

15. CRIMINAL PROCEDURE, EVIDENCE AND SENTENCING

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CRIMINAL PROCEDURE

I. Higher threshold of substantial injustice for extension of time to appeal

15.1 A party who wants to appeal against any judgment, sentence or order in a criminal case must do so within 14 days.¹ Beyond this 14-day period, if a party wants to appeal, he must seek an extension of time. The principles relating to the court's exercise of discretion to grant an extension of time are trite and set out in *Lim Hong Kheng v Public Prosecutor*² – the court considers (a) the length of the delay; (b) the reasons for the delay; and (c) the prospects of an appeal.

15.2 In *Adeeb Ahmed Khan s/o Iqbal Ahmed Khan v Public Prosecutor*,³ the Court of Appeal held that a higher threshold of substantial injustice is required where the delay and the surrounding circumstances suggest that the applicant did not intend to challenge the decision at first instance and had elected to accept the merits of the first instance decision (rather than failed to appeal due to some oversight or had some legitimate explanation for the delay).⁴ The Court of Appeal adapted the applicable higher threshold from the test set out in its 2021 case of *Public Prosecutor v*

1 Criminal Procedure Code 2010 (2020 Rev Ed) s 377.

2 [2006] 3 SLR(R) 358.

3 [2022] 2 SLR 1197.

4 *Adeeb Ahmed Khan s/o Iqbal Ahmed Khan v Public Prosecutor* [2022] 2 SLR 1197 at [21] and [25].

*Pang Chie Wei*⁵ (“*Pang Chie Wei*”), which concerned the reopening of a previous decision of the court. The threshold is as follows:⁶

(a) Where an applicant is seeking an extension of time to appeal against his conviction, an injustice will only have arisen if material is advanced that strikes at the soundness of the conviction in a fundamental way. The injustice may be said to be substantial if the material points to a powerful probability that his conviction is unsound and if the facts do not disclose any other offence of comparable gravity.

(b) Where an applicant is seeking an extension of time to appeal against his sentence, an injustice will only have arisen if material is advanced that shows that the earlier decision was based on a fundamental misapprehension of the law. The injustice may be said to be substantial if the misapprehension had a significant bearing on the sentence imposed.

15.3 Even if some error or misapprehension is shown, the court must be satisfied that this would very likely have a bearing on the outcome in the case. This can at times entail a reconstruction of events, and when considering the question of substantial injustice, the court must be mindful of all the facts before concluding that the outcome would very likely have been different.⁷ The threshold is largely the same as the test in *Pang Chie Wei*, other than that the material advanced need not be new material.⁸

15.4 The determination as to whether the case is one where the applicant did not appeal in time due to some oversight (whereupon the *Lim Hong Kheng* test would apply) or whether it is one where the intending appeal is an afterthought coming after an earlier election to accept the finality of the decision:⁹

... will be significantly influenced by the length of time that has passed without an appeal being filed. But it will nevertheless be a holistic inquiry in which the court will examine all the factors including the submissions made at the original hearing, the reasons advanced for the delay and any other factors.

5 [2022] 1 SLR 452.

6 *Adeeb Ahmed Khan s/o Iqbal Ahmed Khan v Public Prosecutor* [2022] 2 SLR 1197 at [22] and [23].

7 *Adeeb Ahmed Khan s/o Iqbal Ahmed Khan v Public Prosecutor* [2022] 2 SLR 1197 at [23] and [24].

8 *Adeeb Ahmed Khan s/o Iqbal Ahmed Khan v Public Prosecutor* [2022] 2 SLR 1197 at [23].

9 *Adeeb Ahmed Khan s/o Iqbal Ahmed Khan v Public Prosecutor* [2022] 2 SLR 1197 at [26(b)].

II. Third parties have no standing to participate in criminal proceedings

15.5 In two cases, the Court of Appeal reiterated that it is generally against the whole purpose and tenor of criminal proceedings to allow third parties to participate in them.¹⁰ Other persons apart from the Prosecution and the accused may have an interest in the outcome of the case but such persons are not, and cannot be, parties to that case. This position does not change as the case goes through the various stages from trial to appeal to criminal reference and, occasionally, criminal review.

15.6 The first case is *Roslan bin Bakar v Public Prosecutor*,¹¹ where the Court of Appeal held that only a party to the decision of the appellate court can apply for leave under s 394H of the Criminal Procedure Code 2010 (“CPC”) to have the decision reviewed. On this basis, the court found that the third applicant (a Malaysian non-governmental organisation which opposed the death penalty) had no standing to be a party to the application for leave for the court to review its earlier decisions.¹²

15.7 The second case is *Panchalai a/p Supermaniam v Public Prosecutor*,¹³ where the mother of a prisoner facing capital punishment filed a criminal motion as its first applicant (with the prisoner as the second applicant) seeking a stay of the prisoner’s execution. The Court of Appeal held that while the first applicant could be said to be interested in the outcome of the proceedings, she had no legal standing to appear before the court.¹⁴

III. High Court exercises revisionary jurisdiction when considering a bail application arising from denial of bail by State Courts; cross-examination generally not allowed in criminal motions

15.8 In *Muhammad Feroz Khan bin Abdul Kader v Public Prosecutor*,¹⁵ the General Division of the High Court held that the standard which has to be met before it would intervene to grant bail under s 97(1)(a) of the

10 *Roslan bin Bakar v Public Prosecutor* [2022] 1 SLR 1451 at [10]; *Panchalai a/p Supermaniam v Public Prosecutor* [2022] 2 SLR 507 at [14].

11 [2022] 1 SLR 1451.

12 *Roslan bin Bakar v Public Prosecutor* [2022] 1 SLR 1451 at [6]–[12].

13 [2022] 2 SLR 507.

14 *Panchalai a/p Supermaniam v Public Prosecutor* [2022] 2 SLR 507 at [14].

15 [2022] SGHC 287.

CPC, after the State Courts have refused to extend bail to an accused, is where the State Courts' decision would give rise to a "serious injustice".¹⁶

15.9 When the High Court is considering a bail application after the State Courts have refused bail, it is exercising its revisionary jurisdiction rather than its original, appellate or supervisory jurisdiction.¹⁷

The High Court's powers of revision are 'designed to enable the correction of miscarriage of justice arising from a misconception of law, irregularity of procedure, neglect of proper precautions or apparent harshness of treatment' The consequences arising from bail orders can plainly be serious. ... The unjustified deprivation of personal liberty can only be described as a paradigm example of a miscarriage of justice. Thus, the High Court, as the 'guardian of criminal justice', should step in and exercise its powers of revision where it seems that there has been a miscarriage of justice by the State Courts in refusing to grant bail to an accused person Such a standard, which admittedly sets a high bar, is also appropriate to avoid the mischief of excessive intervention by the High Court in matters that are within the original jurisdiction of the State Courts and where there is no right of appeal.

15.10 The High Court also held that cross-examination in the course of a criminal motion will only be considered, if at all, in the most exceptional of cases because of the interlocutory nature of criminal motions.¹⁸ This is in line with the established general position in civil proceedings, where cross-examination will generally not be permitted for interlocutory applications. Criminal motions are akin or analogous to interlocutory applications in that they would typically not finally determine the parties' rights in the proceedings within which the application is being brought.¹⁹ There are other practical solutions available, such as calling for further affidavits to explain any issues that require clarification.²⁰

16 *Muhammad Feroz Khan bin Abdul Kader v Public Prosecutor* [2022] SGHC 287 at [15] and [18]–[24].

17 *Muhammad Feroz Khan bin Abdul Kader v Public Prosecutor* [2022] SGHC 287 at [24].

18 *Muhammad Feroz Khan bin Abdul Kader v Public Prosecutor* [2022] SGHC 287 at [10].

19 *Muhammad Feroz Khan bin Abdul Kader v Public Prosecutor* [2022] SGHC 287 at [12].

20 *Muhammad Feroz Khan bin Abdul Kader v Public Prosecutor* [2022] SGHC 287 at [10]–[14].

IV. Applications under section 283 of the Criminal Procedure Code to summon and examine witnesses

15.11 The High Court held in *Sim Chon Ang Jason v Public Prosecutor*²¹ that it is procedurally improper for an applicant to ask the High Court to intervene in an ongoing trial in the District Court by making an application under s 283 of the CPC directly to the High Court. Section 283(1) provides that:

A court may, on its own motion or on the application of the prosecution or the defence, at the close of the case for the defence, or at the end of any proceeding under this Code, summon a person as a witness or examine a person in attendance as a witness, whether or not summoned, or recall and re-examine a person already examined.

15.12 It is plain from the language of s 283(1) that the provision contemplates the tail end of a trial or other proceedings before a court of original jurisdiction and that any application under the provision is made in the ongoing proceedings to that court.²²

15.13 Even if the applicant had first made the s 283 application to the District Court and the District Court had refused to summon the witness, the High Court will not exercise its appellate or revisionary jurisdiction against the ruling.²³ If the District Court dismisses the s 283 application and eventually convicts the applicant, it is open to the applicant to challenge the correctness of that ruling in an appeal against conviction and seek to persuade the High Court that the witness's evidence was necessary and that his absence resulted in a miscarriage of justice. If the High Court on appeal holds that the District Court was wrong to have refused to summon the witness, the High Court will then make the appropriate orders based on the justice of the entire case.²⁴

21 [2022] SGHC 235.

22 *Sim Chon Ang Jason v Public Prosecutor* [2022] SGHC 235 at [18].

23 *Sim Chon Ang Jason v Public Prosecutor* [2022] SGHC 235 at [25].

24 *Sim Chon Ang Jason v Public Prosecutor* [2022] SGHC 235 at [21] and [25].

EVIDENCE

V. Whether oral remarks regarding the mandatory death penalty notice may constitute threat, inducement and promise

15.14 In *Gunasilan Rajenthiran v Public Prosecutor*,²⁵ the Court of Appeal expressed reservations about the High Court's decision to exclude some statements recorded from an offender. The offender, who faced a capital charge of importing cannabis, challenged the admissibility of his statements in the High Court on the basis that they were not made voluntarily. The High Court admitted the first contemporaneous statement and declined to admit the subsequent statements because the officers from the Central Narcotics Bureau ("CNB") had made oral remarks in response to the offender's queries about the mandatory death penalty ("MDP") notice while recording the other statements and without separately administering the MDP notice in writing. The High Court observed that oral variations of the MDP notice should not be used as, among other things, Explanation 2(aa) to s 258 of the CPC specifically stipulates that the accused be administered the MDP notice in writing.²⁶ The High Court found the statements inadmissible as the oral remarks could be construed as an inducement under s 258(3) of the CPC.

15.15 The Court of Appeal had reservations about the High Court's reasoning, observing that (a) it was entirely reasonable for the officers to have responded to the offender's queries and it would be unrealistic for them to repeat the administration of the written MDP notice;²⁷ and (b) the fact that the oral remarks might strictly fall outside Explanation 2(aa) of s 258 of the CPC does not put an end to the issue on admissibility.²⁸ It remains necessary for the court to consider the remarks objectively to determine whether they constitute an inducement, threat or promise. Given that the MDP notice itself does not constitute a threat, inducement or promise as the conditions for an accused person to be eligible for alternative sentencing are beyond the control of the CNB,²⁹ it follows that oral remarks explaining the same, by themselves, cannot amount to any threat, inducement or promise.³⁰

25 [2022] 1 SLR 1308.

26 *Public Prosecutor v Gunasilan Rajenthiran* [2022] 3 SLR 861 at [37].

27 *Gunasilan Rajenthiran v Public Prosecutor* [2022] 1 SLR 1308 at [21].

28 *Gunasilan Rajenthiran v Public Prosecutor* [2022] 1 SLR 1308 at [22].

29 *Jumadi bin Abdullah v Public Prosecutor* [2022] 1 SLR 814.

30 *Gunasilan Rajenthiran v Public Prosecutor* [2022] 1 SLR 1308 at [21] and [22].

VI. Whether ancillary hearing is required when an accused contests the accuracy of his statement

15.16 Section 279(1) of the CPC provides that:

... where any party objects to the admissibility of any statement made by that party or any other evidence which the other party to the case intends to tender at any stage of the trial, the court must determine it separately at an ancillary hearing before continuing with the trial.

15.17 In *Leck Kim Koon v Public Prosecutor*³¹ (“*Leck Kim Koon*”), the Court of Appeal observed in *obiter dicta* that it is not mandatory for an ancillary hearing to be convened when an accused contests the accuracy (as opposed to voluntariness) of his recorded statement. This is clear from illustration (d) to s 279(1), which states that no ancillary hearing is necessary if an accused denies that he made the statement because it does not relate to the voluntariness of the statement.³²

15.18 The Court of Appeal took the chance to address the *obiter dicta* in *Public Prosecutor v Parthiban Kanapathy*³³ (“*Parthiban*”), where the High Court provided three reasons to support the calling of an ancillary hearing where the accuracy of an accused’s statement is challenged.³⁴ At some points, the language used by the court in *Parthiban* may appear to suggest that it is mandatory to do so.³⁵

15.19 The Court of Appeal in *Leck Kim Koon* observed that the court in *Parthiban* had expressly stated that its reasoning on the issue was *obiter dicta*. Further, the court in *Parthiban* recognised that it is a matter of the court’s discretion to call for an ancillary hearing where the accused challenges the accuracy of his statements, and was of the view that it would be a good practice to do so.³⁶ The Court of Appeal expressed doubts over the reasons given in *Parthiban* to support the calling of an ancillary hearing in such a situation. Among other things, it was not the case that in the absence of an ancillary hearing, the accused’s opportunity to challenge the accuracy of his written statement had to come at the cost of his right to remain silent. It remained open to the Defence to cross-examine the relevant Prosecution witness and to call on other witnesses

31 [2022] 2 SLR 595.

32 *Leck Kim Koon v Public Prosecutor* [2022] 2 SLR 595 at [70].

33 [2021] 5 SLR 372.

34 *Public Prosecutor v Parthiban Kanapathy* [2021] 5 SLR 372 at [29]–[38]; *Leck Kim Koon v Public Prosecutor* [2022] 2 SLR 595 at [72].

35 *Public Prosecutor v Parthiban Kanapathy* [2021] 5 SLR 372 at [32]; *Leck Kim Koon v Public Prosecutor* [2022] 2 SLR 595 at [72].

36 *Leck Kim Koon v Public Prosecutor* [2022] 2 SLR 595 at [73]–[75].

to support its case.³⁷ Given these observations in *Leck Kim Koon*, it would appear that there is generally no need to convene an ancillary hearing if an accused contests the accuracy (as opposed to voluntariness) of his statement.

VII. Fruits of investigation from unrelated case where an offender is the complainant may be admissible as evidence against the offender

15.20 The High Court in *Sa'adiyah bte Jamari v Public Prosecutor*³⁸ considered whether the evidence obtained when a person reports a crime against himself and provides samples for those investigations is admissible as evidence in a separate set of investigations against that complainant.

15.21 The offender was charged with administering poisons to two babies. In arriving at his decision to convict the offender, the trial judge relied, among other things, on a toxicology report of the blood and urine samples collected from the offender, which showed the same drugs that were found in the blood of one of the babies. The toxicology report came about because the offender had made a police report asserting that she was the victim of a sexual assault and allowed the medical tests to be administered as part of those investigations.³⁹ The report had been admitted by consent at trial but on appeal, the offender contested that the trial judge should not have relied on the report.

15.22 The High Court held that the toxicology report was relevant and admissible as evidence. The privilege against self-incrimination was not engaged as, among other things, the privilege did not cover non-testimonial evidence or instances where there was a lack of compulsion to provide the evidence in question. The offender would also have lost any such privilege by not objecting to the admission at trial.⁴⁰ The rule against similar fact evidence was also not engaged. The report was admitted as *prima facie* evidence of the relevant fact of the offender having access to the drugs close to the offending period.⁴¹

15.23 As the probative value of the report outweighed its prejudicial effect, there was no reason to exercise the court's discretion to exclude the evidence. The court observed that:⁴²

37 *Leck Kim Koon v Public Prosecutor* [2022] 2 SLR 595 at [78]–[85].

38 [2023] 3 SLR 191.

39 *Sa'adiyah bte Jamari v Public Prosecutor* [2023] 3 SLR 191 at [3].

40 *Sa'adiyah bte Jamari v Public Prosecutor* [2023] 3 SLR 191 at [55].

41 *Sa'adiyah bte Jamari v Public Prosecutor* [2023] 3 SLR 191 at [66].

42 *Sa'adiyah bte Jamari v Public Prosecutor* [2023] 3 SLR 191 at [73].

... this does not mean, however, that it would always be permissible for evidence voluntarily provided by a complainant to the police to be used subsequently against him in an unrelated criminal proceeding. ... [T]his should be subject at least to the constraint that the evidence should have been reasonably obtained in respect of the initial suspected offence.

15.24 The court also observed that there was no separate right of privacy or confidentiality relating to the person's body that would need to be vindicated in this context.⁴³

15.25 The offender subsequently filed an application for leave to file a criminal reference to the Court of Appeal to refer purported questions of law of public interest concerning this issue. Her application for leave was dismissed.

SENTENCING

VIII. General sentencing principles

A. *Imprisonment in place of a fine where an offender is unable to pay a fine*

15.26 Fines are generally considered to be a less onerous sentence than an imprisonment term. But this conclusion may be less clear in cases where an offender is unable to pay a fine and may therefore have to serve the in-default imprisonment term if a fine were imposed.

15.27 In *Tan Yan Qi Chelsea v Public Prosecutor*,⁴⁴ the High Court considered this issue and reiterated⁴⁵ that where an offender cannot pay a fine, the court should not impose a fine even though it would have preferred to do so rather than impose a short term of imprisonment. In calibrating the imprisonment term, the court must be alive to the reality that imprisonment is imposed because of the offender's indigence and not because the egregiousness of the offence independently calls for an imprisonment term.⁴⁶

43 *Sa'adiyah bte Jamari v Public Prosecutor* [2023] 3 SLR 191 at [40], [74] and [75].

44 [2022] SGHC 275.

45 The High Court cited similar observations in *Low Meng Chay v Public Prosecutor* [1993] 1 SLR(R) 46 and *Yap Ah Lai v Public Prosecutor* [2014] 3 SLR 180; *Tan Yan Qi Chelsea v Public Prosecutor* [2022] SGHC 275 at [21].

46 *Tan Yan Qi Chelsea v Public Prosecutor* [2022] SGHC 275 at [28].

15.28 This does not, however, mean that offenders can elect to serve a custodial sentence rather than pay a fine. Nor does it mean that offenders can simply proffer a bare assertion that he is impecunious and is unable to pay a potential fine.⁴⁷ The court will examine the circumstances of each case. The fact that an offender was remanded or represented by counsel acting *pro bono* are neutral factors that do not, in and of themselves, show that an offender is unable to pay a potential fine.⁴⁸

15.29 The High Court also observed that in-default sentences for fines should not be calibrated based on a precise mathematical ratio. Given that the purpose of an in-default sentence is to deter an offender from evading payment of the fine, the court should have regard to the personal circumstances of the offender in determining the length of the in-default sentence.⁴⁹

B. Post-offence improvement in conduct that does not relate back to the offence is not mitigating

15.30 In *Gaiyathiri d/o Murugayan v Public Prosecutor*⁵⁰ (“*Gaiyathiri*”), the Court of Appeal considered whether an offender’s improvement in conduct after the offence was committed could be a mitigating circumstance for sentencing. The offender in *Gaiyathiri* argued that it was mitigating that her psychiatric conditions and her conduct had improved since she received treatment during her remand in prison.

15.31 The Court of Appeal held such post-offence conduct that is unrelated to the offences which an offender was charged with is not mitigating. As observed in *Chew Soo Chun v Public Prosecutor*,⁵¹ there are generally three kinds of mitigating circumstances in law:⁵²

- (a) where the offender’s culpability is not as great as the nature of the offence suggested;
- (b) where the offender is fully culpable but will suffer more than most offenders would from the normal penalty; and
- (c) where the offender has behaved in a meritorious way which, though it affects neither his culpability nor his sensitivity to the penalty, should count in his favour. This was termed by the High Court as a “behavioural credit”.

47 *Tan Yan Qi Chelsea v Public Prosecutor* [2022] SGHC 275 at [23].

48 *Tan Yan Qi Chelsea v Public Prosecutor* [2022] SGHC 275 at [24].

49 *Tan Yan Qi Chelsea v Public Prosecutor* [2022] SGHC 275 at [26].

50 [2022] 2 SLR 1103.

51 [2016] 2 SLR 78.

52 *Gaiyathiri d/o Murugayan v Public Prosecutor* [2022] 2 SLR 1103 at [30].

15.32 To be considered for sentencing, any such “behavioural credit” should relate back to the offences with which he has been charged. “Behavioural credits” have been limited to matters such as a timeous plea of guilt by an offender or an offender’s co-operation with investigation authorities.⁵³ Post-offence conduct that is unrelated to the offence cannot qualify as a “behavioural credit” and cannot be taken into account as a mitigating circumstance in sentencing.⁵⁴

C. Punishment of a corporate offender

15.33 In 2010, the High Court provided guidance on the sentencing of corporate offenders in *Lim Kopi Pte Ltd v Public Prosecutor*⁵⁵ (“*Lim Kopi*”). The High Court held that deterrence is without doubt a concept applicable to companies, in the same way as it is applicable to individual offenders.⁵⁶ Companies are often engaged in the taking of calculated risk, and the only means by which companies can be deterred from engaging in wrongful conduct would be to ensure that the right forms of financial disincentives are applied, since they cannot be sentenced to imprisonment.⁵⁷ The High Court also set out factors that are relevant in deciding the quantum of fine to be imposed on a corporate offender.⁵⁸

15.34 Since *Lim Kopi*, there has not been much discussion in our case law on the sentencing of corporate offenders, until the recent decision in *Public Prosecutor v Sindok Trading Pte Ltd*⁵⁹ (“*Sindok*”).

15.35 In *Sindok*, the High Court cast doubt on the observation in *Lim Kopi* that deterrence applies to companies in the same way as it does to individuals.⁶⁰ The High Court took the view that companies cannot be punished in the same way as individuals: any punishment against a

53 *Gaiyathiri d/o Murugayan v Public Prosecutor* [2022] 2 SLR 1103 at [31].

54 *Gaiyathiri d/o Murugayan v Public Prosecutor* [2022] 2 SLR 1103 at [31].

55 [2010] 2 SLR 413.

56 *Lim Kopi Pte Ltd v Public Prosecutor* [2010] 2 SLR 413 at [11].

57 *Lim Kopi Pte Ltd v Public Prosecutor* [2010] 2 SLR 413 at [11].

58 *Lim Kopi Pte Ltd v Public Prosecutor* [2010] 2 SLR 413 at [14], [18], [19] and [21]; (a) the degree of contravention of the statute; (b) the intention or motivation of the corporate offender; (c) the steps taken upon discovery of the breach or the degree of remorse shown; (d) whether the corporate offender was the *alter ego* of an individual who owned and managed it, and who had already been punished for the same offence; and (e) whether the quantum of fine imposed was so oppressive such that it vastly exceeds the financial capacity of the company to pay. In appropriate cases, the court should also consider the community of interests (of shareholders, employees and creditors when the company is in winding up) which may be affected if a prohibitive fine is imposed on a company.

59 [2022] 5 SLR 336.

60 *Public Prosecutor v Sindok Trading Pte Ltd* [2022] 5 SLR 336 at [109].

company will not be retributive, rehabilitative or deterrent in nature as there is no moral agency in a company.⁶¹ While recognising that this is the position under our legislation, the High Court queried whether punishing a corporate offender – which would take place against the humans behind the company (its officers, shareholders, employees and creditors) – is truly effective or is overbroad by enveloping persons who may be innocent of any wrongdoing.⁶² The High Court, however, agreed with the observations in *Lim Kopi* that where the corporate offender is the *alter ego* of the errant director (for example, solely managed and owned by the director), the court should not impose a deterrent fine on the corporate offender for the exact same offence for which a deterrent fine had already been imposed on the errant director.⁶³

15.36 The High Court observed that when considering the punishment of a corporate offender, the usual sentencing objectives, which are targeted at human agency, decision-making or moral responsibility, must be modified.⁶⁴ Following these observations in *Sindok*, it would be interesting to see if further guidance on the sentencing of corporate offenders may be forthcoming in future cases.

D. Detention of a child or young offender under Children and Young Persons Act

15.37 In *Public Prosecutor v CNJ*⁶⁵ (“CNJ”), the High Court provided, for the first time, guidance on sentencing a child or young person to detention under s 43 of the Children and Young Persons Act 1993⁶⁶ (“CYPA”).

15.38 Section 43(1) of the CYPA provides that where a child or young person is convicted of certain grave crimes (such as murder, culpable homicide not amounting to murder, attempted murder or causing grievous hurt), and the court is of the opinion that none of the other methods by which the case may legally be dealt with is suitable, the court may sentence the offender to be detained for a specified period. The Minister determines the place and conditions of such a detention⁶⁷ and may also release the child or young person on licence at any time.⁶⁸

61 *Public Prosecutor v Sindok Trading Pte Ltd* [2022] 5 SLR 336 at [106].

62 *Public Prosecutor v Sindok Trading Pte Ltd* [2022] 5 SLR 336 at [107].

63 *Public Prosecutor v Sindok Trading Pte Ltd* [2022] 5 SLR 336 at [109].

64 *Public Prosecutor v Sindok Trading Pte Ltd* [2022] 5 SLR 336 at [108].

65 [2022] 4 SLR 1408.

66 This used to be s 38 of the Children and Young Persons Act (Cap 38, 2001 Rev Ed).

67 Children and Young Persons Act 1993 (2020 Rev Ed) s 42(2).

68 Children and Young Persons Act 1993 (2020 Rev Ed) s 42(4).

15.39 The 15-year-old offender in *CNJ* was sentenced to five years' detention for an offence of culpable homicide not amounting to murder for causing the death of his father. In utilising this rare sentencing option, the High Court observed that:

(a) In deciding whether other methods of dealing with the case were not suitable and whether detention should be the sentence, the court should consider whether any objective of rehabilitation was entirely displaced, and whether the full weight of the normal punishment such as imprisonment should nonetheless be imposed.⁶⁹

(b) Given that the Minister could release a detained offender under licence, a possible approach would be for the court to consider what would be an appropriate maximum term of detention, to be cut down by the Minister in the exercise of discretion.⁷⁰ But given the dearth of guidance in the local context, such an approach might create great uncertainty.⁷¹ The best approach, at present at least, is for the court to consider what is appropriate bearing in mind the sentencing objectives, and to treat the possibility of release on licence as being somewhat exceptional, or at least not run-of-the-mill.⁷²

(c) The provision does not expressly provide for backdating, which may suggest that the length of detention cannot be backdated to include any remand period. But the court left this conclusion tentative as it did not hear arguments on this.⁷³

(d) Of the various sentencing objectives, rehabilitation is important, given the age and immaturity of the offender. Protection of the public, specific deterrence and retribution may also be relevant.⁷⁴ General deterrence is presumably excluded given that detention is a special regime replacing imprisonment.⁷⁵ Rehabilitation, in respect of an offence where death was caused deliberately, would be an objective that one would prudently expect to take a longer time to achieve, in the absence of actual evidence of progress.⁷⁶ A longer period may also be required to

69 *Public Prosecutor v CNJ* [2022] 4 SLR 1408 at [5].

70 *Public Prosecutor v CNJ* [2022] 4 SLR 1408 at [8].

71 *Public Prosecutor v CNJ* [2022] 4 SLR 1408 at [8].

72 *Public Prosecutor v CNJ* [2022] 4 SLR 1408 at [8].

73 *Public Prosecutor v CNJ* [2022] 4 SLR 1408 at [9].

74 *Public Prosecutor v CNJ* [2022] 4 SLR 1408 at [11].

75 *Public Prosecutor v CNJ* [2022] 4 SLR 1408 at [10].

76 *Public Prosecutor v CNJ* [2022] 4 SLR 1408 at [16].

ensure appropriate deterrence, punishment and protection of the public.⁷⁷

(e) It may be worthwhile for the authorities to consider whether, similar to other alternative sentences like reformatory training, a regime of pre-sentencing assessment should be laid out. The creation of a structured pre-sentencing assessment involving psychiatrists, developmental psychologists, detention officers and other specialists could assist the court in calibrating the appropriate sentence.⁷⁸

E. Commencement of a subsequent sentence of imprisonment

15.40 The commencement date of a sentence of imprisonment is generally governed by s 318 of the CPC. But where a person who is already undergoing a sentence of imprisonment is sentenced again to imprisonment, the commencement of the subsequent sentence is governed instead by s 322 of the CPC. Section 322(1) provides that in such a case, the latter sentence of imprisonment must begin either immediately or at the end of the imprisonment to which the person was previously sentenced, as the court awarding the sentence directs.

15.41 In *Ewe Pang Kooi v Public Prosecutor*,⁷⁹ the High Court considered the meaning of the term “latter sentence of imprisonment” in s 322(1). The High Court held that the term referred to the *aggregate* (rather than individual) sentence of imprisonment that was presently being considered by the court.⁸⁰ The court cannot order different commencement dates for the individual sentences in the subsequent set of sentences. In sentencing an offender who was already undergoing a sentence of imprisonment, the court should:⁸¹

- (a) first arrive at the aggregate sentence by applying s 307(1) of the CPC and determining which of the sentences of the offences before it should run consecutively and concurrently; and
- (b) thereafter apply s 322(1) of the CPC to decide whether the aggregate sentence should begin immediately or at the end of the imprisonment term that the person had previously been sentenced to.

77 *Public Prosecutor v CNJ* [2022] 4 SLR 1408 at [16].

78 *Public Prosecutor v CNJ* [2022] 4 SLR 1408 at [19].

79 [2022] SGHC 300.

80 *Ewe Pang Kooi v Public Prosecutor* [2022] SGHC 300 at [43].

81 *Ewe Pang Kooi v Public Prosecutor* [2022] SGHC 300 at [44].

15.42 The principles that should be applied for the exercise of the discretion under s 322(1) were set out in *Public Prosecutor v Hang Tuah bin Jumaat*.⁸² In deciding the commencement date of the subsequent sentence, the court should have regard to whether the subsequent offence(s) arose in the “same transaction” as the earlier offence(s), and also the totality of the sentence to be served.⁸³ The fact that the subsequent offences arose in different transactions is a weighty consideration that warrants the imposition of an order that the subsequent term should start at the expiration of the earlier term of imprisonment.⁸⁴ The court should consider whether the totality of the sentence is proportionate to the inherent gravity of all the offences that were committed.⁸⁵ The court should consider whether it would still have passed a sentence of similar length if all the offences had been before it. If the court would not, it should adjust the sentence imposed for the latest offences.

IX. Specific offences

A. Discretionary death penalty for murder offences

15.43 In *Public Prosecutor v Azlin bte Arujunah*,⁸⁶ the Court of Appeal provided further guidance on the circumstances in which the discretionary death penalty may be imposed for murder offences. Since 2013, the courts have had a discretion to impose life imprisonment rather than the death penalty for murder under ss 300(b), 300(c) and 300(d) of the Penal Code 1871.⁸⁷

15.44 The Court of Appeal reiterated that, as set out in *Public Prosecutor v Kho Jabing*,⁸⁸ the death penalty should be imposed only when the offender’s actions outrage the feelings of the community. The key inquiry is whether the offender had acted in a way that exhibited a blatant disregard for human life.⁸⁹

15.45 The Court of Appeal again cautioned that while cruelty or a display of inhumane treatment is a relevant factor, the court should not be

82 [2016] 2 SLR 527; *Ewe Pang Kooi v Public Prosecutor* [2022] SGHC 300 at [45].

83 *Public Prosecutor v Hang Tuah bin Jumaat* [2016] 2 SLR 527 at [45(c)].

84 *Public Prosecutor v Hang Tuah bin Jumaat* [2016] 2 SLR 527 at [45(c)].

85 *Public Prosecutor v Hang Tuah bin Jumaat* [2016] 2 SLR 527 at [45(d)].

86 [2022] 2 SLR 1410.

87 Since reforms introduced in the Penal Code (Amendment) Act 2012.

88 [2015] 2 SLR 112.

89 *Public Prosecutor v Azlin bte Arujunah* [2022] 2 SLR 1410 at [20] and [21].

distracted by the gruesomeness of the scene of the crime in determining whether the death penalty should be imposed.⁹⁰

15.46 To determine whether the offender had exhibited a blatant disregard for human life:⁹¹

... [t]he court looks at all the surrounding circumstances to determine the offender's state of knowledge, her intentions and motivation, her sensitivity to the possibility of fatal consequences ensuing and her regard for life. In this, the court examines how the offender has acted in the light of what she knows or apprehends about the danger to life that her actions might pose. ... [T]he focus is on the '[offender's] knowledge and state of mind at the relevant time' ..., and the awareness of the possibility of fatal consequences. This is consistent with and follows from the fact that murder under s 300(a) of the Penal Code carries the mandatory death penalty, because the offender must be shown to have 'had the clear *intention to cause death*' [Where the offender's intention] falls short of [an intention to cause death], there should minimally be a finding that [the offender] was either alive to the possibility of death and nonetheless proceeded to act as she did, or that she was utterly indifferent to whether death might ensue. [emphasis in original]

X. Benchmarks and frameworks

15.47 There were at least seven decisions that set out sentencing frameworks in 2022:

(a) *Public Prosecutor v Manta Equipment (S) Pte Ltd*⁹² ("Manta") – body corporates who commit offences under Part 4 (punishable under s 50(b)) of the Workplace Safety and Health Act 2006 ("WSHA");

(b) *Goh Ngak Eng v Public Prosecutor*⁹³ ("Goh Ngak Eng") – private sector corruption offences under ss 6(a) and 6(b) of the Prevention of Corruption Act;⁹⁴

(c) *Public Prosecutor v GED*⁹⁵ ("GED") – distribution of intimate images or recordings of another person without consent (s 377BE(1) punishable under s 377BE(3) of the Penal Code);

90 *Public Prosecutor v Azlin bte Arujunah* [2022] 2 SLR 1410 at [24].

91 *Public Prosecutor v Azlin bte Arujunah* [2022] 2 SLR 1410 at [21].

92 [2022] SGHC 157.

93 [2022] SGHC 254.

94 Cap 241, 1993 Rev Ed.

95 [2022] SGHC 301.

- (d) *Pua Om Tee v Public Prosecutor*⁹⁶ (“*Pua Om Tee*”) – wilful evasion of Goods and Services Tax (“GST”) under s 62(1)(b) of the Goods and Services Tax Act⁹⁷ (“GST Act”);
- (e) *Khoo Moy Seen v Public Prosecutor*⁹⁸ (“*Khoo Moy Seen*”) – provision of unlawful remote gambling service as an agent under s 9(1) of the Remote Gambling Act 2014;
- (f) *Sue Chang v Public Prosecutor*⁹⁹ (“*Sue Chang*”) – careless or inconsiderate driving causing grievous hurt under s 65(3)(a) of the Road Traffic Act¹⁰⁰ (“RTA”); and
- (g) *Public Prosecutor v Rizuwan bin Rohmat*¹⁰¹ (“*Rizuwan*”) – driving without a licence under s 35(1) of the RTA.

15.48 Three of the seven decisions were by a three-judge *coram* of the High Court. All the frameworks – save for the framework for the offence of driving without a licence in *Rizuwan* – were adapted from the two-stage, five-step framework in *Logachev Vladislav v Public Prosecutor*¹⁰² (“*Logachev*”) and are on a claim-trial basis. The framework in *Rizuwan*, in contrast, adopted a benchmark approach and is on a plead guilty basis.

15.49 These seven decisions are canvassed below, along with a few other notable decisions where the High Court:

- (a) provided guidance on the imposition of disqualification from driving orders (*Kwan Weiguang v Public Prosecutor*¹⁰³ (“*Kwan Weiguang*”));
- (b) clarified the applicable frameworks for sexual assault by penetration (*ABC v Public Prosecutor*¹⁰⁴ (“*ABC*”) and *Public Prosecutor v CJH*¹⁰⁵ (“*CJH*”)); and
- (c) raised concerns about the framework laid down for Customs Act¹⁰⁶ offences (*Ripon v Public Prosecutor*¹⁰⁷ (“*Ripon*”)).

96 [2022] 5 SLR 689.

97 Cap 117A, 2005 Rev Ed.

98 [2022] 5 SLR 728.

99 [2022] SGHC 176.

100 Cap 276, 2004 Rev Ed.

101 [2023] SGHC 62; the High Court delivered judgment in November 2022 and issued Grounds of Decision in March 2023.

102 [2018] 4 SLR 609.

103 [2022] 5 SLR 766.

104 [2022] SGHC 244.

105 [2022] SGHC 303.

106 Cap 70, 2004 Rev Ed.

107 *Ripon v Public Prosecutor* [2022] SGHC 255.

A. Sentencing framework for body corporates who commit offences under Part 4 (punishable under section 50(b)) of the Workplace Safety and Health Act

15.50 In *Manta*,¹⁰⁸ a three-judge *coram* laid down a framework for sentencing body corporates who committed an offence under s 12(1) read with s 20 of the WSHA, which is punishable under s 50(b) of the same Act. This offence relates to the breach of an employer's duty to take reasonably practicable measures to ensure its employees' safety and health.

15.51 The High Court provisionally observed that the framework could apply beyond s 12(1) to other offences under Part 4 which are punishable under s 50(b) of the WSHA¹⁰⁹ as these offences are largely similarly formulated.¹¹⁰ The framework builds on and reconciles frameworks that had been laid down for WSHA offences – namely:¹¹¹

(a) *Public Prosecutor v GS Engineering & Construction Corp*¹¹² (“GS Engineering”) and *MW Group Pte Ltd v Public Prosecutor*¹¹³ (“MW Group”), which applied to s 12(1) of the WSHA; and

(b) a more recent decision by a three-judge *coram* of the High Court in 2020, *Mao Xuezhong v Public Prosecutor*,¹¹⁴ that related to what is now s 15(4) of the WSHA (negligent act committed by a person at work that endangered workplace health and safety), which took a different approach from the prior two cases in its consideration of harm and culpability.

15.52 In the first stage of the framework, which was adapted from the *Logachev* framework, the court determines the levels of harm and culpability to derive the indicative starting point according to the following benchmarks:¹¹⁵

108 See para 15.47 above.

109 Workplace Safety and Health Act 2006 (2020 Rev Ed) ss 11, 12(1), 12(2), 14(1), 14(3), 14A(1), 16(1), 17(1) and 19(2).

110 *Public Prosecutor v Manta Equipment (S) Pte Ltd* [2022] SGHC 157 at [33].

111 *Public Prosecutor v Manta Equipment (S) Pte Ltd* [2022] SGHC 157 at [8]–[10].

112 [2017] 3 SLR 682.

113 [2019] 3 SLR 1300.

114 [2020] 5 SLR 580.

115 *Public Prosecutor v Manta Equipment (S) Pte Ltd* [2022] SGHC 157 at [28(a)].

		Culpability		
		Low	Moderate	High
Harm	High	\$150,000– \$225,000	\$225,000– \$300,000	\$300,000– \$500,000
	Moderate	\$75,000– \$150,000	\$150,000– \$225,000	\$225,000– \$300,000
	Low	Up to \$75,000	\$75,000– \$150,000	\$150,000– \$225,000

15.53 To assess the level of harm, the court should consider both potential harm and actual harm. The factors that may be used to assess potential harm include the seriousness of the harm risked, the likelihood of that harm arising, and the number of people likely to be exposed to the risk of the harm.¹¹⁶ Where the harm was likely to be death or serious injury (such as paralysis or loss of a limb), the harm could be considered to be high even though it did not materialise. If death or serious injury did occur, the harm would be graded near the top end of the high range.¹¹⁷

15.54 To assess the level of culpability, the court may consider factors such as the number of breaches or failures, the nature of the breaches, the seriousness of the breaches, whether the breaches were systemic or isolated, and whether the breaches were intentional, rash or negligent.¹¹⁸

15.55 In the second stage of the framework, the starting sentence should be calibrated according to offender-specific aggravating and mitigating factors, which had been set out in earlier cases such as *GS Engineering*¹¹⁹ and *MW Group*.¹²⁰

15.56 The High Court observed that the framework should apply to Part 4 offences punishable under s 50(b) of the WSHA – that is, only where the offender is a body corporate. This would exclude at least two categories of offences under the WSHA:

- (a) **where the Part 4 offender is a natural person (the offence would be punishable under s 50(a)).** The High Court provisionally observed that for natural persons, the overall two-

116 *Public Prosecutor v Manta Equipment (S) Pte Ltd* [2022] SGHC 157 at [28(b)].

117 *Public Prosecutor v Manta Equipment (S) Pte Ltd* [2022] SGHC 157 at [28(b)].

118 *Public Prosecutor v Manta Equipment (S) Pte Ltd* [2022] SGHC 157 at [28(c)].

119 *Public Prosecutor v GS Engineering & Construction Corp* [2017] 3 SLR 682 at [77(e)].

120 *MW Group Pte Ltd v Public Prosecutor* [2019] 3 SLR 1300 at [60] and [61]; *Public Prosecutor v Manta Equipment (S) Pte Ltd* [2022] SGHC 157 at [28(d)].

stage sentencing approach of the framework is applicable. But as natural persons face a different sentencing range (a maximum fine of \$200,000 and/or an imprisonment term not exceeding two years, rather than the maximum fine of \$500,000 that is applicable to bodies corporate), the benchmarks in the table in the first stage cannot simply be transposed to apply to natural persons; nor would it be appropriate to apply a formulaic conversion of the benchmarks since fines and imprisonment are qualitatively different sentences.¹²¹

(b) **where the Part 4 offence is punishable under a section other than s 50(b).** For offences that are punishable under other sections (for example, ss 15(1), 15(2), 15(4) and 18 of the WSHA), the benchmarks in the table in the first stage would also not be applicable. Further, even the two-stage sentencing approach may not be appropriate, as those duties are largely of a different character from those for which contravention is punishable under s 50.

B. Sentencing framework for private sector corruption offences under sections 6(a) and 6(b) of the Prevention of Corruption Act

15.57 In *Goh Ngak Eng*,¹²² the High Court laid down a revised sentencing framework in relation to private sector corruption offences under ss 6(a) and 6(b) of the Prevention of Corruption Act. The framework does not extend to s 5 of the Prevention of Corruption Act. While s 5 “targets corrupt transactions more generally, s 6 is specifically directed at a situation where the corrupt procurement of influence involves the agent subordinating his loyalty to his principal in furtherance of his own interests”.¹²³ The framework also does not extend to public sector corruption cases, which concern different public interest and overarching considerations from private sector corruption cases.¹²⁴

15.58 The High Court disagreed with the sentencing framework laid down in *Takaaki Masui v Public Prosecutor*¹²⁵ (“*Masui*”), which it thought was excessively complex and technical. Among other things, the *Masui* framework and its “single point principle” where every single combination of a specified level of harm and a specified level of culpability gives rise to one indicative starting sentence that is reflective of the severity of

121 *Public Prosecutor v Manta Equipment (S) Pte Ltd* [2022] SGHC 157 at [36].

122 See para 15.47 above.

123 *Goh Ngak Eng v Public Prosecutor* [2022] SGHC 254 at [50].

124 *Goh Ngak Eng v Public Prosecutor* [2022] SGHC 254 at [5] and [50]–[55].

125 [2021] 4 SLR 160.

the offence is “founded on the erroneous premise that there is a simple and direct linear relationship between the severity of [the] offending conduct ... and the length of the indicative starting sentence”.¹²⁶ It is also difficult (if at all possible) to pinpoint the exact levels of harm and culpability that were caused. The objective of a sentencing framework is not to produce a mathematically perfect graph that identifies a precise point for the sentencing court to arrive at each case.¹²⁷ Sentencing frameworks are meant to only guide the court towards the appropriate sentence in each case using a methodology that is broadly consistent.¹²⁸

15.59 The court set out a framework based on the *Logachev* framework which was also adopted for the aggravated offence of participating in a corrupt transaction with agents under s 6 read with s 7 of the Prevention of Corruption Act in *Public Prosecutor v Wong Chee Meng*.¹²⁹

15.60 At step one, the court identifies the level of harm caused by the offence and the level of the offender’s culpability:¹³⁰

(a) Factors going towards harm include (i) actual loss caused to the principal; (ii) benefit to the giver of the gratification; (iii) the type and extent of loss to third parties; (iv) public disquiet; (v) offences committed as part of a group or syndicate; (vi) involvement of a transnational element; (vii) whether the public service rationale is engaged; (viii) presence of public health or safety risks; (ix) involvement of a strategic industry; and (x) bribery of a foreign public official.

(b) Factors going towards culpability include (i) the amount of gratification given or received; (ii) the degree of planning and premeditation; (iii) the level of sophistication; (iv) the duration of offending; (v) the extent of the offender’s abuse of position and breach of trust; (vi) the offender’s motive in committing the offence; (vii) presence of threats, pressure or coercion; and (viii) the role played by the offender in the corrupt transaction. There is:¹³¹

... no material difference, as far as culpability is concerned, between gratification taking the form of an outright gift and that in the form of a loan The repayment of any of the gratification received by the receiver generally has no relevance as a mitigating factor in the

126 *Goh Ngak Eng v Public Prosecutor* [2022] SGHC 254 at [38].

127 *Goh Ngak Eng v Public Prosecutor* [2022] SGHC 254 at [43].

128 *Goh Ngak Eng v Public Prosecutor* [2022] SGHC 254 at [34]–[44].

129 [2020] 5 SLR 807; *Goh Ngak Eng v Public Prosecutor* [2022] SGHC 254 at [33].

130 *Goh Ngak Eng v Public Prosecutor* [2022] SGHC 254 at [95].

131 *Goh Ngak Eng v Public Prosecutor* [2022] SGHC 254 at [61(a)].

context of culpability because the giver of a gratification (to whom such repayment is made), far from being a victim, is in effect a co-conspirator in a corruption offence

15.61 At step two, the court identifies the applicable indicative sentencing range according to the following ranges:¹³²

		Harm		
		Slight	Moderate	Severe
Culpability	Low	Fine or up to 6 months' imprisonment	6–12 months' imprisonment	1–2 years' imprisonment
	Medium	6–12 months' imprisonment	1–2 years' imprisonment	2–3 years' imprisonment
	High	1–2 years' imprisonment	2–3 years' imprisonment	3–5 years' imprisonment

15.62 At step three, the court identifies the appropriate starting point within the indicative sentencing range. At step four, the court calibrates the identified starting point to take into account offender-specific factors. Finally, at step five, which applies where the offender has been convicted of multiple charges, the court considers if further adjustments should be made to the sentence for the individual sentences to take into account the totality principle.¹³³

15.63 The High Court also observed that given that the need for deterrence has resulted in a recent upward trend in custodial sentences for serious private sector corruption offences, sentences imposed in similar or analogous cases from several years ago may no longer constitute appropriate reference points.¹³⁴

C. Sentencing framework for distribution of intimate images or recordings of another person without consent (section 377BE(1) punishable under section 377BE(3) of the Penal Code)

15.64 In *GED*,¹³⁵ a three-judge *coram* of the High Court laid down a framework for a relatively new offence introduced in January 2020

132 *Goh Ngak Eng v Public Prosecutor* [2022] SGHC 254 at [103].

133 *Goh Ngak Eng v Public Prosecutor* [2022] SGHC 254 at [45], [46] and [104].

134 *Goh Ngak Eng v Public Prosecutor* [2022] SGHC 254 at [31].

135 See para 15.47 above.

under s 377BE(1) punishable under s 377BE(3) of the Penal Code. The provision criminalises the distribution of intimate images or recordings of another person without that person’s consent. Prior to its introduction, this social ill was addressed through the reliance on a patchwork of provisions.¹³⁶

15.65 The framework applies only to s 377BE(1) offences (where intimate images or recordings have been distributed), and not to the offence of *threatening* to distribute such images or recordings under s 377BE(2) of the Penal Code, which was not before the court.¹³⁷ The court also left the framework for s 377BE(4) – which applies where the victim of a s 377BE(1) or 377BE(2) offence is below 14 years old – for future consideration.¹³⁸

15.66 The framework is also modelled on the framework set out in *Logachev*.¹³⁹ At the first step, the court will have regard to the relevant offence-specific factors and identify: (a) the level of harm caused by the offence; and (b) the level of the offender’s culpability.

15.67 In respect of harm, the central focus of the inquiry is on the “humiliation, alarm or distress” caused to the victim by the distribution of the intimate image or recording.¹⁴⁰ It can be structured with reference to four broad categories, of which the first two categories will usually be the dominant considerations: (a) the objective aspects of harm; (b) the subjective aspects of harm; (c) other related harm; and (d) other factors related to harm.¹⁴¹

15.68 Objective aspects of harm would include, but would not be limited to, the following:¹⁴²

- (a) the nature of the image or recording, which entails a consideration of (i) what parts of the victim’s body were shown, and how exposed the body parts were; (ii) what acts were depicted; and (iii) the medium used;¹⁴³

136 *Eg*, s 292(a) of the Penal Code which criminalised the distribution of obscene books and s 383 of the Penal Code, which provided for the offence of extortion; *Public Prosecutor v GED* [2022] SGHC 301 at [1].

137 *Public Prosecutor v GED* [2022] SGHC 301 at [41].

138 *Public Prosecutor v GED* [2022] SGHC 301 at [43].

139 See para 15.48 above.

140 *Public Prosecutor v GED* [2022] SGHC 301 at [47]; Penal Code (Cap 224, 2008 Rev Ed) s 377BE(1)(c).

141 *Public Prosecutor v GED* [2022] SGHC 301 at [47].

142 *Public Prosecutor v GED* [2022] SGHC 301 at [51]–[55].

143 *Public Prosecutor v GED* [2022] SGHC 301 at [51].

(b) the degree of identifiability of the victim: the more identifiable, the higher degree of harm will generally be caused;¹⁴⁴ and

(c) the nature and extent of the distribution. This will require the court to consider: (i) how widely the intimate image or recording was distributed; (ii) whether the image or recording was distributed to certain recipients known to the victim; and (iii) how long the image or recording was left accessible for.¹⁴⁵ What is relevant is the nature and extent of the *actual* or *eventual* distribution rather than what the offender may have originally intended or known was likely to result.¹⁴⁶

15.69 Subjective aspects of harm suffered by an individual victim should generally only go towards *enhancing* the degree of harm that is objectively inferred from the circumstances of the case.¹⁴⁷ Subjective aspects of harm may be either disclosed by the victim or inferred from the circumstances. In appropriate cases, they may need to be corroborated by evidence (including expert evidence). Examples of subjective aspects of harm include:¹⁴⁸

... any particular aspects of the victim's suffering that would shed light on the degree of humiliation, alarm or distress subjectively experienced by the victim as a result of the offence, including any impact on the victim's mental health (such as the development of conditions like depression or post-traumatic stress disorder). In this regard, evidence in the form of victim impact statements and medical reports will be useful.

15.70 Other related harm includes at least these two forms of harm that may be suffered by the victim: (a) consequential harm other than emotional and psychological consequences of the distribution, including loss of employment and other economic consequences;¹⁴⁹ and (b) harm caused to the victim in the course of obtaining the intimate image or recording, which the court referred to as "prior harm" or "prerequisite harm".¹⁵⁰

144 *Public Prosecutor v GED* [2022] SGHC 301 at [52].

145 *Public Prosecutor v GED* [2022] SGHC 301 at [53].

146 *Public Prosecutor v GED* [2022] SGHC 301 at [54].

147 *Public Prosecutor v GED* [2022] SGHC 301 at [57].

148 *Public Prosecutor v GED* [2022] SGHC 301 at [56].

149 *Public Prosecutor v GED* [2022] SGHC 301 at [59].

150 *Public Prosecutor v GED* [2022] SGHC 301 at [60].

15.71 Apart from the above three aspects of harm:¹⁵¹

... the court ought also consider to any other factors that further aggravate those aspects of harm. This may include considerations such as the vulnerability of the victim, which may arise if the victim is young, has any pre-existing mental health conditions, or has a relationship with the offender that renders the victim susceptible to being manipulated or taken advantage of.

15.72 In respect of culpability, the court structured the inquiry with reference to three broad categories:

(a) the offender's motive for committing the offence – including (i) whether the offence was committed for personal gain; and (ii) whether the offender acted for the purpose of harming the victim, and in particular whether his actions were calculated to inflict such harm;¹⁵²

(b) the offender's method of obtaining the intimate image or recording – this can be considered with reference to the victim's consent (or lack thereof) at three stages: (i) the capture of the image or recording; (ii) the offender's possession of that image or recording; and (iii) the offender's distribution of the image or recording. The victim's lack of consent in the third stage (distribution) is a necessary element of the offence. Where the victim's consent is also lacking in the first two stages, the offender's culpability would generally increase;¹⁵³ and

(c) other aspects of culpability, which primarily go towards showing the offender's commitment to offending and to evading detection – including (i) the degree of planning, preparation and premeditation; (ii) the level of sophistication; (iii) the duration and persistence of the offending behaviour; (iv) whether there was any abuse of position; (v) use of anonymity by the offender; and (vi) whether there is evidence of cruelty.¹⁵⁴

15.73 The High Court also discussed how uncharged adjacent offending (facts surrounding the commission of the offence that could have given rise to separate charges though these charges were not brought)¹⁵⁵ and adjacent offending that forms the subject of a separate charge that has been preferred¹⁵⁶ should be considered. The court cautioned against

151 *Public Prosecutor v GED* [2022] SGHC 301 at [61].

152 *Public Prosecutor v GED* [2022] SGHC 301 at [63]–[68].

153 *Public Prosecutor v GED* [2022] SGHC 301 at [69]–[74].

154 *Public Prosecutor v GED* [2022] SGHC 301 at [75]–[81].

155 *Public Prosecutor v GED* [2022] SGHC 301 at [82]–[88].

156 *Public Prosecutor v GED* [2022] SGHC 301 at [89]–[97].

double counting in such situations, and also in cases where the different factors that go towards the levels of harm and culpability overlap.¹⁵⁷

15.74 At the second and third steps of the framework, the court will identify the applicable indicative sentencing range within the following matrix and thereafter the appropriate starting point within that range:¹⁵⁸

		Harm		
		Slight	Moderate	Severe
Culpability	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)

15.75 Caning should be considered in all cases other than the three least severe categories.¹⁵⁹ Caning will presumptively be warranted in certain situations, such as:¹⁶⁰

... (a) where the offender uses criminal or violent means to capture images or recordings of bare skin in intimate regions of the victim's body ...; and (b) where the offender widely disseminates (for example, on pornographic websites) images or recordings depicting the victim's bare skin in such intimate regions or the victim engaging in a sexual act, and where the victim is identifiable or expressly identified.

15.76 In the fourth step of the framework, the court will adjust the starting point as may be necessary to take into account the relevant offender-specific aggravating and mitigating factors.¹⁶¹ In a case where the offender has been convicted of multiple charges, as a fifth and final step, the court will consider whether (a) the sentences of imprisonment

157 *Public Prosecutor v GED* [2022] SGHC 301 at [101].

158 *Public Prosecutor v GED* [2022] SGHC 301 at [104].

159 *Public Prosecutor v GED* [2022] SGHC 301 at [106].

160 *Public Prosecutor v GED* [2022] SGHC 301 at [107].

161 *Public Prosecutor v GED* [2022] SGHC 301 at [110].

imposed should be ordered to run consecutively or concurrently; and (b) further adjustments may need to be made on account of the totality principle.¹⁶²

D. Sentencing framework for wilful evasion of Goods and Services Tax (section 62(1)(b) of the Goods and Services Tax Act)

15.77 In *Pua Om Tee*,¹⁶³ the High Court laid down a sentencing framework for the offence of wilfully evading GST under s 62 of the GST Act. The framework was also adapted from the framework in *Logachev*.¹⁶⁴

(a) In the first step, the court identifies the harm and culpability factors.¹⁶⁵

With regard to harm, the amount of GST evaded, and the state resources spent on investigation are examples of relevant factors. With regard to culpability, examples of relevant considerations include the degree of planning and premeditation, the sophistication of the methods of evasion, and the offender's role in the offence.

(b) In the second step, the court determines the indicative starting range for sentencing within the following matrix:¹⁶⁶

		Harm		
		Slight	Moderate	Severe
Culpability	Low	Fine or up to 14 months' imprisonment	14–28 months' imprisonment	28–42 months' imprisonment
	Medium	14–28 months' imprisonment	28–42 months' imprisonment	42–56 months' imprisonment
	High	28–42 months' imprisonment	42–56 months' imprisonment	56–84 months' imprisonment

(c) In the third step, the court determines the indicative starting sentence within the range.

(d) In the fourth step, the court considers offender-specific factors to calibrate the indicative starting sentence upwards or downwards.

162 *Public Prosecutor v GED* [2022] SGHC 301 at [115]–[118].

163 *Pua Om Tee v Public Prosecutor* [2022] 5 SLR 689 at [50]. See para 15.47 above.

164 See para 15.48 above.

165 *Pua Om Tee v Public Prosecutor* [2022] 5 SLR 689 at [50(a)].

166 *Pua Om Tee v Public Prosecutor* [2022] 5 SLR 689 at [50(b)].

(e) In the fifth and final step, the court determines how the sentences for multiple offences should run, with reference to the usual principles such as the one transaction rule and the totality principle. The total amount of GST evaded should be analysed as part of the totality principle under the fifth and final step.¹⁶⁷

15.78 The High Court made the following further observations, among others:

(a) The amount of GST evaded is not necessarily the primary factor in determining the harm caused. Given that the distinct mischief targeted by s 62 of the GST Act is the wilful evasion of GST, the method or mode of evasion, and not just the amount of GST evaded, must be a key consideration in the sentencing exercise.¹⁶⁸

(b) Whether the loss to the State was occasioned by the offender's evasion of tax or by the payment of a refund by the State to the offender, the loss was similar. It was not an additional aggravating factor that the offender had obtained a refund or payment from the State.¹⁶⁹

(c) Generally, where the amount of tax evaded would result in a mandatory penalty that would outstrip the maximum fine, a custodial sentence would be more appropriate than a fine.¹⁷⁰

E. Sentencing framework for the provision of unlawful remote gambling service as an agent under section 9(1) of the Remote Gambling Act

15.79 The High Court laid down a sentencing framework for the offence of providing unlawful gambling service as an agent under s 9(1) of the Remote Gambling Act in *Khoo Moy Seen*.¹⁷¹

15.80 In arriving at the sentencing framework, the High Court took reference from the 2021 High Court decision of *Koo Kah Yee v Public Prosecutor*¹⁷² (“*Koo Kah Yee*”), which promulgated a sentencing framework for the offence under s 11(1) of the Remote Gambling Act. Section 11 punishes remote gambling operators (or principals) for providing remote gambling services, while s 9(1) punishes agents who engage in a range of

167 *Pua Om Tee v Public Prosecutor* [2022] 5 SLR 689 at [71].

168 *Pua Om Tee v Public Prosecutor* [2022] 5 SLR 689 at [55]–[64].

169 *Pua Om Tee v Public Prosecutor* [2022] 5 SLR 689 at [65] and [66].

170 *Pua Om Tee v Public Prosecutor* [2022] 5 SLR 689 at [72].

171 See para 15.47 above.

172 [2021] 3 SLR 1440.

conduct covering different aspects of illegal remote gambling activities in accordance with arrangements made by their principal as specified in ss 9(1)(a)–9(1)(d). Section 9(1)(e) punishes agents who assist in the conduct in ss 9(1)(a)–9(1)(d).

15.81 The High Court in *Khoo Moy Seen* held that the sentencing framework in *Koo Kah Yee* can be adapted for s 9(1), with the following revised sentencing ranges:¹⁷³

		Harm		
		Slight	Moderate	Severe
Culpability	Low	Fine of at least \$20,000 and/or a short term of imprisonment	Up to 9 months' imprisonment	9 months–2 years' imprisonment
	Medium	Up to 9 months' imprisonment	9 months–2 years' imprisonment	2–3 years' imprisonment
	High	9 months–2 years' imprisonment	2–3 years' imprisonment	3–5 years' imprisonment

15.82 The sentencing ranges differ from that in *Koo Kah Yee* because s 9(1) has a narrower sentencing range of up to five years' imprisonment and/or a \$200,000 fine, while s 11(1) has a range of up to seven years' imprisonment and/or a \$500,000 fine.¹⁷⁴

15.83 As with s 11(1), a fine would generally be imposed in addition to any custodial sentence to disgorge any profits made by the offender for an offence under s 9(1).¹⁷⁵ Periods of offending that are not in the charge, but which the offender admits to in the statement of facts, can be taken into consideration in determining the sentence.¹⁷⁶

173 *Koo Kah Yee v Public Prosecutor* [2021] 3 SLR 1440 at [13].

174 *Khoo Moy Seen v Public Prosecutor* [2022] 5 SLR 728 at [11] and [14].

175 *Khoo Moy Seen v Public Prosecutor* [2022] 5 SLR 728 at [16].

176 *Khoo Moy Seen v Public Prosecutor* [2022] 5 SLR 728 at [28]–[30].

F. Sentencing frameworks for offences under the Road Traffic Act**(1) Careless or inconsiderate driving causing grievous hurt under section 65(3)(a) of the Road Traffic Act**

15.84 There were at least three High Court decisions that provided guidance on the sentencing of traffic-related offences, in respect of (a) careless or inconsiderate driving causing grievous hurt;¹⁷⁷ (b) driving without a licence;¹⁷⁸ and (c) the imposition of disqualification terms for dangerous or reckless driving where no hurt was caused.¹⁷⁹

15.85 A sentencing framework for the offence of careless or inconsiderate driving causing grievous hurt under s 65(3)(a) of the RTA was laid down in *Sue Chang*.¹⁸⁰ Being of the view that the framework adopted in *Logachev*¹⁸¹ was more appropriate for this offence, the High Court declined to adopt a sentencing bands approach that had been put forth by the offender and the young *amicus curiae*, and which had been adopted in relation to the offence of reckless driving where no hurt was caused in *Wu Zhi Yong v Public Prosecutor*¹⁸² (“*Wu Zhi Yong*”).

15.86 The framework may be summarised as follows:

- (a) In the first step, the court has regard to the offence-specific factors to identify the levels of harm and culpability.¹⁸³ The level of harm should take into account the nature and degree of the grievous bodily injury caused to the victim(s) and any property damage or potential harm. In assessing the offender’s culpability, the court should consider (i) if the circumstances surrounding the incident required the offender to exercise extra care or consideration; (ii) the manner of driving; and (iii) the offender’s conduct following the commission of the offence.
- (b) In the second step, the court determines the indicative starting range for sentencing within the following matrix:¹⁸⁴

177 *Sue Chang v Public Prosecutor* [2022] SGHC 176.

178 *Public Prosecutor v Rizuwan bin Rohmat* [2023] SGHC 62.

179 *Kwan Weiguang v Public Prosecutor* [2022] 5 SLR 766.

180 See para 15.47 above.

181 See para 15.48 above.

182 [2022] 4 SLR 587; *Sue Chang v Public Prosecutor* [2022] SGHC 176 at [65]–[82].

183 *Sue Chang v Public Prosecutor* [2022] SGHC 176 at [84]–[97].

184 *Sue Chang v Public Prosecutor* [2022] SGHC 176 at [98].

		Harm		
		Low	Moderate	Serious
Culpability	Low	Fine	Fine or up to 4 months' imprisonment	4–8 months' imprisonment
	Medium	Fine or up to 4 months' imprisonment	4–8 months' imprisonment	8–12 months' imprisonment
	High	4–8 months' imprisonment	8–12 months' imprisonment	12–24 months' imprisonment

The High Court did not agree with the Prosecution's submission that there should be lower and more flexible sentencing ranges where culpability is low (as compared to moderate or high) because moderate or serious harm may be the unfortunate result of a minor lapse of concentration or a misjudgment and may be attributable to circumstances beyond the offender's control. The High Court held that it would not be in line with Parliament's intention to place unequal emphasis on considerations of harm and culpability for this offence.¹⁸⁵

- (c) In the third step, the court determines the appropriate starting sentence within the range.
- (d) In the fourth step, the court considers offender-specific factors to calibrate the starting point upwards or downwards.
- (e) The fifth step is relevant only where the offender faces multiple charges. The court should consider the need to make further adjustments to the individual sentences for each charge to take into account the totality principle.

15.87 As there are several similar and overlapping offences in the RTA (for example, careless driving and dangerous driving, each with different sub-sections segregated by the severity of hurt and carrying different maximum punishments), it is likely that there will be more guidance in this area from the courts, further to *Sue Chang* and *Wu Zhi Yong*.

185 *Sue Chang v Public Prosecutor* [2022] SGHC 176 at [100]–[102].

(2) *Driving without a licence under section 35(1) of the Road Traffic Act*

15.88 In *Rizuwan*,¹⁸⁶ the High Court set a benchmark sentence of four weeks' imprisonment for an archetypal case of driving without a licence where the offender has never held a valid driving licence for the class of vehicles he was driving – referred to in the case as an “unqualified driver”.¹⁸⁷ This applies to a case where an offender pleads guilty to the offence.

15.89 The four-week benchmark may be calibrated on account of the following non-exhaustive factors:¹⁸⁸

- (a) **the offender's reason for driving.** Where an offender drove to commit an offence (for example, to deliver drugs or to smuggle duty-unpaid cigarettes), his sentence ought to be significantly higher than the benchmark sentence. If the offender drove due to an emergency, the nature and extent of the emergency and the circumstances that caused the offender to resort to driving could be mitigating factors;
- (b) **the offender's manner and length of driving.** Where an offender failed to obey traffic rules, an uplift would be warranted;
- (c) **the consequences that arose from the offender's driving.** An uplift would be warranted where an accident occurred, with the severity of the accident (in terms of damage and injury) and whether the offender had contributed or caused it being relevant in calibrating the uplift;
- (d) **whether there were other occupants in the offender's vehicle.** In general, an uplift would be warranted if there were other occupants in the vehicle. However, where the offender drove because of an emergency, the presence of other occupants in the vehicle might be a neutral factor in the calibration of sentence, depending on the reasons for their presence;
- (e) **the offender's conduct after the offence had been committed** – for example, whether he tried to evade arrest;
- (f) **the presence of driving-related antecedents;** and
- (g) **whether other driving-related charges were taken into consideration.** Where the offender has other driving-related

186 See para 15.47 above.

187 *Public Prosecutor v Rizuwan bin Rohmat* [2023] SGHC 62 at [59] and [62].

188 *Public Prosecutor v Rizuwan bin Rohmat* [2023] SGHC 62 at [63].

charges taken into consideration for the purposes of sentencing, an uplift would be warranted.

15.90 The High Court observed that the benchmark approach would be more suitable for this offence, which mostly had a similar fact pattern, as compared to the five-step sentencing matrix framework adopted in *Logachev*.¹⁸⁹

15.91 The sentencing framework applies only to an offence under s 35(1) of the RTA (an offender who drives without a licence) and not to an offence under s 35(2) (an offender who employs or permits another person to drive without a licence).¹⁹⁰

15.92 This entails a significant increase in sentences for the offence of driving without a licence, which had, before this decision, mostly attracted a fine (even after the Road Traffic (Amendment) Act 2019).¹⁹¹ This increase was required as Parliament had increased the maximum punishment for the offence in 2019 from three months' imprisonment and/or a \$1,000 fine to three years' imprisonment and/or \$10,000 for a first-time offender and six years' imprisonment and \$20,000 for a repeat offender.¹⁹²

G. Sentencing guidance on the imposition of disqualification from driving orders

15.93 *Kwan Weiguang*¹⁹³ was another High Court decision on road traffic offences. But unlike the cases mentioned above, which focused mainly on the imprisonment term or fine to be imposed, the focus in *Kwan Weiguang* was on the length of the disqualification from driving orders.

15.94 The High Court in *Kwan Weiguang* declined to set a sentencing framework but provided sentencing parameters and guidance for the determination of the appropriate disqualification order to be imposed for an offence punishable under s 64(2C)(a) of the RTA¹⁹⁴ (dangerous or

189 See para 15.48 above. *Public Prosecutor v Rizuwan bin Rohmat* [2023] SGHC 62 at [36]–[52].

190 *Public Prosecutor v Rizuwan bin Rohmat* [2023] SGHC 62 at [61].

191 *Public Prosecutor v Rizuwan bin Rohmat* [2023] SGHC 62 at [14].

192 *Public Prosecutor v Rizuwan bin Rohmat* [2023] SGHC 62 at [44]–[47].

193 See para 15.49 above.

194 The offence in the case was under the Road Traffic Act (Cap 276, 2004 Rev Ed) but the observations should apply also to the present Road Traffic 1961 (2020 Rev Ed) as the provision remains the same.

reckless driving where no hurt was caused). Different considerations may apply for the other provisions under the RTA.¹⁹⁵

15.95 The High Court provided the following sentencing parameters:

(a) For first-time traffic offenders with a clean driving record, the disqualification period should be set at 12 months or below.¹⁹⁶

(b) However, the disqualification period should exceed 12 months and could go up to 24 months and beyond where there was very dangerous behaviour demonstrated by the offender, or conduct showing a disregard for traffic rules, etiquette and the interests of other road users.¹⁹⁷

15.96 These non-exhaustive factors may be considered in determining the period of the order: (a) whether the circumstances of the commission of the offence increased the danger posed to road users during the incident;¹⁹⁸ and (b) whether the continued ability of the offender to drive is compromised, and his attitude towards other road users.¹⁹⁹

15.97 There is no necessary link between the period of the disqualification order and the fine or imprisonment sentence imposed as they have different objectives. It might be appropriate to impose a longer term of disqualification even if the fine or imprisonment sentence imposed was relatively lenient.²⁰⁰

15.98 When deciding on the appropriate period of disqualification to impose, the court should not consider the requirement under s 43(1)(b) of the RTA that a person would have to retake and pass a test of competence to drive if he has been disqualified for one year or longer. The retest is to ensure competence and is not meant as an additional punishment for the offender to relearn safe driving.²⁰¹ In the court's view, this interpretation "best accords with the purpose of s 43(1)(b)"²⁰² and is also similar to the position in England as well as Scotland. This position, however, differs from the position taken in an earlier 2020 High Court decision,²⁰³ which

195 *Kwan Weiguang v Public Prosecutor* [2022] 5 SLR 766 at [53].

196 *Kwan Weiguang v Public Prosecutor* [2022] 5 SLR 766 at [56].

197 *Kwan Weiguang v Public Prosecutor* [2022] 5 SLR 766 at [57].

198 *Kwan Weiguang v Public Prosecutor* [2022] 5 SLR 766 at [65]–[67].

199 *Kwan Weiguang v Public Prosecutor* [2022] 5 SLR 766 at [68]–[71].

200 *Kwan Weiguang v Public Prosecutor* [2022] 5 SLR 766 at [73] and [74].

201 *Kwan Weiguang v Public Prosecutor* [2022] 5 SLR 766 at [80].

202 *Kwan Weiguang v Public Prosecutor* [2022] 5 SLR 766 at [80].

203 *Neo Chuan Sheng v Public Prosecutor* [2020] SGHC 97 at [24].

observed that the 12-month threshold is significant because of the requirement of a re-test.²⁰⁴

15.99 Unless there are exceptional circumstances, the impact of the disqualification order on the offender’s livelihood and hardship to the family should be given little weight.²⁰⁵

H. Clarification of applicable framework for sexual assault under the Penal Code

(1) Sexual assault by penetration under ss 376 and 376A of the Penal Code

15.100 In *ABC*,²⁰⁶ the High Court provided clarification and guidance on the sentencing of offences under ss 376 and 376A of the Penal Code.

15.101 It was the first case concerning the sexual assault by penetration of a minor below the age of 14, who consented to the acts, prosecuted under s 376(2)(a) and punishable under s 376(3) of the Penal Code, after the legislative amendments to ss 376 and 376A in 2019 (“the 2019 amendments”).²⁰⁷ Before the 2019 amendments, such offences, where the victim below the age of 14 consented to the act, could only be punishable under s 376A(3).²⁰⁸ After the amendments, such offences could be punishable under s 376(3) or 376A(3).

15.102 The lower court held that Parliament had, through the 2019 amendments, intended to treat offences against minors under the age of 14 under s 376 (under which a charge could now be brought where the minor consents) more severely than cases under s 376A(3). It held that the cases decided before the 2019 amendments were therefore of limited precedential value and that the sentencing framework in *Pram Nair v Public Prosecutor*²⁰⁹ (“*Pram Nair*”) – which had been laid down by the Court of Appeal for the offence of sexual assault by digital penetration under s 376(2)(a) of the Penal Code – would apply.²¹⁰ This was despite the fact that the prevailing sentencing approach before the 2019 amendments (where such an offence could only be brought under s 376A(3)) was to not apply *Pram Nair*.²¹¹

204 *Kwan Weiguang v Public Prosecutor* [2022] 5 SLR 766 at [76].

205 *Kwan Weiguang v Public Prosecutor* [2022] 5 SLR 766 at [84]–[87].

206 See para 15.49 above.

207 *ABC v Public Prosecutor* [2022] SGHC 244 at [38].

208 *ABC v Public Prosecutor* [2022] SGHC 244 at [29] and [32].

209 [2017] 2 SLR 1015.

210 *ABC v Public Prosecutor* [2022] SGHC 244 at [17] and [18].

211 *ABC v Public Prosecutor* [2022] SGHC 244 at [55].

15.103 The High Court in *ABC* disagreed with the lower court's interpretation of the 2019 amendments. After canvassing the changes to the provisions, the High Court held that the aim of the amendments appears to be to address some anomalies that had applied to the overlapping provisions concerning minors who do not consent to the sexual assault by penetration. None of the changes were relevant to the factual matrix of *ABC*, which concerned a victim under the age of 14 who consented to the act. As there was no substantial change in policy, it is incorrect to view the 2019 amendments as bringing about a policy change to enhance the penalties in relation to cases where victims are under the age of 14.²¹²

15.104 It would also follow that cases that were decided in respect of s 376A(3) before the 2019 amendments would be relevant. However, a review of the precedents, including cases decided by the High Court, showed that the prevailing sentencing approach for cases under s 376A(3) – sexual penetration of a minor under 14 years old – was wrong and had led to too-low sentences that were typically less than four years' imprisonment with no caning.²¹³

15.105 The correct approach should have been, and is, to apply the *Pram Nair* framework to all offences that are to be sentenced under ss 376(3) and 376A(3). This is subject to a possible reservation, to be decided in a future case, that the *Pram Nair* framework may not apply to penile-vaginal penetration which may be more suitably dealt with by applying the framework for rape offences in *Ng Kean Meng Terence v Public Prosecutor*²¹⁴ (“*Terence Ng*”). This is so regardless of whether the offence was committed before or after the 2019 amendments. The application of the *Pram Nair* framework is in line with the lower court's approach but the lower court's reasons for doing so were not correct.²¹⁵

15.106 The *Pram Nair* framework should be applied for offences under ss 376(3) and 376A(3) (apart from penile-vaginal penetration) because of the following reasons:²¹⁶

- (a) The sentencing ranges for the two offences are identical and there are many common considerations to guide the sentencing judge.

212 *ABC v Public Prosecutor* [2022] SGHC 244 at [35].

213 *ABC v Public Prosecutor* [2022] SGHC 244 at [54] and [56].

214 [2017] 2 SLR 449; *ABC v Public Prosecutor* [2022] SGHC 244 at [43] and [46].

215 See para 15.104 above.

216 *ABC v Public Prosecutor* [2022] SGHC 244 at [47], [48] and [56].

(b) Both before and after the 2019 amendments, the consent of a minor under the age of 14 is a neutral factor, while the absence of consent is an aggravating factor that would trigger the mandatory minimum punishment. Consent of a minor under the age of 14 is not a mitigating factor.

(c) While *Pram Nair* was formulated in the context of an adult victim who did not consent, it is clear that Parliament equated the position of an adult victim who did not consent with that of a minor under the age of 14 who did consent.

15.107 The High Court invoked the doctrine of prospective overruling given that there would be serious and demonstrable injustice if the sentence of six years' imprisonment and three strokes of the cane was maintained in this case when the entrenched legal position was that *Pram Nair* had mistakenly not been applied and had led to far lower sentences below four years' imprisonment with no caning in precedents.²¹⁷

(2) *Applicability of Terence Ng framework for penile-vaginal penetration of a minor under section 376A(1)(a) of the Penal Code before the 2019 amendments*

15.108 In *CJH*,²¹⁸ the High Court had occasion to consider the provisional view expressed in *ABC* that the *Pram Nair* framework should not apply to penile-vaginal penetration under s 376A of the Penal Code and that the *Terence Ng* framework should apply instead.²¹⁹

15.109 The High Court in *CJH* held that the *Terence Ng* framework is applicable to the offence of penile-vaginal penetration of a minor under 16 under s 376A(1)(a) committed prior to the 2019 amendments given the following reasons:²²⁰

(a) The Court of Appeal made clear in *Pram Nair* and *BPH v Public Prosecutor*²²¹ that there is an intelligible and defensible distinction to be drawn, in terms of the gravity of the offence, between rape (*ie*, penile-vaginal penetration) and other forms of sexual assault by penetration.²²² Rape is the gravest of all sexual offences.

217 *ABC v Public Prosecutor* [2022] SGHC 244 at [61]–[63].

218 See para 15.49 above.

219 See para 15.106 above.

220 *Public Prosecutor v CJH* [2022] SGHC 303 at [96]–[100].

221 [2019] 2 SLR 764.

222 *Public Prosecutor v CJH* [2022] SGHC 303 at [97].

(b) The provisions prior to the 2019 amendments (which applied to *CJH*) allowed for non-consensual penile-vaginal penetration to be charged under s 376A instead of s 375. Notwithstanding this, the sentencing ranges for the two offences are the same, save that a charge of rape under s 375 carries a mandatory minimum sentence. This does not pose a major hurdle to the application of the *Terence Ng* framework to offences of penile-vaginal penetration in general.

(c) As with the observation in *ABC*, while there will be some variance in the factual circumstances that apply, there will be very many common considerations to guide the sentencing judge in dealing with penile-vaginal penetration offences under the different sections.

15.110 The High Court emphasised that its views were confined to cases where the non-consensual penile-vaginal penetration of a minor was committed prior to 2019. After the 2019 amendments, s 376A(1A) ensures that the prosecutions for such cases – if they would fall within s 375(1)(b) read with s 375(3) – may no longer be alternatively brought under s 376A(1)(a).²²³

I. Concerns about the framework laid down in Public Prosecutor v Pang Shuo for Customs Act offences

15.111 In *Ripon*,²²⁴ the High Court cautioned against using the sentencing framework for Customs Act offences that had been laid down in a 2016 High Court case, *Public Prosecutor v Pang Shuo*²²⁵ (“*Pang Shuo*”).

15.112 *Pang Shuo* involved offences under s 128H of the Customs Act (shipping, loading, unloading *etc* uncustomed goods). The High Court in *Pang Shuo* generally adopted the sentencing benchmarks that had been set out in *Yap Ah Lai v Public Prosecutor*,²²⁶ which were in relation to offences under s 128F of the Customs Act (importation of uncustomed goods), with slight adjustments.²²⁷ The court set out two sets of sentencing benchmarks (one for plead guilty cases and another for claim trial cases) as sentencing curves in a graph format.²²⁸

223 *Public Prosecutor v CJH* [2022] SGHC 303 at [100].

224 See para 15.49 above.

225 [2016] 3 SLR 903.

226 [2014] 3 SLR 180.

227 *Public Prosecutor v Pang Shuo* [2016] 3 SLR 903 at [48].

228 *Public Prosecutor v Pang Shuo* [2016] 3 SLR 903 at [45].

15.113 In 2021, the High Court in *Wong Jing Ho Samuel v Public Prosecutor*²²⁹ held that the *Pang Shuo* framework was relevant and applicable to offences under s 128I(1)(b) of the Customs Act. Section 128I(1)(b) criminalises the conveying, removing, depositing or dealing with uncustomed goods with intent to defraud the government of any customs or excise duty or to evade provisions under the Customs Act.

15.114 In *Ripon*, which concerned offences under s 128I(1)(b) of the Customs Act, the High Court expressed concerns that the approach in *Pang Shuo* is overly complex and technical as graphical curves, while giving a semblance of predictability and precision, may come at the expense of judgment and consideration of circumstances.²³⁰ The High Court held that it is likely that a new framework will be laid down in an appropriate case but in the meantime, parties and lower courts should avoid using the graph in *Pang Shuo* and derivations from it.²³¹

Reference may be had to specific sentences imposed in other cases, for guidance, even if these used the framework in *Pang Shuo* and *Wong Jing Ho*, subject to consideration of the individual circumstances of the [offender]. If no such cases are available, pending the laying down of a revised framework, reference may be had to the sentence that would have been imposed under the *Pang Shuo* framework, but care must be taken in every case to consider the matter in terms of the usual criteria of culpability, harm, and proportionality, and to adjust the sentence accordingly. It would be sufficient to identify a range of possible sentences, without identifying a specific point.

15.115 It would be ideal for there to be an appropriate case soon which would provide an opportunity to resolve the conflicting approaches in *Pang Shuo* and *Ripon* and to avert any ensuing confusion amongst the lower courts on the proper approach to adopt.

229 [2022] 3 SLR 1009.

230 *Ripon v Public Prosecutor* [2022] SGHC 255 at [6].

231 *Ripon v Public Prosecutor* [2022] SGHC 255 at [7].