

Unpacking Beyond a Reasonable Doubt: Public Prosecutor v GCK [2020] SGCA 2

I. Executive Summary

For an accused to be convicted of a crime in Singapore, the Public Prosecutor (“**Prosecution**”), on behalf of the State, must prove its case “beyond a reasonable doubt”. However, difficulties arise in this respect where the sole basis of conviction is the uncorroborated evidence of a single eyewitness. This is especially so where the victims themselves are unable to testify. The Court of Appeal (“**CA**”) dealt with these issues in *Public Prosecutor v GCK [2020] SGCA 2*.

The accused was charged with outrage of modesty under section 354(1) of the Penal Code (Cap. 224, Rev. Ed. 2008) of an elderly female resident at a nursing home (“**the Home**”) where he was employed. The bed-ridden victim, having suffered multiple strokes, was unfit to testify at trial. The Prosecution’s case thus hinged on the sole uncorroborated testimony of a nurse (“**Nurse MJ**”), who had witnessed the incident in question.

The accused was convicted after trial by the District Court (“**DC**”) and sentenced to 22 months’ imprisonment and three strokes of the cane. However, on appeal, the High Court (“**HC**”) acquitted him, stating that a reasonable doubt that Nurse MJ was mistaken in what she saw could not be excluded. The Prosecution subsequently filed a criminal reference¹ with the CA with regard to the standards for evaluating uncorroborated eyewitness testimony for such crimes.

II. Material Facts

A. Testimony

The accused was a maintenance technician at the Home. The victim, an elderly woman, resided in a room exclusively for female residents. Having suffered a series of strokes some years earlier, the victim had limited mobility on the left side of her body and impeded speech and had easily changing moods. She was generally unable to raise her voice, making instead high-pitched cries of a soft to moderate volume. As a result of her cognitive disabilities, she was certified as unfit to testify at trial.

On the day of the alleged offence, the Home hosted a community involvement programme from 2pm to 4pm at the ground floor. The victim, being bed-bound, required assistance in movement and did not attend the programme. The accused was the only maintenance staffer on duty that day.

Nurse MJ testified that she began her rounds to the room at around 3.41pm. She noticed that the curtains around the beds were fully drawn, except for half-drawn curtains around the victim’s bed. She found this odd as curtains were only drawn when residents’ diapers were being changed, and none of them were having diaper changes then. Moreover, several residents were not even at their beds at the time. Walking inside, Nurse MJ heard a crying sound from the victim’s bed, which she recognised as one that the victim would make when she was being moved or in pain.

Nurse MJ testified that as she turned towards the sound, she had a full view of the victim’s bed as the curtains were not drawn across the bed’s width, and she was only about one-and-a-half arm’s lengths away. Nurse MJ then saw the accused on the bed with his knees astride the victim. His pants were lowered, and she saw his exposed buttocks. The victim’s pants were lowered as well, and the left side of her diaper was open.

¹ Filing of a criminal reference is a process whereby parties may refer questions of law of public interest to the CA for guidance. Criminal references can be filed by either party to a dispute.

Nurse MJ was shocked. She testified that she saw the accused's groin area "together" with the victim's groin area and that she thought "it was something to do with sex and it was wrong". She had a "half view" of the accused's face and recognized him as an employee. The victim continued making the crying sound. Nurse MJ observed the scene for five seconds before leaving. She did not attempt to stop the accused as she was frightened. Her account of the timing of the events was consistent with the relevant close-circuit television ("CCTV") recordings.

Nurse MJ then sought the assistance of a male nursing aide ("Nurse DS"), who entered the room around 100 seconds after Nurse MJ's exit. Nurse DS testified to seeing the accused kneeling on the floor space between beds, apparently looking at his mobile phone, while the victim was sleeping on the bed. She appeared normal and there were no sounds coming from her.

Nurse MJ later informed a senior staff nurse of what she had seen. After some internal discussions, the issue was escalated to management around two days later. A police report was filed about two months later, and the accused was subsequently arrested.

At trial, the accused claimed that he was asked by a resident of the home who occupied the bed adjacent to the victim ("Mdm JP") to repair her television. Mdm JP was not present at the time of said repair. He testified that upon doing the repairs, he heard a sound from the victim's bed. He turned and saw that the victim's head was touching the railing of her bed, and that her pillow was displaced. Observing tears flowing from the victim's eyes, he thought she must be in pain as her head was bent towards the railing. He then claimed to have placed his left knee between the bars of the side railing to reach for another pillow at the victim's side, to put under her head. He maintained that no part of his body touched the victim.

As he returned to fixing Mdm JP's TV, he stated that he noticed some "food greens" on Mdm JP's bed, and proceeded to dispose of them in the toilet. He then returned to the room to replace the television on Mdm JP's table, before leaving. At around that time, a friend of Mdm JP came by to retrieve Mdm JP's spectacles for her. The accused claimed he had not noticed either Nurse MJ or Nurse DS entering the room.

Of note is that at trial, the accused testified that he had placed only *one* knee on the bed. However, this conflicted with his earlier statements to the police. In his first statement ("**First Statement**"), he said he had placed "*both* knees" on the bed. But in a later statement ("**Second Statement**"), he talked about placing "*my* knee" on the bed. At trial, the accused claimed he had made a mistake in his First Statement as he was scared at the time; he also did not correct the officer as he was afraid the officer would be angry with him. However, the officer testified that the reference to "my knee" in the Second Statement was a typographical error, and that the phrase ought to refer to *both* the accused's knees.

Further, as part of a scene investigation conducted the day after the Second Statement was recorded, a photograph was taken which showed two arrows placed on the bed. At trial, the accused agreed that the arrows in the photograph corresponded to *both* his knees, and that he had indicated as such to the officer during the scene investigation. However, he maintained that he had mistakenly told the officer that he had placed *both* his knees on the bed as he was scared.

Decisions of the DC and HC

The DC convicted the accused of the charge of outrage of modesty. Since the conviction relied on the sole testimony of Nurse MJ, the DC applied the "unusually convincing" standard to scrutinise this evidence. The DC found that Nurse MJ's evidence was internally consistent. She did not shout for help at the time of the offence as she was scared, and her demeanour at trial showed that she was deeply affected by the incident. Furthermore, her testimony was supported by CCTV footage and Nurse DS's testimony.

On the other hand, the DC found that the accused's evidence was internally inconsistent. He was unable to provide a consistent explanation of why he said he placed both knees on the bed in his First Statement, but later claimed that he had only placed one knee. Although the accused claimed he had made such a mistake due to fear, he was unable to state what he was scared of. The DC concluded that the accused had belatedly realised that his account of having two knees on the bed was "highly unnatural and contrived", and therefore sought to change his story. The DC also conducted a scene visit to the home, where the accused was asked to demonstrate how he had retrieved the victim's pillow with one knee placed on the bed. The DC found this posture also "highly unnatural and contrived". The accused was then asked to reach for the pillow without placing either of his knees on the bed: with his height, he could easily reach for the pillow without placing either knee on the bed.

Upon conviction by the DC, the accused appealed to the HC, which acquitted him of the charge. The HC held that Nurse MJ's testimony was not sufficient to secure a conviction because it fell short of the cogency and strength that on any non-sexual case would be required for a conviction to stand, and a reasonable doubt that she was mistaken could not be excluded. While there was no reason to doubt her truthfulness, her evidence was not definitive and conclusive, and did not adequately address some gaps in the evidence. Additionally, in contrast to a victim's own testimony, an eyewitness' account would be subject to a greater degree of error. Without an appreciation of the full context in which the events unfolded, a bystander's account was liable to misinterpretation. Moreover, Nurse MJ had only had a five-second glimpse of the alleged assault, which heightened the possibility of a mistake. The HC also noted the drastic change in the victim's behaviour, from when Nurse MJ saw her crying in pain to when Nurse DS saw her asleep and looking normal.

III. Questions Presented

The CA addressed the following issues:

- (a) the relevant standard for evaluating an eyewitness' evidence where such evidence is uncorroborated *and* forms the sole basis of a conviction ("**the Applicable Standard Question**");
- (b) whether an eyewitness' evidence is inherently less reliable than that of an alleged victim ("**the Inherent Reliability Question**"); and
- (c) how the court should assess evidence when it applies the "unusually convincing" standard of proof ("**the Specific Test Question**").

A. *The Applicable Standard Question*

The CA held that the "unusually convincing" standard applies to the uncorroborated evidence of a witness in all offences (and not just sexual offences), where such evidence forms the sole basis for a conviction. This standard applies regardless of whether the witness is an eyewitness or an alleged victim.

The "unusually convincing" standard requires that the testimony of the sole witness *alone* is sufficient to prove the Prosecution's case beyond a reasonable doubt. This is because in the absence of any other corroborative evidence, such testimony – whether from an eyewitness or an alleged victim – becomes the keystone upon which the Prosecution's entire case will rest. Thus, such evidence can sustain a conviction only if it is "unusually convincing" and thereby capable of overcoming any concerns arising from the lack of corroboration and the fact that such evidence will typically be controverted by that of the accused person. It is a cautionary reminder to the court of the high threshold that the Prosecution must meet in order to secure a conviction, and of the anxious scrutiny that is required because of the severe consequences that follow from a conviction.

The CA held that the HC had failed to apply this standard correctly. The HC judgment suggested that it had in mind two different standards that could be applied to the evidence of an eyewitness or a victim (as applicable). However, the “unusually convincing” standard was based on the dangers of *uncorroborated* evidence. Thus, any distinction drawn between the evidence of an eyewitness vis-à-vis that of an alleged victim was unsustainable.

Moreover, the HC’s allusion to “any non-sexual case” suggested that the “unusually convincing” standard was only confined to sexual offences. However, the CA considered that it was problematic to draw distinctions between evidential standards for an eyewitness, versus an alleged sexual offence victim. If an eyewitness were subject to a less stringent standard than the “unusually convincing” standard, it would implicitly suggest that sexual offence victims were inherently less honest than eyewitnesses, and that their evidence needed to be treated with more suspicion. A generalised categorisation of female victims of sexual offences based on “perceived dangers of false accusation” was not acceptable in Singapore.

B. The Inherent Reliability Question

The CA clarified that the evidence of an eyewitness was neither more nor less reliable than that of an alleged victim, as the reliability of any witness’ accounts had to be assessed in light of the circumstances of each individual case. Thus, the CA declined to lay down a general rule about the relative evidential reliability of eyewitnesses compared to victims. Instead, the crucial question was whether there was evidence specific to that particular eyewitness or alleged victim, which showed that the quality of his or her observations had been compromised or (conversely) improved.

Moreover, holding that the evidence of eyewitnesses is weaker than that of alleged victims, particularly for cases of sexual offences, could have invidious consequences of placing a more onerous burden on victims of sexual assault to recollect the details of their assault, i.e. expecting such victims to recollect the details of their assault with greater clarity and consistency. Research showed that a substantial number of victims may experience “tonic immobility” at the moment of assault, which “freezes” them in intense fear. This affects their memory processes, causing vivid memory recall in some victims, while causing others to “check out”.

C. The Specific Test Question

The CA held that the principle of proof “beyond a reasonable doubt” entails that upon considering all the evidence presented by the parties, the evidence is sufficient to establish, beyond a reasonable doubt, each and every element of the charge against the accused person. This requires a qualitative appreciation of whether a reasonable doubt has arisen, in the sense of a doubt that is supported by reasons that are logically connected to the evidence, i.e. a “*reasoned doubt*”. This is a necessary condition for an acquittal.

The Prosecution’s legal burden to prove the charge against the accused beyond a reasonable doubt does not shift through the proceedings. However, depending on the fact in issue and the nature of the defence, the evidential burden may lie on either the Prosecution or the defence.

There were two ways reasonable doubt could arise. *First*, a reasonable doubt may arise from *within the case* mounted by the Prosecution. The Prosecution must provide sufficient evidence to establish the accused’s guilt beyond a reasonable doubt. The judge, upon being presented with the Prosecution’s case, must be able to say precisely why and how the evidence supported the Prosecution’s theory of the accused’s guilt. Failure to do so may lead to a finding that the Prosecution has failed to mount a case, or to an acquittal. In such cases, the judge must also particularise the specific weaknesses in the Prosecution’s evidence that has lowered it below the threshold of proof

beyond a reasonable doubt. The Prosecution cannot look to the weaknesses of the defence's case to support its own case, as it has not been able to discharge its legal burden in the first place.

Second, a reasonable doubt could arise on an assessment of the *totality of the evidence* (which would include the defence's case). The court must articulate the doubt that has arisen in the Prosecution's case on the totality of the evidence, and ground that doubt with reference to the evidence. Where the evidential burden lies on the defence and this has not been discharged, the court may find that the Prosecution has discharged its burden of proving its case against the accused person beyond a reasonable doubt. Regard may then be had to weaknesses in the defence's case.

This assessment on the totality of the evidence is intimately connected with the "unusually convincing" standard, which sets the threshold for the witness's testimony to be preferred over the accused's in cases that boil down to one person's word against another's. Whether an eyewitness' uncorroborated evidence is unusually convincing (and therefore capable of discharging the Prosecution's burden of proving the case against the accused beyond a reasonable doubt) requires assessing the internal and external consistencies of the eyewitness's account, as well as any other evidence. This includes the defence's case and the evidence from by the accused (or the lack thereof).

The CA also rejected the Prosecution's argument that the guidelines established in the prior case of *Heng Aik Ren Thomas v Public Prosecutor* [1998] 3 SLR(R) 142 ("*Thomas Heng*") should apply. In *Thomas Heng*, the court considered whether the evidence of two eyewitnesses was sufficient for the Prosecution to have made their case beyond a reasonable doubt. The court there formulated a three-step test for assessing eyewitness evidence, including certain factors to be considered when assessing the quality of such evidence. However, the CA held that the *Thomas Heng* test was not a prescriptive formula that must invariably be applied but was instead a set of possible pointers. Moreover, that test was considered in the context of identification evidence, i.e. answering the question of "who was there", rather than the situation here, which was asking "who did what".

IV. Application to the Present Case

Applying the above standards, the CA affirmed the DC's conviction of the accused.

A. Inherent Reliability

The CA noted that any finding of weaknesses in a witness's observations must be specific to that witness. However, there was no finding that Nurse MJ's line of sight was obscured, or that she was too far away to pick out the details that she alleged. Rather, it was undisputed that at the time in question, Nurse MJ was only one-and-a-half arm's away from the victim's bed, and also had an unobstructed view of the bed as the curtains were open across the width of the bed. Moreover, any comparison between the reliability of an eyewitness' account and that of an alleged victim's was irrelevant here, as in this case the victim was never in a position to testify.

B. Specific Test

The CA held that no reasonable doubt had arisen either (i) within the Prosecution's case, or (ii) on the totality of the evidence.

(i) No reasonable doubt – Prosecution's case

The CA held that the HC erred in failing to identify and particularize the flaw within the Prosecution's case that led it to believe that a reasonable doubt had arisen. *First*, the HC had found no reason to doubt the DC's conclusion that Nurse NJ was honest. *Second*, the HC had not found that what Nurse MJ observed was impossible on the facts; i.e. there was nothing inconsistent or implausible in her

testimony. *Third*, despite the HC noting that Nurse MJ's five-second view of the incident was not sufficient to be definitive, nothing was identified about the purportedly short period of her observation that made the facts or the details of her account insufficient or unreliable. Moreover, the duration of a witness's observation must be viewed in the context of the observation: Nurse MJ was not describing some mundane occurrence, but the dramatic one of the accused straddling the victim with his buttocks exposed and his groin in contact with the victim's exposed groin.

(ii) No reasonable doubt – Totality of evidence

The CA found that the HC erred in assessing whether a reasonable doubt had arisen on the totality of the evidence and in its application of the "unusually convincing" standard. *First*, the HC had failed to particularise the purported mistake in Nurse MJ's observations. It was not sufficient to state that some general mistake might have been made by Nurse MJ; it was necessary to state *what* the mistake might be, so that the HC could evaluate its likelihood.

Second, any doubt in the Prosecution's case must be grounded in the evidence. The CA held that the HC erred by omitting to assess the accused's allegation of Nurse MJ's "mistake" against the totality of the evidence. Nurse MJ's account of the accused straddling the victim with his buttocks exposed was so different from the accused's account of his standing by her bed and assisting her with her pillow that it could not be explained as a mistake; it was a question of which of the two incompatible and mutually exclusive accounts was to be believed.

The CA then evaluated the evidence. *First*, the Prosecution's evidence showed that the accused remained in the room for some three minutes and 30 seconds, during which he had uninterrupted access to the victim. Moreover, the accused proffered contradictory explanations as to what he was doing in the room after he had disposed of the "food greens" and repaired the television: initially accepting that the television was already repaired, and then claiming that he was fixing a plug.

The CA also found glaring inconsistencies in the accused's defence as to the sequence of events. He claimed that Nurse MJ had misperceived his posture while he was assisting the victim with her pillow; however, he could not have been assisting the victim at that point because there were at least two events, corroborated by the CCTV footage, that took place *after* he had allegedly helped the victim and before Nurse MJ entered the room: his departure to the toilet to dispose of the "food greens", and the retrieval of Mdm JP's spectacles, respectively. Thus, he would already have reached for the victim's pillow and assisted her at least five minutes before Nurse MJ even entered the room. As the accused could not have been assisting the victim with her pillow when Nurse MJ saw him, there was nothing for Nurse MJ to be mistaken about.

With regard to the plausibility of the accused's posture while allegedly reaching for the victim's pillow, the HC's suggestion that the accused's posture could have been misperceived by Nurse MJ, and that the position of his knees was ultimately irrelevant, was a doubt that arose only because of the defence's evidence. Thus, the court had to consider whether the Prosecution had failed to rebut that doubt, and if so, why the Prosecution had failed in that regard; further, that doubt had to be grounded in the evidence.

The CA found that the Prosecution had clearly rebutted that doubt by showing that the accused's defence was externally and internally inconsistent. *First*, the DC found that regardless of whether the accused had placed one or both of his knees on the victim's bed while he was reaching for her pillow, his alleged position was "highly unnatural and contrived" as he could have easily reached for the pillow without placing either of his knees on the bed, given his height. *Second*, the accused could not explain the inconsistencies in his statements to the police as to whether he had one or two knees on the victim's bed while reaching for the pillow. Instead, the CA decided that the accused's patchwork of explanations for the inconsistencies in his statements to the police fortified the DC's findings that

he was trying to tailor his defence, to be as close as possible to Nurse MJ's account.

Lastly, the CA found that Nurse MJ's evidence was externally consistent when juxtaposed against the accused's account. While the HC had alluded to an external inconsistency in Nurse MJ's evidence (where another nurse found the victim sleeping shortly after Nurse MJ left the room, which was a "drastic change" from Nurse MJ's statement that the victim had been crying in pain), this had to be reviewed under the totality of the circumstances. One such circumstance was the victim's mental incapacity, which rendered her unfit to testify in the first place. The victim also had emotional dysregulation causing mood fluctuations and would alternate between crying and giggling; her disability could also prevent her from showing emotions even if distressed. Therefore, the HC's expectations of her behaviour was neither meaningful nor realistic. Moreover, even on the accused's own testimony, the victim was capable of quickly going from being in tears to smiling soon after.

Thus, the CA held that the HC had erred, and that the DC's conviction of the accused was safe. It reversed the HC's order of acquittal and affirmed the DC's conviction of the accused.

V. Lessons Learnt

The CA in *GCK* has provided clarity in laying down what the "unusually convincing standard" of proof entails and how it ought to be applied. Criminal law practitioners should be mindful that there now exists only one legal test where witness testimony is uncorroborated, and that there exists no blanket rule that eyewitness testimony is less reliable than that of a victim.

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