

Case Comment

**SENTENCING OFFENDERS FOR UNCHARGED
PRIOR OFFENDING**

Public Prosecutor v Bong Sim Swan Suzanna
[2020] 2 SLR 1001

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I. Introduction

1 It has long been appreciated that foreign domestic workers constitute a special class of victims who are especially vulnerable to repeated abuse within the privacy of an employer's home. Given the realities of the inherent imbalance in power dynamics that such workers find themselves in, they are often unable to extricate themselves upon the first instance of abuse.² Indeed, the many cases in which a foreign domestic worker decides to leave only after an extended period of abuse reflects that reality. As a consequence, an employer is able to repeatedly abuse such workers over a prolonged period of time, resulting in an accumulation and deterioration of injuries with grievous consequences for their physical and mental well-being.

1 While the authors are with the Attorney-General's Chambers, the views expressed in this article are their own.

2 See also similar sentiments expressed by Menon CJ in *Janardana Jayasankarr v Public Prosecutor* [2016] 4 SLR 1288 at [3].

2 In this unique context surrounding the abuse of domestic workers, the courts have quite logically taken into account the backdrop of prolonged abuse to appreciate the totality of the harm suffered by the victim and the offender’s overall culpability.³ Often, charges are not tendered for every single incident of assault or ill-treatment when the domestic worker was subjected to frequent abuse which had taken place over an extended period of time. If not properly understood, criticism could be wrongly levelled against such a sentencing approach for undermining the elementary principle of fairness that an offender cannot be punished for an offence that he has not been charged with. The Court of Appeal in *Public Prosecutor v Bong Sim Swan Suzanna*⁴ (“*Suzanna Bong*”) clarified the approach and highlighted how facts that were relevant and proved ought to be considered by a sentencing court, regardless of whether they could constitute separate criminal charges.

II. Factual and procedural background

3 At trial before the State Courts, evidence was led that the offender subjected her foreign domestic worker, Than Than Soe (“the Victim”), to repeated bouts of physical abuse from September 2013 to May 2015. Initially, the offender would scold the Victim, but it eventually escalated to the offender regularly hitting, slapping and pulling the Victim’s hair. In particular, the Victim recalled attacks to her face including one occasion where the offender punched her in the eye and caused it to turn red. About ten months after arriving here, the Victim’s eyesight began to deteriorate. When she informed the offender about this, the offender told her not to “bullshit”.

4 The Victim was also subjected to other non-physical abuses, such as being denied her monthly salary for the two years she worked and being misled into extending her employment by signing a contract she did not understand.

3 *ADF v Public Prosecutor* [2010] 1 SLR 874 at [104].

4 [2020] 2 SLR 1001.

5 The abuse culminated in an assault on 17 May 2015. On that particular day, the offender hit the Victim’s face three times with a glass medicated oil bottle, leaving the Victim with a bruise on her left cheek. Two days later, the Victim was diagnosed with severe eye injuries, which rendered her, *inter alia*, blind in her left eye. This final assault formed the subject of a single charge punishable under s 323 read with s 73(2) of the Penal Code,⁵ which the offender was convicted of.

6 Applying the sentencing framework in *Tay Wee Kiat v Public Prosecutor*⁶ (“*Tay Wee Kiat*”), the district judge first determined the degree of physical and psychological harm suffered by the Victim. She found that the Victim’s injuries should be classified as being “more serious physical harm” given the medical evidence *vis-à-vis* the Victim’s severe eye injuries. While the district judge accepted that the final assault occurred in a context of a sustained pattern of abusive behaviour by the offender,⁷ she concluded that the psychological harm caused ought to be classified as being “less serious” since the offender’s treatment of the Victim was not particularly humiliating or demeaning.⁸ The district judge also considered that the offender chose to strike the Victim at the same facial area which she knew was already injured, when assessing her culpability.⁹ The district judge sentenced the offender to 20 months’ imprisonment and ordered her to pay compensation of \$38,540.40 to the Victim.

7 On appeal, Chua Lee Meng J (“the Appellate Judge”) upheld the offender’s conviction but reduced the sentence to eight months’ imprisonment and the compensation quantum to a sum of \$1,000. The Appellate Judge found that the evidence adduced at trial had been insufficient to prove that the final assault on 17 May 2015 caused any of the Victim’s eye injuries or had worsened her pre-existing condition to cause blindness.¹⁰ Accordingly, the Appellate Judge concluded that the only injury

5 Cap 224, 2008 Rev Ed.

6 [2018] 4 SLR 1315 at [70]–[75].

7 *Public Prosecutor v Bong Sim Swan Suzanna* [2018] SGMC 75 at [102]–[103].

8 *Public Prosecutor v Bong Sim Swan Suzanna* [2018] SGMC 75 at [104]–[106].

9 *Public Prosecutor v Bong Sim Swan Suzanna* [2018] SGMC 75 at [90].

10 *Bong Sim Swan Suzanna v Public Prosecutor* [2020] SGHC 15 at [49]–[51].

that could be said to have been caused by the offender's acts on 17 May 2015 was the bruise on the Victim's face, which fell into the "less serious" category of physical harm.

8 More pertinently, the Appellate Judge expounded on the principle that an offender cannot be punished for an offence for which he was not charged or convicted. His application of this principle led him to conclude that:

(a) When assessing an offender's culpability, a sentencing court cannot consider the offender's knowledge of the victim's vulnerability if that knowledge is attributed to the offender solely because she had committed the previous uncharged acts. Applying that logic to the present facts, the Appellant Judge concluded that it would be wrong to take into account that the offender knew the Victim was vulnerable to further eye injury if such knowledge is based solely on the fact that the offender had previously struck the Victim's face. However, the Victim had also earlier complained of her worsening eyesight to the offender. As such, the offender's awareness of the Victim's vulnerability could be established independently from the previous uncharged acts of abuse, and thus could be regarded as an aggravating factor.¹¹

(b) The psychological harm suffered by the Victim fell in the "less serious" category.¹²

9 The Prosecution applied to refer three questions of law to the Court of Appeal pursuant to s 397(2) of the Criminal Procedure Code.¹³ Out of the three questions, two pertained to clarifying the contours of the principle that a person cannot be punished for an offence that he has not been charged with:¹⁴

Question 2: In applying the sentencing framework for a maid abuse offence punishable under s 323 read with s 73 of the Penal Code set out in *Tay Wee Kiat* ... should the court take into

11 *Bong Sim Swan Suzanna v Public Prosecutor* [2020] SGHC 15 at [58]–[61].

12 *Bong Sim Swan Suzanna v Public Prosecutor* [2020] SGHC 15 at [62].

13 Cap 68, 2012 Rev Ed.

14 *Public Prosecutor v Bong Sim Swan Suzanna* [2020] 2 SLR 1001 at [90].

account psychological harm that arises from a sustained pattern of abuse, ie, multiple incidents of the offender causing hurt to the domestic maid, even though separate charges were not preferred for the other incidents of abuse?

Question 3 (as reframed by the [Court of Appeal]): Does the fact that an offender knew, or was aware of the likelihood, of a victim's pre-existing injury or particular vulnerability that arose from previous proved incidents which could have been but were not made the subject of separate charges, when he assaulted the victim on that particular part of the body constitute an aggravating factor in sentencing?

10 Following from the Court of Appeal's answers to the Prosecution's two questions in the affirmative, it enhanced the sentence of imprisonment for the offender to 14 months' imprisonment but did not vary the compensation order made by the Appellate Judge.¹⁵

III. Summary of the Court of Appeal's decision

11 It is trite that if facts are relevant and proved, a court is entitled to and in fact should consider them in sentencing. However, the Court of Appeal in *Suzanna Bong* noted that where these relevant facts could constitute separate criminal offences, the courts' application of the sentencing principles has not been entirely consistent.¹⁶ The Court of Appeal ultimately endorsed the general proposition in *Chua Siew Peng v Public Prosecutor*¹⁷ ("*Chua Siew Peng*") that a sentencing court should consider facts with a sufficient nexus to the offending conduct, *irrespective of* whether those facts would amount to separate offences which the offender was not charged with. A sufficient nexus would generally be present if it concerns a fact (a) in the immediate circumstances of the charged offence, or (b) is relevant to the offender's state of mind at the time of the offence, though this was ultimately a fact-sensitive exercise.¹⁸

15 *Public Prosecutor v Bong Sim Swan Suzanna* [2020] 2 SLR 1217 at [12].

16 *Public Prosecutor v Bong Sim Swan Suzanna* [2020] 2 SLR 1001 at [70].

17 [2017] 4 SLR 1247.

18 *Chua Siew Peng v Public Prosecutor* [2017] 4 SLR 1247 at [81]–[84].

12 In the context of domestic worker abuse cases, the Court of Appeal found that a sentencing court may take into account the psychological harm that arises from a sustained pattern of abuse, *ie*, multiple incidents of the offender causing hurt to a domestic worker, even though separate charges were not preferred for the other incidents of abuse.¹⁹ In recognition of the fact that psychological harm is often cumulative and built up over time (over weeks, months and even years), the Court of Appeal found there was no reason for a sentencing court to restrict its assessment of psychological harm to the immediate circumstances of the charge. To arrive at a fair assessment of the psychological harm suffered, a sentencing court should consider the entire background relationship between the domestic worker and her employer, regardless of whether it involves acts that could form criminal charges.²⁰

13 On the facts of *Suzanna Bong*, the Court of Appeal disagreed with the classification of the psychological harm suffered by the Victim by the district judge and the High Court as “less serious”, since the offence clearly took place in the context of a working relationship that was generally oppressive and exploitative. It, however, ultimately decided not to disturb this finding, as it constituted a finding of fact that fell outside the purview of a criminal reference.²¹

14 A sentencing court may also regard as aggravating that the offender knew about the domestic worker’s particular vulnerability that arose from previous incidents of abuse, when he again assaulted the vulnerable body part.²² The Court of Appeal found that there was no need for the offender’s knowledge of the victim’s vulnerability to be proved through a source independent of the offender’s previous acts, even though these acts could also constitute offences. In fact, where the offender’s previous acts of abuse had caused the victim’s weakened condition, the offender would be regarded as more culpable, compared to an

19 *Public Prosecutor v Bong Sim Swan Suzanna* [2020] 2 SLR 1001 at [74]–[76].

20 *Public Prosecutor v Bong Sim Swan Suzanna* [2020] 2 SLR 1001 at [77]–[79].

21 *Public Prosecutor v Bong Sim Swan Suzanna* [2020] 2 SLR 1001 at [81] and [83].

22 *Public Prosecutor v Bong Sim Swan Suzanna* [2020] 2 SLR 1001 at [88].

offender who had nothing to do with the victim's vulnerability, for targeting the victim's vulnerable body part again.²³

IV. Practical implications

15 *Suzanna Bong* usefully clarifies the approach to be taken to background facts in sentencing. There are four notable implications that the case may have for practitioners.

16 First, the courts now recognise that the *entire* background relationship between the offender and the domestic worker would be relevant to assessing the psychological harm suffered by the domestic worker. Practitioners must ensure that that they prove or, conversely, contest any facts pertaining to previous incidents of ill-treatment of the domestic worker, irrespective of whether they form the basis of criminal charges tendered against the offender. Even when an offender pleads guilty, disputes over the background facts, such as the frequency of previous assaults that the offender has not been charged with, may potentially be regarded by the court as crucial to the sentence and thus form the subject of a Newton Hearing.²⁴ Practitioners should be mindful, however, that where an offender challenges background facts and his account is disbelieved after a Newton Hearing, the court may properly withhold some part of the discount which an offender would ordinarily receive in recognition of his plea of guilt.²⁵

17 The second practical implication concerns submissions that an offender is more culpable as a result of his knowledge of the domestic worker's particular vulnerability that he intentionally exploits or aggravates. Where practitioners seek to rely on this factor as aggravating, they need to further establish the basis for the offender's knowledge of the domestic worker's vulnerability. An offender who knew about the domestic worker's weakened condition as he was the very person who caused those earlier

23 *Public Prosecutor v Bong Sim Swan Suzanna* [2020] 2 SLR 1001 at [90].

24 *Public Prosecutor v Soh Song Soon* [2010] 1 SLR 857 at [3].

25 *Public Prosecutor v Azuar Bin Ahamad* [2014] SGHC 149 at [120]; *Public Prosecutor v Chan Yoke Ling Catherine* [2004] SGDC 108 at [119].

injuries would be regarded as more malicious and blameworthy than one who had nothing to do with the earlier injuries.

18 For avoidance of doubt, the Court of Appeal in *Suzanna Bong* also reaffirmed the principle that a sentencing court cannot punish an offender for uncharged offending. This principle seeks to prohibit sentencing practices such as the reliance on antecedent offending conduct that has no nexus whatsoever to the charge(s) in question. Such an approach would be unfair to the offender as he is being sentenced for offences which he has not been charged with. Instead, the aggravating facts relied on must be shown to have a sufficient nexus to the proceeded charge.²⁶ By considering each charge against the background of abuse, the sentencing court can more accurately assess the true level of the offender's culpability or the totality of the harm suffered by the victim.

19 Next, the courts would adopt a broad, commonsensical approach to its assessment of the psychological harm suffered by the domestic worker. As illustrated on the facts of *Suzanna Bong*, the Court of Appeal found that the Victim was subjected to an oppressive working environment, despite the fact that she enjoyed some good times with the offender, such as having her birthday celebrated by the offender once.²⁷ It observed that any intermittent good times enjoyed by the Victim must be contrasted against the offender's persistent abusive conduct. When submitting on the appropriate level of psychological harm, practitioners should avoid focusing on specific incidents (whether good or bad) without situating them against the context of the broader relationship or experience that the domestic worker was subject to in the offender's household.

20 Finally, this sentencing approach in *Suzanna Bong* may find wider application for other types of offences. For instance, in cases of domestic or familial abuse, victims may similarly find themselves in an unequal position of subordination in relation to their spouses or partners. The recently introduced enhanced punishment provisions under ss 74C (for offences against

26 *Public Prosecutor v Bong Sim Swan Suzanna* [2020] 2 SLR 1001 at [64]–[66].

27 *Public Prosecutor v Bong Sim Swan Suzanna* [2020] 2 SLR 1001 at [83].

victims in intimate relationships)²⁸ and 74D (for offences against victims in close relationships)²⁹ of the Penal Code recognise that this class of victims may, similar to foreign domestic workers, be especially vulnerable to repeated abuse within the privacy of the home. The courts may demonstrate a willingness to look at the entire background of the relationship between the offender and the victim, so as to give a more complete reflection of an offender's overall culpability and/or the harm suffered by the victim in the sentence imposed. As observed by the Court of Appeal in *Suzanna Bong*, excluding previous uncharged offending as a sentencing consideration would lead to a perverse outcome that benefits serial abusers, especially where repeated acts of abuse over an extended period of time make it almost impossible to particularise every incident of abuse.³⁰

V. Conclusion

21 The Court of Appeal in *Suzanna Bong* provides useful clarification on the commonsensical notion that it is important to consider the offender's overall culpability and harm suffered by the victim (particularly in the unique context of abuse of foreign domestic workers and other vulnerable victims). This decision offers practitioners greater clarity on the legal principles that underpin the sentencing practice of the courts and how they ought to be applied in arriving at a just and fair outcome.

28 Refer to s 74C(5) of the Penal Code (Cap 224, 2008 Rev Ed) for the non-exhaustive circumstances of the case that the court may consider to determine whether the offender was or is in an intimate relationship with the victim.

29 Under s 74D(5) of the Penal Code (Cap 224, 2008 Rev Ed):
... the offender (A) was or is in a close relationship with the victim (B) where —
(a) A is a member of the same household as B; and
(b) A and B had frequent contact with each other.

30 *Public Prosecutor v Bong Sim Swan Suzanna* [2020] 2 SLR 1001 at [37] and [72].