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Case Comment

RECENT DEVELOPMENTS IN SENTENCING FOR THE OFFENCES OF VOYEURISM AND DISTRIBUTION OF INTIMATE IMAGES

Public Prosecutor v GED [2022] SGHC 301 and *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35

[2023] SAL Prac 11

Three-judge benches of the High Court recently laid down sentencing frameworks for the offences of voyeurism and distribution of intimate images or recordings. This article summarises and discusses these sentencing frameworks, and also identifies three aspects of these decisions which will be useful to practitioners, concerning (a) the use of the model in *Logachev Vladislav v Public Prosecutor* [2018] 4 SLR 609 for future sentencing frameworks; (b) the rule against double-counting; and (c) the relevance of rehabilitation as a sentencing consideration.

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I. Introduction

1 Prior to 1 January 2020, offenders who committed voyeurism offences and offences of distributing intimate images and recordings were dealt with via a patchwork of laws, including provisions in the Penal Code and the Films Act. Recognising that

this was a dissatisfactory state of affairs, and as recommended by the Penal Code Review Committee in its August 2018 report,[1] Parliament enacted a suite of offence-creating provisions with the intention of providing proper framing for such offences and adequate punishments by way of the Criminal Law Reform Act 2019[2].[3]

2 In the recent judgments of *Public Prosecutor v GED*[4] ("*PP v GED*") and *Nicholas Tan Siew Chye v Public Prosecutor*[5] ("*Nicholas Tan*"), the High Court had the opportunity to consider and opine on the sentencing frameworks for two of these newly-enacted offences, in ss 377BE(1) and 377BB(4) respectively.

3 This case comment will first summarise each case in turn, elaborating on the sentencing framework promulgated by the High Court in respect of each offence (in Parts II and III of the article respectively). Thereafter, in Part IV of the article, we highlight three salient issues arising from these judgments, for practitioners to note: (a) the appropriateness of modelling sentencing frameworks based on the two-step, five-stage framework in *Logachev Vladislav v Public Prosecutor*[6] ("*Logachev*"); (b) the rule against double-counting; and (c) the relevance of rehabilitation as a sentencing consideration.

II. *Public Prosecutor v GED*

4 This judgment involved two Magistrate's Appeals both concerning s 377BE(1) of the Penal Code,[7] which criminalises the distribution of an intimate image or recording without the victim's consent. The offence is punishable under s 377BE(3) by a maximum term of five years' imprisonment with the possibility of fine and/or caning. For convenience, this offence can be described as the "Actual Distribution Offence", in contrast

1 *Penal Code Review Committee – Report* (August 2018) at pp 73–85.
2 Act 15 of 2019.
3 Singapore Parl Debates; Vol 94, Sitting No 103 [6 May 2019].
4 [2022] SGHC 301.
5 [2023] SGHC 35.
6 [2018] 4 SLR 609.
7 Cap 224, 2008 Rev Ed.

to the distinct offence under s 377BE(2) of *threatened* distribution of such intimate images or recording without consent.

A. Factual background

5 In the first Magistrate's Appeal, *PP v GED*,[8] the offender GED was the husband of the victim. He suspected his wife of having an extramarital affair and stole her mobile phone to search for pictures and messages to confirm these suspicions. GED found several compromising images and videos on her phone, and used his own mobile phone to take photographs and recordings of them. One image so taken was an image of the victim and the victim's work supervisor engaging in sexual intercourse, with the victim fully naked with her breasts visible, and the faces of both the victim and the supervisor fully visible (the "Image").

6 GED published the Image on his personal Facebook page which was set to "Public", and the image went viral. When GED checked his Facebook page eight hours later, the post had attracted 1,000 comments and 3,000 "likes", and had been shared 2,000 times by other Facebook users. Upon seeing this, GED removed the post because he had not expected it to receive so much attention. However, GED decided to publish a new post on his Facebook page containing an edited version of the Image, in which the victim's breasts and face were blurred out, but the supervisor's face remained fully visible. This second post was only removed one day later.

7 In the second Magistrate's Appeal, *Public Prosecutor v GEH*,[9] the offender GEH suspected his ex-wife ("B"), of having an extramarital affair. GEH and three other persons (for convenience, "C", "D" and "E") went to B's home and followed her when she left and boarded a car driven by the victim. GEH and his companions decided to follow them in their own respective vehicles. GEH and E then coordinated a driving manoeuvre to trap the victim's car. GEH and his companions eventually got the

8 [2022] SGHC 301.
9 [2022] SGHC 301.

victim to step out of his car. Thereafter, GEH and E (later joined by D) attacked the victim for half an hour, including punching and kicking his face and body numerous times, which caused the victim to suffer multiple injuries including fractures near the eye and of the clavicle.

8 While the attack was ongoing, GEH, D and E decided to humiliate the victim further by pulling down his pants and underwear to expose his genitals, hurting him further when he attempted to resist. GEH then used the victim's own mobile phone to take a 55-second-long video recording both the victim's injured face and exposed penis at length, while insulting him verbally (the "Video"). On D's suggestion, GEH sent the Video to more than 500 of the victim's contacts by Whatsapp. The recipients included the victim's colleagues, friends, neighbours and sporting teammates. The police eventually came to arrest GEH and his companions.

B. Decisions below

9 In the court below, GED was sentenced to 12 weeks' imprisonment for the Actual Distribution Offence, and one week's imprisonment for theft of the mobile phone, with both sentences to run consecutively.

10 As for GEH, the principal district judge in the court below sentenced GEH to 18 months' imprisonment for his Actual Distribution Offence, and 18 months' imprisonment and four strokes of the cane for the offence of voluntarily causing grievous hurt, with both sentences ordered to run consecutively. A fine of $1,500 was also imposed for the offence of disorderly conduct on a public road with common intention.

C. The High Court's sentencing framework

11 A three-judge bench of the General Division of the High Court, comprising Sundaresh Menon CJ, Steven Chong JCA, and Vincent Hoong J was empanelled to hear both Magistrate's Appeals.

12 The court determined that a sentencing framework modelled on the two-stage, five-step framework set out in *Logachev*, would be appropriate to guide sentencing for the Actual Distribution Offence. The five steps are set out as follows.

13 *First*, having regard to the relevant offence-specific factors, the court identifies (a) the level of harm caused by the offence; and (b) the level of the offender's culpability.

14 In this regard, practitioners should note that the court has imposed a structured four-categories approach to assess offence-specific factors going towards harm. In essence, the inquiry into harm in the context of the Actual Distribution Offence considers (a) objective aspects of harm; (b) subjective aspects of harm; (c) other related harm; and (d) other factors relevant to harm.[10] The court further noted that it would be the former two categories which will "usually be the dominant considerations".[11] Summarising these categories briefly:

> (a) Category (a) considers the following non-exhaustive *objective* aspects,[12] which are to be weighed and considered holistically to appreciate the degree of harm caused to the individual victim:[13]
>
> > (i) First, the nature of the image or the recording,[14] including (A) what parts of the victim's body were shown and how exposed the body parts were (whether bare or covered); (B) what acts were depicted; and (C) the medium used (whether a still image or a video recording). As regards (A) and (B), the more intrusive and more overtly sexual the nature of the acts, the higher the degree of objective harm that will generally be caused, all else being equal.

10 *Public Prosecutor v GED* [2022] SGHC 301 at [47].
11 *Public Prosecutor v GED* [2022] SGHC 301 at [47].
12 *Public Prosecutor v GED* [2022] SGHC 301 at [50].
13 *Public Prosecutor v GED* [2022] SGHC 301 at [55].
14 *Public Prosecutor v GED* [2022] SGHC 301 at [51].

(ii) Second, the degree of identifiability of the victim – the more identifiable, the higher the degree of harm. Identifiability does not depend only on the face being shown, but can also include other identifiable features such as tattoos, or the use of the victim's name or online profiles.

(iii) Third, the nature and extent of the distribution. Here, the court will have regard to (A) how widely the intimate image or recording was distributed; (B) whether the image or recording was distributed to certain recipients known to the victim; and (C) how long the image or recording was left accessible for.

(b) Category (b) considers *subjective* aspects of harm as may be either disclosed by the victim (for example, through a victim impact statement) or inferred from the circumstances.[15]

(c) Category (c) considers "other related harm", which may take at least two forms:

(i) First, consequential harm *other than* the emotional and psychological consequences of the offence.[16] Such consequential harm would include loss of employment and other economic consequences, for example, the costs incurred by the victim in attempting to have the offending image or recording removed.

(ii) Second, harm caused to the victim in the course of obtaining the intimate image or recording, for example, physical hurt caused to the victim in order to forcibly capture the image – labelled, for convenience, "prior harm" or "prerequisite harm". Such harm, however, is subject to the principles governing the relevance of

15 *Public Prosecutor v GED* [2022] SGHC 301 at [56].
16 *Public Prosecutor v GED* [2022] SGHC 301 at [59].

uncharged offending and the rule against double-counting (elaborated on in Part IV below).[17]

(d) Category (d) considers "other factors relevant to harm" that might aggravate Categories (a) to (c) aspects of harm. These could include the vulnerability of the victim due to youth or pre-existing medical conditions, and could also include any relationship between the offender and the victim that renders the latter susceptible to being manipulated or taken advantage of.[18]

15 Not all of the individual offence-specific factors discussed above are novel, and those which are would probably not be surprising given the nature of the Actual Distribution Offence. As far as the authors are aware, however, the four-categories structure imposed, which proceeds essentially in stages from objective aspects to harm up to the "other factors relevant to harm", *is* novel.

16 We suggest that there may be significant benefits to practitioners adopting the same structure in future cases to organise and weigh up the offence-specific factors going towards harm. The structure has the benefit of conceptual clarity and imposing order on the proliferating number of offence-specific factors now being recognised by the Singapore courts by clearly distinguishing between harm that can objectively be inferred from the circumstances of the case; the subjective harm actually experienced by the victim in question; harm that does not arise naturally but rather is consequential or "prerequisite" in nature; and then other residual aggravating factors.

17 An important practical point to note, however, is that evidence of subjective aspects of harm should generally go towards *enhancing* the degree of harm that is objectively inferred from the circumstances of a particular case. The court in this case was critical of the suggestion that the absence of evidence that the victim being subjectively affected could result in the degree

17 *Public Prosecutor v GED* [2022] SGHC 301 at [60].
18 *Public Prosecutor v GED* [2022] SGHC 301 at [61].

of harm being calibrated downwards.[19] Thus, the objectively-inferable aspects of harm act, in essence, as a floor on the degree of harm caused. Similar observations were made in *Nicholas Tan*.[20]

18 As for the offence-specific factors going towards culpability, the court structured the inquiry by reference to three broad categories:[21]

> (a) The offender's motive for committing the offence – in this regard, it is relevant to ask if the offence was committed for personal gain, which is not limited to monetary gain, *eg*, distribution to elicit money, property, concessions or favours from the victim. It is also relevant whether the offender acted intentionally to harm the victim.
>
> (b) The offender's method of obtaining the intimate image or recording – in this regard, the court in this case noted that although the offence is one of distribution, the offender's method of obtaining the intimate image or recording is a precondition to distribution and is thus fundamental to a holistic assessment of the offender's culpability in relation to the offence.[22] We discuss the court's analysis in greater below in Part IV(B).
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> (c) Other aspects of the offender's culpability – these non-exhaustively include (i) the degree of planning, preparation and premeditation displayed by the offender; (ii) the level of sophistication employed in obtaining the image or recording and distributing it thereafter; (iii) the duration and persistence of the offending behaviour; (iv) any abuse of position by the offender; and (v) the use of anonymity.

19 *Second and third*, the court identifies the applicable sentencing range and identifies the appropriate starting point

19 *Public Prosecutor v GED* [2022] SGHC 301 at [57].
20 See para 43(c)(iv) below.
21 *Public Prosecutor v GED* [2022] SGHC 301 at [62].
22 *Public Prosecutor v GED* [2022] SGHC 301 at [69].

within that range.[23] Here, practitioners should note that the court adopted the following sentencing matrix in the context of the Actual Distribution Offence:[24]

Harm / Culpability	Slight	Moderate	Severe
Low	Fine and/or up to 6 months' imprisonment	6–15 months' imprisonment	15–30 months' imprisonment (with the option of caning)
Medium	6–15 months' imprisonment	15–30 months' imprisonment (with the option of caning)	30–45 months' imprisonment (with the option of caning)
High	15–30 months' imprisonment (with the option of caning)	30–45 months' imprisonment (with the option of caning)	45–60 months' imprisonment (with the option of caning)

20 *Fourth*, offender-specific aggravating and mitigating factors are accounted for and the starting point adjusted accordingly.[25] The court noted that these factors are well-settled in the jurisprudence and did not engage in extensive commentary about the same.

21 *Fifth*, where an offender has been convicted of multiple charges, the court considers whether the totality principle applies so as to require adjustments to the aggregate sentence, by adjusting the individual sentences imposed on the offender of each charge.[26]

D. Application to the facts

22 The court applied the framework above to the respective appeals before it.

23 *Public Prosecutor v GED* [2022] SGHC 301 at [102].
24 *Public Prosecutor v GED* [2022] SGHC 301 at [104].
25 *Public Prosecutor v GED* [2022] SGHC 301 at [110].
26 *Public Prosecutor v GED* [2022] SGHC 301 at [117].

(1) Public Prosecutor v GED

23 In relation to *PP v GED*, the court determined at Step 1 of the framework that this was a case of moderate harm and medium culpability. As regards offence-specific factors going towards harm, the court considered that the objective aspects of harm revealed serious harm,[27] as the image posted was highly intrusive and overtly sexual in nature. Even though there was no evidence as to the degree of humiliation, alarm or distress subjectively experienced by the victim, the court considered that the harm caused was nevertheless at the higher end of the moderate range.

24 The court also determined that the offender displayed medium culpability. Although he had acted out of malice to humiliate and punish the victim for what he regarded to be her "morally revolting"[28] conduct, he removed the first post containing the Image after he saw how much attention it had received, and replaced it with the edited second post. The court also noted that the offender did not distribute the intimate recordings in his possession.[29]

25 The fact that the Image depicted both the victim and the supervisor was considered significant by the court. Although no separate charge was brought in respect of the supervisor being so depicted, the court considered that the offender's culpability was enhanced because it could be inferred from the surrounding circumstances that his actions were calculated to harm the supervisor.[30] The court also observed that the harm caused by the offence was aggravated in two ways – harm would have been suffered by the supervisor and harm would also be caused to the victim as it revealed her being in an extramarital sexual affair with her work supervisor.[31] The court cautioned, however, that these sentencing considerations were nevertheless subject to the qualification that the sentence imposed could not be aimed

27 *Public Prosecutor v GED* [2022] SGHC 301 at [122].
28 *Public Prosecutor v GED* [2022] SGHC 301 at [123].
29 *Public Prosecutor v GED* [2022] SGHC 301 at [123].
30 *Public Prosecutor v GED* [2022] SGHC 301 at [126].
31 *Public Prosecutor v GED* [2022] SGHC 301 at [126].

at punishing the offender for a *separate* Actual Distribution Offence against the supervisor, since no separate charge had been brought.

26 Given the above, the court considered at Steps 2 and 3 of the sentencing framework that the appropriate starting point was 18 months' imprisonment, within the applicable indicative sentencing range of 15 to 30 months' imprisonment with option of caning.[32] The court further held that no reduction in sentence applied on account of the offender-specific sentencing factors at Step 4 of the framework. In addition, no further adjustments were made on account of the totality principle at Step 5 of the framework. Thus, GED was sentenced to 18 months' imprisonment for the Actual Distribution Offence.

(2) Public Prosecutor v GEH

27 Turning next to *Public Prosecutor v GEH*, the court considered at Step 1 of the framework that this offence was one of moderate harm and high culpability.[33]

28 As regards offence-specific factors going towards harm, the court considered that the nature of the Video was highly intrusive. Although no sexual acts were depicted, the victim was readily identifiable; and the distribution was carried out in such a way that its recipients would have been more likely to view the Video, since it had been sent from the victim's own mobile phone.[34]

29 Although the victim had also suffered prior or prerequisite harm, in the form of the injuries inflicted on him in the course of obtaining the video, and also suffered consequential harm – including medical bills and ultimately, loss of employment – the court considered these should be accounted for in sentencing for the separate offence of voluntarily causing grievous hurt.[35]

32 *Public Prosecutor v GED* [2022] SGHC 301 at [127].
33 *Public Prosecutor v GED* [2022] SGHC 301 at [138].
34 *Public Prosecutor v GED* [2022] SGHC 301 at [139].
35 *Public Prosecutor v GED* [2022] SGHC 301 at [140].

30 As for offence-specific factors going towards culpability, the court assessed the offender's culpability to be high. The offender's motive was to humiliate and punish the victim, and the decision to send the Video to the victim's contacts (such as the victim's colleagues and friends) plainly show that he acted out of malice and spite.[36] Further, the offender's method of obtaining the Video was forceful and violent, as the Video was taken in the course of a physical assault by the offender and his co-offenders.[37]

31 The court also considered that the offender displayed "cruelty" in the method of obtaining the Video and its subsequent distribution, given the derogatory oral commentary given by the offender and his co-offenders in the course of filming the Video.[38] The court was especially critical of this conduct, which the court observed was "dehumanising".[39]

32 At Step 2 of the framework, the applicable sentencing frame was 30 to 45 months' imprisonment, with the option of caning. At Step 3, the court considered that the indicative starting point within this range would be 40 months' imprisonment. At Step 4, the court reduced the sentence by four months, on account of the offender's remorse and plea of guilt.[40] However, the court also considered that caning was appropriate in this case given the violent method of obtaining the image and the offender's high culpability, and observed that two strokes of the cane would be appropriate.[41] At Step 5 of the framework, having determined that the appropriate sentence for the separate offence of voluntarily causing grievous hurt was 21 months' imprisonment and four strokes of the cane, and a fine of $1,500 (in default, six days' imprisonment) for the Miscellaneous Offences (Public Order and Nuisance Act) Act offence, the aggregate sentence was 57 months' imprisonment, six strokes of the cane, and a fine of $1,500. The court considered this was high, and adjusted the

36 *Public Prosecutor v GED* [2022] SGHC 301 at [143].
37 *Public Prosecutor v GED* [2022] SGHC 301 at [145].
38 *Public Prosecutor v GED* [2022] SGHC 301 at [146].
39 *Public Prosecutor v GED* [2022] SGHC 301 at [147].
40 *Public Prosecutor v GED* [2022] SGHC 301 at [153].
41 *Public Prosecutor v GED* [2022] SGHC 301 at [154].

aggregate imprisonment term downwards by six months, which included a three-month reduction to the sentence for the Actual Distribution Offence.[42] Thus, the sentence ultimately ordered for the Actual Distribution Offence was 33 months' imprisonment and two strokes of the cane.

III. *Nicholas Tan Siew Chye v Public Prosecutor*

33 This judgment concerned s 377BB(4) of the Penal Code,[43] which criminalises the operation of equipment without the victim's consent, with the intention of enabling the offender or another person to observe the victim's genitals, breasts (if the victim is female), or buttocks (whether exposed or covered) in circumstances where those areas would not otherwise be visible; and where the offender knew or had reason to believe – whether the victim's image was recorded or not – that the victim does not consent to the offender operating the equipment with that intention. The offence is punishable under s 377BB(7) by a maximum term of two years' imprisonment, a fine, caning or with any combination of such punishments.

34 Section 377B(4) is one of the six species of voyeurism offences set out in s 377BB. Notably, the offending conduct in question is the operation of equipment with the intention of observing the victim's private areas; it is irrelevant whether the victim's image is actually captured, arising from the operation of such equipment.

A. Factual background

35 The offender, Tan, was a 24-year-old student in his final year of studies at a local university when he committed two counts of the offence under s 377BB(4).

36 In the first incident, which took place in the university's compound, Tan followed a female student to the lift lobby in her residential hall. While she was waiting for the lift, Tan took out

42 *Public Prosecutor v GED* [2022] SGHC 301 at [183].
43 Cap 224, 2008 Rev Ed.

his mobile phone with the intention of taking an "up-skirt" video of her. He switched his phone camera to video mode, squatted down, placed his phone under her dress with the camera aimed up her dress, and recorded an "up-skirt" video. As the victim felt someone move closer, she turned around and noticed Tan. She left the lobby as she was worried for her safety, and subsequently reported the matter to campus security. Tan was identified, arrested, but thereafter released on police bail.

37 In the second incident, which took place when Tan was still on police bail, Tan was returning home when he noticed the (second) victim in school uniform. He felt the urge to take an "up-skirt" video of her, and followed her from the entrance of the car park where he had just parked his car to the lift lobby at her block. When the lift arrived, Tan followed the victim into the lift. While the lift was ascending, Tan set his mobile phone to video recording mode. Then, while the victim was about to exit the lift, Tan squatted down and stretched out his arm with his phone camera pointing towards her thigh area with the intention to take an "up-skirt" video. At this juncture, the victim felt Tan touch her thigh, turned back and shouted "oi". Tan did not respond but raised his hands in apology. He exited the lift on a different floor. After the incident, the victim informed her father and started crying. After a failed attempt to locate the appellant, the family lodged a police report. Tan's identity was established through closed-circuit television footage and he was later arrested.

B. Decision below

38 Tan pleaded guilty on both counts of s 377BB(4), and also consented to one charge of criminal trespass under s 447 of the Penal Code[44] being taken into account for the purpose of sentencing.[45]

39 The district judge sentenced Tan to three weeks' imprisonment for the first incident (calibrating a one-week

44 Cap 224, 2008 Rev Ed.
45 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [13].

discount from the starting point of four weeks on account of his remorse), and to four weeks' imprisonment for the second incident (calibrating a two-week discount from the starting point of six weeks having regard to the mitigating factors and the totality of the sentence).[46] The two sentences were ordered to run consecutively for an aggregate sentence of seven weeks' imprisonment.[47] Tan appealed, seeking a non-custodial sentence.

C. The High Court's sentencing framework

40 A three-judge bench of the General Division of the High Court, comprising Sundaresh Menon CJ, Tay Yong Kwang JCA, and Vincent Hoong J was empanelled to hear the Magistrate's Appeal.

41 Similar to its prior decision in *PP v GED*, the court determined that a sentencing framework modelled on the two-stage, five-step framework set out in *Logachev* would be appropriate to guide sentencing for the offence under s 377BB(4).

42 On the first step in the *Logachev* framework, the court articulated the offence-specific factors going towards (a) the level of harm caused by the offence; and (b) the level of the offender's culpability.

43 Regarding the inquiry into the level of harm, much like the approach taken by the court in *PP v GED*, the court in *Nicholas Tan* imposed a structured inquiry by identifying three distinct aspects. Summarising these categories briefly:

> (a) Category (a): Invasion of the victim's privacy, which includes both actual and potential invasion of privacy.[48] Some key points made by the court include the following:
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> > (i) First, the more intrusive the observation, the greater the actual loss of privacy. This is a function of several objective factors, including

46 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [21].
47 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [22].
48 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [67].

(A) the extent of body parts under observation; (B) the extent of exposure of these body parts; and (C) the number of persons enabled by the offender to observe the victim's private regions.[49]

(ii) Second, if the offender retained a record of the victim's image, the greater the invasion into the victim's privacy. This is because the offender can, post-offence, view the record repeatedly or circulate it to others through the Internet. Such potential harm is amplified if the victim is identifiable from the record.[50]

(iii) Third, if the offender not only retained a record of the victim's image but also disseminated it, this represents a significant incursion into the victim's privacy over and above observing and recording the victim.[51] However, the court caveated that if the offender is already facing a separate proceeded charge for the Actual Distribution Offence, the same act of dissemination cannot be regarded as an aggravating factor for s 377BB(4) in light of the rule against double-counting.[52] The court further added that if the Actual Distribution Offence were stood down, the sentencing court might either consider the act of dissemination as an aggravating factor for the purpose of sentencing for the s 377BB(4) offence, or take into consideration the Actual Distribution Offence for the purpose of sentencing. In the former case, the extent of the invasion of privacy arising from the dissemination can be evaluated with reference to the objective indicia set out in *PP v GED*.[53]

(b) Category (b): Violation of the victim's bodily integrity. This could occur where the offender makes

49 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [68].
50 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [69].
51 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [71].
52 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [71].
53 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [71].

unwanted physical contact with the victim while committing the offence, for instance, accidentally bumping the victim on the back of the knee while taking an "up-skirt" photo. The more prolonged such physical contact, or if the offender visits violence upon the victim while committing the offence, the greater the level of harm.[54]

(c) Category (c): Humiliation, alarm or distress caused to the victim. This inquiry focuses on the degree of subjective emotional harm suffered by the victim, whether contemporaneous to the offence, or subsequently (for instance, through the development of post-traumatic stress disorder or depression).

(i) The degree of subjective emotional harm suffered by the victim depends on the extent to which the victim's privacy was objectively invaded (*ie*, the Category (a) harm discussed above),[55] and also on other victim-specific factors such as the vulnerability of the victim (such as the victim's age, any pre-existing mental conditions, or whether he or she had a relationship with the offender that rendered the victim susceptible to being manipulated or taken advantage of).[56]

(ii) The existence and extent of the emotional harm may either be disclosed by the victim or inferred from the circumstances, and in appropriate cases may need to be corroborated by evidence including expert evidence. The court reiterated the observation in *PP v GED* that where it is alleged that the victim had developed medical conditions as a result of the offending conduct, such allegations should be substantiated in the

54 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [73].
55 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [66] and [75].
56 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [75].

form of victim impact statements and medical reports.[57]

(iii) An important caveat is that this type of harm pre-supposes that the victim was aware of the offending conduct.[58] If the victim is not so aware, while such victim does not suffer subjective emotional harm, he or she may still suffer harm in the form of loss of privacy determined by reference to objective indicia (*ie*, Category (a) harm).[59]

(iv) Finally, bearing in mind the rule against double-counting, the court should only take into account subjective emotional harm in so far as it exceeds that which is objectively inferred from the extent of the invasion of privacy.[60]

44 Regarding the inquiry into the level of the offender's culpability, the court identified the following factors:[61]

(a) Whether the offender actually knew, or merely had reason to believe, that the victim had not consented to being observed. The court noted that s 377BB(4) captures offenders with either type of mental state. The former type of offender is more culpable than the latter.[62]

(b) Degree of premeditation and planning.

(c) Stalking or following the victim.

(d) Type and sophistication of equipment used and whether it was concealed: The operation of equipment with recording capability is strongly indicative of the offender's intention to make a record of the victim. This raises the culpability of the offender in situations where

57 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [74], citing *Public Prosecutor v GED* [2022] SGHC 301 at [56].
58 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [65(c)].
59 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [66].
60 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [66] and [75].
61 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [76].
62 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [77], citing *Huang Ying-Chun v Public Prosecutor* [2019] 3 SLR 606 at [74].

he or she intended to make a record of the victim's image, but had not in fact done so.[63]

(e) Breach of relationship of trust with the victim: The common categories of such a relationship include husband and wife, landlord and tenant, and work colleagues who share an office space.[64]

(f) Steps taken to evade detection.

(g) Motivation for offence: This refers to why the offender committed the offence. For instance, the offender's culpability may be higher if the offence was committed out of spite or for the purpose of commercial exploitation.[65]

(h) Persistence of the offending conduct that is the subject of the charge: This is to be distinguished from the offender's prolonged pattern of offending extending *beyond* the subject of the charge. This may be a relevant consideration in situations where the offender continues to observe the victim even after the victim has made efforts to prevent or warn the offender against continuing the offending behaviour, such as by shouting at the offender.[66]

45 The court also highlighted the need for the sentencing court to be wary of the danger of double-counting, in the analysis of these factors. For instance, the assessment of the degree of premeditation should exclude factors relating to use of equipment if considerations relating to the type and sophistication of equipment used, as well as whether it was

63 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [72] and [78].
64 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [79].
65 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [80], citing the case of *Prasanth s/o Mogan* [2022] SGDC 209 as one instance where the s 377BB(4) offence was committed out of malice. The offender there bore a personal grudge against the victim and had deliberately humiliated the victim by stripping him naked and instructing him to dance while the offender recorded a video of the same.
66 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [81].

concealed, are also taken into account as standalone factors going towards culpability.[67]

46 Overall, similar to the takeaway from *PP v GED*, practitioners would benefit from adopting the same structure in future cases to organise offence-specific factors going towards harm and culpability. This would be so even if the voyeurism offence in question is not the one under s 377BB(4), but instead is under any of the other species of the offence in s 377BB – this is because similar factors, albeit with some modifications, would likely be applied in the analysis.

47 On the second and third steps in the *Logachev* framework, the court adopted the following sentencing matrix for s 377BB(4) offences punishable under s 377BB(7), promulgated on the basis of a first-time offender convicted after trial:[68]

Harm / Culpability	Low	Moderate	High
Low	Fine or up to 4 months' imprisonment	4 to 8 months' imprisonment	8 to 12 months' imprisonment with caning
Medium	4 to 8 months' imprisonment	8 to 12 months' imprisonment with caning	12 to 18 months' imprisonment with caning
High	8 to 12 months' imprisonment with caning	12 to 18 months' imprisonment with caning	18 to 24 months' imprisonment with caning

48 The key features of this sentencing matrix are as follows:

(a) Caning may be considered in cases which are classified as at least moderate harm-moderate culpability. This is because offences of such gravity may undermine social safety to such an extent that necessitates the

67 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [76].
68 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [83].

extremely strong deterrent effect which is secured through the imposition of caning.[69]

(b) Additionally, caning may be warranted if the harm in a particular case flows from an act of violence against the victim, in which case the additional sentencing objective of retribution is engaged.[70]

(c) Separately, regardless of where the offender is placed in the matrix, the option of imposing a fine in addition to a custodial sentence should be considered if the offender had obtained financial benefits from his offending conduct. For instance, if the offender was paid to procure videos of unsuspecting victims, the fine serves the purpose of disgorging the offender of his unlawful gains.[71]

(d) Finally, if the offence lies at the less severe end of the low harm–low culpability spectrum, it may be appropriate to impose just a fine, even if the offender had not profited from the offending conduct. This is because the level of deterrence warranted by such offences may not justify a custodial sentence, and a fine may sufficiently advance the sentencing objective of deterrence. That being said, the court cautioned that s 377BB(4) cases would *typically* cross the custodial threshold given the intrinsic seriousness of the offence.[72]

49 As regards the fourth and fifth steps in the *Logachev* framework, the court set out the well-established principles, and did not make any s 377BB(4)-specific comments on this front.

D. Application to the facts

50 With reference to the sentencing framework, the court considered that both of Tan's offences fell within the low harm–low culpability category.

69 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [84].
70 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [84].
71 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [85].
72 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [86].

(a) On harm, although Tan had invaded his victims' privacy by observing and recording videos of them, the degree of invasion was limited as he had only observed their covered genitals for a brief period of time and the videos were deleted shortly after. There was also no indication that Tan had viewed or disseminated the videos prior to deleting them. That being said, the harm caused by the second offence was higher, as Tan had made physical contact with the victim and caused her emotional distress, which was exacerbated by her relative youth.[73]

(b) On culpability, although Tan had followed his victims – an act which suggested a degree of determination – he had only done so for a brief duration leading up to the commission of the offences.[74]

51 Accordingly, the applicable indicative sentencing range for each offence was a fine or up to four months' imprisonment. The court considered that the offence-specific factors pointed to a starting point of three weeks' and four weeks' imprisonment for the first and second offences respectively. The circumstances of the offending were such that the custodial threshold was crossed, and there was nothing which suggested that the interests of deterrence would be adequately met by the imposition of a fine.[75]

52 However, both of these starting points were adjusted downwards having regard to the offender-specific factors:

(a) For the first offence, the court considered that this was a fairly standard iteration of the s 377BB(4) offence. Taking into account the charge for criminal trespass, balanced against Tan's guilty plea, co-operation with authorities and demonstration of some propensity for reform, the imprisonment term was calibrated down to one week's imprisonment.[76]

73 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [97].
74 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [97].
75 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [98].
76 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [99].

(b) However, for the second offence, the sentencing discount was much less. Tan had re-offended on police bail, just slightly more than four months after his arrest for the first offence. Moreover, as Tan had relinquished his defence relying on his alleged voyeuristic disorder, he was to be treated as a normal 24-year-old adult who retained his mental ability and capacity to control himself. In this regard, the fact that he chose not to exercise self-control and re-offended while on police bail spoke volumes about his lack of remorse and blatant disregard for the law. As such, only a slight downward calibration to three weeks' imprisonment was warranted.

53 Both sentences were to run consecutively for an aggregate term of four weeks' imprisonment.[77] This represented an overall reduction in the term of imprisonment by three weeks.

IV. Commentary

54 The judgments of *PP v GED* and *Nicholas Tan*, which were released only several months apart, are relevant to practitioners not only for the sentencing frameworks they have now laid down for the offences in ss 377BE(1) and 377BB(4), but also the clear structure and methodical approach to be taken towards identifying and analysing the offence-specific factors relating to harm and culpability in the first step of the *Logachev* model.

55 Additionally, *PP v GED* and *Nicholas Tan* provide practical guidance to practitioners as to when the *Logachev* framework should be adopted as a model for developing a sentencing framework, and set out important statements of principle relating to the rule against double-counting, and the relevance of rehabilitation as a sentencing consideration.

77 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [101].

A. The Logachev *model*

56 In *PP v GED* and *Nicholas Tan*, the High Court developed the applicable sentencing framework for the Actual Distribution Offence in ss 377BE(1) and 377BB(4) offence respectively, based on the two-stage, five-step *Logachev* model.

57 In *PP v GED*, as it was largely common ground between parties and the young *amicus curiae* that the overall form of the sentencing framework should be modelled on the *Logachev* framework, the High Court only briefly stated that it agreed with this approach as the *Logachev* framework would, in its view, "best accommodate the wide variety of the circumstances in which the Actual Distribution Offence can be committed and also of the consequences of such offences".[78]

58 However, in its subsequent decision of *Nicholas Tan*, the High Court had further occasion to elaborate on why the *Logachev* model was preferred.

59 The court began by noting that the *Logachev* framework was gaining ground as the preferred sentencing framework for offences which admit of a wide variety of typical presentations, and that voyeurism was one such offence. Common scenarios include the recording of "up-skirt" or "down-blouse" videos, and recording or peeping at the victim while he or she is using the bathroom. That being said, the court observed that as technology continues to advance, it is likely that typical manifestations of voyeurism offences would incrementally diversify. In this regard, the *Logachev* framework, which provides for a methodical evaluation of offender- and offence-specific factors without over-emphasising any particular factor, is particularly apt for offences like the s 377BB(4) offence as it assists the sentencing court in systematically navigating the broad range of common situations in which the offence may manifest, while giving it sufficient latitude to respond to distinct features of a particular case.[79]

78 *Public Prosecutor v GED* [2022] SGHC 301 at [44].
79 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [56].

60 The court also held that the *Logachev* framework (advanced by the Prosecution, and supported by the young independent counsel) was generally preferable to the sentencing bands approach (advanced by the Defence in *Nicholas Tan*). Although the two approaches were not too far apart as they both involved selecting an indicative sentencing range in view of offence-specific factors followed by the identification of the precise sentence having regard to offender-specific factors, the court identified two key differences, as follows:[80]

> (a) First, the *Logachev* framework categorises offence-specific factors into those relevant to the level of harm, and those relevant to the level of the offender's culpability. Requiring the sentencing court to reason along these two lines facilitated a clearer and more systematic evaluation of the seriousness of the offence, promoting the development of consistent and coherent sentencing precedents.
>
> (b) Second, the *Logachev* framework, which takes the form of a three-by-three matrix, breaks down the overall sentencing range prescribed by legislation into five distinct sentencing ranges, while the sentencing bands approach only does so into three indicative sentencing ranges. As such, for the same offence, the indicative sentencing range in the sentencing bands approach was broader than each one under the *Logachev* framework. In this regard, the court opined that generally, narrow indicative sentencing ranges promote consistency whereas broader ranges potentially heighten the risk of inconsistency. Broader indicative sentencing ranges should only be used when necessary, such as where offence manifests itself in a "broader than usual spectrum"[81] of factual circumstances and greater flexibility is required to calibrate the precise sentence accordingly.

80 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [57]–[59].
81 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [59], citing *Goh Ngak Eng v Public Prosecutor* [2022] SGHC 254 at [99].

61 Ultimately, in choosing between the *Logachev* framework and the sentencing bands approach, the court identified two key questions as follows: (a) whether the offence-specific factors of the s 377BB(4) offence lent themselves to being categorised by reference to harm and culpability; and (b) whether the circumstances in which the offence manifests are so diverse as to require greater flexibility for sentencing. Answering both questions in the affirmative, the High Court thus determined that a sentencing framework based on the *Logachev* model was preferable to the sentencing bands approach.[82]

62 The approach taken by the High Court in *PP v GED* and *Nicholas Tan* provides helpful guidance for practitioners in at least two ways.

63 First, it appears that the *Logachev* model will generally be the preferred sentencing framework for offences in which offence-specific factors can be meaningfully categorised by reference to harm and culpability, which can be carried out in a wide variety of ways and methods, and in which diverse outcomes and consequences might arise.

64 For instance, it can be anticipated that the court will very likely adopt a similar approach when it comes to sentencing for the other newly-enacted offences in ss 377BB–377BE. Indeed, as the court stated (albeit in *obiter*) in *Nicholas Tan*, there was no reason why the sentencing framework premised on the *Logachev* model could not apply to ss 377BB(1), 377BB(2), 377BB(3), 377BB(5) and 377BB(6) offences punishable under s 377BB(7) as well.[83] Thus, if argument is to be made that any other sentencing framework or model should be adopted, practitioners would be advised to provide clear and cogent justification as to why the *Logachev* model is *not* appropriate.

65 Second, the highly methodical approach adopted by the court in both *PP v GED* and *Nicholas Tan* in articulating the categories of harm, as well as factors relevant to culpability at

82 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [60].
83 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [62].

Step 1 of the *Logachev* framework, serves as an indication as to how the court will likely approach similar offences in the future. Practitioners would therefore do well to take guidance from the taxonomy of harm and culpability as articulated by the High Court in *PP v GED* and *Nicholas Tan*, when considering the appropriate position on sentencing under s 377BB–377BE.

B. Double-counting

66 The High Court's analysis in relation to the "single transaction", which comprises the offence that is before the sentencing court, will likely also be of significant interest to practitioners. In this regard, it is worthwhile to note that a wide view is taken of the continuum events that comprise the "single transaction":

> (a) The court in *PP v GED* held that it is a relevant offence-specific factor going towards *both* harm and culpability whether harm is committed in the ***obtaining*** of the image, even though the Actual Distribution Offence is one centred on distribution.[84]
>
> (b) Similarly, the court in *Nicholas Tan* held that if the intimate image or recording which is obtained through the act of voyeurism is ultimately disseminated, that is also an aggravating offence-specific factor, even though the offence is one of voyeurism (and thus, primarily of observation, not distribution).[85]

67 Whether these facts do ultimately feature in the sentencing analysis, however, is subject to the rule against double-counting. We elaborate below, primarily by reference to the court's analysis in *PP v GED*, which was more extensive as compared to that undertaken in *Nicholas Tan* as the issue did not feature significantly in the latter case.

84 See para 18(b) above.
85 See para 43(a)(iii) above.

(1) Prerequisite harm and the method of obtaining the intimate image or recording

68 As canvassed above, the third category of offence-specific factors going towards harm within the *PP v GED* framework considers "other related harm", and one such type of "related harm" is "prior harm" or "prerequisite harm" done to the victim in the course of the offender obtaining the intimate image or recording, for example where hurt is caused by the offender in forcibly obtaining the image in question.[86]

69 The method of obtaining the image or recording ultimately distributed is *also* relevant in the assessment of offence-specific factors going towards culpability. In this regard, the court held that "the offender's method of obtaining the intimate image or recording is a precondition to its distribution and is fundamental to a holistic assessment of the offender's culpability in relation to the offence".[87]

70 The court therefore laid down a three-stage or "three concentric-circles" approach for analysing this factor, considering whether the victim had consented to (a) the capture; (b) the possession; and/or (c) the distribution of the image or recording:

> (a) The base paradigmatic case[88] is where the image or recording was captured with the victim's consent, and the victim also consented to the possession, but distribution took place without consent. The "typical case" is one where "the victim and the offender have had an intimate relationship and the victim has entrusted the offender with possession of the intimate images or recordings".[89]
>
> (b) Next, the offender's culpability is aggravated where the image or recording was captured with the victim's consent, but the victim did not consent to either possession or distribution.[90] Examples include the

86 ***Public Prosecutor v GED*** [2022] SGHC 301 at [60].
87 *Public Prosecutor v GED* [2022] SGHC 301 at [69].
88 *Public Prosecutor v GED* [2022] SGHC 301 at [70].
89 *Public Prosecutor v GED* [2022] SGHC 301 at [70].
90 *Public Prosecutor v GED* [2022] SGHC 301 at [72].

> offender surreptitiously extracting the intimate image or recording without the victim's knowledge, or otherwise obtaining it through theft; or blackmailing the victim into providing it to the offender; or obtaining possession through violence.
>
> (c) Last, the offender's culpability is even more aggravated where the image or recording was not captured with the victim's consent in the first place, in addition to possession and distribution not being consented to.[91] For example, the use of a hidden camera to capture the intimate image or recording.

71 One key point for practitioners to note is that the court has recognised that in some cases, the method of obtaining the image or recording might be analysed under factors going towards harm *and* also factors going towards culpability. For example, violence causing physical harm to the victim in obtaining the image can be considered "prerequisite harm"; but it can equally be considered as a factor enhancing culpability due to the victim's lack of consent to capture or possession. In such cases, the court has cautioned that there should *not* be double-counting of the factors. Thus:[92]

> … where the offender's method of obtaining the image or recording is taken into account in assessing his culpability, the prior or prerequisite harm caused to the victim in this process should not be taken into account again in assessing harm, and vice versa.

(2) The method of obtaining the intimate image or recording and the rule against double-counting

72 Another key point of interest to practitioners concerns the court's explanation and observations as to *why* the method of obtaining the intimate image or recording *can* be taken into account in sentencing for the Actual Distribution Offence. This might appear, at first blush, to be surprising, given that the Actual Distribution Offence is at its heart an offence concerning

91 *Public Prosecutor v GED* [2022] SGHC 301 at [73].
92 *Public Prosecutor v GED* [2022] SGHC 301 at [74].

distribution, whereas the offender's method of obtaining the image or the "prior harm" or "prerequisite harm" thereby caused might more naturally or intuitively be seen as offences of capturing or of possession. In this regard, there are other offences within the Penal Code 1871[93] which criminalise the capture or possession of such images or recordings without consent – for example, s 377BB (the suite of voyeurism offences) or s 377BD (the offence of possession of or gaining access to voyeuristic or intimate images or recordings).

73 In essence, the court has held that the method of obtaining the intimate image or recording can be taken into account because the harm caused by this method may confer upon the Actual Distribution Offence a qualitatively different character, or because the method used demonstrates enhanced culpability by the offender by indicating the lengths to which the offender is prepared to go to obtain the image or recording for distribution against the victim's will. However, this is subject to the rule against double-counting.

74 The rule against double-counting applies in the following way: if the offender's acts of forcibly obtaining the intimate image or recording form the subject of a separate charge for a hurt offence,[94] the physical harm caused to the victim will often be "fully taken into account" in the course of determining the appropriate sentence for the hurt offence, and "as such should not also be taken into account as a factor aggravating the harm suffered by the victim as a result of the *Actual Distribution Offence* or the offender's culpability in committing it"[95] [emphasis in original]. So far, this seems fairly orthodox.

75 What might be of further interest, however, is that the court has gone further to opine that *even though* the physical harm or injury caused has been the subject of punishment and sentence under the distinct hurt offence, the use of violence nevertheless confers on the Actual Distribution Offence a "*qualitatively different*

93 2020 Rev Ed.
94 *Public Prosecutor v GED* [2022] SGHC 301 at [92].
95 *Public Prosecutor v GED* [2022] SGHC 301 at [93].

character which may not be adequately taken into account by the sentence for the separate hurt offence"[96] [emphasis in original]. As the court put it, "the combination of the violence with the act of obtaining the image in order to distribute it, results in a sum that is greater than the parts".[97]

76 The court has given practical guidance as to how the "qualitatively different character" of the Actual Distribution Offence might be assessed and accounted for in sentencing. Essentially, the severity of the victim's injuries – whether physical or non-physical – should not be taken into account in so far as this has been addressed by the sentence for the separate hurt offence.[98] However, if there is "evidence of trauma suffered by the victim, over and above the non-physical harms caused by the separate hurt offence" and "specifically as a result of the offender's *use of violence to capture an intimate image or recording which he would otherwise have been unable to obtain*" [emphasis in original], this would be a distinct type of harm that would be considered "*aggravation of the humiliation, alarm or distress experienced by the victim*" [emphasis in original] that is to be taken into account in sentencing for the Actual Distribution Offence.[99] This accords with the court's observations that:[100]

> … the emotional and psychological harm caused to the victim by the acts of violence and distribution *in combination* may well be greater than the sum of the harm caused by each of these acts taken individually. [emphasis in original]

77 Practically, what this means is that practitioners must consider (a) whether the method of obtaining the image is the subject of a separate charge, and if so, (b) what harm is addressed by the sentence for that separate offence; and (c) whether the method of obtaining the image is such as to confer on the Actual Distribution Offence a "qualitatively different character" than if the method of obtaining had not been accounted for. To distinguish between (b) and (c), it will be necessary to distinguish

96 *Public Prosecutor v GED* [2022] SGHC 301 at [93].
97 *Public Prosecutor v GED* [2022] SGHC 301 at [93].
98 *Public Prosecutor v GED* [2022] SGHC 301 at [94].
99 *Public Prosecutor v GED* [2022] SGHC 301 at [94]
100 *Public Prosecutor v GED* [2022] SGHC 301 at [94].

between the physical and non-physical injuries caused by the hurt offence, which would typically be met by the sentence for the hurt offence in (b), and "trauma … specifically as a result of the offender's *use of violence to capture an intimate image or recording which he would otherwise have been unable to obtain*"[101] [emphasis in original], which can be accounted for in (c). Given the high level of specificity required in relation to (c), a victim impact statement will probably be critical.

78 Practitioners should also note, however, that the method of obtaining the image or recording in question is not only to be examined through the lens of the additional harm caused to the victim. Instead, the method of obtaining the image or recording can *also* be analysed through the prism of culpability. In this regard, the court has stated that where:[102]

> … the offender commits the separate hurt offence *for the purpose of* capturing the intimate image or recording by force, *with a view to the eventual distribution of that image or recording*, this fact may be taken into account as a distinct aspect of culpability in relation to the Actual Distribution Offence, in that it is indicative of the lengths to which the offender was prepared to go to obtain the image or recording for distribution against the victim's will. [emphasis in original]

Thus, practitioners should probably also ask themselves a fourth question: (d) did the offender commit the separate "prior harm" offence – whether hurt or theft or something else – for the purpose of capturing or obtaining possession of the intimate image or recording, *with a view to eventual distribution of that image or recording*?

C. Relevance of rehabilitation as a sentencing consideration

79 The final issue concerns the relevance of rehabilitation as a sentencing consideration. For background, this issue arose in *Nicholas Tan* because the court below had identified deterrence as the dominant sentencing principle for "up-skirt" video cases, and also found that specific deterrence was warranted as Tan had

101 *Public Prosecutor v GED* [2022] SGHC 301 at [94].
102 *Public Prosecutor v GED* [2022] SGHC 301 at [95].

re-offended on police bail.[103] There was no reason for rehabilitation to displace deterrence as the primary sentencing consideration: Tan was not a youthful offender, but a sufficiently mature yet recalcitrant offender whose alleged voyeuristic disorder did not cause or contribute to his offending.[104] His rehabilitation efforts also did not displace the need for deterrence since the purported disorder he was being treated for did not cause or contribute to his offending.[105]

80 On appeal, Tan argued that he had demonstrated an extremely strong propensity for reform, as evinced by the active steps he had taken post-offence to seek psychiatric intervention.[106] As such, Tan argued that the court below had erred in finding that deterrence, rather than rehabilitation, was the dominant sentencing principle in sentencing the appellant.[107]

81 Accordingly, the High Court framed one of the legal issues for consideration in the appeal as follows: In what circumstances, and to what extent, should rehabilitation be a relevant sentencing consideration for voyeurism offences under s 377BB(4)?

82 The court began by making the preliminary observation that the sentencing court has the difficult yet important task of striking the balance between deterrence (as well as retribution and prevention, as the case may be) on the one hand, and rehabilitation on the other, where each sentencing consideration could pull the court towards different sentencing outcomes. How this balance ought to be struck is a fact-centric inquiry, which is in turn shaped by distinct policy considerations relating to

103 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [17].

104 Tan had initially submitted a medical report opining that he suffered from voyeuristic disorder. However, he subsequently confirmed that his mitigation would not rely on the alleged voyeuristic disorder causing or contributing to the offences. In the circumstances, parties agreed that there was no need for a Newton hearing to be conducted to determine if Tan suffered from voyeuristic disorder, and if so, whether it caused or contributed to his commission of the offences: *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [14].

105 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [17].

106 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [2].

107 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [25(a)].

the offender's personal attributes.[108] Apart from cases involving youthful offenders, adult offenders with extremely strong propensity for reform, or offenders with mental conditions causally linked to their offending conduct, rehabilitation could be the dominant sentencing consideration depending on the interplay of the various sentencing considerations in a given set of facts.[109]

83 In the context of offences committed by adult offenders with no mental conditions contributing to their offending conduct (as was the case in *Nicholas Tan*[110]), the court made the following observations:

> (a) Neither the prospective nor retrospective rationale for rehabilitation as the dominant sentencing consideration would apply in such cases.[111] However, that was not to say that rehabilitation could *never* be the operative sentencing consideration for an adult offender: where it is shown that the particular adult offender has demonstrated an extremely strong propensity for reform, rehabilitative sentencing options may still be an effective means of discouraging prospective offending. To this extent, the prospective rationale is engaged.[112]
>
> (b) The three-limbed framework developed in *Public Prosecutor v Siow Kai Yuan Terence*[113] ("*Terence Siow*") is useful in evaluating whether a s 377BB(4) adult offender

108 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [30].
109 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [32].
110 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [33] and [34]. Tan had disclaimed any reliance on his alleged voyeuristic disorder. The court therefore confined itself to opining on the relevance of rehabilitation as a sentencing consideration for s 377BB(4) offences committed by adult offenders with no mental conditions contributing to their offending conduct.
111 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [35]. As explained in [31], the prospective rationale justifies rehabilitation as the preferred tool to discourage future offending, and is applicable to youthful offenders on the premise that the youthful offender would be more receptive towards a sentencing regime aimed at altering his values and guiding him on the right path; while the retrospective rationale justifies giving the offender a second chance, and is typically applicable to youthful offenders in light of their youthful folly and inexperience.
112 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [35].
113 [2020] 4 SLR 1412.

has demonstrated an extremely strong propensity for reform.[114]

(c) However, even if the court is satisfied after applying the *Terence Siow* framework that the s 377BB(4) adult offender demonstrates an extremely strong propensity for reform, it remains to be considered whether it is appropriate in all the circumstances to retain the emphasis on deterrence (both general or specific[115]). Essentially, the inquiry balances the *offender*'s characteristics against the nature of the *offence* itself – while the offender's extremely strong propensity for reform may signal a shift to focus on rehabilitation at first instance, this may still give way to society's need for general and specific deterrence in light of offence-related considerations.[116]

84 Thus, turning to consider the specific nature of the s 377BB(4) offence, the court held that deterrence would generally be the dominant sentencing consideration. The court's reasons were as follows:[117]

(a) First, in every case, the impact of a s 377BB(4) offence extends beyond the particular victim concerned because it offends the sensibilities of the general public and triggers unease. Thus, the sentencing court has to send a stern and unequivocal signal on behalf of society that s 377BB(4) offences will not be tolerated.[118]

(b) Second, s 377BB(4) offences often inflict significant emotional harm on the victim. In the archetypal situation where the offender attempts but fails to make a recording of the victim's image, the victim would more often than not be aware that he or she had been a victim of voyeurism and would, as a result, suffer significant emotional distress. If a recording had been captured, there was also a danger of considerable emotional harm being inflicted

114 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [36]–[39].
115 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [40].
116 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [41].
117 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [42]–[48].
118 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [43].

post-offence given the ease of subsequent dissemination through the Internet (which would be further aggravated if the victim were identifiable from the record). This warrants the imposition of a deterrent sentence.[119]

(c) Third, s 377BB(4) offences entail the operation of equipment with the intention to observe the victim's private regions that would otherwise not be visible, without consent. Thus, the commission of such an offence generally involves a degree of furtiveness, planning and premeditation, warranting the imposition of a deterrent sentence.[120]

(d) Fourth, the need to censure s 377BB(4) offences with deterrent sentences is augmented by the increasing prevalence of voyeurism offences, attributable to technological advancements that have facilitated the ease with which such offences can be stealthily committed. The imposition of stiff sentences would be timely and necessary in curbing the rising number of voyeurism offences.[121]

(e) Finally, retaining the emphasis on deterrence in most s 377BB(4) offences – even where the adult offender has demonstrated an extremely strong propensity for reform – accords with Parliament's intention to place deterrence at the fore for such offences. The clearest indication of this intention is the enactment of s 377BB(7), providing for a maximum imprisonment term of two years which is double the maximum imprisonment term under the now-repealed s 509 of the Penal Code 1871[122], under which voyeurism offences were previously prosecuted prior to the introduction of s 377BB. Moreover, Parliament had indicated in no uncertain terms that the general sentencing position in respect of adult offenders who commit sexual offences, including voyeurism, is to prioritise deterrence over rehabilitation. Accordingly, it

119 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [44] and [45].
120 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [46].
121 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [47].
122 Cap 224, 2008 Rev Ed.

> would only be in truly exceptional cases that deviation from this general position would be justified.[123]

85 Accordingly, the court concluded that it would be appropriate in most s 377BB(4) cases to retain the emphasis on deterrence notwithstanding the adult offender's extremely strong propensity for reform, with the result that sentences imposed would likely include an imprisonment term.[124] Rehabilitation would however remain a subsidiary sentencing consideration, which could be given effect to by calibrating the overall imprisonment term downwards upon the application of the totality principle.[125]

86 While the court's decision in *Nicholas Tan* on the relevance of rehabilitation as a sentencing consideration was specifically confined to the context of adult offenders with no mental conditions causally linked to their s 377BB(4) offending, there is no obvious reason why the court would adopt a different approach when assessing the relevance of rehabilitation as a sentencing consideration in the context of other voyeurism offences, and possibly even other sexual offences in the Penal Code 1871[126].

87 Moreover, the court's clear articulation that it is not strictly only in the cases of youthful offenders, adult offenders with extremely strong propensity for reform, or offenders with mental conditions causally linked to their offending conduct where rehabilitation comes to the fore[127] leaves it open for arguments to be made – in any given case – that rehabilitation functions as the dominant sentencing consideration.

88 Practitioners seeking to make such an argument may wish to focus not only on establishing that the *offender* in question has demonstrated an extremely strong propensity for reform (through the application of the *Terence Siow* framework), but also

123 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [48], citing Singapore Parl Debates; Vol 94, Sitting No 103 [6 May 2019].
124 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [49].
125 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [49].
126 2020 Rev Ed.
127 *Nicholas Tan Siew Chye v Public Prosecutor* [2023] SGHC 35 at [32].

that the nature of the *offence* in question is not one which calls for rehabilitation to give way to general and/or specific deterrence as the dominant sentencing consideration. Drawing from *Nicholas Tan*, this could involve an analysis of the type of harm caused by such offending (including any broader societal implications), statistics or trends regarding the extent and frequency of offending, as well as any statements of Parliament's intention as to what the dominant sentencing consideration for such offences ought to be.

V. Conclusion

89 In conclusion, the High Court decisions in *PP v GED* and *Nicholas Tan* have now set out the applicable sentencing frameworks for the offence of voyeurism under s 377BB(4) of the Penal Code 1871;[128] and the Actual Distribution Offence under s 377BE(1) of the Penal Code 1871[129].

90 Apart from the sentencing frameworks now settled by these decisions, the analysis and observations of the High Court in these decisions are particularly useful to practitioners for the following four points:

(a) First, the *Logachev* framework is particularly apt for offences which admit of a wide variety of typical presentations, and in which offence-specific factors can be meaningfully categorised by reference to harm and culpability.

(b) Second, at the first step of the *Logachev* framework, the court is increasingly organising the factors by categories, in particular drawing a distinction between "objective" factors going towards harm as revealed by the objective circumstances of the offence, and "subjective" factors expressed by the individual victim concerned. The harm revealed by the "objective" factors acts as a floor on the degree of harm committed in the offence.

128 2020 Rev Ed.
129 2020 Rev Ed.

(c) Third, the court will likely take a wide view of the "single transaction" that comprises an offence. Thus, in relation to the Actual Distribution Offence, the method of obtaining the intimate image or recording concerned is relevant as "prior" or "prerequisite harm" to potentially enhance the offender's culpability. Similarly, subsequent dissemination of an image or recording obtained by way of voyeurism can also be an aggravating factor for the voyeurism offence. However, the rule against double-counting applies to narrow the circumstances in which such acts can be taken into account in sentencing.

(d) Fourth, rehabilitation as a sentencing consideration not only requires the offender to have demonstrated an extremely strong propensity for reform, but also, requires the offender to show that the nature of the offence in question is one which admits of rehabilitation as the dominant sentencing consideration, as compared to general and/or specific deterrence.