross-examined about her relationship with Lathiff, a married man. She was asked whether she had asked the Appellant's sister and her husband to arrange a secret marriage for her and Lathiff in Batam. The mother claimed that she became friends with Lathiff only some two months after C1's police report was made. Lathiff called to ask how she was coping and had asked her out for a drink. She admitted that she had invited Lathiff to the flat and that he had driven her to Ang Mo Kio Central in a police patrol car before. Lathiff merely advised her children to be obedient and to study hard. He did not try to coach C1 or C2 concerning their testimony in court. She denied being in a romantic relationship. She stated that she told the Appellant's sister to arrange the secret marriage in Batam merely to anger and hurt the Appellant's family by letting them know that she was marrying someone better than the Appellant. The mother categorically denied that a marriage had been entered into between her and Lathiff. In July 2010, she did go on a one-day shopping trip to Batam with her brother and Lathiff. Lathiff's wife was supposed to join them but could not because of work commitments.

Lathiff's testimony

49 Lathiff, who had been transferred to other duties because of the theft of cough syrup investigation, testified that after he had met C1 and the mother on 29 April 2009, he interviewed C1 for about an hour and spoke to the mother separately. His role was to ascertain whether the allegations of rape were made out or not. C1 was crying and could hardly speak. After she had calmed down, she narrated her story to Lathiff who then informed the SSCB. When the officers from the SSCB arrived later that evening, they took over the investigations and Lathiff was not involved in the case from then on. It was only some two months later that he had decided to call the mother to befriend her. He claimed that they did not know each other before 29 April 2009. He agreed that he had been to the flat but the children were home on those occasions. He merely counselled them and told them to be obedient. His contact with the mother and the children was on a personal basis and had nothing to do with the investigations in this case. He could not recall whether he had given the mother a lift in a police patrol car. On one such visit to the flat, he had met the Appellant's sister and her husband. The mother told Lathiff that she had informed the Appellant's sister and her husband about their supposed wedding as a ploy to hurt the Appellant's family. He too denied that a marriage had been entered into between him and the mother.

C2's testimony

50 C2's testimony covered three separate episodes which are summarised as follows:

(a) The first episode ("the first episode") was in 2006 when C2 was about 9 years old. The Appellant went into the bedroom and told her and C3 to go outside. C1 was asleep and the mother was not home. C2 was told to close the bedroom door. C2 did so but felt uneasy. She waited in the living room and did not dare to open the bedroom door as she was afraid of the Appellant. He emerged from the bedroom about half an hour later. When C2 entered the bedroom, C1 was seated on the bed watching television. Sometime after that day, C2 asked C1 what was going on in the room that day but received no answer from her.

(b) The second episode ("the second episode") happened at night in 2006, when the three children were sleeping in the bedroom. C2 was awakened by some movement on the bed. She saw the Appellant on top of C1. C2 turned away towards C3 as she was afraid of the Appellant. He was not wearing any shirt but C2 could not see if his shorts were on. The mother was out working that night. Subsequently, the Appellant left the bedroom. C2 did not ask C1, nor did she tell anyone about this incident.

(c) The third episode ("the third episode") happened one afternoon in 2008. C1 told C2 that, with regard to the first episode when C2 was asked to leave the bedroom, the Appellant had touched C1's vagina and her body. C2 was shocked to hear this. Both of them cried. C2 told C1 she hated the Appellant for this and would treat him as an uncle and not as their father. C1 told her that the mother did not know about all this and that she would tell her when the time was right. It was C2's testimony that this took place at their home.

The Appellant's case at the trial below

The Appellant's version of events at the trial below

51 The Appellant's defence to the charges consisted in a complete denial that any sexual contact had taken place.

52 When asked by the Prosecution why he had not challenged C1's allegations during the first tranche of the trial despite the court's guidance, he said that he did not know how to challenge her evidence. He explained that when he told the psychiatrist that he might plead guilty in order not to get C1 into trouble (see above at [43]), he meant that his daughter had made a false report against him and he might choose to admit guilt rather than have her prosecuted for making a false report. He was "willing to take over her punishment". It was not an expression of

remorse over what he had allegedly done to her. He was sad when he heard C1's testimony in court, wondering why she was making such allegations and who might be behind them.

53 The Appellant, through defence counsel, also alleged that the mother and Lathiff were in a romantic relationship and that they had colluded to bring false allegations against him. To support this argument, he referred to the testimony of his sister, his sister's husband and his father.

The sister's testimony

54 In her examination-in-chief, the Appellant's sister ("the sister") testified that the mother previously had a "close" relationship with her and considered the mother her "own sister". The sister used to send her children to the mother's flat from 2006 to May 2010. This stopped soon after the sister realised that the general atmosphere in the flat had changed. From April to June 2009, the sister had been told that the Appellant was out working whenever she sent her children to the mother's flat for babysitting on the weekends. The mother finally told the sister about the rape charges sometime in June 2009. The sister stated that the mother apologised to her and had used the Malay word "*rogol*" (which means rape in English). The mother also told the sister that she did not know how to express it to the Appellant's parents as she was afraid.

55 On 27 June 2009, the sister, the Appellant's brother and parents (along with C1, C2, C3 and the mother) met at the Appellant's parents' flat ("the 27 June 2009 meeting"). The children were sent to a room while the meeting was held in the living room. The sister heard the mother say to the Appellant's parents that if the Appellant was willing to divorce her, she would withdraw the case.

56 In a separate incident in October 2009, the mother told the sister that she had first met Lathiff when she reported the loss of her Identity Card ("IC") to the police. When asked when this took place, the sister replied that the mother "did not say". The mother also shared that Lathiff was a married man who lived with his four children and wife. The mother asked the sister for her advice on whether she should become Lathiff's second wife and asked if the sister's husband could speak to Lathiff about the prospect of the mother and him getting married in Batam. Shortly after, the sister's husband made arrangements for the marriage in Batam to take place on 25 December 2009. Subsequently, though, the mother telephoned the sister to inform her that the marriage was cancelled because Lathiff and the mother had a "misunderstanding".

57 In March 2010, the sister and her husband met Lathiff, for the first and only time at the mother's flat. C1 and C3 were also present. As Lathiff, the mother, the sister and her husband were all leaving the flat at

the same time, the sister and her husband offered the mother a lift in their car. The mother declined, saying that Lathiff had brought his police car. The sister later saw the mother being driven by Lathiff in his police car. The sister testified that the mother, C1, C2 and C3 had a close relationship with Latiff. They conversed over the telephone and C1 would sometimes ask Lathiff to buy chocolate while C2 would ask for ice-cream. C2 and C3 addressed Lathiff as *Baba*. The sister knew that the Appellant's children spoke to Lathiff over the phone because she had overheard one such telephone conversation while she was staying over at the flat.

58 Sometime in May 2010, the mother informed the sister that Lathiff and she had gone through with the Batam marriage on 3 May 2010 with the help of the mother's brother. The sister asked the mother whether she had obtained the consent of Lathiff's first wife. The mother said that the first wife had not given her consent. The sister was shown the wedding ring, photograph and marriage certificate which had been issued in Batam. The mother also told the sister that she had received her divorce certificate in March 2010.

59 The Prosecution began its cross-examination by expressly stating that it was not accepting these aspects of the sister's testimony:

> The prosecution is not, okay, accepting what you are telling the Court to be the case, you know, about *your interactions with your sister-in-law, about Lathiff and all, okay*. But I'm proceeding, all right, with my questions and assuming what you are telling the Court is true, okay? [emphasis added]

60 Nonetheless, the Prosecution failed to specifically challenge the precise allegations in the sister's evidence on her observations of the interactions between the mother, her children and Lathiff. At this juncture, we pause to note parenthetically that the sister clarified during cross-examination that at no time did C1 or the mother state that the allegations against the Appellant were false.

61 The Judge, however, did not adequately evaluate this evidence contextually (see below at [81]). Pertinently, the further evidence that has surfaced in the course of this appeal confirms the accuracy of the sister's testimony on some of these points.

The sister's husband's testimony

62 The sister's husband's testimony was that Lathiff and the mother had an established romantic relationship. Sometime at the end of 2009, the sister told him that the mother had wanted him to make preparations for her marriage to Lathiff in Batam. He had agreed to do so and contacted his friends to make the necessary preparations. Some months later, Lathiff and the mother told him that they were not able to perform the marriage there. A few months later, he heard from his wife that Lathiff and the mother had been married in Batam.

63 In relation to the March 2010 meeting at the mother's flat (see above at [57]), he observed that "… Lathiff was sort of a strong person, influential, and [C1] was afraid of him. And he appeared to be very instructive [to C1]". He also mentioned that Lathiff had referred to himself as *Baba* to the children. He corroborated the sister's account that he had, together with the sister, seen Lathiff ferry the mother in his police car.

64 He had asked for permission from the mother to speak to C1 about the allegation against the Appellant but the mother had refused to allow him to talk to C1. Upon cross-examination, the sister's husband clarified that the mother and C1 had never said that the police report was false.

The Appellant's father's testimony

65 The Appellant's final witness was his father. The Appellant's father claimed that he first came to know about the allegations of rape during the 27 June 2009 meeting at his flat (see above at [55]). At the meeting, the mother wanted to tell those present why the Appellant had been arrested. The Appellant's father was not allowed to ask her questions but was only permitted to listen to what she had to say. The mother said that her elder brother had taken both the mother and C1 to make the police report. The mother had a copy of the Appellant's birth certificate and, with that, she had access to the Appellant in prison. The mother also stated that, if the Appellant divorced her, she would withdraw all the charges against him. The Appellant's father asked the mother whether it was true that the Appellant had raped C1. The mother kept silent and told the Appellant's father that he could not ask C1 about this because "[b]eing the mother, she knew what it's all about".

66 The Appellant's father testified that, he found the mother to be "very aggressive" against and "cruel" to the Appellant during their marriage. The mother would come to see the Appellant's father every month for financial help as the Appellant was unemployed. The Appellant's mother would give between $30 and $50 whereas the Appellant's father would not give her any money as he was not on good terms with the mother and did not like to see her.

67 The Appellant's father also testified that even before the Appellant's arrest, he would only be able to talk to C1 for about 10 minutes before the mother would take her away.

68 During cross-examination, the Appellant's father stated that the mother had told him during the 27 June 2009 meeting that she wanted to send the Appellant to prison. The Prosecution noted that the Appellant's father did not mention this during his examination in-chief and neither had the mother claimed to have made such a statement. Nevertheless, the

Appellant's father conceded that the mother or C1 did not at any time say that the police report was false.

The decision below

69 The Judge's detailed reasons are set out in his GD ([11] *supra* at [60]–[73]). To begin with, the Judge was mindful that the allegations in this case were based solely on the testimony of the Appellant. He observed (see the GD at [60]) that:

> … [With] allegations of this nature, the crucial evidence often comes from the alleged victim only and the court must be aware of the dangers of convicting solely on that testimony, bearing in mind the ease with which allegations of sexual assault may be fabricated and the concomitant difficulty of rebutting such allegations (see the Court of Appeal's decision in *PP v Mohammed Liton Mohammed Syeed Mallik* [2008] 1 SLR 601).

C1's testimony

70 The Judge then proceeded to give his evaluation of the demeanour and testimony of C1 (see the GD at [62]–[64]). In particular, he noted (see the GD at [62]) that:

> *C1 appeared to me to be a forthright person, not given to exaggerations or embellishments.* She spoke simply and did not appear to have been coached or 'tutored' (the word used by defence counsel in reference to Lathiff) in her evidence at all, whether during the first or the resumed hearing. I was satisfied that she understood the gravity of what she was saying in court about her father and knew the importance of telling the truth. Allowance must obviously be given for the fact that some of the alleged incidents occurred many years ago when she was much younger. It would therefore not be possible to recall with precision every detail of each occurrence. [emphasis added]

The Judge went on to state (see the GD at [64]) that C1's account of the events on 29 April 2009:

> … [w]as particularly clear and cogent, probably due to the fact that it was the most recent incident involving the Appellant and she was more mature by then. It was also the trigger event that led to the police report.

71 However, the Judge identified two concerns regarding C1's testimony. The first related to the two diaries that C1 alleged she kept but were somehow lost around 2007 or 2008 (see above at [28]). Defence counsel argued that these diaries did not exist because the mother could not have discarded them without so much as browsing through them. The Judge did not think C1 was lying about the loss of the diaries and suggested that perhaps the mother was careless in disposing of them without much thought. However, as both diaries were missing, the Judge did not place any weight on C1's evidence that the alleged sexual assaults were detailed by her in one of them (see the GD at [69]).

72 The second and much more important concern related to the HSA statement regarding the ongoing police investigation into the mother's and Lathiff's involvement in the theft of cough syrup investigation (see above at [40]–[42]). The Judge's findings on this issue (see the GD at [70]–[72]) are highly pertinent to our later discussion on the possibility of collusion as well as C1's credibility and we therefore reproduce it, as follows:

> … This was the only time in C1's testimony in court that she paused hard and long before answering any questions, including those posed by the court. Despite her denials about the accuracy of the said statement regarding how she addressed Lathiff, the prosecution has accepted that she did give the answers as recorded and that she did refer to Lathiff in more recent times as '*Baba*' or father.
>
> … A quick perusal of the questions and answers from question 8 onwards [of the HSA statement] would show that the answers purportedly made by her *were clearly detrimental to her mother in the investigations regarding the cough syrup*. I need not rule on the voluntariness or the accuracy of this statement in this trial in view of the position taken by the prosecution regarding its own witness' previous statement. *I highlighted the rest of the contents of this statement merely to explain why I believed C1 was not willing to acknowledge her own statement*. By this time, C1 obviously realized that if her mother were to get into any trouble with the law, she and her siblings would be left to fend for themselves. She was thus extremely reluctant to accept the statement as having been made by her.
>
> *I reconsidered her veracity in the light of this new development and concluded that while she was not entirely forthright on this score, she was completely truthful in her testimony regarding the charges*. As explained above, it was perfectly understandable why she sought to disavow the statement. This of course attracted the criticism that she was capable of telling an untruth where it suited her purposes. *Nevertheless, bearing in mind the serious charges that the Appellant faced and the burden on the prosecution to prove its case beyond reasonable doubt, I still held the firm belief that C1 was telling the truth about the sexual assaults. This was so even if the mother and Lathiff were not completely upfront about their relationship …*
>
> [emphasis added]

Collusion

73 The Judge also proffered a number of reasons for rejecting the case by the defence that C1 had colluded with her mother, and possibly Lathiff, to bring a false complaint against the Appellant.

74 First, it was not as if C1 had returned to the flat on 29 April 2009 in order to set a trap for the Appellant. After all, as the Appellant testified, C1 was also back at the flat on the two days immediately before that date and nothing happened (see the GD ([11] *supra*) at [64]).

75 Secondly, C1's genuine distress after the confrontation with the Appellant in the flat was also noted by the police officers who saw her that day (see the GD at [64]).

76 Thirdly, although the Prosecution accepted that C1 did refer to Lathiff in more recent times as "*Baba*", her "extreme reluctance" to acknowledge this at trial could be explained by the fact that "if her mother were to get into any trouble with the law [over the HSA investigation], she and her siblings would be left to fend for themselves" (see the GD at [71]).

77 Fourthly, even if the mother and Lathiff were not completely upfront about their relationship, the Judge accepted that any relationship between them developed only a couple of months or so after the police report had been made by C1 (see the GD at [72]).

78 Fifthly, the Judge did not detect any hint that Lathiff, despite being the apparent father figure to the Appellant's children, had sought in any way to influence C1 or C2 in their testimony in court (see the GD at [72]).

The Appellant's cross-examination of C1

79 The Judge appeared to place considerable weight on the fact that the Appellant, who at the time was appearing in-person, was unable to put any questions to C1 about the alleged sexual assaults. The Judge observed (at [65]) that:

> The accused's inability to put any questions to C1 about the alleged sexual assaults during the first hearing was intriguing. He was not highly educated but was certainly no moron. When invited by the court to challenge C1's testimony and to suggest to her that perhaps she was lying about all or some of the allegations in the charges, he chose not to do so or to ask her any questions regarding the crucial matters.

80 Accordingly, the Judge agreed with the Prosecution that the Appellant's subsequent evidence, which emerged after he was represented by counsel, about all the possible reasons why C1 could be fabricating evidence against him "invited scepticism" (see the GD ([11] *supra*) at [65]).

81 It should be noted that the Judge did not make any reference to, or findings on, the veracity of the Appellant's testimony or the witnesses that were called by the defence.

Corroborative evidence

82 The Judge also found that there were two pieces of corroborative evidence.

83 The first was C2's testimony that C1 had confided in C2 about the sexual assaults by the Appellant. At [67] of the GD, the Judge noted that:

> *Corroborative evidence may be found in C2's testimony.* C1 had confided in C2 about the sexual assaults by the Appellant and that caused C2 to have such poor regard for their father that he was downgraded to being an uncle in her eyes. No reason has been proffered by the Appellant why C2 would also turn against him unjustly. She certainly did not appear to have been manipulated by anyone in her evidence despite her age. [emphasis added]

84 The second was the medical evidence. At [68] of the GD, the Judge noted as follows:

> Corroborative evidence may also be found in the medical evidence. What C1 told the doctors was by and large consistent with her evidence in court. Naturally, while the hymenal tears indicated previous sexual penetration of the vagina, they did not point to the Appellant being the perpetrator.

Sentence

85 On these grounds, the Judge found the Appellant guilty of the five proceeded charges and sentenced the Appellant to 29 years' imprisonment and to a maximum of 24 strokes of the cane (see above at [10]–[11]).

The appeal

86 The Appellant in his Notice of Appeal dated 2 December 2010 stated that he wished to appeal against his sentence and conviction. On 8 February 2011, the Appellant confirmed that he would not be engaging counsel to act for his appeal. Soon after, on 2 March 2011, the Appellant's filed his Petition of Appeal, which at paras 2 and 3 states as follows:

> *2. Your Petitioner is dissatisfied with the said judgment on the grounds* **the sentence is manifestly excessive and unreasonable**
>
> *3. Your Petitioner prays that such Judgment or sentence may be reversed annulled or that such order made thereon as Justice may require.*
>
> [emphasis in original in italics and bold]

The first Court of Appeal hearing ("the first CA hearing") on 29 July 2011

87 Two preliminary issues took centre stage at the first hearing before this court on 29 July 2011.

88 First, was the issue of whether the Appellant was appealing against only his sentence or his conviction as well. This confusion arose from the different grounds of appeal stated in the Appellant's Notice of Appeal and subsequent Petition of Appeal (see above at [86]). Clarifications were thus sought from the Appellant who confirmed at the hearing that he wished to appeal against his sentence *and* conviction. The Prosecution did not object. Accordingly, the appeal proceeded on that basis.

89 Secondly, there were a number of issues which arose from a perusal of the *Official Transcript* and exhibits in the proceedings in the court below which we felt the Prosecution ought to address this court on. Accordingly, we ordered that the appeal be adjourned for:

(a) *pro bono* counsel to be appointed to assist the Appellant; and

(b) the Prosecution to reply to this court's request for further information ("the CA's first round of requests") on:

(i) *the mother's, Lathiff's and C1's phone records* in order to verify their testimony on when the couple first met and the sequence of events on 29 April 2009 ("the phone records");

(ii) *the police report that the mother allegedly lodged for the loss of her IC* in order to verify the sister's testimony that Lathiff and the mother had met on that occasion ("the loss of IC police report");

(iii) *the relevant pages of Lathiff and the mother's passports for all travels they undertook in 2009 and 2010* to determine whether the couple had indeed travelled to Batam together and if they had undertaken other travels together prior to 29 April 2009 ("the passport pages");

(iv) *C1's school report* to determine the extent of C1's "disciplinary problems" that caused the mother to decline Dr Lim's request for the said report ("C1's school report"); and

(v) *C1's full HSA statement* to ascertain the context of the answers which C1 had later disavowed at trial and whether the statement contained further relevant information ("C1's HSA statement").

We also ordered that a pre-trial conference ("PTC") be held in a month's time, for the purpose of allowing the court to receive updates on the CA's first round of requests.

The events between the first and second CA hearing

The first PTC

90 On 23 August 2011, the Prosecution furnished the following information to this court:

(a) the ICA travel records of Lathiff, the mother and her brother;

(b) C1's school report; and

(c) C1's full statement in relation to the HSA investigation ("C1's HSA statement").

91 The Prosecution also informed this court that the mother had not lodged a police report for the loss of her IC and it would need more time for the service providers to furnish the phone records.

92 The ICA travel records revealed that Lathiff and the mother had made six overseas trips together in 2010. On one of these occasions, they were also accompanied by the mother's brother.

93 However, the production of the ICA records was not in strict compliance with our request for all the relevant pages in Lathiff and the mother's passports for all travels they undertook in 2009 and 2010 (see above at [89(b)(iii)]). This was not an insignificant difference since the ICA travel records only highlighted the fact that the couple had gone on joint overseas trips without stating the precise destinations where they had travelled to.

94 C1's school report dated 17 August 2011 raised serious concerns about the credibility of her trial testimony. The school report was authored by the school's counsellor and discipline co-ordinator ("the school counsellor"). In the report, the school counsellor noted that C1 was always "a very quiet and well-behaved girl" who "adhered to school rules and did the her [*sic*] school work". However, the school counsellor went on to state that:

> It was when a group of Malay boys from the Technical stream of the same level was heard boosting [*sic*] of **their *sexual endeavors with her*** **[*ie*, C1]** that a few issues came to light.
>
> Upon asking [C1] *she admitted that she was at the park next to may flower primary and did* ***a few adult acts – willingly*****.**
>
> The mother was informed and was asked to do the needful. On the school side she was counselled and daily monitoring was rendered. Arrangements were even made by the DM to give her different recess time, so as not to come in contact with the boys or his friends.
>
> [emphasis added in italics and bold italics]

95 Accordingly, the school report raised even more questions. Firstly, it did not state exactly when these "sexual endeavours" took place, although one can only infer that they must have happened sometime between January 2005 and October 2009, when C1 was in secondary school.

96 Additionally, the school report did not detail the precise nature of the "adult acts" or "sexual endeavours" that C1 had engaged in. This is significant in light C1's evidence that she never had voluntary sexual intercourse.

97 The final item that was disclosed by Prosecution at the first PTC was C1's HSA statement. In addition to the fragments of the HSA statement that could be read off the *Official Transcript* (see above at [40]), the full

statement also revealed that the mother had told C1 sometime in April 2010 that if the mother was ever caught for stealing cough syrup, *Baba* (Lathiff) would not admit to being the mastermind. The mother was also afraid to stop stealing because she was afraid that *Baba* would scold her.

The CA's second round of requests from the Prosecution

98 In light of these new facts emerging, the Prosecution was directed by this court (on 25 August 2011) to provide details with regard to:

(a) the travel destinations of Lathiff, the mother and her brother for the six overlapping travel dates; and

(b) the precise nature of the "sexual endeavours" and "adult acts" disclosed in the school report.

99 The Prosecution were also invited to produce:

(a) all the statements made by C1, the mother and Lathiff to the police; and

(b) all the statements made by the Appellant to the police.

The Prosecution's reply

100 By a letter dated 31 August 2011, the Prosecution updated this court, as follows:

(a) It would obtain the relevant travel records.

(b) The information as to the "adults acts" "is not available from those who prepared the report".

(c) C1, the mother and Lathiff's statements recorded by the police and HSA in relation to the theft of cough syrup investigation would be disclosed to Appellant's counsel under the rules for disclosure set out in *Muhammad bin Kadar v PP* [2011] 3 SLR 1205 ("*Muhammad bin Kadar*").

(d) The statements made by C1, the mother and Lathiff to the police in relation to the rape investigation could not be disclosed without a prior request from Appellant's counsel under s 122(2) of the CPC (Cap 68). Furthermore, the Prosecution were not obliged to disclose these statements according to the *Muhammad bin Kadar* rules of disclosure.

(e) Barring any objections from the Appellant, the Appellant's police statements would be made available to this court.

(f) The Prosecution's position was that if this court considered the conviction unsafe *purely on the basis that the new information was not adequately explored at the trial below*, then the proper course would

be to set aside the conviction and remit the matter to the Judge for further evidence to be led.

101 In response to the Prosecution's s 122(2) CPC (Cap 68) objection (see above, at [100(d)]), the Appellant, on 17 January 2012, made a formal request to the Prosecution for all the police statements of C1, the mother and Lathiff recorded in relation to the rape investigation to be produced to this court.

The second and third PTC

102 Subsequently, two more PTCs were held. The second PTC on 21 September 2011 was an uneventful affair with the Prosecution updating the court that the phone and travel records were not available yet.

103 At the third PTC on 28 October 2011, the Prosecution updated the court that:

(a) The phone records received thus far from the service providers was of no use as it related to pre-paid SIM cards. As such, more time was required to uncover the phone records for the remaining phone lines.

(b) The mother's passport revealed that five of the six trips with Lathiff were to Malaysia while one trip on 12 July 2010 was to Batam. Lathiff's passport was reported lost in September 2010 and was unavailable for verification. The couple's last overlapping trip on 12 October 2010 was captured in his replacement passport. This was to Malaysia.

104 The Appellant's counsel updated the court that they:

(a) intended to interview the school counsellor in the presence of the police;

(b) wished to apply to refer to the statements made by C1, the mother and Lathiff to the police in relation to the rape charges under s 122(2) CPC (Cap 68);

(c) had been instructed that the Appellant had no objections to having his police statements produced to this court; and

(d) would be requesting from the Prosecution: (i) the mother's CPF/employment records; (ii) the status of proceedings in relation to the theft of cough syrup investigation; and (iii) the police report relating to C1's running away from home in 2006. A formal request to this effect was made by letter to the Prosecution on 4 November 2011.

The fourth PTC

105 At the fourth PTC on 16 January 2012, the Prosecution updated the court that:

(a) The only available phone records for the mother and Lathiff were from 1 September 2009 to 31 December 2010. All phone records prior to 1 September 2009 had been purged from the service provider's records.

(b) All the five trips to Malaysia made by the mother and Lathiff were through the Woodlands Checkpoint.

(c) The school counsellor was able to recall the details of the "adult acts" and "sexual endeavours" even though the school records had been purged. This would be set out in a conditioned statement to be exhibited to the court.

106 Meanwhile, the Appellant's counsel updated the court that they *would not* be pursuing their requests which were set out in their letter to the Prosecution dated 4 November 2011 (see above at [104(d)]).

Summary of the status of the CA's requests before the second CA hearing

107 To summarise, at the commencement of the second CA hearing on 8 February 2012, the status of all the requests to the Prosecution was as follows:

(a) *The phone records* of the mother and Lathiff prior to 1 September 2009 had been purged. However, more time was required to provide the phone records for the mother's last mobile phone number and her mother's home at Yishun.

(b) *The loss of IC report*, according to the Prosecution, does not exist.

(c) *The mother's passport pages* reveal that five of the six trips she took with Lathiff were to Malaysia (via the Woodlands checkpoint) while one trip on 12 July 2010 was to Batam.

(d) *Lathiff's passport* was reported lost in September 2010 and was unavailable for verification. However, the couple's last joint trip on 12 October 2010 is captured in his replacement passport. This was to Malaysia.

(e) *C1's school report* and the school counsellor's conditioned statement dated 19 January 2012 were submitted.

(f) *C1's full HSA statement* in relation to the HSA investigation was submitted.

(g) *The mother, Lathiff and C1's police statements in relation to the theft of cough syrup investigation* were submitted.

(h) *The mother, Lathiff and C1's police statements in relation to the rape investigation* would be submitted pending the Appellant's formal request under s 122(2) CPC (Cap 68).

(i) The Appellant's police statements were submitted.

Parties' submissions at the second hearing before the Court of Appeal ("the second CA hearing") on 8 February 2012

108 At the second CA hearing, the Appellant's counsel submitted that:

(a) Even without taking into account the fundamental problems caused by the additional new materials, the conviction in this case is totally unwarranted. Given the suspect credibility of C1, the material inconsistencies in her evidence and various aspects of her evidence which were simply inherently incredible, the Prosecution's case fell woefully short of proof beyond a reasonable doubt. Quite apart from that, independent corroborative evidence was totally absent.

(b) The new material, should this court be inclined to consider it, compounds the Prosecution's difficulties even further.

(c) Accordingly, the conviction is plainly unsafe and ought to be quashed, without the need to remit this matter back to trial to be reconsidered in light of the fresh evidence.

(d) In the alternative, a retrial should be ordered before a new judge.

109 In response, the Prosecution argued that:

(a) Based on the new material there is no basis to conclude that the finding of guilt has been arrived at against the weight of the evidence or is plainly wrong.

(b) However, if this court considers that the conviction is unsafe on the basis that the matters which the court seeks to verify were not adequately explored in the trial below, then the proper course is for this court to remit the matter to the Judge for further evidence to be led.

Issues before this court

110 The questions to be resolved in the appeal are as follows:

(a) Was C1's testimony "unusually convincing"?

(b) Was there any corroborative evidence, which would make up for any deficiencies in C1's testimony?

(c) Did the Prosecution at the trial below prove beyond a reasonable doubt that the complaint was not the result of collusion between the mother, C1 and Lathiff?

(d) If the conviction is unsafe, should a retrial before a new judge, remittance on an issue before the Judge or an acquittal be ordered?

Issue 1: Was C1's testimony "unusually convincing"?

The law

111 It is well-established that in a case where no other evidence is available, a complainant's testimony can constitute proof beyond reasonable doubt (see s 136 of the Evidence Act (Cap 97, 1997 Rev Ed) ("EA")) – but only when it is so "unusually convincing" as to overcome any doubts that might arise from the lack of corroboration (see generally the decision of this court in *PP v Mohammed Liton Mohammed Syeed Mallik* [2008] 1 SLR(R) 601 at [37]–[44] ("*Liton*") and the Singapore High Court decision of *XP v PP* [2008] 4 SLR(R) 686 at [27]–[36] ("*XP*")).

112 The need for "fine-tooth comb" scrutiny in so far as allegations of sexual abuse are concerned is particularly acute, "given both the ease with which allegations of sexual assault may be fabricated and the concomitant difficulty of rebutting such allegations" (see the Singapore High Court decision of *Chng Yew Chin v PP* [2006] 4 SLR(R) 124 at [33], cited with approval in *Liton* at [37]–[38]).

113 In *XP*, V K Rajah JA observed (at [31]) that the requirement that the alleged victim's evidence ought to be "unusually convincing":

> … *does nothing, however, to change the ultimate rule that the Prosecution must prove its case beyond a reasonable doubt*, but it does suggest how the evidential Gordian knot may be untied if proof is to be found solely from the complainant's testimony against the Appellant. [emphasis added]

114 Apart from stating that its role is that of a cognitive aid, Rajah JA further elaborated on what "unusually convincing" entails (see *XP* at [29]–[35]). Rajah JA's pronouncements can be distilled into the following propositions:

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

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

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

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

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

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

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

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

> *court has access to the same material and is accordingly in an equal position to assess the veracity of the witness's evidence* (see *Jagatheesan s/o Krishnasamy v PP* [2006] 4 SLR(R) 45 ('*Jagatheesan*') at [40], citing *PP v Choo Thiam Hock* [1994] 2 SLR(R) 702 at [11]).
>
> [emphasis added in italics and bold italics]

Application of law to the facts

116 In light of our subsequent finding that the Judge erred in finding the medical evidence and C2's testimony to be corroborative (see Issue 2 below, at [177]–[208]), the need for C1's testimony to be "unusually convincing" takes on greater significance. However, as will be demonstrated below, the *Official Transcript* reveals a number of significant discrepancies in C1's testimony which demonstrates that it is not "unusually convincing". Moreover, this assessment is *confirmed* by the new material which has been disclosed by the Prosecution at the request of this court.

C1's evidence at the trial below

C1's pre-trial testimony

117 C1's First Information Report ("FIR") was lodged at Ang Mo Kio South NPC at 4.48pm on 29 April 2009. The report was signed by C1 and reads (in its entirety), as follows:

> Sometime in year 2006, I was raped by my father one [name of Appellant and his NRIC No] at [the flat].

118 Suffice it to note, that apart from its brevity, the offence alleged in the FIR took place in *2006* whereas the proceeded charges took place in *1999* (one charge), *2003* (two charges), *2004* (one charge) and *2009* (one charge), respectively.

119 C1 was also interviewed by Dr Lim and Dr Pang on her mental state and sexual history, respectively. However, as will be demonstrated below (at [188]–[209]), both Dr Lim and Dr Pang's reports, contrary to the Judge's view (see above at [84]), are not corroborative and are of questionable probative value.

C1's testimony at the trial

RECOLLECTION OF THE FIRST CHARGE

120 In relation to the first charge, C1's evidence-in-chief was that the Appellant made her hold his penis and suck it and *put his finger on her vagina*. In cross-examination, C1 said that the Appellant made her hold his penis and suck it and *penetrated her vagina with his finger*. It appears

that the Judge preferred her earlier testimony without, with respect, noting this consequential inconsistency (see the GD ([11] *supra*) at [16]).

Recollection of the second charge

121 In relation to the second charge, C1's evidence-in-chief was that the Appellant inserted his finger into her vagina, made C1 suck his penis and inserted his penis into her vagina. This account was repeated by C1 when she was cross-examined by defence counsel.

122 However, Dr Pang's report mentioned that she was told by C1 that the first alleged rape also involved "digito-vaginal, oral-penile, *oral-vaginal* and penile-vaginal penetration" [emphasis added]. In her evidence-in-chief, Dr Pang confirmed that she had expressly asked C1: "[d]id he put his mouth to your vagina?" and that C1 had answered the question in the affirmative. C1 did not mention at any time during her testimony in the court below that the Appellant had put his mouth on her vagina during this incident. This takes on added significance, considering that C1 purported to give a detailed step-by-step account of the first alleged rape in 2003.

Recollection of the fifth charge

123 Regarding C1's recollection of the fifth and most contemporaneous charge which took place on 29 April 2009, the Judge found (see the GD at [64]), as follows:

> Her account about the events of 29 April 2009 was *particularly clear and cogent*, probably due to the fact that it was the most recent incident involving the Appellant and she was more mature by then. It was also the trigger event that led to the police report. [emphasis added]

124 However, despite its contemporaneous nature, in our view, C1's testimony suffers from a number of significant inconsistencies which were not, with respect, addressed by the Judge.

125 First, C1 testified that the Appellant had held her right wrist with his left hand and pulled her towards him. The Appellant managed to unbutton the first button below the collar button of her blouse. She told the Appellant: "*[C1] tak nak buat itu.*" (translated from Malay: "[C1], does not want to do it."). The Appellant replied: "*Macam tak biasa itu.*" (translated from Malay: "As if you haven't done it before."). C1 then said: "*[C1] nak call mummy ini.*" (translated: "I'm going to call mummy."), took out her mobile phone and dialled her mother's number. The Appellant tried to close C1's flip phone but by that time her mother had picked up. C1 asked her mother where she was. The mother replied that she was on the bus. C1 told mother that she was leaving the flat. Then, C1 quickly took her school bag and shoes and walked out of the flat.

126 When, however, C1 was recalled, she testified that the Appellant had held her right hand with his left hand and she stood up. She clarified that while the Appellant was holding her right hand and unbuttoning her blouse, she managed to take out her mobile phone from right skirt pocket with her right hand. When C1 was making the call with her mobile phone, the Appellant tried to close the phone's flap as that would end the call. C1 further added that that while she was struggling, the Appellant moved behind her and held her left hand. When questioned by defence counsel whether this was mentioned in C1's evidence-in-chief, she replied that she did not state so. Nonetheless, C1 went on to state that after the Appellant had moved behind her, he held her left hand and then she took out her mobile phone from her right skirt pocket. When further questioned, she changed her earlier position and said that the Appellant had not moved behind her but she had shifted. She later maintained that the Appellant did not release her hand throughout. C1 also stated that the Appellant *did not* manage to unbutton any button on her blouse. C1 clarified that her earlier equivocation on the question was because she was tired and confused. This led the Judge to amend the fifth charge of his own accord to:

> … wit, by ~~undoing~~ *attempting to* undo one button. [strikethrough in original]

127 On either of C1's accounts, it seems improbable that she was able to overpower the Appellant's grip on her right hand or wrist, reach into her right skirt pocket, fish out her mobile phone and call her mother – all with the same right hand, whilst in the midst of a struggle. Furthermore, it is also questionable how the Appellant was able to unbutton C1's blouse, hold her hand throughout and try to stop her from using her mobile phone – all at the same time.

128 Secondly, when C1 confided in her mother, the latter testified that she had asked C1 whether it was "*sedap*" (translated: "nice or not"). The mother explained that she asked this question to find out if her daughter was a willing party. When recalled, C1 denied that the mother had said this.

129 Even taking into account the fact that a victim's testimony of such a traumatic event would inevitably be imperfect, these are troubling inconsistencies which were apparently not scrutinised below.

The frequency of the alleged rapes

130 Apart from the *internal inconsistencies* within C1's trial testimony with regard to the alleged rapes, the new material brought to focus a significant *external inconsistency* in C1's account of the frequency of the alleged rapes. To be clear, this inconsistency was, as we shall see, already present in the *Official Transcript* and exhibits in the trial below. In this regard, the relevant new material, *viz*, C1's statements recorded by the

police, *only* serves to *confirm* our conclusion that C1's testimony was *not* "unusually convincing".

131 Beginning chronologically, in the FIR on 29 April 2009 at 4.48pm, C1 stated that she had *been rape*d by the Appellant "*[s]ometime in year 2006*". The new material submitted by the Prosecution contains Lathiff's investigation diary entry of his interview with C1 on 29 April 2009 at 5.45pm. In this diary entry, C1 was recorded as stating that *from sometime in 2003 to 2005, she was raped by her father "on 4 to 5 occasions in a month"*. C1 also claimed that *from "July 2006 to Dec[ember] 2006, her father had sex with her on two or three occasions"*.

132 The next interview was conducted by SI Chandra a few hours later at 9.35pm. This time, C1's breakdown of the alleged rapes was as follows: *four to five times in 2003*; *three times in 2004; three times in 2005; and two times in 2006*, respectively. Taking even the most conservative estimate, these two accounts, given within the span of a few hours, represent a difference of close to 100 rapes.

133 In her statement recorded on 30 April 2009 at 3.15pm by SI Chandra, C1 stated that she was raped *four times in 2003; three to four times in 2004; and twice in 2006*. Two and a half months later, C1 recorded another statement on 13 July 2009 at 4.45 pm where she confirmed that there were *no rapes in 2005 and that she was raped twice in July and November 2006 respectively*.

134 A year later, C1's statement of 15 July 2010 stated that she was *raped sometime in 2004 during the day time* and *sometime in February 2006*. As is clear from these police statements, there is hardly a single instance where C1 maintained a consistent account of the frequency of the alleged rapes over two or more consecutive statements. There is also a clear trend of C1's allegations of the frequency of the rapes decreasing with each successive statement she gave to the police.

135 Further, the police Statement of Facts ("SOF"), which was prepared by SI Chandra and furnished to Dr Lim, stated that C1 was raped *"4 to 5 occasions in a month" from 2003 to 2005* and *two to three times between July and December 2006*.

136 This substantially larger figure was corroborated by both medical experts. Dr Lim's report dated 10 July 2009 stated that:

> C1 said that her father had vaginal sex with her regularly during the period when she was in Primary 4 [2003] till Secondary One [2006], *averaging 4 to 5 times a month.* [emphasis added]

This was confirmed in Dr Lim's trial testimony. The same figure was repeated by C1 to Dr Pang as recorded in Dr Pang's report and hand-written notes. Further, Dr Pang's trial testimony was that her medical

report was based on C1's answers to the specific questions which she had posed to C1.

137 This is in stark contrast to the evidence at the trial itself where C1 alleged that there were *two isolated rape incidents in 2003, two rape incidents in 2004 and two rape incidents in 2006*.

138 At the second CA hearing, these somewhat glaring inconsistencies were forcefully raised by counsel for the Appellant, Mr Harpreet Singh SC ("Mr Singh"), who submitted that they cannot be easily explained on the basis that C1's memory of the rapes had faded over time.

139 Counsel for the Prosecution, Ms Lee Lit Cheng ("Ms Lee"), submitted that there was an innocent explanation for the variations in frequency. Apart from Lathiff's investigation diary entry on 29 April 2009, all of the remaining statements given by C1 to the police did not indicate that the rapes took place between four to five times a month. Therefore, the SOF must have mistakenly reflected this substantially larger figure. This was clearly an oversight by SI Chandra because this substantially larger figure was never recorded by SI Chandra in any of the statements he took from C1. The SOF was then furnished to Dr Lim, which would explain why his report repeated the substantially larger figure. This led to the error being innocently perpetuated in Dr Lim and Dr Pang's testimony at the trial itself. This will be referred to as the "innocent explanation thesis".

140 However, there is no indication from Dr Lim's testimony at the trial itself that he had blindly copied the substantially larger figure from the SOF. In fact, Dr Lim's testimony clearly states otherwise:

> Q Now, Dr Lim, now, can you, based on your recollection from your notes, tell us how [C1] describe the background of this --- this sexual intercourse to you? How were---how---how did those information basically come out during the interview?
>
> A Right. So---usually during the interview, the---the first bit, erm, is when I build some rapport with er. So I---I obtained some information about background, family history before I went on to ask her about what---whether she was aware about the charge. So she told me that the charge is child abuse. *When I asked her, erm, what that meant, she said in her own words, 'My biological father had sex with me when I was in primary 4.' Then she went on to say that this happened for about 4 to 5 times a month since primary 4 and the last time it happened was in secondary 1*. After that, erm, basically, I probed with some questions before she went on to describe that these events happened at home and because, erm, *there were several occasions*, she said that usually, it would happen after midnight and it would take place in the halls and that her father will carry her out to the hall.
>
> [emphasis added]

141 Pertinently, the Prosecution at the trial were content to accept Dr Lim's account that C1 had specifically told him that the "rapes" had "happened for about 4 to 5 times a month since primary 4 and the last time it happened was in secondary 1".

142 Further, we think it is important to point out that the innocent explanation thesis is contradicted by Dr Pang's report and hand-written notes which similarly recorded the substantially larger figure of four to five rapes a month from 2003 to 2006. We pause to note that this would conservatively add up to 192 alleged rape incidents in total (see above at [132]). Indeed, as the Prosecution conceded at the second CA hearing, it appears that the SOF was not given to Dr Pang. In any event, Dr Pang testified that this information was unmistakably given by C1 in the course of their interview:

> *Q:* *At para 5, you begin with: [Reads] 'The assaults would happened'---'would happened 4 to 5 times a month …' And they would involve penile-vaginal and oral-penile intercourse. This information was given by who?*
>
> *A:* *Patient.*
>
> Q: And thereafter, it's stated in the same paragraph:
>
> [Reads] 'She claims that she was not restrained and not threatened with any weapons'---and---'the assaults stopped when she was in secondary 1 …'
>
> A: Yes.
>
> Q: And this information came from your examination with the victim.
>
> A: Er, no. The information came from---the assaults stopped when she was in secondary 1, came from the patient's history.
>
> Q: Patient's history. So the patient told you this herself?
>
> A: Yes.
>
> Q: Now what was the communication? What language did you all use?
>
> A: English.
>
> [emphasis added]

Dr Pang also confirmed this figure was given to her by C1 when she was re-called by the Appellant during the second tranche of the trial in the court below.

143 Moreover, the CID Report, which was a separate document from the SOF, given to Dr Pang before her interview with C1, did not mention the substantially larger figure of alleged rapes of four to five times a month *since 2003*. On the contrary, the CID Report plainly states that the assaults only began in 2006:

> On April 2009, the abovementioned lodged *a police report stating that since 2006 July*, she was sexually assaulted by her biological father. She claimed that

> the last coitus took place sometime in end 2006. Kindly examine for her *virgo intact*. [emphasis added]

144 We pause to observe, parenthetically, that this inconsistency between Dr Pang's report and the CID Report was raised by the defence counsel during Dr Pang's cross-examination and could therefore have been explored in the proceedings below. Indeed, the CID Report, which was exhibited in the Preliminary Inquiry ("PI") Bundle, was not admitted into evidence although the Prosecution explicitly sought the Judge's leave to do so at the end of Dr Pang's re-examination. The CID Report was again referred to by Dr Pang when she was later recalled by the Appellant after he had engaged counsel. The CID Report, was however not admitted into evidence. Thus, the CID Report only surfaced in its entirety when it was exhibited by the Appellant at the second CA hearing.

145 Returning to the inconsistencies in relation to the frequency of the alleged rapes committed by the Appellant on C1, the Prosecution's innocent explanation thesis would have us unquestioningly accept that three different witnesses, *ie*, Dr Lim, Dr Pang and SI Chandra, had made the same innocent mistake when recording C1's testimony independently of each other. This suggestion is, with respect, even more fanciful when one takes into account the fact that Dr Lim and Dr Pang have no vested interest in the matter and, more significantly, the SOF was never provided to Dr Pang.

146 It should also be emphasised that these inconsistencies in the frequency of the alleged rapes were already present in the *Official Transcript* and exhibits in the trial below (see above at [136]–[137]). In fact, the new material, particularly the SOF and Lathiff's investigation diary entry on 29 April 2009, only served to *confirm* our conclusion on the matter.

Was C1's testimony "unusually convincing"?

147 This significant *external* inconsistency in the frequency of the alleged rapes found in C1's trial testimony and her earlier statements to the police cogently suggest that C1's evidence was quite obviously questionable and therefore not "unusually convincing". It should be reiterated that this new material, *viz*, C1's statements to the police, only serves to confirm the same *external* inconsistency between C1's trial testimony and the doctors' reports, which were exhibited and subjected to cross-examination in the trial below.

148 In this respect, it is puzzling that the Prosecution had initially resisted disclosing to the Appellant, C1's statements to the police in relation to the rape investigation (see above at [100]). This is clear from the Prosecution's letter to the court dated 31 August 2011 where it was stated that:

> These statements [C1, Lathiff and the mother's statements made pursuant to the rape investigation] are not liable to disclosure under the criteria set out in *Muhammad bin Kadar & Ismil bin Kadar v PP* [2011] SGCA 32 ('*Muhammad bin Kadar*');

149 The relevant passage in *Muhammad bin Kadar* ([100] *supra* at [113]–[114]) reads as follows:

> 113 … It suffices for us to say that we agree with the Prosecution that the duty of disclosure certainly does not cover all unused material or even all evidence inconsistent with the Prosecution's case. However, the Prosecution must disclose to the Defence material which takes the form of:
>
> (a) any unused material that is likely to be admissible and that might reasonably be regarded as credible and relevant to the guilt or innocence of the Appellant; and
>
> (b) any unused material that is likely to be inadmissible, but would provide a real (not fanciful) chance of pursuing a line of inquiry that leads to material that is likely to be admissible and that might reasonably be regarded as credible and relevant to the guilt or innocence of the Appellant.
>
> ***This will not include material which is neutral or adverse to the Appellant – it only includes material that tends to undermine the Prosecution's case or strengthen the Defence's case.*** To ensure congruence with the statutory scheme for disclosure this material should initially be disclosed no later than seven days before the date fixed for the committal hearing for High Court trials or two weeks from the CCDC for Subordinate Court trials (corresponding to the timelines in ss 176(3)(b) and 161(2) of the CPC 2010 respectively). Where under s 159 of the CPC 2010 the statutory criminal case disclosure procedures do not apply, ***the common law disclosure described here should take place at the latest before the trial begins.*** The obligation of disclosure (as the Prosecution has correctly acknowledged in its further submissions) is a continuing one and ***only ends when the case has been completely disposed of, including any appeal. Throughout this period, the Prosecution is obliged to continuously evaluate undisclosed material in its possession to see if it ought to be the subject of further disclosure.***
>
> 114 When we use the phrase 'material … that might reasonably be regarded as credible and relevant', we refer to ***material that is*** *prima facie* ***credible and relevant. This is to be determined on an objective test.*** We reject the Prosecution's submission that it should have an exclusive and an unquestionable right to assess an item of inconsistent evidence alongside other evidence available to it, *which may never be seen by the court*, and in that way *unilaterally* decide on its credibility and/or relevance (and therefore disclosability) based on its own *bona fide* exercise of subjective discretion. *Such a procedure provides an unacceptably low level of accountability.*
>
> [emphasis in original; emphasis added in bold italics]

150 In fact, it was only after the Appellant's application under s 122(2) CPC (Cap 68) that the Prosecution disclosed to the Appellant C1's police

statements in relation to the rape investigation *during the second CA hearing*.

151 C1's police statements were by all accounts "*prima facie credible and relevant*" to the Appellant's guilt or innocence. Indeed, this must have been tacitly accepted by the Prosecution as evidenced by its position that the new evidence should be remitted before the Judge, a point which we will return to later (see Issue 4 below, at [269]–[309]). After all, if the Prosecution was indeed of the view that C1's police statements were completely irrelevant, why seek to remit the matter as opposed to an outright conviction, even if this was presented as an argument in the alternative?

152 Moreover, it is clear that all six of C1's previously undisclosed C1's police statements are at least relevant in so far as they revealed, *inter alia*, significant discrepancies in the frequency of the alleged rapes. This should have engaged the Prosecution's *continuing obligation of disclosure* that "*only ends when the case has been completely disposed of, including any appeal*" [emphasis added] (see *Muhammad bin Kadar* at [113]). Moreover, the *Muhammad bin Kadar* judgment was released on 5 July 2011. Whilst this was admittedly close to the first CA hearing for this case on 29 July 2011, it was well before the second CA hearing on 8 February 2012.

Epilogue: the new material

153 While the above findings establish that C1's testimony was not "unusually convincing" and therefore sufficient to acquit the Appellant (in the absence of corroborative evidence, as to which see [173]–[209] below), we pause to note a number of disquieting further *external inconsistencies* between C1's trial testimony and the new material which undermine C1's credibility.

Alleged physical abuse

154 An even more striking revelation that emerged from C1's previously undisclosed police statements was the allegation that she had been beaten and slapped by her father when she refused him sex.

155 C1's statement recorded on 30 April 2009 at 3.15pm stated that she was "beaten up" by the Appellant when she refused him sex on one occasion. In C1's statement recorded on 15 July 2010 at 5.25pm, she claimed that the Appellant had attempted to have sex with C1 during one night in 2004. When C1 resisted, the Appellant "slapped" her. Similarly, C1's statement recorded on 19 July 2010 also stated that in 2004 there was one occasion when the Appellant beat C1 up when she refused to have sex with him.

156 However, C1's testimony at trial made no mention of any physical abuse by the Appellant towards her. This omission is, in our view, significant given that C1's mind was directed to the issue of family violence when she explained in her examination in-chief that she did not want to tell her mother about the alleged rapes as she was scared that "my mother would ask my father and I'm afraid that my father will beat her up". Furthermore, there are no references to any physical abuse towards C1 in Dr Pang's and Dr Lim's reports although Dr Lim recorded C1's account of how the Appellant was physically violent towards *the mother*.

The frequency of the alleged incidents of fellatio

157 C1's testimony in the court below was that there were sporadic incidents of fellatio in 1999 and 2000. In her evidence-in-chief, C1 stated that apart from the first time she was asked to perform fellatio when she was in kindergarten two (in 1999), which formed the basis of the first charge, there were "*other incidents*" of fellatio that year. C1 also alleged that the incidents of fellatio continued in primary one (2000) and that no such incidents occurred in 2001 and 2002. Under cross-examination, C1 maintained the position that she was made to perform fellatio "*a few times*".

158 However, C1's police statements reveal a *different* picture. C1's police statement dated 19 July 2010 claimed that the Appellant had asked C1 to:

> [S]uck his penis about *3 times to 4 times a month*. Sometimes, he will not ask me to do it for a few months and then he will start again. I cannot remember exactly how many times I was made to suck his penis.
>
> It continued until I was in Primary 1 in the year 2000 … The oral sex continued through Primary 1 until I was about to go to Primary 2. My father then stopped asking me to suck his penis.
>
> [emphasis added]

159 Similarly, the SOF stated that:

> The [Appellant] requested her to perform oral sex on him about *twice a week* [from the first incident in 1999]. [C1] claimed that the oral sex activities stopped when she was in *Pri 2*. [emphasis added]

160 In fact, this is a glaring inconsistency, which cannot be dismissed merely on the basis that C1's recollection of events in the distant past is inevitably imperfect. As the Appellant's submissions notes:

> As with the case of the frequency of the alleged rape incidents, there is such a stark contrast between the 2 versions as to seriously undermine [C1's] credibility and the overall strength of the Prosecution's case. *Again, if, as [C1] had informed the Police, she had been made to perform fellatio 2 times each week (or 8 times each month) over 2 years, one would have expected her evidence at trial and the Prosecution's closing submissions to reflect this. The*

> *conspicuous absence of any such suggestion at trial is (as in the case of the alleged rape incidents) fundamentally detrimental to her credibility and the force of her testimony.* [emphasis added]

The people C1 told about the alleged rapes

161 When questioned during the trial as to whether C1 had disclosed the alleged rapes to any person, C1 only mentioned that she had told her younger sister (C2) about the rapes. However, the information disclosed in the new material cast a somewhat different light on this account.

162 C1's statements dated: 29 April 2009 at 9.35pm; 30 April at 3.15pm; and 19 July 2010 mention that she had told her ex-boyfriend in December 2008 that she had been raped. C1 had dated him for six months and they had broken off the relationship sometime in February 2009. His mobile phone number was recorded in C1's statements dated 29 April 2009 at 9.35pm and 30 April at 3.15pm but surprisingly no serious follow-up action appears to have been taken by the investigators to locate this ex-boyfriend. This account is consistent with Dr Pang's testimony that C1 had told her ex-boyfriend of the sexual assaults. This was a particularly material omission from C1's trial testimony.

C1's previous sexual history

163 The Prosecution were directed by this court to produce C1's school report owing to the less than convincing reason the mother and C1 gave at trial for denying its production to Dr Lim (see above at [45] and [89(b)(iv)]). To recapitulate, the mother claimed that she had not wanted C1's school to know about the alleged rapes. However, C1 admitted in cross-examination that the school report would expose her disciplinary problems at school:

> Q: Now, [C1], the Court has been told by the doctor from the Child Guidance Clinic, Dr Lim, I think you may recall him---
>
> A: Mm, mm.
>
> Q: ---at IMH---
>
> A: Mm-hm.
>
> Q: ---that you did not attend the counselling session which was recommended by the doctor. Can you tell the Court why you failed to turn up for counselling?
>
> A: My mother didn't tell me that I have---for the counselling.
>
> A: Oh, okay.
>
> A: Mm-hm.
>
> Q: You didn't know that there was---
>
> A: No.

Q: Do you als---do you know that actually the doctor asked your mother permission to get a school report on you?

A: Mm, yah.

Q: And---

A: Then my mother say, mm, she didn't allow.

Q: Yes. Do you know why she didn't?

A: Because she---she didn't want my school to know anything about this.

Q: Could it be that perhaps the report would expose your disciplinary problems at school?

A: Mm, yah.

Q: Yes. The answer was 'yes', right?

A: Yes.

164 It should also be noted that, barely a few questions later, C1 denied having disciplinary problems at school and at home prior to April 2009. Moreover, the mother had earlier in the trial denied that C1 had other disciplinary problems apart from the incident when she ran away from home in April 2006. *Most significantly, both CI and her mother took great pains to conceal her history of previous sexual indiscretions.*

165 The school report dated 17 August 2011 was eventually submitted by the Prosecution on 23 August 2011. The relevant paragraphs read as follows:

> It was when a group of Malay boys from the Technical stream of the same level was heard boosting [*sic*] of *their sexual endeavors with* her [C1] that a few issues came to light.
>
> *Upon asking [C1] she admitted that she was at the [nearby] park … and did a few adult acts – willingly.*
>
> The mother was informed and was asked to do the needful. On the school side she was counselled and daily monitoring was rendered. Arrangements were even made by the DM to give her different recess time, so as not to come in contact with the boys or his friends.
>
> [emphasis added]

166 In response to the second round of requests from this court that sought, *inter alia*, an elaboration of what these "adult acts" consisted of, the Prosecution, in its letter dated 31 August 2011, stated that the information relating to C1's "adults acts" and "sexual endeavours" "*was not available from those who prepared the report*" (see above at [100(b)]) However, during the fourth PTC held on 16 January 2012, the Prosecution informed the court that the school counsellor was able to recall the information even though the school records had been purged (see above at [105(c)]).

167 The counsellor's conditioned statement dated 19 January 2012 states that, sometime in 2007, C1, who was then in secondary two, was interviewed by the counsellor after she had heard two boys boasting about their "sexual endeavours" with C1. In her interview with the two boys, they revealed that they had spent two nights at a park with C1. One of the boys informed the counsellor that:

> *[D]uring the kissing, he forcefully pushed [C1]'s head towards his groin and made her perform oral sex on him. Subsequently, I gathered from* [him] *that she performed the act of oral sex willingly. I cannot remember if [C1] performed oral sex on the other boy.*
>
> On the second night, the two boys attempted to perform anal sex on [C1] but their attempts did not materialise. No oral sex took place on the second night apart from kissing. Separately I interviewed [C1] about the revelations made by the two boys. All the interviews I conducted with the trio were done separately.
>
> …
>
> When I interviewed [C1] about why she spent two nights at the park, *she informed me that she had ran away from home due to family problems. I still remember that she started to cry and did not want to elaborate about her family problems. It took her a while to calm down.*
>
> …
>
> The reason why we decided to inform their parents instead of making a police report was because the incidents took place outside the school premises and during a weekend. We left the decision to the parents if they wished to initiate a police report. As for [C1]'s mother, she was invited to the school and we conveyed the message to her. *I remembered clearly that she wanted to discuss the matter with her husband before deciding whether she would make a police report.*
>
> [emphasis added]

168 The Prosecution's position on these two pieces of new material, *viz*, the school report and school counsellor's conditioned statement, is that whether C1 engaged in any sexual act with the two boys was irrelevant to the question whether the Appellant had raped her. This seemingly simple logic is, with respect, questionable.

169 On the contrary, this new material is, in our view, hardly irrelevant to the question as to whether the Appellant had raped C1. First, it undermines C1's overall credibility by contradicting her testimony that she was not sexually active apart from the alleged rapes. At the trial, C1 had emphatically testified that she did not have sexual intercourse with any of her three boyfriends and only shared "just a kiss on the cheek" with one of the boys. Dr Pang's report recorded that C1 had a boyfriend when she was in secondary one, but C1 had claimed that they did not have any sexual relations. Similarly, Dr Lim's report recorded that C1 had

"previous non-sexual relationships with 3 boys, the longest of which lasted over a year starting from Secondary One".

170 Secondly, and more significantly, the new material raises the very real possibility that C1's hymenal tears could be attributable to conduct unrelated to the Appellant. The Judge was unaware of this.

171 We are mindful, however, that the fact that C1 might have previously engaged in "adult acts" does not in itself compromise her credibility. This is, in our view, to improperly engage in the "forbidden chain of reasoning" (see Lord Hailsham's speech in the House of Lords decision of *Director of Public Prosecutions v Boardman* [1975] AC 421 at 453). Instead, Mr Singh quite correctly relied on these new pieces of evidence to suggest that:

> The attempt by the Complainant and her mother to suppress the school report raises serious questions as to her overall credibility and whether she is being '*forthright*' with the Court. The Complainant was obviously not being *'forthright'* when she attempted to suppress this incident. [emphasis in original]

Indeed, it has been foremost in our minds that it is the Appellant's alleged conduct and *not* C1's sexual history that is on trial.

172 That said, the new material remains (as we have pointed out above) relevant in rebutting C1's testimony in the lower court that she was not sexually active. To reiterate, C1's sexual history would indeed be completely irrelevant but for the fact that, based on C1's trial testimony, C1's hymenal tears could not be plausibly attributed to anyone but the Appellant (see above at [169]). The new evidence changes all that, and, to that very limited extent, it is highly significant especially given that the Judge's GD ([11] *supra* at [30]) made reference to the fact that, "C1 said that she did not have sex with any other person *besides [the Appellant]*" [emphasis added].

Issue 2: Was there any corroborative evidence?

The law

173 It is settled law that where the evidence of a complainant is not "unusually convincing", an accused's conviction is unsafe unless there is some corroboration of the complainant's story. This requirement was laid down in Federation of Malaya High Court decision of *Public Prosecutor v Mardai* [1950] MLJ 33 where Spencer-Wilkinson J declared (at 33), as follows:

> Whilst there is no rule of law in this country that in sexual offences the evidence of the complainant must be corroborated; nevertheless it appears to me, as a matter of common sense, to be unsafe to convict in cases of this kind unless either the evidence of the complainant is unusually convincing or

> there is some corroboration of the complainant's story. *It would be sufficient, in my view, if that corroboration consisted only of a* ***subsequent complaint by complainant herself*** *provided that the statement* ***implicated the Appellant*** *and was* ***made at the first reasonable opportunity after the commission of the offence.*** [emphasis added in italics and bold italics]

The EA did not, at its inception, provide a definition of corroboration and still does not do so. In *Liton* ([111] *supra*), this court (at [43]) preferred Spencer-Wilkinson J's more liberal approach to corroboration ("liberal corroboration") as opposed to the stricter traditional common law definition laid down in *The King v Baskerville* [1916] 2 KB 658 at 667 ("*Baskerville*") of independent evidence implicating the Appellant in a material particular ("*Baskerville* corroboration"):

> … [I]t is clear that the Baskerville standard … does not apply in its strict form in Singapore since Yong CJ, in *Tang Kin Seng* ([37] supra), advocated a liberal approach in determining whether a particular piece of evidence can amount to corroboration. This is so, notwithstanding Yong CJ's apparent allusion to the whole or part of the *Baskerville* standard in *B v PP* [2003] 1 SLR(R) 400 (at [27]); *Lee Kwang Peng* ([38] supra) at [71]; and *Kwan Peng Hong* ([37] supra) at [37] as being 'essential' in nature. In our view, to adopt a stringent definition of what constitutes corroborative evidence goes against the liberal approach which Yong CJ himself alluded to as a broad principle of law in the other cases. In *Kwan Peng Hong* (at [36]), Yong CJ held that our courts 'have left behind a technical and inflexible approach to corroboration and its definition', and alluded to similar pronouncements in *Tang Kin Seng* (at [53]–[68]) and *Soh Yang Tick* ([37] supra at [43]). The principle of law which emerges from these cases is that the local approach to locating corroborative evidence is *liberal*, thus ensuring that the trial judge has the necessary flexibility to treat relevant evidence as corroborative. ***What is important is the substance as well as the relevance of the evidence, and whether it is supportive or confirmative of the weak evidence which it is meant to corroborate.*** [emphasis in original; emphasis added in bold italics]

174 Similarly in *XP* ([111] *supra*), Rajah JA observed (at [31]) that the liberal approach has:

> … found favour in our jurisprudence for its inherent pragmatism and intuitive good sense. …

Nonetheless, he immediately proceeded to reiterate that:

> *It does nothing, however, to change the ultimate rule that* the Prosecution must prove its case *beyond a reasonable doubt* … [emphasis added]

175 Indeed, it would be wholly misconceived to think that so-called "liberal corroboration" does not possess its own inherent conceptual constraints. For instance, s 159 of the EA states that former statements of witnesses may be proved to corroborate later testimony as to the same fact so long as the former statements was made "*at or about the time when the*

fact took place, or before any authority legally competent to investigate the fact" [emphasis added]. Section 159 of the EA reads as follows:

> **Former statements of witness may be proved to corroborate later testimony as to same fact**
>
> **159**. In order to corroborate the testimony of a witness, any former statement made by such witness, whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

176 In the Singapore High Court decision of *Lee Kwang Peng v PP* [1997] 2 SLR(R) 569 ("*Lee Kwang Peng*") (at [80]), Yong CJ applied s 159 of the EA to the facts in that case and found that:

> … the complaints made by the first and second complainants did not even fall within the ambit of s 159, *because they were made so long after the alleged incidents.* Even if that difficulty could be circumvented, I would still have to conclude, as did the High Court in *Khoo Kwoon Hain* that such corroboration, not being independent, could only be of 'little additional evidential value'. See also *John Benjamin Cadawanaltharayil v PP* [1995] 3 SLR 805 and *PP v Anuar bin Arshad* [1996] 2 SLR 52. [emphasis added]

In *Lee Kwang Peng*, the complaints by the first and second complainants were made one year and six months respectively after the alleged incidents.

177 As Yong CJ noted in the passage cited in the preceding paragraph, such "corroboration", not being independent, could only be of "little additional evidential value". In other words, whilst the failure to meet the strict standards of *Baskerville* corroboration does not rule out the *relevance* of evidence, this deficiency is likely to adversely affect the *weight* of the evidence which the court concerned may accord to it. In the final analysis, to reiterate the words of this court in *Liton* (at [43]), "[w]hat is important is the substance as well as the relevance of the evidence, and whether it is supportive or confirmative of the weak evidence which it is meant to corroborate".

Application of law to the facts

178 The Judge at [67]–[68] of his GD ([11] *supra*) found two pieces of evidence that, in his view, corroborated C1's account. The first was C2's testimony that C1 had confided in C2 about the sexual assaults by the Appellant (see the GD at [67] and above at [83]). The second was the medical evidence (see the GD at [68] and above at [84]). These two findings will be considered *seriatim*.

179 At this juncture, it should be pointed out that the Judge did not explain whether he was referring to *Baskerville* corroboration ([173]

supra) or liberal corroboration. Thus, for the sake of completeness, the analysis will proceed on the basis that: (a) the Judge was referring to *Baskerville* corroboration; and (b) in the alternative, if in fact the two pieces of evidence do not constitute *Baskerville* corroboration, we will then examine the relevance and weight that should be assigned to both pieces of evidence.

C2's testimony

180 It is unclear from the GD whether the Judge found C2's accounts of *all three episodes* corroborative of the C1's evidence with respect to the five charges before him (see above at [50]). For instance, the Judge referred to all three episodes at [40]–[42] of the GD albeit under the section entitled "The prosecution's case". Later under the section entitled "The decision of the court", he mentioned at [67] of the GD that:

> *Corroborative evidence may be found in C2's testimony*. C1 had confided in C2 about the sexual assaults by the Appellant and that caused C2 to have such poor regard for their father that he was downgraded to being an uncle in her eyes. No reason has been proffered by the Appellant why C2 would also turn against him unjustly. She certainly did not appear to have been manipulated by anyone in her evidence despite her age. [emphasis added]

181 This suggests that the Judge's opening sentence, *viz*, "*corroborative evidence may be found in C2's testimony*" [emphasis added], was meant to include C2's testimony on all three episodes with the remainder of the paragraph being a non-exhaustive elaboration of C2's testimony.

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

183 In fact, on closer scrutiny, *none* of the three episodes recounted by C2's account is corroborative, in either the *Baskerville* or the liberal sense, for other more fundamental reasons.

184 First, all three episodes that were recounted by C2 did not form the basis for any of the charges proceeded upon in the court below.

185 Secondly, C2's accounts of the first and second episodes, which took place in 2006, should either have been rendered inadmissible as they do not constitute similar fact evidence that is admissible under the EA, or, if admitted, have been given little weight. The alleged *modus operandi* of the Appellant was significantly different from that found in the charges proceeded upon in the court below. Similar to the first four charges, the Appellant was in the living room, while the three children were asleep in their bedroom. However, *unlike* the first four charges, the Appellant had allegedly disrupted his settled *modus operandi* since 1999, *viz*, only

waking up C1 and bringing her into the hall, leaving C2 and C3 asleep) in favour of a different approach. In relation to the first episode, this involved getting C2 and C3 to leave the room and locking himself in the room with C1. In relation to the second episode, this involved moving "on top" of C1 while she was sleeping in her bedroom although C2 and C3 were in the same bedroom at the time.

186 Thirdly, C2's testimony on all three episodes does not disclose incidents of rape and/or fellatio which are the offences in the five charges. To recapitulate, in the first episode, as C2 was told by the Appellant to leave the bedroom, she did not see what happened inside the bedroom. In the second episode, she saw the Appellant on top of C1, but nothing more. In the third episode, she was told by C1 that the Appellant had touched C1's vagina and body (see above at [50]).

187 Fourthly, C2's recollection of the third episode is also inconsistent with C1's trial testimony. C2's evidence was that one afternoon in 2008, while C1 and she were *in the kitchen at their flat*; C1 told her that on the first episode where C2 was asked to leave the bedroom, the *Appellant had touched C1's vagina and her body*. However, C1's testimony at trial was that on this particular occasion, the Appellant had *made C1 perform fellatio on him*. Further, C1 recounted that she had revealed this to C2 when they were at *their grandmother's house*. The latter inconsistency had already been pointed out to C2 during cross-examination.

The medical evidence

188 There were two medical reports of C1 which the Prosecution tendered, *viz*, Dr Pang's report and Dr Lim's report (see above at [44]–[45]).

189 In so far as both medical reports were concerned, the Judge held at [68] of the GD ([11] *supra*) that:

> Corroborative evidence may also be found in the medical evidence. *What C1 told the doctors was by and large consistent with her evidence in court.* Naturally, while the hymenal tears indicated previous sexual penetration of the vagina, they did not point to the Appellant being the perpetrator. [emphasis added]

190 Accordingly, the Judge found the following two elements in the medical reports corroborative of C1's account:

> (a) Dr Pang's findings on the C1's hymnenal tears were corroborative of the fact that sexual penetration had taken place. It is not corroborative of the fact that the Appellant had *caused* C1's hymenal tears.
>
> (b) C1's interview with the doctors was corroborated by her testimony at trial with regard to the alleged sexual assaults.

191 These two elements of the medical evidence will be examined *seriatim*. Before doing so, a number of preliminary points may be usefully made.

192 First, both medical reports did *not* constitute *Baskerville* corroboration ([173] *supra*) of the alleged rapes in so far as they were mere repetitions of a complaint made by C1. Accordingly, the inquiry turns on the extent to which they are supportive or confirmative of C1's testimony at trial.

193 Secondly, both medical reports did not constitute either *Baskerville* or liberal corroboration with regard to the *first charge* involving fellatio in 1999 since the incident was not mentioned in the reports.

194 Thirdly, the medical reports were found by the Judge to corroborate incidents which took place *between three and five years ago*. As mentioned above (at [175]–[176]), under s 159 of the EA, former statements may only corroborate *the same facts* if the statements are recorded "*at or about the time when the fact took place* or before any authority legally competent to investigate the fact" [emphasis added]. In *Lee Kwang Peng*, Yong CJ (at [80], cited above at [176]) held that two complaints in that case did not fall within the ambit of s 159 of the EA because "they were made so long after the alleged incidents". On the facts in *Lee Kwang Peng*, the two complaints were made *one year and six months respectively after the alleged incidents*. *A fortiori*, the medical reports, which are based on interviews with C1, cannot, under s 159 of the EA, corroborate her account of incidents that took place *between three and five years ago*. Therefore, the medical reports do not provide a contemporaneous account of the *first four charges* and do not constitute even *liberal* corroborative evidence under s 159 of the EA.

Do C1's hymenal tears amount to corroborative evidence?

195 Dr Pang found at para 7 of her report that:

> Her [C1's] hymen was deficient posteriorly, with old tears at the 2 o'clock and 9 o'clock position, suggestive of previous penetration.

196 In her testimony at trial, Dr Pang revealed that C1's hymenal tears did not definitely mean that there was penetration. However, Dr Pang added that the "old tears at the 2 o'clock and 9 o'clock positions" were "more suggestive of penetration" although "[i]t doesn't tell how many times of penetration has occurred".

197 In the Singapore High Court decision of *B v PP* [2003] 1 SLR(R) 400, Yong CJ found (at [28]) that a medical report of a victim confirming a tear in her hymen was only relevant in establishing the fact that the victim had sustained injuries to her vagina. It was certainly not corroborative of the victim's allegation that the injuries had

been caused by the accused in that case. On the unique facts of that case, Yong CJ found this particular piece of corroborative evidence sufficient to sustain the accused's conviction.

198 While we would agree that Yong CJ's statement in the preceding paragraph, viz, that hymenal tears while evidencing sexual penetration, do not point to a specific perpetrator, is unimpeachable as a matter of logic, the evidence of C1's hymenal tears cannot, in contrast to the facts in *B v PP*, be sufficient corroboration to sustain the Appellant's conviction. Indeed, there are two critical distinguishing factors between the facts in *B v PP* and those in the present case.

199 First, the victim in *B v PP* was three years old when she was medically examined meaning that there was next to no possibility that the victim in *B v PP* had been penetrated by someone else. In contrast, C1 was 16 year-old at the time of her examination. C1's age *per se* would have been a neutral factor had it not been for the revelation of the school report and school counsellor's statement that suggested that she had been sexually active by the time of her medical examination (see above at [165]–[171]). Secondly, the medical examination in *B v PP* was a contemporaneous report since the victim was examined a day after the sexual penetration had taken place. In contrast, C1 was medically examined close to four years after the last alleged rape.

200 In this respect, the Judge rightly highlighted the limited probative value of such evidence and we respectfully adopt the same findings he made at [68] of the GD ([11] *supra*), as follows:

> … while the hymenal tears indicated previous sexual penetration of the vagina, *they did not point to the Appellant being the perpetrator.* [emphasis added]

Did C1's interview with the doctors corroborate her testimony at trial?

DR PANG'S REPORT

201 Dr Pang's report can only be considered, in the words of the Judge, "by and large consistent with [C1's] evidence in court" (see the GD at [68]) if one takes what Mr Singh has labelled as an excessively "broad-brush" approach.

202 First, Dr Pang's report is *not* corroborative of the *fifth charge* since the 29 April 2009 incident is not mentioned in her report.

203 Secondly, as highlighted above (at [142]), Dr Pang's report states that the first incident of penile penetrative sex occurred in 2003. The assaults would happen *four to five times a month* and stopped in 2006. Dr Pang confirmed during two rounds of cross-examination that C1 had specifically given her this information during their interview. This is

some way off from C1's trial testimony that there were *two isolated rape incidents in 2003, two rape incidents in 2004 and two rape incidents in 2006*.

DR LIM'S REPORT

204 Similarly, Dr Lim's report is inconsistent with C1's testimony at trial on the following points.

205 First, Dr Lim's testimony in his report and at trial recorded that C1 had stated, during their interview, that there were other "acts of sexual nature but which did not involve vaginal intercourse". These occurred prior to 2003 when C1 was in primary four. During that interview, C1 had stated that she was not sure when those incidents first started. However, by the time of the trial, C1 was certain that the first incident of sexual abuse occurred when she was in her second year of kindergarten. This is significant inasmuch as C1's recollection of past events somehow improbably became clearer with the passing of time.

206 Secondly, Dr Lim's report states that C1 had told C2 and her last boyfriend of the sexual assaults but made them keep the matter confidential. However, C1's testimony at trial did not mention telling her last boyfriend of these alleged assaults (see above at [161]–[162]).

Was the medical evidence and C2's testimony consistent and corroborative?

207 As would be evident, the Judge, with respect, erred in his finding that "[w]hat C1 told the doctors was *by and large consistent* with her evidence in court" [emphasis added] (see the GD ([11] *supra*) at [68]). The significant inconsistencies in C1's testimony at trial as set out above should have led him to the opposite conclusion. Further, the Judge had also erred in holding that Dr Pang's and Dr Lim's reports amounted to *corroborative evidence* in either the liberal or the *Baskeville* sense.

208 C2's testimony should also have been found to be inadmissible or assigned minimal weight as they concerned incidents which did not form the basis of any of the charges for which the appellant was convicted.

209 Finally, the Judge had also, with respect, erred in failing to consider that Dr Seng Kok Han's medical reports on the Appellant could equally have "corroborated" the Appellant's testimony, where he had consistently asserted his innocence and denied the charges against him (see above at [43]). As Yong CJ held in *Khoo Kwoon Hain* (([114] *supra*) at [49]):

> I can see no reason why a s 159 corroboration of a complainant's testimony should necessarily carry more weight than a s 159 corroboration of the Appellant's denial. Both appear to me to be equally self-serving.

Issue 3: Did the Prosecution at the trial below prove beyond reasonable doubt that the complaint was not the result of collusion?

The law

210 In the House of Lords decision of *Regina v H* [1995] 2 AC 596 ("*R v H*"), Lord Mustill (at 616) distinguished between two forms of "collusion":

> … the word 'collusion' … may denote a wicked conspiracy in which the complainants put their heads together to tell lies about the defendant … [and is also] wide enough to embrace any communications between the witnesses, even without malign intent, which may lead to the transfer of recollections between them, and hence to an unconscious elision of the differences between the stories which each would independently have told … the two situations may be labelled ***'conspiracy'*** and '***innocent infection'*** … *'conspiracy' [is] the deliberate and malicious fabrication of untrue stories whose details chime because that is what they are designed to do … such cases … must surely be a small minority by comparison with those where the witness statements show no more than the opportunity (although not necessarily the reality) of 'innocent infection'.* [emphasis added in italics and bold italics]

211 Where the allegation is one of *innocent infection*, as opposed to conspiracy or collusion, and there is some evidence suggesting the opportunity for contamination arising, for example, from the transfer of recollections between witnesses leading to an unconscious elision of the differences between their accounts, the court must always be alive to that possibility even if it considers the possibility to be slight. In such instances, the accused is objecting to the weight and not the relevance of the prosecution witness's testimony. To put it another way, the accused is not challenging the evidence as an outright lie, but is saying that the degree of veracity of the evidence and the strength of recollection of the witness must be subject to scrutiny (see *Lee Kwang Peng* ([176] *supra*) at [95]).

212 When the allegation is one of *collusion* properly so called, the burden is on the Prosecution to prove beyond a reasonable doubt that there was in fact no collusion to make a false complaint because motive and conduct are "legally distinct concepts which ought not to be conflated" (see *XP* ([111] *supra*) at [21]).

213 In *XP*, charges of outrage of modesty were brought against a teacher-in-charge of a water polo team by seven of his students under s 354 of the Penal Code (Cap 224, 1985 Rev Ed) ("PC"). Rajah JA found (at [23]–[26]) that the teacher's allegations of collusion, which were based on the students' close friendship and their obvious resentment towards him for being a harsh, interfering disciplinarian who was strict with training and took upon himself the task of overseeing their studies, revealed a "*plausible*" motive (see *XP* at [24]). Accordingly, the evidential

burden of proof should have shifted to the Prosecution to prove beyond a reasonable doubt that there was in fact no collusion. However, the trial judge in *XP* had erred in failing to satisfactorily explain the absence of collusion. As Rajah JA noted (at [25]):

> … [The trial judge] took a broad-brush approach without condescending into the very specific charges levelled against the boys by the appellant. This lack of reasoning does seem to subtly suggest that she could have unconsciously erred in placing the burden of proof of collusion on the Defence, contrary to the stated rule …

214 In contrast, in *Lee Kwang Peng*, where three students brought nine charges against their taekwondo instructor for outrage of modesty under s 354 of the PC, Yong CJ held (at [104]) that:

> Counsel for the appellant both in this appeal and in the lower court also did not elaborate on how the second complainant could have persuaded the first and third complainant to bring false charges, nor did the appellant make any suggestions as to why the latter two boys might have been motivated to undertake this ordeal. This fact alone — the absence of a unifying motive amongst the complainants — eliminated any doubts that may have arisen out of the second complainant's evidence and the evidence adduced by the appellant's witnesses in contradiction of it.

Accordingly, Yong CJ found that there had been no collusion on the part of the complainants since they did not have a "unifying motive".

215 It is uncontroversial that *the defence* has *first* to establish that the complainant has a *motive* to falsely implicate the accused. As Yong CJ explained in the Singapore High Court decision of *Goh Han Heng v PP* [2003] 4 SLR(R) 374 at [33]:

> [W]here the accused can show that the complainant has a motive to falsely implicate him, then the burden must fall on the Prosecution to disprove that motive. *This does not mean that the Appellant merely needs to allege that the complainant has a motive to falsely implicate him.* ***Instead, the Appellant must adduce sufficient evidence of this motive so as to raise a reasonable doubt in the Prosecution's case.*** Only then would the burden of proof shift to the Prosecution to prove that there was no such motive. [emphasis added in italics and bold italics]

216 We would agree with the general thrust of the statement quoted in the preceding paragraph in so far as the Prosecution ultimately bears the legal burden of disproving beyond a reasonable doubt the fact of collusion. However, the statement should not be interpreted as suggesting that the Prosecution bears the legal burden to disprove the allegation of collusion *only after* the accused has discharged his evidential burden by proving a motive for collusion to a standard that is sufficient to create a *reasonable doubt* in the Prosecution's case. This would admittedly set the standard of proof too high. It is preferable to frame the accused's

evidential burden in terms of whether the complainant had a *plausible* motive to collude to bring false charges against him. Furthermore, the term "*plausible*" (see *XP* at [24] and [26]) should be preferred to "*reasonable*" in so far as it prevents the court from conflating the separate, and admittedly irrelevant, question of whether complainant's motive to bring a fabricated complaint against the accused is "*reasonable*" in the sense of being legally and/or morally justified.

Application of law to the facts

The shifting of the burden of proof

217 Before examining the Appellant's contention that C1's complaint was fabricated, we pause to note that there is, with respect, an initial ambiguity in the Judge's finding (see the GD ([11] *supra*) at [63]):

> … Other than the 'grounding' in 2006, for which there was a valid reason, there was no suggestion that the Appellant was an impediment to her lifestyle. *Indeed, the Appellant was at a loss when asked for the reasons why he thought C1 would be making such serious false allegations against him* … [emphasis added]

As a matter of logic, the question as to whether C1 had a motive for making false allegations against the Appellant must, ultimately, involve an objective inquiry. The fact that the Appellant, who was unrepresented at the time, was unable to discern such a motive is neither here nor there. Nevertheless, as discussed above at [216], the Appellant does bear an *evidential burden* to provide a plausible motive for collusion. There also remains, in the final analysis, the clear rule that the *evidential burden* shifts to the Prosecution to disprove the fact of collusion beyond a reasonable doubt (see *XP* ([111] *supra*) at [21]).

218 More importantly, the line of inquiry adopted by the Judge suggests that he may, with respect, have erred in placing the legal burden of proof of collusion on the Appellant by focussing on *why* the Appellant *thought* C1 would be making such serious false allegations against him instead of *whether* there *objectively* existed a plausible motive for C1 and the mother to falsely implicate the Appellant. Besides, there may be any number of explanations why the Appellant was at a loss when asked why he thought C1 would make such false allegations against him. The short answer could well be that, as defence counsel suggested; he was simply oblivious to the collusion. Consequently, this line of enquiry may have led the Judge to inadvertently overlook the possibility that at the time when C1 reported the alleged incidents to the police, she was either not aware of or had failed to think through the consequences of her actions.

219 The Judge's later comments (at [65] of the GD) lends further weight to the suggestion that he had erroneously reversed the burden of proof for collusion:

> The Appellant's inability to put any questions to C1 about the alleged sexual assaults during the first hearing was intriguing. He was not highly educated but was certainly no moron. *When invited by the court to challenge C1's testimony and to suggest to her that perhaps she was lying about all or some of the allegations in the charges, he chose not to do so or to ask her any question regarding the crucial matters. I therefore agreed with the prosecution that the Appellant's subsequent evidence about all the possible reasons why C1 could be fabricating evidence against him invited scepticism* … [emphasis added]

220 With respect, it is not clear *how* the Appellant's subsequent evidence concerning the possibility of collusion "invited scepticism". First, the fact that this allegation only emerged after the Appellant engaged counsel must surely be a neutral factor at best.

221 Secondly, the Judge did not mention the testimonies of the Appellant's three witnesses, and hence did not assess their credibility in the reasons found in his GD (see above at [61] and [81]). In doing so, the Judge dismissed Appellant's evidence on collusion without condescending to its details. This is significant because all three of the Appellant's witnesses' testimonies focused on the issue of collusion in general and the relationship between the mother and Lathiff in particular (see above at [54]–[68]). More to the point, there were significant allegations in their testimonies that went unchallenged by the Prosecution and were therefore implicitly accepted, namely that:

> (a) Lathiff had first met the mother when she reported the loss of her IC (the sister's testimony). This leaves open the possibility that their relationship began prior to 29 April 2009.
>
> (b) During the 27 June 2009 meeting, the mother had stated that she would be willing to drop the charges against the Appellant if he divorced her (the sister's and her husband's testimony). Although this stops short of admitting that the charges were fabricated, the fact that the mother was willing to use the charges as a bargaining chip to obtain a divorce is troubling.
>
> (c) Lathiff and the mother were romantically involved and had married in Batam (the sister's and her husband's testimony). This directly contradicts the mother, C1 and Lathiff's testimony that the couple were not in a "love relationship". It also contradicts the mother and Lathiff's account that the Batam marriage was simply a "plot" to rouse the Appellant's parents' jealousy.
>
> (d) Lathiff is a father figure to the children whom they addressed as "*Baba*" (the sister's and her husband's testimony). This directly contradicts the mother, Lathiff and C1's testimony during the trial.

222 In fact, the Prosecution had been made aware of the risks of failing to challenge these points during the trial but had chosen not to do so (see

above at [59]). First, during the examination in-chief, the Prosecution raised an objection to the sister's testimony in relation to the 27 June 2009 meeting (see above at [55]), on the basis that it was a "very peripheral area and really not relevant to the proceedings that is now before the Court". Accordingly, the Judge directed that the Prosecution could either make their submission subsequently or choose not to cross-examine her if indeed it was a "peripheral area". Second, during the second hearing before this court, the Prosecution accepted that the failure to specifically challenge the Appellant's witnesses on these crucial points during the trial carried the implication that the Prosecution had accepted their testimonies on those so-called "peripheral area[s]".

223 Third, the Appellant could not be said to have "chose[n]" not to question C1 in any meaningful sense of the word. Despite the Judge's attempt to facilitate the Appellant's efforts at cross-examination, it was plain, and the Appellant stated as much, that he did not know how to challenge C1's evidence. It is difficult to see why this explanation proffered by the Appellant should be viewed with "scepticism" given that the gravity of the charges he faced could have easily overawed anyone – not least someone with only a secondary two education like the Appellant.

224 Finally and most significantly, the revelation of the HSA investigation only came to light at the end of the Prosecution's case (see above at [40]–[42]), which meant that the Appellant's then counsel was unable to cross-examine the mother and Lathiff on it. This substantially deprived the Appellant of the opportunity to fully develop his case on collusion.

225 Another possible reading of the abovementioned passages in the GD (see above at [217] and [219]) is that the Judge had actually found that the Appellant had failed to discharge the prior evidential burden of raising a plausible case of collusion. For the sake of completeness, we will assume the latter reading to be the Judge's final position on the matter and propose to examine the substantive issue of collusion from that perspective.

C1 and the mother's motive

226 Defence counsel below submitted that there was a plausible motive for C1 and the mother to bring a false complaint against the Appellant. C1 testified during cross-examination that she was sad that the Appellant treated her less favourably than C2. Moreover, the Appellant was very strict with her. For example, the Appellant had grounded her for six months for allegedly running away from home and there were times in primary school when the Appellant would not let C1 have dinner until she had finished her homework. There were also deeper issues of resentment that went beyond mere teenage angst. In this regard, C1

testified that the mother and the Appellant quarrelled frequently over money and the Appellant's alleged extra-marital affairs with "Indonesian ladies". In fact, it was a quarrel between the spouses over finances that had sparked the mother's and children's move away from the flat prior to 29 April 2009.

227 The Appellant also admitted during cross-examination that the mother had made a police report relating to one of the assaults by the Appellant more than two to three years ago. On that occasion, the Appellant was also warned by the IO that his wife could have obtained a Personal Protection Order as a result. Moreover the Appellant proceeded to make an even more self-incriminating admission by conceding that these assaults went on even after the police report.

228 This troubling history of physical abuse deeply affected C1. In fact, by the mother's own admission, C1 was acutely sensitive to this abuse to the extent that she did not want her mother and father to quarrel lest it resulted in her mother getting "hit":

> A: Okay, I asked her then, er, 'When is the sex happened [*sic*]?' Then she said, 'In Primary 4 and 5', that is the first time when it started to have---to rape her. It means the---then when in K2, doing oral sex, er, when I was working in night shift in factory, yah, mm. Then I asked her, 'Why---why didn't you tell me early?' *Then she said she doesn't want me and my husband to quarrel.*
>
> Q: That is her reason?
>
> A: *Yes. Because she knew that if I quarrel with my husband, when---when the quarrel starts to become very, very, tight or very, very bad, I mean very bad, he start to---he will start to hit me.*
>
> *Q: Okay.*
>
> *A: So C1 doesn't want anything to happen to me. She knew her daddy very well, very bad-tempered.*
>
> [emphasis added]

229 More significantly, the mother's answer highlights that C1 was very close to her mother. C1's concern for her mother and siblings was also evident in her answers to why she did not want to tell her mother of the alleged incidents:

> Q: Yes, why? What kept you from telling your mother even after sitting through the sex education classes?
>
> A: *I just don't want my---my mother to be unhappy. And I'm thinking about, er, happiness and what will happen to her if I---if I told her what happened, then my mother would ask my father and I'm afraid that my father will beat her up. So that stops me from telling her what happened.*
>
> [emphasis added]

230 Similarly, when C1 was asked by the Prosecution to describe some of the happier moments as a family, C1 replied:

> A: Because, erm, I at least when---when we went out together as a family, I can feel---I can feel the warmth as a family together when---when---we are together as a family. I have been thinking---and after I get back together from either dinner or went out together as a family, when I get home, I will be thinking second thought of just---of just keeping what---whatever happened behind me, just---just forget whatever happened to me as long as---*as long as my mother is happy.*
>
> *Q: As long as who's happy?*
>
> *A: My mother. My mother is happy---my younger sister---my younger sister and little brother have the care of a father.*
>
> [emphasis added]

231 Thus, according to defence counsel's case theory at the trial below, C1's desire to protect her mother and siblings from their physically abusive father could have led her to go along with the plan to bring false allegations against her father.

232 Considering the above, Mr Singh argued before this court that the mother had a motive to frame the Appellant. Theirs was not a happy marriage as evidenced by the Appellant's own trial testimony:

> Q: Yes. Now [Appellant], I'm going to backtrack a little on your ex-wife. Now---now what do you think that - to the application for divorce, your view?
>
> A: She was probably angry with me. She had already intended to divorce me and she had already made few tries for divorce.
>
> Q: Now what happened on those occasions when she made those few tries for divorce?
>
> A: She made such attempt but there was no follow up. She only left the house.
>
> Q: Now prior to making those attempts, prior to leaving the house, on those occasions, what happened in the family, between you and her?
>
> A: There was a financial issues [*sic*].
>
> Q: Now [Appellant], you were in Court when your wife gave evidence and---and also when you daughter gave evidence … And what would these fights be over..?
>
> …
>
> A: There were issues of money.
>
> …
>
> A: There were occasions when I have no money because I have no job and we can't afford to pay the rent, the water bills and also about the children's---also about the children's expenses.

Q: Any other causes of these quarrels?

A: She suspected that I have another woman. That's all.

233 The divorce finally took place on 2 February 2010, around nine months after the Appellant's arrest. The mother testified that she had commenced proceedings in the Syariah Court because she could not tolerate the physical abuse by the Appellant; his financial irresponsibility towards their family; and the allegations of rape. However, she agreed that the divorce was granted without the court requiring her to prove her allegations since all that was required was for the Appellant to pronounce the "*talak*". The Syriah Court papers exhibited in the trial below similarly do not disclose any grounds for the divorce.

Major and minor collusion

234 Defence counsel advanced two arguments in support of his contention that C1's complaints were fabricated. In the interest of convenience, we have labelled them the major and minor collusion arguments.

235 According to the *major collusion argument*, Lathiff and the mother had a *pre-existing romantic relationship prior to the arrest* and that they had manipulated C1 to make a false complaint against the Appellant. In short, C1 was putty in the hands of the mother she loved and had wanted to protect. In the meantime, the mother had every reason to ensure that the Appellant would be convicted given his history of martial violence, his string of affairs and her desire to be with Lathiff.

236 However, there are a number of wrinkles in the manner in which the collusion argument was presented in the trial below which have led us to refrain from making a conclusive finding as to whether there was *in fact* major collusion.

237 First, the major collusion argument was not fully ventilated in the trial below. The defence counsel's initial position after being engaged by the Appellant was that Lathiff and the mother were in a "love relationship" "*at least from the time of arrest of* [*the Appellant*]" [emphasis added]. That said, the major collusion argument was alluded to at various points throughout the trial. For instance, it was expressly put to Lathiff that the mother and he had met before the report was made, which he denied. On the other hand, defence counsel did not press the mother on her testimony that she had only befriended Lathiff two months after the report was made – following which, they subsequently went out for drinks on a number of occasions and the mother went so far as to invite Lathiff over to the flat on a number of occasions where he met her children, including C1. Further, it was also never directly put to C1 that she had fabricated the evidence to get rid of the Appellant so that the mother could be with Lathiff. It was only after the revelation of C1's HSA

statement that defence counsel explicitly submitted that Lathiff, the mother and C1 had colluded to bring fabricated allegations against the Appellant.

238 Second, by the end of the trial, defence counsel appeared to abandon the major collusion argument in their oral and written closing submissions. Instead, defence counsel's submissions focussed on the more modest *minor collusion argument*: even if Lathiff had only become friends with the mother two months after the report was made, Lathiff's close relationship with C1 gave rise to the real concern that Lathiff could have facilitated this fabrication, during investigation and at the trial by tutoring C1, C2 and the mother on to how to prepare for their police statements and testimony at the trial. After all, defence counsel argued, Lathiff had been a Senior Investigation Officer, presumably of some years' standing. Lathiff would therefore have been familiar with the relevant processes and procedure of police investigation, prosecution and court trials. Moreover, on his numerous visits to the mother's flat, Lathiff, by his own account, gave "advice" to C1. C1 testified that this "advice" covered areas relating to her schoolwork and future ambitions but they did not discuss the case against the Appellant with Lathiff. The latter point was repeated by the mother and Lathiff.

239 A corollary of this is the subtler, separate argument that C1's police statements and testimony at the trial itself were "contaminated" by Lathiff's "advice" and discussions she had with C2 and the mother. This would be so even if Lathiff did not know of the plot to frame the Appellant but had unwittingly colluded. As stated above at [211], "collusion" is wide enough to embrace "*innocent contamination*", *ie*, any communications between the witnesses, *even without malign intent*, which may lead to the transfer of recollections between them, and hence to a subconscious elision of the differences between the stories which each would independently have told (see *R v H* ([210] *supra*) at 880, cited above at [210]). Accordingly, the Judge's finding (at [72] of the GD ([11] *supra*)) that he:

> … did not detect any hint that Lathiff, despite being the apparent father figure to the accused's children, had *sought in any way to influence C1 or C2 in their testimony in court.* [emphasis added]

should have been the start and not the end of the inquiry.

240 A final misgiving that we have over the major collusion argument in particular and the case theory of collusion in general relates to the lack of evidence at the trial below.

241 As should be clear, the major collusion argument hinges almost entirely on the nature and duration, of the couple's relationship, particularly, whether the mother and Lathiff had known each other *prior*

to 29 April 2009, Indeed, the deeper their ties, the greater the likelihood of collusion.

242 By way of background to Lathiff's and the mother's relationship, the mother had testified that, sometime before her divorce, she told the sister (*ie*, the Appellant's sister) that she was in a "love relationship" with Lathiff and that she intended on marrying Lathiff as his second wife. The mother subsequently asked for the sister and her husband to help to arrange a secret wedding for them in Batam. This was verified in Lathiff's testimony. The mother also testified that at no time did she reveal to her sister in-law that Lathiff was the IO in her brother's case.

243 It was only when the Judge asked Lathiff and the mother directly whether they had visited Batam together that they admitted that they had indeed travelled to Batam with the mother's brother but only for "sightseeing". Lathiff recalled that the trip took place on 12 July 2010 whereas the mother was clearly evasive:

Court:	So did two of you go to Batam together?
Witness:	Yes, we did.
Court:	*I see. When was this?*
Witness:	*But we are not together. I mean it's not me and him only.*
Court:	Elaborate please.
Witness:	Er, I with, er, my elder brother. Actually we have to go---four person---four people together with his wife but the end of the day, er, the wife couldn't come but I'm not sure why. So we go three person---three person to---plus me, three, for sightseeing.
Court:	One day, is it?
Witness:	Er, yes.

[emphasis added]

244 Somewhat coincidentally, Lathiff's first wife did not come for the trip. The mother "was not sure why" while Lathiff claimed that she had "work commitments". This contradicts the sister's testimony that Lathiff's first wife was opposed to him having a second wife. This would provide a more plausible explanation as to why Lathiff and the mother needed to get secretly married in Batam in the first place.

245 When questioned by the Judge, the mother denied being in a "love relationship" with Lathiff. She claimed, along with Lathiff, that she had only told her sister in-law about the secret marriage in Batam as a "plot" or "game" to make her in-laws angry:

Witness:	I suggest, er that to … my sister in law because I just want them to know that I'm marrying someone more better than her---her brother. But its just a---er, just---just a plot, just a---a---a game. Its not really. And I told IO Lathiff about that.
Court:	That means what, to make them angry or what?
Witness:	Yes, just to make them [the Appellant's parents] angry, jealous that I'm getting a better person than their son.

246 This exchange between the mother and the Judge seriously undermines the mother's overall credibility. If the mother's testimony on this point is to be believed, then her ability to fabricate such "plots" and "games" in order to make her parents in-law "jealous" suggests that she could have similarly concocted a "plot" to get rid of her husband.

247 On the other hand, if the mother's testimony about the "plot" is to be disbelieved, this, at the very least, suggests that the mother and Lathiff were deliberately concealing the nature and extent of their relationship from the court. If there had in fact been a Batam wedding on 12 July 2010, this would raise suspicions as to the length of time they had known each other and whether there was a unifying motive to frame the Appellant. Indeed, the very short time within which they had grown from fast friends in June 2009 to a married couple in July 2010, whilst not impossible, does appear to be a little out of the ordinary.

248 At a more general level, the mother was less than forthcoming about her "friendship" with Lathiff. In fact, this "friendship" only came to light when she was recalled for cross-examination after the Appellant had engaged legal counsel. Even then, she remained evasive when questioned by both counsel and the Judge. Therefore, in light of the abovementioned evidence found in the *Official Transcript*, we respectfully do not share the Judge's observation (at [72] of the GD ([11] *supra*)) that:

> … [E]ven if the mother and Lathiff were not completely upfront about their relationship. *I accepted that any relationship between them developed only a couple of months or so after the police report was made by C1.* [emphasis added]

On the contrary, the fact that Lathiff and the mother "*were not completely upfront about their relationship*" [emphasis added] should have undermined, and not supported, the Judge's belief that their relationship had only developed "a couple of months" after the police report was made. The fact of the matter is that there is nothing in the *Official Transcript* and trial exhibits to support Lathiff and the mother's account as to the commencement of their relationship. Furthermore, it bears reiterating that the burden was on the Prosecution to prove that the mother and Lathiff's relationship had not blossomed before 29 April 2009.

The new material

249 In the absence of any clear evidence on the issue of collusion, this court therefore requested fresh evidence. The new material that was disclosed by the Prosecution before the second CA hearing (see above at [107]) also raises serious misgivings on making a conclusive finding on the issue of collusion.

C1's full HSA statement

250 Of relevance to the present case is C1's HSA statement which reveals that:

> (a) C1 believed that the mother married Lathiff in Batam and that, at first, she called the mother's new husband "uncle" but subsequently called him "*Baba*"; and
>
> (b) the mother had told C1 sometime in April 2010 that if the mother was ever caught for stealing cough syrup, "*Baba*" (Lathiff) would not admit to being the mastermind. The mother was also afraid to stop stealing because she was afraid that *Baba* would scold her.

251 The first piece of information serves to corroborate Lathiff's and the mother's 6 September 2010 police statements in relation to the theft of cough syrup investigation where the couple had admitted to have been married in Batam (see below at [258]–[261]). Meanwhile, the second piece of information casts doubts on the Judge's finding (see the GD at [72]) that:

> [I] did not detect any hint that Lathiff, despite being the apparent father figure to the Appellant's children, had sought in any way to influence C1 or C2 in their testimony in court.

In light of the fact that the Judge had sight of the *full* HSA statement, the question as to why Lathiff's alleged domineering influence, did not extend to him exerting an influence over C1's, C2's and the mother's testimony at trial in this case, ought to have been closely explored. Moreover, the Judge ought not to have ignored C1's HSA statement given the Prosecution's uncontested position that it had been voluntarily made by C1.

The phone records

252 Unfortunately, because of the initial oversight in securing the relevant phone records earlier, the phone records currently provided by the Prosecution are of limited relevance. Lathiff's only mobile line and one of the mother's four mobile lines only have call records dating back to 1 September 2009. All records before that have been purged by the service provider. Further, two of the mother's other mobile phone lines are pre-paid SIM cards for which call records are not available. Nevertheless, the available call records reveal that Lathiff and the mother were in frequent

contact from the earliest date the call records started from (*ie*, 1 September 2009).

253 At the time of the second hearing before this court, the call records for the mother's final mobile phone line were still pending and we were informed by the Prosecution that this number had initially been overlooked. This was surprising since this was, by the Prosecution's own admission, precisely the mobile phone line that the mother had given to the police when she accompanied C1 to lodge the police report against the Appellant. Therefore, this was most likely the mobile phone line that Lathiff had initially contacted the mother on. As a matter of logic, obtaining the records for this particular mobile phone line should, in our view, have been a priority.

254 Consequently, there is no objective evidence to corroborate Lathiff and the mother's testimony that:

(a) they had first met when the mother and C1 went to lodge the rape report on 29 April 2009; and

(b) Lathiff had only initiated communications with the mother by calling her on her mobile phone in June 2009.

255 Not only does this cast doubt on the Prosecution's attempts to rebut the allegation of major collusion beyond reasonable doubt, it also irretrievably prejudices the Appellant's ability to mount a defence should the issue be remitted before the Judge or a retrial ordered, an issue which will be considered in greater detail below (see Issue 4, at [269]–[309] below).

Alleged police report for loss of the mother's IC

256 At the first PTC on 23 August 2011, the Prosecution updated the court that the mother had not reported the loss of her IC to the police. In their further arguments for the second CA hearing, they elaborated that the IO had performed a screening for all police reports lodged by the mother and found no reports relating to the loss of her IC. However, this could equally mean that the mother had told the sister a lie (see above at [56]).

Lathiff and the mother's passports for all travels they undertook in 2009 and 2010

257 The travel records reveal that Lathiff, the mother and her brother had travelled to Batam for a day trip on 12 July 2010. This corroborates Lathiff and the mother's testimony that they had all visited Batam together. However, the *purpose* of the 12 July 2010 trip remains unanswered. Was it, as the mother testified, for "sight-seeing", or to get secretly married?

Lathiff and the mother's police statements recorded for the theft of cough syrup investigation

258 In this respect, the new information from Lathiff and the mother's police statements for the theft of cough syrup investigations shed some light on the true purpose of the Batam jaunt on 12 July 2010.

259 In Lathiff's statement recorded on 21 September 2010 at 2.51pm, he stated that their marriage was solemnised in Batam on 12 July 2010. Similarly, the mother's statement recorded on 21 September 2010 at 1.00pm stated that:

> On *12th July 2010*, Mohammed Lathiff and I went to Sekupang, Indonesia *for our wedding solemnisation*. I am aware that Mohammad Lathiff is legally married in Singapore. His wife and 4 children are staying somewhere in Woodlands. We had planned to get married somewhere in June 2010. [emphasis added]

260 This is echoed, in the mother's statement recorded on 21 September 2010 at 5.35pm:

> On 12 July 2010, Lathiff, my elder brother, Noorizan and I went to Sekupang, Indonesia. Before we left for Sekupang, Lathiff and I had already [*sic*] *to get married* there since we are not allowed to get married in Singapore. My elder brother was the witness for the marriage. Since 12 July 2010, both Lathiff and I consider ourselves as husband and wife. [emphasis added]

261 The mother repeated this position in another statement she recorded later that same day at 6.45pm:

> *Since my marriage with Mohammed Lathiff on 12 July 2010*, I had decided to put a stop to my theft of the Dhasedyl cough syrup because I know that it is a crimes [*sic*] and I also do not want to Mohammed Lathiff to continue making mistake. [emphasis added]

262 However, Lathiff's and the mother's account of their relationship underwent a dramatic and disturbing *volte face* when they were recalled by the police on 6 October 2010. The mother's statement, recorded on 6 October 2010 at 10.31am, claimed that while she had gone to Sekupang (a town in Batam) on 12 July 2010 with her brother and Lathiff, this was only to "*jalan jalan*" and not solemnise their wedding:

> … *Lathiff and I did not solemnise any wedding in Indonesia. I wish to state that I had lied that Lathiff was my husband because I was threatened by the investigation officer recording my statement as he said that he would remand me in the lock-up if I did not co-operate with him and that I would not be seeing my children that day*. As I know that Lathiff is an investigation officer from Ang Mo Kio Police Station, I thought that if I used Lathiff's name, I would get sympathy from the police from Bedok Police Station. However, I did not know what I did would get him into trouble. As such, I made a story that Lathiff and I were married in Indonesia … [emphasis added]

263 Somewhat coincidentally, Lathiff also retracted his earlier position. In his statement, recorded at 1.20pm that same day, Lathiff claimed that the mother and him were just "close friends" and they did not have their marriage solemnised in Indonesia. Lathiff also explained that:

> I [Lathiff] said that I was the husband of [the mother] in my first statement because we had an agreement between both of us to let me act as a father to [the mother's] three children.

264 Furthermore, Lathiff claimed to have forgotten when he had gone to Indonesia with the mother – a surprising turn given that he seemed to be able to recall the date without much hesitation a month later during his testimony at the rape trial on 3 November 2010.

265 It is significant that both the mother and Lathiff admitted to their romantic relationship and Batam marriage when they were initially questioned by the police on 21 September 2010. This was before they had had the opportunity to agree on what they should say to the police. It was only later, on 6 October 2010 that these statements were retracted. However, the Prosecution in its Further Arguments has glossed over this by suggesting that:

> The account given by the mother and Lathiff in their statements recorded on 21 September 2010, as to how they first met during the lodging of the rape report and subsequently developed a closer relationship, is *spontaneous and therefore reliable*. [emphasis added]

266 Admittedly, Lathiff has consistently maintained that he first met the mother when the rape report was lodged and only established contact two months later. However, it still leaves unanswered why the couple would lie about their relationship in their 6 October 2010 police statements when this issue would appear to have had no bearing on their guilt or innocence *vis-à-vis* that particular investigation. It is not inconceivable that, by this time, they might have realised its significant ramifications for the rape trial, which was still ongoing at the time.

267 Moreover, it is inaccurate for the Prosecution to suggest that the 21 September 2010 statements were completely spontaneous and do not carry the possibility of contamination or collusion. As mentioned in the preceding paragraph, by this time, the rape trial had already commenced on 23 August 2010. Lathiff and the mother had already testified as prosecution witnesses on 23 and 24 August 2010, respectively. At this stage of the trial, the Appellant was not represented and had yet to raise the possibility of collusion. However, defence counsel was appointed on 30 August 2010, and when the trial resumed on 3 November 2010, the revelation of Lathiff and the mother's romantic relationship came to the fore when they were cross-examined that day, albeit with both denying having gotten married in Batam. This might also explain why, in light of the growing scrutiny into the couple's relationship, the mother and

Lathiff were able to maintain a consistent position in their 21 September 2010 statements that they had only become fast friends *two months after the rape report was lodged*. In fact, the only thing that had changed in their 6 October 2010 statements was the *nature* of their relationship.

268 At this juncture it should be pointed out that the Prosecution at the trial below ought to have been aware, by the second tranche of hearings, that Lathiff and the mother had admitted in their 21 September 2010 statements to their Batam marriage. However, this was not revealed to the court either during their re-examination of Lathiff and the mother on 3 and 4 November 2010 or at any time after that. This meant that defence counsel was denied the opportunity to cross-examine the couple on this evidence and the Judge was not alerted to this disturbing development (see above at [224]). Had Lathiff and the mother's 21 September 2010 statements been brought to the attention of the Judge and defence counsel, the line of enquiry in the rape trial would likely have taken a different turn and might have even led to the timely disclosure of the phone records. We also note that the Prosecution, on 15 November 2010, had rightly brought C1's HSA statement to the court's attention to contradict her trial testimony (see above at [40]). This fact alone demonstrates that the Prosecution at the trial below ought to have been aware of the ongoing investigation into the theft of cough syrup although it appeared not to have *fully* appreciated its implications on the rape trial.

Summary of findings on collusion

269 To summarise our findings on the issue of collusion:

(a) In our view, based on the available facts, there appears to be a case for alleging the existence of a motive for C1 and the mother to bring a false complaint against the Appellant – not least because of the close (and, indeed, romantic) relationship between the mother and Lathiff on the one hand and between Lathiff and the children (including C1) on the other. The issue then is when this relationship developed.

(b) However, the evidence adduced at trial was, in this regard, problematic. For an issue as serious as that of collusion the courts always seek clarity of facts. This court therefore requested fresh evidence. In this regard, given that a crucial issue (in so far as the major collusion argument is concerned) relates to the *time* at which the mother and Lathiff *first* established their relationship, *the phone records* were of *critical* importance – in particular, whether the mother and Lathiff had known each other *prior to* 29 April 2009 (when the mother and C1 lodged the rape report), in which case the major collusion argument would have been made out. Unfortunately, in the absence of the couple's pre-1 September 2009 phone records, there is *in*sufficient evidence to enable this court to ascertain whether

or not the major collusion argument had in fact been established or disproved. It would, in our view, be unfair for this court (or, indeed, the trial court) to make a conclusive determination in relation to this particular issue simply because it was imperative, in the specific circumstances of the present case, that both parties be given an opportunity to address (through examination, cross-examination, re-examination as well as the relevant submissions) *all* the evidence (especially the crucial evidence, which, however, as just mentioned, was not (and is not presently) available).

(c) For the same reasons, the evidence in relation to the minor collusion argument was also problematic and, hence, no conclusive determination could be made in relation to this particular issue as well. This would be an even greater exercise in speculation given that the minor collusion argument was only tangentially traversed by the Appellant's witnesses' testimonies, as evidenced by the sister and her husband's evidence that Lathiff was a father figure to the children whom they addressed as "*Baba*". Furthermore, defence counsel's cross-examination of Lathiff, the mother and C1 was equally unfruitful with all three prosecution witnesses maintaining that Lathiff did not facilitate any possible fabrication, during investigation and at the trial by tutoring C1, C2 and the mother on to how to prepare for their police statements and testimony at the trial. What we can say is that it is entirely unsatisfactory for an enforcement official who was plainly involved in the rape investigation at the outset to have developed a familial relationship with the two key witnesses while proceedings were ongoing. This has in turn raised many questions about the reliability of these individuals as they have quite clearly been selective in testifying on a number of key issues (see above at [164], [245], [248] and [265]).

Issue 4: Should the Appellant be retried, acquitted or have the new materials remitted before the *same* trial judge, *ie*, the Judge?

270 In light of the above findings, parties were asked at the close of the second CA hearing to file written submissions on whether a retrial, remittance to the Judge for him to consider the new material or acquittal should be ordered. Accordingly, we now turn our attention to this question.

Applicable law

271 The power to order a retrial when a conviction is quashed owes its origin not to the common law, but to the Indian Code of Criminal Procedure 1861 (Act No 25 of 1861) more than one hundred years ago. A similar power, albeit with minor linguistic differences, has subsequently been incorporated in the criminal procedure codes of a number of

Commonwealth jurisdictions (see the Hong Kong Privy Council decision of *Au Pui-kuen v Attorney-General of Hong Kong* [1980] AC 351 ("*Au Pui-kuen*") at 356).

272 In Singapore, the powers which this court may exercise upon quashing a conviction were previously found in s 54(2) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the SCJA") which reads as follows:

> **Powers of Court of Appeal**
>
> **54.**—(1) At the hearing of an appeal, the Court of Appeal shall hear the appellant or his advocate and solicitor, if he appears, and, if it thinks fit, the respondent or his advocate and solicitor, if he appears, and may hear the appellant or his advocate and solicitor in reply.
>
> (2) The Court of Appeal may thereupon confirm, reverse or vary the decision of the trial court, or may order a retrial or may remit the matter with the opinion of the Court of Appeal thereon to the trial court, or may make such other order in the matter as it may think just, and may by such order exercise any power which the trial court might have exercised.
>
> …

273 Section 54 of the SCJA, along with the rest of Pt V of the pre-amended SCJA which concerned the Court of Appeal's criminal jurisdiction, were repealed with effect from 2 January 2011. Nevertheless, the (now repealed) s 54 of the SCJA remains the applicable provision in the present appeal by virtue of the fact that the Appellant was charged before 2 January 2011. Presently, the repealed s 54(2) is found in s 390(1)(*b*)(i) of the Criminal Procedure Code 2010 (Act 15 of 2010) ("the CPC 2010"), which is identical in all material aspects. Section 390(1)(*b*)(i) of the CPC 2010 reads as follows:

> **Decision on appeal**
>
> **390**.—(1) At the hearing of the appeal, the appellate court may, if it considers there is no sufficient ground for interfering dismiss the appeal, or may —
>
> …
>
> (*b*) in an appeal from a conviction —
>
> (i) *reverse the finding and sentence and acquit or discharge the appellant or order him to be retried by a court of competent jurisdiction, or remit the matter, with the opinion of the appellate court, to the trial court;*
>
> (ii) alter the finding, maintaining the sentence or, with or without altering the finding, reduce or enhance the sentence; or
>
> (iii) with or without reducing or enhancing the sentence, and with or without altering the finding, alter the nature of the sentence;

…

(2) Nothing in subsection (1) shall be taken to prevent the appellate court from making such other order in the matter as it may think just, and by such order exercise any power which the trial court might have exercised.

[emphasis added]

274 The most extensive statement of the applicable principles in determining whether a retrial or acquittal should be ordered can be found in the Jamaican Privy Council decision of *Dennis Reid v The Queen* [1980] AC 343 ("*Dennis Reid*").

275 In *Dennis Reid*, the appellant was charged with murder. At his trial the appellant was convicted on the basis of an identification of him by a single eye-witness. The appellant's conviction was quashed on appeal by the Jamaican Court of Appeal and a retrial was ordered on the grounds that the jury's verdict was unreasonable and unsupported by the evidence. The appellant then successfully appealed to the Privy Council against the order for a retrial. Crucially, Lord Diplock, delivering the unanimous opinion of the Board, held (at 348E–F) that:

> It would conflict with the basic principle that in every criminal trial it is for the prosecution to prove its case against the defendant, if a new trial were ordered *in cases where at the original trial the evidence which the prosecution had chosen to adduce was insufficient to justify a conviction* by any reasonable jury which had been properly directed … [T]he governing reason why the verdict must be set aside is because the prosecution having chosen to bring the defendant to trial had failed to adduce sufficient evidence to justify convicting him of the offence with which he has been charged. *To order a new trial would be to give the prosecution a second chance to make good the evidential deficiencies in its case - and, if a second chance, why not a third?* [emphasis added]

276 Having disposed of the substance of the appeal, Lord Diplock went on to consider (at 349D–351C) the principles which should apply in considering whether a retrial should be ordered:

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

assessment of their relative importance are matters which call for the exercise of the collective sense of justice and common sense of the members of the Court of Appeal of Jamaica who are familiar, as their Lordships are not, with local conditions. What their Lordships now say in an endeavour to provide the assistance sought by certified question (4) must be read with the foregoing warning in mind.

Their Lordships have already indicated in disposing of the instant appeal that the interest of justice that is served by the power to order a new trial is the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the trial judge in the conduct of the trial or in his summing up to the jury. ***Save in circumstances so exceptional that their Lordships cannot readily envisage them it ought not to be exercised where, as in the instant case, a reason for setting aside the verdict is that the evidence adduced at the trial was insufficient to justify a conviction by a reasonable jury even if properly directed.*** *It is not in the interests of justice as administered under the common law system of criminal procedure that the prosecution should be given another chance to cure evidential deficiencies in its case against the defendant.* ***At the other extreme, where the evidence against the defendant at the trial was so strong that any reasonable jury if properly directed would have convicted the defendant, prima facie the more appropriate course is to*** apply the proviso to section 14 (1) and ***dismiss the appeal instead of incurring the expense and inconvenience to witnesses and jurors which would be involved in another trial.***

In cases which fall between these two extremes there may be many factors deserving of consideration, some operating against and some in favour of the exercise of the power. ***The seriousness or otherwise of the offence must always be a relevant factor: so may its prevalence; and where the previous trial was prolonged and complex, the expense and the length of time for which the court and jury would be involved in a fresh hearing may also be relevant considerations. So too is the consideration that any criminal trial is to some extent an ordeal for the defendant, which the defendant ought not to be condemned to undergo for a second time through no fault of his own unless the interests of justice require that he should do so. The length of time that will have elapsed between the offence and the new trial if one be ordered may vary in importance from case to case, though having regard to the onus of proof which lies upon the prosecution lapse of time may tend to operate to its disadvantage rather than to that of the defendant. Nevertheless there may be cases where evidence which tended to support the defence at the first trial would not be available at the new trial and, if this were so, it would be a powerful factor against ordering a new trial.***

The strength of the case presented by the prosecution at the previous trial is always one of the factors to be taken into consideration but, except in the two extreme cases that have been referred to, the weight to be attached to this factor may vary widely from case to case according to the nature of the crime, the particular circumstances in which it was committed and the current state of public opinion in Jamaica. On the one hand there may well be cases where despite a near certainty that upon a second trial the defendant would be

> ***convicted the countervailing reasons are strong enough to justify refraining from that course. On the other hand it is not necessarily a condition precedent to the ordering of a new trial that the Court of Appeal should be satisfied of the probability that it will result in a conviction. There may be cases where, even though the Court of Appeal considers that upon a fresh trial an acquittal is on balance more likely than a conviction***,
>
> > ***It is in the interest of the public, the complainant, and the [defendant] himself that the question of guilt or otherwise be determined finally by the verdict of a jury, and not left as something which must remain undecided by reason of a defect in legal machinery.***
>
> This was said by the Full Court of Hong Kong when ordering a new trial in *Ng Yuk-kin v. The Crown* (1955) 39 H.K.L.R. 49, 60. That was a case of rape, but in their Lordships' view it states a consideration that may be of wider application than to that crime alone.
>
> Their Lordships in answer to the Court of Appeal's request have mentioned some of the factors that are most likely to call for consideration in the common run of cases in Jamaica in which that court is called upon to determine whether or not to exercise its power to order a new trial. They repeat that the factors that they have referred to do not pretend to constitute an exhaustive list. ***Save as respects insufficiency of the evidence adduced by the prosecution at the previous trial, their Lordships have deliberately refrained from giving any indication that might suggest that any one factor is necessarily more important than another.*** The weight to be attached to each of them in any individual case will depend not only upon its own particular facts but also upon the social environment in which criminal justice in Jamaica falls to be administered today. As their Lordships have already said, this makes the task of balancing the various factors one that is more fitly confided to appellate trial judges residing in the island.
>
> [emphasis added in italics and bold italics]

277 The relevant propositions from Lord Diplock's observations can be summarised as follows:

> (a) First, the recognition of the factors relevant to the particular case and the assessment of their relative importance are matters which call for the exercise of the "collective sense of justice and common sense" of the appellate court (*Dennis Reid* at 349D).
>
> (b) Secondly, the danger of such a catalogue is that, despite all warnings, it may come to be treated as exhaustive or the order in which the various factors are listed may come to be regarded as indicative of the comparative weight to be attached to them (*Dennis Reid* at 349F).
>
> (c) Thirdly, the cases can be classified according to two extremes. At one extreme are cases where the evidence adduced at the original trial was insufficient to justify a conviction ("category one" cases). In such cases, "save in circumstances so exceptional that … cannot be

readily envisaged" an acquittal and not a retrial should be granted. At the other end of the extreme, are cases where the evidence against the appellant at the original trial was so strong that a conviction would have resulted ("category two" cases). In such cases, *prima facie*, the more appropriate course is to dismiss the appeal and affirm the conviction (*Dennis Reid* at 349H–350A).

(d) Fourthly, in cases that fall between the two extremes ("category three" cases), the relevant factors include, but are not limited to the following (*Dennis Reid* at 350D–G):

(i) The seriousness and prevalence of the offence.

(ii) Where the original trial was prolonged and complex, the expense and the length of time for a fresh hearing.

(iii) An appellant ought not to be condemned to undergo a trial for the second time through no fault of his own unless the interests of justice require that he should do so.

(iv) The length of time that will have elapsed between the offence and the new trial if one is to be ordered. Owing to the onus of proof which lies upon the Prosecution, a lapse of time may tend to operate to its disadvantage rather than to that of the appellant.

(v) Whether there was evidence which tended to support the appellant at the original trial which would no longer be available at the new trial.

(vi) The relative strengths of the case presented by the Prosecution and appellant at the original trial, but, except in the two extreme cases that have been referred to (see above, at [277(c)]), the weight to be attached to this factor may vary widely from case to case.

(vii) There may well be cases where despite a near certainty that upon a second trial the appellant would be convicted the countervailing reasons are strong enough to justify refraining from that course. Conversely, it is not necessarily a condition precedent to the ordering of a new trial that the appellate court should be satisfied of the probability that it will result in a conviction.

(viii) There may also be cases where, even though the appellate court considers that, upon a fresh trial an acquittal is on balance more likely than a conviction, it may be still be in the interest of the public, the complainant and the appellant that the question of guilt or innocence be determined finally by a trial court and

> not left as something which must remain undecided by reason of a defect in legal machinery.

278 It should be noted that Lord Diplock was at pains to stress that this list of propositions is non-exhaustive (see *Dennis Reid* at 351A and 349D–F). Indeed, as this appeal has vividly demonstrated, it would be churlish to attempt to set out a definitive list of factors that would comprehensively address all manner of scenarios that could arise. Simply put, the exercise of the court's discretion, upon quashing a conviction, is, in the final analysis, a matter that calls for the exercise of "the collective sense of justice and common sense" of the court (see *Dennis Reid* at 349F and *Au Pui-kuen* ([271] *supra*) at 357D).

279 *Dennis Reid* ([274] *supra*) was referred to in the Singapore High Court decision of *Ng Chee Tiong Tony v PP* [2008] 1 SLR(R) 900 ("*Ng Chee Tiong Tony*") at [28]. *Dennis Reid* was also implicitly endorsed in the Singapore High Court decision of *Beh Chai Hock v PP* [1996] 3 SLR(R) 112 ("*Beh Chai Hock*") where Yong CJ at [38] cited the Ipoh High Court decision of *Chee Chiew Heong v Public Prosecutor* [1981] 2 MLJ 287 which had itself referred to *Dennis Reid*.

280 In *Ng Chee Tiong Tony*, the appellant was convicted in the district court of voluntarily causing hurt as a result of an altercation at a traffic junction and was sentenced to six weeks' imprisonment. He then appealed against both his conviction and sentence on the grounds that, *inter alia*, the trial judge had unreasonably and unfairly entered the arena of conflict by excessively questioning the appellant through a total of 76 continuous questions covering 12 pages of the notes of evidence thus rendering the conviction unsafe. Lee Seiu Kin J quashed the appellant's conviction and acquitted him on the basis that:

> (a) The offence of voluntarily causing hurt is a non-seizable one and may be compounded by the victim (*Ng Chee Tiong Tony* at [30]).
>
> (b) It was far from clear that a retrial would likely lead to a conviction because the case essentially turned on the evidence of the victim and the appellant (*Ng Chee Tiong Tony* at [31]).
>
> (c) The trial had taken place over a period of five months and the appellant had had his conviction hanging over his head for another eight months leading up to the appeal. As such, ordering a retrial would give the Prosecution a second bit of the cherry (*Ng Chee Tiong Tony* at [33]).

281 In support of these findings, Lee J referred to the decision of this court in *Roseli bin Amat v PP* [1989] 1 SLR(R) 346 ("*Roseli*"). In *Roseli*, the four appellants were convicted of rape. On appeal, the appellants claimed that the trial judge had: (a) excessively interrupted and hampered the appellants' counsel in their examination and cross-examination of

witnesses; (b) unfairly and improperly cross-examined the appellants in a hostile manner including disallowing them to give evidence in their own way; and (c) made adverse comments of the appellants which strongly indicated that the trial judge had predetermined the guilt of the appellants even before he had considered all the available evidence. The Court of Appeal quashed the rape convictions on the ground that the trial judge had failed to keep an open mind and had adversely determined issues against the accused prior to the presentation of the case. Having regard to the long lapse of time since the alleged offences and the fact that the appellants had already served a term of imprisonment of over three years, the Court of Appeal decided against ordering a retrial (at [23]):

> With great reluctance, we have reached the unavoidable conclusion that the convictions should not be allowed to stand. Accordingly, we allow the appeal and quash the convictions and the sentences. *We have considered whether we should now order a new trial. In our judgment, having regard to the long lapse of time since the alleged offence and the fact that the appellants have by now served a term of imprisonment of over three years it would be unfair to subject them again to a long trial on the same charges. We therefore do not propose to make such an order.* [emphasis added]

282 In *Roseli*, the trial judge sentenced the four appellants to, respectively, imprisonment terms of between ten to 14 years and ten to 15 strokes of the cane. It was with this reference point in mind that the Court of Appeal held that it would be unfair to the appellants to subject them to a lengthy retrial since they had already been imprisoned for over three years. As should be clear, the facts of *Roseli* bear some resemblance to those in the present appeal in so far as they both involved rape convictions, the imposition of lengthy sentences and a concomitantly lengthy period of imprisonment prior to the disposal of the appeal.

283 In *Beh Chai Hock*, the appellant was convicted of knowingly furnishing false information to a police officer under s 182 PC in his statement to a Staff Sergeant Goh ("SSgt Goh"). The appellant alleged that the statement was given to a Corporal Lee ("Cpl Lee") instead and as a result of inducement. The trial judge was of the view that the identity of the recorder was a question of fact and that there was no issue of voluntariness to be determined by way of a *voir dire*. If the statement had in fact been recorded by Cpl Lee, it would be excluded anyway because it was made to a police officer not of the rank of sergeant or above. On the other hand, if the statement was recorded by SSgt Goh, then the *voir dire* would also not be necessary since the appellant had only made allegations against Cpl Lee and not SSgt Goh.

284 On appeal, Yong CJ quashed the appellant's conviction but did not find that this was a suitable case for an acquittal and, therefore, ordered a retrial. Yong CJ explained (at [39]) that:

> Considering the circumstances of this case, however, one can clearly see that ordering a retrial would not be tantamount to letting the Prosecution have another bite at the cherry because it was really not any failing on the part of the Prosecution that caused the trial judge to err in law. *It is not that the Prosecution had relied on unsatisfactory evidence to prove its case. The trial judge had come to his own conclusion, without any submission as to its necessity or otherwise, that it would be unnecessary to hold a voir dire to establish the identity of the recorder of the statement.* At the same time, it is also clear, from the totality of the evidence adduced and the findings of the trial judge on the evidence, that the appellant's conviction is being overturned even though *his defence, which consisted mainly of a denial of the Prosecution's case, was not credible to any degree.* Therefore, this would be a suitable case to order a retrial. [emphasis added]

285 In contrast to the facts in *Dennis Reid* ([274] *supra*), the Prosecution in *Beh Chai Hock* ([279] *supra*) were not to blame for the unsafe conviction at the trial below. Rather, it was the trial judge's failure to hold a *voir dire* that had compromised the safety of the appellant's conviction. In this respect, the facts in *Beh Chai Hock* bear a closer resemblance to those in *Roseli* and *Ng Chee Tiong Tony* ([279] *supra*) in so far as they were all cases where the fairness of the trial below had been compromised by the conduct of the trial judge. Nevertheless, Yong CJ's holding in *Beh Chai Hock*, that a retrial and not an acquittal should be ordered, was entirely justified because, unlike in *Roseli* and *Ng Chee Tiong Tony*, this would not amount to giving the Prosecution a second bite of the cherry since the appellant's defence at the trial below "was not credible to any degree". Moreover, although not expressly stated in the judgment in *Beh Chai Hock*, there was no issue, unlike in *Roseli* and *Ng Chee Tiong Tony*, of prejudice to the appellant arising from a prolonged delay in the proceedings.

286 As can be distilled from *Dennis Reid* (at 350D, cited above at [276]), a lengthy interval between the commission of the alleged crime, the date of the complaint or the date of the charge and a putative retrial can operate to the detriment of the Appellant in two ways.

287 First, as demonstrated in *Roseli* ([281] *supra*) and *Ng Chee Tiong Tony*, the length of time that will have elapsed may be disproportionate to the Appellant's sentence and/or ongoing period of incarceration.

288 Secondly, there is also the separate issue of whether the Appellant would be irretrievably prejudiced by the fact that exculpatory evidence would no longer be available at the retrial. This latter point has been discussed at some length in two English Court of Appeal decisions, *viz*, *R v B* [2003] 2 Cr App R 13 ("*R v B*") and *Khalid Ali Mohammed Altaf v The Crown Prosecution Service, West Midlands* [2007] EWCA Crim 691 ("*Khalid Ali*"), to which we now turn.

289 *R v B* was another rape case where the appellant's guilt or innocence turned on the complainant's testimony. The appellant was charged with sexually abusing his step-daughter. An application was made before the start of the trial that the proceedings be stayed as an abuse of process based on the 30-year delay between the alleged incidents and the complaints made. The trial judge refused the application and at the end of the trial, the appellant was convicted. The appellant appealed against his conviction on the ground that the evidence relied on was unreliable and unsupported by any independent evidence.

290 In allowing the appeal and acquitting the appellant, Lord Woolf CJ emphasised (at [18]) that "*the passage of time in this jurisdiction has never been a ground in itself for the staying of a prosecution*" [emphasis added]. Nevertheless, the appellant was put in an impossible position to defend himself owing to the delay. As Lord Woolf observed (at [28]):

> In this case it has to be recognised that because of the delay that occurred, in our judgment the appellant was put in an impossible position to defend himself. *He was not, as Mr Jenkins* [counsel for the appellant] *says with force, able to conduct any proper cross-examination of the complainant. There was no material he could put to the complainant to suggest that she had said that something had happened on one occasion which could be established to be incorrect. There was no material in the form of notes that were given to the doctors which showed that she had changed her account. All that the appellant could do was to say that he had not committed the acts alleged against him. Mr Jenkins says that to say to a jury, when faced with allegations of the sort that were made here, 'I have not done it' is virtually no defence at all.* [emphasis added]

291 In *Khalid Ali*, two appellants were convicted of various sexual offences against two complainants involving an incident in December 1995. However, the first appellant was not arrested until 2004 while the second appellant, who was originally arrested in 1997, was only rearrested in 2004. The trial took place in April 2006 with the first appellant being convicted of two offences of false imprisonment and one offence of aiding and abetting rape but acquitted of another offence of rape. The second appellant was convicted of one offence of rape. Both appellants appealed on the grounds that important documents had been destroyed during the period of unjustified delay between the reporting of the alleged incident in December 1995 and the appellants' being rearrested and charged in 2004. Absent such documents, they argued, the verdicts were unsafe. The appellants were acquitted due to three main factors in their favour, which will be discussed in turn below.

292 First, both complainants (*ie*, T and S) had, after they had complained to the police, made applications to the Criminal Injuries Compensation Authority ("CICA"). S's application still existed but T's was no longer available. At the trial below, S accepted that her account in

the CICA application was untrue and exaggerated. For example, she had falsely accused the second appellant of raping her "every five minutes of the day and nights with lots of different ones" (at [16]). In this respect, Moses LJ (delivering the unanimous opinion of the English Court of Appeal) acknowledged (at [34]) that while:

> It was, of course, a matter of speculation as to whether it [*ie* T's CICA application] was consistent with the account T gave, both at the time when being interviewed on video by the police and subsequently, to the court. *But the fact that S's account was untrue and exaggerated is relevant. Both girls were still friends, living near each other, so we were told. It is unlikely that they did not discuss their applications to the CICA.* [emphasis added]

293 Accordingly, Moses LJ noted that the delay, had irretrievably removed any opportunity for the appellant to investigate whether T had similarly lied in her CICA form, short of cross-examining T about it (see *Khalid Ali* ([288] *supra*) at [17]). In this respect, Moses LJ held (at [39]) that:

> In the instant appeal there was no credible evidence which could be distinguished from the missing material. *T's credibility depended, in part, upon the reliability of her account to the CICA. The mere fact that S's account had proved to be false did not establish that T's was similarly untrue, but it does cause us concern, as it seems to have done to the trial judge at the time of the ruling.* [emphasis added]

294 Secondly, the delay led to the destruction of the pocketbook belonging to one of the two Police Officers who initially attended to the complaints. This deficiency in the evidence was compounded by the fact these two Police Officers had, by their own testimony, erroneously interviewed the complainants together, thereby presenting the opportunity for contamination. Accordingly, the delay deprived the appellant of the opportunity of seeing whether any greater clarification was contained in the missing pocketbook. Such clarification was required given the other Police Officer (whose pocketbook was still in existence for the purposes of the trial) could not explain why his pocketbook referred to an unidentified "Aktar" and not the first appellant (see *Khalid Ali* at [19]–[20]).

295 Thirdly, the telephone records that could corroborate the Prosecution's case were no longer available. T and S were said to have found a telephone box and S had called a friend and told her to let S's mother know where they were. Moses LJ expressed dissatisfaction (at [22]) that:

> … [T]he girls' friend, to whom the initial telephone call was made, once traced by the defence, could no longer assist. The prosecution made no attempt to trace her at all.

Consequently, Moses LJ acquitted the appellants on the basis that the cumulative effect of the missing documents meant that the appellants could not be fairly tried. Put simply, "*there was no credible evidence which could be distinguished from the missing material*" [emphasis added] (see *Khalid Ali* at [39]).

296 To summarise, from the cases referred to above, it is clear that where the evidence adduced at the original trial was insufficient to justify a conviction, such as in *Dennis Reid* ([274] *supra*), an acquittal, as opposed to a retrial, should ordinarily be ordered ("category one cases"). At the other end of the extreme, where the evidence adduced at the original trial was so strong that a conviction would have resulted, the more appropriate course would be to dismiss the appeal and affirm the conviction ("category two cases").

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

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

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

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

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

Application of law to the facts

Remitting the new materials to the Judge

299 The Prosecution maintains that the new materials, particularly, the school report, school counsellor's statements, and C1, the mother and Lathiff's police statements, should be remitted to *the same trial judge,* ie*, the Judge*, for his consideration because:

(a) The Appellant is relying on a large amount of new material that has only emerged on appeal thereby denying the relevant prosecution witnesses the opportunity to respond to the new material. For instance, C1 ought to be given an opportunity to respond to the

school counsellor's statement so as to enable the Judge to determine the proper weight that should be attached to it.

(b) The Appellant has relied on a new point that was not canvassed or pursued in the trial below, *viz*, the discrepancies in C1's account of the frequency of the alleged assaults.

300 Regarding the Prosecution's first submission, *viz*, the prosecution witnesses should be given an opportunity to respond to the *new material*; remitting these issues to the Judge would, in our view, be redundant and inappropriate.

301 It is redundant because the relevant facts contained in the school report and school counsellor's statements can be clearly and objectively ascertained by this court without the need for a retrial. In this respect, it bears reiterating that the Appellant is only relying on these new materials for the very limited purpose of undermining C1's trial testimony that she was not sexually active and that C1's hymenal tears may not have been caused by the Appellant (see above at [169]–[172]).

302 It is inappropriate because remitting the matter would put the Judge in an invidious position as the new materials, particularly the school report and school counsellor's statement, have the potential to unravel most of the Judge's favourable findings on C1's testimony. Moreover, it might be prudent, for the sake of completeness, to recall other witnesses other than C1 and the school counsellor. For example, Dr Lim and Dr Pang may have to be recalled to re-examine C1 in light of the newly disclosed school report. Thus, it is self-evident that the issues that would be remitted back to the Judge are not discrete – and limited – ones that, once decided, would enable the Judge to automatically arrive at a final decision, having regard to the findings already made at the original trial. On the contrary, all these issues are inextricably connected not only amongst themselves but also with the findings hitherto made by the Judge. Put simply, they are all of a piece – and an integrated piece at that. In these circumstances, to expect the Judge to disregard some of the findings he had made at the original trial whilst retaining other findings which are not impacted by the issues remitted to him, and then to make new findings on the issues remitted to him and to arrive at a final decision once again, would be to place him in an invidious (and, we dare say, impossible) position. We must express our puzzlement that the Prosecution would suggest such a course of action – let alone in the very strong terms they have advocated it. Indeed, in their further written submissions on this particular issue, the Prosecution argued that it would be "unprincipled and unjust" for the court not to adopt this proposed course of action and to acquit the Appellant instead. On the contrary, given our findings above, it would be the *precise opposite*. Given (as we have explained above) that the Prosecution has fallen short of the mark in

its attempt to prove its case against the Appellant beyond a reasonable doubt *even based* on the evidence before the Judge, *not* to acquit the Appellant would be "unprincipled and unjust".

303 Regarding the Prosecution's second submission, *viz*, that C1 should now be given the opportunity to explain the inconsistencies in her various statements and her testimony in court as such opportunity was *not available at trial*, we find that any failure to resolve this inconsistency at trial is attributable to the Prosecution's conduct of the trial below. The Prosecution at the trial below led evidence from both Dr Pang and Dr Lim that C1 had told them that the rapes had taken place four to five times a month. This was neither challenged by the Prosecution during re-examination nor put to the two doctors that their reports may have been influenced by the CID Report or SOF which had been given to them prior to the interview. In this respect, it is paradoxically the Prosecution, not the Appellant, which has relied on a new point, *viz*, the innocent explanation thesis, which was not canvassed or pursued in the trial below (see above at [139]–[146]). At the very least, both parties have been remiss in this particular regard.

304 Further, C1's account to the doctors of the *frequency of the alleged rapes* conflicted glaringly with a number of C1's earlier police statements – a fact which only the Prosecution would (or ought reasonably to) have been aware of, since these statements were not disclosed to the Appellant either at the Preliminary Inquiry, the trial below, or during the period leading up to the second CA hearing (see above at [130]–[146]).

305 Admittedly, defence counsel below did not expressly draw C1's attention to the inconsistent account she had given to the doctors regarding the frequency of the rapes. However, the Prosecution at the trial below were equally remiss in failing to clarify this point with C1 during re-examination especially given the marked inconsistency with Dr Lim and Dr Pang's earlier testimonies. At any rate, as Mr Singh persuasively put it: "it is difficult to comprehend what reasonable explanation C1 could possibly give to explain away the vast difference in the frequency in her different accounts of the alleged rapes".

A retrial or acquittal?

306 We did, in the first instance, consider whether there ought to be a retrial before another trial judge instead of an acquittal. However, having carefully considered all the arguments and evidence as set out above, it was clear to us that the Prosecution at the trial below had failed to prove its case against the Appellant beyond a reasonable doubt, as it had failed to adduce sufficient evidence to justify a conviction. Since this is a "category one case", it would be wholly unjust to the Appellant to order a

retrial before another trial judge (see *Dennis Reid* ([274] *supra*) at 349H, cited above at [276] and [296]).

307 *Even if* it can be argued that the Prosecution at the trial below did not fail to prove its case beyond a reasonable doubt and that this is in fact a "category three case", falling between the two extremes enunciated above at [296], three factors militate against the ordering of a retrial.

308 First, close to three years have elapsed since the Appellant's arrest on 29 April 2009. The Appellant has been incarcerated during this entire period. Should the Appellant be acquitted after a retrial, he would have been unjustifiably detained for a prolonged period of time. This would be a grave injustice to the Appellant. Moreover, the delay is not of the Appellant's own doing. The phone records were requested from the Prosecution during the CA's first round of requests on 29 July 2010. However, it was not until we pressed the Prosecution for a conclusive response on their status at the second hearing before this court that we were informed on 9 February 2012 that the remaining phone records were unavailable. In these circumstances, the consequences for any delays in the disposal of this appeal should not be borne by the Appellant.

309 Secondly, the Appellant has been – and will be – irretrievably prejudiced in a retrial because crucial exculpatory evidence, in the form of the pre-September 2009 phone records, is no longer available. In response, the Prosecution submits that:

> It seems unprincipled and extremely prejudicial to the prosecution for the appellant to now assert that he is prejudiced by the non-availability of the call records when *he did not request for the records at the trial below to pursue the point he was seeking to raise in his defence.* [emphasis added]

310 With respect, this is a flawed argument. The Appellant was under no obligation to request for the phone records at the trial below. The law on collusion is well settled: so long as the Appellant is able to raise a plausible motive for collusion it is for the Prosecution to rebut this allegation beyond a reasonable doubt. Accordingly, the onus was on the Prosecution at the trial itself to adduce the phone records.

311 Thirdly, to order a new trial would be to give the Prosecution a second chance to make good the evidential deficiencies in its case. To name but a few examples, the Prosecution could have, with reasonable diligence, located C1's ex-boyfriend and called him as a witness at the trial to confirm that he was told by C1 about the alleged rapes (see above at [162]). He could have also confirmed that he did not have an intimate relationship with C1. Similarly, given the wholly inconsistent testimonies of Lathiff and the mother on certain material issues, it is not too much of a stretch to postulate that they may tailor their testimonies at the retrial in a manner that would be expedient to them.

Conclusion

312 As mentioned at the outset of this judgment (at [1]–[2]), the vital importance of examining the facts in a granular and meticulous manner *as well as* the closely related need for the Prosecution to prove its case against the Appellant beyond a reasonable doubt cannot be emphasised enough. In our view, having regard to all the relevant facts, we find that the Prosecution has *not* proved its case *vis-a-vis* all the five charges against the Appellant beyond a reasonable doubt. The reasons for our decision have been set out in great detail above. In summary, we found as follows:

(a) The evidence of C1 was *not* – as required by the established legal principles – *unusually convincing* and therefore could *not*, in and of itself, *constitute sufficient evidence* to establish the charges against the Appellant beyond a reasonable doubt (see generally above at [111]–[172]).

(b) The evidence of C1 referred to at (a) above has *not* been *corroborated* by *either* the evidence of C1's sister, C2, *or* the medical evidence (see generally above at [173]–[209]). This is crucial, given our finding at (a) above (*viz*, that C1's evidence was *not*, in and of itself, unusually convincing).

(c) There was, however, insufficient evidence for us to decide on the issue of alleged collusion – whether stemming from a pre-existing romantic relationship between Lathiff and the mother which led to the manipulation of C1 to make a false complaint against the Appellant *or* from a relationship existing after C1's complaint had been made which led Lathiff to tutor the mother, C1 and C2 as to how to prepare for the police statements and their testimony at the trial itself (see generally above at [217]–[269]). What we can say, however, is that it is troubling that the trial process may have been compromised by the development of familial relationships among Lathiff, C1 and the mother (see above at [251], [261]–[269]). Nevertheless, this did not impact the decision of this court as, based on our findings as summarised above at (a) and (b), it is clear that the Prosecution had not proved its case against the Appellant beyond a reasonable doubt.

(d) In the circumstances, ordering a new trial before a different trial judge or remitting the new materials to the Judge is inappropriate because the aforementioned findings were based on clear evidence from the record with the new evidence only confirming this conclusion – with the result that the Prosecution at the trial below had not only failed to prove its case against the Appellant beyond a reasonable doubt but had failed to do so by no small measure (see above at [300]–[306]). Further, as explained above, the fact that close to three years have elapsed since the Appellant's arrest as well as the

fact that the Appellant would be irretrievably prejudiced because crucial potentially exculpatory evidence is no longer available would, *in any event*, *also* have led to the conclusion that a retrial ought *not* to be ordered (see above at [307]–[310]).

313 In the circumstances, the appeal is allowed and the Appellant is acquitted of all the charges brought against him.

314 It cannot be overemphasised that the need to convict an accused person (such as the Appellant) based on the standard of proof beyond a reasonable doubt is – as pointed out above – a time-honoured and integral part of our criminal justice system (and, to the best of our knowledge, all other criminal justice systems as well). In this respect, we adopt Lord Woolf's comments in *R v B* ([288] *supra*) at [27]:

> … ***We must do justice to the prosecution****, whose task it is to see that the guilty are brought to justice.* ***We must also do justice to the victim****.* In this case we are particularly conscious of the position of the victim. If she is right, she was treated in a most disgraceful way by someone whom she should have been entitled to trust: her stepfather. For years, for understandable reasons, as we have already indicated, she felt unable to make public what had happened. She is entitled to justice as well. ***But we also have to do justice to the appellant. At the heart of our criminal justice system is the principle that while it is important that justice is done to the prosecution and justice is done to the victim, in the final analysis the fact remains that it is even more important that an injustice is not done to a defendant. It is central to the way we administer justice in this country that although it may mean that some guilty people go unpunished, it is more important that the innocent are not wrongly convicted.*** [emphasis added in italics and bold italics]

315 Indeed, any approach to the contrary would be wholly inconsistent with the presumption of innocence that is the *necessary* hallmark of any criminal justice system. It is precisely this presumption that underlies the fundamental principle set out at the outset of this Judgment (see above at [2]) – that the Prosecution bears the legal burden of proving its case against the accused (here, the Appellant) *beyond a reasonable doubt*. In this regard, the following observations by Rajah J in the Singapore High Court decision of *Jagatheesan s/o Krishnasamy v PP* [2006] 4 SLR(R) 45 (at [58]–[60]) ought to be noted:

> 58 In deciding whether the evidence supports a conviction beyond reasonable doubt, it is not only necessary to clarify the conceptual dividing line between reasonable doubts and mere or fanciful doubts. ***It is also vital to appreciate that the principle that the Prosecution bears the burden of proving its case beyond reasonable doubt embodies two important societal values.***
>
> 59 First, it 'provides concrete substance for the presumption of innocence': *Winship* [*In re Winship* 397 US 358 (1970)] at 363. ***It is axiomatic that the presumption of innocence is a central and fundamental moral assumption in criminal law. It cannot be assumed that an individual is guilty***

by mere dint of the fact that he has been accused of an offence, unless and until the Prosecution adduces sufficient evidence to displace this presumption of innocence. That threshold below which society will not condone a conviction or allow for the presumption of innocence to be displaced is the line between reasonable doubt and mere doubt. Adherence to this presumption also means that the trial judge should not supplement gaps in the Prosecution's case. If indeed gaps in the evidence should prevail so that the trial judge feels it is necessary to fill them to satisfy himself that the Prosecution's burden of proof has been met, then the accused simply cannot be found legally guilty. In short, the presumption of innocence has not been displaced.

60 *Second*, ***the principle of reasonable doubt connotes and conveys the gravity and weightiness that society equates with punishment. It would be wrong to visit the indignity and pain of punishment upon a person (and his family) unless and until the Prosecution is able to dispel all reasonable doubts that the evidence (or lack thereof) may throw up.*** Therefore, it is critical that trial judges appreciate that inasmuch as fanciful conspiracy theories, often pleaded by the Defence, will not suffice to establish reasonable doubt, the Prosecution's theory of guilt must be supportable by reference to the evidence alone and not mere conjecture that seeks to explain away gaps in the evidence. Suspicion and conjecture can never replace proof.

[emphasis added in italics and bold italics]

Reported by Calvin Liang Hanwen.