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, Crime Division, Attorney-General's Chambers.

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

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

CRIMINAL PROCEDURE

14.1 It has been said that the "golden thread" that runs through criminal law – a corollary of the presumption of innocence – is that the Prosecution bears the burden of proving a criminal charge beyond reasonable doubt.[1] Two cases in 2018 – both involving offences under the Misuse of Drugs Act[2] ("MDA") – underscore the importance of this, and the application of the principle.

Fundamental requirement of fairness for Prosecution to run a consistent case that gives accused chance to rebut it

14.2 The first – the Court of Appeal decision of *Mui Jia Jun v Public Prosecutor*[3] ("*Mui Jia Jun*") – serves as a salutary reminder[4] that, in view of the Prosecution's burden, a trial court should not make a finding that resolves against the accused what would otherwise amount to a vital

1 *AOF v Public Prosecutor* [2012] 3 SLR 34 at [1] and [2].
2 Cap 185, 2008 Rev Ed.
3 [2018] 2 SLR 1087.
4 Affirming V K Rajah JA's (as he then was) observations in *Jagatheesan s/o Krishnasamy v Public Prosecutor* [2006] 4 SLR(R) 45 and *Sakthivel Punithavathi v Public Prosecutor* [2007] 2 SLR(R) 983.

weakness in the Prosecution's case when such weakness was not addressed by the Prosecution sufficiently to support such finding. Put another way, it is incumbent on the Prosecution, and not the court, to address any weaknesses in the evidence adduced.

14.3 The case involved two offenders, though the appeal only involved one of these two individuals. The Prosecution's case at trial in *Mui Jia Jun* was a composite one that comprised two facets of participation – first, that the appellant had handed the co-offender ("Tan") a bag containing the drugs; and second, that the appellant had sent the co-offender text messages containing instructions regarding the delivery of the drugs. The Prosecution did not suggest, in its opening address or otherwise, that these two aspects of its case were independent bases upon which the appellant could be convicted. On appeal, the Prosecution conceded that although there was reasonable doubt as to whether the first facet of its case had been established, the appellant's conviction could be upheld nonetheless based singularly on the evidence supporting the second facet of its case.

14.4 Tan claimed to have only handled the drugs in the course of separating them for their intended recipients. In spite of his evidence that he had not packed any of the drugs, his DNA was found on the adhesive side of the tape covering the cling wrap around five of the ten bundles. No reasonable explanation was offered by the Prosecution for this, although this suggested that Tan may have been more intimately involved in the preparation of the drug bundles than he had claimed to be. The trial judge reasoned that Tan's DNA could have been left on the exposed adhesive edges of tape at the ends of the bundles while he was handling the bundles for delivery. The Court of Appeal took issue with such a finding, noting that it was wrong to resolve such doubt in the circumstances in the Prosecution's favour and that the trial judge was not entitled to fill in this significant lacuna in the Prosecution's case even assuming there may have been some evidential basis to do so.[5]

14.5 The Court of Appeal accordingly ordered a retrial of the matter. It highlighted that an accused person was not liable to be convicted based on a case that was not clearly mounted against him at the trial where the evidence, especially that of the defence, might have unfolded differently had the Prosecution clearly advanced that case.[6] The Court of Appeal also laid down guidance for the Prosecution to make it explicit when it was seeking a conviction based on any individual facet of its case, if it was advancing a composite case comprising several facets

5 *Mui Jia Jun v Public Prosecutor* [2018] 2 SLR 1087 at [71].
6 *Mui Jia Jun v Public Prosecutor* [2018] 2 SLR 1087 at [92].

and such intent was otherwise not reasonably clear to the accused absent an express statement to that effect. Two points in particular were highlighted:[7]

> (a) First, the charge should, if practicable, clearly state the various facets of the Prosecution's case against the accused.
>
> (b) Second, the Prosecution should make clear that it is seeking a conviction of the accused based on any one of the multiple facets of its case. If this cannot be done in the charge, it could be made clear in the opening address at the trial or in other ways in writing.

Chain of custody – Drug exhibits under MDA

14.6 It is trite that *vis-à-vis* offences under the MDA, the Prosecution bears the burden of proving beyond reasonable doubt that the exhibits seized were, in fact, the substances analysed and that formed the substratum of the charge(s) against the accused.[8] The second case, *Mohamed Affandi bin Rosli v Public Prosecutor*[9] ("*Mohamed Affandi*"), served as a useful and salutary reminder of the importance of the integrity of establishing the chain of possession *vis-à-vis* such exhibits. For present purposes, it is useful to note that, in that case, two officers from the Central Narcotics Bureau ("CNB") testified to two mutually exclusive narratives on who had possession of the drug exhibits for a few hours on the day of the seizure. The question that arose was whether this raised a reasonable doubt on the chain of custody, notwithstanding the fact that both narratives entailed a CNB officer taking care, and having carriage, of the exhibits in question.

14.7 The Court of Appeal, in a majority decision, acquitted the accused persons, concluding that a reasonable doubt was raised in relation to the integrity of the chain of custody of the exhibits in this case. The majority (Sundaresh Menon CJ and Chao Hick Tin SJ) noted that the two disparate accounts gave rise to a reasonable doubt as to the identity of the exhibits. In their view, the court had, before it, two complete and mutually exclusive chains of custody of exhibits, neither of which could be disproved, and neither of which therefore could be proved beyond a reasonable doubt.[10] In the majority view, it was not for an accused to have to show that the exhibits left the custody of the officers, that unauthorised parties had access to them during such

7 *Mui Jia Jun v Public Prosecutor* [2018] 2 SLR 1087 at [95].
8 *Abdul Rashid v Public Prosecutor* [1993] 3 SLR(R) 656.
9 [2019] 1 SLR 440.
10 *Mohamed Affandi bin Rosli v Public Prosecutor* [2019] 1 SLR 440 at [51].

period, or that the exhibits had been interfered with, but for the Prosecution to prove the chain of custody beyond reasonable doubt.

14.8 The minority (Tay Yong Kwang JA) disagreed with such analysis. Instead, the minority opined that going by either version of events, there was a single unbroken chain of custody of the exhibits. As there was no evidence to suggest that the exhibits ever left the custody of the CNB officers, or were mixed up with other unrelated exhibits, no reasonable doubt was raised in relation to the identity of the exhibits.[11] Consequently, the minority concluded that the convictions recorded by the High Court should not be disturbed and dismissed the appeals.

14.9 Whatever the merits of the diametrically opposed outcomes arrived at by the majority and minority of the Court of Appeal in this case, it is perhaps apt for the authors to underscore the fact that the decision is not, and should not be seen, as being reflective of any change in the law. In particular, the majority decision was quick to highlight that none of what the majority decided means that speculative arguments about the *possibility* of contamination would be entertained, or that in every drug case, the Prosecution bears the burden of calling each and every witness to establish chain of possession.[12] Put another way, the majority noted, speculative contentions of a theoretical possibility of a break in the chain of custody would not suffice.[13] This coheres with the position taken by the minority that the mere raising of possibilities that fall within the realm of speculation would not rise to the level of creating a reasonable doubt.[14]

The Prosecution's obligations of disclosure

14.10 In 2011, the seminal case of *Muhammad bin Kadar v Public Prosecutor*[15] ("*Kadar (No 1)*") set out the common law duty of the Prosecution in relation to disclosure of relevant material not favourable to its case. In summary, the Prosecution must disclose to the Defence material which takes the form of (a) any unused material that is likely to be admissible and that might reasonably be regarded as credible and relevant to the guilt or innocence of the accused; and (b) any unused material that is likely to be inadmissible, but would provide a real (not fanciful) chance of pursuing a line of inquiry that leads to material that is likely to be admissible and that might reasonably be regarded as

11 *Mohamed Affandi bin Rosli v Public Prosecutor* [2019] 1 SLR 440 at [123].
12 *Mohamed Affandi bin Rosli v Public Prosecutor* [2019] 1 SLR 440 at [41].
13 *Mohamed Affandi bin Rosli v Public Prosecutor* [2019] 1 SLR 440 at [56].
14 *Mohamed Affandi bin Rosli v Public Prosecutor* [2019] 1 SLR 440 at [120].
15 [2011] 3 SLR 1205.

credible and relevant to the guilt or innocence of the accused.[16] Following the decision in *Kadar (No 1)*, there have been multiple – largely unsuccessful – challenges brought by the Defence against what is claimed to be purported breaches by the Prosecution of its disclosure obligations. 2018 was no exception, with four cases in particular warranting mention.

14.11 In *Public Prosecutor v Muhammad Nabill bin Mohd Fuad*[17] and *Tay Wee Kiat v Public Prosecutor*[18] ("*Tay Wee Kiat*"), the High Court reiterated that the starting point in the analysis was to first recognise that, pursuant to s 259 of the Criminal Procedure Code[19] ("CPC"), witness statements made by a person other than the accused were inadmissible unless they fell within the scope of the exceptions listed. The court did not have power to depart from or vary the requirements of statute, and the Prosecution's obligations under *Kadar (No 1)* would not affect the operation of any ground for non-disclosure recognised by any law.[20] The Prosecution would therefore only be obliged to disclose the statements to the Defence if they "would provide a real (not fanciful) chance of pursuing a line of inquiry that leads to material that is likely to be admissible and that might reasonably be regarded as credible and relevant to the guilt or innocence of the accused".[21] The High Court, in dismissing the application in both instances, noted that these requirements were not satisfied in either case. The High Court specifically emphasised that even if there were possible inconsistencies to be found in a victim's statements, this did not necessarily or by itself entitle the Defence to disclosure. It noted that to hold otherwise would be to essentially introduce a general "duty" to disclose the victim's statements, as this would lead to the exceptions to s 259 of the CPC invariably being the rule rather than the exception.[22]

14.12 In *Nurun Novi Saydur Rahman v Public Prosecutor*,[23] a witness (who had absconded from Singapore before trial) had given two statements that were materially inconsistent – the first statement was a denial that he had instructed the appellant not to install a loading platform, while the second statement included an admission that he had instructed the appellant not to install the loading platform. The Defence contended that the Prosecution had breached its disclosure obligations by not disclosing the second statement. However, the fact that the

16 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [113].
17 [2018] SGHC 268.
18 [2018] 4 SLR 1315.
19 Cap 68, 2012 Rev Ed.
20 *Muhammad bin Kadar v Public Prosecutor* [2011] 4 SLR 791 at [18].
21 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [113(b)].
22 *Tay Wee Kiat v Public Prosecutor* [2018] 4 SLR 1315 at [27].
23 [2019] 3 SLR 413.

witness had instructed the appellant not to install the loading platform was not in dispute to begin with, and was, in fact, set out in the agreed statement of facts adduced in evidence. The High Court thus agreed with the trial judge that there were no reasonable grounds to believe that the second statement was material that ought to have been disclosed.[24]

14.13 In *Public Prosecutor v BNO*[25] ("*BNO*"), the Defence applied for a copy of the victim's statement after the defence was called, on the basis of (a) alleged material discrepancies and contradictions between the victim's testimony in court, and a summary of facts produced by the investigating officer as well as his testimony in court; and (b) a subsequent amendment of a charge as originally framed. Both of these grounds were rejected by the High Court. The alleged inconsistencies as raised by the Defence were found by the court not to be sufficiently material to raise reasonable grounds for the belief that the victim had told widely differing versions about the incidents to the police, and the amendment to the charge was similarly found to not be material.

Witness not being made to take oath or cautioned to tell the truth before giving evidence

14.14 Another matter that arose in *BNO* pertained to the effect of a young individual not being made to take an oath before he gave evidence in court, by reason of immaturity of age. The victim in that case was also not cautioned, pursuant to s 6 of the Oaths and Declarations Act,[26] to state the truth. The Defence latched on to this contending that this "procedural defect" "[struck] at the very heart of the Prosecution's case". This argument was given short shrift by the High Court, which pointed out that the provision gave the judge the prerogative whether to caution a witness or not, and that in any case, s 8(*a*) of the Oaths and Declarations Act made clear that no omission to take an oath or administer a caution would invalidate any proceedings or render inadmissible any evidence in or in respect of which the omission took place.

24 *Nurun Novi Saydur Rahman v Public Prosecutor* [2019] 3 SLR 413 at [40].
25 [2018] SGHC 243.
26 Cap 211, 2001 Rev Ed.

Effect of omissions in charges

14.15 In *Ali bin Mohamad Bahashwan v Public Prosecutor*,[27] it was contended that the charges of trafficking and abetment of trafficking (of drugs) preferred in that case were defective as they omitted to specify the person to whom the drugs were to be transported. The trafficking charge stated that the offence was committed by "transporting [the drugs] from the void deck to the lift landing", while the abetment charge had stated that the abettor's offence was of "instigating [the abettee] to transport [the drugs] from the void deck to the lift landing".

14.16 While the Court of Appeal recognised that the charges could perhaps have been more comprehensively phrased, it nonetheless noted that it would have been implicit in the charges (as framed) that the transporting of the drugs must have been done with the intention to part with possession of the drugs to another person in order to promote the supply and distribution of the drugs. Applying s 127 of the CPC, the omission in expressly stating that the drugs were to be transported to someone did not render the charges defective, as both the abettor and abettee would have had no doubt as to the substance of the charges they were facing.[28]

Retraction of plea of guilt

14.17 In *Sukla Lalatendu v Public Prosecutor*,[29] the appellant sought to retract his plea of guilt on appeal, on the premise that the District Judge presiding over such proceedings had allegedly promised him, in chambers, the imposition of the minimum custodial sentence if he pleaded guilty. This was dismissed by Sundaresh Menon CJ, who disbelieved the appellant's allegations against the District Judge, and found instead that the appellant's attempt to retract his earlier plea of guilt had been motivated by the fact that he received a sentence more onerous than he had hoped for.

14.18 A preliminary issue which the court had to deal with was whether to allow the Prosecution's application to adduce fresh evidence by way of an affidavit deposed by a prosecutor as to her version of what had transpired (in the proceedings before the District Judge). In granting the application, Menon CJ recognised that the courts would generally require the adduction of sworn or affirmed evidence by the

27 [2018] 1 SLR 610.
28 *Ali bin Mohamad Bahashwan v Public Prosecutor* [2018] 1 SLR 610 at [27]–[30].
29 [2018] 5 SLR 1183.

relevant persons or authorities concerned in dealing with applications by an accused person to retract his plea of guilt, depending on the nature of the allegations grounding the application. Menon CJ endorsed the general procedure laid down in *Thong Sing Hock v Public Prosecutor*,[30] with suitable modifications in different contexts, where allegations have been made to support an application to retract such plea. This procedure was distilled as follows:[31]

> (a) First, the accused should be asked to confirm his intention to make the specific allegations and to make clear the precise contents of these allegations. An affidavit may be required of the accused if the allegations were numerous and involved, but this was not necessary if the court could clearly distil their essence since the allegations would have to be made in open court and on the record.
>
> (b) Secondly, the accused's previous counsel should be given an opportunity to respond. This was because the allegations would usually involve an attack on the counsel's integrity and/or professionalism, and any alleged misconduct by a member of the profession would often stain the image of the profession as a whole. Further, the evidence could then be evaluated to determine whether there was any basis for the accused's allegations. The filing of an affidavit was often desirable as this would provide the court with sworn or affirmed evidence which could then form the basis for its decision.
>
> (c) Thirdly, the accused may be given an opportunity to respond to the evidence provided by his previous counsel.

14.19 Seeing as the appellant's allegations in this case centred on what the District Judge had allegedly said or had done at a pretrial conference, the affidavit deposed to by the Prosecutor present was highly probative as to the assessment of the veracity of the appellant's allegations.

14.20 On the substantive issue before the court, Menon CJ stated as a matter of principle that if a judge or judicial officer made a promise or unequivocal representation to the accused that he would receive a particular sentence on condition that he pleaded guilty, and that promise or representation in fact induces the accused to plead guilty when he would not otherwise have done so, that would almost certainly constitute good grounds for the conviction premised on that plea to be

30 [2009] 3 SLR(R) 47.

31 *Sukla Lalatendu v Public Prosecutor* [2018] 5 SLR 1183 at [21].

set aside. These would, however, not apply in limited situations in which a judge may make certain statements to the accused regarding the issue of sentence, for example, where the judge explains the mechanics of the sentencing process or conveys the statutorily prescribed sentencing range to the accused.

Referring questions of law from three-judge *coram* of High Court

14.21 The four requirements for determining whether the Court of Appeal ought to exercise its substantive jurisdiction under s 397 of the CPC to answer questions referred to it are well established.[32] In past years, this typically meant the reference of a matter in the High Court presided over by a single judge to a three-judge *coram* of the Court of Appeal. The recent move to have matters of particular significance in the High Court be adjudicated by a three-member *coram* then raises an interesting question: to what extent do the conventional principles for a criminal reference to the Court of Appeal apply to such an application arising from a decision of a three-judge High Court *coram*?

14.22 The Court of Appeal decision of *Public Prosecutor v Lam Leng Hung*,[33] involving a five-judge *coram* of the Court of Appeal, had to grapple with this issue. In this regard, the Court of Appeal highlighted decisions from a three-judge *coram* of the High Court were conventionally intended to be an authoritative pronouncement on the issues of law, including the issues of law of public importance, arising from the case.[34] As such, where a question had already been determined by a three-judge *coram* in the High Court, the Court of Appeal would only exercise its substantive jurisdiction to determine such a question referred by the Public Prosecutor or grant leave to refer such a question to the Court of Appeal in "exceptional situations".[35] The rationale for this general principle lies in how a question can properly be regarded to have been settled, and therefore not one of public interest within the meaning of s 397, where a question has been considered and answered by a three-judge *coram* of the High Court (in essence, a *de facto* Court of Appeal) convened precisely to deal with important questions affecting the public interest that required detailed explanation.

14.23 In this case, notwithstanding the fact that a three-judge *coram* of the High Court had been convened to hear the appeal in the High Court, the Court of Appeal found that the circumstances were

32 *Mohammad Faizal bin Sabtu v Public Prosecutor* [2013] 2 SLR 141 at [15].
33 [2018] 1 SLR 659.
34 *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [60].
35 *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [56].

sufficiently exceptional to justify the exercise of its substantive jurisdiction under s 397 of the CPC. This was on the principal basis that a determination of the disputed issue by the High Court in that case would involve overturning or overruling High Court authority, which could only be accomplished as a matter of *stare decisis* by a *de jure* Court of Appeal. The question that was sought to be referred also arose not only from diverging local High Court decisions, but also in the light of conflicting judgments of three superior courts of the common law. Finally, the High Court *coram* had been split on the result (which was decided on a 2:1 majority of the three-judge *coram*), indicating that an authoritative determination by the Court of Appeal was necessary.

Late applications to adjourn criminal appeals

14.24 There has been, unfortunately, a rash of recent cases where appellants have sought adjournments on the premise that they require further time to prepare arguments, or wish to procure further evidence that is contended to be critical for the purposes of their appeal. While the courts have been largely accommodating in this regard, the Court of Appeal, in *Hamzah bin Ibrahim v Public Prosecutor*,[36] made clear that applications to adjourn criminal appeals at the eleventh hour would not be granted as a matter of course. Instead, where counsel considers that an adjournment application is absolutely necessary, they would be expected to identify the precise deficiency in their client's understanding and the prejudice resulting therefrom, and explain why an adjournment would be necessary in the interests of justice.[37] This certainly is correct in so far as there should be no assumption that adjournments being sought are a *fait accompli*, without showing that such an adjournment would be reasonable or necessary in the circumstances.

14.25 In the present case, the request for an adjournment was made only two days before the scheduled hearing. The Court of Appeal stated that it took a dim view of such late applications, which impede the proper administration of justice, but eventually acceded to the application on an exceptional basis after noting that the Prosecution did not object to it. In delivering an *ex tempore* judgment on this issue, the court took pains to underscore its expectations of counsel involved in criminal cases and of their duty to work with the court and in the interests of those they represent, in the discharge of the important work of the fair and efficient administration of criminal justice.[38]

36 [2018] 2 SLR 783.
37 *Hamzah bin Ibrahim v Public Prosecutor* [2018] 2 SLR 783 at [11].
38 *Hamzah bin Ibrahim v Public Prosecutor* [2018] 2 SLR 783 at [12].

Adducing fresh evidence on appeal

14.26 The three relevant conditions for the admission of fresh evidence on appeal as set out in *Ladd v Marshall*[39] – being non-availability at trial, relevance and reliability – have been adopted and adapted by our courts in the context of criminal appeals. Whereas our courts initially adopted a restrictive approach which significantly limited the circumstances under which any application to introduce fresh evidence would be allowed,[40] the *Ladd v Marshall* conditions have been gradually loosened in the context of criminal proceedings. This subtle but discernible shift commenced with the Court of Appeal's decision in *Mohammad Zam bin Abdul Rashid v Public Prosecutor*,[41] where the emphasis shifted to the question of relevancy (specifically, materiality and credibility) of the further evidence to be adduced. Subsequently, the High Court in *Soh Meiyun v Public Prosecutor*[42] made clear that, in determining whether an application by an accused person to admit further evidence on appeal should be allowed, the key considerations were the relevance and reliability of the evidence. The condition of non-availability was less paramount than the other two conditions.[43]

14.27 As all of these cases involved applications from the accused, it remained an open question as to how, if at all, the test would be different to an application from the Prosecution under s 392 of the CPC. In *Public Prosecutor v Mohd Ariffan bin Mohd Hassan*,[44] the Court of Appeal had to grapple with this precise issue. It held that, unlike applications by accused persons, the conditions set out in *Ladd v Marshall* should continue to apply in an unattenuated manner to applications by the Prosecution to admit further evidence in a criminal appeal.[45] Its reasons for assessing applications by accused persons more flexibly than those by the Prosecution were as follows:

> (a) First, there is a dire anxiety on the part of the court not to convict an innocent person or to impose a sentence that is disproportionate to the criminality of an offender's conduct.[46]
>
> (b) Second, there is a disparity of resources between the Prosecution and the accused persons generally. This "real, obvious and undeniable gap" between the resources of the

39 [1954] 1 WLR 1489.
40 *Juma'at bin Samad v Public Prosecutor* [1993] 2 SLR(R) 327 at [15].
41 [2007] 2 SLR(R) 410 at [6].
42 [2014] 3 SLR 299.
43 *Iskandar bin Rahmat v Public Prosecutor* [2017] 1 SLR 505.
44 [2018] 1 SLR 544.
45 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [56].
46 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [57].

Prosecution and the accused persons in general forms the basis for a reasonable expectation that the Prosecution is in possession of all the evidence it deems necessary to make its case by the time of trial. It also conversely justifies a comparatively more accommodating attitude in relation to attempts by accused persons to admit new evidence on appeal.

(c) Third, it is within the Prosecution's discretion to decide when to formally bring charges against an accused. While the Prosecution has control over the lead time before it presses charges, an accused person may not have as full an opportunity to deliberate on his litigation strategy and gather the evidence he wishes to put before the trial judge. More leniency should therefore be afforded to accused persons wishing to have fresh evidence admitted on appeal to ensure greater parity between the Prosecution and the Defence.[47]

(d) Fourth, fairness demands that sufficient recognition is accorded to the harrowing nature of the experience of being subject to criminal investigations and proceedings, and its likely effect on the accused's ability to fully and soundly consider the nature of the evidence he will need at trial.[48]

14.28 On the requirement of non-availability, the Court of Appeal accepted that in determining whether this requirement had been satisfied, the court should consider whether the evidence sought to be admitted on appeal was reasonably not thought to be necessary at trial. Where it was reasonably not apprehended that the evidence would or could have a bearing on the case at hand, this should favour permitting the party to subsequently have that evidence admitted on appeal.[49] There was no requirement that such further evidence be likely to have a decisive effect.

14.29 Over and above the *Ladd v Marshall* conditions, the Court of Appeal also found it relevant for the court to consider the proportionality of allowing an application and admitting the further evidence. The court in doing so was required to assess the balance between the significance of the new evidence, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional proceedings.[50] In its view, where evidence that favoured the respondent at the trial would no longer be available at the further proceedings (whether this is a retrial or some other type of proceedings)

47 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [59].
48 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [60].
49 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [68].
50 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [72].

to be ordered if the new evidence were admitted, and it would be necessary for this evidence to be re-examined or led again at the further proceedings in light of the new evidence, this would weigh heavily against allowing the application. Doing so would lead to severe prejudice against the respondent, through no fault of his own.[51] The court further highlighted that considerations of proportionality and prejudice were also relevant to the court's identification of the type of further proceedings to be ordered – only additional proceedings as are necessary to address the issues raised by the new evidence should be ordered.[52]

EVIDENCE

Turnbull identification guidelines

14.30 The courts have understandably been cautious about identification evidence, and its use as evidence indicative of guilt, particularly in situations where there is a paucity of corroborative evidence:[53]

> [The] need for (such) caution stems from the danger of a miscarriage of justice, particularly as the decision of the court will be determined by its acceptance or non-acceptance of such testimony.

Consequently, the courts have adopted a variant of the *Turnbull* guidelines[54] devised in the UK as a means to assess the reliability of the identification evidence. The local variant[55] encompasses three considerations:

> (a) first, whether the case is dependent wholly or substantially on the correctness of the identification evidence alleged by the Defence to be mistaken;
>
> (b) if so, second, whether the identification evidence is of good quality, having regard to the circumstances in which it was made; and
>
> (c) third, where the quality of such evidence is poor, whether there is any other evidence that supports the correctness of the identification.

51 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [75].
52 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [80].
53 Jeffrey Pinsler, *Evidence and the Litigation Process* (6th Ed, 2017) at para 13.023.
54 The name is derived from the seminal decision in which the principles emanated, *ie*, *R v Turnbull* [1977] QB 224.
55 *Heng Aik Ren Thomas v Public Prosecutor* [1998] 3 SLR(R) 142.

14.31 In *Kunasekaran s/o Kalumuthu Somasundara v Public Prosecutor*[56] ("*Kunasekaran*"), the court reaffirmed the applicability of the test in the context of identification evidence provided by a victim who had her modesty outraged on a public bus by the offender. The victim did not, at that juncture, confront the offender, but made a police report the very same day. Noting that the offender took the same bus from the same bus stop for the next three days, the offender was arrested on the third day by police officers who were waiting in ambush at the vicinity of the bus-stop. One of the issues raised by the offender was that he could have been mistakenly identified by the victim as the perpetrator.

14.32 Applying the test to the facts of the case, the court found that the case depended substantially on the correctness of the victim's identification of the offender, and her evidence was of good quality. Not only did the victim have a good opportunity to observe the offender for an extended period of time, she also did it from up close during the entire incident.[57] Furthermore, the offender had a distinct physical appearance and the fact that she was molested would have incited her to have a good look at the perpetrator to commit his face to memory.[58] In any event, even if her evidence were not of good quality, there was supporting evidence corroborating her identification of the offender in the form of bus records placing the offender in the same bus as the victim during the incident.[59]

"Unusually convincing" evidence

14.33 Decades ago, the courts largely required that evidence of a victim of a sexual crime be corroborated given the possibility of fabrication by the victim.[60] Such notions of the "perceived dangers of false accusation caused by sexual neurosis, jealousy, fantasy, spite or shame" warranting corroboration of a victim's testimony is generally viewed as being antiquated and out of step with modern-day society.[61] Instead, the courts have in more recent times adopted the stance that what is required in such circumstances is for the uncorroborated testimony of the victim to be "unusually convincing". This is an

56 [2018] 4 SLR 580.
57 *Kunasekaran s/o Kalumuthu Somasundara v Public Prosecutor* [2018] 4 SLR 580 at [17]–[19].
58 *Kunasekaran s/o Kalumuthu Somasundara v Public Prosecutor* [2018] 4 SLR 580 at [19].
59 *Kunasekaran s/o Kalumuthu Somasundara v Public Prosecutor* [2018] 4 SLR 580 at [22].
60 *Ng Kwee Piow v Public Prosecutor* [1960] MLJ 278.
61 *Kwan Peng Hong v Public Prosecutor* [2000] 2 SLR(R) 824 at [27].

evidential vehicle which requires that the court be aware of the dangers of convicting on the testimony of a singular uncorroborated witness and be satisfied that the testimony contains a ring of truth which leaves it satisfied that the charge is proved beyond reasonable doubt.[62]

14.34 In *Public Prosecutor v Yue Roger Jr*[63] ("*Yue Roger*"), the court provided further useful guidance on what amounts to "unusually convincing" testimony. In line with the Court of Appeal's observations in *Public Prosecutor v Mohammed Liton Mohammed Syeed Malik*,[64] Aedit Abdullah J noted that the assessment of what is "unusually convincing" and sufficient *by its own* to bring the case beyond the threshold of "beyond reasonable doubt" is multi-factorial, taking into account the demeanour of the individual, and the internal and external consistencies of the evidence.[65] On the facts of the case, the court found that while the victim was believable and credible as well as *convincing*, she was not *unusually convincing*, which requires something more in such testimony that can be ascribed additional weight, such that it would be sufficient to prove the case against the accused beyond reasonable doubt.[66] Having said that, Abdullah J noted the victim's testimony was not the only evidence against the accused, and his finding that her testimony was not unusually unconvincing was not fatal to a finding of the case against the accused having been made out beyond reasonable doubt.[67]

Admissibility of matters pertaining to disposition and reputation – Sections 56 and 122(4) of Evidence Act

14.35 Given the prejudicial nature of such evidence, s 122(4) of the Evidence Act[68] ("Evidence Act"), as a starting point, protects an accused from attacks on his character in view of the prejudicial nature of such evidence. As the law does not allow an accused person to be afforded an unfair advantage by providing a slanted view of his background, such protection is not absolute – where such individual offers evidence connoting a good disposition or reputation, s 56 of the Evidence Act allows the Prosecution to contradict this by offering evidence to the contrary. The question, however, could be asked as to what

62 *Public Prosecutor v Mohammed Liton Mohammed Syeed Malik* [2008] 1 SLR(R) 601 at [39].
63 [2019] 3 SLR 749.
64 *Public Prosecutor v Mohammed Liton Mohammed Syeed Malik* [2008] 1 SLR(R) 601.
65 *Public Prosecutor v Yue Roger Jr* [2019] 3 SLR 749 at [35].
66 *Public Prosecutor v Yue Roger Jr* [2019] 3 SLR 749 at [37]–[38].
67 *Public Prosecutor v Yue Roger Jr* [2019] 3 SLR 749 at [51].
68 Cap 97, 1997 Rev Ed.

circumstances would amount to a lowering of the shield by virtue of s 56(2) of the Evidence Act – in particular, would a response furnished by an accused during cross-examination be tantamount to him offering evidence of good disposition, such that evidence of bad disposition or reputation could be given?

14.36 *BNO*,[69] which is already the subject of discussion at an earlier part of this chapter, discusses the law on this area – and its practical application – in some detail. It may be useful to briefly sketch out the facts of that case at this juncture. The accused was charged with various counts of sexual offences involving young male children. The Prosecution had, during the course of cross-examination of the accused, produced a document that the accused had prepared extolling his "strong family ethics/Asian values" to the investigators dealing with the matter ("the document"). As part of such cross-examination, the accused asserted that he had "strong ethical values", "would always do the right thing, tell the truth" and had no homosexual inclination or tendencies. Based on such responses, the Prosecution contended that s 56(2) of the Evidence Act applied in allowing the Prosecution to offer evidence of his bad character. The Prosecution accordingly sought to adduce a document comprising 67 obscene images retrieved from the accused's laptop of males engaged in sexual acts to disprove his assertion that he was a "heterosexual with strong family ethics/Asian values" ("Annex C").

14.37 See Kee Oon J rejected the application to admit Annex C on various grounds. Of particular interest for current purposes is See J's assessment of the contours of s 56 of the Evidence Act. While See J noted that the accused's evidence of being a person with "strong ethical values" was arguably an assertion of good disposition, he noted that it was the Prosecution, and not the accused, who tendered the document and none of the evidence in question had been offered by the accused on his own accord. See J opined that, in such a situation where the Prosecution appeared to have forced an accused's hand, an accused could not be said to lose the protections afforded to him under s 122(4) of the Evidence Act.[70]

14.38 This, See J concluded, was in line with a purposive reading of s 56, which appears to require the accused to take an active step to testify as to his good disposition or reputation rather than do so by way of simply answering questions from the Prosecution under cross-examination. In the circumstances, as the accused was induced to testify

69 See para 14.13 above.
70 *Public Prosecutor v BNO* [2018] SGHC 243 at [64].

as to his "strong ethical values and sexual orientation" as a result of the Prosecution's questions and the document, the accused could not be said to have given evidence tending to establish his good disposition or reputation within the meaning of s 56 of the Evidence Act, such that the protections under s 122(4) could be said to be lifted.[71]

14.39 In any event, See J noted that even if it could be said that the threshold for s 56(2) was met, His Honour indicated that he would have been minded to rule Annex C as being inadmissible as its prejudicial effect outweighed its probative value.[72] In the present circumstances, See J noted that the probative value of Annex C was low given that it did not necessarily indicate that the accused must have been sexually attracted to prepubescent males. This contrasted with the prejudicial effect as Annex C might nevertheless colour the court's view as to the accused's sexual orientation and suggest that he was more predisposed to commit the offences he was charged with.[73]

SENTENCING – GENERAL SENTENCING PRINCIPLES

Consecutive sentences and the aggregation principle

14.40 The year 2018 also provided the occasion for the court to clarify that the general (but displaceable) rule in sentencing is that a multiple offender who has committed unrelated offences should be separately punished for each offence. In *Public Prosecutor v Raveen Balakrishnan*[74] ("*Raveen Balakrishnan*"), it was observed that this should be achieved by ordering the individual sentences to run consecutively. This would avoid the perverse and unjust outcome of the offender not having to bear any real consequences for the further offending (if they were given concurrent sentences). A court departing from this general rule should briefly explain its reasons for doing so. The general rule is complementary to s 307(1) of the CPC and the one-transaction rule, with these principles acting in concert to collectively assist a court to decide how sentences should be ordered.

14.41 The general rule – as sketched out in the preceding paragraph – would, however, be subject to three qualifications. The pivotal qualification is the totality principle, as elucidated in *Mohamed Shouffee bin Adam v Public Prosecutor*[75] ("*Shouffee*"). The court, however,

71 *Public Prosecutor v BNO* [2018] SGHC 243 at [65]–[67].
72 *Public Prosecutor v BNO* [2018] SGHC 243 at [69].
73 *Public Prosecutor v BNO* [2018] SGHC 243 at [70].
74 [2018] 5 SLR 799.
75 [2014] 2 SLR 998.

emphasised that this is not a recognition of the existence of any bulk discount for multiple offending but a reflection of the aggregation principle, that is, a relatively long sentence is likely to increase in compounded severity because it may induce hopelessness that negates rehabilitative prospects. The totality principle would accordingly ordinarily apply with greater force where longer aggregate sentences are involved. In *Public Prosecutor v Lai Teck Guan*[76] ("*Lai Teck Guan*"), the High Court held that the aggregation principle also applies to a long sentence imposed for a single offence.

14.42 In *Muhammad Sutarno bin Nasir v Public Prosecutor*,[77] the Court of Appeal affirmed *Raveen Balakrishnan* and held that as stated in *Shouffee*, even where offences are temporally proximate, if they violate different legally protected interests, they may still be unrelated.

Parity of sentencing co-offenders

14.43 In *Raveen Balakrishnan*,[78] the High Court also noted that the principle of parity of sentencing would not be engaged through contrasting the outcome of an offender charged and those who may have participated in the offence but who were not prosecuted and instead, were issued with warnings. This is because there can be no meaningful comparison between a sentence imposed by the court and warnings issued in the exercise of prosecutorial discretion.

Mentally disordered offenders

14.44 The sentencing of mentally disordered individuals has always served as a challenging exercise, as the four classic principles of sentencing may at times pull in diametrically opposed directions. This tension came to the fore again in 2018 in the form of *Public Prosecutor v Kong Peng Yee*,[79] a case that concerned an offender who killed his wife with a knife and chopper while suffering from a brief psychotic episode. He had pleaded guilty to a charge of culpable homicide not amounting to murder under s 304(*a*) of the Penal Code.[80] In the High Court, the offender was sentenced to two years' imprisonment, the lowest sentence ever imposed for such an offence. The Prosecution's appeal against sentence was allowed, and the sentence enhanced to six years' imprisonment. In so doing, the Court of Appeal took the opportunity to

76 [2018] 5 SLR 852 at [36].
77 [2018] 2 SLR 647.
78 See para 14.40 above.
79 [2018] 2 SLR 295.
80 Cap 224, 2008 Rev Ed.

refine and clarify the principles relevant in sentencing an offender with a mental disorder that fell short of unsoundness of mind.

14.45 The court held that the moral culpability of mentally disordered offenders lies on a spectrum:[81]

> (a) On one end of the spectrum are offenders with temporary and situational mental disorders who retain their understanding of their actions and can reason and weigh the consequences. In such cases, deterrence and retribution still feature.
>
> (b) On the other end of the spectrum are offenders whose mental disorders severely impair their ability to understand the nature and consequences of their acts, to make reasoned decisions or to control their impulses. In such cases, where the mental disorder was causally linked to the offence, and motivated by the reasoning of an indisputably warped mind, deterrence (both general and specific) and retribution[82] carry lower weight. Rehabilitation may take precedence, and this can take place within the prison environment.[83] Rehabilitation and prevention can be complementary and not conflicting principles,[84] as offenders in prison will have free and easy access to psychiatric services, live in a structured environment and be subject to the supervision of trained staff who can ensure that they consume medication and assist them along the path of recovery.[85]

14.46 In *Public Prosecutor v Chia Kee Chen*,[86] the Court of Appeal held that an offender's mental condition may be relevant in deciding whether to impose the discretionary death sentence under s 302(2) of the Penal Code. If it were established that an offender's mental condition significantly diminished his capacity to comprehend his actions or appreciate the wrongfulness of his conduct at the material time, this may militate against a finding that he acted in blatant disregard of human life, which may in turn militate against imposing the death penalty.[87]

---

81 *Public Prosecutor v Kong Peng Yee* [2018] 2 SLR 295 at [65]–[66].
82 *Public Prosecutor v Kong Peng Yee* [2018] 2 SLR 295 at [75].
83 *Public Prosecutor v Kong Peng Yee* [2018] 2 SLR 295 at [78].
84 *Public Prosecutor v Kong Peng Yee* [2018] 2 SLR 295 at [79].
85 *Public Prosecutor v Kong Peng Yee* [2018] 2 SLR 295 at [96].
86 [2018] 2 SLR 249.
87 *Public Prosecutor v Chia Kee Chen* [2018] 2 SLR 249 at [113].

Youthful offenders

14.47 It is trite that a probation order accords primacy to the principle of rehabilitation, and in two key judgments in 2018, the High Court explicated on the circumstances in which rehabilitation would take precedence.

14.48 *A Karthik v Public Prosecutor*[88] had to deal with the question of sentencing an offender who was above 21 years of age, but who had committed the offence when he was below 21. In grappling with this issue, the High Court noted that two rationales underlie the presumptive primacy of rehabilitation in relation to youthful offenders (that is, offenders below the age of 21). The first was the retrospective rationale, based on the premise of the offender's youthful folly and inexperience, the application of which rests on the offender's age at the time of the offence. The second was the prospective rationale, which is based on the offender's receptiveness to a rehabilitative sentencing regime, benefit to society from rehabilitation, and a young offender's disproportionate suffering under the typical punitive options, which rests on the offender's age at the time of sentencing.

14.49 The court highlighted that both rationales applied to offenders aged 21 or below at both the time of the offence and the time of sentencing. As for offenders at or below the age of 21 at the time of the offence but above that age by the time of sentencing, the retrospective rationale would continue to be relevant, though the prospective rationale would not. In such cases, the court should examine all the facts of the case, including the offender's actual age at each of the two points in time, the delay between them, and the available evidence of the offender's rehabilitative progress during this period, to determine whether it would remain appropriate to treat the offender as a youthful offender with rehabilitation as the key sentencing consideration.

14.50 On the flip side, where the offender is above the age of 21 both at the time of the offence and time of sentencing, there is no presumption that rehabilitation takes precedence, as neither rationale applies. As such, in *Public Prosecutor v Lim Chee Yin Jordon*,[89] the High Court affirmed that it would be the exception rather than the norm for adult offenders to be sentenced to probation. The offender would have to demonstrate an "extremely strong propensity for reform" or show "exceptional circumstances" in order to justify an order of probation. Further, where there is a need for deterrence, for example, where the

88 [2018] 5 SLR 1289.
89 [2018] 4 SLR 1294.

offence is serious, probation would generally not be considered, as it bears only a relatively modest deterrent effect.

Satisfaction of "courier" exception

14.51 The delimitations of the "courier" exception for offences under the MDA were further considered in *Zainudin bin Mohamed v Public Prosecutor*[90] ("*Zainudin*"). The term "courier" is a convenient shorthand for one of the requirements[91] under s 33B(2) of the MDA, namely, that the offender's role was restricted only to the transporting, sending, or delivering of a controlled drug or acts incidental or necessary thereto.

14.52 In *Zainudin*, the offender, who was convicted of a capital charge of possession of diamorphine for the purposes of trafficking, sought to bring himself within the "courier" exception. At the time of his arrest, the offender had repacked one bundle of controlled drugs, under instructions. The judgment thus examined and rationalised the breadth of activities which would be considered "incidental" to and/or "necessary" for the purposes of "transporting, sending or delivering" within the meaning of s 33B(2)(*a*) of the MDA.

14.53 The court held that the interpretation of s 33B(2)(*a*) must give effect to Parliamentary intention for the provision to be interpreted cautiously and restrictively.[92] The acts which fall within s 33B(2)(*a*) are as follows:[93]

> (a) acts that consist of transporting, sending or delivering of controlled drugs *simpliciter* ("the primary acts") and offering to do such acts;
>
> (b) acts which are *facilitative of* the primary acts. These are acts which are preparatory to or for the purpose of the primary acts. Acts falling within this category include storage or safe-keeping of the drugs before meeting the intended recipient to deliver the drugs; and externally wrapping a packet of drugs to make the bundle more compact and permit ease of transport or to better camouflage and conceal it to enable delivery; and
>
> (c) acts *incidental to* the primary acts. These are secondary or subordinate acts which occur or are likely to occur in the course of the primary acts. In view of the cautious and

90 [2018] 1 SLR 449.
91 In addition to proving that he is a courier, the offender will need to be in receipt of a certificate of substantive assistance, in order to qualify for life imprisonment.
92 *Zainudin bin Mohamed v Public Prosecutor* [2018] 1 SLR 449 at [49].
93 *Zainudin bin Mohamed v Public Prosecutor* [2018] 1 SLR 449 at [81]–[87].

> restrictive approach, the offender will need to explain how his act satisfies the definition. The acts must be highly proximate to the nature and purpose of the primary acts. Receipt of money in exchange for delivery which is natural and appurtenant to such delivery; and relaying information from one courier to another in relation to the primary acts, fall within this category. Conduct such as recruitment of couriers, sourcing for customers, and selling drugs fall outside this definition. Acts which show executive decision-making power also fall outside this definition.

14.54 In this regard, the court noted that not every act of division or packing of drugs of an existing quantity into smaller amounts would take an offender outside the courier exception.[94] The court is required to undertake a fact-specific analysis to objectively ascertain the reason or purpose of division and packing to see if it is an act facilitative of or incidental to the primary acts.[95] If the offender breaks bulk to enable the original quantity to be distributed to a wider audience that was hitherto not possible, this would take the offender out of the courier exception, as he would have done additional acts beyond the primary acts.[96]

Road traffic offences

Effect of compounded road traffic offences

14.55 In *Public Prosecutor v Ong Heng Chua*,[97] the court held that offences under the Road Traffic Act[98] ("RTA") which have been compounded can be taken into account for sentencing purposes.[99] Composition is a relevant *indicia* of a person's driving record, and a person with a slew of compounded offences is a repeat offender in the eyes of the court.[100] A person's bad driving record would be relevant in the case of an offence involving driving because it reflects his attitude towards road safety as well as his unwillingness to comply with the law.[101]

94 *Zainudin bin Mohamed v Public Prosecutor* [2018] 1 SLR 449 at [89] and [92].
95 *Zainudin bin Mohamed v Public Prosecutor* [2018] 1 SLR 449 at [92].
96 *Zainudin bin Mohamed v Public Prosecutor* [2018] 1 SLR 449 at [101]–[103].
97 [2018] 5 SLR 388.
98 Cap 276, 2004 Rev Ed.
99 See also *Public Prosecutor v Koh Thiam Huat* [2017] 4 SLR 1099, discussed in (2017) 18 SAL Ann Rev 415 at 436, paras 14.71–14.72.
100 *Public Prosecutor v Ong Heng Chua* [2018] 5 SLR 388 at [42].
101 *Public Prosecutor v Ong Heng Chua* [2018] 5 SLR 388 at [46].

When to order a disqualification order

14.56 In *Public Prosecutor v Fizul Asrul Bin Efandi*,[102] the offender caused hurt to the victim in the context of a road rage incident. The offender's car was blocking the victim's car, and the victim had sounded his horn at the offender. The offender then confronted the victim and this resulted in a physical scuffle. The Prosecution's appeal against the District Judge's refusal to impose a driving ban by way of a disqualification order under s 42(2) of the RTA was allowed.

14.57 The court held that the statutory requirements in s 42(2) of the RTA were satisfied, as the offence arose from or was connected with a dispute over the use of a road within the meaning of s 42(2)(*c*) of the RTA. The test is whether the overall assessment of the actions of the persons involved could be said, as a matter of common sense, to have occurred as a result of a dispute over the use of the road or public place.[103]

14.58 If the requirements are satisfied, the next question is whether the court should exercise its discretion under s 42(2)(*d*) of the RTA to impose a disqualification order. In exercising this discretion, the court should bear in mind the need for general and specific deterrence of unruly or violent behaviour as well as the need to protect other road users.[104] The "circumstances under which the offence was committed" would also encompass the behaviour of the victim and any other persons present before and during the commission of the offence.

Costs order to the Prosecution

14.59 Prior to *Abdul Kahar bin Othman v Public Prosecutor*[105] ("*Abdul Kahar*"), there was divergent case law on whether, by enacting s 357 of the CPC, Parliament had excluded the court's inherent power to order counsel to pay costs to the Prosecution directly, that is, without making a costs order against the accused. In *Zhou Tong v Public Prosecutor*,[106] the High Court held that the court's inherent power was not so excluded or limited. However, in *Arun Kaliamurthy v Public Prosecutor*[107] ("*Kaliamurthy*"), the High Court took a narrower reading of the same provision and concluded that the inherent power was excluded by deliberate omission. As such, in the latter decision, in order

102 [2018] 5 SLR 475.
103 *Public Prosecutor v Fizul Asrul Bin Efandi* [2018] 5 SLR 475 at [12].
104 *Public Prosecutor v Fizul Asrul Bin Efandi* [2018] 5 SLR 475 at [13].
105 [2018] 2 SLR 1394.
106 [2010] 4 SLR 534.
107 [2014] 3 SLR 1023.

to have counsel pay costs, the court had to make two concurrent orders to achieve that practical effect: the court could only order the client to pay, and for the solicitor to then reimburse the client.

14.60 In *Abdul Kahar*, the Court of Appeal overruled *Kaliamurthy* on this issue. On the reasoning in *Kaliamurthy*, the court found that the costs order might be worthless, where the Prosecution is unable to obtain costs from the client, for example, if the client leaves jurisdiction, or is impecunious.[108] The Court of Appeal therefore affirmed that the court's inherent power was not so excluded. This was, the court found, in line with the statutory intention to penalise and discipline the solicitor for the sort of conduct set out in s 357 of the CPC.[109]

Compensation orders

14.61 The strings of jurisprudence relating to compensation orders in criminal cases were woven together in *Tay Wee Kiat v Public Prosecutor*[110] ("*Tay Wee Kiat (Compensation)*"):

> (a) Under s 359 of the CPC, the court is obliged to consider whether it is appropriate to make a compensation order where it convicts the offender for "any offence". Under the amendments to s 359 of the CPC,[111] the importance of this obligation is reinforced by requiring the court to give reasons if it chooses *not* to make such an order.
>
> (b) Compensation orders are not part of the sentence imposed and do not seek to punish the offender.
>
> (c) The criminal court should adopt a broad common sense approach in assessing whether compensation should be awarded. Compensation should be awarded where the court is able to say, with a high degree of confidence, that the damage in question has been caused by the offence under circumstances which would ordinarily entitle the victim to civil damages; and that the offender has the means to pay the compensation within a reasonable time.
>
> (d) Compensation can be made at an earlier stage of the proceedings, even before a plea is recorded.
>
> (e) The assessment of loss or damage must be based on some credible evidence. However, the absence of medical

108 *Abdul Kahar bin Othman v Public Prosecutor* [2018] 2 SLR 1394 at [78]–[79].
109 *Abdul Kahar bin Othman v Public Prosecutor* [2018] 2 SLR 1394 at [77].
110 [2018] 5 SLR 438.
111 With the enactment of the Criminal Justice Reform Act 2018 (Act 19 of 2018).

reports will not necessarily prevent a compensation order, particularly where the victim was unable to seek timely medical treatment.

SENTENCING – BENCHMARKS AND SENTENCING FRAMEWORKS

14.62 In line with the academic observation elsewhere that "there has been a palpable surge in the courts' interest, accompanied by an increased investment in time and resources, in sentencing methodology",[112] developments in sentencing jurisprudence continued apace in 2018. This included the development of new sentencing frameworks and the revision of sentencing benchmarks. These judgments feature in areas of law where there was a paucity of written judgments; where there was no satisfactory attempt at rationalising the cases against each other and situating them along a sentencing continuum; or where the cases did not sit comfortably with each other. When laying down sentencing frameworks, the courts have consistently emphasised that the indicative sentences are nothing more than that – that is, indications – and that the particular aggravating and mitigating circumstances of each case must be considered.

Ill-treatment of foreign domestic workers

14.63 The courts have, in recent times, emphasised the pressing public interest concerns behind ensuring the protection of domestic maids from abuse by their employers.[113] To this end, in *Tay Wee Kiat*,[114] a three-judge *coram* of the High Court laid down a sentencing framework for offences of maid abuse.

14.64 The court recognised that maid abuse involving psychological abuse in conjunction with physical harm was especially abhorrent.[115] In view of this, the sentencing framework for such offences was devised as follows:[116]

112 Benny Tan Zhi Peng, "Assessing the Effectiveness of Sentencing Guideline Judgments in Singapore issued Post-March 2013 and a Guide to Constructing Frameworks" (2018) 30 SAcLJ 1004 at 1004–1005, para 1.

113 See also discussion in (2017) 18 SAL Ann Rev 415 at 440, paras 14.85–14.86.

114 See para 14.11 above.

115 *Tay Wee Kiat v Public Prosecutor* [2018] 4 SLR 1315 at [66].

116 *Tay Wee Kiat v Public Prosecutor* [2018] 4 SLR 1315 at [70]–[71].

(a) The first step would be for the court to determine whether the harm caused to the victim was predominantly physical, or both physical and psychological.

(i) Where hurt was caused impulsively on only one occasion, and did not form part of any broader trend or history of abusive conduct, the harm would be predominantly physical.

(ii) Where the abuse was sustained, humiliating and degrading, or occurred in the context of a working relationship which was generally oppressive and exploitative, there would be significant psychological harm in addition to the physical harm, which must be given due weight in sentencing.

(b) Where the harm was both physical and psychological, the second step would be for the court to identify the degree of harm caused in relation to each charge. Psychological harm can be considered even where there was no victim impact statement. Indicators of psychological harm included behaviour calculated to reinforce the offender's authority and to oppress and bully the victim into submission; and humiliating or degrading treatment of the victim. The indicative sentencing range would be as follows:[117]

	Less serious physical harm	**More serious physical harm**
Less serious psychological harm	3–6 months' imprisonment	6–18 months' imprisonment
More serious psychological harm	6–18 months' imprisonment	20–30 months' imprisonment

(c) At the third step, the court adjusts the sentence for each charge in light of other aggravating or mitigating circumstances.

(d) At the fourth step, the court decides which sentences are to run consecutively and which, concurrently. Factors to be considered include duration, frequency, and escalation of abuse, as well as whether psychological harm arose from a sustained pattern of abuse,[118] to give effect to the cumulative effect of the abuse.[119]

117 *Tay Wee Kiat v Public Prosecutor* [2018] 4 SLR 1315 at [71]–[72].
118 *Tay Wee Kiat v Public Prosecutor* [2018] 4 SLR 1315 at [72(c)].
119 *Tay Wee Kiat v Public Prosecutor* [2018] 4 SLR 1315 at [75].

14.65 The court then went on to hold in *Tay Wee Kiat (Compensation)*[120] that a compensation order is *prima facie* appropriate in maid abuse cases and should generally be ordered as a matter of course because the victims are often, if not invariably, impecunious.[121] In cases of maid abuse, a compensation order will usually be based on one or more of the following heads of damage:[122]

(a) pain and suffering caused to the victim;

(b) medical expenses incurred by the victim;

(c) loss or damage to the victim's property as a result of the offences; and

(d) loss of prospective earnings.

14.66 The court adopted a rough-and-ready measure of compensation for pain and suffering, holding that a sum of $500 per charge was in accordance with the quantum accorded in civil cases.[123] As regards loss of prospective earnings, while it was not right to order compensation for the entire period of the victim's unemployment, the court accepted that it was equally unrealistic to expect the victim to have found alternative employment immediately.[124] The court found that four months was a reasonable estimation of the time the victim would reasonably have required to take on alternative employment. The principles relating more broadly to compensation orders have been discussed in an earlier part of this chapter.

Hurt offences

Attempted murder causing hurt

14.67 In *Public Prosecutor v BPK*,[125] the offender inflicted multiple stab and slash wounds on the victim, causing her life-threatening and permanent injuries. He was convicted after trial on one charge under the second limb of s 307(1) of the Penal Code, that is, attempted murder causing hurt. The High Court declined to lay down a sentencing framework, noting that cases of attempted murder are factually highly diverse, and that there was a less-than-substantial body of jurisprudence on such offences.[126]

120 See para 14.61 above.
121 *Tay Wee Kiat v Public Prosecutor* [2018] 5 SLR 438 at [15].
122 *Tay Wee Kiat v Public Prosecutor* [2018] 5 SLR 438 at [12].
123 *Tay Wee Kiat v Public Prosecutor* [2018] 5 SLR 438 at [19].
124 *Tay Wee Kiat v Public Prosecutor* [2018] 5 SLR 438 at [21].
125 [2018] 5 SLR 755.
126 *Public Prosecutor v BPK* [2018] 5 SLR 755 at [55].

14.68 The court held that the offence-specific factors include:

(a) harm:[127] the victim's extent of injuries, including whether they are life-threatening or permanent, and whether there is psychological harm; and

(b) culpability:[128] the *mens rea* of the offender (intention to kill is the most culpable of the states of *mens rea*); whether the attack is relentless, involving use of a deadly weapon, planning or premeditation; and whether public disquiet is caused.

Voluntarily causing grievous hurt

14.69 In *Muhammad Khalis bin Ramlee v Public Prosecutor*,[129] the offender was involved in spontaneous group fights. As the fights were simmering down, the offender delivered a lunging punch to the deceased from behind, knocking the deceased unconscious, and causing him to fall and hit his head on the kerb. The deceased died from severe head injuries. In sentencing the offender, the High Court applied the sentencing framework laid down in *Public Prosecutor v BDB*.[130] As the offender's punch led to the deceased's death, the indicative starting point was a sentence of around eight years and 12 or more strokes of the cane.[131] At the second step, which is to consider the offender's culpability, the court found it aggravating that the attack was unprovoked and sudden, leaving the deceased with little chance to defend himself; and that the offender was in a state of self-induced intoxication.[132] As the offender did not intend to cause the deceased's death, the court found it mitigating as there was no direct connection between the offender's act and the harm that he either intended or knew to be likely and the actual harm caused.[133]

Affray

14.70 The High Court considered when the custodial threshold is crossed for cases of affray in *Public Prosecutor v Goh Jun Hao Jeremy*.[134] It held that a custodial sentence would be warranted where there is a

127 *Public Prosecutor v BPK* [2018] 5 SLR 755 at [15]–[16].
128 *Public Prosecutor v BPK* [2018] 5 SLR 755 at [17]–[26].
129 [2018] 5 SLR 449.
130 [2018] 1 SLR 127. See (2017) 18 SAL Ann Rev 415 at 455–456, paras 14.128–14.130.
131 *Muhammad Khalis bin Ramlee v Public Prosecutor* [2018] 5 SLR 449 at [59]; *Public Prosecutor v BDB* [2018] 1 SLR 127 at [56] and [76].
132 *Muhammad Khalis bin Ramlee v Public Prosecutor* [2018] 5 SLR 449 at [61].
133 *Muhammad Khalis bin Ramlee v Public Prosecutor* [2018] 5 SLR 449 at [68].
134 [2018] 4 SLR 1438.

higher level of harm and culpability.[135] In the context of affray, the offence-specific factors under the parameters of harm and culpability include the following:[136]

> (a) harm: the extent of injury caused to the co-offender and the extent of disruption caused to public order; and
>
> (b) culpability: the manner of attack; the extent of injury that could be attributed to the accused where there were multiple accused persons inflicting injuries on the same co-offender; whether the accused was the instigator; and whether weapons were used.

Sexual offences

Rape

14.71 The sentencing framework for rape laid down in *Ng Kean Meng Terence v Public Prosecutor*[137] ("*Terence Ng*") was applied in *Public Prosecutor v Ong Soon Heng*,[138] and the case was found to fall within Band 2 of the sentencing framework. The offender knew of and exploited the vulnerability of the victim in her state of severe intoxication, where she lacked the capacity to respond to or to resist his sexual advances.[139] As the offender and victim were merely close friends or colleagues, there was no abuse of position.[140] However, the offender had exploited the entrustment of the victim's safety to him by her friends and colleagues, and this was found to be a new offence-specific aggravating factor, which was not expressly recognised in *Terence Ng*.[141] As regards psychological harm, the court held that there needs to be a relatively severe state of psychological or physical harm shown in order for the court to find that there is an additional offence-specific aggravating factor bringing the case to a higher sentencing band.[142]

Outrage of modesty simpliciter

14.72 In *Kunasekaran*,[143] which is already the subject of discussion at an earlier part of this chapter, the offender touched the 14-year-old

135 *Public Prosecutor v Goh Jun Hao Jeremy* [2018] 4 SLR 1438 at [37].
136 *Public Prosecutor v Goh Jun Hao Jeremy* [2018] 4 SLR 1438 at [36].
137 [2017] 2 SLR 449. See (2017) 18 SAL Ann Rev 415 at 442–444, paras 14.91–14.96.
138 [2018] SGHC 58.
139 *Public Prosecutor v Ong Soon Heng* [2018] SGHC 58 at [132].
140 *Public Prosecutor v Ong Soon Heng* [2018] SGHC 58 at [137]–[138].
141 *Public Prosecutor v Ong Soon Heng* [2018] SGHC 58 at [142].
142 *Public Prosecutor v Ong Soon Heng* [2018] SGHC 58 at [154].
143 See para 14.31 above.

victim's groin area from outside her school skirt while they were on a public bus. The High Court held[144] that recent developments in local jurisprudence on sentencing for sexual offences necessitated revising the earlier sentencing benchmark laid down in *Public Prosecutor v Chow Yee Sze*[145] for cases of outrage of modesty *simpliciter* under s 354(1) of the Penal Code.

14.73 The sentencing framework devised in *GBR v Public Prosecutor*[146] ("*GBR*") for cases of aggravated outrage of modesty committed against a child under 14 years of age under s 354(2) of the Penal Code was found to be similarly applicable to outrage of modesty *simpliciter*.[147]

14.74 The sentencing framework for outrage of modesty *simpliciter* is thus as follows:

> (a) The court should first consider the following offence-specific factors: the degree of sexual exploitation, circumstances of the offence, and harm caused to the victim.
>
> (b) Based on these offence-specific factors, the court should ascertain the gravity of the offence and place the offence within any of the following three bands of imprisonment (scaled down linearly from *GBR* to account for the differences in maximum punishment between ss 354(1) and 354(2) of the Penal Code):[148]
>
> > (i) band 1: less than five months' imprisonment;
> >
> > (ii) band 2: five to 15 months' imprisonment. Where the victim's private parts or sexual organs are intruded upon, such offences would tend to fall within band 2;[149] and
> >
> > (iii) band 3: 15 to 24 months' imprisonment.
>
> (c) The court should then consider the offender-specific aggravating and mitigating factors.

144 *Kunasekaran s/o Kalimuthu Somasundaram v Public Prosecutor* [2018] 4 SLR 580 at [44].

145 [2011] 1 SLR 481.

146 [2018] 3 SLR 1048, discussed in (2017) 18 SAL Ann Rev 415 at 445–446, paras 14.100–14.102.

147 *Kunasekaran s/o Kalimuthu Somasundaram v Public Prosecutor* [2018] 4 SLR 580 at [48].

148 *Kunasekaran s/o Kalimuthu Somasundaram v Public Prosecutor* [2018] 4 SLR 580 at [49].

149 *Kunasekaran s/o Kalimuthu Somasundaram v Public Prosecutor* [2018] 4 SLR 580 at [51(b)].

14.75 In *Public Prosecutor v Thompson, Matthew*,[150] a passenger outraged the modesty of a flight stewardess on board a flight. The High Court applied the *Kunasekaran* sentencing framework.[151] The court identified as aggravating factors the facts that the offence was (a) committed aboard an aircraft; and (b) against an air transportation worker.[152] As regards (a), compared to other forms of public transport, commercial air travel results in closer physical proximity between individuals, greater curtailment of freedom, with no ready means of escape, and difficulty in obtaining the assistance of law enforcement.[153] These features may be present to differing degrees, and the facts of each case should be taken into account in determining the degree of aggravation.[154] As regards (b), flight stewardesses are exposed to a much greater risk of undesired physical contact by passengers, and jeopardising their well-being may impact on their ability to carry out their functions essential to the safety and well-being of passengers as a whole.[155]

Invocation of prospective overruling in sentencing guideline judgments

14.76 In *Adri Anton Kalangie v Public Prosecutor*,[156] the Court of Appeal reiterated that prospective overruling should only be done by the appellate courts in exceptional cases where a departure from the default position of retroactivity is necessary to avoid serious and demonstrable injustice to the parties or to the administration of justice.[157] The prospectivity of a sentencing guideline judgment should, as a general rule, only be considered and pronounced by the court that is establishing or clarifying the new sentencing framework.[158] Where a sentencing guideline judgment is said to apply prospectively, it should ordinarily apply to all offenders *sentenced* after the delivery of the decision, regardless of when they had *committed* the offence.[159] While the court held that the offender in the very case being dealt with in that judgment would be sentenced per the previous framework, it was left open whether this would be so where the new sentencing framework would result in a more lenient sentence for the offender.[160]

150 [2018] 5 SLR 1153.
151 *Public Prosecutor v Thompson, Matthew* [2018] 5 SLR 1153 at [32].
152 *Public Prosecutor v Thompson, Matthew* [2018] 5 SLR 1153 at [44].
153 *Public Prosecutor v Thompson, Matthew* [2018] 5 SLR 1153 at [46]–[50].
154 *Public Prosecutor v Thompson, Matthew* [2018] 5 SLR 1153 at [51].
155 *Public Prosecutor v Thompson, Matthew* [2018] 5 SLR 1153 at [58]–[60].
156 [2018] 2 SLR 557.
157 *Adri Anton Kalangie v Public Prosecutor* [2018] 2 SLR 557 at [39]–[44].
158 *Adri Anton Kalangie v Public Prosecutor* [2018] 2 SLR 557 at [71(a)].
159 *Adri Anton Kalangie v Public Prosecutor* [2018] 2 SLR 557 at [46].
160 *Adri Anton Kalangie v Public Prosecutor* [2018] 2 SLR 557 at [46].

Repeat offenders who traffic in diamorphine

14.77 The framework for repeat offenders who traffic in diamorphine under s 5 of the MDA was elucidated in two judgments of the High Court that built on each other. The framework was first laid down in *Lai Teck Guan*[161] by Sundaresh Menon CJ. It was then modified in *Soh Qiu Xia Katty v Public Prosecutor* ("*Katty Soh*") by Chan Seng Onn J.[162]

14.78 The sentencing framework as *per Lai Teck Guan* is a two-stage process as follows:

> (a) The indicative starting point is based on the starting sentence derived from the quantity of drugs for first-time offenders using *Vasentha d/o Joseph v Public Prosecutor*[163] ("*Vasentha*") and *Public Prosecutor v Tan Lye Heng*,[164] with an indicative uplift having due regard to the circumstances of the repeat offence:[165]

Weight of diamorphine (g)	Starting sentence (first-time offender)	Indicative uplift
Up to 3	5–6 years 5–6 strokes	5–8 years 5–6 strokes
3–5	6–7 years 6–7 strokes	5–8 years 4–5 strokes
5–7	7–8 years 7–8 strokes	5–8 years 4–5 strokes
7–8	8–9 years 8–9 strokes	4–7 years 3–4 strokes
8–9	10–13 years 9–10 strokes	4–7 years 3–4 strokes
9–9.99	13–15 years 10–11 strokes	3–6 years 2–3 strokes
10–11.5	20–22 years 15 strokes (mandatory)	3–6 years
11.5–13	23–25 years 15 strokes (mandatory)	2–4 years
13–15	26–29 years 15 strokes (mandatory)	1–2 years

161 See para 14.41 above.
162 [2019] 3 SLR 568.
163 [2015] 5 SLR 122, discussed *in extenso* in (2015) 16 SAL Ann Rev 396 at 438–440, paras 14.107–14.110, and in (2017) 18 SAL Ann Rev 415 at 441, para 14.88.
164 [2017] 5 SLR 564.
165 *Public Prosecutor v Lai Teck Guan* [2018] 5 SLR 852 at [42].

Factors to be taken into account in determining the indicative uplift include the length of the offender's crime-free period before re-offending.[166]

In arriving at this framework, Menon CJ held that it was wrong in principle to determine the sentences of repeat drug trafficking offenders by doing a mere mathematical modification of the approach in *Vasentha*. This is so for two reasons:[167]

(i) The *Vasentha* approach is only suitable where the offence is clearly targeted at a particular mischief, and the sentence hinges largely on a single metric (albeit later adjusted for other factors). It is not suitable where the gravity of the offence is or may be affected by several metrics. For repeat drug trafficking offenders, there are at least two important metrics in the sentencing analysis: (A) the quantity of drugs; and (B) the circumstances in which the repeat offence came about.

(ii) The sentencing ranges for first-time offenders and repeat offenders do not mirror each other. The higher the quantity of drugs, the lower the uplift for repeat offenders and possibly even the same length of imprisonment in some cases.

(b) The indicative starting point is adjusted based on the offender's culpability and the aggravating or mitigating factors which have not been taken into account in the analysis up to that point.

14.79 In *Katty Soh*, Chan J, while agreeing with the general principles that were laid down in *Lai Teck Guan*, found that there were several errors in that sentencing framework:[168]

(a) There were some "gaps" in the range of indicative starting sentences at several weight points. For caning in particular, the indicative uplifts include two possible choices (for example, five or six strokes), which could lead to inconsistencies in the application of the framework.

(b) For trafficking in 14.99g of diamorphine, applying the maximum indicative uplift would exceed the statutory maximum term of imprisonment.

166 *Public Prosecutor v Lai Teck Guan* [2018] 5 SLR 852 at [52]–[53].
167 *Public Prosecutor v Lai Teck Guan* [2018] 5 SLR 852 at [29]–[31].
168 *Soh Qiu Xia Katty v Public Prosecutor* [2018] SGHC 260 at [28]–[35] and [48]–[50].

(c) Compared to the lower weights of diamorphine, there is an inexplicable decline in the rate of change of sentence past the 9g weight point up to the 9.99g weight point.

14.80 Chan J thus modified the sentencing framework as follows:[169]

Weight of diamorphine (g)	Starting sentence (notional first-time offender)	Sentence with minimum indicative uplift	Sentence with maximum indicative uplift
1	5 years 4 months 5 strokes	10 years 4 months 10 strokes	13 years 4 months 12 strokes
2	5 years 8 months 5 strokes	10 years 8 months 10 strokes	13 years 8 months 12 strokes
3	6 years 6 strokes	11 years 10 strokes	14 years 12 strokes
4	6 years 6 months 6 strokes	11 years 6 months 10 strokes	14 years 6 months 12 strokes
5	7 years 7 strokes	12 years 11 strokes	15 years 13 strokes
6	7 years 6 months 7 strokes	12 years 6 months 11 strokes	15 years 6 months 13 strokes
7	8 years 8 strokes	13 years 11 strokes	16 years 13 strokes
8	9 years 9 strokes	14 years 12 strokes	17 years 14 strokes
9	11 years 10 strokes	15 years 12 strokes	18 years 14 strokes
9.99	14 years 10 strokes	17 years 12 strokes	20 years 14 strokes
10	20 years 15 strokes (mandatory)	23 years 15 strokes (mandatory)	26 years 15 strokes (mandatory)
11	20 years 8 months 15 strokes (mandatory)	23 years 8 months 15 strokes (mandatory)	26 years 8 months 15 strokes (mandatory)
11.5	21 years 15 strokes (mandatory)	24 years 15 strokes (mandatory)	27 years 15 strokes (mandatory)

169 *Soh Qiu Xia Katty v Public Prosecutor* [2018] SGHC 260 at [44] and [55]. This framework indicates the sentences at specific weight points, and to derive the sentence for weights that fall between these points, the sentencing judge can interpolate linearly, or read off the graph at [38] of that decision.

Weight of diamorphine (g)	Starting sentence (notional first-time offender)	Sentence with minimum indicative uplift	Sentence with maximum indicative uplift
12	22 years 15 strokes (mandatory)	24 years 8 months 15 strokes (mandatory)	27 years 4 months 15 strokes (mandatory)
13	24 years 15 strokes (mandatory)	26 years 15 strokes (mandatory)	28 years 15 strokes (mandatory)
14	26 years 15 strokes (mandatory)	27 years 6 months 15 strokes (mandatory)	29 years 15 strokes (mandatory)
14.99	28 years 15 strokes (mandatory)	29 years 15 strokes (mandatory)	30 years 15 strokes (mandatory)

Road traffic offences – Causing grievous hurt by a negligent act which endangered human life

14.81 The High Court observed that the sentencing practice for road traffic cases in which the offender was charged under s 338(*b*) of the Penal Code lacked sufficient coherence and consistency, and laid down a two-step analytical framework for sentencing in *Tang Ling Lee v Public Prosecutor*:[170]

> (a) The court should identify which sentencing band the offence falls within and where it falls within the range, having regard to the parameters of harm and culpability:[171]
>
> > (i) harm: the nature and degree of the grievous bodily injury caused to the victim(s), including the period of hospitalisation or medical leave; and
> >
> > (ii) culpability:
> >
> > > (A) the manner of driving (how dangerous the driving was and the extent of danger to road users posed by the offender's conduct). Culpability is increased where the offender speeds, drives while under the influence of alcohol or drugs or while sleepy, while using a mobile phone, flouts traffic rules, drives against the flow of traffic or off the road, is involved in

170 [2018] 4 SLR 813.
171 *Tang Ling Lee v Public Prosecutor* [2018] 4 SLR 813 at [25]–[29].

a car chase or racing competition, or exhibits poor vehicle control.

(B) the circumstances of driving which might have increased the danger to road users during the incident. Culpability is increased where the offender drives without a licence or while under disqualification, where he drives during rush hours where traffic is heavy, within a residential or school zone, drives a heavy vehicle, or intends to travel a substantial distance.

The following presumptive sentencing ranges apply where the offender claims trial, with appropriate periods of disqualification from driving:[172]

Category	Circumstances	Presumptive sentencing range
1	Lesser harm and lower culpability	Fines
2	Greater harm and lower culpability or Lesser harm and higher culpability	One to two weeks' imprisonment
3	Greater harm and higher culpability	More than two weeks' imprisonment

(b) Adjustments should be made to take into account the relevant mitigating and aggravating factors, which may take the eventual sentence out of the applicable presumptive sentencing range.

Operating a remote communication service under the Women's Charter

14.82 In *Koh Jaw Hung v Public Prosecutor*,[173] the offender set up and ran a vice operation. As part of his operations, he used a mobile phone number to communicate with paying clients for sexual services, an offence of operating a remote communication service under s 146A(1)(*a*) of the Women's Charter[174] ("WC").[175] This is a relatively

172 *Tang Ling Lee v Public Prosecutor* [2018] 4 SLR 813 at [31].
173 [2019] 3 SLR 516.
174 Cap 353, 2009 Rev Ed.

new offence, as the offence-creating provision was enacted in 2016, before the decision in *Poh Boon Kiat v Public Prosecutor* ("*Poh Boon Kiat*").[176]

14.83 The High Court held that the sentencing framework in *Poh Boon Kiat* for offences under ss 147 and 148 of the WC (managing a place of assignation or brothel) could be extended to the offence under s 146A of the WC.[177] Such extension is appropriate as the offences under s 146A(1) are the virtual equivalent of ss 147 and 148.[178] By enacting s 146A, Parliament had intended to extend the reach of law in respect of the same public interests protected by ss 147 and 148.[179] Further, the prescribed punishment for offences under s 146A of the WC is exactly the same as that provided for in its "offline" counterparts.[180] The sentencing benchmark for s 146A offences is thus as follows:[181]

	A Culpability	B Culpability	C Culpability
Cat 1 Harm	Start: 2 years Indicative range: 1 year 6 months to 3 years	Start: 1 year Indicative range: 9 months to 1 year 6 months	Start: 5 months Indicative range: $2,500 fine to 8 months
Cat 2 Harm	Start: 1 year Indicative range: 9 months to 1 year 6 months	Start: 3 months Indicative range: $3,000 fine to 9 months	Start: $1,500 fine Indicative range: Up to $3,000 fine

14.84 The offender had used a phone number not registered to his name to evade detection; his phone number was linked to a customised vice website he procured; and he had transacted with multiple clients over this phone number, with the clients informing him through the phone number when they began engaging in sexual services and when they left, which allowed him to keep close tabs on the prostitutes under his charge.[182] Based on these facts, the court found that the offender's culpability was within Category B, and the harm was within Category 2.[183]

175 The appellant also faced other vice-related charges under the Women's Charter (Cap 353, 2009 Rev Ed).
176 [2014] 4 SLR 892. See discussion in (2014) 15 SAL Ann Rev 295 at 336–338, paras 14.121–14.126.
177 *Koh Jaw Hung v Public Prosecutor* [2018] SGHC 251 at [35].
178 *Koh Jaw Hung v Public Prosecutor* [2018] SGHC 251 at [35].
179 *Koh Jaw Hung v Public Prosecutor* [2018] SGHC 251 at [36]–[37].
180 *Koh Jaw Hung v Public Prosecutor* [2018] SGHC 251 at [38].
181 *Koh Jaw Hung v Public Prosecutor* [2018] SGHC 251 at [39].
182 *Koh Jaw Hung v Public Prosecutor* [2018] SGHC 251 at [40].
183 *Koh Jaw Hung v Public Prosecutor* [2018] SGHC 251 at [41].

14.85 The High Court also affirmed that a fine should be imposed for confiscatory effect to disgorge the offender's profit, gain, or benefit. The starting point is that the total earnings, takings or revenue received by an offender represent his profit, and should be disgorged.[184] The burden is on the offender to show related, necessary or reasonable expenses in order to displace the starting point.[185] Some details or documentary evidence should be furnished, and a bare assertion by the offender will not suffice.[186] The sentencing judge will then undertake a rough and ready inquiry to fix a fine quantum which serves a confiscatory purpose.[187] If the offender ploughs the criminal proceeds back into the illegal enterprise, the judge will have to consider on a case-by-case basis whether these should be taken into account as expenses.[188]

14.86 The term of imprisonment in default of paying the fine is to be set at a level sufficient to deter the individual offender from evading payment, and this is a fact-specific exercise.[189]

Cheating at play in a casino

14.87 In *Logachev Vladislav v Public Prosecutor*[190] ("*Logachev*"), the High Court sentenced an offender who was part of a syndicate targeting slot machines in casinos through smartphone devices. These are offences punishable under s 172A(2) of the Casino Control Act.[191] The court laid down a five-step sentencing framework for such offences:

> (a) Having regard to the following offence-specific factors,[192] identify: (i) the level of harm caused by the offence (slight, moderate or severe); and (ii) the level of the offender's culpability (low, medium or high).[193]

Offence-specific factors	
Factors going towards harm	Factors going towards culpability
(i) the amount cheated; (ii) involvement of a syndicate; and	(i) the degree of planning and premeditation; (ii) the level of sophistication;

184 *Koh Jaw Hung v Public Prosecutor* [2018] SGHC 251 at [48].
185 *Koh Jaw Hung v Public Prosecutor* [2018] SGHC 251 at [48].
186 *Koh Jaw Hung v Public Prosecutor* [2018] SGHC 251 at [52].
187 *Koh Jaw Hung v Public Prosecutor* [2018] SGHC 251 at [48].
188 *Koh Jaw Hung v Public Prosecutor* [2018] SGHC 251 at [50].
189 *Koh Jaw Hung v Public Prosecutor* [2018] SGHC 251 at [61].
190 [2018] 4 SLR 609.
191 Cap 33A, 2007 Rev Ed.
192 *Logachev Vladislav v Public Prosecutor* [2018] 4 SLR 609 at [37]–[38].
193 *Logachev Vladislav v Public Prosecutor* [2018] 4 SLR 609 at [76]–[77].

(iii) involvement of a transnational element	(iii) the duration of offending; (iv) the offender's role; and (v) abuse of position and breach of trust

(b) Identify the applicable indicative sentencing range as per the following table (which sets out the sentencing range for contested cases):[194]

Harm / Culpability	**Slight**	**Moderate**	**Severe**
Low	Fine	Up to 1 year's imprisonment	1–3 years' imprisonment
Medium	Up to 1 year's imprisonment	1–3 years' imprisonment	3–5 years' imprisonment
High	1–3 years' imprisonment	3–5 years' imprisonment	5–7 years' imprisonment

(c) Identify the appropriate starting point *within* that range with regard to the factors of harm and culpability to granulate the case.[195]

(d) Adjust the starting point based on the following offender-specific aggravating and mitigating factors:[196]

Offender-specific factors	
Aggravating factors	Mitigating factors
(i) offences taken into consideration for sentencing purposes; (ii) relevant antecedents; and (iii) evident lack of remorse	(i) a guilty plea; (ii) voluntary restitution; and (iii) co-operation with the authorities

(e) Where an offender has been convicted of multiple charges, consider the need to calibrate the individual sentences so that the global sentence takes into account the totality principle.[197]

194 *Logachev Vladislav v Public Prosecutor* [2018] 4 SLR 609 at [78].
195 *Logachev Vladislav v Public Prosecutor* [2018] 4 SLR 609 at [79].
196 *Logachev Vladislav v Public Prosecutor* [2018] 4 SLR 609 at [79] and [37].
197 *Logachev Vladislav v Public Prosecutor* [2018] 4 SLR 609 at [81]–[84].

Laundering of cash proceeds of offences committed in Singapore

14.88 The *Logachev* sentencing framework was adapted in *Huang Ying-Chun v Public Prosecutor*[198] for the offence of laundering of cash proceeds of offences committed in Singapore[199] under s 44(1)(*a*) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act[200] ("CDSA").[201]

14.89 The court laid down a five-step sentencing framework modelled on that in *Logachev*. At the first stage, all the offence and offender specific factors set out in *Logachev*[202] to cheating at play are equally applicable to a s 44(1)(*a*) CDSA offence.[203] In addition, the following factors (non-exhaustive) are also relevant to the sentencing analysis:

(a) The more serious the predicate offence is, the more serious the offence under s 44(1)(*a*) of the CDSA. The court will take into account uncontested evidence of the underlying predicate offence.[204] This has a limited bearing on sentence.

(b) The *mens rea* of the offence, where actual knowledge has a higher degree of culpability.[205] This too has a limited bearing on sentence.

(c) Foreigners who come to Singapore for the *sole* purpose of committing crime will be treated more severely.[206]

(d) The offender's knowledge of the underlying predicate offence is material to the offender's culpability.[207]

(e) The prospect of a large reward can be considered aggravating.[208]

14.90 At the second stage, the indicative sentencing ranges are as follows:[209]

198 [2019] 3 SLR 606.
199 The principal factual elements of such offences are laid out in *Huang Ying-Chun v Public Prosecutor* [2018] SGHC 269 at [48].
200 Cap 65A, 2000 Rev Ed.
201 *Huang Ying-Chun v Public Prosecutor* [2019] 3 SLR 606 at [35].
202 See para 14.87 above. The facts of *Logachev Vladislav v Public Prosecutor* [2018] 4 SLR 609 are recounted in *Huang Ying-Chun v Public Prosecutor* [2019] 3 SLR 606 at [37].
203 *Huang Ying-Chun v Public Prosecutor* [2019] 3 SLR 606 at [40].
204 *Huang Ying-Chun v Public Prosecutor* [2019] 3 SLR 606 at [63]–[67].
205 *Huang Ying-Chun v Public Prosecutor* [2019] 3 SLR 606 at [74].
206 *Huang Ying-Chun v Public Prosecutor* [2019] 3 SLR 606 at [86].
207 *Huang Ying-Chun v Public Prosecutor* [2019] 3 SLR 606 at [87].
208 *Huang Ying-Chun v Public Prosecutor* [2019] 3 SLR 606 at [94].
209 *Huang Ying-Chun v Public Prosecutor* [2019] 3 SLR 606 at [102].

Harm / Culpability	Slight	Moderate	Severe
Low	Fine and/or short custodial term	10–30 months' imprisonment	30–60 months' imprisonment
Medium	10–30 months' imprisonment	30–60 months' imprisonment	60–90 months' imprisonment
High	30–60 months' imprisonment	60–90 months' imprisonment	90–120 months' imprisonment

14.91 The other steps are as *per* the *Logachev* framework.

Negligent act which endangered the safety of others under Workplace Safety and Health Act

14.92 *Nurun Novi Saydur Rahman v Public Prosecutor*[210] was the first time an offence under s 15(3A) of the Workplace Safety and Health Act[211] ("WSHA") had been brought before the High Court. The High Court found that the existing sentencing practice ought to be reviewed, as the full sentencing range had not been fully utilised.[212] This did not give effect to the legislative intent to improve safety at the workplace by effecting a cultural change, in part through ensuring that penalties for non-compliance are sufficiently high to deter risk-taking behaviour.[213]

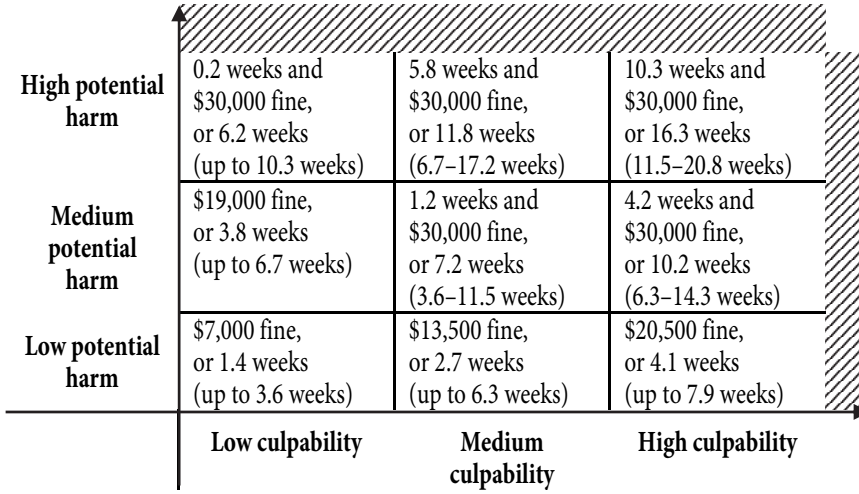
14.93 The High Court set out a two-step sentencing framework. At the first stage, the factors to be taken into account fall under the rubric of harm and culpability, and include the following (non-exhaustive):[214]

> (a) potential for harm: seriousness of the harm risked, likelihood of that harm arising, and number of people likely to be exposed to the risk of that harm; and
>
> (b) culpability: nature of the unsafe act, number of unsafe acts committed by the offender, and level of deviation from established procedure.

14.94 Based on these factors, the court will determine the indicative starting point. The court will first determine what level of potential for

210 See para 14.12 above.
211 Cap 354A, 2009 Rev Ed.
212 *Nurun Novi Saydur Rahman v Public Prosecutor* [2019] 3 SLR 413 at [70].
213 *Nurun Novi Saydur Rahman v Public Prosecutor* [2019] 3 SLR 413 at [71]–[73].
214 *Nurun Novi Saydur Rahman v Public Prosecutor* [2019] 3 SLR 413 at [86]–[87].

harm and culpability the offender falls under. The indicative starting points are based on the following table:[215]



14.95 The court then elaborated on this table, and how to use it:[216]

(a) Harm and culpability each separately and independently affect the sentence. Any increase along either the axis of risk of potential harm or the axis of culpability necessarily represents an increase in sentence.

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

(c) The sentences in brackets represent the sentencing ranges.

(d) The sentences indicated are the midpoints of each of the ranges. The sentencing judge can start at these midpoints and then determine where to move within each of the ranges.[217]

(e) After deriving the sentence in terms of weeks of imprisonment, the sentencing judge can then consider whether it is appropriate to impose a fine, an imprisonment term or some combination of the two.[218] As a general guide, the custodial threshold is crossed when more than six weeks'

215 *Nurun Novi Saydur Rahman v Public Prosecutor* [2019] 3 SLR 413 at [92].
216 *Nurun Novi Saydur Rahman v Public Prosecutor* [2019] 3 SLR 413 at [94].
217 *Nurun Novi Saydur Rahman v Public Prosecutor* [2019] 3 SLR 413 at [99(b)].
218 *Nurun Novi Saydur Rahman v Public Prosecutor* [2019] 3 SLR 413 at [99(d)].

imprisonment is appropriate. This is derived using a notional conversion rate of one week's imprisonment being convertible to a fine of $5,000.[219]

14.96 At the second stage, the indicative starting point is adjusted based on aggravating and mitigating factors. A non-exhaustive list of aggravating factors includes:[220]

(a) actual harm where occasioned, as consistent with the approach taken in other offences which also criminalise the risk of harm.[221] Actual harm includes a consideration of the severity of harm, as well as the number of people harmed. Where death is caused, an additional eight to 40 weeks' imprisonment should be added to the sentence depending on the number of fatalities. Where serious injury is caused, an additional sentence of up to ten weeks' imprisonment (or the equivalent proportion in fines where appropriate) may be added depending on the severity of the injuries and the number of persons injured.

(b) whether the unsafe act was a significant cause of the harm that resulted;

(c) whether the offender obtained financial gain from the breaches;

(d) the existence of relevant antecedents;

(e) deliberate concealment of the illegal nature of the activity; and

(f) obstruction of justice.

14.97 A non-exhaustive list of mitigating factors includes:[222]

(a) a high level of co-operation with the authorities;

(b) a timely plea of guilt; and

(c) whether the offender has voluntarily taken steps to remedy the breach or prevent future occurrences of similar breaches.

14.98 The court also provided *obiter* sentencing frameworks for reckless acts and wilful acts under s 15(3) of the WSHA.[223]

---

219 *Nurun Novi Saydur Rahman v Public Prosecutor* [2019] 3 SLR 413 at [96].
220 *Nurun Novi Saydur Rahman v Public Prosecutor* [2019] 3 SLR 413 at [107].
221 *Nurun Novi Saydur Rahman v Public Prosecutor* [2019] 3 SLR 413 at [80]–[85].
222 *Nurun Novi Saydur Rahman v Public Prosecutor* [2019] 3 SLR 413 at [108].
223 *Nurun Novi Saydur Rahman v Public Prosecutor* [2019] 3 SLR 413 at Annexes A-1 and A-2.

Unauthorised person practising as a medical practitioner under Medical Registration Act

14.99 In *Neo Ah Luan v Public Prosecutor*,[224] the offender provided freelance home-based beauty services, including dermal filler injections on clients' faces, purportedly to remove their wrinkles. One of the offender's clients suffered redness, inflammation and rashes on her face following such injection.

14.100 The High Court laid down the following sentencing framework for unauthorised persons practising as a medical practitioner under the Medical Registration Act[225] for first-time offenders who claim trial.

14.101 The first step is to identify the level of harm and the level of culpability:[226]

> (a) Harm includes actual and potential bodily harm, as well as emotional or psychological harm to the victim, or the undermining of public confidence in the medical profession. The level of harm may be characterised according to the following broad guidelines, which is not to be applied rigidly or mechanistically:
>
> > (i) low: no actual personal injury and low potential for personal injury; no actual psychological or emotional harm; and/or public confidence not undermined;
> >
> > (ii) medium: some actual personal injury or substantial potential for personal injury; psychological or emotional harm; and/or undermined public confidence; and
> >
> > (iii) high: serious actual personal injury (including permanent injury or necessitating surgical intervention); recognised psychiatric illness; and/or seriously undermined public confidence.
>
> (b) Culpability depends on factors including: offender's state of mind; extent of profits gained; duration of the offending behaviour; whether the offender held himself out to be a registered medical practitioner; sophistication of the offence; extent of premeditation and planning; and extent to which the offender may have abused any position of trust.

224 [2018] 5 SLR 1153.
225 Cap 174, 2014 Rev Ed.
226 *Neo Ah Luan v Public Prosecutor* [2018] 5 SLR 1153 at [74(a)].

14.102 The second step is to identify the indicative sentencing range, according to the following matrix:[227]

		Culpability		
		Low	Medium	High
Harm	Low	Low fine	⟷	High fine
	Medium	At least a short custodial term	⟷	Up to 6 months
	High	At least 6 months	⟷	Up to 12 months

14.103 The third step is to adjust the starting point according to offender-specific aggravating and mitigating factors that have not yet featured in the analysis.[228]

14.104 At the final step, the court will make further adjustments to take into account the totality principle.

Possessing foreign travel document not lawfully issued to offender

14.105 In *Ma Wenjie v Public Prosecutor*,[229] the offender was found in Changi Airport with 17 passports not lawfully issued to him. The offender thus faced 17 charges under s 47(5) of the Passports Act.[230] In laying down a sentencing framework, the court held that the dominant sentencing principle for s 47(5) offences is general deterrence.[231] To evaluate the seriousness of the offence, the court will have regard to the following:

> (a) Harm:[232] harm caused to the legitimate passport-holders and the public interest. This includes actual harm and potential harm – assessed in relation to the intended outcome of possessing a passport in any particular case. Factors to be considered include scale of the commission of offences (including the number of passports affected) and syndication.

227 *Neo Ah Luan v Public Prosecutor* [2018] 5 SLR 1153 at [74(b)].
228 *Neo Ah Luan v Public Prosecutor* [2018] 5 SLR 1153 at [74(c)].
229 [2018] 5 SLR 775.
230 Cap 220, 2008 Rev Ed.
231 *Ma Wenjie v Public Prosecutor* [2018] 5 SLR 775 at [58].
232 *Ma Wenjie v Public Prosecutor* [2018] 5 SLR 775 at [60].

(b) Culpability:[233] factors to be considered include planning and premeditation, circumstances leading to possession, degree of involvement, intended use of the passport, efforts to avoid detection or apprehension and personal gain.

233 *Ma Wenjie v Public Prosecutor* [2018] 5 SLR 775 at [61].