14. CRIMINAL PROCEDURE, EVIDENCE AND SENTENCING

MOHAMED FAIZAL Mohamed Abdul Kadir
LLB (Hons) (National University of Singapore), LLM (Harvard);
Attorney and Counsellor-at-law (New York);
Deputy Chief Prosecutor and Senior State Counsel, Criminal Justice Division, Attorney-General's Chambers.

WONG Woon Kwong
LLB (Hons) (National University of Singapore);
Advocate and Solicitor (Singapore);
Director and Deputy Senior State Counsel, Criminal Justice Division, Attorney-General's Chambers.

Sarah **SHI**
BA (Oxon) (Hons), BCL (Oxon);
Advocate and Solicitor (Singapore);
Deputy Public Prosecutor and Deputy Senior State Counsel, Criminal Justice Division, Attorney-General's Chambers.

CRIMINAL PROCEDURE

Interplay between substantive justice and procedural requirements

14.1 It is often said that procedural laws and requirements are "ultimately handmaidens to help us achieve the ultimate and only objective of achieving justice as best we can in every case" and that consequently, they will not be allowed to "rule us to such an extent such that an injustice is done".[1] Three cases in 2017 provide an insight on how the courts weigh the interests of substantive and procedural justice to strike this balance and to determine the appropriate case-specific remedy.

14.2 In the first case, *Public Prosecutor v Ong Say Kiat*[2] ("*Ong Say Kiat*"), the court dispensed with certain procedural requirements in the interests of substantive justice. In *Ong Say Kiat*, the Prosecution had initially filed a criminal revision to persuade the court to set aside the respondent's sentence of corrective training ("CT") that had been imposed some three years prior. This was in the light of the decision of

1 *Lea Tool and Moulding Industries Pte Ltd v CGU International Insurance plc* [2000] 3 SLR(R) 745 at [16].
2 [2017] 5 SLR 946.

Sim Yeow Kee v Public Prosecutor[3] ("*Sim Yeow Kee*"), which was decided about 21 months after the respondent had been sentenced. Pursuant to the framework laid down in *Sim Yeow Kee*, the sentence of CT that was imposed on the respondent appeared to be unduly disproportionate.

14.3 However, Sundaresh Menon CJ found that criminal revision was not the correct procedure, for two reasons. First, the threshold for revision was not met, as *Sim Yeow Kee* represented a change in the law and there was no serious injustice at the time the respondent was sentenced.[4] Secondly, s 400(2) of the Criminal Procedure Code[5] ("CPC") appeared to preclude the exercise of revisionary jurisdiction.[6] The High Court thus granted the Prosecution leave to withdraw the application for criminal revision.

14.4 While the threshold for revisionary jurisdiction would not have been met, there were ample grounds for appellate intervention. In order for substantive justice to be done, Menon CJ granted the respondent leave to appeal out of time. The Prosecution also stated that it did not object to the respondent filing an appeal out of time. As no formal papers were filed, the High Court made a further order under s 380 of the CPC to dispense with the procedural requirements in the CPC to file a notice of appeal, petition of appeal, and any written submissions that might ordinarily be filed.[7] The High Court then treated the appeal as having been heard and allowed it, setting aside the sentence of CT and imposing a term of imprisonment of time already served.

14.5 While the original vehicle of criminal revision was not the proper procedure to facilitate an appropriate outcome in line with the needs of justice in the case, the court exercised its power to trigger its appellate jurisdiction, including dispensing with certain procedural requirements under s 380 of the CPC in the interests of justice.

14.6 This does not mean that the courts will always waive such procedural requirements. Indeed, where the interests of substantive justice do not form a countervailing weight against procedural impropriety, the courts will be slow to dispense with procedural requirements, as it would not countenance an abuse of process. This point came to fore in the second case, *Chew Eng Han v Public Prosecutor*[8] ("*Chew Eng Han*"), where the Court of Appeal found that

3 [2016] 5 SLR 936; see also discussion in (2016) 17 SAL Ann Rev 382 at 418–419, paras 14.93–14.96.
4 *Public Prosecutor v Ong Say Kiat* [2017] 5 SLR 946 at [22]–[23].
5 Cap 68, 2012 Rev Ed.
6 *Public Prosecutor v Ong Say Kiat* [2017] 5 SLR 946 at [25]–[26].
7 *Public Prosecutor v Ong Say Kiat* [2017] 5 SLR 946 at [41]–[49].
8 [2017] 2 SLR 935.

there was no countervailing interest of substantive justice that required the dispensation of procedural requirements. The applicant in that case had made a second application for a criminal reference out of time, after his first application had been heard and dismissed in its entirety.

14.7 The second application was filed out of time, and contained allegations that the three-judge *coram* of the High Court which heard his appeal against conviction and sentence was unconstitutional.

14.8 Writing on behalf of the Court of Appeal, Andrew Phang Boon Leong JA observed that the unwarranted delay in filing his second application alone would have warranted a dismissal of his application.[9] Further, the applicant ought to have consolidated his questions in the first and second applications into a single application. The drip-feed questions through multiple applications were similarly an abuse of process that could not be countenanced.[10] The second application was consequently dismissed.

14.9 *Chew Eng Han* demonstrates that where the failure to adhere to the stipulated procedure is irremediable, this may in itself result in the application being dismissed. In considering whether to dismiss procedurally irregular applications, *Chew Eng Han* suggests that the court will determine whether the ends of substantive justice are being served by the application. Where there is none, this will weigh in favour of the dismissal of the application.

14.10 The third and final case, *Oon Heng Lye v Public Prosecutor*[11] ("*Oon Heng Lye*"), illustrates that where there is no countervailing interest of substantive justice in rectifying a procedurally defective order, an order will be allowed to stand as the revisionary threshold is not met. In *Oon Heng Lye*, while the forfeiture order bore procedural defects (the petitioner was not given the right to be heard, and the court had no power of forfeiture), the petitioner admitted that the property seized were the proceeds of a crime. In that case, while there was a procedural irregularity in the forfeiture order, this did not rise to a grave and serious injustice, and the forfeiture order was upheld as the court's revisionary power was not engaged.[12]

9 *Chew Eng Han v Public Prosecutor* [2017] 2 SLR 935 at [2].
10 *Chew Eng Han v Public Prosecutor* [2017] 2 SLR 935 at [3]–[4].
11 [2017] 5 SLR 1064.
12 In any event, there was no basis for reversing the forfeiture order, as the seized funds would have vested in the State, albeit pursuant to s 393(2) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed).

14.11 In *Oon Heng Lye*, the petitioner filed a criminal revision to quash a forfeiture order by a magistrate directing that moneys seized from him be forfeited to the State. These moneys were seized following the petitioner's arrest on suspicion of operating a business of unlicensed moneylending. While the petitioner was detained under the Criminal Law (Temporary Provisions) Act,[13] the police applied for the seized funds to be forfeited to the State pursuant to s 392 of the 1985 edition of the Criminal Procedure Code[14] ("CPC 1985"). The petitioner was not thereafter charged with any offence relating to unlicensed moneylending.

14.12 Menon CJ found that the forfeiture order was wrong in law for two reasons:

> (a) The petitioner had a right to be heard under s 392 of the CPC 1985, and there was a requirement of notification.[15] However, the petitioner had been denied the right to be heard, and the requirement of notification was not met.
>
> (b) The magistrate had no power under s 392(1) of the CPC 1985 to forfeit the seized funds.[16]

14.13 However, these errors did not lead to a grave and serious injustice which warranted the exercise of revisionary powers, as the petitioner had no *lawful* entitlement to the moneys. The court held that reading s 392 of the CPC 1985 in context, and considering s 393(1) of the CPC 1985 in particular, a person is only "entitled to the possession" of seized property if he is in lawful possession of the seized property.[17]

14.14 While the petitioner had not been convicted of any offence, it was wrong to assume *ipso facto* that he was in lawful possession of the seized property.[18] As the petitioner had admitted that the seized property was the proceeds of a crime in his statements, his possession cannot be regarded as lawful.[19] It had been established beyond a reasonable doubt that the seized funds were the proceeds of the petitioner's unlicensed moneylending activities and the errors in the forfeiture order thus occasioned no substantial injustice to him.[20]

13 Cap 67, 2000 Rev Ed.
14 Cap 68, 1985 Rev Ed.
15 *Oon Heng Lye v Public Prosecutor* [2017] 5 SLR 1064 at [24]–[28] and [31]–[32].
16 *Oon Heng Lye v Public Prosecutor* [2017] 5 SLR 1064 at [38]–[41].
17 *Oon Heng Lye v Public Prosecutor* [2017] 5 SLR 1064 at [45]–[47].
18 *Oon Heng Lye v Public Prosecutor* [2017] 5 SLR 1064 at [48].
19 *Oon Heng Lye v Public Prosecutor* [2017] 5 SLR 1064 at [49].
20 *Oon Heng Lye v Public Prosecutor* [2017] 5 SLR 1064 at [55].

Use of accused persons' and co-accused persons' statements in trial

14.15 The use of an accused person's statements at trial to prove guilt, a matter that has been said to be a "complex and problem-fraught area in a legislative framework that itself is viewed by most commentators as having become overly technical",[21] continues to be the subject of multiple strands of jurisprudential development in 2017.

14.16 In *Public Prosecutor v Tan Lye Heng*[22] ("*Tan Lye Heng*"), the High Court found that the trial judge has a discretion and a duty to reconsider its decision to admit a statement following a *voir dire*, if further or new evidence arises in the main trial, where this evidence is not tenuous.

14.17 The trial judge in *Tan Lye Heng* initially admitted the accused's statements following a *voir dire*. These statements contained the accused's admissions that the drugs belonged to him and were intended for sale or repacking. However, at the end of the proceedings, the district judge reversed his decision to admit the offender's statements. The district judge then acquitted the offender of a charge of trafficking in diamorphine.

14.18 On appeal, the High Court held that the trial judge erred in reversing his decision to admit the statements. The court then admitted the statements and reversed the acquittal. Steven Chong JA held that where a trial judge decides to admit a statement after a *voir dire*, he has a discretion and duty throughout the trial to reconsider this decision if further or new evidence emerges in the main trial that raises doubt about the voluntariness of the statement.[23] This is the position under ss 279(7) and 279(8) of the CPC. If there is such evidence, which is not tenuous, the trial judge has the discretion to disregard the statement that was earlier admitted.[24]

14.19 The appellate court will apply the following test to determine whether the trial judge's discretion is rightly exercised:[25] firstly, to examine what is the alleged operative threat, inducement, promise or oppression; secondly, to consider the trial judge's initial reasons for admitting the statements; thirdly, to consider the trial judge's reasons for his reversal; and finally, to examine what *further evidence* was raised at the main trial that was not raised during the *voir dire*.

---

21 (2015) 16 SAL Ann Rev 396 at 422, para 14.60.
22 [2017] 5 SLR 564.
23 *Public Prosecutor v Tan Lye Heng* [2017] 5 SLR 564 at [24].
24 *Public Prosecutor v Tan Lye Heng* [2017] 5 SLR 564 at [29] and [36].
25 *Public Prosecutor v Tan Lye Heng* [2017] 5 SLR 564 at [37].

14.20 The issue of when a *co-accused person's statements* may be used to prove the guilt of the accused, when this is the sole piece of evidence against the accused person, also arose for consideration by the Court of Appeal in the year under review. It is well-established that the court may convict an accused *solely* on the co-accused's confession. This was decided in *Chin Seow Noi v Public Prosecutor*[26] ("*Chin Seow Noi*"), which analysed s 30 of the Evidence Act[27] of 1990, the predecessor of s 258(5) of the CPC. The caveat was that the evidence emanating from the co-accused's confession satisfied the court beyond reasonable doubt of the accused's guilt.[28] However, *Chin Seow Noi* received somewhat negative treatment in subsequent cases (as an example, *Lee Chez Kee v Public Prosecutor*,[29] in which it was intimated that the "need to reconsider [*Chin Seow Noi*] may come in the future"), on the basis that a co-accused's statements are inherently unreliable and ought not to be given so much weight.

14.21 In *Norasharee bin Gous v Public Prosecutor*,[30] the Court of Appeal affirmed that *Chin Seow Noi* was correctly decided on the point of principle that an accused may be convicted solely on a co-accused's testimony.[31] However, for the court to do so, the co-accused's confession has to be very compelling such that it can on its own satisfy the court of the accused's guilt beyond a reasonable doubt.[32] The court will consider the state of mind and the incentive that the co-accused may have in giving evidence against the accused.[33] If the accused alleges that the co-accused has a motive to frame him, the burden is on him to prove this.[34]

14.22 In that case, three accused persons, Mohamad Yazid bin Md Yusof ("Yazid"), Norasharee bin Gous ("Norasharee") and Kalwant Singh a/l Jogindar Singh ("Kalwant"), were jointly tried on capital drug charges. Yazid identified Norasharee as the person who told him that there would be a delivery of drugs and instructed him to collect bundles from a Malaysian courier (Kalwant). Norasharee's defence was that Yazid was framing him because Yazid wanted to receive a certificate of substantive assistance, and because Yazid bore a long-time grudge against him arising from gangland rivalry.

26 [1993] 3 SLR(R) 566.
27 Cap 97, 1990 Rev Ed.
28 *Chin Seow Noi v Public Prosecutor* [1993] 3 SLR(R) 566 at [84].
29 [2008] 3 SLR(R) 447 at [113].
30 [2017] 1 SLR 820.
31 *Norasharee bin Gous v Public Prosecutor* [2017] 1 SLR 820 at [59].
32 *Norasharee bin Gous v Public Prosecutor* [2017] 1 SLR 820 at [59].
33 *Norasharee bin Gous v Public Prosecutor* [2017] 1 SLR 820 at [59].
34 *Norasharee bin Gous v Public Prosecutor* [2017] 1 SLR 820 at [59].

14.23 In his judgment, Tay Yong Kwang JA, writing on behalf of the Court of Appeal, held that under s 258(5) of the CPC, a court could consider a co-accused's confession against an accused if they were being tried jointly for the same offence, and even convict an accused solely on that confession. While Norasharee alleged that Yazid had a motive to frame him, he failed to prove this as a fact.[35] The Court of Appeal consequently dismissed all three accused persons' appeals against conviction and sentence.

Power of court to order stays of execution

14.24 In 2017, the Supreme Court also had occasion to consider whether it has the power to order a stay of two different types of orders: (a) an order to release seized property under s 35 of the CPC; and (b) a sentence of imprisonment pending a criminal reference, where the accused person had already commenced serving sentence.

14.25 A stay of the former type of order arose for consideration in *Rajendar Prasad Rai v Public Prosecutor*[36] ("*Rajendar 2*"). In that case, the Prosecution applied for a temporary stay of orders to release certain funds to the applicants. This temporary stay was sought pending the Prosecution's application under the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act[37] ("CDSA"). The Prosecution's primary concern was the risk of dissipation of the funds, that is, that it might not be able to attach those funds even if an order was subsequently made under the CDSA.

14.26 The High Court held that it had no power to grant the stay sought under s 390(2) of the CPC. Under that provision, any order the appellate court might make had to be one that was within the power of the trial court to make.[38] The High Court found that the stay was not within the power of the magistrate to grant, and, by extension, not an order which the appellate court could have made.[39] The stay was therefore not granted.

14.27 A stay of the latter type of order was considered in *Bander Yahya A Alzahrani v Public Prosecutor*.[40] In that case, the accused had been convicted and sentenced, and his appeals against conviction and sentence were dismissed. He then applied for a stay of execution

35 *Norasharee bin Gous v Public Prosecutor* [2017] 1 SLR 820 at [73] and [101].
36 [2017] 5 SLR 796.
37 Cap 65A, 2000 Rev Ed.
38 *Rajendar Prasad Rai v Public Prosecutor* [2017] 5 SLR 796 at [10].
39 *Rajendar Prasad Rai v Public Prosecutor* [2017] 5 SLR 796 at [30].
40 [2018] 3 SLR 925.

pending the hearing and final disposal of a separate criminal motion in which he applied for leave under s 397 of the CPC to refer questions to the Court of Appeal.

14.28 The issue was whether the court had the power under s 383(1) of the CPC to order a stay of execution of sentence, pending the determination of a leave application to bring a criminal reference, where an accused person had already commenced serving sentence.

14.29 Chong JA held that the High Court did possess the power to do so, as s 383(1) of the CPC extended to an application for a stay of execution pending a criminal reference and not only an appeal.[41] Given that the court had the power to stay execution of sentence pending the determination of a criminal reference, the court must *a fortiori* have the power to do the same pending the conclusion of an application for leave to file a criminal reference as well.[42]

14.30 The test for whether a court should exercise its power to order a stay of execution pending a criminal reference is whether there is a *prima facie* good arguable case that there are real questions of law of public interest that warrant the Court of Appeal's intervention.[43] The court will also consider whether the application was only done in an attempt to defer the serving of his sentence.[44] In applying the test, there is no principled basis for any difference in the court's power based on whether the accused person was serving sentence at the time of an application for stay of execution.[45]

14.31 Applying the test, the High Court found that on a *prima facie* examination of the questions raised, there was no good arguable case that there were real questions of law of public interest to be referred to the Court of Appeal, and consequently, there was little risk of irreparable prejudice to the applicant if the stay of execution were not granted. Further, the procedural history of this case suggested that the applicant was simply attempting to defer the serving of his sentence. The application for a stay was thus denied.

41 *Bander Yahya A Alzahrani v Public Prosecutor* [2018] 3 SLR 925 at [13], citing *Rajendar Prasad Rai v Public Prosecutor* [2017] 5 SLR 796 at [14].
42 *Bander Yahya A Alzahrani v Public Prosecutor* [2018] 3 SLR 925 at [14].
43 *Bander Yahya A Alzahrani v Public Prosecutor* [2018] 3 SLR 925 at [24]–[25].
44 *Bander Yahya A Alzahrani v Public Prosecutor* [2018] 3 SLR 925 at [24]–[25].
45 *Bander Yahya A Alzahrani v Public Prosecutor* [2018] 3 SLR 925 at [29].

Procedure for disposal of seized property under section 370 of Criminal Procedure Code

14.32 In *Rajendar Prasad Rai v Public Prosecutor*[46] ("*Rajendar 1*"), the applicants applied for the release of (a) funds seized in three of their bank accounts; and (b) caveats which had been lodged by the Registrar of the Singapore Land Authority ("Registrar") over three of the applicants' property. These funds were seized by the Corrupt Practices Investigation Bureau ("CPIB") pursuant to the applicants' arrest. The High Court allowed the application for the release of the property in (a), as the funds were not the suspected proceeds of an identifiable offence. The property in (b) could not be released, as the High Court had no revisionary jurisdiction over the caveats lodged by the Registrar.[47]

14.33 To determine whether the seizure of property may be extended under s 370 of the CPC, the court will undertake a three-stage inquiry and consider:[48]

(a) the legislative basis on which an order for the continued seizure of the property is sought;

(b) the purpose for which it is sought; and

(c) the factual basis on which it is sought.

14.34 Under (a), the property must be seized under s 35 or s 78 of the CPC. If the property was seized under s 35 of the CPC, and the extension sought is under s 35(1)(*a*), the Prosecution will need to prove that the property is the fruit or traceable proceeds of an identifiable offence.[49] The test is whether there is a reasonable basis for thinking that the seized property is relevant for the purpose of any investigation, inquiry, trial or other proceeding, if this is the basis on which the extension is sought.[50]

14.35 Following *Rajendar 1*, the Prosecution applied in *Rajendar 2* for a temporary stay of the orders releasing the seized funds.[51] The High Court held in *Rajendar 2* that while s 370 of the CPC had a long-stop date of one year, there are provisions to allow the Prosecution an extension of time to complete investigations and retain property in the interim. These include cases where the court is satisfied that (a) the three-stage inquiry for an extension under s 370 of the CPC is met,

46 [2017] 4 SLR 333.
47 *Rajendar Prasad Rai v Public Prosecutor* [2017] 4 SLR 333 at [30]–[31].
48 *Rajendar Prasad Rai v Public Prosecutor* [2017] 4 SLR 333 at [46].
49 *Rajendar Prasad Rai v Public Prosecutor* [2017] 4 SLR 333 at [47].
50 *Rajendar Prasad Rai v Public Prosecutor* [2017] 4 SLR 333 at [47]–[48].
51 See para 14.25–14.26 above.

(b) on the evidence, the seized property is to be retained under s 370(3) of the CPC, or (c) there is a basis to adjourn the proceedings under s 238 of the CPC and make a decision on the return of the seized property only at a later date. If none of these three situations are met, there is no basis to continue to seize the funds.[52]

Forfeiture of bail

14.36 In recent years,[53] the courts have, in a series of decisions, considered the principles underlying the granting of bail.

14.37 In *Cher Ting Ting v Public Prosecutor*,[54] the High Court affirmed that where the surety failed to show sufficient cause, the starting point is the forfeiture of the entire amount of the bond. In that case, an accused person absconded on bail. His surety was his sister. At the show cause hearing, the district judge forfeited the entire bail sum of $60,000. The surety unsuccessfully appealed the district judge's decision. She had not communicated with the accused, leaving it to their mother to contact him.

14.38 Chan Seng Onn J articulated a detailed two-step framework for considering such matters involving forfeiture:[55]

> (a) First, the court would consider whether the surety had shown sufficient cause for the non-forfeiture of the bond amount. The key consideration is whether the surety exercised reasonable due diligence in the discharge of his duties as surety. The burden is on the surety to show that sufficient cause exists.[56]
>
> (b) Second, if the court found that the surety has failed to show sufficient cause, the court would determine, in the exercise of its discretion, the extent to which the bond was to be forfeited. The starting point where the surety failed to show sufficient cause is the forfeiture of the entire amount of the bond.[57] This starting point will be departed from only if the surety satisfies the court that there are exceptional circumstances warranting a departure.[58] The degree of

52 *Rajendar Prasad Rai v Public Prosecutor* [2017] 5 SLR 796 at [41].
53 See, *eg*, the discussion in (2015) 16 SAL Ann Rev 396 at 401–405, paras 14.12–14.20.
54 [2017] 3 SLR 1009.
55 *Cher Ting Ting v Public Prosecutor* [2017] 3 SLR 1009 at [24].
56 *Cher Ting Ting v Public Prosecutor* [2017] 3 SLR 1009 at [28] and [34]–[36].
57 *Cher Ting Ting v Public Prosecutor* [2017] 3 SLR 1009 at [41].
58 *Cher Ting Ting v Public Prosecutor* [2017] 3 SLR 1009 at [41].

culpability of the surety is a crucial consideration.[59] A lack of financial means to suffer the consequences of forfeiture, and the impact of the forfeiture on the surety and his dependents, are relevant considerations under s 104(2) of the CPC, *but* are in themselves insufficient reasons for reduction of the sum to be forfeited, unless they are exceptional.[60] If the surety made substantial efforts between the date of the accused's non-attendance in court and the date of the show cause hearing to locate the accused, this can be taken into account as a mitigating factor.[61]

EVIDENCE

Adducing fresh evidence on appeal

14.39 As was articulated at some length in a previous edition of this Chapter,[62] the courts have, in recent times, concluded that the English evidential standards as articulated in *Ladd v Marshall*[63] should not be slavishly applied in the domestic criminal law context. It would be recalled that under the *Ladd v Marshall* test, an appellate court should consider the *non-availability* of the evidence (that is, whether the evidence could be obtained with reasonable diligence for use at trial), the *relevance* of the evidence (that is, whether the evidence, if given, has an important influence on the result of the case) and the *reliability* of the evidence (that is, the evidence should be apparently credible though it need not be incontrovertible).

14.40 In particular, the courts have, in a couple of decisions in 2007 (namely, *Mohammad Zam bin Abdul Rashid v Public Prosecutor*)[64] and 2014 (namely, *Soh Meiyun v Public Prosecutor*)[65] clarified that the quite distinct setting and evidential burdens engaged in the criminal law context mandate that the conditions of relevance and reliability of such evidence serve as the primary considerations for the adduction of such evidence on appeal, with the question of availability taking a back seat. In two decisions in 2017, the High Court and the Court of Appeal provided further examples of the applicability of the three

59 *Cher Ting Ting v Public Prosecutor* [2017] 3 SLR 1009 at [43]–[45].
60 *Cher Ting Ting v Public Prosecutor* [2017] 3 SLR 1009 at [46], [56] and [58].
61 *Cher Ting Ting v Public Prosecutor* [2017] 3 SLR 1009 at [64].
62 See (2014) 15 SAL Ann Rev 295 at 316–319, paras 14.56–14.62.
63 [1954] 1 WLR 1489.
64 [2007] 2 SLR(R) 410.
65 [2014] 3 SLR 299.

considerations articulated in *Ladd v Marshall* in the criminal law context.

14.41 The first decision is that of the Court of Appeal in *Iskandar bin Rahmat v Public Prosecutor*[66] ("*Iskandar bin Rahmat*"). The appellant in that case was convicted of two counts of murder under s 300(*a*) of the Penal Code[67] in furtherance of his plan to rob one of his two victims (a father and son) of the moneys he kept in his safe deposit box at CERTIS CISCO. It was the Prosecution's case that as part of that plan, he would inform one of the victims (the father) that his safe deposit box would be "hit" and that he should remove their contents so as to place a CCTV camera inside such box. The appellant executed the plan and proceeded to follow the father home and eventually attacked him, as well as the second victim (the son), who arrived at the home at around the time of such attack. On appeal, the appellant sought to adduce two new pieces of evidence in his defence. The first was a forensic pathology report that contained certain conclusions on whether the wounds on the appellant were defensive in nature, and of certain characteristics of the knife used in the attack ("the pathology report"). The second was a forensic psychiatrist report ("the psychiatrist report") that contended that the appellant was suffering from adjustment disorder and acute stress reaction at the time the offences were committed.

14.42 The Court of Appeal granted leave for the admission of the psychiatrist report but refused to grant leave for the admission of the pathology report. On the matter of the framework used to govern the admission of new evidence on appeal, Phang JA, writing on behalf of the court, reiterated the evidential thresholds that applied before emphasising that the condition of "non-availability" was less important than the satisfaction of the two other conditions, such that an appellate court exercising criminal jurisdiction should generally admit additional evidence which was favourable to the accused persons and which fulfilled the conditions of relevance and reliability. In this connection, at the leave stage (that is, whether leave would be granted to allow the evidence to be admitted), the court was only concerned with the reliability of the report, as opposed to its merits.[68] The court then proceeded to apply these thresholds to the two reports that the respondent sought to adduce.

14.43 On the matter of the psychiatrist report, the court observed that it was apparently "credible" in so far as it reflected the psychiatrist's independent, truthful and professional opinion. While there were

66 [2017] 1 SLR 505.
67 Cap 224, 2008 Rev Ed.
68 *Iskandar bin Rahmat v Public Prosecutor* [2017] 1 SLR 505 at [72].

differences in the account provided by the appellant to the psychiatrist and the Prosecution's psychiatrist, this was a matter that the appellant had sought to explain. Consequently, as the psychiatric report would also satisfy the requirement of "reliability", the court allowed the admission of the psychiatric report.[69]

14.44 In dismissing the application for the adduction of the pathology report, the court observed that its conclusions were immaterial to assessing the findings of the court as the conclusion in that report were only relevant if the first victim (that is, the father) had attacked the appellant first, a finding the court rejected.[70]

14.45 The second decision – namely, *Chong Yee Ka v Public Prosecutor*[71] – involved an employer who had pleaded guilty to two counts of voluntarily causing hurt to her domestic maid. The appellant received a custodial sentence at first instance and, on appeal, sought to adduce a further clarificatory psychiatric report ("the further clarification report") – above and beyond the various psychiatric reports that were already adduced in the first instance court – which further buttressed the appellant's contention of there having been a direct causal link between the offences committed and the psychiatric ailments ostensibly suffered by the appellant.

14.46 See Kee Oon J allowed the admission of the new evidence on appeal. To commence analysis, See J observed, as did the Court of Appeal in *Iskandar bin Rahmat*, that the criteria of non-availability was less "paramount" than the conditions of relevance and credibility, though it remained a relevant consideration that required careful examination and that should not be conveniently jettisoned.[72] On the facts, the court concluded that while the evidence could have been obtained earlier with reasonable diligence (thereby failing to meet the condition of non-availability), as the further clarification report provided grounds – supplemented by new corroborative accounts from the appellant's friends and relatives – that provided a fuller insight into her conduct, there was no reason why the further clarification report should not be considered "reliable" and "relevant" to the proceedings at hand. The court, accordingly, allowed the admission of the evidence in question.[73]

69 *Iskandar bin Rahmat v Public Prosecutor* [2017] 1 SLR 505 at [74]–[76].
70 *Iskandar bin Rahmat v Public Prosecutor* [2017] 1 SLR 505 at [109]–[110].
71 [2017] 4 SLR 309.
72 *Chong Yee Ka v Public Prosecutor* [2017] 4 SLR 309 at [24].
73 *Chong Yee Ka v Public Prosecutor* [2017] 4 SLR 309 at [27]–[29].

SENTENCING

Public service and contributions

14.47 Offenders often seek to adduce evidence of good character and past good works in mitigation. In *Stansilas Fabian Kester v Public Prosecutor*[74] ("*Stansilas Fabian Kester*"), the High Court considered the conceptual basis for considering such evidence in sentencing, and set out guidance as to how a sentencing court should consider the relevance of an offender's claimed good character and contributions to the public.

14.48 Menon CJ held that it was necessary to justify the mitigating value of public service and contributions by reference to the four established principles of sentencing, namely, retribution, prevention, deterrence (both specific and general) and rehabilitation.[75] Reductions to the sentence would otherwise be inappropriate as the role of a sentencing court is not to adjudicate or pass judgments on moral worth. In particular, Menon CJ articulated the following principles:[76]

> (a) Any evidence concerning the offender's public service and contributions must be targeted at showing that *specific sentencing objectives will be satisfied* were a lighter sentence to be imposed on the offender.
>
> (b) The fact that an offender has made past contributions to society might be a relevant mitigating factor not because it somehow reduces his culpability in relation to the present offence committed, but because it is indicative of his capacity to reform and it tempers the concern over the specific deterrence of the offender.
>
> (c) This, however, would carry modest weight and can be displaced where other sentencing objectives assume greater importance.
>
> (d) Any offender who urges the court that his past record bears well on his potential for rehabilitation will have to demonstrate the connection between his record and his capacity and willingness for reform, if this is to have any bearing.
>
> [emphasis in original]

74 [2017] 5 SLR 755.
75 *Stansilas Fabian Kester v Public Prosecutor* [2017] 5 SLR 755 at [94].
76 *Stansilas Fabian Kester v Public Prosecutor* [2017] 5 SLR 755 at [102].

Enhancing sentence in lieu of caning

14.49 By virtue of s 325(1) of the CPC, three categories of offenders are exempted from caning:

> (a) all female offenders and male offenders aged above 50 at the time of caning;
>
> (b) offenders sentenced at the same sitting to more than the specified limit of 24 strokes (for adults) or ten strokes (for juveniles); and
>
> (c) offenders certified to be medically unfit for caning.

14.50 However, as set out in s 325(2) of the CPC, the sentences of these offenders can be enhanced by up to a maximum of 12 months' imprisonment in lieu of caning. The provision in question is silent as to the principles governing the exercise of such powers. A three-member *coram* of the High Court convened in *Amin bin Abdullah v Public Prosecutor*[77] sought, therefore, to shed light on *when* an offender's sentence should be enhanced in lieu of caning, and if so enhanced, *how* the extent of enhancement should be determined.

When should a sentence be enhanced in lieu of caning?

14.51 Writing on behalf of the High Court, Menon CJ observed that the starting point is that the discretion to enhance an offender's term of imprisonment should only be exercised if there are grounds to justify doing so.[78] This was discerned from the permissive (as opposed to mandatory) language adopted in the relevant legislative provisions, and cohered with how courts should generally not exercise punitive powers absent sufficient justification. In deciding whether enhancement of the exempted offender's sentence is warranted, Menon CJ noted that the sentencing court should consider the matter holistically and consider factors which both warrant and militate against an enhancement. Factors which could possibly warrant an enhancement are:[79]

> (a) The need to compensate for the deterrent effect of caning that is lost by reason of the exemption …
>
> (b) The need to compensate for the retributive effect of caning that is lost by reason of the exemption.
>
> (c) The need to maintain parity among co-offenders.

77 [2017] 5 SLR 904.

78 *Amin bin Abdullah v Public Prosecutor* [2017] 5 SLR 904 at [53]–[58]; *cf Public Prosecutor v Nguyen Thi Thanh Hai* [2016] 3 SLR 347.

79 *Amin bin Abdullah v Public Prosecutor* [2017] 5 SLR 904 at [59].

14.52 Conversely, factors which could militate against an enhancement include:[80]

(a) medical grounds;

(b) old age;

(c) compassionate grounds;

(d) the need for proportionality; and

(e) parliamentary intention in enacting a sentencing regime for a given offence.

14.53 Menon CJ also observed that in considering whether the enhancement of the sentence would replace the lost deterrent or retributive effect of caning, two key factors to consider would be whether an additional term of imprisonment was needed (with the focus being on whether the offender would have known before committing the offence that he would likely be exempted from caning), and whether an additional term of imprisonment would be effective (with regard to the length of the likely imprisonment term that the offence already carried). The marginal deterrent/retributive value of additional imprisonment would generally diminish in relation to the length of the original contemplated term of imprisonment.[81]

How should the extent of enhancement be determined?

14.54 Menon CJ then proceeded to sketch out indicative guidelines on the extent of enhancement to an offender's sentence in correlation to the number of strokes that the offender is exempted from:[82]

Number of strokes avoided	**Imprisonment term as enhanced sentence**
1–6	Up to 3 months
7–12	3–6 months
13–18	6–9 months
More than 19	9–12 months

80 *Amin bin Abdullah v Public Prosecutor* [2017] 5 SLR 904 at [60].
81 *Amin bin Abdullah v Public Prosecutor* [2017] 5 SLR 904 at [65]–[69].
82 *Amin bin Abdullah v Public Prosecutor* [2017] 5 SLR 904 at [90].

Sentencing of young offenders – Probation and reformative training

14.55 The principles undergirding when probation and reformative training are appropriate sentences for youthful offenders were reiterated by the High Court in *Public Prosecutor v Lim Cheng Ji Alvin*[83] ("*Lim Cheng Ji Alvin*") and *Praveen s/o Krishnan v Public Prosecutor*[84] ("*Praveen s/o Krishnan*"). Both cases involved offenders convicted of drug offences.

14.56 In *Lim Cheng Ji Alvin*, the offender was almost 27 years old when he committed offences of drug possession and possession of drug utensils. He was sentenced to probation notwithstanding that he was not a young offender, with the district judge finding that more weight should be given to rehabilitation, given, *inter alia*, the views of the probation officer expressing optimism about the offender's prospects of rehabilitation. On appeal, Menon CJ substituted the sentence of probation with eight months' imprisonment. He highlighted that the law took a presumptive view that the primary sentencing consideration for young offenders was rehabilitation, but this was not presumptively the case with an older offender.[85] In the context of, in particular, drug offences committed by adult offenders, deterrence was the dominant consideration which warranted a custodial term save for exceptional cases.

14.57 *Praveen s/o Krishnan*, conversely, involved a young offender (17 years old at the time of the offences) who was sentenced to reformative training at first instance for offences of drug trafficking and drug consumption. On appeal, the sentence was substituted with 36 months' split probation, with additional conditions that included a 12-month hostel residence. Chong JA observed that probation with the additional condition of hostel residence of a specified duration struck a good balance between rehabilitation and deterrence where rehabilitation remained the dominant sentencing consideration, but where it was also necessary to temporarily remove the offender from an undesirable social environment or to tightly monitor him.[86] Chong JA further emphasised that the opinion of a probation officer (probation had not been recommended in the present case) should not be conclusive on the issue of sentencing, nor should it bind the court to a certain decision.[87]

83 [2017] 5 SLR 671.
84 [2018] 3 SLR 1300.
85 *Public Prosecutor v Lim Cheng Ji Alvin* [2017] 5 SLR 671 at [6]–[7].
86 *Praveen s/o Krishnan v Public Prosecutor* [2018] 3 SLR 1300 at [34].
87 *Praveen s/o Krishnan v Public Prosecutor* [2018] 3 SLR 1300 at [65].

14.58 Finally, the case of *Muhammad Nur bin Abdullah v Public Prosecutor*[88] ("*Muhammad Nur bin Abdullah*") was a criminal reference before the Court of Appeal which shed light on the question of whether an offender could be sentenced to reformative training at proceedings relating to the breach of a probation order ("breach proceedings"), where the offender was above 21 at the time of breach proceedings.

14.59 Answering the question in the negative, Tay JA, writing on behalf of the Court of Appeal, explained that s 305(1)(*a*) of the CPC anchored the age requirement for reformative training to the date of conviction. An offender above 21 years old at the time of conviction would therefore not qualify for reformative training. In a situation where the offender had been ordered to undergo probation, but subsequently breached the order and was being dealt with after he had already turned 21 years of age, s 9(5) of the Probation of Offenders Act[89] required the court in the breach proceedings to deal with the offender for his original offence as "if he had just been convicted" on that offence, that is, convicted on the date of the breach proceedings.[90] An offender above the age of 21 years on the day of the breach proceedings therefore did not qualify for, and cannot be ordered to undergo, reformative training. The authors would highlight that the same outcome as that arrived at in *Muhammad Nur bin Abdullah* would follow if the offender were *exactly* 21 years of age at the time of conviction for the breach, as the judgment clearly suggests that there are two binary statutory regimes: one for an offender below 21 years of age, and one for offenders who are 21 years old or above.

Consideration of uncharged offending conduct

14.60 The general rule, as articulated in several recent High Court decisions, is that uncharged offences cannot be considered by a sentencing court as an aggravating factor.[91] Such facts relating to prior offending, for which no charges had been brought (whether proceeded or taken into consideration), could not be used as a "sword" to enhance the sentence as an aggravating factor, but could be used as a "shield" by the Prosecution to deny the accused any mitigating weight associated with being a first-time offender.[92]

88 [2018] 1 SLR 114.
89 Cap 252, 1985 Rev Ed.
90 *Muhammad Nur bin Abdullah v Public Prosecutor* [2018] 1 SLR 114 at [28].
91 *Vasentha d/o Joseph v Public Prosecutor* [2015] 5 SLR 122 at [57]–[62].
92 *Public Prosecutor v Tan Thian Earn* [2016] 3 SLR 269 at [58]–[66]; *Chong Yee Ka v Public Prosecutor* [2017] 4 SLR 309 at [45].

14.61 Chan J, in *Chua Siew Peng v Public Prosecutor*[93] ("*Chua Siew Peng*"), nuanced this general principle by holding that a fact with sufficient nexus to the commission of the offence *could* be considered at the sentencing stage, irrespective of whether this fact could also constitute a separate offence for which the accused was not charged.[94] The nexus made it a relevant fact in assessing the culpability of the offender for an offence for which he was charged. Sufficient nexus would generally be present if it concerned a fact in the immediate circumstances of the charged offence or was a fact relevant to the accused's state of mind at the time the offence was committed. While a sentencing judge could take such facts into consideration in deciding on the culpability of the accused in relation to the charges brought against him, a judge is not to sentence the accused as if he has been convicted of the uncharged offence.

Dealing with aggravating factors in cases involving more than one distinct offence

14.62 Where a case involves more than one distinct offence, there is a need to distinguish between "sentence specific aggravating factors" (which can enhance the sentence for each individual offence at the first stage of the sentencing process), and "cumulative aggravating features", which affect whether the global sentence should be enhanced at the second stage of the sentencing process.[95] In particular, care must be taken not to factor in an aggravating consideration at the second stage if it has already been taken into account at the first stage.

14.63 The offender in *Chang Kar Meng v Public Prosecutor*[96] ("*Chang Kar Meng*") had inflicted significant force on the victim, rendering her temporarily unconscious, with the intention to rob her. He proceeded to rape her after coming into contact with her body and becoming aroused. The Court of Appeal was asked to consider, in this situation, the submission that the offender's assault on the victim should not have been counted against him twice, as treating the same assault as a factor which aggravated the rape offence would amount to doubly punishing the offender.

14.64 The aforesaid submission was rejected. Menon CJ, writing on behalf of the Court of Appeal, held that where the hurt inflicted by the offender was sufficiently and separately linked to both offences of rape

93 [2017] 4 SLR 1247.
94 *Chua Siew Peng v Public Prosecutor* [2017] 4 SLR 1247 at [81]–[84].
95 *ADF v Public Prosecutor* [2010] 1 SLR 874 at [92].
96 [2017] 2 SLR 68.

and robbery with hurt, it may be treated as a relevant sentencing consideration for both. It would be artificial to ignore the assault if the infliction of force on the victim was a critical part of the commission of both of these offences. Any harshness in the aggregate sentence that this could lead to could be dealt with at the end of the sentencing process when consideration is given to the totality principle.[97]

Whether it is condition precedent for body corporate to be convicted before officer of body corporate can be convicted

14.65 The High Court, in *Abdul Ghani bin Tahir v Public Prosecutor*[98] ("*Abdul Ghani bin Tahir*"), dealt with the issue of whether a conviction of a body corporate is a prerequisite to a conviction of an officer of the body corporate under s 59(1) of the CDSA. Section 59(1) of the CDSA states:

> **Offences by bodies corporate, etc.**
>
> **59.**—(1) Where an offence under this Act committed by a body corporate is *proved* —
>
> (*a*) to have been committed with the consent or connivance of an officer; or
>
> (*b*) to be attributable to any neglect on his part,
>
> the officer as well as the body corporate shall be guilty of the offence and shall be liable to be proceeded against and punished accordingly.
>
> [emphasis added]

14.66 Chan J held that it was not necessary for the body corporate to have been convicted before its officers can be convicted. All that was required was for sufficient evidence to be available to satisfy the court that an offence has been committed by the body corporate and that there are no relevant defences to exculpate the body corporate.[99]

Road rage offences

14.67 Offences involving "road rage" violence have consistently been dealt with sternly, with the primary sentencing consideration for such offences being both general and specific deterrence. Not all instances of violence that arise on the roads, however, constitute "road rage" offences.

97 *Chang Kar Meng v Public Prosecutor* [2017] 2 SLR 68 at [27].
98 [2017] 4 SLR 1153.
99 *Abdul Ghani bin Tahir v Public Prosecutor* [2017] 4 SLR 1153 at [42]–[45].

14.68 In *Public Prosecutor v Lim Yee Hua*,[100] the High Court stated that an incident of violence should be labelled as an episode of road rage violence only where the facts disclosed violence perpetrated by road users as a result of real or perceived slights by other road users stemming from differences that arose in the course of the shared use of the roads. Chan J noted that where incidents of violence break out on the roads, but the cause of the violence has no nexus to the parties' shared use of the roads, the road rage deterrent sentencing policy should not apply.[101]

14.69 As regards sentencing for road rage offences, Chan J observed that due regard had to be given to the deterrent sentencing policy underlying the sentencing of road rage offences, over and above the usual considerations of harm and culpability that informed the sentencing of offences involving hurt. Whether an incident of road rage violence crossed the custodial threshold is still ultimately a fact-specific inquiry, and where the harm caused was minimal and the culpability of the offender was low, a fine might suffice.[102] In this regard, the High Court clarified that the case of *Wong Hoi Len v Public Prosecutor*[103] did not appear to lay down a benchmark sentence of one to three months' imprisonment for road rage offences.[104]

14.70 Similarly, in *Public Prosecutor v Teo Chang Heng*,[105] the High Court cautioned against the blanket categorisation of cases where the use of the road has been part of the factual backdrop as being a case of "road rage" as a means to impose a custodial sentence.[106] In that case, See J opined that although the offender had deliberately used his vehicle to damage his spouse's car, there was no evidence to suggest he was potentially a menace to other road users or that he had inflicted or sought to inflict physical harm or bodily injury on them. The offender's aggression was targeted specifically at the driver of his spouse's car. The sentence of a ten-day short detention order ("SDO"), coupled with a 120-hour community service order, was affirmed on appeal, with a recognition that an SDO carries a punitive element and is inherently capable of serving to deter.[107]

100 [2018] 3 SLR 1106.
101 *Public Prosecutor v Lim Yee Hua* [2018] 3 SLR 1106 at [21].
102 *Public Prosecutor v Lim Yee Hua* [2018] 3 SLR 1106 at [29]–[30].
103 [2009] 1 SLR(R) 115.
104 *Public Prosecutor v Lim Yee Hua* [2018] 3 SLR 1106 at [34]–[36].
105 [2018] 3 SLR 1163.
106 *Public Prosecutor v Teo Chang Heng* [2018] 3 SLR 1163 at [8].
107 *Public Prosecutor v Teo Chang Heng* [2018] 3 SLR 1163 at [15].

Road traffic offences

Dangerous driving

14.71 The harm/culpability framework was endorsed by the High Court in *Public Prosecutor v Koh Thiam Huat*[108] as applying to the offence of dangerous driving under s 64(1) of the Road Traffic Act[109] ("RTA"). In assessing the measure of harm caused, the High Court noted that one would look both at the extent of injury or damage caused, as well as the potential harm that might have resulted. As for the level of culpability, factors that increase an offender's culpability include a particularly dangerous manner of driving (such as speeding, drink-driving, sleepy driving, or driving whilst using a mobile phone).[110] See J opined that where serious damage or injuries resulted from dangerous driving, the appropriate starting point would be a custodial sentence.[111]

14.72 See J further held that offences that have been compounded under the RTA or its subsidiary legislation can be taken into account for sentencing purposes. This allows for a more holistic approach in sentencing, and gives better effect to the need of considering both specific and general deterrence.[112]

14.73 The sentencing framework for the offence of dangerous driving was further expounded on by Chong JA in *Public Prosecutor v Aw Tai Hock*.[113] The High Court in that case set out the various degrees of harm in the context of dangerous driving:[114]

> (a) *slight harm* – slight or moderate property damage and/or slight physical injury characterised by no hospitalisation or medical leave;
>
> (b) *moderate harm* – serious property damage and/or moderate personal injury characterised by hospitalisation or medical leave but no fractures or permanent injuries;
>
> (c) *serious harm* – serious personal injury usually involving fractures, including injuries which are permanent in nature and/or which necessitate significant surgical procedures; and
>
> (d) *very serious harm* – loss of limb, sight or hearing or life; or paralysis.

108 [2017] 4 SLR 1099.
109 Cap 276, 2004 Rev Ed.
110 *Public Prosecutor v Koh Thiam Huat* [2017] 4 SLR 1099 at [41].
111 *Public Prosecutor v Koh Thiam Huat* [2017] 4 SLR 1099 at [43].
112 *Public Prosecutor v Koh Thiam Huat* [2017] 4 SLR 1099 at [56] and [59].
113 [2017] 5 SLR 1141.
114 *Public Prosecutor v Aw Tai Hock* [2017] 5 SLR 1141 at [33].

14.74 Chong JA also elucidated that the factors that affect culpability in dangerous driving offences would generally include (a) the manner of driving, (b) the circumstances of driving, and (c) the offender's reasons for driving.[115]

Drink-driving

14.75 In *Stansilas Fabian Kester*, the High Court had the opportunity to augment the sentencing framework set out in *Edwin s/o Suse Nathen v Public Prosecutor*[116] for the offence of drink-driving. As a starting point, Menon CJ observed that a person convicted under s 67(1)(*b*) of the RTA, and who caused personal injury or damage to property as a result of his drink-driving, would receive a custodial sentence save in an exceptional category of cases involving slight injury and low culpability.[117]

14.76 Menon CJ then proceeded to set out an analytical framework to assess the overall gravity of the offence for drink-driving cases, considering (a) the degree of harm caused and (b) the culpability of the offender. Ascertaining culpability entailed consideration of the extent to which the offender's alcohol level exceeded the prescribed limit as well as the manner of the offender's driving. Indicative sentencing ranges were accordingly calibrated:[118]

		Degree of harm			
		Very serious	**Serious**	**Moderate**	**Slight**
Culpability of offender	**High**	4–6 months	2–4 months	Up to 2 months	Up to 2 months
	Medium	2–4 months	Up to 2 months	Up to 1 month	Up to 1 month
	Low	Up to 2 months	Up to 2 month	Up to 1 month	Custodial threshold not typically crossed

115 *Public Prosecutor v Aw Tai Hock* [2017] 5 SLR 1141 at [37].
116 [2013] 4 SLR 1139.
117 *Stansilas Fabian Kester v Public Prosecutor* [2017] 5 SLR 755 at [39].
118 *Stansilas Fabian Kester v Public Prosecutor* [2017] 5 SLR 755 at [78].

14.77 Menon CJ, in the separate appeal in the High Court of *Pua Hung Jaan Jeffrey Nguyen v Public Prosecutor*,[119] had the occasion to further expound on the calibration of the appropriate sentence when dealing with an offender convicted of drink-driving, where the said offender possessed a previous conviction for an offence of being in charge of a motor vehicle while under the influence of drink under s 68(1)(*b*) of the RTA.

14.78 Menon CJ held that, in such a situation, imprisonment was not mandatory and the facts and circumstances of the offence that was the subject matter of the current proceedings had to be considered in determining whether the custodial threshold had been crossed.[120] Whilst recognising the anomaly this created, in so far as offenders with an antecedent under s 68(1) of the RTA faced mandatory imprisonment for a subsequent conviction under the same provision even though this scenario was less serious, the court found that it would be inappropriate to adopt a rectifying construction against the offender when this involved a penal provision and in the absence of clear evidence of Parliament's intent. In the present case, the High Court substituted the sentence of one week's imprisonment with the maximum fine of $5,000, given the offender's low culpability and there having been no actual damage or injury caused. Separately, Menon CJ added that there was no reason why cases involving two charges under s 67(1)(*b*) of the RTA being prosecuted at the same hearing should not be visited with custodial sentences.[121]

Impact of forfeiture

14.79 Forfeiture of property takes many different forms and achieves different purposes depending on the facts and statutory context. At least four distinct purposes can be served through forfeiture: (a) a form of punishment that serves as an additional penalty to an offender; (b) a deterrent against the commission of future offences, dissuading would-be offenders on pain of suffering the loss of their property; (c) preventing crime by removing from circulation the instrumentalities of the crime which could be used in the commission of future offences; and (d) disgorgement of ill-gotten profits to prevent unjust enrichment.

14.80 In *Public Prosecutor v Kong Hoo (Pte) Ltd*,[122] the relevance of the consequences of a prospective forfeiture order to a court's decision on

119 [2017] 5 SLR 1120.
120 *Pua Hung Jaan Jeffrey Nguyen v Public Prosecutor* [2017] 5 SLR 1120 at [54].
121 *Pua Hung Jaan Jeffrey Nguyen v Public Prosecutor* [2017] 5 SLR 1120 at [61].
122 [2017] 4 SLR 1291.

sentence was examined for the first time by the High Court. See J opined that a sentencing court can and should properly have regard to the effect of any forfeiture order in deciding on an appropriate sentence. To that end, however, the effect of a forfeiture order to the sentencing calculus would depend on what was sought to be forfeited and for what purpose.[123]

14.81 For example, forfeiture of the proceeds of crime should be disregarded in the sentencing process, since the dominant purpose of such a forfeiture order was the reversal of unjust enrichment.[124] Similarly, where the principle of deterrence was so imperative, as is the case for forfeiture orders issued under s 28(2) of the Misuse of Drugs Act,[125] the punitive consequences of a forfeiture order might not result in any significant reduction in an offender's sentence, if at all.[126]

14.82 On the facts of the case, See J noted that forfeiture of the seized items (Madagascan Rosewood) was mandatory upon conviction under the Endangered Species (Import and Export) Act.[127] Expenses incurred in relation to, amongst other things, the detention and storage of the items were also charged against the offender, amounting to about $3.5m. The High Court found that the dominant purpose of a forfeiture order here was to serve an additional punitive purpose and to deter would-be offenders. The punitive consequences of the forfeiture ought to therefore be taken into account in determining the totality of the punishment.[128]

Cost orders to Prosecution

14.83 Costs to the Prosecution are awarded only in the most exceptional of circumstances. This is to ensure that accused persons can conduct their defence without fear of a costs sanction.[129] The important test to consider is whether an accused had conducted his defence or appeal "extravagantly and unnecessarily".

14.84 In *Abdul Ghani bin Tahir*, the offender had run a defence contrary to what had been stated in the case for the Defence, put the Prosecution to strict proof of its case against him, and cross-examined several victims on irrelevant points. The District Court presiding over the trial had ordered for the appellant to pay the costs of the Prosecution

123 *Public Prosecutor v Kong Hoo (Pte) Ltd* [2017] 4 SLR 1291 at [33] and [35].
124 *Public Prosecutor v Kong Hoo (Pte) Ltd* [2017] 4 SLR 1291 at [35].
125 Cap 185, 2008 Rev Ed.
126 *Public Prosecutor v Kong Hoo (Pte) Ltd* [2017] 4 SLR 1291 at [36].
127 Cap 92A, 2008 Rev Ed.
128 *Public Prosecutor v Kong Hoo (Pte) Ltd* [2017] 4 SLR 1291 at [39]–[40].
129 *Arun Kaliamurthy v Public Prosecutor* [2014] 3 SLR 1023 at [19].

given these circumstances. On appeal, Chan J reversed such order, noting that in the overall analysis, the defence was neither conducted extravagantly or unnecessarily.

Ill-treatment of foreign domestic workers

14.85 The protection of domestic maids from abuse by their employers has consistently been recognised as a matter of public interest, given their vulnerable status and the prevalence of such relationships in Singapore.[130] In *Public Prosecutor v Lim Choon Hong*,[131] these same principles were found to apply to offences under s 22(1)(*a*) of the Employment of Foreign Manpower Act[132] ("EFMA"), where the contravention of the work permit condition that adequate food be provided saw a 15-month period of systemic food deprivation, causing the domestic maid to lose 20kg in weight to be 29kg.

14.86 Whilst Menon CJ recognised that the EFMA offence was one of strict liability, the culpability of the offender remained relevant in assessing the gravity of the offence and the appropriate sentence to be imposed.[133] The systematic cruelty and denial of the domestic maid's basic human dignity placed this case at the very high end of culpability. The Prosecution's appeal against sentence was therefore allowed, and both co-offenders were sentenced to ten months' imprisonment (the maximum punishment under the EFMA is 12 months' imprisonment).

Discount for pleading guilty to rape charge

14.87 Where the evidence against an offender is overwhelming, a guilty plea may have no mitigating value.[134] In the context of sexual offences, however, a benefit of a plea of guilt is that the victim is spared the trauma of having to relive the experience in court and be cross-examined on it. In the Court of Appeal decision of *Chang Kar Meng*, Menon CJ, writing on behalf of the court, held that offenders who plead guilty to sexual offences, even in cases where the evidence against them is compelling, ought ordinarily to be given at least some credit for having spared the victim additional suffering in this regard.[135] Having said that, Menon CJ noted that the precise discount to the sentence, if at all, is ultimately still a fact-sensitive matter and that in the context of

130 *ADF v Public Prosecutor* [2010] 1 SLR 874.
131 [2017] 5 SLR 989.
132 Cap 91A, 2009 Rev Ed.
133 *Public Prosecutor v Lim Choon Hong* [2017] 5 SLR 989 at [8].
134 *Fu Foo Tong v Public Prosecutor* [1995] 1 SLR(R) 1 at [12].
135 *Chang Kar Meng v Public Prosecutor* [2017] 2 SLR 68 at [47].

rape, given its grievous and pernicious nature, it is incorrect to automatically apply a discount of a quarter to a third of the sentence on a plea of guilt.

Sentencing benchmarks

Drug importation and trafficking

14.88 The landmark case of *Vasentha d/o Joseph v Public Prosecutor*[136] ("*Vasentha*") introduced a framework with which to approach sentencing for offenders convicted of trafficking in diamorphine in quantities up to 9.99g. This framework relied on the quantity of drugs that an offender was charged with importing to be indicative of a range of possible sentences, and was subsequently used to derive equivalent sentencing ranges for the offences of trafficking between 167g and 250g of methamphetamine,[137] between 200g and 600g of cannabis mixture,[138] and between 0g and 330g of cannabis mixture.[139]

14.89 In *Suventher Shanmugam v Public Prosecutor*,[140] the Court of Appeal had to deal with how such a graduated approach applied to an offender who imported not less than 499.99g of cannabis (that is, a quantum just immediately below the potentially-capital threshold). The sentencing range here differed from that in *Vasentha* based on the quantity of drugs involved, being 20–30 years or life imprisonment and a fixed 15 strokes of the cane. Applying the principles of utilising the full spectrum of possible sentences as well as having indicative starting points broadly proportional to the quantity of drugs trafficked or imported,[141] Tay JA, writing on behalf of the Court of Appeal, laid down the following sentencing guidelines for the unauthorised import or trafficking of cannabis:[142]

(a) 330 to 380g: 20 to 22 years' imprisonment.

(b) 381 to 430g: 23 to 25 years' imprisonment.

(c) 431 to 500g: 26 to 29 years' imprisonment.

136 [2015] 5 SLR 122, discussed *in extenso* in (2015) 16 SAL Ann Rev 396 at 438–440, paras 14.107–14.110.
137 *Loo Pei Xiang Alan v Public Prosecutor* [2015] 5 SLR 500.
138 *Public Prosecutor v Chandrasekran s/o Elamkopan* [2016] SGDC 20.
139 *Public Prosecutor v Sivasangaran s/o Sivaperumal* [2016] SGDC 214.
140 [2017] 2 SLR 115.
141 *Suventher Shanmugam v Public Prosecutor* [2017] 2 SLR 115 at [26].
142 *Suventher Shanmugam v Public Prosecutor* [2017] 2 SLR 115 at [29].

14.90 As with *Vasentha*, the indicative starting sentence could then be adjusted upward or downward to take into account the offender's culpability and the presence of aggravating or mitigating factors.

Rape

14.91 Rape offences had consistently been sentenced in accordance with the framework laid down by the High Court in *Public Prosecutor v NF*.[143] This has since been replaced with a new sentencing framework set down by the Court of Appeal in *Ng Kean Meng Terence v Public Prosecutor*[144] ("*Terence Ng*"), in recognition of the inherent limitations underlying the *Public Prosecutor v NF* framework.

14.92 Under the new *Terence Ng* sentencing framework, Chao Hick Tin JA, writing on behalf of the Court of Appeal, noted that a sentencing court should proceed in two steps:[145]

> (a) [*Offence-specific factors.*] First, the court should identify under which band the offence in question falls within, having regard to the factors which relate to the manner and mode by which the offence was committed as well as the harm caused to the victim … Once the sentencing band, which defines the range of sentences which may usually be imposed for a case with those offence-specific features, has been identified the court should then determine precisely where within that range the present offence falls in order to derive an 'indicative starting point', which reflects the intrinsic seriousness of the *offending act*.
>
> (b) [*Offender-specific factors.* Second,] the court should have regard to the aggravating and mitigating factors which are *personal to the offender* to calibrate the appropriate sentence for that offender. These … factors relate to the offender's particular personal circumstances, and … *cannot* be the factors which have already been taken into account in the categorisation of the offence. In exceptional circumstances, the court is entitled to move outside of the prescribed range for that band if, in its view, the case warrants such a departure.
>
> [emphasis in original]

14.93 Chao JA also set out a non-exhaustive list of offence-specific factors which would aggravate the offence, which included the following:[146]

143 [2006] 4 SLR(R) 849.
144 [2017] 2 SLR 449.
145 *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 at [39].
146 *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 at [44].

(a) group rape;

(b) abuse of position and breach of trust;

(c) premeditation;

(d) violence;

(e) rape of a vulnerable victim;

(f) forcible rape of a victim below 14;

(g) hate crime;

(h) severe harm to victim; and

(i) deliberate infliction of special trauma.

14.94 Chao JA also took pains to specifically caution against taking into account the two factors of *forgiveness by the victim* and *consent by a victim under 14*, as these were typically irrelevant in assessing the seriousness of the offence.[147] Upon ascertaining the gravity of the offence, the court should then place the offence within an appropriate band. The proposed bands set out in *Terence Ng* were:[148]

> (a) *Band 1 – 10–13 years' imprisonment and six strokes of the cane.* This band comprises cases at the lower end of the spectrum of seriousness, being cases which feature no offence-specific aggravating factors or where the factors were only present to a very limited extent. Cases falling in the middle to upper ranges of band 1 would include those where the offence was committed with only one of the listed aggravating factors.
>
> Cases of statutory rape in which the victim consents and there are no further notable aggravating factors should fall in the upper end of this band, with an indicative starting point of 12 years' imprisonment.
>
> (b) *Band 2 – 13–17 years' imprisonment and 12 strokes of the cane.* Band 2 comprises cases of rape of a higher level of seriousness, and would usually contain two or more of the offence-specific aggravating factors. Cases which contain any of the statutory aggravating factors and prosecuted under s 375(3) of the Penal Code would almost invariably fall within this band.
>
> The middle and upper reaches of this band would involve offences marked by serious violence and those which take place over an extended period of time and which leave the victims with serious and long-lasting physical or psychological injuries.

147 *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 at [45].
148 *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 at [47]–[61].

(c) *Band 3 – 17–20 years' imprisonment and 18 strokes of the cane.* Cases within Band 3 are extremely serious cases of rape by reason of the number and intensity of the aggravating factors. They often feature victims with particularly high degrees of vulnerability and/or serious levels of violence attended with perversities. Many of these cases would involve offences committed as part of a "campaign of rape".

The apex of this band would be cases in respect of which the offender manifested perverted or psychopathic tendencies or gross personality disorder, and where he is likely, if at large, to remain a danger to women for an indefinite time.

14.95 The second step of the *Terence Ng* analytical framework involves regard to the offender-specific factors, and the weight to place on these factors and the effect that they will have on the indicative starting point. While adjustments beyond the sentencing range prescribed for the band may be made, clear and coherent reasons should be set out if this was done. The non-exhaustive list of offender-specific factors set out by Chao JA in *Terence Ng* included:[149]

(a) offences taken into consideration for the purposes of sentencing;

(b) presence of relevant antecedents;

(c) evident lack of remorse;

(d) display of evident remorse;

(e) youth; and

(f) advanced age.

14.96 As for the effect of a plea of guilt, *Terence Ng* reaffirmed its decision in *Chang Kar Meng* that offenders who plead guilty to sexual offences even in cases when the evidence against them is compelling ought ordinarily to be given at least some credit for having spared the victim additional suffering. The utilitarian approach properly considered the need to protect the welfare of the victims of sexual crimes.[150] However, Chao JA declined to set out prescribed sentencing discounts based on the timeliness of the plea of guilt, agreeing that this would not allow the court to take into account the many and varied reasons for which a plea of guilt is entered and the effects it might have on the victim and the criminal justice system as a whole.[151]

149 *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 at [64]–[65].
150 *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 at [68].
151 *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 at [70].

Sexual penetration of minor under 16

14.97 In *Public Prosecutor v BAB*,[152] the 40-year-old female offender (who suffered from gender dysphoria) sexually penetrated the victim's (who was 13 and 14 years old at the material times of the offences) vagina on multiple occasions using a dildo.

14.98 Tay JA, writing on behalf of the Court of Appeal, set out the appropriate starting points, having regard to the gravity of the offence, applicable sentencing range and the factor of abuse of trust, to be as follows:

> (a) for offences punishable under s 376A(2) of the Penal Code – three years' imprisonment where there is an element of abuse of trust; and
>
> (b) for offences punishable under s 376A(3) of the Penal Code – 10–12 years' imprisonment where there is an element of abuse of trust.[153]

Outrage of modesty against person under 14 years of age

14.99 The approach in establishing a sentencing framework in *Terence Ng* was adapted by See J in *GBR v Public Prosecutor*[154] in relation to the offence under s 354(2) of the Penal Code of outrage of modesty against a person under 14 years of age.

14.100 Similar to the approach taken by the Court of Appeal in *Terence Ng*, in *GBR v Public Prosecutor*, See J noted that the first step is to consider the offence-specific factors, which his Honour enumerated to include:[155]

> (a) degree of sexual exploitation, including the part of the victim's body the accused touched, how the accused touched the victim, and the duration of the outrage of modesty;
>
> (b) circumstances of the offence, including but not limited to:
>
> (i) presence of premeditation;
>
> (ii) use of force or violence;
>
> (iii) abuse of a position of trust;

152 [2017] 1 SLR 292.
153 *Public Prosecutor v BAB* [2017] 1 SLR 292 at [65].
154 [2018] 3 SLR 1048.
155 *GBR v Public Prosecutor* [2018] 3 SLR 1048 at [27]–[30].

(iv) use of deception;

(v) other aggravating facts accompanying the outrage of modesty; and

(vi) exploitation of a vulnerable victim; and

(c) harm caused to the victim.

14.101 The court should next place the offence within an appropriate band of imprisonment.

(a) *Band 1 – Less than one year's imprisonment.*[156] Cases at the lowest end of the spectrum of seriousness. These include those which do not present any (or at most one) of the aggravating factors. Caning is generally not imposed for this category of cases.

(b) *Band 2 – one to three years' imprisonment.*[157] Cases where two or more of the aggravating factors present themselves. Caning will nearly always be imposed, with a suggested starting point of at least three strokes.

The lower end of this band would be cases in which there was an absence of skin-to-skin contact with the private parts of the victim. The higher end of this band would be those involving skin-to-skin touching of the victim's private parts or sexual organs.

The use of deception is also a relevant aggravating factor which would bring a case to the higher end of the spectrum of Band 2 cases.

(c) *Band 3 – three to five years' imprisonment.*[158] These are the most serious instances of aggravated outrage of modesty. Caning ought to be imposed and the starting point would be at least six strokes.

Cases in Band 3 include those involving the exploitation of a particularly vulnerable victim, a serious abuse of a position of trust, and/or the use of violence or force on the victim.

14.102 *GBR v Public Prosecutor* noted that offender-specific factors should be considered thereafter to adjust the sentence to properly take into account aggravating and mitigating factors that relate to the offender generally.[159]

156 *GBR v Public Prosecutor* [2018] 3 SLR 1048 at [32].
157 *GBR v Public Prosecutor* [2018] 3 SLR 1048 at [33]–[35].
158 *GBR v Public Prosecutor* [2018] 3 SLR 1048 at [37].
159 *GBR v Public Prosecutor* [2018] 3 SLR 1048 at [39].

Fatal road traffic accident cases

14.103 In *Public Prosecutor v Ganesan Sivasankar*,[160] the offender executed a U-turn in his lorry without bothering to check for oncoming traffic, causing the victim's motorcycle to collide into the lorry. The pillion rider, who was five months pregnant at the time of the accident, passed away, and the unborn child did not survive the accident.

14.104 In allowing the appeal by the Prosecution, the High Court observed that in the specific context of fatal accident cases, the culpability of the offender would largely determine the resulting sentence since the harm caused by the offence was, by definition, the death of the victim. See J noted that culpability-increasing factors would typically involve the violation of traffic regulations or a high degree of rashness.[161] See J categorised fatal accident cases under s 304A(*a*) of the Penal Code into three categories depending on the offender's culpability, with the presumptive sentencing range for each category set as follows in a claim trial scenario:[162]

Category	Offender's culpability	Presumptive sentencing range
1	Low	3–5 months' imprisonment
2	Moderate	6–12 months' imprisonment
3	High	More than 12 months' imprisonment

14.105 Category 1 involved cases where an offender's culpability was low. Culpability-increasing factors would either be absent altogether or present only to a very limited extent.[163] Category 2 cases dealt with offenders whose culpability were moderate. Cases falling within this category would usually involve culpability-increasing factors.[164] Category 3 cases would cover cases where an offender's culpability was high, and would involve the most culpable of offenders. If more than one of the more serious culpability-increasing factors were present, such a case would clearly fall within Category 3. Other examples included

160 [2017] 5 SLR 681.
161 *Public Prosecutor v Ganesan Sivasankar* [2017] 5 SLR 681 at [54].
162 *Public Prosecutor v Ganesan Sivasankar* [2017] 5 SLR 681 at [55].
163 *Public Prosecutor v Ganesan Sivasankar* [2017] 5 SLR 681 at [58].
164 *Public Prosecutor v Ganesan Sivasankar* [2017] 5 SLR 681 at [61].

cases where the offender's conduct was deliberately rash or exhibited a blatant disregard for human life.[165]

14.106 After deciding on which applicable presumptive sentencing range the case fell within, further adjustments would then have to be made to take into account relevant mitigating and aggravating factors which do not directly relate to the commission of the offence *per se*.

National Service ("NS") defaulters

14.107 In *Public Prosecutor v Sakthikanesh s/o Chidambaram*,[166] a three-judge *coram* of the High Court set out the applicable principles for sentencing persons who default on their NS, and established benchmark sentences for such offences.

14.108 Observing that the underlying principles of NS are national security, universality and equity, Chao JA, writing on behalf of the High Court, noted that in order to ensure Singapore's national security, every male Singaporean must serve NS and at the time he is required to under the Enlistment Act,[167] without regard to his personal convenience and considerations. The punishment for NS defaulters must be sufficiently severe, so as to deter potential offenders from evading their obligations or opting to postpone them to a time of their own convenience. The court therefore noted that general deterrence is the key sentencing objective in the sentencing of NS defaulters.[168]

14.109 As a general rule, the standard of performance of a defaulter who returned to serve NS would be considered irrelevant for sentencing. It is the duty and obligation of every male Singaporean to do his best in NS, and recognising exceptional NS performance as a mitigating factor could undermine the sentencing objective of general deterrence.[169]

14.110 The court further observed that the key consideration in the determination of the appropriate sentence for an NS defaulter would, as a general rule, be the length of the period of default. This was because the length of the period of default had a direct correlation to the likelihood of the offender being able to serve his NS duties in full.[170] Cases involving short periods of default of two years or less would generally not attract a custodial sentence, while conversely, NS

165 *Public Prosecutor v Ganesan Sivasankar* [2017] 5 SLR 681 at [64].
166 [2017] 5 SLR 707.
167 Cap 93, 2001 Rev Ed.
168 *Public Prosecutor v Sakthikanesh s/o Chidambaram* [2017] 5 SLR 707 at [47]–[48].
169 *Public Prosecutor v Sakthikanesh s/o Chidambaram* [2017] 5 SLR 707 at [55]–[56].
170 *Public Prosecutor v Sakthikanesh s/o Chidambaram* [2017] 5 SLR 707 at [57].

defaulters whose period of default was around 23 years or more would constitute the worst category of NS defaulters and start at the statutory maximum of 36 months' imprisonment.[171] Between the two ends of the custodial range, the sentence to be meted out should not increase linearly with the length of the period of default; instead, the rate of increase in sentence should be amplified with longer periods of default, to reflect the decline in a person's physical fitness with age and to create a progressive disincentive for NS defaulters to delay their return to resolve their offences. A spike in the sentence was also warranted once the period of default crossed the ten-year mark, as NS defaulters who return after more than ten years of default would unlikely be able to serve their post-operationally ready date reservist obligations in full before the statutory age of 40.[172]

14.111 The court rejected the view that the sentence to be meted out to an NS defaulter should be calibrated based on whether he has a substantial connection to Singapore, or the amount of benefits he has enjoyed as a Singapore citizen. Chao JA observed that doing so would severely undermine the principle of universality and equity by differentiating between classes of Singapore citizenship when no such differentiation exists.[173]

14.112 However, where an NS defaulter voluntarily surrenders, Chao JA noted that some mitigating weight might be given so as to provide an incentive for them to come forward to resolve their offences. However, the mitigating weight to be attached to voluntary surrender would in most cases be quite limited as (a) awarding a significant sentencing discount would be inconsistent with the principles of universality and equity which require all male Singaporeans to serve NS when notice is given and not at a time of their choosing, (b) overseas defaulters placed themselves in a situation where they could not be arrested by remaining outside jurisdiction, and (c) an NS defaulter's voluntary surrender is unlikely to be borne out of genuine remorse. In a similar vein, a plea of guilt in the context of sentencing NS defaulters would in most cases attract either very limited or no mitigating value at all, and should be considered holistically with the fact of voluntary surrender.[174]

171 *Public Prosecutor v Sakthikanesh s/o Chidambaram* [2017] 5 SLR 707 at [60]–[62].
172 *Public Prosecutor v Sakthikanesh s/o Chidambaram* [2017] 5 SLR 707 at [66].
173 *Public Prosecutor v Sakthikanesh s/o Chidambaram* [2017] 5 SLR 707 at [70].
174 *Public Prosecutor v Sakthikanesh s/o Chidambaram* [2017] 5 SLR 707 at [76]–[80].

14.113 The court set out the following sentencing benchmarks or pegs, based on the length of the period of default, which provide appropriate starting points in determining the sentence for an NS defaulter:[175]

Peg	Length of period of default	Starting point of imprisonment
1	2–6 years	2–4 months
2	7–10 years	5–8 months
3	11–16 years	14–22 months
4	17–23 (or more) years	24–36 months

14.114 The starting point sentences were to increase by different lengths for each additional year of default depending on which peg the case belonged to, on the basis that the sentence meted out should not increase linearly but should be amplified with longer periods of default. As such:

> (a) for Peg 1 – the starting point sentence was to increase by half a month with each additional year of default;
>
> (b) for Peg 2 – the starting point sentence was to increase by one month for each additional year of default;
>
> (c) for Peg 3 – the starting point sentence was to increase by one-and-a-half months for each additional year of default; and
>
> (d) for Peg 4 – the starting point sentence was to increase by two months for each additional year of default.[176]

14.115 Naturally, all the circumstances including the relevant aggravating and mitigating factors should be considered in ultimately arriving at the appropriate sentence in each case, after having reference to the starting points in the sentencing process.

Sale of cough preparations for non-medical purposes – Offences under Poisons Act[177]

14.116 The case of *Tan Gek Young v Public Prosecutor*[178] involved a medical doctor who sold more than 2,300 litres of cough preparations

175 *Public Prosecutor v Sakthikanesh s/o Chidambaram* [2017] 5 SLR 707 at [87].
176 *Public Prosecutor v Sakthikanesh s/o Chidambaram* [2017] 5 SLR 707 at [88].
177 Cap 234, 1999 Rev Ed.
178 [2017] 5 SLR 820.

for non-medical purposes over a period of 15 months. Both the Prosecution and Defence appealed against the sentence imposed at first instance.

14.117 Dismissing both cross-appeals, Chao JA opined that deterrence was the primary sentencing consideration for the offences under the Poisons Act, and that the illicit supply of codeine cough preparations specifically was a prevalent problem which needed to be met with deterrent sentences.[179] Chao JA declined, however, to lay down sentencing bands tied to the quantity of codeine cough preparations supplied, as he observed there was an insufficient body of precedents that could guide the formulation of such sentencing bands. He did, however, set out sentencing guidelines through which the appropriate sentence could be determined.[180]

14.118 First, the court ought to determine the circumstances in which the custodial threshold would be crossed. Chao JA disagreed that a custodial sentence and a fine should be imposed on a medical practitioner or pharmacist convicted of selling codeine cough preparations without a licence *regardless* of the quantity supplied, and instead pegged the custodial threshold at being where the quantity of codeine cough preparations involved was substantial or if there were multiple charges indicating the offender regularly sold codeine cough preparations.[181]

14.119 Second, once it was determined that the custodial threshold had been crossed, the focus should then shift to a consideration of sentence-specific aggravating factors, which would include:[182]

(a) the quantity of codeine cough preparations involved;

(b) the role of the offender;

(c) whether the offence was committed while the offender was under investigation;

(d) the amount of profit made;

(e) the presence of relevant antecedents; and

(f) the number of charges taken into consideration for the purpose of sentencing.

The court should then consider the mitigating factors.

179 *Tan Gek Young v Public Prosecutor* [2017] 5 SLR 820 at [43]–[44].
180 *Tan Gek Young v Public Prosecutor* [2017] 5 SLR 820 at [66]–[67].
181 *Tan Gek Young v Public Prosecutor* [2017] 5 SLR 820 at [69]–[70].
182 *Tan Gek Young v Public Prosecutor* [2017] 5 SLR 820 at [72]–[73].

14.120 Third, once the appropriate custodial sentence for each charge had been decided, the court should consider whether to impose a fine as well, to disgorge the offender's benefit from his offending.[183]

14.121 Finally, the sentencing judge should then, having regard to the cumulative aggravating factors, decide how many of the individual sentences should be ordered to run consecutively. A judge should consider ordering more than two sentences to run consecutively when one or more of the following four circumstances are present:[184]

(a) The offender is a persistent or habitual one.

(b) There is a pressing public interest in discouraging the type of criminal conduct.

(c) There are multiple victims.

(d) Other peculiar cumulative aggravating factors are present.

Voluntarily causing hurt to police officer

14.122 Police officers are often exposed to violence and aggression in the course of their frontline duties. Attacks against police officers have undesirable societal consequences: (a) they undermine public confidence in our police officers as authority figures; (b) they may have an adverse impact on the Singapore Police Force's recruitment efforts; and (c) they may, if left unchecked, manifest a risk of defensive policing. The High Court in *Public Prosecutor v Yeo Ek Boon Jeffrey*[185] recognised these concerns and, consequently, devised a sentencing framework for cases involving offences under s 332 of the Penal Code of voluntarily causing hurt to public servants who are police officers as well as public servants performing duties akin to police duties at the material time.

14.123 The framework formulated by the three-judge *coram* in the High Court comprised three broad sentencing bands, within which the severity of an offence and hence the sentence to be imposed may be determined on the basis of the twin considerations of harm and culpability. Tay JA, writing on behalf of the High Court, noted that the offence-specific and offender-specific aggravating and mitigating factors ought to be factored into the analysis within the harm and culpability considerations themselves. The degree of harm caused would refer to the nature and gravity of the hurt caused to the particular police officer and the consequences to the police in general, while the degree of

183 *Tan Gek Young v Public Prosecutor* [2017] 5 SLR 820 at [75].
184 *Tan Gek Young v Public Prosecutor* [2017] 5 SLR 820 at [76].
185 [2018] 3 SLR 1080.

culpability would be measured chiefly in relation to the manner and the motivation of the offender's involvement in the criminal act. The sentencing bands were set out as follows:[186]

Category	Circumstances	Sentencing band
1	Lesser harm and low culpability	Fine or up to 1 year's imprisonment
2	Greater harm and lower culpability or lesser harm and higher culpability	1–3 years' imprisonment
3	Greater harm and higher culpability	3–7 years' imprisonment

14.124 Tay JA further observed that fines should be meted out only in very exceptional cases, where the offending act ranks the lowest in the harm and culpability spectrum.[187] The High Court also set out a non-exhaustive list of factors relating to the harm and the culpability of the offence:[188]

> (a) the degree of hurt caused and its consequences;
>
> (b) the use or attempted use of a weapon or other dangerous implement or means … and its capacity to do harm;
>
> (c) the age, lack of maturity or presence of mental disorder where it affects materially the responsibility of the offender;
>
> (d) the circumstances leading to the commission of the offence[;]
>
> (e) the timing and location of the offence, in particular whether it was committed within the public's view and hearing;
>
> (f) whether the offence involved a sustained or repeated attack;
>
> (g) the number of offenders involved;
>
> (h) whether the offender intended to inflict more serious hurt than what materialised;
>
> (i) whether any steps were taken to avoid detection or prosecution; and
>
> (j) the offender's criminal history and propensity.

14.125 For Category 3 cases, which cover the most serious of offences under the provision that involve a high degree of both harm and

186 *Public Prosecutor v Yeo Ek Boon Jeffrey* [2018] 3 SLR 1080 at [57]–[59].
187 *Public Prosecutor v Yeo Ek Boon Jeffrey* [2018] 3 SLR 1080 at [59].
188 *Public Prosecutor v Yeo Ek Boon Jeffrey* [2018] 3 SLR 1080 at [60].

culpability, Tay JA noted that caning would be appropriate as a general rule where inordinate violence is shown, weapons are used or where the offender attempts to snatch or to use the police officer's firearms. Other considerations justifying caning would be where:[189]

> (a) the attack on the police officer involved a high degree of brutality or gratuitous violence, often with some prior planning;
>
> (b) the attack on the police officer involved group or gang-related violence;
>
> (c) the attack resulted in very serious injuries to the police officer;
>
> (d) the attack occurred at a time and place where the public was put at risk[; and]
>
> (e) the offender's antecedents demonstrated recalcitrance and a strong propensity to commit violent offences.

Wrongful confinement

14.126 In *Chua Siew Peng*, a domestic helper was wrongfully confined in her place of employment on one date, when she had been similarly confined during other periods throughout her term of employment of 11 months. This was done by locking the victim in the residence to prevent her from leaving the house, so that no one would notice the visible injuries that she had sustained from the offender's assaults. Chan J sketched out a sentencing framework for the offence of wrongful confinement under s 342 of the Penal Code in light of prior inconsistent case law and the hitherto absence of a settled sentencing framework.

14.127 Chan J stated that the following non-exhaustive aspects of the offence ought to be considered:[190]

> (a) *Total duration of the wrongful confinement.* Generally, the longer the period of confinement is, the more aggravated the offence will be.
>
> (b) *Conditions in which the victim was wrongfully confined.* The court should consider, amongst other things, whether the victim was given inadequate access to basic necessities such as food, water, clothing and sanitation and whether the place of confinement is dirty, uncomfortable or barely habitable. It would be an aggravating factor if the offender was responsible for conditions intended to deny the victim access to basic

189 *Public Prosecutor v Yeo Ek Boon Jeffrey* [2018] 3 SLR 1080 at [74].
190 *Chua Siew Peng v Public Prosecutor* [2017] 4 SLR 1247 at [115].

necessities, or to cause prolonged discomfort, or to humiliate the confined person.

(c) *Whether the wrongful confinement was committed to facilitate the commission of another offence.* A sentence of at least four weeks' imprisonment is the norm when wrongful confinement is committed to facilitate the commission of a further or multiple offences such as criminal intimidation, voluntarily causing hurt or a sexual offence.

Where domestic helpers are wrongfully confined, a custodial sentence should be the starting point if the wrongful confinement was intended to abet, allow, facilitate or conceal the physical abuse of the domestic helper.

(d) *Consequences of the confinement on the victim.* The injuries suffered by a victim of wrongful confinement should be considered in determining the severity of the sentence to be imposed on the offender, even if those injuries did not arise directly from the offender's actions, as long as there is a causal link between the wrongful confinement and the injuries suffered.

Voluntarily causing grievous hurt

14.128 The tragic case of *Public Prosecutor v BDB*[191] saw the offender repeatedly abuse her four-year-old biological son, who eventually died. The Court of Appeal observed that the primary sentencing objective in cases prosecuted under s 325 of the Penal Code for voluntarily causing grievous hurt would likely be deterrence, with retribution possibly relevant where heinous violence has been inflicted. Menon CJ, delivering the decision of the Court of Appeal, held that sentencing in such cases should be approached in the following two-step process:[192]

(a) First, the seriousness of the injury caused is a good indicator of the gravity of the offence, and can guide the court in determining the indicative starting point for sentencing. This should be assessed along a spectrum, having regard to considerations such as the nature and permanence of the injury.

(i) Where the grievous hurt takes the form of death, the indicative starting point should be around eight years' imprisonment.[193]

191 [2018] 1 SLR 127.
192 *Public Prosecutor v BDB* [2018] 1 SLR 127 at [55].
193 *Public Prosecutor v BDB* [2018] 1 SLR 127 at [56].

(ii) Where the grievous hurt takes the form of multiple fractures such as elbow, calf and rib fractures, the indicative starting point should be a term of imprisonment of around three years and six months.[194]

(b) Second, after the indicative starting point has been identified, the judge should consider the necessary adjustments upwards or downwards based on an assessment of the offender's culpability and the presence of relevant aggravating and/or mitigating factors. Such aggravating factors would include:[195]

(i) the extent of deliberation or premeditation;

(ii) the manner and duration of the attack;

(iii) the victim's vulnerability;

(iv) the use of any weapon;

(v) whether the attack was undertaken by a group;

(vi) any relevant antecedents on the offender's part; and

(vii) any prior intervention by the authorities.

14.129 Typical mitigating factors that are raised would include (a) the offender's mental condition, (b) the offender's genuine remorse, and (c) the offender's personal, financial or social problems.

14.130 In respect of caning, Menon CJ observed that caning should follow unless there were exceptional circumstances. On the matter of quantum, Menon CJ noted that where a death had been caused, a sentence of between six and 12 strokes of the cane should be generally considered.[196]

Cheating committed in the context of people smuggling

14.131 In *Keeping Mark John v Public Prosecutor*,[197] the offender had been recruited by a people smuggling syndicate to assist in facilitating the illegal entry of its customers to New Zealand. The Prosecution argued that people smuggling posed a major threat to public safety and security, emphasising that terrorist groups appear to be increasingly resorting to organised crime, including activities such as people smuggling.

194 *Public Prosecutor v BDB* [2018] 1 SLR 127 at [56].
195 *Public Prosecutor v BDB* [2018] 1 SLR 127 at [62].
196 *Public Prosecutor v BDB* [2018] 1 SLR 127 at [76].
197 [2017] 5 SLR 627.

14.132 Chao JA observed, however, that the evidence linking people smuggling to safety threats and terrorism was thin, and that in this particular case, there was no evidence that the syndicate which the offender was working with had any links to terrorism. His Honour further noted that although the maximum sentence for offences of cheating by personation under s 419 of the Penal Code had been increased from three to five years' imprisonment, no weight ought to be given to this increase in maximum sentence, as this had to be moderated against the parliamentary material which made clear that existing sentencing guidelines need not be changed and could continue.

14.133 Consequently, in view of this, Chao JA decided that the benchmark sentence for s 419 offences committed in the context of people smuggling should be a term of imprisonment of four to six months, and consequently reduced the sentence imposed on the offender by the court of first instance (of 12 months' imprisonment).

Culpable homicide not amounting to murder

14.134 In *Dewi Sukowati v Public Prosecutor*,[198] a 17-year-old domestic helper suffering from an acute stress reaction caused the death of her 69-year-old employer. Amongst other things, the offender had grabbed hold of the deceased's hair and swung her head forcefully against a wall, causing the deceased to collapse and fall unconscious. As the offender was dragging the deceased's body towards the swimming pool to drown her and give the impression that the deceased had committed suicide, she slammed the back of the deceased's head against the edge of a step in anger. The sentence of 18 years' imprisonment was upheld on appeal.

14.135 Menon CJ, delivering the decision of the Court of Appeal, observed that the sentencing inquiry for cases of culpable homicide must always be fact-sensitive, given the wide variety of circumstances in which these offences are committed. Previous sentencing decisions involving homicides by domestic helpers broadly fell into two clusters: first, cases in which the sentences imposed have ranged between ten and 13 years; and second, cases where the sentences have tended to cluster around either 20 years' or life imprisonment. The court rationalised the first set of cases to have involved offenders suffering from severe mental disorders with psychotic symptoms, and that deterrence played little if at all of a role in sentencing. The second set of cases, however, generally involved premeditation and the interests of deterrence.

198 [2017] 1 SLR 450.

Murder – When death is warranted

14.136 The principles in relation to the imposition of the discretionary death penalty for murder have been thoroughly considered in *Public Prosecutor v Kho Jabing*[199] ("*Kho Jabing*"). The unanimous decision was that the test for determining whether to impose the death penalty in this context is whether the actions of the offender would *outrage the feelings of the community*. The death penalty would be appropriate in cases where the offender had acted in a way which exhibited viciousness or a blatant disregard for human life.

14.137 In *Micheal Anak Garing v Public Prosecutor*,[200] the court had to consider when the discretionary death penalty ought to be imposed in respect of a *secondary* offender, meaning an offender who did not inflict the fatal blow on the victim. The Court of Appeal held that the principles laid down in *Kho Jabing* would apply equally to a secondary offender.[201]

14.138 In considering the specific culpability of a secondary offender, the court rejected the Prosecution's submission that the secondary offender would bear equal culpability for the deceased's death as the principal offender because they were convicted on the basis of their shared common intention to commit murder under s 300(*c*) read with s 34 of the Penal Code. Section 34 only equated the culpability of a principal offender with that of a secondary offender for the purposes of *determining criminal liability*, but not for the purposes of *sentencing*.[202]

14.139 In deciding whether a secondary offender acted in blatant disregard for human life, two particular factors were relevant: (a) the mental state of the offender at the time of the attack; and (b) his actual role or participation in the attack. The confluence of both these factors would ultimately determine whether the offender acted in blatant disregard for human life. The mere fact that an offender did not inflict the fatal blows would not necessarily mean that the death penalty would therefore be unwarranted. Each case must necessarily turn on its own facts.[203]

14.140 In this present case, the court was not satisfied that the secondary offender acted in blatant disregard for human life such that

199 [2015] 2 SLR 112, discussed at some length in (2015) 16 SAL Ann Rev 396 at 432–435, paras 14.88–14.95.
200 [2017] 1 SLR 748.
201 *Micheal Anak Garing v Public Prosecutor* [2017] 1 SLR 748 at [52].
202 *Micheal Anak Garing v Public Prosecutor* [2017] 1 SLR 748 at [53].
203 *Micheal Anak Garing v Public Prosecutor* [2017] 1 SLR 748 at [54].

the sentence of death was warranted. The evidence did not show that he had held on to the deceased for a significant period of time long enough for the principal offender to inflict the fatal injuries on the deceased. While the secondary offender must have known that the principal offender would use the *parang* on the deceased, the court found that such knowledge coupled with his act of initiating the attack on the deceased would, without more, be insufficient to amount to a blatant disregard for human life. Conversely, had there been a preconceived plan to inflict the heinous injuries sustained by the deceased (as opposed to knowledge that a savage and merciless attack was likely), or a plan to kill the deceased in such a brutal manner, the imposition of the death penalty on the secondary offender may have been justified. Similarly, had there been more certainty on the evidence as to his actual participation in the attack, the death penalty may also have been warranted.[204]

204 *Micheal Anak Garing v Public Prosecutor* [2017] 1 SLR 748 at [61]–[62].