IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 213

Magistrate's Appeal No 9303 of 2016

Between

Public Prosecutor

… *Appellant*

And

Ong Chee Heng

… *Respondent*

GROUNDS OF DECISION

[Criminal Law] – [Offences] – [Hurt]

[Criminal Procedure and Sentencing] – [Sentencing] – [Appeals]

TABLE OF CONTENTS

Public Prosecutor
v
Ong Chee Heng

[2017] SGHC 213

High Court — Magistrate's Appeal No 9303 of 2016
Chao Hick Tin JA
22 March 2017

28 August 2017

Chao Hick Tin JA:

Introduction

1 This was an appeal by the Prosecution against the sentence imposed on the respondent, Mr Ong Chee Heng ("the Respondent"), following his conviction on a charge for voluntarily causing hurt under s 323 of the Penal Code (Cap 224, 2008 Rev Ed) ("the Penal Code"). The Respondent and his co-accused were involved in an altercation in a smoking room at a pub. The victim was a patron at the pub and he was beaten so severely that there was a real possibility that he would suffer permanent blindness in his right eye. The district judge ("the DJ") sentenced the Respondent's co-accused, who was the primary assailant, to 20 weeks' imprisonment but merely imposed a fine of $4,000 on the Respondent. The Prosecution appealed against the imposition of a fine on

the Respondent, arguing that a custodial sentence ought to have been imposed on the Respondent in all the circumstances of the case.

2 The Prosecution's main submission on appeal was that the DJ, in characterising the Respondent's participation in the violence as that of "an accused person who had punched a victim a couple of times and not inflicted any serious injuries" at [61] of his grounds of decision ("the GD"), had wrongly appreciated the role of the Respondent in the altercation and failed to take into account the fact that this was an incident of "group violence". This appeal therefore raised the question of the proper approach towards a case involving a group element in a violence-related offence and the justifications for treating such an element as an aggravating factor. After considering the parties' written and oral submissions and viewing the CCTV footage of the incident during the hearing of the appeal, I allowed the Prosecution's appeal and enhanced the Respondent's sentence to two weeks' imprisonment. I now give my reasons.

The Respondent and his co-accused

3 The Respondent, a 31-year-old Singaporean, was at the material time a manager at the pub – Talk Cock Sing Song pub ("the Pub"), located at 244A Upper Thomson Road – where the altercation took place.

4 On 25 October 2016, the Respondent pleaded guilty to a single charge under s 323 of the Penal Code. The charge read as follows:[1]

> You … are charged that you, on the 2 September 2015, at or about 1.20 a.m., at the Talk Cock Sing Song Pub, located at No. 244 Upper Thomson Road, Singapore, did voluntarily cause hurt to one Song Chee Kiong, Male / 43 years old, *to wit*, by punching the said Song Chee Kiong on his face, and you have thereby committed an offence punishable under Section 323 of the Penal Code (Cap 224, 2008 Rev Ed).

[1] ROP at p4.

5 The Respondent's co-accused, Mr Lee Mun Soon Freddy ("Mr Lee"), likewise pleaded guilty to a single charge under s 323 of the Penal Code. The charge against Mr Lee was as follows:

> You, are charged that you, on the 2 September 2015, at or about 1.21 a.m., at the Talk Cock Sing Song Pub, located at No. 244 Upper Thomson Road, Singapore, did voluntarily cause hurt to one Song Chee Kong, Male / 43 years old, *to wit*, by punching the said Song Chee Kiong on his right eye, causing him to suffer permanent damage to the eye structures (retinal tear with retinal and cilio-chorodial detachment), and you have thereby committed an offence punishable under section 323 of the Penal Code (Cap 224, 2008 Rev Ed).

6 Before I proceed to examine the sentences imposed by the DJ on both the Respondent and Mr Lee, I will first set out the facts that led to their convictions.

The facts

7 It is appropriate to highlight at this juncture that apart from the Statement of Facts ("the SOF") that was tendered and accepted by the Respondent at the plead guilty mention, an important source of evidence from which the material facts were ascertained by the DJ was a CCTV recording from a camera installed within the smoking room of the Pub that captured the relevant events. The Prosecution had the CCTV recording screened before the DJ at the plead guilty mention, and also before me on appeal. The Respondent did not dispute, either before the DJ or on appeal, that the CCTV footage was authentic and also a full, accurate and reliable recording of the material events that had occurred that day. I accordingly accepted the footage as evidence relevant to the sentencing of the Respondent.

8 The DJ set out a useful table at [13] of the GD describing the events that transpired and the times they occurred, as seen from the CCTV footage. On

appeal, none of the parties disputed the accuracy of the DJ's description of events in that table and I therefore relied on it in reaching my sentencing decision. In these grounds, I will also supplement the DJ's account of the facts with my own observations from the CCTV footage.

The victim and his wife

9 The material events occurred in the smoking room in the Pub, in the early hours of 2 September 2015. Apart from the Respondent and Mr Lee, who were friends,[2] the other two key persons involved in the events were Mr Song Chee Kong ("the Victim"), a 43-year-old Singaporean, and the Victim's wife, Ms Yvonne Low Boon Kun ("Ms Low"). They were both patrons in the Pub at the material time.

The first incident

10 The Victim was drinking with his group of friends in the Pub at about 1 am. He subsequently saw Mr Lee get into a dispute with one of his friends. The Victim then intervened and suggested to Mr Lee that they go to the smoking room.[3] The start of the CCTV recording shows Mr Lee, the Victim and Ms Low near the entrance of the smoking room, with the Victim in a discussion with an unknown individual.[4] Mr Lee also began talking continuously in the direction of the Victim, whose attention was on certain individual(s) standing outside the smoking room.[5] At some point, the Respondent also entered the smoking room and stood at its entrance, holding a cigarette. He also appeared to have started speaking rather agitatedly in the Victim's direction.

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2 Statement of Facts ("SOF") at para 1: ROP p5.

3 SOF at para 5: ROP p5.

4 ROP p37 at s/no 1 of the table.

5 ROP p37 at s/no 2 of the table.

11 It was at this point in time that the physical violence, as recorded in the CCTV footage, began. Mr Lee directed a flurry of punches to the Victim's head or face.[6] As Deputy Public Prosecutor Mohd Faizal ("Mr Faizal") pointed out during the hearing, and as reflected in the CCTV footage, at some point near the start of the violence, the Respondent also threw a punch at the Victim. Mr Faizal described this as a "quick attempt to punch the Victim" and conceded that it was not clear if the punch actually landed on any part of the Victim, but he sought to make the point that the Respondent was an "active participant in the process". I noted that the Respondent's punch or attempted punch was not mentioned in the DJ's table of events. One of Mr Lee's punches floored the Victim. While the Victim was still on the ground, Mr Lee landed more blows on him. The Respondent then approached Mr Lee and pulled the back of Mr Lee's t-shirt with one hand, with little effect on Mr Lee. Mr Lee continued to punch the Victim. An unknown individual (whom the DJ found to be a patron of the Pub (see GD at [51])) eventually grabbed hold of Mr Lee and pulled him away from the Victim.[7]

12 The Victim got up and appeared to have a verbal confrontation with the Respondent, who pushed the Victim away.[8] Mr Lee then forcefully punched the Victim again, causing the Victim to once again fall onto the floor.[9] Ms Low intervened by pushing Mr Lee away from the Victim (who, as earlier mentioned, was Ms Low's husband). At this time, the Respondent simply continued to smoke his cigarette. Ms Low then launched herself at Mr Lee but was grabbed by the Respondent. When the Victim attempted to release her from the Respondent's hold, Ms Low fell at a corner of the room.[10] In the meantime, the

6 ROP p37 at s/no 4 of the table.

7 ROP p37 at s/nos 3–5 of the table.

8 ROP p38 at s/no 6 of the table.

9 ROP p38 at s/no 7 of the table.

Victim was ushered out of the smoking room by another patron of the Pub.[11] However, Ms Low remained in the smoking room. I will refer to this aforementioned series of events as "the first incident".

The second incident

13 The altercation in the smoking room continued at this juncture but, as Mr Faizal observed, it did not involve the Victim. After the Victim left the smoking room, Ms Low stood up and launched herself at Mr Lee again. What followed was essentially a series of attempts by both Mr Lee and Ms Low to hit and push each other. This persisted for slightly over a minute, during which the Respondent left the room. Mr Lee also went out of the room shortly thereafter.[12]

14 Realising that Ms Low was still in the smoking room, the Victim returned to the room and went over to Ms Low. After a while, the Respondent also sought to re-enter but other patrons appeared to be trying to prevent the Respondent from entering the room.[13] As Mr Faizal put it, the other patrons were basically trying to restrain the Respondent from further interference. The Victim continued to tend to Ms Low, who was seated on the floor.[14] At a certain point, both Mr Lee and the Respondent had managed to re-enter the smoking room. The Victim did not turn his attention to the two of them but continued to tend to Ms Low, looking only at her. I agreed with Mr Faizal's submission that there was no indication at this juncture that the Victim was "spoiling for a fight" – all he was seeking to do was to care for his wife.

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10 ROP p38 at s/no 8 of the table.

11 ROP p38 at s/no 8 of the table; SOF at para 6: ROP p6.

12 ROP p38 at s/nos 9 and 10 of the table.

13 ROP p38 at s/nos 11–12 of the table.

14 ROP p38 at s/no 12 of the table.

15 While the Victim was doing so, the Respondent punched the Victim once on the face, causing the latter to reel backward and fall onto the floor.[15] Both Mr Lee and the Respondent then pointed repeatedly at the Victim while he was on the floor. The Victim attempted to get back up, but Mr Lee moved forward and elbowed the Victim on the back, forcing him toward the wall of the room. Mr Lee continued to elbow the Victim several more times.[16] At this point, the Respondent threw another punch at the Victim.[17] I agreed with Mr Faizal that from the Victim's reaction, there appeared to have been an impact on the Victim following the Respondent's swing. The Respondent then swung at the Victim several more times but, as the Prosecution conceded, there did not appear to have been any further impact. Mr Lee picked up a metal chair and appeared to be trying to hit the Victim with it, but again it was not clear if there was any impact.[18] Thereafter, other patrons in the room separated the Victim from Mr Lee and the Respondent, and this brought the altercation to an end with the Victim being ushered out of the smoking room by those patrons.[19] I will refer to this series of events as "the second incident".

The victim's injuries

16 According to a medical report by Dr Rajagopalan Rajesh from Tan Tock Seng Hospital, the Victim sustained permanent damage to the right eye structures (retina and ciliary body) as a result of the events. He would require follow-up treatment for at least two years if his condition stabilised, as well as surgery for removal of silicone oil in that eye and implantation of intraocular

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15 ROP p39 at s/no 14 of the table.

16 ROP p39 at s/no 16 of the table.

17 ROP p39 at s/no 17 of the table.

18 ROP p39 at s/no18 of the table.

19 ROP p39 at s/no 19.

lens. According to Dr Rajesh, since the Victim's right eye pressure was very low, there was a possibility of that eye shrinking, leading possibly to blindness.[20]

The DJ's decision

17 The DJ sentenced Mr Lee to 20 weeks' imprisonment and the Respondent to a fine of $4,000, in default one month's imprisonment.

18 For present purposes, it suffices to briefly summarise the DJ's findings with regard to Mr Lee. The DJ found that Mr Lee was the aggressor and that there was no provocation by the Victim that would in any way justify Mr Lee's assault: the GD at [23]–[24]. Mr Lee's attack was not only unexpected but also very forceful and persistent; indeed, it was an assault carried out in a "vicious, brutal and sustained manner": the GD at [29] and [33]. The DJ also observed at [34]–[35] that the injuries suffered by the Victim right eye were "very severe", given the permanence of the damage and the possibility that he might lose his sight in that eye. However, the DJ noted that Mr Lee had voluntarily compensated the Victim over $8,000 for medical expenses and held at [38] that this was a valid mitigating factor. After considering the sentencing precedents and the entirety of the circumstances, the DJ found that the primary sentencing consideration in respect of Mr Lee was the need for specific deterrence and imposed a sentence of 20 weeks' imprisonment.

19 The DJ then turned his attention to the sentence to be imposed on the Respondent. His analysis in respect of the Respondent was much briefer than that devoted to Mr Lee. He found at [51] that the Respondent was "far less involved in the assault". Significantly, he stated that the Respondent "did not participate in the assault when Mr Lee was first attacking [the Victim]".

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[20] ROP p55.

However, he disagreed with the submission made by counsel for the Respondent, Mr Selva K. Naidu ("Mr Naidu"), that the latter was "for most of the time" trying to stop the fight, finding that the Respondent's attempts to pull Mr Lee away from the Victim (by pulling at Mr Lee's shirt (see [11] above)) were "cursory at best" and "[i]t was the unknown patron who had exerted most of the force to pull Mr Lee away from [the Victim]".

20 The DJ also highlighted at [52] the Respondent's nonchalant conduct during the first incident. After Mr Lee first landed punches on the Victim, who fell onto the floor, the Respondent had not tried to restrain Mr Lee when the latter resumed his attack on the Victim; instead, the Respondent "appeared to be more intent on finishing his cigarette than intervening to protect [the Victim]" (see [12] above). He further noted that when Ms Low tried to push Mr Lee away to stop the latter's assault on the Victim, the Respondent in fact grabbed Ms Low and moved her away from Mr Lee.

21 In relation to the second incident, the DJ rejected Mr Naidu's submission that the Victim had informed the Respondent that "he wanted to call people down", and that therefore the Respondent had struck the Victim in order "to make him leave the premises": the GD at [53].[21] The DJ found, quite rightly, that this argument was "absurd" because it was implausible that the Respondent would have resorted to violence in this manner if he had truly wanted to diffuse the tension of the situation. If the Respondent really had peaceful motives, he would likely have tried to talk the Victim out of such a course of action or sought to persuade him to call the police. The Respondent was "in fact the aggressor and … there [was] no evidence that [the Victim] had provoked him": GD at

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[21] ROP p56.

[54]. He acted opportunistically by punching the Victim when the latter was looking at Ms Low and not at the Respondent.

22 The DJ decided at [55] that the "primary culpability" for the assault on the Victim and the injuries he suffered rested on Mr Lee. The Respondent's participation, "whilst completely unjustified and unprovoked, was minor in the whole scheme of things as he only punched [the Victim] twice". The DJ observed that the Respondent had antecedents for violence-related offences (*ie,* the offences of voluntarily causing hurt to deter a public servant from his duty (under s 332 of the Penal Code), using indecent, threatening, abusive or insulting words or behaviour toward a public servant (under s 13D(1)(*a*) of the Miscellaneous Offences (Public Order and Nuisance) Act (Cap 184, 1997 Rev Ed) ("the Miscellaneous Offences Act") in 2005, and disorderly behaviour (under s 20 of the Miscellaneous Offences Act) in 2007)). The DJ took these antecedents into consideration as an aggravating factor in respect of sentencing, although he noted that these antecedents were quite dated: the GD at [57].

23 Notably, the DJ held at [58] that "[e]xcept for his plea of guilt … there were *no significant mitigating factors* to be considered with regard to [the Respondent]" [emphasis added]. The DJ concluded that although the Respondent was not responsible for the serious injuries inflicted on the Victim, the Respondent was "opportunistic in his attack" and there was likewise "a need for specific deterrence": the GD at [60]. That said, the DJ took the view that the custodial threshold was not crossed and it sufficed to impose a fine "that was higher than the usual fine that would be imposed on an accused person who had punched a victim a couple of times and not inflicted any serious injuries": the GD at [61]. In the result, the DJ imposed a fine of $4,000 on the Respondent.

The Prosecution's submissions on appeal

24 The Prosecution's appeal against sentence was on the ground that a fine of $4,000 was manifestly inadequate and that a custodial sentence of between three and four weeks' imprisonment should have been imposed.[22]

25 The Prosecution's first and main submission was that the DJ failed to apply the principles of group violence as articulated by the Court of Appeal in *Public Prosecutor v Leong Soon Kheong* [2009] 4 SLR(R) 63 ("*Leong Soon Kheong*").[23] According to the Prosecution, this was a case of group violence. During the first incident, the Respondent stood by casually smoking his cigarette instead of taking any steps to prevent Mr Lee from beating up the Victim. He also grabbed Ms Low and moved her away from Mr Lee, thus preventing her from intervening.[24] During the second incident, there was absolutely no reason for the Respondent to re-enter the smoking room after he had left following the first incident. He voluntarily chose to re-enter the fray and proceeded to punch the Victim. When the Victim eventually stumbled back up, the Respondent punched him again.[25] The Prosecution submitted that the Respondent's "active participation in the violent attack … emboldened [Mr Lee]", leading Mr Lee to escalate the degree of violence in the attack by attempting to use a metal chair to hit the Victim. This "emboldening effect" was reflective of the reason why group violence is generally treated as more aggravating than acts of violence by an individual.[26] The Respondent's behaviour, including his repeated gesticulation at the Victim during the second

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22 Appellant's submissions at para 4.

23 Appellant's submissions at para 19.

24 Appellant's submissions at para 21.

25 Appellant's submissions at para 22.

26 Appellant's submissions at para 23.

assault, further reflected his complicity in the assault.[27] While the Prosecution accepted that the Respondent was not as culpable as Mr Lee,[28] it was "unrealistic and simply wrong to view the Respondent as being culpable 'only' for the punches he landed directly on the [Victim] and nothing else"; the court should "ascribe significant weight to the composite nature of the attack rather than to microscopically and artificially ascribe individualised sentences predicated completely on that individual's specific acts". Since – at least in relation to the second incident – "the parties were both acting in concert … it must consequently follow that the culpability of the Respondent must be calibrated significantly above that of an individual 'who had punched a victim a couple of times and not inflicted any serious injuries' [quoting from the GD at [61]".[29]

26 The Prosecution's second argument was that the DJ did not accord sufficient weight to the fact that (a) the attack was unprovoked and involved the use of gratuitous violence; and (b) the offence took place in a public entertainment outlet to which members of the public had access. The Respondent had attacked the Victim when the Victim was not looking at him and was thus in no position to defend himself. Furthermore, the blow struck by the Respondent (*ie,* the first blow during the second incident (see [15] above)) was delivered with such force that it caused the Victim to reel backward and fall onto the floor. This was not merely an opportunistic attack, as the Respondent proceeded to punch the Victim another time after that.[30] In addition, the attack occurred at a publicly accessible location, raising public disquiet and alarm and therefore necessitating a deterrent response.[31]

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27 Appellant's submissions at para 21.

28 Appellant's submissions at para 25.

29 Appellant's submissions at para 24.

30 Appellant's submissions at para 27.

31 Appellant's submissions at para 28.

27 Third, the DJ did not place any weight on the fact that the Respondent was a manager of the Pub. Although he was off-duty at the time, he would, at least, have had the responsibility to call the police or notify staff members who were on duty to stop the fight. He did none of that. Instead, he "proceeded actively to fan the flames of [Mr Lee's] aggression by becoming an active participant in the attack".[32]

28 The Prosecution's fourth argument was that the DJ gave undue weight to the Respondent's plea of guilt, which should have been of extremely limited mitigating value in light of the fact that the evidence against him was overwhelming and he did not show genuine remorse. The Respondent's lack of remorse was reflected in the way in which he conducted his mitigation plea. By arguing that he had been trying to break up the fight between Mr Lee and the Victim, he had essentially sought to downplay his role. This argument was unequivocally rejected by the DJ, who described this claim as "absurd" (see [21] above). In the light of what I observed from the CCTV recording, the Respondent was not telling the truth. His aim in making this argument in mitigation was simply to save his own skin, regardless of whether his argument actually bore any relation to what happened at the material time.

29 Finally, the Prosecution submitted that the DJ failed to consider relevant sentencing precedents in determining the appropriate sentence to be imposed on the Respondent. While the DJ considered the sentences meted out in past cases in sentencing Mr Lee, he did not specifically refer to any such precedents in concluding that the custodial threshold had not been crossed in relation to the Respondent. The Prosecution took the position that an imprisonment term of

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[32] Appellant's submissions at para 30–31.

three to four weeks would be in line with the sentencing precedents.[33] I will refer to several of the relevant precedents in a moment.

Issues for determination

30 Reduced to its essentials, the Prosecution's case was that the DJ had failed to take into account or place appropriate weight on several features of the Respondent's conduct that demonstrated the true gravity of his actions and the extent of his culpability. As I saw it, the key issues that arose in the appeal were the following:

(a) Whether this was a case of "group violence" and, if so, how this impacted on the proper sentence;

(b) Whether the DJ failed to consider or did not attribute the necessary weight to the fact that the Respondent's attack was unprovoked and took place in a public area, and that the Respondent was an off-duty manager of the Pub where the attack took place;

(c) Whether the DJ placed undue mitigating weight on the Respondent's plea of guilt; and

(d) In light of the sentencing precedents, whether the custodial threshold was crossed and, if so, what the appropriate length of imprisonment ought to be.

Group element as an aggravating factor

31 I must at this point highlight that the charge upon which the Respondent was convicted did *not* involve an element of common intention nor that of a

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[33] Appellant's submissions at paras 37–40.

common object of an unlawful assembly under ss 34 and 149 respectively of the Penal Code. Rather, the charge brought against him was for voluntarily causing hurt under s 323 of the Penal Code *simpliciter*. Consequently, there was a need for caution in considering sentencing precedents involving charges for causing hurt with common intention or pursuant to the common object of an unlawful assembly. It is trite that the Respondent must be sentenced only for the charge for which he has been convicted. Nevertheless, the question remained as to whether the existence of a group element – if indeed this was a case involving such an element – could properly be taken into account as an *aggravating factor* in respect of the offence committed by the Respondent and for which he was convicted.

Relevance of a group element in sentencing

32 In *Public Prosecutor v Law Aik Meng* [2007] 2 SLR(R) 814 ("*Law Aik Meng*"), V K Rajah J (as he then was) held at [25(b)] that the fact that an offence was committed by two or more persons may be regarded as an aggravating factor potentially attracting a need for general deterrence. Rajah J explained as follows:

> … Group offences generally result in greater harm. Another significant factor is that the victim is likely to be in greater fear in cases where physical intimidation is exerted. Further, group pressure to perpetuate such offences may add to their persistency, and group dynamics necessarily imply greater harm or damage: see Professor Andrew Ashworth in *Sentencing and Criminal Justice* (Cambridge University Press, 2005, 4th Ed) ("*Sentencing and Criminal Justice*") at p 157. …

33 In the most recent edition of Prof Ashworth's book, *Sentencing and Criminal Justice* (Cambridge University Press, 6th Ed, 2015), Prof Ashworth explains at pp 170–171 that the key justification for regarding the commission of an offence by two or more people as an aggravating factor lies in the greater

harm which might result. He also notes that "[i]n cases where two or more offenders confront a victim, a significant factor is that the victim is likely to be in greater fear and to feel a greater sense of humiliation and helplessness". Another "reason for aggravation in these cases might be that group pressure to continue may make such offences less likely to be abandoned, and that group dynamics may lead to greater harm or damage being caused" (citing Lord Lane CJ's view in *Regina v Pilgrim* (1983) 5 Cr App R (S) 140 that "mob violence feeds upon itself"). As Rajah J described in *Law Aik Meng* at [25(b)], toward the more serious end of the spectrum are group offences that involve syndicate crimes. In all cases involving syndicate crimes, deterrence is a key sentencing concern because, apart from the aggravation accruing from the group element in syndicate crimes, deterrence is needed in light of the premeditation, sophistication and planning that is inevitably involved. For the purposes of the present appeal, however, it is unnecessary to set out and further consider the sentencing approach to syndicate crimes.

34 In my judgment, the sentencing court ought to have careful regard to the facts and circumstances of a given case in determining whether there was in existence a group element, and if so, whether that element aggravated or had the potential to aggravate the offence committed. The court must consider, for instance, whether the fact that more than one offender was present resulted in (a) a higher degree or a greater likelihood of fear to the victim; (b) had the effect of encouraging, facilitating or perpetuating the continued commission or escalation of the offence; and/or (c) resulted in a higher degree of actual and potential harm to the victim.

35 The need for sensitivity to the facts of the case was illustrated most clearly in *Tan Kay Beng v Public Prosecutor* [2006] 4 SLR(R) 10 ("*Tan Kay Beng*"). In that case, the appellant pleaded guilty before a district judge to a

charge of theft with common intention as well as to a second charge of criminal intimidation. The appellant had gone to confront, together with two other persons, an individual who allegedly owed debts to him. After some unsuccessful discussion, one of the appellant's companions pulled out a bread knife and pointed it at the appellant's debtor, demanding that the latter hand over his possessions in order to settle the debts. The district judge found that the confrontation "was a confrontation of one person by a group of three" and that this could have resulted in the greater likelihood of harm. On appeal, Rajah J disagreed with the district judge, finding (at [28]) that the incident conjured "the image of hot-blooded individuals acting impulsively"; "[c]ritically, no one in [the appellant's] party came armed with a weapon" as the bread knife was taken from the coffee shop where the confrontation occurred. There was no plan or organisation to criminally intimidate and steal from the debtor. Rajah J also found at [27] that the party of three could not "by any stretch of imagination" be described as a mob or as participants in organised crime.

36 The crucial point that I drew from *Tan Kay Beng* for present purposes was that the mere fact that there was a group element in the facts and circumstances of the offence did not mean that the commission of the offence was *necessarily* aggravated. The court must determine whether the existence of the group element had, in point of fact, the *effect* of elevating the fear, harm or other aggravating characteristics of the offence. In a case where the offender has not even been charged with a common intention or common object offence, the court must first satisfy itself that there was in fact a group element to the criminal conduct, before considering how the existence of such an element served to aggravate the commission of the offence (if at all). I agreed with the view expressed in *Sentencing Practice in the Subordinate Courts* (LexisNexis, 3rd Ed, 2013) ("*Sentencing Practice*") at p 140 that "the nature of group

offences may differ and therefore this necessitates *a close examination of the facts*. It would be incorrect to invariably assume that a person who offends as part of a group is always more culpable than another person who offends on his own" [emphasis added]. In *Biplob Hossain Younus Akan v Public Prosecutor and another matter* [2011] 3 SLR 217 (cited by the authors of *Sentencing Practice* at p 140 in support of their view), Rajah JA provided at [18] the following succinct and timely statement of principle which I endorse entirely:

> … it also appears that significant weight is ordinarily placed on the fact that an accused person acted as part of a group. Here I would like to stress that there are group offences and there are group offences. And within each group of offenders there might well be varying degrees of culpability. *It would be incorrect to invariably assume that a person who offends as part of a group is always more culpable than another person who offends on his own. Each case must turn on a close examination of its facts, for which a bland recitation of general principles is no substitute.* [emphasis added]

Whether this was a case involving a group element

37 As mentioned at [25] above, the Prosecution relied on the Court of Appeal's decision in *Leong Soon Kheong*. The victim in *Leong Soon Kheong* was beaten by a group of men and eventually passed away due to his injuries. The respondent in that case did not, however, physically participate in the assault. The court found at [34]–[35] that the respondent nevertheless "actively participated" in the menacing interrogation of the victim prior to the assault and was in fact the person who had instructed the group to launch the assault. The court allowed the Prosecution's appeal against sentence and enhanced the sentence to seven years' imprisonment from the original term of four years' and nine months' imprisonment. Notably, the respondent in that case had been convicted of a charge for culpable homicide not amounting to murder under s 304(*b*) read with s 149 of the Penal Code (Cap 224, 1985 Rev Ed). Section 149 states that if an offence was committed by any member of an unlawful assembly

in prosecution of a common object, or such as the members knew to be likely to be committed in prosecution of that object, every person who is a member of that assembly at the time the offence was committed will be guilty of that offence. In the present case, the Prosecution relied[34] on [37] of *Leong Soon Kheong* where the court stated that "[a] person, who by his presence and/or conduct authorises, instigates or supports an act of physical violence cannot avoid or limit his own personal responsibility by simply pointing to his lack of physical participation in the incident". As described at [25] above, it was the Prosecution's submission that the Respondent in the present case actively participated in the beating of the Victim and that his participation emboldened Mr Lee and resulted in the escalation of violence.

38 In relation to the first incident, I found that the Respondent's attempt, at the start of the altercation, to throw a punch at the Victim (see [11] above) was aggravating. Although it was not clear if the punch actually landed on the Victim, this was a clear demonstration of antagonism toward the Victim and I agreed with Mr Faizal's submission that the Respondent was "not a passive individual", even at this early stage of the violence. It likely had the effect of generating greater animosity towards the Victim and encouraging Mr Lee to continue his attack on the Victim. Here, one must bear particularly in mind the fact that the Respondent was at the time a manager of the Pub, though off-duty. Instead of helping to preserve the peace in the Pub, which any sensible off-duty manager would have done, he did quite the opposite. I elaborate on this important point at [42] below. I disagreed with the DJ that the Respondent "did not participate in the assault when Mr Lee was first attacking [the Victim]" (see [19] above). In addition, I did not think that the Respondent's attempt during this period to pull Mr Lee from the Victim was of any mitigating value. As the

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[34] Appellant's submissions at para 19.

DJ himself found (see [19] above), this attempt was cursory at best and consisted of nothing more than a one-handed tugging at the back of Mr Lee's t-shirt. The Respondent's general nonchalance was also reflected in the fact that he generally stood around smoking his cigarette while Mr Lee persisted in his assault on the Victim (see [12] above).

39 Moving to the second incident, I found that the Respondent's behaviour was even more aggravated. To reiterate the material facts, the Respondent re-entered the smoking room after the Victim had come back in. While the Victim was looking at Ms Low, the Respondent punched the Victim once on the face, causing him to reel backwards and then fall forward onto the floor. When Mr Lee later re-entered as well and started elbowing the Victim, the Respondent punched the Victim a second time (see [13]–[15] above). In the circumstances, I agreed with the Prosecution that it was clear by that juncture both Mr Lee and the Respondent were seeking to cause hurt to the Victim. This was further demonstrated by the fact that at some point during the second incident, both Mr Lee and the Respondent pointed repeatedly to the Victim while he was on the floor, indicating that both of them had ill intent toward the latter, before the assault on the Victim continued.

40 In my judgment, the DJ was correct to identify the Respondent's aggression and willingness to resort to physical violence without provocation as an aggravating factor (see [21] above). But he did not appear to take into account the fact that the Respondent's behaviour in all likelihood served to encourage Mr Lee in continuing his violence towards the Victim. The Victim had to fend off two attackers and this undoubtedly also enhanced the fear and helplessness he felt (and likely by his wife, Ms Low, as well). I therefore agreed with the Prosecution that the Respondent could not simply be sentenced as "an accused person who had punched a victim a couple of times and not inflicted any serious

injuries": the GD at [61]. The DJ's approach did not adequately reflect the gravity of his acts even though his punches *per se* did not cause serious hurt to the Victim.

Other aggravating factors

Lack of provocation and role as pub manager

41 I further agreed with the Prosecution that the Respondent's attack on the Victim appeared, to all intents and purposes, to be unprovoked. According to the SOF,[35] the confrontation between Mr Lee and the Victim occurred following a dispute between Mr Lee and one of the Victim's friends. The Respondent was completely uninvolved in this earlier dispute. Given, as the DJ found (see [21] above), that the Respondent did not act to get the Victim to leave the Pub, perhaps the reason why the Respondent decided to get involved in the fracas was that Mr Lee was his friend (as reflected in the SOF)[36] and the Respondent therefore wanted to "help" Mr Lee by taking his side in the altercation.

42 As I mentioned at [38] above, the Respondent was an off-duty *manager* of the Pub. As a manager, though off-duty, he should have acted as a peacemaker instead of fanning the flame of violence. The Respondent's actions must also be seen in light of the fact that the Victim was a *patron* of the Pub. I note that Mr Naidu himself had pointed out to the DJ at the sentencing hearing the fact that the Respondent was a manager at the Pub,[37] yet no mention of this important fact was made in the GD. In my view, this was an important aggravating factor which the DJ did not appear to have taken into account in deciding on the appropriate sentence to be imposed on the Respondent.

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35 ROP pp5–6.

36 ROP p5 at para 1.

37 ROP p18.

Commission of offence in a public place

43 In *Tan Kay Beng*, Rajah J explained at [25] that the fact that "an offence is committed in public cannot *ipso facto* be an aggravating factor" and, conversely, "an offence committed in private cannot inevitably or invariably be viewed as meriting more lenient treatment". On the facts of *Tan Kay Beng* (described at [34] above), Rajah J found that there was no suggestion that the public was disturbed in any way, and held that "[t]he level of public fear or alarm generated by an incident is a relevant sentencing consideration". As there was no evidence to invite any inference that the brief incident caused alarm either to the coffee shop's patrons or to any member of the public, Rajah J decided that there was no basis to draw such an inference and therefore did not regard the fact that the offence was committed in public as a relevant aggravating factor.

44 In *Public Prosecutor v Muhamad Hasik bin Sahar* [2002] 1 SLR(R) 1069 ("*Muhamad Hasik*"), the offender was a member of an unlawful assembly whose common intention was to cause hurt to members of a rival gang. Tay Yong Kwang JC (as he then was) found at [39] that the attack occurred in a "public area popular with locals and foreigners" (a pub along South Bridge Road) and held that "[o]ur streets and public places must be kept safe by day and by night for law abiding people. … Gang fights and running street battles have absolutely no place in a civilised society."

45 In my judgment, the fact that an offence – particularly a violence-related offence – is committed in a public place will be an aggravating factor if it causes *public fear and alarm* (as Rajah J considered in *Tan Kay Beng* at [25]) and/or if it poses a *threat to the health and safety of the public* (as Tay JC found in *Muhamad Hasik*). I agreed with Rajah J's view in *Tan Kay Beng* (at [25]) that

the location where the offence in question is committed is often a relevant sentencing consideration but it need not invariably be so. What is required is an assessment of whether, on the facts and circumstances of the case and having regard to the nature of the offence committed, the conduct of the accused had the potential to cause fear and alarm and/or to pose a danger to the public given the particular location at which it occurred. I would also add that the fact that an offender chooses to commit the offence in a public place is a factor that may enhance his culpability insofar as it demonstrates the brazenness of his conduct and his blatant disregard for law and order.

46 On the facts of the present case, I found that the commission of the offence by the Respondent in a public place such as the Pub was a clear aggravating factor. As the CCTV footage showed, there were several other patrons in the smoking room at the time the altercation occurred. Fortunately, those patrons acted more sensibly than the Respondent, as can be observed from their proactiveness in escorting the Victim out of the smoking room twice, thus putting an end to the first and second incidents, and their attempts to prevent the Respondent and Mr Lee from entering the smoking room just prior to the commencement of the second incident. If they had taken sides like the Respondent, one shudders to think what greater breach of the peace would have occurred. None of these aggravating circumstances were taken into account by the DJ.

Lack of remorse

47 The DJ attributed mitigating weight to the Respondent's plea of guilt (although he noted at [58] that apart from this plea of guilt, there were "no significant mitigating factors to be considered with regard to [the Respondent]" (see [23] above)). The Prosecution contended that even the Respondent's guilty

plea ought not to be counted in his favour given the strength of the evidence against him and the lack of remorse he displayed.[38]

48 As explained in *Angliss Singapore Pte Ltd v Public Prosecutor* [2006] 4 SLR(R) 653 at [77], a plea of guilt can be taken into consideration in mitigation when it is motivated by genuine remorse, contriteness or regret, and/or a desire to facilitate the administration of justice. Yong Pung How CJ in *Chen Weixiong Jerriek v Public Prosecutor* [2003] 2 SLR(R) 334 held at [22]–[23] that "remorse is only a mitigating factor where there is evidence of genuine compunction or remorse on the part of the offender"; "[i]t is all too easy for an offender to say he is sorry when the strong arm of the law has caught up with him". I agreed with the Prosecution that the evidence against the Respondent – in particular the CCTV footage which captured each aspect of the Respondent's conduct – was of such a quality and extent as to make it implausible that the Respondent would be able to deny the charge against him with any credibility.

49 More importantly, I found that the Respondent's claim in mitigation, that all he had desired to do when he struck the Victim was to prevent the Victim from "call[ing] people down" and to make him leave the premises (see [21] above), was wholly unjustified. This was in effect a claim that *the Victim* was the individual who was attempting to provoke violence. At the hearing of the appeal, the Respondent essentially reiterated this claim, asserting that "the Victim hurled vulgarities at [the Respondent] and threatened to call his gang down". The Respondent further argued that the Victim refused to leave despite the Respondent's suggestion to the Victim that he do so, choosing instead to re-enter the smoking room, which then "[made the Respondent] throw the first punch at [the Victim] out of fear that his gang would come down and to make

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[38] Applicant's submissions at paras 34–36.

him leave". For the reasons identified by the DJ (see [21] above), this was a thoroughly implausible submission. But, in my judgment, the DJ should then have gone further to find that in running such a plea in mitigation and seeking to shift the blame for his actions onto the very person on whom he inflicted physical harm, the Respondent demonstrated little to no remorse for his actions. As stated in Kow Keng Siong, *Sentencing Principles in Singapore* (Academy Publishing, 2009) at para 20.116, "where an accused makes excuses for, or belittles the gravity of, his offence(s) after pleading guilty, this may suggest that he is not truly remorseful and, hence, undeserving of any credit for his plea". The authorities in support of this point of law are numerous and well-established, and do not bear repeating here. I therefore found that the Respondent should not be given much, if any, credit for his guilty plea.

The appropriate sentence

50 Upon careful consideration of the facts and circumstances of the Respondent's conduct, I was satisfied that the custodial threshold for the offence under s 323 of the Penal Code had been crossed. This was in light of the fact that there were serious aggravating factors in the present case that the DJ had apparently failed to consider in reaching his decision. Chief among these aggravating factors was that the Respondent had not carried out his attack on the Victim in isolation but had done so alongside Mr Lee, and their respective conduct had the effect of reinforcing and strengthening each other's antagonism toward the Victim. The CCTV footage laid bare the extent of the Respondent's involvement in the altercation; he did not merely throw a few choice punches at the Victim when he had the opportunity, but was, as Mr Faizal submitted, an "active participant" in the series of events that culminated in the very serious injuries suffered by the Victim. While I did not, in the absence of medical evidence thereto, attribute the Victim's injuries to the blow struck by the

Respondent, the evidence demonstrated that the Respondent played a key role in the escalation of the violence within the smoking room, and the sentence to be imposed on him therefore had to reflect the culpability of his conduct in this regard. In the circumstances, a custodial sentence was necessary both in the interests of deterrence as well as retribution.

51 In addition, I found that the sentencing precedents that had roughly similar facts to those in the present case indicated that a custodial sentence was appropriate. The Prosecution tendered several such precedents, in respect of which I will only describe those that were the most material to my determination of the appropriate sentence in this case.

Sentencing precedents

52 The first precedent was a decision of See Kee Oon JC (as he then was) in *Koh Jing Kwang v Public Prosecutor* [2015] 1 SLR 7 ("*Koh Jing Kwang*").[39] The appellant and his friends had been out clubbing and were about to leave, when one of the appellant's friends got into a fight with the victim outside the club. The appellant noticed the fight and ran towards the victim. He made contact with the victim and, as a result, the victim fell backward and landed on the road, suffering a fracture to the skull from his fall. The appellant was originally charged with an offence under s 325 of the Penal Code (*ie,* voluntarily causing grievous hurt), but See JC reduced this to a charge under s 323 of the Penal Code on appeal. There was also some dispute about whether the appellant had pushed or had punched the victim, but See JC found at [16] that on the evidence there were no grounds to disturb the district judge's finding that the appellant punched the victim.

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[39] Appellant's Bundle of Authorities ("ABOA") at Tab J.

53 See JC sentenced the appellant to 12 weeks' imprisonment, noting that (a) the appellant had punched the victim in a vulnerable region (*ie,* the face); (b) he had only thrown a single punch; (c) the victim suffered very serious injuries as a result, even though the appellant could not be held to account for the full extent of the consequences (since the appellant did not intend to, and did not know it was likely that, such severe injuries would result); and (d) the appellant was unremorseful as he had maintained that he merely wanted to prevent a fight. The appellant had claimed trial to the charge against him.

54 The second precedent was *Public Prosecutor v Ahmad Zaki Bin Mohd Said* [2013] SGDC 454 ("*Ahmad Zaki*").[40] The accused, who was a bouncer at a nightclub, was convicted after trial of an offence under s 323 of the Penal Code for kicking the victim. The victim was at the nightclub together with his wife and two friends. The accused and his colleague approached them and asked the victim and one of his friends to leave as they were smoking. The victim was unhappy and hurled vulgarities at them. The accused and his colleague escorted the victim and his friend out of the nightclub and to a nearby perimeter road, where the accused and his colleague then proceeded to trip and assault the victim whilst he was on the ground. Subsequently, the victim confronted another bouncer and hurled vulgarities at him, unhappy that he had been assaulted. The accused and various other bouncers then chased the victim beyond the exit barrier and to the main road, where they further assaulted the victim. The victim suffered bruising over both eyes, a small laceration over the right eyebrow, a small cephalohaemanatoma over the left occital region and a right periorbital ecchymosis. The district judge sentenced the accused, who did not have relevant antecedents, to two months' imprisonment.

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40 ABOA at Tab K.

55 In *Public Prosecutor v Brian Ong (Brian Wang)* [2016] SGMC 27 ("*Brian Ong*"), the accused approached the victim, angry over an incident that had occurred several hours ago. The accused pushed the victim at her shoulder area, causing the victim to fall backward, hit her back on the lockers behind her, and land hard on her buttocks. When the victim got up, the accused pushed her again, causing her to fall on her buttocks once more. The victim suffered a fracture of the victim's coccyx (or tail bone) as a result. The accused was sentenced to eight weeks' imprisonment.

56 The final precedent cited to me was the unreported case of *Public Prosecutor v Tan Lien Yew* (DAC Nos 8018 and 8019 of 2013) ("*Tan Lien Yew*").[41] The first victim, a waiter at a club, got involved in a dispute with the accused's friend. The accused then "came out of nowhere" and threw several punches at the first victim's face and stomach. The second victim came to the scene and tried to separate the parties. As the second victim was holding on to the accused's friend, the accused threw a punch at the right side of the second victim's face. The first victim suffered a right eye contusion and an undisplaced fracture of the nasal bone, and the second victim suffered a right cheek contusion and a left knee contusion. The accused pleaded guilty to two charges under s 323 of the Penal Code (one in respect of each of the victims), and was sentenced to six weeks' imprisonment and two weeks' imprisonment for causing hurt to the first and second victims respectively, with the sentences ordered to run concurrently.

Analysis and decision

57 I found that the offender's conduct in *Koh Jing Kwang* was, in relation to these sentencing precedents, the most serious amongst them. Although there

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41 ABOA at Tab M.

were similarities between that case and the present case – such as the accused's decision to get involved in the altercation after a preceding dispute between the victim and the accused's friend, and the throwing of only one or two punches to the victim's face – the injuries suffered in *Koh Jing Kwang* were very severe. In the present case, it was not disputed that the Respondent's punches did not cause the injuries to the victim (or did not contribute to those injuries in any substantial manner).

58 Right on the heels of *Koh Jing Kwang* on the scale of gravity of criminal conduct was the case of *Ahmad Zaki*. Again, there were similarities to the present case, since the accused persons in both cases were employees of the club or bar. The aggravating factor in *Ahmad Zaki*, which was not present in the instant case, was the high degree of aggression shown by the accused there, who, together with his fellow bouncers, chased the victim out of the exit and toward the main road, where they continued to assault him. It would therefore be excessive to sentence the Respondent to a custodial term of two months' imprisonment, which the offender in *Ahmad Zaki* received. The case of *Brian Ong* involved the important aggravating factor that the offender's conduct directly caused the injuries suffered by the victim, which consisted of a fracture and therefore could not be considered insubstantial. No such similar injuries were suffered by the Victim on account of the acts of the Respondent in the present case.

59 In my judgment, *Tan Lien Yew* provided a relatively close parallel to the present case. The offenders in *Tan Lien Yew* and the present case got involved following an earlier altercation involving the offenders' friends. In both cases, the offenders' physical intervention was wholly unexpected and had little justification. In relation to the second victim in *Tan Lien Yew*, I observe that the offender's deeds were similarly unprovoked given that the second victim was

merely holding on to the offender's friend when the offender assaulted the second victim by throwing a single punch at his face. The injuries suffered by the second victim were also relatively minor. Similarly, the offender in that case pleaded guilty to the charges brought against him.

60 With these preceding cases as guides, I was satisfied in light of all the circumstances that a custodial sentence of two weeks' imprisonment – which was the sentence imposed on the accused in *Tan Lien Yew* for attacking the second victim – was apposite in the present case. It suitably reflected the fact that the Respondent's culpability was not insubstantial given his participation in an ongoing violent assault in respect of which he ought never to have played any part, as well as the opportunistic manner in which the Respondent attacked the Victim and his added culpability as a manager of the Pub. Indeed, if there had been medical evidence to show that the Respondent's actions contributed in any substantial degree to the injuries suffered by the Victim, I would have had little hesitation in further enhancing the custodial term beyond two weeks' imprisonment given the various aggravating factors in the Respondent's conduct. He demonstrated little contrition for his participation in the shocking violence that occurred in those early hours at his place of employment, that now has the possibility of marring the Victim's eyesight permanently.

Conclusion

61 For the foregoing reasons, I allowed the Prosecution's appeal and enhanced the sentence imposed on the Respondent to two weeks' imprisonment. I further directed that the fine of $4,000, which the Respondent had already paid, be refunded to him.

Chao Hick Tin
Judge of Appeal

Deputy Public Prosecutors Mohamed Faizal and Gail Wong for the appellant;
The respondent in person.
