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Case Note

ADMISSIBILITY OF FRESH EVIDENCE IN A CRIMINAL TRIAL

Opening Pandora's Box?

Public Prosecutor v Mohd Ariffan bin Mohd Hassan
[2018] 1 SLR 544

The Court of Appeal has had occasion to revisit the rules as to the admissibility of fresh evidence at a criminal appeal. In *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544, the court approved the three conditions of non-availability, relevance and reliability articulated in the English case of *Ladd v Marshall* [1954] 1 WLR 1489 and further held that these conditions continue to apply "in an unattenuated manner" to applications by the Prosecution to admit further evidence in a criminal appeal. The court thus refused the Prosecution's application to admit affidavits from witnesses whose evidence could have been obtained with reasonable diligence. However, rather surprisingly, it allowed in part a report from a psychologist, prepared for the appeal and essentially to rebut the findings of the trial judge as to the credibility of the complainant. This note considers the implications of such a modification of the condition of non-availability of evidence and the consequence of permitting fresh evidence merely to rebut findings of fact that a trial judge makes on the evidence before him.

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I. Introduction

1 The principles governing the admissibility of fresh evidence in a criminal appeal are fairly well settled. The law on taking additional evidence in a criminal appeal is governed by s 392(1) of the Criminal

Procedure Code[1] ("CPC"), which states that "in dealing with any appeal under this Part, the appellate court may, if it thinks additional evidence is necessary, either take such evidence itself or direct it to be taken by the trial court". Apart from conferring the power to take additional evidence, the provisions of the CPC do not explain how this should be exercised. The courts have, therefore, turned to English cases for guidance in determining when further evidence would be considered "necessary" as required under s 392(1) of the CPC. In Singapore, the courts are guided by the three conditions articulated by Lord Denning in *Ladd v Marshall*,[2] bearing in mind the higher burden of proving guilt in a criminal case.[3] These three conditions of non-availability at trial, relevance and reliability were further examined by the Court of Appeal in *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* ("*Mohd Ariffan*").[4] The Court of Appeal affirmed these three conditions as they apply to an application by the Prosecution to admit new evidence and further clarified the analysis to be done under the first condition. Most significantly, in what is believed to be the first for a case here, the application to admit new evidence was granted in order to rebut findings of fact that the trial judge had made in his grounds of decision. This note focuses on the apparent qualification of the first condition of non-availability. First, it will examine the basis for such a qualification and the desirability of doing so in an application by the Prosecution. It will then discuss problems with its application in the instant case, arguing that this may be tantamount to opening Pandora's box for the future use of fresh evidence in criminal appeals.

II. Facts and the decision

2 In *Mohd Ariffan*, the respondent had been charged with committing rape and other sexual offences against the complainant, who was 15 to 16 years old at the material time. The offences came to light only gradually, with the complainant first telling her boyfriend about the alleged offences – said to have taken place from March 2009 to early 2011 – sometime in 2010, and subsequently telling her mother about some aspects in 2011 and revealing the details more fully to her siblings in December 2012. The first information report to the police was made in December 2012.

1 Cap 68, 2012 Rev Ed.

2 [1954] 1 WLR 1489. These are similar to those stated in *R v Parks* [1961] 1 WLR 1484: that the court would only exercise its discretion to admit further evidence when the evidence was not available at trial was relevant to the issue and was credible evidence, capable of belief.

3 *Mohammad Zam bin Abdul Rashid v Public Prosecutor* [2007] 2 SLR(R) 410 at [7].

4 [2018] 1 SLR 544.

3 In respect of the rape charges, the respondent was accused of having driven the complainant in a prime mover to a forested area and having raped her at the back of the cabin of the prime mover. At the trial, the accused's employer testified that it was not the accused but another employee named Idris bin Mohamed who had been assigned to drive the prime mover at the material time. The Prosecution was apparently not previously aware of the existence of Idris. The trial judge subsequently acquitted the respondent on all five charges against him, finding that the evidence by the respondent and his employer at the time contrasted with a description by the complainant which was "confusing"; and "real doubt" was cast on the Prosecution's case regarding the identity and use of the prime mover.[5] Further, the trial judge found, *inter alia*, that the complainant's delay in informing others of the alleged offences, her reluctance to report the matter to the police, and the "contradictory and inconsistent" information she eventually gave had a "negative impact on her credibility".[6] Overall, her testimony did not stand up to the requirements for an "unusually convincing" account where no other evidence was available in order to prove the Prosecution's case beyond a reasonable doubt.[7]

4 The Prosecution appealed against the acquittal and also filed an application to admit further evidence on appeal, pursuant to s 392 of the CPC. The additional evidence in question consisted of three affidavits by Idris's son and two police officers, designed to rebut evidence by the respondent's employer in respect of Idris. The Prosecution also sought to admit at the appeal parts of an "expert report" by the chief psychologist at the Ministry of Social and Family Development, who opined that delays in disclosure, as well as inaccuracies and inconsistencies in accounts, were "highly realistic" characteristics of a victim's psychological response to rape.[8] This was intended to address what the Prosecution considered were mistaken conceptions of rape victims which had influenced the judge, as seen in his judgment.

5 Regarding the admissibility of further evidence, the Court of Appeal held that the three conditions in *Ladd v Marshall* should continue to apply in an "unattenuated manner" to such applications by the Prosecution, even though it had been previously held that "a less restrictive" approach should be used in considering the first condition of non-availability for an accused person – it being "less paramount than

5 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2017] SGHC 81 at [26]–[33].
6 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2017] SGHC 81 at [41]–[43].
7 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2017] SGHC 81 at [37] and [44]–[45].
8 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [89]–[90].

the other two conditions".[9] This was because the arguments for attenuation with regard to an accused person's application did not apply to applications by the Prosecution. These arguments were:

> (a) the need to avoid considerable prejudice that might be suffered by an accused person who is wrongfully convicted or receives a sentence manifestly disproportionate to his culpability;
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> (b) the disparity of resources between the Prosecution and accused persons and the Prosecution's control over the commencement of the criminal litigation process, by which time it would have had the opportunity to ensure that evidence gathered "is in a satisfactory state"; and
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> (c) the "harrowing nature" of an accused person's experience in defending criminal charges, which may impact his ability to consider the nature of the evidence needed for trial.[10]

6 The Court of Appeal subsequently made two modifications to the *Ladd v Marshall* requirements. First, it held that an appellate court, in considering the first condition of non-availability, should consider not only whether the evidence was physically available and so could have been obtained with reasonable diligence at trial but also whether the evidence was reasonably not thought to be necessary at trial. This was as "counsel cannot be expected to consider things that, objectively and reasonably, would not have been thought to be relevant to the case".[11] Such a consideration of what was reasonably thought necessary should entail "consideration of the issues a party would reasonably have become aware either before or during the course of trial".[12] Overall, then, such a consideration was said to be "essential … to ensure fairness and due process".[13] Second, the Court of Appeal held that the court should, in an application to admit fresh evidence, further consider the proportionality of allowing its admission, weighing the significance of the new evidence against the need for swift conduct of litigation and any prejudice which might arise from additional proceedings.[14] As will be argued later in this note, the Court of Appeal's approach in allowing the Prosecution's admission of part of an expert report in the present case may well militate against these very principles.

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9 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [49], referred to in the recent decision of the Court of Appeal in *Public Prosecutor v Chia Kee Chen* [2018] 2 SLR 249 at [50]; *Soh Meiyun v Public Prosecutor* [2014] 3 SLR 299 at [15].

10 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [57]–[60].

11 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [68].

12 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [68].

13 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [69].

14 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [72].

7 On applying the *Ladd v Marshall* requirements, the Court of Appeal, quite rightly, declined to admit the three affidavits relating to the evidence of Idris's son, holding that they did not meet the requirement for non-availability. In the court's view, there was no evidence to show that the Prosecution or the investigation team had made sufficient enquiries to ascertain the identity of the driver of the prime mover. The identity of Idris would likely have surfaced much earlier had this been done. Additionally, the Prosecution could have, during the trial, sought an adjournment for further investigations instead of closing its case.[15] The Court of Appeal was of the view that as the Prosecution had made a "conscious decision" in the latter regard, it could not presently accept that the evidence could not have been obtained with reasonable diligence.[16]

8 However, in relation to certain paragraphs in section 7 and two paragraphs in section 5 of the expert's report, the Court of Appeal held that, as the issue of the complainant's delay in disclosing the alleged abuse and her reluctance to report the matter to the police was "not a live point of contention at trial", the Prosecution could not "reasonably be expected to have considered at trial that it would be necessary to adduce an expert report dealing with how rape victims tend to approach the disclosure of sexual abuse", and evidence relating to the issue accordingly satisfied the requirement of non-availability.[17] These were also found to be relevant to issues in the appeal and were considered reliable, given the expert's "extensive learning and clinical experience".[18]

III. Analysis

A. Desirability of the qualification to the "non-availability" requirement

9 It is submitted that the addition of a separate qualification of what is "reasonably thought necessary" to the first condition of "non-availability" in *Ladd v Marshall* is both ambiguous and unnecessary. Indeed, the courts have previously proceeded on the basis that such a requirement is already bound up in an assessment of reasonable diligence. For example, in *Mohammad Zam bin Abdul Rashid v Public Prosecutor*,[19] where the appellant sought to avoid a term of life imprisonment, the Court of Appeal appeared to suggest that defence counsel should reasonably have thought of necessary affidavits

15 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [83].
16 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [84].
17 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [95].
18 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [96].
19 [2007] 2 SLR(R) 410.

attesting to family or other support, which he sought to produce only post-sentencing. This was because, on the available facts, the Defence "*knew* that the mitigating factor was the lack of impulse control by reason of the appellant's mental condition" and was thus "*aware* of the prognosis and the long-term medical treatment that would be required" [emphasis added].[20]

10 Similarly, in *Che Din Bin Ahmad v Public Prosecutor*,[21] where the Defence suggested a frame-up between the complainant and a prosecution witness, and additional evidence was sought to be admitted to rebut the evidence of the witness given at the trial, the Malaysian High Court held that it "should have been topmost in [the appellant and his counsel's] minds from the beginning" to enquire into whether the two knew each other so intimately as to so frame up a case.[22] Thus, the court held that the evidence sought to be adduced to show that the witness had committed perjury at the appellant's trial was "capable of being made available at trial if the appellant had exercised due diligence".[23]

11 Additionally, it would appear that by introducing the "reasonably thought necessary" qualification, the Court of Appeal was intending a more flexible interpretation of the court's discretion to admit fresh evidence under s 392 of the CPC. The position had hitherto been that, while s 392 of the CPC provides that additional evidence will be accepted only if it is "necessary", a much stricter application of the three *Ladd v Marshall* conditions was required to justify such necessity.[24]

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20 *Mohammad Zam bin Abdul Rashid v Public Prosecutor* [2007] 2 SLR(R) 410 at [8].

21 [1976] 1 MLJ 289.

22 *Che Din Bin Ahmad v Public Prosecutor* [1976] 1 MLJ 289 at 290, followed by the Court of Appeal in Putrajaya in *Mohamad Jamil bin Che Din v Public Prosecutor* [2014] 2 MLJ 98. The corresponding provision to s 392 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) is s 317 of the Malaysian Criminal Procedure Code (No 593 of 2012).

23 *Che Din Bin Ahmad v Public Prosecutor* [1976] 1 MLJ 289.

24 *Chung Tuck Kwai v Public Prosecutor* [1998] 2 SLR(R) 396 at [17]. It was held by Yong Pung How CJ that the circumstances in which an application to introduce fresh evidence will be allowed are "extremely limited" as "a liberal policy will go against the grain of the adversarial system … [in our trials which] is hardly compatible with allowing lacunae in the case of any party to be filled in by afterthoughts or reconstruction of any case after it has failed at the trial". Similarly, in *Juma'at bin Samad v Public Prosecutor* [1993] 2 SLR(R) 327, Yong Pung How CJ endorsed the explanation by Edmund Davies LJ in *R v Stafford* (1969) 53 Cr App R 1 that "public mischief would ensue and legal process could become indefinitely prolonged were it the case that evidence produced at any time will generally be admitted by this court when verdicts are being reviewed", and that overall "it is only in the most exceptional circumstances … subject to … exceptional circumstances, that the court is ever willing to listen to additional evidence": *R v Jordan* (1956) 40 Cr App R 152, followed in Malaysia in such cases

(*cont'd on the next page*)

It has further been held that where the additional evidence in question was not strictly unavailable at trial, it may be admitted only "in the most extraordinary circumstances", where "it can be shown that a miscarriage of justice has resulted".[25]

12 The Indian Supreme Court in *Rajeswar Prosad Misra v State of West Bengal*[26] also expressed similar sentiments and emphasised that the power afforded by s 392(1) must be "exercised sparingly and only in suitable cases".[27] Further, it stated that the new evidence should not cause prejudice to the accused, for example, "as a disguise for a retrial or to change the nature of the case against him".[28]

13 Thus, bearing in mind concerns about causing prejudice to an accused person and that the Prosecution had more time and resources to gather what was necessary to frame and prove its case, elements which had militated against an attenuation of the *Ladd v Marshall* requirements for it, it is submitted that the added qualification of what was "reasonably thought necessary" was undesirable for an application by the Prosecution in this case. It is further submitted that a strict requirement of previous physical non-availability of evidence should apply in the absence of factors specific to accused persons which militate against such strictness.[29] It should be remembered that the *Ladd v Marshall* condition of non-availability is "designed to prevent the waste of judicial resources that results from reopening cases which ought to have been disposed of the first time around", and a "spirit of greater willingness" to admit fresh evidence has been held to apply where such evidence would go towards exonerating a convicted person or reducing his sentence, given the "drastic ramifications" of an erroneous criminal conviction or erroneously heavy punishment for the convicted person.[30] The added qualification in *Mohd Ariffan* thus undermines the Court of Appeal's holding that the *Ladd v Marshall* requirements apply to the Prosecution in an unattenuated manner. The ultimate question then is

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as *Mohamed bin Jamal v Public Prosecutor* [1964] MLJ 254 and *Mohamad Jamil bin Che Din v Public Prosecutor* [2014] 2 MLJ 98.

25 *Mohammad Zam bin Abdul Rashid v Public Prosecutor* [2007] 2 SLR(R) 410 at [34].

26 [1966] 1 SCR 178.

27 *Rajeswar Prosad Misra v State of West Bengal* [1966] 1 SCR 178 at [16]. Section 392(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) is *in pari materia* with s 391(1) of the Indian Code of Criminal Procedure 1973 (Act No 2 of 1974).

28 *Rajeswar Prosad Misra v State of West Bengal* [1966] 1 SCR 178 at [16].

29 Yong Pung How CJ in *Juma'at bin Samad v Public Prosecutor* [1993] 2 SLR(R) 327 at [18] also allowed for the possibility for "wholly unexpected evidence … unearthed after the trial which brings into contention a new aspect which was not addressed at all in the trial".

30 *Soh Meiyun v Public Prosecutor* [2014] 3 SLR 299 at [16], *per* Chao Hick Tin JA.

how rigorously the courts wish to distinguish applications for admissibility of further evidence by the Prosecution from those by accused persons, for reasons that were well articulated by the Court of Appeal in the Prosecution's application for the evidence of witnesses to be admitted in *Mohd Ariffan*.

B. Issues with application of qualification

14 Even given the propriety of the new qualification, there are a number of issues as regards its application in this case. These are, in respect of its relevance to the facts of the present case, the nature and content of the parts of the expert's report sought to be admitted as "fresh evidence", and its relevance to the pending appeal.

(1) Relevance to the present case

15 If one were to apply the extended test of "reasonably thought necessary" under the non-availability requirement, a different conclusion from that of the Court of Appeal could well have been easily reached in *Mohd Ariffan*. In any criminal trial that relies on the uncorroborated evidence of the complainant, would the Prosecution not normally anticipate issues as to the complainant's credibility and prepare its case accordingly? More importantly, in a prosecution for a sexual offence, based largely on the uncorroborated evidence of the complainant which requires her evidence to be "unusually convincing", should the Prosecution not reasonably have considered issues as to her credibility, or lack of it, to be paramount to the trial? And where there is already evidence of considerable delays in reporting the offence to her boyfriend, family and the police, and her inconsistent narrations, would that not have been of sufficient concern to the Prosecution in proving the complainant's credibility and its case beyond a reasonable doubt? In fact, the Prosecution in *Mohd Ariffan* appears to have agreed at the trial that the case "rested primarily on the credibility of the girl and the respondent"; thus, it should have been aware of the need for an "unusually convincing" testimony from a complainant whose testimony lacked corroboration and was inconsistent.[31]

16 The Court of Appeal appears to have given undue credit to the Prosecution in this regard because it opined that the complainant's delay in disclosing the alleged abuse and her reluctance to report the matter to the police were "not a live point of contention" at the trial, although defence counsel had during cross-examination of the complainant made

31 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2017] SGHC 81 at [37]; *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [15].

"expository queries on the chronology of her disclosure to her boyfriend and family members", which ought to have alerted the Prosecution.[32]

17 But in a criminal trial, where the court is concerned that there ought not to be a failure of justice, it is not pleadings, submissions or the strategies of the Prosecution and Defence that matter. Judges must make decisions on the evidence before them; therefore, it is the evidence that matters. Thus, in *Pemble v The Queen*,[33] Barwick CJ observed:[34]

> Whatever course counsel may see fit to take, no doubt *bona fide* for tactical reasons in what he considers the best interest of his client, the trial judge must be astute to secure for the accused a fair trial according to law. This involves, in my opinion, an adequate direction both in law and possible use of the relevant facts upon any matter upon which the jury could in the circumstances of the case upon the materials before them find or base a verdict in whole or in part.

This was followed by the Court of Appeal in *Public Prosecutor v Mas Swan bin Adnan*[35] where the court held that the trial judge ought to have, on the evidence before him, found the accused guilty of a lesser offence even if the alternative defence was inconsistent with the main defence and not raised for consideration.

(2) Nature of "fresh evidence"

18 Considering the nature, content and objective of those parts of the expert's report, it is difficult to regard them as "fresh evidence" for the purposes of s 392(1) of the CPC and the *Ladd v Marshall* principles. These were unavailable only because they were not in existence before or at the time of the trial. Instead, the expert's report was commissioned and specially prepared *after* the grounds of decision of the trial judge was issued. Its sole purpose was to rebut the trial judge's findings on the credibility of the complainant and obviously to support the Prosecution's case during the appeal.

19 It is further submitted that where new evidence is sought to be adduced to question a trial judge's findings of fact, greater scrutiny

32 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [94].

33 (1971) 124 CLR 107.

34 *Pemble v The Queen* (1971) 124 CLR 107 at 117–118.

35 [2012] 3 SLR 527, followed by the Court of Appeal in *Public Prosecutor v Ilechukwu Uchechukwu Chukwudi* [2015] SGCA 33. Reference was made to a number of English cases, including *R v Cambridge* [1994] 1 WLR 971 and *R v Coutts* [2006] 1 WLR 2154 at [12], and to the Privy Council decision of *Mohamed Kunjo v Public Prosecutor* [1977–1978] SLR(R) 211, where the Privy Council considered the defence of sudden fight, although it was not raised in the courts below, as "otherwise there would be a real risk of failure of justice".

ought to be brought to bear on the relevance or credibility of such evidence.[36] In *HKSAR v Nwadiuto Samuel Joseph*,[37] the trial judge had declined to accept that the US$4,000 in possession of a convicted drug trafficker was from his brother-in-law as none of the documents provided by his wife had supported this. He thus drew the "irresistible inference" that the money was for the purposes of satisfying the Hong Kong Immigration Authority that he was a legitimate businessman, and for securing transportation, hotel and food bills during his stay, whether or not it was partly a reward for trafficking.[38] The money was hence ordered to be forfeited. On appeal to the Hong Kong Court of Appeal, the applicant sought to admit two letters, one from his wife about harassment over non-repayment from his brother-in-law, and another undated letter from the brother-in-law about a loan. The court noted that "the letters have clearly been written, and admitted by the applicant to have been so written, in order to provide a response to part of the reasoning of the judge in her forfeiture ruling".[39] Bearing such a "motive in mind", as well as a contradiction between the content of the two letters and what had been previously said by the applicant's counsel and his wife, the court found that the evidence was "not likely to be credible".[40]

20 Next, the content of the expert's partial report hardly qualifies as fresh evidence for the purposes of admission under s 392 of the CPC. Section 7 was nothing more than a *general* comment on characteristics of victims' disclosure of sexual abuse, including reasons for delays in the disclosure of child abuse, available in commentaries on the subject. The first paragraph in section 5 that was accepted for admission by the Court of Appeal stated that very few victims report immediately to law enforcement. The second referred to foreign research with jurors to indicate how inaccurate knowledge of victim psychology and stereotyped beliefs some jurors held about victims' responses influenced their decisions against rape victims. The significance of the foreign research is not clear in a country like Singapore where judges and not juries are the finders of facts. Juries were abolished in 1969 precisely for the reason that they were capable of easy persuasion and prejudice. More significantly, the trial judge in *Mohd Ariffan* was a Senior Judge of

36 The requirement of relevance is stated as "evidence [which is] such that, if given it would probably have an important influence on the result of the case, though it need not be decisive". Further, the requirement of reliability or credibility is that the evidence is "such as presumably to be believed … it must be apparently credible, though it need not be incontrovertible": *Ladd v Marshall* [1954] 1 WLR 1489 at 1491.

37 [2017] HKEC 280.

38 *HKSAR v Nwadiuto Samuel Joseph* [2017] HKEC 280 at [24].

39 *HKSAR v Nwadiuto Samuel Joseph* [2017] HKEC 280 at [57].

40 *HKSAR v Nwadiuto Samuel Joseph* [2017] HKEC 280 at [57].

the High Court with many decades of experience in criminal proceedings. A trial judge is entitled and often required to make judgments on a witness's credibility on the evidence before him, especially in sexual offences. What is unprecedented is the admission of an expert's report (the new evidence), prepared especially for the appeal, merely to rebut findings of fact of the trial judge on credibility and other findings of fact made on the evidence before him.

21 What stood out in the expert's report, however, was that it had no particular reference or relevance to the complainant herself. The expert admitted in her report that the "[l]imitation of [her] expert opinion" was that all the information about the complainant was from materials given to her by the Prosecution and she had not "personally conducted a face-to-face assessment or personally questioned the complainant".[41] Indeed, the Court of Appeal rejected sections 10 and 11 of the report for this very reason:[42]

> [I]n preparing her views on the complainant, Ms Ng had not interviewed the complainant and was provided by the Prosecution with only a part of the evidence. She therefore had an incomplete picture of the complainant and, indeed, of the case as a whole. In these circumstances … we think that her opinion specifically concerning the complainant is largely theoretical and therefore cannot be considered, to use the language in *Ladd v Marshall* … to be 'apparently credible' in the circumstances.

It does not, therefore, take an expert's report to bring the literature on which the expert's general comments were obviously based to the attention of the appellate court. If the trial judge was wrong in making the findings on the complainant's credibility, or was given to mistaken conceptions in respect of rape victims which clouded his judgment, this should be a matter for submission at the appeal.

(3) Relevance of the new evidence on appeal

22 Finally, for the reasons indicated above, it is unclear of what relevance the expert's partial report is going to be to the appellate judges or how the Prosecution will be allowed to use this report to rebut the trial judge's findings.

23 For a start, it is well established that an appellate court should be slow to overturn the findings of fact of a trial judge who has had the benefit of observing the witnesses in court, "especially where they hinge

41 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [90].

42 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [98], applied recently by the High Court in *Public Prosecutor v BDA* [2018] SGHC 72 at [39].

on the trial judge's assessment of the credibility and veracity of witnesses, unless they can be shown to be plainly wrong or against the weight of the evidence".[43] Such "judicial restraint" in relation to overturning or altering findings of fact of a trial judge is entrenched in numerous decisions.[44]

24 The additional difficulty for the Prosecution on appeal is that its application for a retrial, on the grounds that that the trial judge's findings on delay "infected" his assessment of all the other factual claims made by the respondent, was soundly rejected by the Court of Appeal:[45]

> In our judgment, the Prosecution's submission … finds no basis in the reasoning of the Judge. A careful reading of the GD ([12] *supra*) bears this out. The Judge clearly provided a number of reasons other than the complainant's delayed disclosure and reluctance to report the matter to the police in reaching his conclusion that she lacked credibility.

The Court of Appeal had further regard to various reasons given by the judge including the "contradictory and inconsistent" account of the respondent's sexual advances to various parties, contradictory evidence of a prosecution witness and the failure of the complainant's sister to corroborate her testimony.[46] It then concluded that "there was no indication from the judge's reasoning that his findings on the delayed disclosure marred his view of the complainant's credibility".[47]

25 A trial judge should be entitled to make judgments on a witness' credibility on the evidence before him without new evidence being all too easily adduced on appeal to question these findings. Although the trial judge in *Mohd Ariffan* did not comment on the girl's demeanour, he noted that evidence which contradicted hers (regarding the identity and use of the prime mover) came from a prosecution and non-partisan witness who "was obviously telling the truth as he knew it, and his credibility and veracity were not disputed".[48] Further, he noted inconsistencies in her accounts to her mother, siblings and boyfriend, as

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43 *Yap Giau Beng Terence v Public Prosecutor* [1998] 2 SLR(R) 855 at [24], approved in *Jagatheesan s/o Krishnasamy v Public Prosecutor* [2006] 4 SLR(R) 45 at [34].

44 See, for example, *Jagatheesan s/o Krishnasamy v Public Prosecutor* [2006] 4 SLR(R) 45; *Public Prosecutor v Poh Oh Sim* [1990] 2 SLR(R) 408; *ADF v Public Prosecutor* [2010] 1 SLR 874; *Ng Soo Hin v Public Prosecutor* [1993] 3 SLR(R) 703; *Public Prosecutor v Azman bin Abdullah* [1998] 2 SLR(R) 351; *Ang Jwee Herng v Public Prosecutor* [2001] 1 SLR(R) 720; *Bala Murugan a/l Krishnan v Public Prosecutor* [2002] 2 SLR(R) 420; and *Public Prosecutor v Mohammed Liton Mohammed Syeed Mallik* [2008] 1 SLR(R) 601.

45 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [102]–[103].

46 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [103].

47 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [103].

48 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2017] SGHC 81 at [32].

well as the failure by the Prosecution to have the girl's evidence regarding events around the time of an alleged instance of sexual penetration corroborated by her sister, who was present at the trial. It was thus in considering these inconsistencies that the trial judge found her evidence "not unusually compelling or convincing", while other evidence "did not strengthen the Prosecution['s] case in any significant way".[49] How then is the expert's report going to assist in rebutting such a finding on witness credibility based on the totality of evidence? Is this report so sacrosanct that it will now be tendered by the Prosecution at all criminal trials to uphold the credit of the complainant in sexual offences without question? Are trial and appellate judges now not going to be able to make findings on the credibility of complainants in sexual offences on the evidence before them?

IV. Conclusion

26 The courts in Singapore and other Commonwealth jurisdictions have emphasised that the appellate powers conferred by s 392(1) of the CPC and its equivalent, being an exception to the general rule that an appeal must be decided on the evidence before the trial court, must be "exercised with caution and circumspection so as to meet the ends of justice … not to fill up [a] lacuna but to subserve the ends of justice".[50] With respect, such gap-filling may be perceived to have taken place in this case.

27 *Mohd Ariffan* is troubling if it is seen as a precedent for lowering the standard for the admission of fresh evidence reasonably not thought necessary by the Prosecution at the time of trial, and additionally, that fresh evidence, including experts' reports, can now be obtained or prepared after the release of a trial judge's grounds of decision merely to challenge the findings of fact made by the trial judge on the evidence before him.

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49 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2017] SGHC 81 at [44].

50 *Per* the Supreme Court of India in *Rambhau v State of Maharashtra* [2001] 3 SCR 210 at [4], with similar concerns stated by Yong Pung How CJ in *Chung Tuck Kwai v Public Prosecutor* [1998] 2 SLR(R) 396 at [17] and *Lee Yuen Hong v Public Prosecutor* [2000] 1 SLR(R) 604 at [58].