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15. CRIMINAL PROCEDURE, EVIDENCE AND SENTENCING

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CRIMINAL PROCEDURE

I. Disclosure obligations revisited

15.1 The scope and extent of the Prosecution's disclosure obligations continued to be put in issue in 2021. In 2020, additional disclosure obligations were introduced in *Muhammad Nabill bin Mohd Fuad v Public Prosecutor*[1] ("*Nabill*") in pursuit of achieving a more satisfactory balance between ensuring fairness to the accused person on the one hand and preserving the adversarial nature of the trial process on the other.[2] These additional disclosure obligations required the Prosecution to disclose to the Defence statements furnished to the police by a "material witness". A "material witness" was defined in this context as a person "who can be expected to confirm, or conversely, contradict an accused person's defence in material respects".[3] These statements ought to be disclosed when the Prosecution files and serves the Case for the Prosecution (if the statutory criminal case disclosure regime ("the CCD regime") applies), or at the latest, before the trial begins if the CCD regime does not apply.

15.2 In *Roshdi bin Abdullah Altway v Public Prosecutor*[4] ("*Roshdi*"), the Prosecution invited the Court of Appeal to reconsider its holdings in *Nabill* in respect of the definition of a "material witness", and sought guidance as to the process of identifying "material witnesses", the potential

1 [2020] 1 SLR 984.
2 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [47].
3 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [4].
4 [2022] 1 SLR 535.

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consequences of any breach of its additional disclosure obligations, and whether the Prosecution has a positive duty to conduct further investigations once a witness had been identified as "material":

(a) First, the Prosecution argued that the definition of "material witness" should be narrowed to cover only a witness whom the accused person identified as the "true culprit" responsible for the offence.

(b) Second, the Prosecution proposed that the Defence should bear the "duty" of first identifying persons whom it considered "material witnesses" by naming such persons and explaining why they were material. The Defence should generally make this identification at the pretrial stage within a reasonable time upon its receipt of the Prosecution's list of witnesses. Where a witness could only be identified as "material" as a result of the accused person's evidence at trial, the onus should be on the Defence to (i) notify the court that the person was a material witness; (ii) explain why the witness was material; and (iii) clarify why the identification was not made earlier. Finally, if there was any dispute as to the "materiality" of a witness, the parties should apply to the court for a ruling on the issue.

(c) Third, the Prosecution sought clarification that it did *not* have a legal duty to conduct further investigations and to record further statements from a witness where a new "material witness" was identified.

(d) Fourth, the Prosecution invited the Court of Appeal to clarify the consequences that would flow from a breach of the Prosecution's additional disclosure obligations.

15.3 The Court of Appeal did not accept the Prosecution's proposed redefinition of a "material witness". It reiterated the two key rationales for imposing the additional disclosure obligations on the Prosecution – First, it would be an intolerable outcome for the court to be deprived of relevant evidence that might potentially exculpate the accused person simply because the Prosecution erred, despite acting in good faith, in assessing the significance of certain evidence. Second, the accused person ought to have access to all relevant information in order to make an informed choice in deciding whether or not to call a "material witness", and it would not reflect a satisfactory balance between ensuring fairness to the accused person and preserving the adversarial nature of the trial process if the Defence were to be unaware of what a "material witness" had previously said in the course of police investigations.[5] Both

5 *Roshdi bin Abdullah Altway v Public Prosecutor* [2022] 1 SLR 535 at [137].

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of these rationales are generally engaged whenever there is a witness who can be expected to materially confirm or contradict the accused person's defence, and not just to witnesses who may be the "true culprit".[6]

15.4 The Court of Appeal also rejected the proposals for the Defence to bear the duty of identifying persons whom it considered "material witnesses", observing that their effect would be to transform what was meant to be a disclosure obligation borne by the Prosecution into a duty falling upon the Defence to outline its case prior to trial, which would be incongruent with the adversarial position that an accused person occupied in criminal proceedings in relation to the Prosecution.[7] At the same time, however, the Court of Appeal highlighted that the "materiality" of a witness is assessed only by reference to such defences as the accused person may have disclosed at each stage of a criminal proceeding, and does not require the Prosecution to speculate as to any defences that have not been identified by the Defence.[8] Given this, the Court of Appeal did not think there were substantial difficulties for the Prosecution to comply with its additional disclosure obligations, and set out the general process of identifying "material witnesses" as follows:[9]

> (a) *At the pretrial stage*, the Prosecution should disclose the statements of witnesses whom it thinks are "material" based on the accused person's statements (as well as the Case for the Defence, if and when one is filed). If the Prosecution has any doubt as to whether a witness is "material", it should generally err on the side of disclosure. However, the Prosecution is not required to speculate on the accused person's intended defence at trial, and the additional disclosure obligations are only limited to defences which can reasonably be discerned from the information the Prosecution has.
>
> (b) Once the Prosecution has made its initial disclosures, the Defence can decide (although it is under no duty to do so) whether it wishes to notify the Prosecution of any *additional* witnesses whom it also considers to be "material". Where the Defence does so, it must explain to the Prosecution (and/or the court, if necessary) why the additional witnesses are "material", either by reference to the defences already mentioned in the accused person's statements, and/or the defences which the accused person intends to raise at trial.

6 *Roshdi bin Abdullah Altway v Public Prosecutor* [2022] 1 SLR 535 at [138].
7 *Roshdi bin Abdullah Altway v Public Prosecutor* [2022] 1 SLR 535 at [146]–[148].
8 *Roshdi bin Abdullah Altway v Public Prosecutor* [2022] 1 SLR 535 at [152].
9 *Roshdi bin Abdullah Altway v Public Prosecutor* [2022] 1 SLR 535 at [157]–[161].

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(c) *Once trial begins and in any subsequent appeal*, it is incumbent upon *both* the Prosecution and the Defence to identify any new "material witnesses" at the earliest opportunity. The "materiality" of such witnesses will be ascertained by reference to defences which the accused person may have raised in his statements, as well as any new defences which he runs at trial.

(d) In the event that a dispute arises as to the "materiality" of a witness, either party can apply to the court for a ruling.

15.5 As regards the other clarifications sought by the Prosecution, the Court of Appeal made it clear that it did not impose a legal duty on the Prosecution or law enforcement agencies to conduct further investigations – however, if the Prosecution chose not to pursue any further investigations, it would take the risk that it would be found to have failed to discharge its evidential burden in respect of the facts that had properly come into issue.[10] The consequences that would flow from a breach of the Prosecution's additional disclosure obligations would also necessarily depend on all the facts at hand, and it would not be helpful or necessary to attempt a comprehensive discussion of the potential consequences that might result.[11]

15.6 A noteworthy point made by the Court of Appeal was that the Defence should, in fairness, give the Prosecution an opportunity to respond before putting any allegation of a breach of the Prosecution's additional disclosure obligations before the court. After all, such allegations could amount to an accusation of professional misconduct against the deputy public prosecutors who had conduct of the matter, and this would also give the court a full picture of the facts in order to assess any alleged breaches. The Court of Appeal emphasised that any allegation that the Prosecution dishonestly or knowingly withheld evidence that it ought to have disclosed to the Defence should *never* be made lightly, as a basic rule of professional conduct. Practitioners should be mindful of this caution sounded by the Court of Appeal when alleging a potential breach of disclosure obligations by the Prosecution.

15.7 At the same time, the specific contours of the Prosecution's disclosure obligations remain unresolved. The Court of Appeal expressly left open the issue of whether the Prosecution's additional disclosure obligations extend to the statements of a "material witness" who is also a prosecution witness. Whilst the rationales for imposing the additional disclosure obligations[12] would not apply in such a scenario, it could also

10 *Roshdi bin Abdullah Altway v Public Prosecutor* [2022] 1 SLR 535 at [166]–[167].
11 *Roshdi bin Abdullah Altway v Public Prosecutor* [2022] 1 SLR 535 at [168].
12 See para 15.3 above.

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be argued that extending the additional disclosure obligations as such would ultimately flow from the fundamental premise that all relevant material should be placed before the court to assist it in its determination of the truth, and that it would conduce to the administration of justice (in possibly encouraging the early disposition of cases) for such "material witness" statements to be similarly extended to the Defence.

15.8 Sundaresh Menon CJ's coda on the breadth of the *Kadar* disclosure obligation, set out in *Xu Yuanchen v Public Prosecutor*[13] ("*Xu Yuanchen*"), is instructive. In *Xu Yuanchen*, Menon CJ (sitting in the General Division of the High Court ("High Court (General Division)")) noted that a statement recorded from an accused which the Prosecution did not intend to rely on at trial as part of its affirmative case would appear to fall within the universe of "unused material" in *Muhammad bin Kadar v Public Prosecutor*[14] ("*Kadar*"). At the same time, Menon CJ observed that the accused person's own statements, being a form of evidence that emanates entirely from the accused person, may not properly fall within the universe of unused evidentiary material that the *Kadar* disclosure obligations were intended to address; the accused person would almost invariably have known of his earlier statements and would have known of the underlying facts that were or could have been covered in those statements, and there would almost never be a situation of such evidence being overlooked by the Defence despite its relevance as to the innocence of the accused person. Menon CJ stated that this was a point for consideration should the question come before the Court of Appeal in the future.

15.9 By the same token, it may be argued that extending additional disclosure obligations to include statements of a "material witness" who is also a prosecution witness would go beyond what the additional disclosure obligations were intended to address. After all, if a prosecution witness ("material" or otherwise) gives testimony at trial which is inconsistent with a previous statement, the Prosecution would generally be required to disclose such a statement to the Defence as part of its *Kadar* obligations, thereby placing all relevant material before the court and avoiding any injustice that could arise from such a situation. It could be argued that extending additional disclosure obligations in such a manner would unduly shift the balance away from preserving the adversarial nature of the trial process.

13 [2021] 4 SLR 719.
14 [2011] 3 SLR 1205. See *Xu Yuanchen v Public Prosecutor* [2021] 4 SLR 719 at [29].

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II. Gag orders

15.10 There has hitherto been limited jurisprudence on the court's power to impose an order under s 7(3) of the State Courts Act 1970[15] prohibiting the publication of information that might lead to the identification of witnesses, known otherwise as a "gag order". In the timely case of *Chua Yi Jin Colin v Public Prosecutor*[16] ("*Colin Chua*"), the High Court (General Division) detailed the jurisprudential basis for such an order which derogates from the principle of open justice.

15.11 *Colin Chua* involved an offender who had been convicted of charges pertaining to him filming voyeuristic videos of various women. The victims of the offences were the offender's classmates, schoolmates and friends. At the first State Courts mention, the court granted a gag order prohibiting the publication of any information that might lead to the identification of any witness in those proceedings. The gag order covered not only the victims' identities but also that of the offender. Following the offender's plea of guilt, the Prosecution applied to vary the gag order so that the offender's identity would not be covered under it, adducing evidence through victim impact statements which showed that the victims unanimously expressed support for the gag order to be so varied. This was granted by the District Judge. The offender then filed an application to the High Court (General Division), urging the court to exercise its revisionary powers to set aside the District Judge's order.

15.12 Sundaresh Menon CJ identified four issues for his determination:

(a) Did the District Judge act within his jurisdiction in varying the gag order?

(b) Were the victim impact statements used for their proper purpose? If this question was answered in the negative, what was the effect of such an irregularity?

(c) Were the victims' views towards the disclosure of an accused person's identity relevant under s 7(3) of the State Courts Act?

(d) Having regard to the relevant facts and circumstances, should the offender's identity be disclosed?

15.13 On the first issue, Menon CJ found that the District Judge acted within his jurisdiction. The court's power to make a gag order is an ancillary power intended to allow the court to carry out its processes

15 2020 Rev Ed.

16 [2021] SGHC 290.

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more effectively, and such ancillary powers can only serve their proper function if they can be amended or rescinded in the light of changing circumstances.[17] In the absence of any legislative intention to the contrary, and considering s 27(3) of the Interpretation Act,[18] a State Court's power to make gag orders under s 7(3) of the State Courts Act necessarily includes the power to amend, vary, rescind, revoke or suspend such orders.[19]

15.14 On the second issue, Menon CJ agreed that victim impact statements should be strictly confined to the sole purpose of allowing victims to convey to the court any harm that they have suffered as a direct result of an offence, and are only relevant to the Prosecution's address on sentence. The victims' stance towards the disclosure of the offender's identity should therefore have been conveyed by way of affidavits instead.[20] However, this was a mere procedural irregularity which did not occasion any failure of justice.

15.15 On the third and central issue, Menon CJ stated that gag orders are imposed solely for the protection of victims and witnesses, and never for the benefit of accused persons. As such, the *only* basis for extending the scope of a gag order to include an accused person's identity is that the disclosure of his identity would likely lead to the identification of the victims or witnesses.[21] This is because gag orders serve *facilitative* and *protective* functions of encouraging witnesses and victims to testify candidly by shielding them from the glare of public scrutiny and minimising re-victimisation by sparing victims the further trauma of unwanted public scrutiny and embarrassment. Menon CJ therefore held that the views of the victims are an undoubtedly relevant factor that must be weighed in the balance, and that the balance will ordinarily tilt in favour of disclosing the accused person's identity where the victims consent to the disclosure of an accused person's identity and to the heightened risk of their identification.[22] In fact, the continued suppression of the accused person's identity in cases where the victims are in favour of such disclosure may well compound the victims' distress, thereby undermining the very purpose of a gag order.[23]

15.16 On the facts of the case, Menon CJ had no hesitation in finding that the District Judge was entirely correct to vary the gag order to disclose the offender's identity. The victims had given unequivocal and

17 *Chua Yi Jin Colin v Public Prosecutor* [2021] SGHC 290 at [25].
18 Cap 1, 2002 Rev Ed.
19 *Chua Yi Jin Colin v Public Prosecutor* [2021] SGHC 290 at [22].
20 *Chua Yi Jin Colin v Public Prosecutor* [2021] SGHC 290 at [31].
21 *Chua Yi Jin Colin v Public Prosecutor* [2021] SGHC 290 at [36].
22 *Chua Yi Jin Colin v Public Prosecutor* [2021] SGHC 290 at [38].
23 *Chua Yi Jin Colin v Public Prosecutor* [2021] SGHC 290 at [39].

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unanimous support for the disclosure of the offender's identity, and there was no countervailing interest that outweighed the principle of open justice. Menon CJ found that the application was wholly self-serving and that the offender clearly had no genuine interest in protecting the victims, and ordered him to pay costs of $2,000 to the Prosecution.

III. Duties of defence counsel

15.17 While there has been substantial ink spilled on the important role the Prosecution plays as ministers of justice,[24] less has been said about the equally critical role of defence counsel. Defence counsel are indispensable for the proper administration of justice.[25] For that reason, the requisite standards must be rigorously enforced. A line of cases decided in 2021 illustrates the importance of this, as well as sets out the potential consequences that could befall counsel who breach their duties.

15.18 In *Miya Manik v Public Prosecutor*,[26] the applicant filed a criminal motion seeking to adduce fresh evidence to aid his appeal in the form of two medical reports prepared by a psychiatrist. The Court of Appeal held that it was patently obvious that the application was hopeless and wholly ill conceived, failing all the *Ladd v Marshall*[27] requirements,[28] and was plainly an abuse of process. The Court of Appeal emphasised that solicitors have a duty to properly instruct the experts that they appoint, and that where a solicitor files an unmeritorious application on behalf of his or her client, this may amount to professional misconduct. The fact that the accused person faces dire consequences, even a capital sentence, cannot and will not justify counsel filing ill-considered and baseless applications.[29] The Court of Appeal stated that the only reason they did not refer defence counsel to the Law Society for disciplinary action was because he made no attempt to defend the indefensible and instead apologised unreservedly when these points were put to him.[30] The Court of Appeal also stated that it would have considered making an adverse costs order against defence counsel but for the fact that the Prosecution did not apply for this.[31]

24 See, *eg*, the discussion in (2020) 21 SAL Ann Rev 486 at 486–494, paras 15.1–15.23.
25 *Syed Suhail bin Syed Zin v Public Prosecutor* [2021] 2 SLR 377 at [67].
26 [2021] 2 SLR 1169.
27 [1954] 1 WLR 1489.
28 Of non-availability, relevance and credibility.
29 *Miya Manik v Public Prosecutor* [2021] 2 SLR 1169 at [82].
30 *Miya Manik v Public Prosecutor* [2021] 2 SLR 1169 at [86].
31 *Miya Manik v Public Prosecutor* [2021] 2 SLR 1169 at [92].

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15.19 In *Wong Tian Jun De Beers v Public Prosecutor*[32] ("*De Beers*"), the appellant perpetrated a multifaceted and multi-victim scheme which was essentially a scam for free sex. He pleaded guilty to and was convicted of ten charges of cheating under s 417 of the Penal Code,[33] for which he was sentenced to an aggregate of 42 months' imprisonment and a fine of $20,000 (in default one month's imprisonment). In his subsequent appeal against sentence, the appellant, relying on both a psychiatric report and a clarificatory report prepared by a private psychiatrist, argued that insufficient mitigating weight had been attributed to his purported psychiatric condition of adjustment disorder. Sundaresh Menon CJ (sitting in the High Court (General Division) found the psychiatric evidence relied on by the appellant wholly unhelpful and to suffer from a complete lack of reliability. Pertinently, Menon CJ observed that the private psychiatrist did not appear to have inquired into the charges and statement of agreed facts, and instead accepted the appellant's self-reported account without attempting to verify or assess its veracity. Menon CJ again emphasised that expert witnesses owe a duty to the court to ensure that their evidence is reliable and fit for court use, and that failure to comply with such a duty raises serious questions not only in respect of the psychiatrist but *also* of the solicitors who may have instructed the psychiatrist and who will have considered the report before seeking to rely on it. When such evidence is rejected, the consequences may well extend beyond making an adverse costs order.[34] Solicitors, in their capacity as officers of the court, are under an obligation to ensure that the relevant material is placed before the expert when procuring an expert report,[35] which in a case like this would include the charges and statement of agreed facts. This duty to properly instruct the relevant experts, which extends to providing the experts with the relevant material as may be necessary, is a clear and continuing duty.[36]

15.20 In *Public Prosecutor v Takaaki Masui*[37] ("*Takaaki Masui*"), leave was sought by the offenders to refer several purported questions of law of public interest to the Court of Appeal. The Court of Appeal found that the applications could not conceivably have raised any question of law of public interest and were instead poorly disguised attempts to appeal against the High Court judge's findings of fact. The applications had thus been brought in abuse of process, and the offenders were each ordered to pay costs of $2,000 to the Prosecution.[38] The Court of Appeal raised the possibility of making a personal costs order under s 357(1) of the

32 [2021] SGHC 273.
33 Cap 224, 2008 Rev Ed.
34 *Wong Tian Jun De Beers v Public Prosecutor* [2021] SGHC 273 at [19].
35 *Wong Tian Jun De Beers v Public Prosecutor* [2021] SGHC 273 at [27].
36 *Wong Tian Jun De Beers v Public Prosecutor* [2021] SGHC 273 at [27].
37 [2022] 1 SLR 1033.
38 *Public Prosecutor v Takaaki Masui* [2022] 1 SLR 1033 at [61].

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Criminal Procedure Code[39] ("CPC") against counsel for the offenders for two reasons. First, the nature of applications under s 397(1) of the CPC means that applicants will likely depend heavily on their counsel to assess whether the conditions for leave to be granted have been met, and counsel are responsible for ensuring that they do not put forward a case that amounts to an abuse of process. Second, the Court of Appeal was especially troubled by the allegations that the District Judge and the High Court judge had failed to fulfil their judicial duty to give reasoned decisions and/or had extensively copied the Prosecution's closing submissions – allegations against judges, if found to be unjustified, will usually attract personal liability for counsel in the form of costs orders, as officers of the court should know better than to make such grave and reckless assertions that risk diminishing public confidence in the judicial system.[40] The Court of Appeal ultimately decided not to make a personal costs order against counsel as they candidly accepted at the hearing that the allegations against the judges were unmeritorious, but cautioned that this should not be taken to mean that counsel who make spurious allegations against judges will not have costs ordered against them personally as long as they recant those allegations.[41]

15.21 In *GCM v Public Prosecutor*,[42] cross-appeals were brought against the aggregate sentence of 24 months' imprisonment imposed following the offender's conviction on three charges under s 376A(3) of the Penal Code for sexual penetration of a minor under 14 years of age. Aedit Abdullah J noted with concern the manner in which the offender's plea in mitigation sought to cast aspersions on and shift blame onto the 13-year-old victim,[43] and made several observations regarding the manner in which the offender's counsel at first instance had conducted the defence. Specifically, counsel had made assertions which essentially blamed the victim, alluded to her supposed promiscuity and ill repute, and being the initiator of intimacy. Counsel also gratuitously included photographs in his submissions which seemed to be intended to show the sexual maturity of the victim. Cumulatively, Abdullah J found that counsel's submissions constituted a blatant and unapologetic attempt to foist responsibility and blame on the victim through character assassination.[44] He reiterated that officers of the court should always be mindful of the importance of ensuring the appropriateness and relevance of any submission that they are making, and this is especially so where such submission impugns the character or integrity of a person who is in fact the victim of the crime

39 Cap 68, 2012 Rev Ed.
40 *Public Prosecutor v Takaaki Masui* [2022] 1 SLR 1033 at [63].
41 *Public Prosecutor v Takaaki Masui* [2022] 1 SLR 1033 at [64].
42 [2021] 4 SLR 1086.
43 *GCM v Public Prosecutor* [2021] 4 SLR 1086 at [35].
44 *GCM v Public Prosecutor* [2021] 4 SLR 1086 at [93].

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in question. If an argument is scurrilous or scandalising, and/or casts aspersions about a victim without any real relevance to the accused's wrongdoing, counsel should not make any such submission.[45] Where such submissions are made, it may be appropriate for the court to impose an uplift to any sentence imposed to reflect a clear absence of remorse in attacking the victim in a scurrilous way, where it is clear that this was or must have been made upon the instructions of the accused person.[46]

15.22 Finally, in *Syed Suhail bin Syed Zin v Public Prosecutor*,[47] the Prosecution sought a personal costs order against counsel following the Court of Appeal's dismissal of a review application brought under s 394J of the CPC. The Court of Appeal found that the principles developed in the context of civil cases are of general application in determining how to exercise the power under s 357(1)(*b*) of the CPC or the court's inherent power to make a personal costs order.[48] It adopted a three-step approach in deciding whether to order personal costs:[49]

> (a) Has the legal representative of whom complaint is made acted improperly, unreasonably or negligently?
>
> (b) If so, did such conduct cause the applicant to incur unnecessary costs?
>
> (c) If so, is it in all the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?

15.23 The Court of Appeal accepted that the ultimate question must be whether it is just to make such a personal costs order, and that the categories of what constitutes "improper", "unreasonable" or "negligent" conduct are not mutually exclusive categories.[50] One situation where a personal costs order may be appropriate is where the solicitor advances a wholly disingenuous case or files utterly ill-conceived applications even though the solicitor ought to have known better and advised his client against such a course of action.[51] On the facts of the case, the Court of Appeal found that counsel had acted improperly as his conduct fell short of what is expected of reasonable defence counsel and was conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion, and that the application was brought in abuse of process.[52] The Court of Appeal further emphasised that the review application process is not an appeal, and that if counsel

45 *GCM v Public Prosecutor* [2021] 4 SLR 1086 at [96].
46 *GCM v Public Prosecutor* [2021] 4 SLR 1086 at [100].
47 [2021] 2 SLR 377.
48 *Syed Suhail bin Syed Zin v Public Prosecutor* [2021] 2 SLR 377 at [18].
49 *Syed Suhail bin Syed Zin v Public Prosecutor* [2021] 2 SLR 377 at [19].
50 *Syed Suhail bin Syed Zin v Public Prosecutor* [2021] 2 SLR 377 at [21].
51 *Syed Suhail bin Syed Zin v Public Prosecutor* [2021] 2 SLR 377 at [21].
52 *Syed Suhail bin Syed Zin v Public Prosecutor* [2021] 2 SLR 377 at [42].

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chooses to bring such an application despite its lack of merit in an attempt to stave off execution or on the off chance that it might somehow succeed, then a personal costs order is all the more appropriate.[53] In the context of a review application in particular, the requirement for the applicant's advocate to aver specifically on affidavit to the advocate's belief as to the merits of the review application underscores the principles that (a) review applications are to be exceptional; (b) the threshold for review is high; and (c) defence counsel are expected to play their part in the administration of justice by ensuring that unmeritorious applications are not brought.

EVIDENCE

IV. Admissibility of police statements in disciplinary proceedings governed by section 259(1) of the Criminal Procedure Code

15.24 In *Law Society of Singapore v Shanmugam Manohar*,[54] the court considered, for the first time, when police statements recorded for criminal proceedings are admissible in disciplinary and other non-criminal proceedings. The case turned on the interpretation of s 259(1) of the CPC – whether it governs admissibility of witness statements in criminal proceedings only[55] or applies to all proceedings generally. The court found that it applies to all proceedings generally.

15.25 Section 259(1) of the CPC provides that any police statement given by a witness is inadmissible unless it falls within the specified exceptions. The court noted the breadth of the exception in s 259(1)(*c*) of the CPC, which covers any witness statement that is made admissible "in any criminal proceeding by virtue of any other provisions in [the CPC] or the Evidence Act or any other written law". If s 259(1) was applicable only to criminal proceedings, the wide exception in s 259(1)(*c*) would render otiose the general rule of inadmissibility and the exceptions in ss 259(1)(*a*), 259(1)(*b*) and 259(1)(*e*) of the CPC. Based on the canon of statutory interpretation that Parliament does not legislate in vain, s 259(1) ought to apply to all proceedings generally.

53 *Syed Suhail bin Syed Zin v Public Prosecutor* [2021] 2 SLR 377 at [44].
54 [2022] 3 SLR 731.
55 If s 259(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) is confined to criminal proceedings, the admissibility of witness statements would be governed by the Evidence Act (Cap 97, 1997 Rev Ed), which as a general rule contemplates that all relevant evidence is generally admissible unless specifically provided otherwise: *Law Society of Singapore v Shanmugam Manohar* [2022] 3 SLR 731 at [96].

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15.26 This is in line with the purpose of s 259 of the CPC, which comprises (a) protection of accused persons from the risk of untruthful witnesses; (b) encouraging free and candid disclosure of information by witnesses to law enforcement agencies ("Disclosure Purpose"); and (c) limiting the use of information obtained from witnesses through coercive police powers ("Limitation Purpose").[56] The Disclosure Purpose is better served by assuring witnesses that their police statements will not be used in *any* court proceedings generally,[57] while the Limitation Purpose recognises that the public interest in investigating and prosecuting criminal offences is simply not applicable in the disciplinary context or in civil proceedings.[58]

15.27 The general legislative purpose of the CPC, which is to govern the conduct of criminal proceedings generally,[59] does not preclude the interpretation that s 259 of the CPC applies to all proceedings generally. This interpretation regulates the use of police statements recorded under CPC powers by limiting the use of such statements outside criminal proceedings; it does not regulate the conduct of proceedings other than criminal proceedings.[60]

15.28 Further, this interpretation of s 259 of the CPC is not inconsistent with the overarching principle under the Evidence Act[61] ("EA") that all relevant evidence is admissible unless specifically expressed to be inadmissible.[62] The starting point in determining whether a witness statement obtained by the exercise of police powers is admissible is whether any of the s 259(1) exceptions are met, and the provisions of the EA become relevant where they fall within one of those exceptions.

15.29 Where a witness statement is admissible under one of the said exceptions, the court, in criminal and disciplinary proceedings, retains a residual discretion to exclude it where its prejudicial effect exceeds its probative value.[63] The court left open the question of whether this exclusionary discretion exists in the context of civil proceedings and

56 *Law Society of Singapore v Shanmugam Manohar* [2022] 3 SLR 731 at [79], [91]–[92] and [97].
57 *Law Society of Singapore v Shanmugam Manohar* [2022] 3 SLR 731 at [94].
58 *Law Society of Singapore v Shanmugam Manohar* [2022] 3 SLR 731 at [98].
59 *Law Society of Singapore v Shanmugam Manohar* [2022] 3 SLR 731 at [106].
60 *Law Society of Singapore v Shanmugam Manohar* [2022] 3 SLR 731 at [108].
61 Cap 97, 1997 Rev Ed.
62 *Law Society of Singapore v Shanmugam Manohar* [2022] 3 SLR 731 at [116]. This overarching principle was laid down in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [124]–[126] and *Wong Keng Leong Rayney v Law Society of Singapore* [2007] 4 SLR(R) 377 at [40].
63 *Law Society of Singapore v Shanmugam Manohar* [2022] 3 SLR 731 at [120].

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whether the same balancing test (where the prejudicial effect of the evidence is weighed against its probative value) ought to apply.

15.30 Finally, the court cautioned that the practical effect of s 259 of the CPC in imposing a general rule of inadmissibility on witness statements ought not to be overstated in the legal professional disciplinary context. First, the general rule of inadmissibility in s 259(1) of the CPC is subject to the express statutory exceptions therein. More importantly, s 259 of the CPC deals only with admissibility of evidence in court proceedings and does not bar *disclosure* of information. Depending on the facts, law enforcement agencies may be able to justify disclosure of information to regulatory bodies on the basis that it is in the public interest to facilitate investigation and prosecution of professional misconduct.[64]

15.31 Once the regulatory body is in possession of the relevant information, it may commence disciplinary proceedings and construct its case in the ordinary way (by calling witnesses from whom the relevant evidence may be elicited at a disciplinary hearing).[65] Where any of the statutory exceptions in s 259(1) of the CPC apply, the witness statements in question may also be adduced.

V. Evidential burden when raising a defence in criminal cases

15.32 In *Roshdi*,[66] the Court of Appeal clarified that in raising a defence, an accused person must discharge the evidential burden of properly putting his defence into issue. This arose due to a misinterpretation of *Nabill*,[67] that is, that all the Defence had to do was make an assertion that was not inherently incredible and this, in and of itself, would suffice to shift the evidential burden to the Prosecution.

15.33 The court affirmed that *Nabill* did *not* change the established law governing the legal and evidential burdens in criminal cases.[68] The principles are as follows. Where the overall legal burden is on the Prosecution, the accused person's evidential burden is to point to evidence capable of generating a reasonable doubt.[69] If the Prosecution fails to rebut such evidence, it will necessarily fail in its overall legal burden of proving

64 *Law Society of Singapore v Shanmugam Manohar* [2022] 3 SLR 731 at [146].
65 *Law Society of Singapore v Shanmugam Manohar* [2022] 3 SLR 731 at [147].
66 See para 15.2 above.
67 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [70]–[71]. See para 15.1 above.
68 *Roshdi bin Abdullah Altway v Public Prosecutor* [2022] 1 SLR 535 at [82].
69 *Public Prosecutor v GCK* [2020] 1 SLR 486 at [145].

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the charge against the accused person beyond a reasonable doubt.[70] Conversely, where the legal burden rests on the accused person to prove certain statutory defences and exceptions to liability, the accused's burden will typically be to point to evidence capable of proving the existence of the relevant facts on the balance of probabilities.[71]

15.34 In the first instance, the evidential burden[72] may lie on either the Prosecution[73] or the Defence, depending on the nature of the defence and the fact in issue being raised. The evidential burden can shift; if one side raises credible evidence and the other side fails to engage with or rebut that, then that other side will have failed to discharge *its* evidential burden.[74] To this end, the court clarified that while *Nabill*[75] does not impose a legal duty on the Prosecution to conduct further investigations and record further statements from a material witness,[76] *if* the Prosecution chooses not to do so, it risks failing to discharge its evidential burden in respect of facts that have properly come into issue.[77]

15.35 However, if the accused person's evidence is inherently incredible, he would have failed to discharge his evidential burden of properly putting his defence into issue.[78] There would be no question of the evidential burden shifting to the Prosecution to rebut the accused person's defence simply because "a hopeless defence … raises nothing to rebut".[79]

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70 *Public Prosecutor v GCK* [2020] 1 SLR 486 at [145].
71 *Roshdi bin Abdullah Altway v Public Prosecutor* [2022] 1 SLR 535 at [80].
72 The evidential burden is to adduce sufficient evidence to raise an issue for the consideration of the trier of fact: *Public Prosecutor v GCK* [2020] 1 SLR 486 at [132].
73 Generally, the evidential burden lies on the Prosecution to adduce sufficient evidence which establishes the issue beyond reasonable doubt: *Public Prosecutor v GCK* [2020] 1 SLR 486 at [133].
74 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [69]; *Roshdi bin Abdullah Altway v Public Prosecutor* [2022] 1 SLR 535 at [77].
75 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [77].
76 *Roshdi bin Abdullah Altway v Public Prosecutor* [2022] 1 SLR 535 at [166].
77 *Roshdi bin Abdullah Altway v Public Prosecutor* [2022] 1 SLR 535 at [167].
78 *Roshdi bin Abdullah Altway v Public Prosecutor* [2022] 1 SLR 535 at [81].
79 *Gobi a/l Avedian v Public Prosecutor* [2021] 1 SLR 180 at [57(d)].

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VI. Compounded offences can be taken into account in sentencing

15.36 In a series of cases, the courts have considered the effect and relevance of various categories of a person's past conduct for the purpose of sentencing.

(a) Stern warnings, whether conditional or not, have no legal effect and are excluded from consideration in sentencing.[80]

(b) Uncharged past conduct which has a sufficient nexus to the offence before the court is relevant for sentencing, even if such past conduct could constitute a separate offence for the purpose of sentencing.[81]

(c) Charges that have been taken into consideration ("TIC") are relevant for sentencing and would generally increase the sentence for the offences proceeded with, though the court retains a discretion whether to increase the sentence.[82]

(d) Previous convictions are relevant pursuant to s 228 of the CPC, and unless there is a substantial gap in time between the previous offences and the instant one, the offender is likely to receive a heavier punishment, particularly where his previous offences and the instant one are the same or of a similar nature.[83]

15.37 *Teo Seng Tiong v Public Prosecutor*[84] concerned the relevance of another category of past conduct, that is, composition history. The five-judge *coram* of the Court of Appeal held that a compounded offence under any law can be taken into account in sentencing an offence under any

80 *Teo Seng Tiong v Public Prosecutor* [2021] 2 SLR 642 at [88], affirming *Wham Kwok Han Jolovan v Attorney-General* [2016] 1 SLR 1370; *Public Prosecutor v Raveen Balakrishnan* [2018] 5 SLR 799; and *GCO v Public Prosecutor* [2019] 3 SLR 1402.

81 *Teo Seng Tiong v Public Prosecutor* [2021] 2 SLR 642 at [92], affirming *Public Prosecutor v Bong Sim Swan Suzanna* [2020] 2 SLR 1001 and *Chua Siew Peng v Public Prosecutor* [2017] 4 SLR 1247.

82 *Teo Seng Tiong v Public Prosecutor* [2021] 2 SLR 642 at [94]–[95], affirming *Re Salwant Singh s/o Amer Singh* [2019] 5 SLR 1037.

83 *Teo Seng Tiong v Public Prosecutor* [2021] 2 SLR 642 at [97]–[98], affirming, *inter alia*, *Iskandar bin Muhamad Nordin v Public Prosecutor* [2006] 1 SLR(R) 265; *Public Prosecutor v Fernando Payagala Waduge Malitha Kumar* [2007] 2 SLR(R) 334; and *Public Prosecutor v NF* [2006] 4 SLR(R) 849.

84 [2021] 2 SLR 642.

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law.[85] Under s 228(2) of the CPC, the Prosecution's address on sentence may include compounded offences as "any relevant factors which may affect the sentence".[86]

15.38 Compounded offences are relevant because accepting a composition offer is at least a *presumptive admission of guilt* until the offender proves otherwise.[87] Composition is offered to a person reasonably suspected of having committed the offence,[88] and a person who denies committing the offence or asserts a defence would not pay the composition amount. This is particularly so in traffic offences, where accepting the composition offer would also entail accepting demerit points which go towards disqualification from driving.

15.39 Even so, the court recognised that alleged offenders accept composition for a variety of reasons. Some offences may be compounded for the sake of expedience and efficient administration.[89] Therefore, entering into a settlement agreement does not *necessarily* mean an admission of liability or guilt.[90] It is thus open to the alleged offender to adduce evidence that he accepted a composition offer for reasons other than admission of guilt.[91]

15.40 Even if the court finds that a composition offer was an admission of guilt, whether the compounded offences amount to aggravation which warrants an enhancement of the sentence will depend on their factual relevance and the time that has elapsed between the compounded offences and instant offence.[92]

VII. Enhanced sentencing jurisdiction for amalgamated offences governs eligibility for community sentences

15.41 In *Public Prosecutor v Song Hauming Oskar*,[93] the High Court (General Division) considered how to determine whether persons

85 *Teo Seng Tiong v Public Prosecutor* [2021] 2 SLR 642 at [104].
86 *Teo Seng Tiong v Public Prosecutor* [2021] 2 SLR 642 at [80].
87 *Teo Seng Tiong v Public Prosecutor* [2021] 2 SLR 642 at [67] and [101].
88 Under s 135(1) of the Road Traffic Act (Cap 276, 2004 Rev Ed), a composition is offered to "a person reasonably suspected of having committed the offence". Similarly, under ss 242(1) and 243(4) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed), the Public Prosecutor or the compounding authority may offer composition to "a person reasonably suspected of having committed the offence".
89 *Teo Seng Tiong v Public Prosecutor* [2021] 2 SLR 642 at [51] and [63].
90 *Teo Seng Tiong v Public Prosecutor* [2021] 2 SLR 642 at [51] and [62].
91 *Teo Seng Tiong v Public Prosecutor* [2021] 2 SLR 642 at [101].
92 *Teo Seng Tiong v Public Prosecutor* [2021] 2 SLR 642 at [103].
93 [2021] 5 SLR 965.

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convicted of amalgamated offences are eligible for community sentences under s 337(1)(*i*) of the CPC. Under that provision, persons convicted of offences punishable with a term of imprisonment exceeding three years are precluded from community sentences. The court held that the three-year imprisonment threshold takes reference from the maximum sentence of the amalgamated charge under s 124(8)(*a*)(ii) of the CPC[94] and not the sentence of the base offences being amalgamated.

15.42 For amalgamated charges, the term "offence" in s 337(1)(*i*) of the CPC refers to the amalgamated offence and not the base offences, which are distinct in law from the amalgamated offence. This is supported by the context of the provision, where references to the sentence of imprisonment, in lieu of which a community order is imposed or which is subsequently resurrected for the reasons stipulated in the CPC, must refer to the maximum sentence of the amalgamated charge under s 124(8)(*a*)(ii) of the CPC.[95] This flows logically from the fact that the sentencing jurisdiction of a court which convicts an accused person of an amalgamated charge is no longer confined to the maximum sentence of the base offence but is augmented under s 124(8)(*a*)(ii) of the CPC.[96]

15.43 This interpretation is in line with the legislative purposes of the community sentencing regime and the device of amalgamation.

(a) Community sentences target offences and offenders traditionally viewed to be on the rehabilitation end of the spectrum, and s 337 of the CPC filters out offences outside this scope.[97]

(b) The device of amalgamation under s 124(4) of the CPC is not merely administrative or procedural, but may be used to signal the higher *criminality* of the accused and the gravity of the course of criminal conduct.[98] The fact that an accused person committed a string of base offences, which constitute a "course of conduct" under s 124(4), is traditionally an aggravating factor; it heightens the accused's culpability and more strongly engages the consideration of deterrence.[99]

(i) Hence, it is fair for an accused convicted of an amalgamated offence to be precluded from community

94 This provides that for amalgamated charges, the court may sentence the accused to twice the punishment which the accused would have been liable for that offence.
95 *Public Prosecutor v Song Hauming Oskar* [2021] 5 SLR 965 at [58].
96 *Public Prosecutor v Song Hauming Oskar* [2021] 5 SLR 965 at [55].
97 *Public Prosecutor v Song Hauming Oskar* [2021] 5 SLR 965 at [63]–[65].
98 *Public Prosecutor v Song Hauming Oskar* [2021] 5 SLR 965 at [69].
99 *Public Prosecutor v Song Hauming Oskar* [2021] 5 SLR 965 at [70]–[71].

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orders, even if these would have been available had he inflicted the same outcome by a single offence.

(ii) Further, in some circumstances, the overall criminality of an accused facing an amalgamated charge comprising *X* number of incidents of the base offence will be higher than the overall criminality of an accused facing *X* number of separate charges of the same base offence, as an amalgamated charge requires the Prosecution to establish one or more of the factors in s 124(5) of the CPC.[100]

15.44 However, not all amalgamated charges reflect higher overall criminality,[101] and it is conceptually possible for a person facing an amalgamated offence to still be deserving of a community sentence.[102] The court thus stressed that the Prosecution must take extreme care when framing amalgamated charges so as not to inadvertently preclude a deserving offender from receiving a community sentence.[103]

SENTENCING – BENCHMARKS & SENTENCING FRAMEWORKS

15.45 The Court of Appeal has repeatedly cautioned against excessively complex or technical sentencing frameworks as these are prone to cause confusion and uncertainty, which are the very antithesis of a sound sentencing framework.[104] It is clear that sentencing benchmarks are never intended to achieve mathematically precise sentences.[105]

15.46 However, where data is available from sentencing precedents (for example, to show the percentage of prosecuted cases involving a particular level of harm), the sentencing court should not eschew using it in a sensible rationalisation of the sentencing considerations.[106] For instance, in devising a sentencing framework for income tax evasion, the High Court (General Division) in *Tan Song Cheng v Public Prosecutor*[107] considered data which showed that about 75% of the prosecuted cases involved less than $75,000 of tax being evaded. The court then used that

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100 *Public Prosecutor v Song Hauming Oskar* [2021] 5 SLR 965 at [72]–[73].
101 *Public Prosecutor v Song Hauming Oskar* [2021] 5 SLR 965 at [74].
102 *Public Prosecutor v Song Hauming Oskar* [2021] 5 SLR 965 at [89].
103 *Public Prosecutor v Song Hauming Oskar* [2021] 5 SLR 965 at [76] and [89].
104 *Public Prosecutor v Takaaki Masui* [2022] 1 SLR 1033 at [15].
105 *Public Prosecutor v Takaaki Masui* [2022] 1 SLR 1033 at [15].
106 *Tan Song Cheng v Public Prosecutor* [2021] 5 SLR 789 at [65].
107 [2021] 5 SLR 789.

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sum to draw the lowest level of its stratified three levels of harm. Even so, the court cautioned against deriving a "mathematically perfect graph" to identify a precise point for the sentencing court to arrive at in each case.[108]

VIII. Penalty under section 13(1) of the Prevention of Corruption Act should reflect value of gratification retained by recipient

15.47 In *Takaaki Masui*,[109] the Court of Appeal held that the quantum of the penalty under s 13(1) of the Prevention of Corruption Act[110] ("PCA") should take into account the amount of the gratification returned or repaid by the corrupt recipient or otherwise disgorged from him, whether voluntarily or otherwise.

15.48 There were conflicting High Court authorities on this point. In *Public Prosecutor v Marzuki bin Ahmad*[111] ("*Marzuki*"), the court held that a penalty of a sum equivalent to the gratification sum should not be imposed where the corrupt recipient has returned or repaid the gratification sum to the giver.[112] However, the High Court in the instant case considered that *Marzuki* only concerned gratification in the form of a loan of money rather than a gift, and held that where the gratification is a sum of money, the court must impose a penalty of a sum equivalent to the gratification sum and is precluded from taking into account that part or all of that gratification sum has been repaid or disgorged.[113]

15.49 The Court of Appeal disagreed with the High Court on this point. It held that s 13(1) of the PCA obliges the court to impose a penalty where the gratification is quantifiable,[114] that is, where it is either money or a non-monetary gratification which value may be assessed (for example, a car or valuable security).[115] The penalty to be paid is a sum equal to the amount of that gratification or a sum that is, in the court's opinion, the value of that gratification. As regards the value of the gratification, where

108 *Tan Song Cheng v Public Prosecutor* [2021] 5 SLR 789 at [65].
109 See para 15.20 above.
110 Cap 241, 1993 Rev Ed.
111 [2014] 4 SLR 623.
112 *Public Prosecutor v Marzuki bin Ahmad* [2014] 4 SLR 623 at [71].
113 *Takaaki Masui v Public Prosecutor* [2021] 4 SLR 160 at [326] and [336].
114 Where the gratification does not readily admit of a monetary value (*eg*, protection from disciplinary proceedings), s 13(1) of the Prevention of Corruption Act (Cap 241, 1993 Rev Ed) is inapplicable because the gratification is unquantifiable: *Public Prosecutor v Takaaki Masui* [2022] 1 SLR 1033 at [83].
115 *Public Prosecutor v Takaaki Masui* [2022] 1 SLR 1033 at [83]–[84].

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the gratification is a sum of money, and all or part of it has been repaid[116] to the principal or the giver[117] or disgorged by the State, the court should impose a penalty of a sum that reflects the value of the gratification *retained* by the recipient.[118]

15.50 This interpretation of the penalty is consistent with the legislative purpose of s 13(1) of the PCA, which is to prevent corrupt recipients of gratification, whether monetary or otherwise, from retaining their ill-gotten gains.[119] This legislative purpose can be gleaned from the text of the PCA.[120] First, s 13(1) of the PCA only targets the recipient and not the giver, though both parties would have committed an offence, respectively under ss 6(*a*) and 6(*b*) of the PCA. Second, s 13(1) of the PCA only applies where the recipient has accepted or obtained gratification, whereas s 6(*a*) of the PCA is made out by an agreement to accept or attempt to obtain gratification. Third, s 13(1) of the PCA does not have the effect of a fine; it would be unprincipled to effect further punishment on a recipient who voluntarily returns or surrenders gratification but not a recipient who does not do so, despite being more blameworthy.[121]

15.51 Reading s 13 together with s 14 of the PCA, it is clear that among the State, the principal, the giver and the recipient, it is the principal's interests that are paramount.[122] The policy of the law is to encourage a recipient to return his ill-gotten gains to his principal.[123] Therefore, a recipient who surrenders the gratification to the authorities in full will nonetheless remain liable to his principal by virtue of s 14 of the PCA, but a recipient who fully returns the gratification to his principal will not remain liable to the State for the entire sum under s 13 of the PCA. This departs from *Leong Wai Kay v Carrefour Singapore Pte Ltd*[124] to the extent that that decision suggests a recipient who repays all or part of

116 Payment of the gratification sum to a third party who is not the principal or the giver will *not* be taken into account, as the recipient would be applying the gratification to his own benefit: *Public Prosecutor v Takaaki Masui* [2022] 1 SLR 1033 at [136].
117 This only refers to genuine disgorgements. Where the repayment of the gratification sum to the giver is a ploy to perpetuate a mutually beneficial corrupt scheme, it will not be taken into consideration for the purposes of s 13(1) of the Prevention of Corruption Act (Cap 241, 1993 Rev Ed): *Public Prosecutor v Takaaki Masui* [2022] 1 SLR 1033 at [134]–[135].
118 *Public Prosecutor v Takaaki Masui* [2022] 1 SLR 1033 at [87].
119 *Public Prosecutor v Takaaki Masui* [2022] 1 SLR 1033 at [91] and [116].
120 *Public Prosecutor v Takaaki Masui* [2022] 1 SLR 1033 at [91]–[93].
121 *Public Prosecutor v Takaaki Masui* [2022] 1 SLR 1033 at [93] and [112].
122 *Public Prosecutor v Takaaki Masui* [2022] 1 SLR 1033 at [106] and [108]–[109].
123 *Public Prosecutor v Takaaki Masui* [2022] 1 SLR 1033 at [109] and [122].
124 [2007] 3 SLR(R) 78.

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the gratification to the principal *before* the court imposes a penalty will remain liable to pay a penalty for the full amount of the gratification.[125]

15.52 The relevant cut-off point when examining if any part of the gratification sum has been repaid or disgorged is the time when the penalty is *first* imposed, whether at trial or on appeal.[126] The criminal courts will not take into account any restitution made *after* the imposition of the penalty.

15.53 The recipient will also have to pay a penalty for the benefit accrued to him by his ability to use the gratification sum from the time of receipt to the time of disgorgement or repayment.[127] This gratification will be treated as a loan rather than a gift, a loan and gift having different values to their recipient.[128] The benefit to the recipient can be quantified by treating the gratification sum as though it was placed in a fixed deposit for 12 months and calculating the interest payable for the relevant period based on a suitable per annum interest rate, or by adopting another method that would not further penalise the recipient.[129]

15.54 Separately, the Court of Appeal also did not endorse the sentencing framework formulated by the High Court for offences under ss 6(*a*) and 6(*b*) of the PCA.[130] While the High Court had formulated an elaborate three-dimensional sentencing framework for such offences, the Court of Appeal noted that its complexity made it likely to be of little assistance to sentencing courts.

IX. Sentencing framework for cheating to procure sex and other sexual acts

15.55 *De Beers*[131] concerned an accused person who had notoriously perpetrated a scam by claiming to act as a "freelance agent" to procure "sugar babes" for "sugar daddies", to procure sex for his own gratification. Menon CJ, sitting in the High Court (General Division), observed that the harm caused by the accused was at the very highest end of the harm which might arise under s 417 of the Penal Code.[132] While cheating is normally thought of as a property offence, cheating in this context

125 *Public Prosecutor v Takaaki Masui* [2022] 1 SLR 1033 at [125].
126 *Public Prosecutor v Takaaki Masui* [2022] 1 SLR 1033 at [127].
127 *Public Prosecutor v Takaaki Masui* [2022] 1 SLR 1033 at [119] and [122].
128 *Public Prosecutor v Takaaki Masui* [2022] 1 SLR 1033 at [86], [122] and [132].
129 *Public Prosecutor v Takaaki Masui* [2022] 1 SLR 1033 at [119] and [132].
130 *Public Prosecutor v Takaaki Masui* [2022] 1 SLR 1033 at [15].
131 See para 15.19 above.
132 *Wong Tian Jun De Beers v Public Prosecutor* [2021] SGHC 273 at [3].

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violated not property rights but bodily integrity, within which violation of sexual integrity must rank at a particularly high level of odium and gravity, wholly incommensurable with mere loss of property.[133]

15.56 To reflect the seriousness of such cases within the constraints of s 417 of the Penal Code, the court laid down a sentencing framework for cheating to procure sex and other sexual acts. A harm–culpability matrix was adopted given (a) the more narrow and constrained forms of this particular species of the offence; and (b) the fact that the harm engendered can fall at the very highest and most intrusive end of the spectrum depending on the nature of the relevant sexual acts.[134]

15.57 The court laid down[135] the following indicative starting points[136] in sentencing offenders convicted after trial:[137]

Harm \ **Culpability**	**Low**	**Medium**	**High**
Low	Fine or up to 4.5 months' imprisonment	4.5–9 months' imprisonment	9–18 months' imprisonment
Medium	4.5–9 months' imprisonment	9–18 months' imprisonment	18–27 months' imprisonment
High	9–18 months' imprisonment	18–27 months' imprisonment	27–36 months' imprisonment

15.58 Beyond the nuances in determining the indicative starting points, the precise sentences imposed for each charge will depend on the specific *acts* each charge entails and all relevant aggravating and mitigating factors applicable to each charge.[138] Aggravating factors include:

133 *Wong Tian Jun De Beers v Public Prosecutor* [2021] SGHC 273 at [3] and [39].
134 *Wong Tian Jun De Beers v Public Prosecutor* [2021] SGHC 273 at [38].
135 *Wong Tian Jun De Beers v Public Prosecutor* [2021] SGHC 273 at [40].
136 The court emphasised that these are merely *starting points* and should not ossify into a rule that is unthinkingly applied: *Wong Tian Jun De Beers v Public Prosecutor* [2021] SGHC 273 at [41].
137 While these starting points apply to offenders who have claimed trial, there is no general rule that pleading guilty entitles an offender to a discount of one third off his sentence, especially where the offender pleads guilty when the "game was up" and there would be no difficulty proving his guilt: *Wong Tian Jun De Beers v Public Prosecutor* [2021] SGHC 273 at [41] and [49(e)].
138 *Wong Tian Jun De Beers v Public Prosecutor* [2021] SGHC 273 at [46].

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(a) presence of planning and premeditation;[139]

(b) vulnerability of the victims: the reluctance of victims to come forward because of the stigma of being cheated and sexually exploited in the context of responding to an advertisement soliciting a sexual relationship renders them vulnerable; and the ability to exercise independent thought is not a bar to being vulnerable; and[140]

(c) psychiatric harm caused to the victim.[141]

X. Sentencing frameworks for reckless or dangerous driving under section 64(2C)(*a*) read with section 64(2C)(*c*) of the Road Traffic Act, and drink driving

15.59 Through the Road Traffic (Amendment) Act 2019[142] ("Amendment Act"), Parliament intended to deter acts of reckless or dangerous driving and drink driving, reduce the "deadly consequences" of such acts and "make our roads safer".[143] The 2019 amendments thus introduced a new scheme of tiered penalties[144] for reckless or dangerous driving calibrated according to the degree of hurt caused, and enhanced the penalties for drink driving.

15.60 In view of the Amendment Act, the High Court (General Division) in *Wu Zhi Yong v Public Prosecutor*[145] found it apposite to revisit the sentencing frameworks for reckless or dangerous driving under s 64 of the Road Traffic Act[146] ("RTA") and drink driving under s 67(1)(*b*) of the RTA. As the punishment provisions under s 64 of the RTA differ based on the harm caused, the High Court emphasised that its sentencing framework is confined to offences under s 64(2C)(*a*) read with s 64(2C)(*c*).[147]

139 *Wong Tian Jun De Beers v Public Prosecutor* [2021] SGHC 273 at [49(a)].
140 *Wong Tian Jun De Beers v Public Prosecutor* [2021] SGHC 273 at [49(b)].
141 *Wong Tian Jun De Beers v Public Prosecutor* [2021] SGHC 273 at [49(c)].
142 Act 19 of 2019.
143 *Singapore Parliamentary Debates, Official Report* (8 July 2019), vol 94 "Second Reading Bill: Road Traffic (Amendment) Bill" (Josephine Teo, Minister for Manpower and Second Minister for Home Affairs).
144 Under ss 64(2)–64(2C) of the Road Traffic Act 1961 (2020 Rev Ed).
145 [2021] SGHC 261.
146 Cap 276, 2004 Rev Ed.
147 *Wu Zhi Yong v Public Prosecutor* [2021] SGHC 261 at [20] and [29]. The sentencing framework also does not apply where the offender is a "repeat offender" or "serious repeat offender" (s 64(2C)(*a*) or 64(2C)(*b*) read with s 64(2C)(*d*) of the Road Traffic Act (Cap 276, 2004 Rev Ed)): *Wu Zhi Yong v Public Prosecutor* [2021] SGHC 261 at [47].

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15.61 The punishment under s 64(2C)(*a*) read with s 64(2C)(*c*) should be calibrated as a whole to reflect that the gravity of the compound offence of driving recklessly or dangerously while under the influence of drink is greater than the sum of its component parts.[148] This can be seen from s 64(2C)(*c*), where a serious offender is liable to additional punishment *on top of* that under s 64(2C)(*a*), with a compounded effect of at least 40% (and up to two times) of the maximum fine under the basic offence, or up to the full imprisonment term or both. The sheer severity of this additional punishment suggests that the extent of drink driving is a necessary and significant consideration for sentencing under s 64(2C)(*c*).[149]

15.62 The court then laid down the modified "sentencing bands" approach.

(a) At the first step, the court identifies the applicable band and the indicative starting point, having regard to offence-specific factors. Offence-specific aggravating factors include:[150]

(i) serious potential harm, assessed against circumstances of driving that could increase the danger to road users;

(ii) serious property damage;

(iii) high alcohol level in the accused's blood or breath. This factor is of particular importance;[151]

(iv) an offender's reason or motivation for driving;[152]

(v) increased culpability, including a particularly dangerous manner of driving; and

(vi) belligerent or violent conduct upon arrest, and failure to stop to evade arrest.

148 *Wu Zhi Yong v Public Prosecutor* [2021] SGHC 261 at [32] and [38].
149 *Wu Zhi Yong v Public Prosecutor* [2021] SGHC 261 at [34].
150 *Wu Zhi Yong v Public Prosecutor* [2021] SGHC 261 at [36].
151 *Wu Zhi Yong v Public Prosecutor* [2021] SGHC 261 at [37] and [49].
152 Depending on the circumstances, this could be aggravating or mitigating.

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The bands are as follows:[153]

Band	Factors	Indicative starting point[154]
1	• Limited actual harm • No or limited offence-specific aggravating factors • Blood alcohol level in lowest or second lowest band in the framework in *Rafael Voltaire Alzate v Public Prosecutor*[155] ("*Rafael*")	• $2,000–$15,000 fine (generally, fines are appropriate only for offences at the lowest end of Band 1);[156] and/or • Up to 1 month's imprisonment; and • 2–3 years' disqualification period ("DQ")
2	• Two or more offence-specific aggravating factors • Level of culpability and blood alcohol level typically both on the higher side • Case will be *at least* within Band 2 where blood alcohol level is in the highest or second highest band in the *Rafael* framework	• 1 month's–1 year's imprisonment; and • 3–4 years' DQ
3	• Multiple aggravating factors suggesting higher levels of culpability and higher alcohol levels	• 1–2 years' imprisonment; and • 4–5 years' DQ

(b) At the second step, the court calibrates the sentence from the starting point by considering offender-specific factors.[157] Such factors include the serious offender provision in s 64(2C)(*c*) of the RTA and other aggravating and mitigating factors personal to the offender.

153 *Wu Zhi Yong v Public Prosecutor* [2021] SGHC 261 at [39]–[44].
154 Where the facts that are so unusual that a sentencing point outside the prescribed band should be adopted, the court should provide reasons for departing from the sentencing range: *Wu Zhi Yong v Public Prosecutor* [2021] SGHC 261 at [46].
155 [2022] 3 SLR 993 at [31].
156 *Wu Zhi Yong v Public Prosecutor* [2021] SGHC 261 at [45].
157 *Wu Zhi Yong v Public Prosecutor* [2021] SGHC 261 at [30] and [48].

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15.63 The court also affirmed the *Rafael* sentencing framework for drink driving offences under s 67(1)(*b*) of the RTA.[158]

15.64 The court then held that where an offender is convicted of separate offences under ss 64 and 67 of the RTA, and the serious offender provision in s 64(2C)(*c*) applies, the general rule is that the sentences under ss 64 and 67 should run *concurrently* in so far as any term of imprisonment or DQ is concerned.[159] This is because (a) the serious offender provision would only apply when the facts engaged by both charges bear co-relation to each other; and (b) the punishment for the offence of dangerous or reckless driving would already have been enhanced on account of the serious offender provision by a range similar to that applicable under s 67.[160] A person ought not to be punished twice for the same act, and there should be no double counting of factors in sentencing.[161]

XI. Sentencing framework for tax evasion under section 96 of the Income Tax Act

15.65 In *Tan Song Cheng v Public Prosecutor*,[162] the court promulgated a sentencing framework for offences under s 96(1) of the Income Tax Act[163] ("ITA"). At the first step, the court identifies the fact-specific level of harm caused and the offender's culpability, based on offence-specific factors which include:[164]

158 *Wu Zhi Yong v Public Prosecutor* [2021] SGHC 261 at [50]–[54].
159 *Wu Zhi Yong v Public Prosecutor* [2021] SGHC 261 at [56].
160 *Wu Zhi Yong v Public Prosecutor* [2021] SGHC 261 at [56]–[57].
161 *Wu Zhi Yong v Public Prosecutor* [2021] SGHC 261 at [58]–[62].
162 See para 15.46 above.
163 Cap 134, 2008 Rev Ed.
164 *Tan Song Cheng v Public Prosecutor* [2021] 5 SLR 789 at [39] and [48].

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Factors going to harm[165]	Factors going to culpability[166]
(a) Amount of income tax evaded – as the harm caused to the State is measurable according to the single metric of the amount of income tax evaded, this is the *primary*, albeit not sole, determinant of the harm[167] Other factors will be considered to adjust the severity of the harm caused: (b) Involvement of a syndicate (c) Involvement of a transnational element	(a) Degree of planning and premeditation (b) Sophistication of systems and methods used to evade income tax or avoid detection (c) Sustained period of offending (d) Offender's role in criminal syndicate (e) Abuse of position and breach of trust

15.66 At the second step, the court identifies the applicable indicative sentencing range based on the table below[168] (applicable to offenders who claim trial);[169] and at the third step identifies the appropriate starting point within that range, having re-examined the offence-specific factors.

Harm[170] / Culpability	Level 1 (below $75,000 evaded)	Level 2 ($75,000–$150,000 evaded)	Level 3 (above $150,000 evaded)
Low	Fine[171] or up to 6 months' imprisonment (custodial sentence is generally the norm)	6–12 months' imprisonment	12–18 months' imprisonment
Medium	6–12 months' imprisonment	12–18 months' imprisonment	18–24 months' imprisonment
High	12–18 months' imprisonment	18–24 months' imprisonment	24–36 months' imprisonment

165 *Tan Song Cheng v Public Prosecutor* [2021] 5 SLR 789 at [40]–[48].
166 *Tan Song Cheng v Public Prosecutor* [2021] 5 SLR 789 at [49]–[53].
167 *Tan Song Cheng v Public Prosecutor* [2021] 5 SLR 789 at [42], [68] and [70].
168 *Tan Song Cheng v Public Prosecutor* [2021] 5 SLR 789 at [71].
169 *Tan Song Cheng v Public Prosecutor* [2021] 5 SLR 789 at [58].
170 As the average income of the population changes with time, the various stratified levels of harm set out in the sentencing framework may have to be revisited from time to time: *Tan Song Cheng v Public Prosecutor* [2021] 5 SLR 789 at [70].
171 A fine may be imposed where the where the deterrent effect of the fine would not be eclipsed by the imposition of the mandatory treble penalty, *eg*, where the amount of tax evaded is in the lower range: *Tan Song Cheng v Public Prosecutor* [2021] 5 SLR 789 at [73].

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15.67 At the fourth step, the court adjusts the starting point based on the offender-specific aggravating and mitigating factors, including:

Aggravating factors	Mitigating factors
(a) TIC charges – court must consider the total amount of tax evaded in both the proceeded and TIC charges[172] (b) Relevant antecedents (c) Evident lack of remorse	(a) A guilty plea – this may have little or no weight, given the presumption in s 96(3) of the ITA and the "paper trail"[173] (b) Voluntary restitution (c) Co-operation with the authorities

15.68 At the fifth step, the court adjusts the sentence on account of the totality principle.

XII. Sentencing principles for furnishing false information under section 177 of the Penal Code

15.69 In *Public Prosecutor v Chua Wen Hao*,[174] the court elucidated principles for sentencing offences under s 177 of the Penal Code. To determine whether the threshold for imposing a custodial term had been crossed, the principles for sentencing for an offence under s 182 of the Penal Code apply with equal force. As a starting point, if appreciable harm may be caused by the offence, a custodial term should be imposed.[175] Other relevant sentencing factors should then be considered to determine: (a) whether the starting point should be departed from; and (b) the appropriate quantum of fine and/or length of imprisonment.[176]

15.70 The factors relevant to a sentence for an offence under s 177 of the Penal Code include:[177]

(a) *Offence-specific factors*: (i) complexity of deceptive scheme employed to deceive the public servant (including planning and premeditation); (ii) seriousness of predicate offence sought to be concealed; (iii) extent to which public resources were wasted because of false information; and (iv) offender's

172 *Tan Song Cheng v Public Prosecutor* [2021] 5 SLR 789 at [76].
173 *Tan Song Cheng v Public Prosecutor* [2021] 5 SLR 789 at [55].
174 [2021] 4 SLR 766.
175 *Public Prosecutor v Chua Wen Hao* [2021] 4 SLR 766 at [37].
176 *Public Prosecutor v Chua Wen Hao* [2021] 4 SLR 766 at [37].
177 *Public Prosecutor v Chua Wen Hao* [2021] 4 SLR 766 at [45].

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culpability (including motive, whereby shielding oneself is more aggravating than shielding *another* from investigation).[178]

(b) *Offender-specific factors*: (i) offender's antecedents; (ii) plea of guilt; and (iii) TIC charges.

15.71 Even where deterrence is the principal sentencing consideration, as is the case for offences under s 177 of the Penal Code, a fine may have a sufficient and effective deterrent effect where it is fixed at a sufficiently high quantum.[179] Deterrence must be applied with due regard for proportionality between the gravity of the offender's conduct and the punishment imposed.[180]

XIII. Sentencing framework for breach of remission orders and mandatory aftercare conditions

15.72 All ex-inmates released from prison are placed on the Conditional Remission System, ("CRS"). The conditions of the remission order include not to commit fresh offences while the remission order is in effect.[181] Under s 50T of the Prisons Act 1933,[182] offenders convicted of fresh offences may be punished with an enhanced sentence in addition to the underlying sentences for the fresh offences.

15.73 High-risk ex-inmates may also be placed on the Mandatory Aftercare Scheme and subject to mandatory aftercare conditions ("MAC"). If they commit a serious breach of a MAC, they may be convicted of a distinct offence under s 50Y of the Prisons Act and shall be sentenced to imprisonment.[183]

15.74 In *Abdul Mutalib bin Aziman v Public Prosecutor*,[184] the three-judge *coram* of the High Court considered the sentencing framework for offences under ss 50T and 50Y of the Prisons Act. The court noted the unique nature of ss 50T and 50Y of the Prisons Act, as factors relevant to these sentences take reference from the original offences for which the offender was granted remission.

178 *Public Prosecutor v Chua Wen Hao* [2021] 4 SLR 766 at [46(c)].
179 *Public Prosecutor v Chua Wen Hao* [2021] 4 SLR 766 at [47].
180 *Public Prosecutor v Chua Wen Hao* [2021] 4 SLR 766 at [48].
181 Prisons Act 1933 (2020 Rev Ed) s 50S(1)(*a*).
182 2020 Rev Ed.
183 The imposition of an imprisonment term for an offence under s 50Y of the Prisons Act 1933 (2020 Rev Ed) is mandatory: *Abdul Mutalib bin Aziman v Public Prosecutor* [2021] 4 SLR 1220 at [31].
184 [2021] 4 SLR 1220.

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15.75 The court then laid down a sentencing band framework[185] as follows:[186]

Band	Degree of severity of fresh offence or MAC breach	Sentencing range (based on remaining duration of remission order)
1	Low	Up to ⅓
2	Moderate	⅓ to ⅔
3	High	⅔ to the full remaining duration

15.76 To determine the band, the court will consider the factors in ss 50T(3) and 50Y(2) of the Prisons Act:

(a) *The gravity of the fresh or s 50Y offence committed while on remission*:

(i) This is a significant factor as it is a proxy indicator of the harm caused by the offender's failure to realise the promise of rehabilitation and reintegration.[187]

(ii) For s 50T offences, the gravity of the fresh offence may be gleaned from, among other things, the underlying sentence for that offence. Further, unless the case is exceptional, the enhanced sentence should not exceed the underlying sentence for the fresh offence.[188]

(b) *The offender's rehabilitative prospects*:[189]

(i) The smaller the time lapse between the offender's release from prison and his fresh or section 50Y offence, the greater the severity.

(ii) For s 50T offences, similarity between the fresh offence and the original offence increases the severity. However, the converse does not follow, as the rationale of CRS is to deter offenders from committing offences in general. Where multiple original offences are concerned, the court should consider the remaining duration of the

185 This framework does not apply to offenders whose original offences entail a sentence of *life imprisonment*: *Abdul Mutalib bin Aziman v Public Prosecutor* [2021] 4 SLR 1220 at [43].
186 *Abdul Mutalib bin Aziman v Public Prosecutor* [2021] 4 SLR 1220 at [47].
187 *Abdul Mutalib bin Aziman v Public Prosecutor* [2021] 4 SLR 1220 at [54].
188 *Abdul Mutalib bin Aziman v Public Prosecutor* [2021] 4 SLR 1220 at [55].
189 *Abdul Mutalib bin Aziman v Public Prosecutor* [2021] 4 SLR 1220 at [57]–[63].

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remission period of all the original offences, regardless of their similarity to the fresh offence.

(iii) The court must consider the totality of the circumstances in assessing the offender's rehabilitative prospects, including the offender's lack of commitment to rehabilitation and reintegration.

(c) *All other relevant circumstances*:[190]

(i) For s 50Y offences, a plea of guilty will have little weight as the offender will be inevitably caught "red-handed".

(ii) For s 50T offences, aggravating or mitigating circumstances of the fresh offence which are considered in that offence's underlying sentence should not be double counted in the enhanced sentence under s 50T.

15.77 Having regard again to the factors in ss 50T(3) and 50Y(2) of the Prisons Act, the court identifies the appropriate degree of severity within a particular sentencing band to arrive at a fraction or percentage of the remaining duration of the remission order.[191] For s 50T offences, while the court has a discretion to impose an enhanced sentence, where the fresh offence is more than *de minimis*, an enhanced sentence should generally be imposed.[192] The questions of *whether* an enhanced sentence should be imposed, and if so, *how long* that sentence should be, may be assessed in the round.

15.78 The (aggregate of) any enhanced sentence under s 50T or 50Y must not exceed the remaining duration of the remission order at the time of the (earliest) fresh offence or s 50Y offence, as the case may be.[193] Further, the *cumulative* sentence imposed under ss 50T and 50Y of the Prisons Act must not exceed the remaining duration of the remission order at the time of the offender's earliest offence.[194]

15.79 In view of this outer limit to the cumulative sentence, the court should first determine the appropriate enhanced sentence for the s 50Y offences (as these carry mandatory imprisonment terms). The court should then consider the appropriate enhanced sentence under s 50T for the most to the least serious of the fresh offences. Once the whole

190 *Abdul Mutalib bin Aziman v Public Prosecutor* [2021] 4 SLR 1220 at [64]–[67].
191 *Abdul Mutalib bin Aziman v Public Prosecutor* [2021] 4 SLR 1220 at [48].
192 *Abdul Mutalib bin Aziman v Public Prosecutor* [2021] 4 SLR 1220 at [51].
193 Prisons Act 1933 (2020 Rev Ed) ss 50T(1)(*a*) and 50T(2)(*b*); see also ss 50Y(1)(*a*) and 50Y(3)(*b*).
194 *Abdul Mutalib bin Aziman v Public Prosecutor* [2021] 4 SLR 1220 at [75]–[76].

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remaining duration of the remission order is rescinded, there is no need to further analyse the appropriate enhanced sentence for the remaining offences.[195] The court should make clear that no enhanced sentences were imposed for these remaining offences because the maximum duration of the enhanced sentence(s) that could be imposed had already been reached.

15.80 Finally, the court adjusts the sentence by applying the totality principle. However, the first limb of the principle[196] has a limited role, if any, in the sentencing process under ss 50T and 50Y, as the statutory framework has built-in constraints of proportionality.[197] The second limb of the principle[198] has a role in the sentencing process, and the court should consider both the underlying sentences for the fresh offences and the enhanced sentences in this determination.

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195 *Abdul Mutalib bin Aziman v Public Prosecutor* [2021] 4 SLR 1220 at [78]–[79].
196 The aggregate sentence should not be substantially above the normal level of sentences for the most serious of the individual offences committed.
197 *Abdul Mutalib bin Aziman v Public Prosecutor* [2021] 4 SLR 1220 at [83]–[85].
198 The aggregate sentence should not be crushing and should be in keeping with the offender's past record future prospects.

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