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14. CRIMINAL PROCEDURE, EVIDENCE AND SENTENCING

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CRIMINAL PROCEDURE

I. Stood down charges

14.1 Where an accused faces multiple charges across unrelated investigations and claims trial to all of the charges, it is inevitable that the proceedings would necessarily have to straddle multiple trials by virtue of the operation of s 133 of the Criminal Procedure Code[1] ("CPC") that would only allow for a joint trial where the "offences form part or are a part of series of offences of the same or a similar character". On a practical level, this would mean "standing down" the charges that are not the subject of the trial, and having those charges held in abeyance as the proceeded charges (that is, the charges subject to the subsisting trial) are tried.

14.2 In *Lim Chit Foo v Public Prosecutor*,[2] as the applicant had taken issue with the Prosecution's decision to proceed on a certain number of the charges in a particular trial to be scheduled as it caused him prejudice,

1 Cap 68, 2012 Rev Ed.
2 [2020] 1 SLR 64.

the Court of Appeal had the occasion to consider the precise character of standing down such pending charges and to determine the statutory basis for doing so, as well as whether the Prosecution's decision on which charges to proceed and to stand down at any one trial would be subject to judicial scrutiny.

14.3 Sundaresh Menon CJ, writing on behalf of the Court of Appeal, opined that the discussion necessarily implicated the question of whether the practice of standing down criminal charges was something that fell within the Prosecution's discretion in its conduct of criminal prosecutions or whether it was to be properly situated within the court's duty to supervise and fairly manage criminal proceedings.[3] In coming to the conclusion that it was the latter, Menon CJ observed that the standing down of charges was, in effect, a decision to postpone the proceedings for those charges to a later date and if so, the conduct of those proceedings in relation to the *management* of these matters, as opposed to their *prosecution*, would necessarily be within the purview of the court and be subject to its supervisory jurisdiction. In this connection, Menon CJ found that the statutory basis for the standing down of charges was that of s 238 of the CPC. Section 238 allows the court to "postpone or adjourn any … proceedings … if the absence of a witness or any other reasonable cause makes this necessary or advisable". While the provision only explicated on one specific example of reasonable cause, Menon CJ noted that this did not militate against a broader interpretation of the provision given that the provision in question was framed broadly and permissively[4] and should be construed in a way that situated it in the context of the court's broader duty to guard against injustices in the conduct of criminal proceedings that are before it.[5]

14.4 Menon CJ, however, was at pains to impress the fact that this did not mean that the court would impinge on the Public Prosecutor's prerogative to initiate, conduct or discontinue criminal prosecutions as it deemed fit and that judicial scrutiny would only be considered where it is contended that a particular course of action would give rise to a risk of injustice.[6] In this regard, it was highlighted that notwithstanding its decision in this case, the court has almost always granted such applications for charges to be stood down and that this would not change even if the practice was to be grounded in the court's jurisdiction to adjourn proceedings under s 238 of the CPC.[7]

3 *Lim Chit Foo v Public Prosecutor* [2020] 1 SLR 64 at [23].
4 *Lim Chit Foo v Public Prosecutor* [2020] 1 SLR 64 at [19].
5 *Lim Chit Foo v Public Prosecutor* [2020] 1 SLR 64 at [30].
6 *Lim Chit Foo v Public Prosecutor* [2020] 1 SLR 64 at [31].
7 *Lim Chit Foo v Public Prosecutor* [2020] 1 SLR 64 at [32].

II. Section 370 applications

14.5 Previous iterations of this chapter[8] have discussed at some length the many strands of litigation in relation to s 370 of the CPC. The year 2019 was yet another in which the s 370 process was the subject of considerable litigation, and two decisions of the High Court from 2019 – *Ng Siam Cheng Sufiah v Public Prosecutor*[9] ("*Ng Siam Cheng Sufiah*") and *Lee Chen Seong Jeremy v Public Prosecutor*[10] ("*Lee Chen Seong*") – provide further judicial illumination on specific matters *vis-à-vis* the s 370 process.

14.6 In *Lee Chen Seong*, the High Court grappled with a variety of issues, two of which are of especial significance: first, whether the report filed pursuant to s 370 of the CPC within a year of seizure (as required under the provision in question) could be supplemented by additional material that had been filed out of time by the Prosecution; and second, whether it could be allowed to attend *ex parte* once the *inter partes* proceedings have commenced pursuant to s 370.

14.7 In responding to the first question in the negative, See Kee Oon J noted that the statutory language of the provision envisioned that a singular complete report be filed within the one-year time frame, and that this was consonant with considerations of finality and fairness.[11] Any allowance for additions to the report would undermine the statutory framework and effectively allow the Prosecution to extend the deadline, rendering hollow the exercise of judicial oversight.[12]

14.8 As for the second question, See J observed that in the interests of certainty, finality and fairness, the court should not allow *ex parte* hearings once the *inter partes* hearing had commenced. Instead, See J observed if there were concerns as to the sensitivity of any information within the report filed pursuant to the obligations under s 370 of the CPC, the Prosecution should have gone before the magistrate *ex parte* first to request that such part of the report not be disclosed.[13] Consequently, See J noted that it would necessarily follow that the *inter partes* hearing under s 370 of the CPC has to be confined to the material contained within the report filed by the Prosecution, and if the report is found to

8 See for example, the discussions on cases in relation to the s 370 procedure at (2015) 16 SAL Ann Rev 396 at 415–418, paras 14.45–14.48 and (2017) 18 SAL Ann Rev 415 at 423–424, paras 14.32–14.35.
9 [2019] SGHC 281.
10 [2019] 4 SLR 867.
11 *Lee Chen Seong Jeremy v Public Prosecutor* [2019] 4 SLR 867 at [45].
12 *Lee Chen Seong Jeremy v Public Prosecutor* [2019] 4 SLR 867 at [48] and [49].
13 *Lee Chen Seong Jeremy v Public Prosecutor* [2019] 4 SLR 867 at [89].

be inadequate, it should order the delivery of the property to the persons entitled to the possession of the property.[14]

14.9 In *Ng Siam Cheng Sufiah*,[15] the applicant had filed a criminal revision with the High Court alleging a suite of purported procedural irregularities and improprieties that she contended impugned the validity and legality of the seizure and, *inter alia*, seeking the High Court to order that the continued seizure and retention of the properties by the law enforcement agency (that first effected such seizures) were invalid, illegal and illegitimate. Such application had been taken *after* the Prosecution had filed various reports under s 370 of the CPC and during the life of a disposal inquiry hearing ordered, and overseen, by a magistrate to facilitate the distribution of the seized proceeds to the rightful claimants. In response to the application, the respondent, *inter alia*, took the position that the case did not fall within the revisionary jurisdiction of the High Court as there was no order made by the magistrate to finally dispose the rights of the parties, a prerequisite as criminal revision proceedings only applied to judgments or orders of finality. The respondent also contended that there was no legal basis to contend that the continued seizure and retention of the properties were invalid as legal control and custody of the seized properties would have been vested in the magistrate once the properties were subject to a report under s 370 of the CPC.

14.10 While finding against the applicant on the premise that there was no basis for the application for revision on the merits,[16] See J provided two useful clarifications in relation to the court's powers *vis-à-vis* such seizures. The first is that s 400 of the CPC was not, in the context of the court's revisionary powers, to be read narrowly as the High Court's revisionary jurisdiction was wide and not confined to final orders. The fact that there was a lack of finality in the magistrate's orders in this case therefore was not an obstacle for the court to exercise its revisionary jurisdiction.[17] The second is that the filing of a report pursuant to s 370 does not *per se* mean that there was no continued seizure by the law enforcement agency which first effected the seizure of such properties. See J noted that there was a valid distinction between legal custody and control as well as continued seizure by a law enforcement agency.[18] Consequently, while legal custody and control may have vested in the

14 *Lee Chen Seong Jeremy v Public Prosecutor* [2019] 4 SLR 867 at [91].
15 See para 14.5 above.
16 See generally *Ng Siam Cheng Sufiah v Public Prosecutor* [2019] SGHC 281 at [49]–[89].
17 *Ng Siam Cheng Sufiah v Public Prosecutor* [2019] SGHC 281 at [30]–[41], in particular [37] and [39].
18 *Ng Siam Cheng Sufiah v Public Prosecutor* [2019] SGHC 281 at [45].

magistrate, the properties in question would continue to be under seizure by the law enforcement agency.[19] It thus could not be said that the matter of the legality of such continued seizure by the law enforcement agency was outside the jurisdiction of the court.

III. Qualification of plea

14.11 In *Public Prosecutor v Dinesh s/o Rajantheran*,[20] the respondent was charged with various offences under the Employment of Foreign Manpower Act[21] and had pleaded guilty halfway through trial. However, during mitigation, he sought to retract his plea on the basis of disputing various factual material allegations against him that formed the crux of the charges in question. The District Court declined to reject the respondent's plea of guilt, noting that the procedural safeguards in law were adhered to and that the respondent's attempts to resile from such plea of guilt amounted to an abuse of process. On appeal, the High Court set aside the conviction on the premise that s 228(4) of the CPC was unambiguous and mandated such a rejection of the plea when it is qualified in mitigation. The Prosecution then proceeded to file a criminal reference to the Court of Appeal seeking clarification on various questions arising from the High Court's interpretation of s 228(4) of the CPC. The questions raised by the Prosecution (as reformulated by the Court of Appeal) read as follows:[22]

> (a) Does s 228(4) of the CPC apply to a case where an accused person seeks to qualify his plea of guilt at the mitigation stage of sentencing to such an extent that it amounts to a retraction of his plea of guilt? [("First Question")]
>
> (b) Must an accused person seeking to qualify his plea of guilt in the manner aforesaid at the mitigation stage of sentencing satisfy the court that he has valid and sufficient grounds for doing so before the court may reject his plea of guilt? [("Second Question")]

14.12 In answering the First Question, Menon CJ (writing on behalf of the Court of Appeal) noted that although under s 228 of the CPC, the taking of the plea of guilt (and consequently, the conviction of an accused) would necessarily precede sentencing, the whole plead guilty procedure should be seen as a continuum that begins with the taking of the accused person's plea to the charge and his admission of the statement of facts to the pronouncement of the appropriate sentence.[23] It would follow from this that where an accused person asserts facts in mitigation that qualify

19 *Ng Siam Cheng Sufiah v Public Prosecutor* [2019] SGHC 281 at [47].
20 [2019] 1 SLR 1289.
21 Cap 91A, 2009 Rev Ed.
22 *Public Prosecutor v Dinesh s/o Rajantheran* [2019] 1 SLR 1289 at [71].
23 *Public Prosecutor v Dinesh s/o Rajantheran* [2019] 1 SLR 1289 at [36].

the guilty plea in the sense that these undermine a legal condition which constitutes a material element or ingredient of the offence, the court, at least as a general rule, would be bound to set aside the earlier guilty plea.[24] This general rule would, however, be qualified by situations where such conduct by the accused would amount to an abuse of process.[25] It would follow, in relation to the Second Question, that it was not necessary for the accused to qualify his plea of guilt at mitigation in order to satisfy the court that he possesses valid and sufficient grounds for doing so, since the plea must be rejected as it would suffice that the mitigation plea materially affected a legal condition of the offence.[26]

14.13 In coming to this conclusion, the Court of Appeal observed that it may be sensible to adopt appropriate practices to minimise the risk of any abuse by an accused by virtue of its interpretation of s 228 of the CPC. This, the Court of Appeal noted, could include the expediting of timelines in cases involving foreign witnesses, not releasing witnesses until after an accused had been sentenced and ensuring that as far as possible the taking of the plea is followed immediately by the sentencing hearing.[27]

IV. Compensation

14.14 In *Tay Wee Kiat v Public Prosecutor*,[28] the appellants had failed to pay compensation pursuant to orders made under s 359 of the CPC to a foreign domestic worker who had been abused by them. The Prosecution therefore applied for further directions with a view to ordering garnishment or attachment of the appellants' property to satisfy the unpaid compensation sums.

14.15 See Kee Oon J, writing on behalf of the three-judge *coram* of the High Court, declined to make the orders sought. See J observed that should such orders for examination and garnishment be required, the necessary directions for these ought to have been sought at the prior hearing of the matter. Such a request at this stage would result in undue protraction of proceedings by converting a concluded criminal matter into "quasi-criminal" enforcement proceedings over which extended judicial oversight had to be exercised, which was precisely what the compensation regime was intended to avoid.[29] While it may be argued

24 *Public Prosecutor v Dinesh s/o Rajantheran* [2019] 1 SLR 1289 at [66].
25 *Public Prosecutor v Dinesh s/o Rajantheran* [2019] 1 SLR 1289 at [67].
26 *Public Prosecutor v Dinesh s/o Rajantheran* [2019] 1 SLR 1289 at [71] and [72].
27 *Public Prosecutor v Dinesh s/o Rajantheran* [2019] 1 SLR 1289 at [69]–[70].
28 [2019] 5 SLR 1033.
29 *Tay Wee Kiat v Public Prosecutor* [2019] 5 SLR 1033 at [4] and [5].

that convicted individuals may be incentivised to serve the default term especially where the amount involved was large, See J noted that most compensation amounts were "fairly modest" and those who refused to make such payments were in the minority, with most offenders in fact paying the compensation amounts ordered.[30]

V. Ancillary hearings for "involuntary" statements

14.16 Section 279 of the CPC was introduced in 2010 (together with a whole suite of changes in the CPC) to enshrine statutorily longstanding practices in the context of ancillary hearings to determine the admissibility of statements furnished by accused persons. Two cases in 2019 – both decided by Chan Seng Onn J – shed further light on the contours and applicability of s 279.

14.17 The first case, *Public Prosecutor v Mohamed Ansari bin Mohamed Abdul Aziz*,[31] had to deal with the question of whether it would be possible for the *contents* of the statements that are the subject of an ancillary hearing to be the subject of questioning of the accused in determining the voluntariness of such statement. The question arose as the accused's counsel had, in that case, objected to the Prosecution's line of questioning *vis-à-vis* the accused that engaged the contents of the statement during such ancillary hearing, as it was contended that this would be unsafe due to the effect of s 279(5) of the CPC. The provision allowed for such evidence to be admissible in the main trial without the need to recall any of the witnesses to give evidence. This, it was contended, would mean that even before the defence was called, there would be a potential flow of the accused's testimony into the main trial, which would thereby prejudice his right to remain silent at the main trial should his defence be called.

14.18 Chan J, while noting that the *raison d'être* of the ancillary hearing was to deal singularly with the voluntariness of the statement,[32] conceded that there were going to be instances where the content of the statements that would be the subject of questioning during the ancillary hearing could concomitantly engage issues in relation to the commission of the offence.[33] Nonetheless, he opined that it would not be in the interest of justice to prevent the content of such statements from being explored just because it may also relate to broader substantive issues (of guilt or

30 *Tay Wee Kiat v Public Prosecutor* [2019] 5 SLR 1033 at [6].
31 [2019] SGHC 268.
32 *Public Prosecutor v Mohamed Ansari bin Mohamed Abdul Aziz* [2019] SGHC 268 at [14].
33 *Public Prosecutor v Mohamed Ansari bin Mohamed Abdul Aziz* [2019] SGHC 268 at [15].

innocence) that were being considered at the main trial. However, at the same time, as an accused should not be constrained in the manner that he gives evidence when challenging the voluntariness of the statements during the ancillary hearing, and should not have to sacrifice his right to remain silent should the court later decide to call for his defence, the court would have the discretion, in appropriate cases, to disallow his oral testimony from flowing back into the main trial via the backdoor under s 279(5) *even before his defence is called*.[34]

14.19 While Chan J's concerns are entirely understandable, it is not necessarily clear that the position adopted would serve as any form of particularly effective safeguard against an accused having to sacrifice his right to remain silent. The following hypothetical highlights the tension: imagine a situation where the accused had given evidence in an ancillary hearing which engages issues both in relation to voluntariness of the statement and also on the commission of the substantive offence, and the court decides that such statements ought to be admitted. In such a case, even if the court exercises its discretion *not* to allow such evidence from entering the main trial *before the defence is called*, the court would still be constrained to have to consider that evidence later on *if* the accused remains silent after his defence is called, as such evidence is plainly of utility in determining the weight that ought to be ascribed to the admitted statements. If that were the case, then an accused may very well still feel that his right to remain silent may be prejudiced as a result of his evidence in the ancillary hearing regardless. It would be interesting to see how the courts confront this conundrum in Chan J's approach in future cases – it may very well be that the court may have to accept the reality that all such strategic decisions by the accused to offer evidence in court (even at the ancillary hearing) carry strategic risks and may, by virtue of s 279(5) of the CPC, result in the court relying on such evidence in the main trial. It may be argued that this is a hardly exceptional approach – indeed, it is precisely such a practical approach where the court demands at the outset that an accused elect "what his evidence will be" even if he would desire to take on contradictory stances at different stages of a trial, which has gained currency in relation to similar issues that have arisen under s 33B of the Misuse of Drugs Act[35] ("MDA").

34 *Public Prosecutor v Mohamed Ansari bin Mohamed Abdul Aziz* [2019] SGHC 268 at [18] and [19].

35 Cap 185, 2008 Rev Ed. See, for example, the discussions in (2014) 15 SAL Ann Rev 295 at 308–310, paras 14.32–14.37 on *Public Prosecutor v Chum Tat Suan* [2015] 1 SLR 834 (and in particular, the comments of Tay Yong Kwang JA and Woo Bih Li J at [79] of the decision of the Court of Appeal in that case).

14.20 One other matter discussed in *Public Prosecutor v Mohamed Ansari bin Mohamed Abdul Aziz*[36] ought to be highlighted. In the course of his decision, Chan J observed that there appeared to be a certain artificiality to attempting to restrict the court from having sight of the statements, and in the process, having the Prosecution avoid specific references to the substantive contents of the statements during the ancillary hearing.[37] Chan J took the view that in view of the fact that there was nothing in the CPC that restricts the court from having sight of the contents of such statements, they can be marked for identification and the court should be entitled to view the contents to facilitate the determination of the ancillary issue.[38] The authors agree with Chan J's stance on this – any other position, in our view, would require the court to adjudicate on admissibility without having the full context of the statements that were the subject of the dispute. In the authors' view, this is neither sensible, nor in the interest of justice. While the concerns of prejudice are understandable (in the event the statements are not admitted), it would seem that the provisions under the CPC already reflect the reality that the arbiters in the Singapore courts are well versed with not placing any reliance on inadmissible evidence in determining the outcome of a hearing.[39]

14.21 The second decision, *Public Prosecutor v Parthiban Kanapathy*,[40] deals with the discrete, but inextricably interlinked, issue of whether and when the court ought to call for an ancillary hearing whenever the accuracy and/or authenticity of a statement is being challenged. Chan J had opined, in that decision, that notwithstanding illustration (*d*) to s 279(1) of the CPC suggesting that no such ancillary hearing is required when the challenge does not relate to voluntariness,[41] it would nonetheless still make good sense that an ancillary hearing be called when the accuracy and/or authenticity of the statement is being challenged.[42] Chan J noted that the failure to call for an ancillary hearing in such a situation may result in an accused who intended to remain silent after his defence is called facing a Hobson's choice in dealing with the issue of such inaccuracy or lack of authenticity – either testify in his defence and be

36 See para 4.16 above.
37 *Public Prosecutor v Mohamed Ansari bin Mohamed Abdul Aziz* [2019] SGHC 268 at [18].
38 *Public Prosecutor v Mohamed Ansari bin Mohamed Abdul Aziz* [2019] SGHC 268 at [19] and [20].
39 As an example, this is clearly the premise of s 279(8) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed). See also the comments of Steven Chong JA in *Public Prosecutor v Tan Lye Heng* [2017] 5 SLR 564 at [36].
40 [2019] SGHC 226.
41 *Public Prosecutor v Parthiban Kanapathy* [2019] SGHC 226 at [38].
42 *Public Prosecutor v Parthiban Kanapathy* [2019] SGHC 226 at [33].

liable to cross-examination on all matters in the trial, or elect to remain silent and thereafter lose the opportunity to substantively challenge the accuracy or authenticity of the statement.[43]

14.22 While the concerns of Chan J should not be understated, it would be interesting to assess if subsequent courts adopt the same approach as that advanced in *Parthiban Kanapathy*, and if so, *when* such an approach should be adopted (for example, should it apply in all such cases, or just a specific type of case?). Not only is such a stance seemingly contradicted by established jurisprudence prior to the enactment of s 279 of the CPC,[44] there is some force underlying the argument that Chan J's approach squarely contradicts illustration (*d*) to s 279(1) of the CPC.

EVIDENCE

VI. Evidential burdens under section 33B of the Misuse of Drugs Act

14.23 Under the changes made to the MDA in 2012, an individual who might otherwise be sentenced to death for trafficking an amount in excess of a specified amount of narcotics may, in certain select circumstances, be sentenced to life imprisonment instead. One possible means to do so would require the convicted individual to show, *inter alia*, that he was nothing more than a "courier", a convenient shorthand for the statutory requirement under s 33B(2)(*a*) of the MDA that the individual's actions be circumscribed to certain forms of acts involving the narcotics.

14.24 While it is clear that, as a matter of law, the burden of showing that one is a courier lies with an accused, in *Zamri bin Mohd Tahir v Public Prosecutor*,[45] the Court of Appeal had to grapple with how such an issue ought to be determined where there was no evidence of the specifics of what the accused intended to do with the drugs as he would follow as yet non-received instructions from his supplier.

14.25 The appellant in that case had been arrested after collecting a fourth consignment of narcotics from his supplier. For each of the first three assignments, he had followed the instructions of his supplier, passing the drugs to third parties on the first two occasions and repacking the drugs for distribution on the third. At first instance, the High Court opined that as the burden laid on the appellant to prove on a balance of

43 *Public Prosecutor v Parthiban Kanapathy* [2019] SGHC 226 at [36] and [37].
44 See, *eg*, the comments of Lord Bridge in *Seera Ajodha v The State* [1982] AC 204.
45 [2019] 1 SLR 724.

probabilities that he would be instructed to deliver the fourth consignment without repacking it, and as the evidence of what the supplier would have asked the appellant to do was indeterminate and equivocal at the time, the appellant had failed to discharge such burden.

14.26 On appeal, the Court of Appeal reversed this finding. Sundaresh Menon CJ observed that the focus of the inquiry under s 33B(2)(*a*) of the MDA should have been on the appellant's acts, and not on what the supplier's instructions would have been since there was no basis on the evidence for the court to make any such finding.[46] Menon CJ further opined that while the court was not prevented from inferring that an accused arrested before he was able to deal with the drugs was expected to do more (for example, to repack the drugs), this would only be possible where the evidence allowed the court to make such finding.[47] On the present facts, as the only evidence was that the appellant could only do as he was told, it could not be said that he was doing or had committed to doing anything that would take him outside the ambit of s 33B(2)(*a*) of the MDA.[48]

VII. Expert and opinion evidence

14.27 It is, of course, trite under the statutory framework in Singapore that a witness should only testify to facts which he had personally perceived or which he has personal knowledge of. Under s 47(1) of the Evidence Act,[49] however, where the court is able to derive assistance from the opinion of an expert on a "point of scientific, technical or other specialised knowledge", such evidence is admissible as it provides more clarity for the court in its role in determining a just outcome in the matter. The law on expert evidence is nevertheless not without its challenges, to state just two matters in this regard: (a) to what extent should an expert be entitled to proffer an opinion on the very issue for determination by the court; and (b) to what extent would testimony given by a relevant party to the experts (and thereafter testified to by the experts in court) be admissible hearsay.

14.28 These issues came squarely to the fore in *Anita Damu v Public Prosecutor*.[50] The appellant in that case had pleaded guilty to various charges involving the causing of hurt to her domestic helper. In the statement of facts accompanying her plea of guilt, the appellant had

46 *Zamri bin Mohd Tahir v Public Prosecutor* [2019] 1 SLR 724 at [15]–[16].
47 *Zamri bin Mohd Tahir v Public Prosecutor* [2019] 1 SLR 724 at [17].
48 *Zamri bin Mohd Tahir v Public Prosecutor* [2019] 1 SLR 724 at [19].
49 Cap 97, 1997 Rev Ed.
50 [2020] 3 SLR 825.

admitted to committing these offences as a result of frustration or anger with the domestic helper. During the course of mitigation, after the appellant had already pleaded guilty, she tendered a mitigation plea which, for the first time, asserted she had suffered from major depressive disorder with psychotic features ("the disorder"), based on findings made by two psychiatrists. The Prosecution rejected this conclusion, not on the basis of whether the psychiatrists were correct to have diagnosed her to have suffered from the disorder based on the symptoms she testified to them, but on whether she, in fact, did suffer from such symptoms, in particular, whether she experienced and acted under the influence of supposed auditory hallucinations at the time of the offences. While a Newton Hearing was convened at first instance, and both psychiatrists called to give testimony, the appellant was not called to the stand, with her counsel at the time ostensibly contending that "the evidence adduced through the two psychiatrists was sufficient to establish what he wanted to establish". At the conclusion of the Newton Hearing, the District Judge appeared to conclude that the appellant was suffering from the disorder, including auditory hallucinations – in this connection, even though the appellant did not testify on this point, the District Judge opined that this did not materially affect his conclusion "given the nature of the Newton Hearing, which was to determine something that was within the expertise of the psychiatrists".

14.29 On appeal, Menon CJ vacated the finding of the District Judge in this regard. In particular, Menon CJ noted that the conclusions of the District Judge were problematic in at least two respects.

14.30 First, the fact that the appellant failed to give direct evidence of her state of mind seriously undermined the relevance of the psychiatric evidence as it was based in part on the appellant's own testimony that she suffered from auditory hallucinations. Menon CJ observed the "basis rule" where the factual basis for an expert's opinion must itself be established on admissible evidence and not on hearsay.[51] While the basis rule is often relaxed in the interest of logistical practicality where experts rely on evidence from authoritative publications or other extrinsic material, a principled distinction is made between doing so where the expert opinion is based on "general hearsay" (for example, prior research) as opposed to "specific hearsay" pertaining to a particular inquiry, fact, examination or experiment. As such, where, as was the case here, an expert puts forth an opinion that is founded on the specific hearsay evidence of another individual, and the truthfulness of that other

51 *Anita Damu v Public Prosecutor* [2020] 3 SLR 825 at [30].

individual's assertion is in dispute, the basis rule ought to apply with full rigour.[52]

14.31 Second, Menon CJ found that, on the facts, allowing the psychiatrists' evidence to serve as the basis of whether the appellant did, in fact, suffer from auditory hallucinations came close to contravening the ultimate issue rule, which provides that an expert should not give evidence on the ultimate issue as doing so would usurp the role of the court as the trier of fact.[53] While Menon CJ conceded that the ultimate issue rule has lost much of its force in contemporary times, it is important to appreciate that the true ambit of the ultimate issue rule is not that an expert is prohibited from expressing an opinion on the ultimate issue, but that a judge must discharge his responsibility as the adjudicator to rule on the ultimate issue and must not, in doing so, simply adopt the expert's opinion on this without satisfying himself that this was the correct outcome.[54] On the facts, in the absence of any direct evidence from the appellant, the District Judge would have had no factual basis upon which to make such a finding.[55]

14.32 Menon CJ's conclusions ought not to be viewed as a reflection of the need for the strict application of the hearsay principle when it comes to the testimony of experts such that they should not be allowed to testify in relation to what was told to them – indeed, as Menon CJ took pains to emphasise, it would have been perfectly valid for the two psychiatrists in this case to testify to what had been said to them in order to explain why they formed their respective opinions.[56] Instead, Menon CJ's point is somewhat more subtle in that it reflects the reality that the expert witness cannot and must not be used improperly "as a channel for admitting what is otherwise inadmissible evidence".[57]

14.33 Just as much as expert evidence should not be used as a means to circumvent the rule against hearsay, so too it would be equally vital for the proper administration of justice that while experts would be fully entitled to "propound and press home the opinion [they seek] to persuade the court to accept",[58] they should never become partisan witnesses advancing a client's cause. This point was exemplified by *Ho Mei Xia*

52 *Anita Damu v Public Prosecutor* [2020] 3 SLR 825 at [31].
53 *Anita Damu v Public Prosecutor* [2020] 3 SLR 825 at [35].
54 *Anita Damu v Public Prosecutor* [2020] 3 SLR 825 at [36].
55 *Anita Damu v Public Prosecutor* [2020] 3 SLR 825 at [37].
56 *Anita Damu v Public Prosecutor* [2020] 3 SLR 825 at [33].
57 Jeffrey Pinsler, *Evidence and the Litigation Process* (Lexis Nexis, 6th Ed, 2017) at para 8.049.
58 *Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] 4 SLR(R) 162 at [82].

Hannah v Public Prosecutor[59] ("*Ho Mei Xia Hannah*"), which also offered some conceptual clarity on the framework to be applied in determining whether a mental condition could be said to have contributed to the commission of an offence.

14.34 The facts of *Ho Mei Xia Hannah* can be briefly stated. In that case, the appellant had pleaded guilty and was convicted of offences involving disorderly behaviour, causing hurt and being abusive to various police officers, in a spree that took place within ten minutes. The District Court sentenced the appellant to a total of 21 weeks' imprisonment. On appeal, the appellant sought to adduce a psychiatric report from a psychiatrist ("defence psychiatrist") which concluded that there was a significant contributory link between her persistent depressive disorder ("PDD") and the offences. This report also suggested that the appellant's aggressive behaviour was significantly caused by the emotional liability and irritability that arose from PDD. In response, the respondent tendered a different psychiatric report arising from a separate assessment by a psychiatrist from the Institute of Mental Health ("IMH") ("the IMH psychiatrist") in which the IMH psychiatrist concluded that while the appellant had PDD, this bore no contributory link to the offences.

14.35 See J observed that, on a reading of the evidence, he was constrained to conclude that the defence psychiatrist was a partisan witness who sought to confirm his own bias and was skewed towards the end of having the court exercise "great compassion" rather than justice to the appellant.[60] See J found that the defence psychiatrist had knowingly omitted relevant information from his report, which reflected negatively on his objectivity and independence, and consequently on the weight to be given to his report.[61] To exacerbate matters, his evidence was at points verifiably inaccurate and his cavalier attitude towards the truth undermined his credibility. In the premises, See J concluded that the evidence of the defence psychiatrist had to be viewed with great circumspection.[62]

14.36 On the matter of whether the appellant's mental disorder contributed to the offences committed by her, See J noted that four factors should be considered in determining whether a mental condition contributed to the commission of the offence. These factors are (a) the nature of the mental disorder; (b) the nature of the offender; (c) the manner and circumstances of the offending; and (d) the nature of the

59 [2019] 5 SLR 978.
60 *Ho Mei Xia Hannah v Public Prosecutor* [2019] 5 SLR 978 at [52].
61 *Ho Mei Xia Hannah v Public Prosecutor* [2019] 5 SLR 978 at [49].
62 *Ho Mei Xia Hannah v Public Prosecutor* [2019] 5 SLR 978 at [55] and [56].

offence.[63] On the facts, the court opined that the appellant's PDD could not have been said to have caused or contributed to the commission of the offence as it was mild and did not bear the characteristics or risk factors of PDD, and there were cogent reasons for the conclusion that the appellant's PDD did not affect her self-control or ability to appreciate the nature of her actions and their consequences.[64]

14.37 Quite apart from offering a conceptual framework to consider whether a mental condition had, in fact, contributed to the commission of an offence, *Ho Mei Xia Hannah* provides a clear example of the reality of the adversarial processes resulting in "a real possibility of bias in favour of the party who calls the expert".[65] It would be interesting to see how (if at all), in future, the court may seek to exercise its statutory power under s 47(4) of the Evidence Act to sanction such behaviour through excluding such expert opinion evidence where it takes the view that such evidence is so bereft of objectivity and integrity that it would not be in the interest of justice to treat such partial evidence as being legally relevant to begin with.

VIII. Litigation privilege

14.38 In 2016, the High Court in *Rahimah bte Mohd Salim v Public Prosecutor*[66] had occasion to consider the matter of legal privilege that arose in the context of the defence – in particular, whether (and in what circumstances) a medical report procured by an accused person is covered by litigation privilege. In 2019, the issue of litigation privilege was considered once more by the High Court in *Public Prosecutor v Soh Chee Wen*[67] ("*Soh Chee Wen*"), this time in the context of whether the Prosecution is able to assert litigation privilege and if so, whether such privilege would protect communications between prosecutors and witnesses in the preparation of conditioned statements and in the preparation of witnesses for giving evidence in court. This had apparently arisen in the case before the court in view of the questions posed by counsel to various prosecution witnesses concerning such communications in the course of trial.[68]

63 *Ho Mei Xia Hannah v Public Prosecutor* [2019] 5 SLR 978 at [59].
64 *Ho Mei Xia Hannah v Public Prosecutor* [2019] 5 SLR 978 at [61] and [76].
65 Jeffrey Pinsler, *Evidence and the Litigation Process* (Lexis Nexis, 6th Ed, 2017) at para 8.059.
66 [2016] 5 SLR 1259. The case was discussed in some detail in (2016) 17 SAL Ann Rev 382 at 411–413, paras 14.74–14.77.
67 [2020] 3 SLR 1435.
68 *Public Prosecutor v Soh Chee Wen* [2020] 3 SLR 1435 at [2].

14.39 After considering the "not entirely consistent" approaches in other common law jurisdictions on the matter of whether the Prosecution possesses any right to claim litigation privilege, Hoo Sheau Peng J indicated that she was inclined to agree with the Canadian position that such privilege ought to extend to the Prosecution,[69] though this may be subject to a number of exceptions of potentially broad applicability. In this connection, on the issue of whether oral communications between prosecutors and witnesses ought to be protected under such privilege, Hoo J noted that, in concept, there would be no reason for the court to exclude oral (as opposed to written) communications between the prosecution and witnesses from such protection.[70]

14.40 Hoo J then discussed some broad contours for the application of litigation privilege to such communications. In this regard, in order to claim litigation privilege, the Prosecution must first show that the two conditions necessary for litigation privilege to generally attach – (a) that the communications were made at a time when there was a reasonable prospect of litigation; and (b) that the communications were made for the dominant purpose of litigation – were satisfied.[71] Such privilege, however, was not absolute. Litigation privilege would necessarily fall away if it had been waived, or the communications were made in furtherance of an illegal purpose, which would necessarily include situations where there was sufficient reason to think that witness tampering or witness coaching had taken place.[72] In view of the serious consequences of criminal proceedings for accused individuals, Hoo J also accepted that a claim of litigation privilege is subject to a necessity exception, that is, where an accused person may show that it would be necessary for him to rely on such evidence and that his interest in so doing outweighs that of the Prosecution claiming the privilege.[73]

14.41 Hoo J also took the opportunity to highlight the need for parties to conduct criminal proceedings in a manner that ensures that only relevant matters are before the court. In particular, the court stressed the importance of counsel not prematurely examining witnesses on communications with prosecutors/investigators even before such communications were shown to be relevant,[74] and for the Prosecution not to be too hasty in objecting to permissible and proper questions even if this may potentially disclose the fact of such communications.[75]

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69 *Public Prosecutor v Soh Chee Wen* [2020] 3 SLR 1435 at [11].
70 *Public Prosecutor v Soh Chee Wen* [2020] 3 SLR 1435 at [14].
71 *Public Prosecutor v Soh Chee Wen* [2020] 3 SLR 1435 at [15].
72 *Public Prosecutor v Soh Chee Wen* [2020] 3 SLR 1435 at [17] and [19].
73 *Public Prosecutor v Soh Chee Wen* [2020] 3 SLR 1435 at [20].
74 *Public Prosecutor v Soh Chee Wen* [2020] 3 SLR 1435 at [23].
75 *Public Prosecutor v Soh Chee Wen* [2020] 3 SLR 1435 at [22].

SENTENCING

IX. General sentencing principles

A. Discrete sentences arising from separate proceedings

14.42 In 2018, the court had the opportunity to clarify, in *Public Prosecutor v Raveen Balakrishnan*,[76] the general rule that an offender who commits multiple unrelated offences should be separately punished for each offence. That decision, however, came in the context of an offender being sentenced in one sitting. It did not have to consider a situation where an offender was sentenced to discrete sets of sentences arising from separate trials. Such a situation presented itself in the *Tay Wee Kiat* series of cases.

14.43 In *Tay Wee Kiat v Public Prosecutor*,[77] the offenders had been sentenced for offences relating to the abuse of their domestic helper, with their appeals against their convictions and sentences dismissed on 2 March 2018. As a second set of criminal proceedings relating to the abuse of another domestic helper was still pending, the High Court deferred the commencement of the offenders' sentences to a future date, to be fixed upon the completion of the second set of criminal proceedings. The offenders were subsequently convicted on further maid abuse charges against another domestic helper, and after their respective appeals pertaining to these charges were dealt with, commenced serving their sentence for these later proceedings on 27 March 2019.

14.44 See Kee Oon J, writing on behalf of the three-judge *coram* of the High Court in *Tay Wee Kiat v Public Prosecutor*,[78] ordered the sentences that were imposed in the earlier proceedings to commence at the expiry of the sentences that the offenders were serving following the later proceedings. In doing so, See J recognised that having the sentences commence on an earlier date would virtually enable the offenders to evade punishment entirely for one set of offences, and that there were two victims involved in two separate sets of proceedings. The High Court further opined that the aggregate sentences were neither crushing nor disproportionate, and properly reflected the overall criminality of the offences.

76 [2018] 5 SLR 799.
77 [2018] 4 SLR 1315.
78 See para 14.44 above.

B. Affirmation of the approach taken in Shouffee *in cases involving multiple offences which demonstrate a single course of criminal conduct*

14.45 In the landmark case of *Mohamed Shouffee bin Adam v Public Prosecutor*[79] ("*Shouffee*"), Sundaresh Menon CJ set out an analytical framework to apply when sentencing an offender facing multiple charges. This required a sentencing judge to first decide on the appropriate individual sentences in respect of each charge, before determining the overall sentence which should be imposed. How, however, should a court approach a case involving multiple similar offences which taken alone may be a minor offence that merits only a light punishment, but taken together, demonstrate a single course of more serious criminal conduct?

14.46 In *Gan Chai Bee Anne v Public Prosecutor*,[80] the mastermind of the criminal enterprise had initiated a plan to wrongfully extract pecuniary gain from her employer for herself and two of her colleagues. She enlisted the help of the offender, who agreed to participate in facilitating the plan in order to maintain a good business relationship with the mastermind. The offender would inflate the invoices issued by her company to the mastermind's company, which the mastermind would approve before submission to her finance department, which would in turn disburse the invoiced sums to the offender. The offender would then transfer the illegitimate gains to the mastermind. The offender herself received no monetary benefit. The offender pleaded guilty to, and was convicted of, ten charges under s 6(*c*) of the Prevention of Corruption Act,[81] with another 144 similar charges taken into consideration for the purpose of sentencing. The District Judge sentenced the offender to 13 weeks' imprisonment, with the individual sentences for the ten charges correlating with the amount of unauthorised claims as particularised.

14.47 On appeal, Menon CJ substituted the individual sentences with a sentence of one week's imprisonment each, and ordered five of the sentences to run consecutively for an aggregate sentence of five weeks' imprisonment. In doing so, Menon CJ found, *inter alia*, that the District Judge had erred in law by not engaging the two steps in *Shouffee* sequentially.

14.48 Whilst he recognised that the conceptual paradigm of treating each offence individually and on its own terms appeared to sit uneasily with the reality that in committing all of these offences, the offender had

79 [2014] 2 SLR 998.
80 [2019] 4 SLR 838.
81 Cap 241, 1993 Rev Ed.

engaged in a unified course of criminal conduct, Menon CJ highlighted that the converse (of having a sentencing judge decide the total sentence based on his overall impression of the offender's conduct) would be too subjective a method of analysis and therefore unprincipled. Menon CJ therefore reiterated that the two-step analysis in *Shouffee* was the proper approach. In particular, a sentencing judge ought not to be concerned at the first step over saying that *prima facie* an offence warranted only a fine and not imprisonment, even if at the second step the existence of cumulative aggravating factors justify calibrating the individual sentences upwards and running those calibrated sentences consecutively.

14.49 On the facts of the case, Menon CJ observed that it would have been difficult to justify a custodial sentence at the first stage given that the amount of the unauthorised claim involved in each charge was small, and further because none of the charges pertained to circumstances where the improper claim was intended to accrue to the offender's benefit.[82] At the second stage, however, Menon CJ found that the custodial threshold was crossed because of the premeditation and planning involved, and because of the sustained and deliberate manner in which the offender committed the offences which revealed a mind consciously habitualised to crime, all of which demonstrated that the offender participated in a calculated course of criminal conduct designed to siphon moneys from the victim.[83] Menon CJ emphasised that he did not consider the value of the economic loss suffered by the victim to be an accurate proxy for the offender's culpability, seeing as she did not intend to, and indeed did not, benefit from the victim's loss. The calibrated sentences were thus uniform, given that the relevant aggravating factors arose from all the charges considered in totality.

14.50 Menon CJ highlighted that the most appropriate mechanism to reflect the substance and totality of offending conduct where multiple offences were involved was the consecutive running of multiple sentences. This was preferable to imposing unexpectedly disproportionate individual sentences for relatively minor offences.

C. Principle of escalation

14.51 The principle of escalation was briefly referenced in the 2016 case of *Sim Yeow Kee v Public Prosecutor*,[84] but had yet to be fully explicated by the courts until the case of *Public Prosecutor v Low Ji Qing*.[85]

82 *Gan Chai Bee Anne v Public Prosecutor* [2019] 4 SLR 838 at [39].
83 *Gan Chai Bee Anne v Public Prosecutor* [2019] 4 SLR 838 at [74].
84 [2016] 5 SLR 936 at [99].
85 [2019] 5 SLR 769.

14.52 In *Public Prosecutor v Low Ji Qing*, the Prosecution appealed against the sentence of ten months' imprisonment imposed on the offender following his conviction on three charges of simple theft under s 379 of the Penal Code[86] ("Penal Code"). Each of these charges involved the theft of wallets from female victims, with the offender's motivation for stealing these wallets stemming from his fetishistic disorder – he would smell the wallets of women in order to get a sense of euphoria and to feel sexually aroused. The offender had many property-related antecedents, and had notably been previously sentenced to ten years' preventive detention for property-related offences in 2000. His most recent conviction prior to this was in 2014, when he was convicted of three charges of theft and was sentenced to an aggregate of three years' imprisonment. The Prosecution sought, on appeal, an aggregate term of two years' imprisonment, relying on the principle of escalation.

14.53 Menon CJ observed that the principle of escalation was a reformulation of the longstanding principle that specific deterrence may justify a longer term of imprisonment being imposed on a persistent offender in light of his antecedents, if these reflected a tendency for repeat offending or a marked proclivity toward criminal offending.[87] The logic lay in such harsher punishment seeking to deter the particular offender concerned from committing any further offences, by instilling in him the fear of re-offending. The principle of escalation was thus generally invoked to cumulatively increase sentences.

14.54 Menon CJ cautioned that the appropriateness of escalation required a scrupulous assessment of the particular factual matrix, with the court having to assess whether the objective of preventing re-offending is in fact met by the use of escalation. This involved an inquiry into factors such as changes in the pattern of offending behaviour, changes in the offender's circumstances, and efforts made at reform in order to determine whether further escalation is warranted. Any finding that escalation was appropriate had to be premised on the court being satisfied that the offender could be deterred by imposing a graver punishment.[88]

14.55 In this regard, the following points were highlighted:

(a) An escalation of sentences may be warranted where the offender's antecedents disclose a cavalier disregard for the law.[89] Conversely, where the offender's antecedents are irrelevant, and where the index offence was an uncharacteristic aberration, it

86 Cap 224, 2008 Rev Ed.
87 *Public Prosecutor v Low Ji Qing* [2019] 5 SLR 769 at [56].
88 *Public Prosecutor v Low Ji Qing* [2019] 5 SLR 769 at [66].
89 *Public Prosecutor v Low Ji Qing* [2019] 5 SLR 769 at [62].

would be inappropriate to mechanically enhance the sentence of an offender simply by virtue of the fact that he has a criminal record.[90]

(b) Where the court is persuaded that the offender is unlikely to re-offend, perhaps because of mental disability, illness and frailty, or responsiveness to protective factors, then the principle of escalation recedes as a consideration.[91]

(c) The degree of cognisance displayed by the offender during the commission of the index offence was relevant. Where an offender lacked the (or had a reduced) capacity to appreciate the nature and quality of his offending conduct, an escalation in the sentence was likely to be ineffective.[92] On the other hand, where the index offence was committed with (or the offender's current circumstances demonstrated a capacity for) premeditation, this was both an indicator of the offender's culpability as well as a sign that the offender was capable of deterrability, and an escalation in sentence length may in such situations be justifiable and effective.[93]

(d) The principle of escalation incorporated the safeguard of proportionality. Hence, before a court imposed an uplift on an offender's previous sentences, there must be a careful comparison with the offender's previous offending.[94] It was essential for the court to undertake a comparison of the gravity of the antecedent and the index offences, and consider how this should affect the sentence to be imposed on the index offence.[95]

(e) In order to have the correct factual basis for applying the principle of escalation, reference solely to an offender's antecedents in the form of the Criminal Records Office record may be insufficient. Having reference to, amongst others, the charges, statement of facts, psychiatric reports, and grounds of decision (where available) would be helpful or even necessary in order to have a fuller comparison between the index offence and the antecedent offence.[96]

14.56 Menon CJ rejected the Prosecution's reliance on the principle of escalation in the present case, and dismissed the appeal against sentence.

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90 *Public Prosecutor v Low Ji Qing* [2019] 5 SLR 769 at [63].
91 *Public Prosecutor v Low Ji Qing* [2019] 5 SLR 769 at [63].
92 *Public Prosecutor v Low Ji Qing* [2019] 5 SLR 769 at [64].
93 *Public Prosecutor v Low Ji Qing* [2019] 5 SLR 769 at [65].
94 *Public Prosecutor v Low Ji Qing* [2019] 5 SLR 769 at [74].
95 *Public Prosecutor v Low Ji Qing* [2019] 5 SLR 769 at [75].
96 *Public Prosecutor v Low Ji Qing* [2019] 5 SLR 769 at [76].

Whilst the offender had a history of similar offending, with his antecedents arising from his failure to control his sexually-driven desire to steal the wallets of his female victims, the need for specific deterrence was already accommodated in the imposed sentence. There was no escalating pattern of behaviour here, and the offender was suffering from an adjustment disorder with depressed mood at the material time, which attenuated the need for specific deterrence and had to also be considered in the context of the principle of escalation. Furthermore, mitigating weight was rightly placed on the fact that the offender had voluntarily attended multiple psychotherapy sessions, and had felt remorseful after each theft, with him having even returned the wallet on the third occasion before he was apprehended.

D. Guidance on whether to call for a mandatory treatment order suitability report

14.57 The relevant law concerning mandatory treatment orders ("MTOs") is found in s 339 of the CPC, in particular ss 339(1) to 339(4). While these provisions guide the court in its exercise of the discretion whether or not to order an MTO, they offer no guidance as to the anterior question of whether the court should even call for an MTO suitability report. This is similar to how s 5 of the Probation of Offenders Act[97] does not set out the considerations to apply when a court decides whether it should call for a probation pre-sentencing report, although the courts have offered guidance on the calling of probation pre-sentencing reports when dealing with young or youthful offenders.[98] In *GCX v Public Prosecutor*,[99] See Kee Oon J set out the considerations that ought to apply at the stage of calling for an MTO suitability report.

14.58 The offender in *GCX v Public Prosecutor* had initially been sentenced to 12 weeks' imprisonment on a charge of voluntarily causing hurt, arising from a single incident at the offender's home where he assaulted his former wife. A separate charge for breaching a personal protection order was taken into consideration for the purposes of sentencing. The offender had been assessed to have been suffering from an adjustment disorder around the time of the offence, secondary to his severe marital problems and impending divorce which had caused him a lot of stress. The psychiatrist from the Institute of Mental Health who assessed the offender had opined that the offender's adjustment disorder had substantially contributed to the offence, and that the offender would benefit from ongoing psychiatric follow-up.

97 Cap 252, 1985 Rev Ed.
98 *A Karthik v Public Prosecutor* [2018] 5 SLR 1289 at [20].
99 [2019] 3 SLR 1325.

14.59 See J held that in considering whether to call for an MTO suitability report, the court should bear in mind the following:[100]

> (a) The court should identify and balance the relevant sentencing principles, giving each its appropriate weight. Having done so, the court would have some sense of the offender's rehabilitative potential.
>
> (b) The court would need to be persuaded that rehabilitation was a real prospect, and that the other sentencing principles were not so dominant that rehabilitation should be rejected out of hand. The threshold to be met should not be overly restrictive, and the determination as to whether the threshold was met was intensely fact-dependent.
>
> (c) The court should bear in mind that it should not lightly find that other sentencing principles so substantially trumped the principle of rehabilitation that there was simply no need to call for the MTO suitability report, because the court still lacked, at this stage, the necessary facts to apprise itself fully of the offender's true rehabilitative potential.

E. Applicability of the public service rationale to the corruption of foreign public officials

14.60 The public service rationale refers to the public interest in preventing a loss of confidence in Singapore's public administration and is an aggravating factor to be considered for sentencing developed at common law. In cases of corruption, the courts have recognised that the integrity of public service and the administration of justice would be jeopardised by acts of corruption committed by public servants, as such acts not only erode the confidence of the general public in their duty of service, but also reflects poorly on those public servants who stick by the law. This in turn has seen cases involving public sector corruption generally attracting custodial sentences. The public service rationale has been extended to particular kinds of private sector corruption cases, for example, cases where private agents handled public money, or where the private sector offence concerned regulatory or oversight roles.

14.61 In *Public Prosecutor v Tan Kok Ming Michael*,[101] Hoo J considered the novel issue of whether the public service rationale applied to the corruption of foreign public officials. In the first case, the offender had given another party a sum of $10,000 for the benefit of officers of the

100 *GCX v Public Prosecutor* [2019] 3 SLR 1325 at [47].
101 [2019] 5 SLR 926.

Malaysian Maritime Enforcement Agency to detain a vessel belonging to his competitor. In the second case, the offender, who was an employee of the US government, had accepted bribes from the chief executive officer of a Singapore-incorporated company, to provide non-public information on the US Navy to him. In both cases, the District Judges had found that the public service rationale was not triggered.

14.62 Hoo J held that the corruption of foreign public officials does not, and should not, fall within the ambit of the public service rationale. Having considered the legislative intent underlying the Prevention of Corruption Act[102] as well as the cases that had expounded on the public service rationale, Hoo J found that the public service rationale was developed with the protection of Singapore's public service in mind, and that it would be wrong in principle to stretch it to apply to foreign public sector corruption, as doing so would dilute the true purpose and meaning of the principle.[103]

14.63 Nonetheless, Hoo J found that whilst the public service rationale did not apply, the bribery of foreign public officials implicated Singapore's public interest. She thus found that the fact that a foreign public official is the recipient or intended recipient of a bribe is an aggravating factor, distinct from the public service rationale. Corruption involving foreign public officials shared the same starting point with local public sector corruption of a custodial sentence.[104]

F. Inapplicability of the Ganesan *framework when dealing with offenders operating under a mental condition*

14.64 In *Public Prosecutor v Ganesan Sivasankar*,[105] the High Court established a sentencing framework for fatal accident cases under s 304A(*a*) of the Penal Code, under which the case would first be categorised into one of three categories depending on the offender's culpability, followed by, in exceptionally severe cases, the harm caused by the offence ("the *Ganesan* framework"). In *Public Prosecutor v Lim Chai Heng*,[106] Vincent Hoong JC (as he then was) departed from the *Ganesan* framework on account of the offender having been operating under a mental condition.

102 Cap 241, 1993 Rev Ed.
103 *Public Prosecutor v Tan Kok Ming Michael* [2019] 5 SLR 926 at [72].
104 *Public Prosecutor v Tan Kok Ming Michael* [2019] 5 SLR 926 at [92].
105 [2017] 5 SLR 681.
106 [2020] 3 SLR 1275.

14.65 *Public Prosecutor v Lim Chai Heng* involved an offender who drove against the flow of traffic for a distance of approximately 1.8km, at one point reaching a top speed of 147km/h, culminating in a head-on collision with another car and consequential accidents. One person died from the collision, with three others suffering serious injuries and another suffering relatively minor injuries. Property damage in excess of $100,000 was caused. The offender was assessed to have had his judgment significantly impaired by his acute psychotic symptoms at the material time, which led to him discounting the risks associated with his actions.

14.66 Whilst both the Prosecution and the Defence applied the *Ganesan* framework in submitting for the appropriate sentence, Hoong JC found that the *Ganesan* framework was the inappropriate starting point when dealing with an offender who was operating under a mental condition. The starting inquiry in sentencing an offender with a mental disorder ought instead to be whether the deterrent, retributive and protective principles of sentencing prevailed over the principle of rehabilitation.[107] This was consistent with the Court of Appeal's decision in *Public Prosecutor v Kong Peng Yee*,[108] which examined the principles relevant in sentencing an offender with a mental disorder that fell short of unsoundness of mind.

14.67 Hoong JC opined that the approach of considering the applicability of each of the respective sentencing principles, and striking the appropriate balance between these sentencing considerations in determining the sentence, was preferable to applying the *Ganesan* framework and calibrating a sentencing discount or applying a broad-based but unascertained measure of discount to each culpability-increasing factor.

14.68 In the present case, Hoong JC found that the principle of retribution was the dominant sentencing principle, given the extensive and severe harm caused as well as the potential harm arising from the offender's rash act.[109] The other sentencing principles of deterrence and prevention were found to be less relevant.[110] The rehabilitation principle was also not of significant weight, as the offender's symptoms of acute psychosis had resolved within a short period, and the risk of recidivism was reduced by his compliance with treatment and insight into his mental health condition.[111] Hoong JC therefore focused on the twin conceptions of retribution, namely, the harm caused and the reduced culpability of the

107 *Public Prosecutor v Lim Chai Heng* [2020] 3 SLR 1275 at [52].
108 [2018] 2 SLR 295.
109 *Public Prosecutor v Lim Chai Heng* [2020] 3 SLR 1275 at [74].
110 *Public Prosecutor v Lim Chai Heng* [2020] 3 SLR 1275 at [79].
111 *Public Prosecutor v Lim Chai Heng* [2020] 3 SLR 1275 at [97]–[99].

offender in causing such harm, and, on the facts, found that a one-year imprisonment term and 12-year disqualification order were appropriate.

X. Benchmarks and sentencing frameworks

14.69 The Court of Appeal has recognised that it is "hard to say with absolute quantitative precision what an offender deserves for his crime".[112] Therefore, the general practice in promulgating sentencing frameworks is for the court to first identify the appropriate sentencing range based on the harm caused and the offender's culpability. The range is a margin of reasonableness, to ensure that the eventual sentence is broadly proportionate to the crime.[113] The court then considers other sentencing factors and objectives, to choose the appropriate sentence within that range, and tempers it with the totality principle.[114] At the end of the day, the court should be able to say that all things considered, "the punishment fits the crime".[115]

A. Abuse of process

14.70 Where an offender abuses the process of the courts by adducing false evidence to secure an acquittal, the courts will not hesitate to impose a "significant uplift" in his sentence.[116] This was done in the case of *BLV v Public Prosecutor*,[117] where the offender devised an elaborate scheme to present false evidence to the court, and procured a witness to lie in court, to exonerate himself.

14.71 The offender was charged with sexually abusing his biological daughter on multiple occasions. His defence was that his penis was deformed, due to a penis enlargement procedure gone wrong, and this deformity made it highly improbable that he could have penetrated the victim's mouth and anus with his penis.

14.72 At the first hearing of the appeal, the offender sought to adduce fresh evidence from an acquaintance on the deformed state of his penis. Although this acquaintance later decided not to testify for him, the offender found a second acquaintance who could testify to the same facts. The Court of Appeal remitted the matter to the High Court to receive additional evidence, to establish, *inter alia*, whether the offender had

112 *Public Prosecutor v ASR* [2019] 1 SLR 941 at [133].
113 *Public Prosecutor v ASR* [2019] 1 SLR 941 at [133].
114 *Public Prosecutor v ASR* [2019] 1 SLR 941 at [133].
115 *Public Prosecutor v Kwong Kok Hing* [2008] 2 SLR(R) 684 at [42].
116 *BLV v Public Prosecutor* [2019] 2 SLR 726 at [83].
117 [2019] 2 SLR 726.

been party to any abuse of process. Having heard the evidence, the High Court found that the offender had colluded with the witness to falsify evidence. The case then proceeded back to the Court of Appeal, for its second hearing.

14.73 The Court of Appeal upheld the High Court's finding that the offender and witness had colluded to present false evidence, which constituted a clear abuse of the process of the court.[118] The Court of Appeal thus imposed a significant uplift to the offender's aggregate sentence, given the need for general[119] and specific[120] deterrence, and the need to protect the integrity of the judicial process.[121]

14.74 The following factors are relevant to determine the extent of the uplift in sentence on account of an offender's abuse of the court's process:

(a) the severity of the sentence to be enhanced in order to ensure that the uplift is sufficiently significant,[122] which gives effect to the need for deterrence.

(b) the egregiousness of the abuse committed,[123] including a consideration of:

(i) the significance of the false evidence to the offender's guilt;

(ii) the extent of planning and premeditation involved;

(iii) the level of sophistication, such as whether there was a third party involved; and

(iv) whether the false evidence was adduced on appeal (which is more egregious),[124] as opposed to at first instance.

(c) applicable safeguards to ensure that the uplift is not excessive:[125]

118 *BLV v Public Prosecutor* [2019] 2 SLR 726 at [83].
119 *BLV v Public Prosecutor* [2019] 2 SLR 726 at [86].
120 *BLV v Public Prosecutor* [2019] 2 SLR 726 at [84]–[85].
121 *BLV v Public Prosecutor* [2019] 2 SLR 726 at [88].
122 *BLV v Public Prosecutor* [2019] 2 SLR 726 at [96]–[97].
123 *BLV v Public Prosecutor* [2019] 2 SLR 726 at [99].
124 This is more egregious as the offender would have had sight of the trial court's judgment and would be able to identify points that he might attack by adducing false evidence; and would also almost inevitably lead to a significant delay in the proceedings: *BLV v Public Prosecutor* [2019] 2 SLR 726 at [100].
125 *BLV v Public Prosecutor* [2019] 2 SLR 726 at [101].

(i) The uplifted sentence must not exceed the statutorily imposed maximum sentence for which the offender is convicted. Therefore, where an offender's sentence pre-uplift is already very close to the statutory maximum, the Prosecution may instead prefer a separate charge.[126] This does not detract from the principle that the court can impose an uplift in sentence without the Prosecution preferring a separate charge.[127]

(ii) The uplift must not exceed the maximum sentence that the offender could have received if a separate charge for abuse of process had been preferred.[128]

(iii) The totality principle.[129]

B. Young offenders

(1) Interaction between the principle of sentencing parity and principles in sentencing young offenders

14.75 Where co-offenders have similar levels of culpability, the principle of sentencing parity requires that they receive the same sentence, unless there are relevant differences in their personal circumstances.[130]

14.76 In *Public Prosecutor v See Li Quan Mendel*[131] ("*Mendel See*"), the High Court clarified that one such relevant personal circumstance is the age of the offender. In particular, where an offender is under the age of 21 (but his co-offenders are over that age), parity with the co-offenders' sentences is irrelevant to the question of whether rehabilitation is displaced as the dominant sentencing consideration.[132] Instead, whether rehabilitation is displaced will depend on the considerations laid down in *Public Prosecutor v Koh Wen Jie Boaz*.[133]

126 *BLV v Public Prosecutor* [2019] 2 SLR 726 at [101]. Where the court does so, it is simply taking into account the entirety of the offender's conduct. Where an accused person conducts his defence abusively, be it at first instance or on appeal, this can fairly be taken into consideration for sentencing purposes: *BLV v Public Prosecutor* [2019] 2 SLR 726 at [91].

127 *BLV v Public Prosecutor* [2019] 2 SLR 726 at [91].

128 *BLV v Public Prosecutor* [2019] 2 SLR 726 at [102].

129 *BLV v Public Prosecutor* [2019] 2 SLR 726 at [105].

130 See also *Lim Bee Ngan Karen v Public Prosecutor* [2015] 4 SLR 2230, discussed in (2015) 16 SAL Ann Rev 396 at 428–429, paras 14.75–14.78.

131 [2019] SGHC 255. See also discussion below at para 14.81(b).

132 *Public Prosecutor v See Li Quan Mendel* [2019] SGHC 255 at [49]–[51].

133 *Public Prosecutor v Koh Wen Jie Boaz* [2016] 1 SLR 334 at [30], discussed in (2015) 16 SAL Ann Rev 396 at 430–432, paras 14.83–14.87. Factor (d) has received recent

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(2) Intellectually disabled young offenders who commit serious offences

14.77 In *Public Prosecutor v ASR*[134] ("*ASR*"), a five-judge *coram* of the Court of Appeal was convened to grapple with the challenging issue of sentencing intellectually disabled young offenders convicted of serious offences. The offender was 17 years of age at the time of sentencing, and 18 at the time of the appeal.

14.78 The facts of the case were egregious. The offender, then only 14 years of age and with an IQ of 61, "felt horny" after seeing the victim (aged 16 and with an IQ of 50). He tailed her for 15 minutes,[135] hid while she waited for a lift, then hurried into the lift after her. When she exited the lift, he molested her, and inserted his finger into her vagina. He threatened to pull a knife on her, pushed her to the floor, and raped her. Following the rape, he took the victim's 15-cm comb and inserted it into her vagina, then her mouth. The victim felt pain, was afraid, and cried when she got home.

14.79 The offender pleaded guilty to one charge of aggravated rape and two charges of sexual assault by penetration. Six other charges were taken into consideration. Despite the egregious nature of his offences, the High Court sentenced the offender to reformative training.

14.80 This presented the Court of Appeal with a dilemma. As the aggravated rape charge carried a mandatory minimum sentence of eight years' imprisonment and 12 strokes of the cane, the court had to choose between "vastly disparate"[136] sentences – either a long term of imprisonment with caning, or reformative training. If these were both "sub-optimal options", the Court of Appeal found that reformative training was the "less imperfect" and only principled option.[137] The court also took into account that the offender had already been incarcerated for almost four years, and reformative training could not be backdated.[138]

14.81 The Court of Appeal laid down the following general principles for sentencing intellectually disabled offenders:

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judicial clarification in *Public Prosecutor v ASR* [2019] 1 SLR 941 at [99]: see para 14.82 below.

134 [2019] 1 SLR 941.

135 *Public Prosecutor v ASR* [2019] 3 SLR 709 at [22].

136 *Public Prosecutor v ASR* [2019] 1 SLR 941 at [127].

137 *Public Prosecutor v ASR* [2019] 1 SLR 941 at [159].

138 *Public Prosecutor v ASR* [2019] 1 SLR 941 at [159].

(a) The older an offender, the more serious the diminishment of mental capacity required to reduce his culpability for sentencing purposes.[139] However, the court also held that the particular offender's intellectual disability led to a *prima facie* reduction in his culpability, because he did not understand the world around him like the average person of his chronological age.[140] While it is unclear how these two propositions cohere, it is likely that the *prima facie* reduced culpability of the particular offender was due to his young chronological age.

(b) If a sentencing framework was not promulgated specifically with intellectually disabled offenders in mind, the framework may not be applicable.[141] The converse of this is also true. In *Mendel See*,[142] similar to *ASR*, a young offender committed, *inter alia*, rape after threatening the victim with a chopper.[143] However, unlike *ASR*, the offender in *Mendel See* had no intellectual disability, and the High Court thus found that the outcome in *ASR* was not directly relevant.[144] Therefore, where young offenders with no intellectual disability commit rape, the observation of the Court of Appeal in the earlier case of *Mohd Noran v Public Prosecutor*[145] *– that as a general rule, neither probation nor reformative training is suitable in cases of rape – may still hold true.*[146]

14.82 The Court of Appeal clarified that in sentencing young offenders, practical constraints on achieving rehabilitation[147] do not entail that the offenders should not be rehabilitated.[148] Instead, such constraints will be taken into account at the second step[149] of the framework set out in *Public Prosecutor v Mohammad Al-Ansari bin Basri*[150] ("*Al-Ansari*").

139 *Public Prosecutor v ASR* [2019] 1 SLR 941 at [92].
140 *Public Prosecutor v ASR* [2019] 1 SLR 941 at [106].
141 *Public Prosecutor v ASR* [2019] 1 SLR 941 at [149].
142 See para 14.76 above.
143 The offender in *Public Prosecutor v See Li Quan Mendel* [2019] SGHC 255 was charged with rape *simpliciter* and not aggravated rape.
144 *Public Prosecutor v See Li Quan Mendel* [2019] SGHC 255 at [55].
145 [1991] 2 SLR(R) 867 at [3].
146 *Public Prosecutor v See Li Quan Mendel* [2019] SGHC 255 at [41].
147 *Public Prosecutor v Koh Wen Jie Boaz* [2016] 1 SLR 334 at [30], factor (d).
148 *Public Prosecutor v ASR* [2019] 1 SLR 941 at [99].
149 The Court of Appeal recognised an exception to this, *ie*, where a young offender was a foreign national who was not locally resident. In such cases, it might be a first step consideration, such that rehabilitation will generally not be a relevant sentencing consideration from the outset: *Public Prosecutor v ASR* [2019] 1 SLR 941 at [101].
150 [2008] 1 SLR(R) 449. The *Al-Ansari* two-step framework requires the court first to consider whether rehabilitation ought to be the dominant sentencing objective,
(cont'd on the next page)

14.83 Applying this framework to the instant case, the Court of Appeal held:

> (a) Rehabilitation was the dominant sentencing consideration, in view of the offender's youth and substantially reduced culpability.[151] His cognitive ability was extremely low; his intellectual disability compromised his ability to control his impulses; and he had a limited understanding of the nature and consequence of his actions.[152]
>
> (b) Deterrence (both general and specific) carried minimal weight because it was predicated in part on cognitive normalcy.[153]
>
> (c) Even though the offender had a high risk of reoffending,[154] prevention by way of incapacitation did not displace rehabilitation. As the offender was young and thus more amenable to reform, the prospective rationale of rehabilitation continued to apply, and society would benefit more by his rehabilitation.[155]

14.84 Long-term imprisonment with caning was thus inappropriate in principle. Such punishment would principally be a deterrent sentence and a form of incapacitation, and these objectives had no rational application to the offender.[156]

(3) Voluntarily causing hurt to police officer

14.85 In *Ho Mei Xia Hannah v Public Prosecutor*,[157] a young offender (20 years of age) verbally and physically assaulted three police officers, including by biting an officer. While the offender had mild persistent depressive disorder, this had no contributory link to her offences.[158] She was not a first offender, having been convicted for disorderly behaviour approximately two months prior to the commission of the present set of offences.

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then to choose the appropriate sentencing option in the light of the answer at the first step.

151 *Public Prosecutor v ASR* [2019] 1 SLR 941 at [113].
152 *Public Prosecutor v ASR* [2019] 1 SLR 941 at [113].
153 *Public Prosecutor v ASR* [2019] 1 SLR 941 at [115].
154 *Public Prosecutor v ASR* [2019] 1 SLR 941 at [103].
155 *Public Prosecutor v ASR* [2019] 1 SLR 941 at [122].
156 *Public Prosecutor v ASR* [2019] 1 SLR 941 at [138].
157 See para 14.33 above.
158 *Ho Mei Xia Hannah v Public Prosecutor* [2019] 5 SLR 978 at [61] and [76]. For a discussion on the psychiatric evidence, see paras 14.33–14.37 above.

14.86 Applying the first step of the *Al-Ansari* framework, the High Court found that the presumptive dominance of rehabilitation was displaced by the need for specific and general deterrence.[159] The s 332 Penal Code offence is a serious one which generally carries a custodial sentence.[160]

14.87 However, the High Court emphasised that rehabilitation would not be displaced in every case under s 332 involving young offenders, as each offender and offence will be carefully analysed.[161] In this particular case, the offender's culpability was not low – she had engaged in a protracted assault on the police officers.[162] The offender was thus sentenced in accordance with the framework in *Public Prosecutor v Yeo Ek Boon Jeffrey*.[163]

C. Sexual assault by penetration

14.88 In *Pram Nair v Public Prosecutor*[164] ("*Pram Nair*"), the Court of Appeal set out the sentencing framework for sexual assault by way of digital-vaginal penetration. The Court of Appeal left open whether the *Pram Nair* framework should apply to the other forms of sexual penetration under s 376 of the Penal Code.[165] Since then, the questions of whether the *Pram Nair* framework is of broader application; and whether there is a "hierarchy" of severity between the forms of sexual penetration, have vexed the courts, giving rise to conflicting decisions of the High Court.

14.89 In one set of decisions, the High Court adopted a hierarchical approach:

(a) In *Public Prosecutor v BMD*,[166] the court found fellatio and penile-anal penetration (of the two, fellatio was said to be "more disgusting") more severe then digital-anal penetration.

(b) In *Public Prosecutor v Koh Rong Guang*,[167] the court found that fellatio was more intrusive and degrading than digital-vagina penetration.

159 *Ho Mei Xia Hannah v Public Prosecutor* [2019] 5 SLR 978 at [84] and [92].
160 *Ho Mei Xia Hannah v Public Prosecutor* [2019] 5 SLR 978 at [86].
161 *Ho Mei Xia Hannah v Public Prosecutor* [2019] 5 SLR 978 at [92].
162 *Ho Mei Xia Hannah v Public Prosecutor* [2019] 5 SLR 978 at [86]–[87].
163 [2018] 3 SLR 1080, discussed in (2016) 17 SAL Ann Rev 382 at 452–426, paras 14.122–14.111.
164 [2017] 2 SLR 1015.
165 Cap 224, 2008 Rev Ed.
166 [2013] SGHC 235.
167 [2018] SGHC 117.

(c) In *Public Prosecutor v BPH*[168] *("BPH")*, the court held that digital-anal penetration was less serious than digital-vaginal penetration, and calibrated the *Pram Nair* framework downwards.[169]

14.90 In the second set of decisions, the High Court held that the *Pram Nair* framework was applicable across all forms of sexual penetration, and applied it in four cases involving fellatio: *Public Prosecutor v Tan Meng Soon Bernard*;[170] *Public Prosecutor v BNO*;[171] *Public Prosecutor v BMF*[172] ("*BMF*"); and *Public Prosecutor v BVZ*[173] ("*BVZ*"). Notably, in *BMF*, the court held that the mere fact that the offence was one of fellatio should not in and of itself warrant an uplift in the sentencing bands set out in *Pram Nair*.[174]

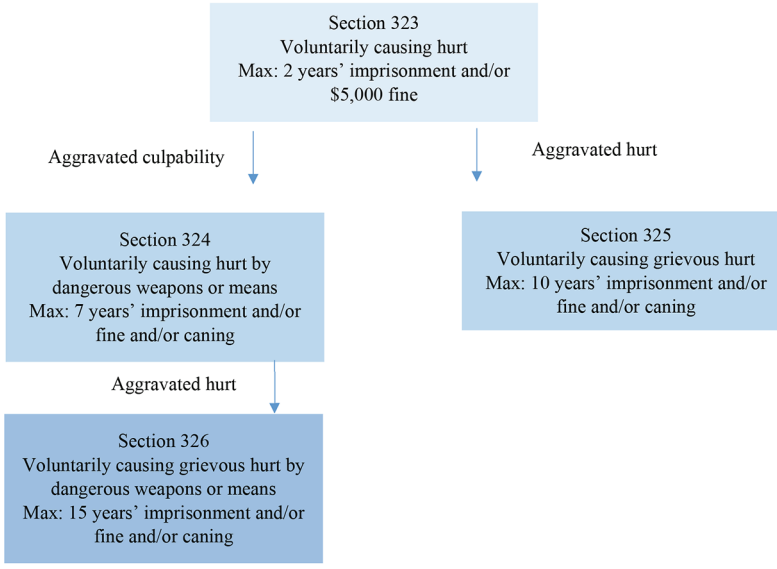
14.91 The offenders in *BPH* and *BVZ* appealed against their sentences, and the two cases came before the Court of Appeal. As the cases involved the same related point of principle, the Court of Appeal delivered joint grounds of decision in *BPH v Public Prosecutor*.[175]

14.92 The Court of Appeal laid to rest the divergent lines of authority, and held that the *Pram Nair* framework applied to all forms of sexual assault by penetration under s 376 of the Penal Code.[176] Given the myriad permutations possible, and the lack of a reasonable consensus on severity, it was neither useful nor practical to rank by severity the different types of sexual penetration.[177] Further, there was no statutory basis to do so, as the text of s 376 did not indicate any such rank.[178] Instead, the court held that it would be more practical and sensible to weigh a range of factors (as laid down in *Pram Nair*)[179] in assessing the seriousness of a particular permutation of the offence.[180]

168 Criminal Case No 90 of 2017.
169 The hierarchical approach was also taken in *Public Prosecutor v BMD* [2013] SGHC 235, where the High Court held that fellatio and penile-anal penetration were of the same severity, and both were more serious than digital-anal penetration.
170 [2019] 3 SLR 1146.
171 [2018] SGHC 243.
172 [2019] SGHC 227.
173 [2019] SGHC 83.
174 *Public Prosecutor v BMF* [2019] SGHC 227 at [27].
175 [2019] 2 SLR 764.
176 *BPH v Public Prosecutor* [2019] 2 SLR 764 at [55].
177 *BPH v Public Prosecutor* [2019] 2 SLR 764 at [55]–[58] and [60].
178 *BPH v Public Prosecutor* [2019] 2 SLR 764 at [59].
179 See para 14.88 above.
180 *BPH v Public Prosecutor* [2019] 2 SLR 764 at [61].

D. Hurt offences

14.93 The hurt offences under the Penal Code[181] are tiered in severity, such that the maximum sentences increase as the gravity of resultant harm and/or culpability increase, as depicted below:[182]



However, even though the mischief targeted by, and the elements of, the offences may appear similar, it is now clear that there is no one-size-fits-all sentencing approach across the hurt offences. It remains to be seen whether the court will rationalise the approaches across the hurt offences, to bring greater coherence and unity to this area of the law.

(1) Voluntarily causing hurt

14.94 In *Public Prosecutor v BDB*[183] ("*BDB*"), the Court of Appeal set out the sentencing approach for voluntarily causing grievous hurt under s 325 of the Penal Code. In *Low Song Chye v Public Prosecutor*[184] ("*Low Song Chye*"), the High Court declined to apply and proportionately extrapolate downwards the *BDB* approach, to the offence of voluntarily

181 Cap 224, 2008 Rev Ed.
182 These are the provisions prior to the amendments effected by the Criminal Law Reform Act (Act No 15 of 2019).
183 [2018] 1 SLR 127. See (2017) 18 SAL Ann Rev 415 at 455–456, paras 14.128–14.130.
184 [2019] 5 SLR 526.

causing hurt under s 323 of the Penal Code.[185] While *BDB* accords primacy to the seriousness of the injury by prescribing indicative starting points based on the injury,[186] for s 323 offences where less serious hurt is concerned, other factors, including those going towards culpability, may carry greater weight.[187]

14.95 The High Court laid down a two-step sentencing approach for offences under s 323 of the Penal Code:

(a) First, the court determines the band, and derives an indicative starting point by considering the actual[188] harm caused:[189]

Band	Hurt caused	Indicative sentencing range
1	Low harm: no visible injury or minor hurt such as bruises, scratches, minor lacerations or abrasions	Fines or short custodial term up to four weeks
2	Moderate harm: hurt resulting in short hospitalisation or a substantial period of medical leave, simple fractures, or temporary or mild loss of a sensory function (such as hearing or sight)	Between four weeks' to six months' imprisonment
3	Serious harm: serious injuries which are permanent in nature and/or which necessitate significant surgical procedures	Between six to 24 months' imprisonment

These bands are for a first-time offender who pleads guilty.[190]

(b) Second, the court adjusts the indicative starting point based on the offender's culpability, and relevant aggravating and/

185 *Low Song Chye v Public Prosecutor* [2019] 5 SLR 526 at [71]–[75].

186 Under the *BDB* sentencing framework, the court first determines the indicative starting point based on the seriousness of the injury, then adjusts this based on the offender's culpability and relevant aggravating and/or mitigating factors: *Public Prosecutor v BDB* [2018] 1 SLR 127 at [55]–[59].

187 *Low Song Chye v Public Prosecutor* [2019] 5 SLR 526 at [71].

188 The court should not consider the potential harm caused: *Low Song Chye v Public Prosecutor* [2019] 5 SLR 526 at [79].

189 *Low Song Chye v Public Prosecutor* [2019] 5 SLR 526 at [77]–[78].

190 Appropriate calibrations can be made where the offender claims trial: *Low Song Chye v Public Prosecutor* [2019] 5 SLR 526 at [78].

or mitigating factors.[191] This may take the eventual sentence out of the applicable indicative sentencing range.

14.96 *Low Song Chye* fell within the bottom half of Band 2, as the offender had caused the victim to suffer, amongst others, a perforation of the left eardrum leading to mild hearing loss and tinnitus.[192] The indicative sentence was two to three months' imprisonment. This indicative sentence was adjusted upwards, in view of the offender's subsequent acts of aggression against the victim,[193] and violence-related antecedents.[194] The High Court thus allowed the Prosecution's cross-appeal against sentence, enhancing the offender's sentence to four months' imprisonment.

(2) Voluntarily causing hurt by dangerous weapons or means

14.97 In *Ng Soon Kim v Public Prosecutor*,[195] the offender pleaded guilty to a charge of voluntarily causing hurt by means of fire under s 324 of the Penal Code. Following an altercation arising from a road traffic incident, the offender lit a lighter in front of a can of insecticide, creating a fire, which caused the victim superficial first degree burns and singed his hair.

14.98 The Prosecution had proposed a sentencing matrix that gave equal emphasis to harm and culpability.[196] The High Court held that equal weightage was incorrect in principle. While the harm under ss 323 and 324 are the same, s 324 has a much heftier maximum penalty – this reflects the dangerous weapon or means, suggesting that culpability should be given greater weightage. Further, some of the means of inflicting hurt under s 324 are likely to be inherently more egregious than other means, for example, using an instrument for shooting, or using a weapon likely to cause death.[197] As there was insufficient jurisprudence, the High Court declined to prescribe a sentencing framework.

14.99 Instead, the High Court provided a sentencing approach:[198]

(a) First, the court considers what would be an appropriate sentence had the hurt been the subject of an offence under s 323, by applying the framework in *Low Song Chye*.[199]

191 The aggravating and mitigating factors are identified in *Public Prosecutor v BDB* [2018] 1 SLR 127 at [62]–[70] and [71]–[75] respectively.
192 *Low Song Chye v Public Prosecutor* [2019] 5 SLR 526 at [94].
193 *Low Song Chye v Public Prosecutor* [2019] 5 SLR 526 at [98].
194 *Low Song Chye v Public Prosecutor* [2019] 5 SLR 526 at [100].
195 [2020] 3 SLR 1097.
196 *Ng Soon Kim v Public Prosecutor* [2020] 3 SLR 1097 at [8]–[9].
197 *Ng Soon Kim v Public Prosecutor* [2020] 3 SLR 1097 at [11].
198 *Ng Soon Kim v Public Prosecutor* [2020] 3 SLR 1097 at [12].
199 See para 14.96 above.

(b) Second, it considers the suitable uplift, having regard to the dangerous means used, and the potential harm that could result from the chosen means of offending.

(c) Third, calibration is made, based on aggravating or mitigating circumstances.

14.100 At the first step, the High Court considered that the harm caused to the victim was low, though it was caused to the victim's face, a vulnerable area. The High Court also took into account that the offence took place in the context of road rage, which is an aggravating factor.[200] It is unclear why the court took this aggravating factor into account at the first, rather than the third stage. Nonetheless, at the first step, the court arrived at a sentence of two months.

14.101 At the second step, the use of a lighter with a flammable aerosol was not at the high end of serious culpability, though it had potential for harm, was lit in a confined space, and caused alarm to others. Balancing these factors, the court found that a substantial uplift of six months was justified.[201]

14.102 At the third step, the court adjusted the sentence down by one month, taking into account the offender's plea of guilt, and that he was a first-time offender.[202]

E. Criminal intimidation by anonymous communication

14.103 In *Ye Lin Myint v Public Prosecutor*,[203] the offender, a spurned insurance agent, waged a campaign of criminal intimidation against his clients, prospective clients, and their neighbours and family members, under the pseudonym of Lord Voldemort or Dr Bruce Banner. He had employed sophisticated means, using anonymised e-mail accounts and a Bitcoin wallet in the hopes of receiving payments anonymously. His communications caused considerable distress to the recipients, and reached a sufficiently large number of people that public disquiet was occasioned. He was charged and convicted of, *inter alia*, five charges under s 507 of the Penal Code, an aggravated[204] form of criminal intimidation.

200 *Ng Soon Kim v Public Prosecutor* [2020] 3 SLR 1097 at [14].
201 *Ng Soon Kim v Public Prosecutor* [2020] 3 SLR 1097 at [15]–[16].
202 *Ng Soon Kim v Public Prosecutor* [2020] 3 SLR 1097 at [17].
203 [2019] 5 SLR 1005.
204 It is aggravated because the recipient suffers a heightened sense of unease from being unable to identify the person behind the threat, and consequently to assess its gravity or when or how it might manifest: *Ye Lin Myint v Public Prosecutor* [2019] 5 SLR 1005 at [39] and [54].

14.104 Noting the dearth of authorities on offences under s 507, the High Court laid down sentencing guidance from first principles.[205] The court found that a sentencing matrix was not appropriate, as s 507 offences are likely to occur in quite a wide range of factual situations, and the means by which the anonymous communication is conveyed can also take many forms.[206] Instead, the wide diversity of acts punishable under s 507 lends itself to the two-stage, five-step sentencing approach set out in *Ng Kean Meng Terence v Public Prosecutor*.[207]

14.105 At the first step of the framework, the court will identify whether the following non-exhaustive offence-specific factors are present on the facts:[208]

(a) Factors going towards harm include:

(i) the degree of alarm caused, or extent to which the recipient was compelled to perform acts against his will or to refrain from exercising his rights;

(ii) physical harm occasioned by the threat; and

(iii) public disquiet, where the threats are made on such a scale as to provoke anxiety in the general public.[209]

(b) Factors going towards culpability include:[210]

(i) degree of planning and premeditation; and level of sophistication that went into sending the threatening communications *and* preserving the offender's anonymity;

(ii) duration of offending, where there was a sustained campaign of threatening communications;

(iii) abuse of position and breach of trust, where the offender had misused confidential information to target the recipient;

(iv) offender's motive in committing the offence. Where the motive is malice, spite, greed, or self-interest, this is aggravating. Where the motive is fear, coercion, or financial need, this may be mitigating; and

205 *Ye Lin Myint v Public Prosecutor* [2019] 5 SLR 1005 at [42].
206 *Ye Lin Myint v Public Prosecutor* [2019] 5 SLR 1005 at [43]–[45].
207 [2017] 2 SLR 449.
208 *Ye Lin Myint v Public Prosecutor* [2019] 5 SLR 1005 at [47].
209 *Ye Lin Myint v Public Prosecutor* [2019] 5 SLR 1005 at [49].
210 *Ye Lin Myint v Public Prosecutor* [2019] 5 SLR 1005 at [50]–[57].

(v) degree to which the offender exploited his anonymity to cause alarm. While the use of anonymity is an element of the offence, where anonymity is exploited to maximise alarm, this is aggravating.

14.106 Based on the factors identified at step one, at the second step, the court will identify the indicative sentencing range, according to the following table:[211]

Harm / Culpability	Slight	Moderate	Severe
Low	Fine or 0–6 months' imprisonment	6–12 months' imprisonment	12–24 months' imprisonment
Medium	6–12 months' imprisonment	12–24 months' imprisonment	24–36 months' imprisonment
High	12–24 months' imprisonment	24–36 months' imprisonment	36–48 months' imprisonment

This indicative sentencing range is confined to s 507 offences founded on s 506 *simpliciter*[212] offences.

14.107 At the third step, the court identifies the appropriate indicative starting point within the range, by again having regard to the offence-specific factors.[213]

14.108 The fourth step involves consideration of the following non-exhaustive offender-specific factors:[214]

(a) aggravating factors: offences taken into consideration for sentencing purposes, relevant antecedents, and evident lack of remorse; and

(b) mitigating factors: plea of guilty, and co-operation with the authorities.

211 *Ye Lin Myint v Public Prosecutor* [2019] 5 SLR 1005 at [65].
212 *Ie*, not the enhanced forms of criminal intimidation, involving threats of death or grievous hurt or arson, or imputing unchastity, for which s 506 itself already provides enhanced punishment.
213 *Ye Lin Myint v Public Prosecutor* [2019] 5 SLR 1005 at [66].
214 *Ye Lin Myint v Public Prosecutor* [2019] 5 SLR 1005 at [47].

14.109 If this results in the sentence moving out of the indicative sentencing range, the court must set out clear and coherent reasons why this should be done.[215]

14.110 The fifth step involves making further adjustments to take into account the totality principle.[216]

F. Infectious Diseases Act offences

14.111 *GCP v Public Prosecutor*[217] was the first appeal against conviction and sentence in respect of an offence under s 23(1), and punishable under s 23(3), of the Infectious Diseases Act.[218] The offender, who had tested positive for human immunodeficiency virus ("HIV"), did not inform his sexual partner of the risk of contracting HIV from him before engaging in sexual activity with him on multiple occasions.

14.112 The High Court set out a sentencing framework, and laid down the indicative sentencing ranges for first-time offenders who claim trial:[219]

Band	Factors[220]	Sentencing range
1	Low risk of transmission and low culpability.	Fine to two years' imprisonment
2	Higher risk of transmission and/or greater culpability.	Two to six years' imprisonment
3	Actual transmission of HIV.[221] Any culpability-increasing factors would increase the starting point within this band.	Six to 10 years' imprisonment

215 *Ye Lin Myint v Public Prosecutor* [2019] 5 SLR 1005 at [67].
216 *Ye Lin Myint v Public Prosecutor* [2019] 5 SLR 1005 at [68].
217 [2019] 5 SLR 626.
218 Cap 137, 2003 Rev Ed.
219 *GCP v Public Prosecutor* [2019] 5 SLR 626 at [68].
220 Where HIV is not transmitted, harm and culpability are given equal weight: *GCP v Public Prosecutor* [2019] 5 SLR 626 at [71].
221 The sentencing framework must give sufficient weight to the transmission of HIV, so Band 3 is reserved for such cases. The starting point of six years' imprisonment addresses the sentencing considerations of deterrence and retribution: *GCP v Public Prosecutor* [2019] 5 SLR 626 at [70].

14.113 Factors going towards harm and risk of transmission include:[222]

(a) the viral load of the HIV-positive person;

(b) the consumption of pre-exposure prophylaxis or post-exposure prophylaxis by the victim;

(c) any sexually transmitted infection in either partner;

(d) the type and number of instances of sexual exposure; and

(e) male circumcision in cases involving penile-vaginal intercourse and a HIV-negative male.

14.114 Factors going towards culpability include:[223]

(a) any disclosure relevant to the risk of transmission, for example, of one's HIV status;

(b) any intention to transmit HIV;

(c) any deception or active misrepresentation by the offender of his HIV status, or facts relating to his HIV status (for example, viral load);

(d) the vulnerability of the victim (for example, young or intellectually disabled victim);

(e) serious breaches of trust (for example, in a domestic context); and

(f) the presence of a risk factor which is significant to the transmission of HIV.

14.115 Having identified the sentencing band and the starting point within the band, the court may then make adjustments to the indicative starting point with regard to any other aggravating and mitigating factor.[224]

G. Employment of Foreign Manpower Act offences

14.116 The sentences imposed for offences under s 22(1)(*d*) of the Employment of Foreign Manpower Act[225] have been inconsistent. Recent

222 *GCP v Public Prosecutor* [2019] 5 SLR 626 at [74].
223 *GCP v Public Prosecutor* [2019] 5 SLR 626 at [84].
224 *GCP v Public Prosecutor* [2019] 5 SLR 626 at [69].
225 Cap 91A, 2009 Rev Ed.

sentencing trends run along two lines, with courts either meting out fines in the range of $8,000, or imposing short custodial terms.[226]

14.117 With the decision in *Chiew Kok Chai v Public Prosecutor*[227] ("*Chiew Kok Chai*"), it is now clear that a custodial sentence is the starting point,[228] though fines may be appropriate nonetheless where strong personal mitigating factors are present.[229]

14.118 In *Chiew Kok Chai*, the offender had abetted by engaging in a conspiracy to make false declarations in connection with work pass applications. As a result of these false declarations, a company which was not entitled to a foreign manpower quota due to previous levy defaults, was allowed to employ foreign workers.

14.119 The High Court set out a two-step sentencing framework for natural persons.[230] At the first step, the court considers offence-specific factors[231] to determine the sentencing band:[232]

Band	Elaboration	Sentencing range
1	Lower end of the spectrum, involving one or very few offence-specific factors, or where offence-specific factors were not present to a significant degree.	Short custodial sentence of less than five months' imprisonment
2	Middle band of the spectrum, involving higher levels of seriousness or harm, comprising cases falling between Bands 1 and 3.	Five to 15 months' imprisonment
3	Higher end of the spectrum, involving numerous offence-specific factors, or where offence-specific factors were present to a significant degree.	15 to 24 months' imprisonment

226 *Chiew Kok Chai v Public Prosecutor* [2019] 5 SLR 713 at [28].
227 [2019] 5 SLR 713.
228 *Chiew Kok Chai v Public Prosecutor* [2019] 5 SLR 713 at [62].
229 *Chiew Kok Chai v Public Prosecutor* [2019] 5 SLR 713 at [68].
230 The sentencing framework for corporate offenders has been set out in *Lim Kopi Pte Ltd v Public Prosecutor* [2010] 2 SLR 413 and remains unchanged: *Chiew Kok Chai v Public Prosecutor* [2019] 5 SLR 713 at [66].
231 *Chiew Kok Chai v Public Prosecutor* [2019] 5 SLR 713 at [67].
232 *Chiew Kok Chai v Public Prosecutor* [2019] 5 SLR 713 at [25] and [63].

14.120 The offence-specific factors include:[233]

(a) the materiality of the false representation on the mind of the decision-maker;

(b) the nature, sophistication and extent of the deception:

(i) the consequences of the deception. Factors include the extent to which harm was caused to foreign workers by way of exploitation; wastage of resources by public authorities in uncovering the deception; whether a potentially better-qualified applicant was deprived of the job opportunity; or whether the offender put others at risk of adverse consequences by performing a job without the requisite skills;

(ii) whether a transnational element was present and/or whether the offence was part of a criminal syndicate's operations;

(iii) the offender's specific role, and the number of people involved in the furnishing of false information;

(iv) whether the offender obtained gains (financial or otherwise) from the offence; and

(v) the motive of the offender in circumventing the work pass framework, for example, for vice or criminal activities.

14.121 At the second step, the court takes into account the offender-specific factors.[234] As the High Court only mentioned personal *mitigating* factors,[235] it is unclear whether *aggravating* factors can also be taken into account, though there is no reason why they should be excluded.

14.122 In addition, the High Court held that where the offender has profited from his illegal behaviour, confiscatory fines to disgorge the profits are appropriate.[236]

233 *Chiew Kok Chai v Public Prosecutor* [2019] 5 SLR 713 at [67].
234 *Chiew Kok Chai v Public Prosecutor* [2019] 5 SLR 713 at [68].
235 *Chiew Kok Chai v Public Prosecutor* [2019] 5 SLR 713 at [68].
236 *Chiew Kok Chai v Public Prosecutor* [2019] 5 SLR 713 at [69].

H. Workplace and Safety Health Act offences

14.123 There are now two conflicting sentencing frameworks for breach of s 12[237] of the Workplace and Safety Health Act[238] ("WSHA"). See Kee Oon JC (as he then was) first set out the framework in *Public Prosecutor v GS Engineering & Construction Corp*[239] ("*GS Engineering*"). In *MW Group Pte Ltd v Public Prosecutor* ("*MW Group*"),[240] Chan Seng Onn J revisited the *GS Engineering* framework.

14.124 While Chan J agreed broadly with the *GS Engineering* framework,[241] he disagreed with the benchmarks set out. For ease of reference, the *GS Engineering* bands are as follows:

		Culpability		
		High	Medium	Low
Potential for harm	High	$300,000 to $500,000	$150,000 to $300,000	$100,000 to $150,000
	Medium	$100,000 to $150,000	$80,000 to $100,000	$60,000 to $80,000
	Low	$40,000 to $60,000	$20,000 to $40,000	Up to $20,000

14.125 Chan J found that there were "gaps" between the *GS Engineering* bands, leading to jumps in the indicative starting point sentences.[242] These "gaps" arbitrarily restricted the sentencing court from providing certain sentences as a starting point, with the effect that the sentencing range provided by the law is not fully utilised.[243] Further, the "gaps" would result in disproportionately higher sentences where either the harm or culpability had only increased slightly.[244] Chan J therefore formulated a revised sentencing benchmark, based on his framework in *Nurun Novi Saydur Rahman v Public Prosecutor*.[245]

237 The offence is under s 12(1) read with s 20 and punishable under s 50(*b*) of the Workplace and Safety Health Act (Cap 354A, 2009 Rev Ed).
238 Cap 354A, 2009 Rev Ed.
239 [2017] 3 SLR 682, discussed in (2016) 17 SAL Ann Rev 382 at 424–426, paras 14.108–14.111.
240 [2019] 3 SLR 1300.
241 *MW Group Pte Ltd v Public Prosecutor* [2019] 3 SLR 1300 at [26].
242 *MW Group Pte Ltd v Public Prosecutor* [2019] 3 SLR 1300 at [30].
243 *MW Group Pte Ltd v Public Prosecutor* [2019] 3 SLR 1300 at [31].
244 *MW Group Pte Ltd v Public Prosecutor* [2019] 3 SLR 1300 at [32].
245 [2019] 3 SLR 413, discussed in (2016) 17 SAL Ann Rev 382 at 481–483, paras 14.92–14.98. Although this chapter focuses on cases in 2019, readers should note that in

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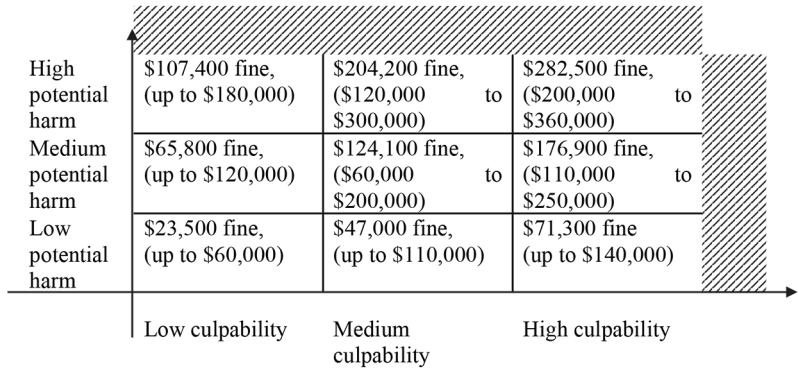
14.126 Under the *MW Group* framework, the sentencing judge will first determine the indicative starting point based on the following table, for an offender who has claimed trial:



14.127 According to this table:[246]

(a) The sentences indicated are the midpoints of each of the ranges. The ranges are represented by the figures in parentheses in each box. The exact indicative starting sentence can be further calibrated.

(b) The extreme edges of the table (indicated in shaded portions) reflect offences which are extremely egregious in terms of the potential for harm or culpability. For such offences, the starting point can extend to the maximum sentence provided by law.

14.128 The second stage of inquiry is to calibrate the starting point sentence based on any aggravating or mitigating factors.[247]

I. Illegal online gambling

14.129 Until recently, there was little consistency in sentencing for the offence of illegal online gambling under s 8 of the Remote Gambling Act[248] ("RGA"), where the bet involved large amounts. The sentencing

May 2020, a three-judge High Court panel in *Mao Xuezhong v Public Prosecutor* [2020] SGHC 99 declined to endorse the *Nurun Novi* framework. The implications of this would be discussed in next year's chapter.

246 *MW Group Pte Ltd v Public Prosecutor* [2019] 3 SLR 1300 at [52].

247 See *Public Prosecutor v GS Engineering & Construction Corp* [2017] 3 SLR 682 at [77(e)]–[77(f)], and *Nurun Novi Saydur Rahman v Public Prosecutor* [2019] 3 SLR 413 at [107]–[108].

248 Act 34 of 2014.

framework laid down in *Lau Jian Bang v Public Prosecutor*[249] will now pave the way for a consistent sentencing practice.

14.130 The High Court set out a single starting point approach for such offences – for first-time offenders, the starting point is a fine of about $1,000.[250] The court held that a fine was appropriate, as it could have the desired deterrent effect by eroding profits or exacerbating any losses.[251]

14.131 The quantum of the fine will be adjusted to take into account the amount wagered, and other aggravating or mitigating factors. Aggravating factors may include steps taken to conceal the illegal bets, where these necessitated painstaking investigation to uncover the illegal activity.[252]

14.132 It does not automatically follow that a custodial sentence will be imposed where the bet quantum exceeds the maximum fine.[253] A custodial sentence should generally only be imposed for repeated offenders.[254]

14.133 While the High Court recognised that the sentencing framework does not fully utilise the full sentencing range prescribed, the court held that full utilisation was not always possible, especially when devising a framework for first-time offenders.[255]

J. Securities and Futures Act offences

14.134 *Public Prosecutor v Tan Seo Whatt Albert*[256] was the first prosecution for an offence of offering securities without a prospectus under s 240(1) and punishable under s 240(7) of the Securities and Futures Act.[257]

14.135 The offender's secondary liability arose under the "consent" limb in s 331(3A) of the Securities and Futures Act. The High Court held that for a charge based on the "consent" limb, the full range of punishment may be considered by the sentencing court.[258]

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249 [2020] 3 SLR 1161.
250 *Lau Jian Bang v Public Prosecutor* [2020] 3 SLR 1161 at [59]–[60].
251 *Lau Jian Bang v Public Prosecutor* [2020] 3 SLR 1161 at [60].
252 *Lau Jian Bang v Public Prosecutor* [2020] 3 SLR 1161 at [62].
253 *Lau Jian Bang v Public Prosecutor* [2020] 3 SLR 1161 at [61].
254 *Lau Jian Bang v Public Prosecutor* [2020] 3 SLR 1161 at [64].
255 *Lau Jian Bang v Public Prosecutor* [2020] 3 SLR 1161 at [65].
256 [2019] 5 SLR 654.
257 Cap 289, 2006 Rev Ed.
258 While the High Court found that the "neglect" and "connivance" limbs involved lesser culpability relative to "consent", no finding was made on the notional upper

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14.136 The indicative starting positions for such charges are as follows:[259]

Harm / Culpability	Low	Moderate	High
Low	Fine of $10,000 and upwards	Fine of $30,000 and upwards	
Moderate	Fine of $30,000 and upwards	A short custodial sentence *may* be considered	
High			Custodial sentence

The High Court refrained from providing more detailed starting points given the paucity of cases on such offences.[260]

14.137 Factors going towards culpability include:[261]

(a) The role of the offender. The court will consider the limb under which the offender is charged, that is, consent, connivance, or neglect (which have decreasing levels of culpability), the offender's role in the entity, and nature and extent of his offending acts or omissions.

(b) The offender's mental state. An offender charged with either consent or connivance has higher culpability than an offender charged with neglect. Where there is a knowing, deliberate or wilful contravention of the legal requirement, this is an aggravating factor.

(c) Intention or motive of the offender (whether he was motivated by financial or other gains), and benefits or gains made by the offender.

(d) Steps taken to mitigate the effects of the offence.

14.138 Factors going towards harm include:[262]

(a) Consequences of the conduct. This includes the actual and potential harm caused.

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limits for those limbs, as the instant case was not based on either of those limbs: *Public Prosecutor v Tan Seo Whatt Albert* [2019] 5 SLR 654 at [45]–[46] and [54(a)].

259 *Public Prosecutor v Tan Seo Whatt Albert* [2019] 5 SLR 654 at [56].

260 *Public Prosecutor v Tan Seo Whatt Albert* [2019] 5 SLR 654 at [56].

261 *Public Prosecutor v Tan Seo Whatt Albert* [2019] 5 SLR 654 at [54].

262 *Public Prosecutor v Tan Seo Whatt Albert* [2019] 5 SLR 654 at [56].

(b) Materiality (relevance and importance) of the information not disclosed. The riskier the investment, the more material the relevant information required to adequately inform investors' choices would be.

14.139 These broad indicative starting positions may be adjusted based on other relevant sentencing factors apart from those listed in the paragraphs above.[263]

263 *Public Prosecutor v Tan Seo Whatt Albert* [2019] 5 SLR 654 at [56].