IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 82

Criminal Reference No 2 of 2019

Between

Public Prosecutor

… *Applicant*

And

Bong Sim Swan, Suzanna

… *Respondent*

JUDGMENT

[Criminal Procedure and Sentencing] — [Criminal references]
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v
Bong Sim Swan, Suzanna

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Court of Appeal — Criminal Reference No 2 of 2019
Sundaresh Menon CJ, Andrew Phang Boon Leong JA, Tay Yong Kwang JA
10 June 2020

21 August 2020 Judgment reserved.

Tay Yong Kwang JA (delivering the judgment of the court):

1 This is the Prosecution's application to refer three questions of law to the Court of Appeal pursuant to s 397(2) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC"). The respondent, Bong Sim Swan Suzanna ("the Respondent"), is now 48 years old. She was convicted after trial in the State Courts on one charge of voluntarily causing hurt to a female domestic helper employed by her by using a glass bottle containing medicated oil to hit the domestic helper's left cheek a few times, an offence under s 323 read with s 73 of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code"). She appealed against her conviction and sentence. The High Court dismissed the appeal against conviction but allowed the appeal against sentence by reducing the term of imprisonment and the amount of compensation to be paid by her to the domestic worker. The High Court also dismissed the Prosecution's appeal against sentence and the compensation order.

2 In *Tay Wee Kiat and another v Public Prosecutor and another appeal* [2018] 4 SLR 1315 ("*Tay Wee Kiat*"), a three-Judge High Court set out a sentencing framework for domestic helper abuse offences. The issues raised in the present application arose from the application of the framework.

Background facts

3 In 2013, Than Than Soe ("the Victim"), a national of Myanmar who was then 23 years old, came to Singapore to work. In May 2013, she began working for the Respondent as a domestic helper in the three-room flat belonging to the Respondent's parents. About four months after she began work, the Respondent started to find fault with her and to scold her. The scolding eventually escalated into incidents of violence with the Respondent regularly hitting, slapping or pulling the Victim's hair. The Respondent would often punch the Victim in the eye or face and particularly on the left side. The Victim recalled one occasion where the Respondent punched her in the eye and caused it to turn red because a blood vessel burst. In another incident, the Respondent rubbed curry on the Victim's face, pulled her hair and slapped her because she did not heat up the curry for dinner. About ten months after arriving here, the Victim's eyesight began to deteriorate. When she told the Respondent about this, the Respondent told her not to "bullshit".

4 When the Victim started working for the Respondent, she first lived in the Respondent's parents' flat in Yishun. About one and a half years later, she moved to the Respondent's flat in Fernvale but was expected to perform household chores in both flats.

5 For the two years that the Victim worked for the Respondent, she was not paid her monthly salary. Her contract with the Respondent was due to expire

after two years and she hoped to be paid and to return home. Instead, the Respondent told her to sign a document that she could not understand. The Victim found out later that it was an extension of her contract of employment. The Victim only received her salary after the authorities learnt about her situation after the incident stated in the charge.

6 The charge in question concerned an incident on 17 May 2015. The Victim was suffering from a headache and applied some medicated oil from a glass bottle on her head. When the Respondent returned home, she complained about the smell, ostensibly because her dog was very annoyed by it. When the Victim explained that she was having a headache, the Respondent asked her to hand over the glass bottle. She then held the glass bottle in her hand with the base of the glass bottle protruding out and used it to hit the Victim's face somewhere below her left eye several times. The Victim felt pain and there was swelling and a bruise on the left side of her face. The Victim testified that she could not sleep that night.

7 In the morning of 18 May 2015, after the Respondent had left for work, the Victim called the police and reported that "My madam always beat me. Please help me. No need ambulance." Two police officers were despatched to the Fernvale flat. They brought the Victim to the police station and later to a hospital. A medical report dated 23 July 2015 from the hospital noted that the Victim had a 3cm bruise at the left cheekbone area and diagnosed her as having suffered a contusion secondary to the assault. The Victim was discharged from the hospital the same day and brought back to the police station where she spent the night.

8 The next day, 19 May 2015, the Victim was sent to the Good Shepherd Centre ("the Centre"), a shelter for women who had suffered abuse. She had to

sign some forms for admission and realised she had blurred vision as she could not see what was on the papers. When she had to visit an optician, she was unable to walk there alone as she could not see clearly and a staff member from the Centre had to lead her by the hand.

9 The Victim testified that she did not have any problems with her vision prior to coming to Singapore. She noticed her vision beginning to blur sometime in March or April 2014. She complained about her worsening vision to the Respondent but the Respondent did not believe her. After the incident on 17 May 2015, the Victim's eyesight deteriorated to the point where she could not walk around by herself.

10 The Victim was subsequently diagnosed with the following injuries ("the Injuries"):

(a) retinal detachment in the left eye as a result of retinal dialysis;

(b) bilateral vitreous haemorrhage (bleeding in both eyeballs);

(c) bilateral posterior subcapsular cataracts (cataracts in both eyes); and

(d) a macular hole in the left eye.

11 She required significant follow-up medical care, including six eye operations. Dr Chee Ka Lin Caroline ("Dr Chee"), who examined the Victim, gave evidence that at the time of the Victim's first consultation with her on 2 June 2015, the Victim was found to be legally blind in her left eye. The Victim recovered after the eye operations but still suffered from 22% disability in her right eye and 48% disability in her left eye. While her right eye had recovered

near normal vision, her left eye had permanent visual loss. She was likely to require follow-up treatment indefinitely.

12 At the trial, the Respondent denied the charge completely. She claimed that she treated the Victim like a daughter and never hit her. She also denied the allegations of oppressive and abusive conduct.

The Magistrate's Court's decision

13 The Trial Judge convicted the Respondent on the sole charge and sentenced her to 20 months' imprisonment. The Trial Judge also ordered her to pay compensation of $38,540.40 to the Victim: see *Public Prosecutor v Bong Sim Swan Suzanna* [2018] SGMC 75 ("MC GD").

14 The Trial Judge accepted that the Victim was a credible witness who provided a simple and even-handed account of the events: MC GD at [32]–[34]. The evidence that the Victim gave was found to be internally and externally consistent: MC GD at [57]–[58]. In contrast, the Respondent was found to be not completely truthful: MC GD at [69]. She appeared to be a fairly exploitative employer who wanted to maximise the benefits of having a live-in maid and did not fully regard the welfare of the Victim: MC GD at [72].

15 The Trial Judge did not prefer the Respondent's version of events in respect of the incident on 17 May 2015: MC GD at [73]. Bearing in mind the Victim's evidence of how she had been treated by the Respondent in the course of her employment, the Respondent's version of how she reacted to the smell of medicated oil was uncharacteristically muted. The Respondent had claimed that she merely chastised the Victim in a slighter higher tone of voice, telling her, "Next time, just don't apply": MC GD at [74]. Considering the totality of the

evidence, the Trial Judge concluded that the Prosecution had proved its case against the Respondent beyond reasonable doubt.

16 The Trial Judge then applied the sentencing framework for domestic helper abuse cases set out in *Tay Wee Kiat*: MC GD at [85]. The past assaults inflicted on the Victim were relevant because the prolonged history of abuse had sufficient nexus to the charge and formed part of the circumstances surrounding the commission of the offence: MC GD at [87]. The Victim's enfeebled physical state was a result of frequent abuse which made her susceptible to further injury. It was impossible to divorce the condition that the Victim's eyes were in after 17 May 2015 from the history of abuse that she had received: MC GD at [89]. The Respondent's knowledge of the past assaults formed a crucial part of her state of mind at the time of the final attack and by choosing to hit the Victim at the same area on her face on 17 May 2015, this awareness was relevant to the Respondent's culpability: MC GD at [90].

17 The Victim suffered both physical and psychological harm. The extent of the Injuries was a result of constant assault over a period of time, with the final blow executed on 17 May 2015: MC GD at [94]. In considering the physical harm, given the medical evidence, it was not possible to segregate the specific or type of injury attributable to the single act of hurt on 17 May 2015. To sentence the Respondent based solely on the bruise ignored the reality of the situation: MC GD at [96]. The extent of injury to the Victim's eyes fell within the "more serious physical harm" category in *Tay Wee Kiat*: MC GD at [101].

18 As for psychological harm, the incident occurred in a context of a sustained pattern of abusive behaviour and a generally exploitative relationship: MC GD at [102]–[103]. At the same time, the Respondent's treatment of the Victim was not particularly humiliating or degrading: MC GD at [104]–[105].

The degree of psychological harm fell in the higher range in the category of "less serious psychological harm". The indicative starting range was therefore between 15 to 18 months' imprisonment: MC GD at [106].

19 Turning to the aggravating and mitigating circumstances, the Respondent's knowledge that the Victim had been assaulted previously in the facial region was relevant to culpability as the Respondent knew that the Victim had complained about her worsening eyesight. The Respondent was therefore highly culpable: MC GD at [107]. She also used a weapon – the glass bottle – on the Victim and targeted a vulnerable part of the Victim's body: MC GD at [108]. There were no mitigating circumstances and this was not a case where the Respondent was labouring under a psychiatric condition at the time of the offence: MC GD at [109]–[111].

20 The Trial Judge sentenced the Respondent to 20 months' imprisonment: MC GD at [116]. The Respondent was also ordered to compensate the Victim a total amount of $38,540.40, in default, seven weeks' imprisonment. This sum comprised $20,370.40 for medical expenses, $10,000 for pain and suffering and $8,170 for loss of prospective earnings: MC GD at [137]. Although the Centre had paid a sum of $19,329.10 on behalf of the Victim, the Trial Judge held that s 359 of the CPC did not allow the court to make a compensation order in favour of the Centre since the Centre did not fall within the meaning of "the person injured or his representative" in that provision. Further, there was no evidence that the Centre intended to claim from the Victim the amount paid for her medical bills or that it had paid for her on the understanding that it would be repaid: MC GD at [128]. Upon the Respondent's application, the Trial Judge granted a stay of execution on the sentence of imprisonment and the compensation order and allowed bail pending appeal: MC GD at [139].

The High Court's decision

21 Both the Prosecution and the Respondent filed appeals against the Trial Judge's decision in Magistrate's Appeal No 9255 of 2018 ("MA 9255"). The Respondent appealed against the whole decision while the Prosecution appealed against the sentence and the compensation order. The High Court judge ("the Judge") dismissed the Respondent's appeal against conviction but allowed her appeals against the sentence and compensation order, reducing the imprisonment term to eight months and the compensation sum to $1,000. The Prosecution's appeals were dismissed: see *Bong Sim Swan Suzanna v Public Prosecutor* [2020] SGHC 15 ("HC GD").

22 In the High Court, the Respondent submitted that the Trial Judge erred in relying on uncharged incidents to convict her. The Judge held that the Trial Judge did not do so but had treated the past instances of physical abuse as evidence of the background to the charge: HC GD at [25]. The Judge was of the view that the background to an alleged offence may but need not necessarily involve facts which could constitute separate offences and a judge was entitled to take all such facts into consideration in assessing the credibility of the witnesses, including the accused and the victim. There was no reason why the consideration of background facts in assessing credibility should depend on whether those facts could constitute separate offences: HC GD at [26]. The case of *Public Prosecutor v Rosman bin Anwar* [2015] SGHC 247 ("*Rosman bin Anwar*") supported the proposition that all background facts could be considered in assessing the credibility of the witnesses: HC GD at [27]. The Trial Judge's findings of facts were not plainly wrong or against the weight of the evidence: HC GD at [28].

23 On the appeals against sentence, the Judge relied on *Chua Siew Peng v Public Prosecutor and another appeal* [2017] 4 SLR 1247 ("*Chua Siew Peng*") for the general principle that an offender may only be sentenced for offences for which he has been convicted and that in doing so, regard may be had only to any other charges that the offender has admitted and consented to being taken into consideration for the purpose of sentencing. Prior offending conduct for which no charge has been brought was to be disregarded even if the offender had admitted to such conduct: HC GD at [39]. A sentencing court might, however, take into consideration facts which had a sufficient nexus to the commission of the offence, irrespective of whether such facts could constitute separate offences for which the accused was not charged. In *Chua Siew Peng*, the court held that a sufficient nexus was generally present if it (a) concerned a fact in the immediate circumstances of the charged offence or (b) was a fact relevant to the accused's state of mind at the time the offence was committed. The Judge agreed with the first proposition to the extent that only facts relating to the immediate background may be considered. For the second proposition, he was of the view that there were certain limitations: HC GD at [40].

24 The Trial Judge took the Injuries into consideration as she was of the view that the previous incidents of abuse formed part of the circumstances surrounding the commission of the charged offence. However, on appeal, the Judge held that none of the previous incidents of abuse could be said to relate to the immediate circumstances or background to the charged offence: HC GD at [44]. The Trial Judge also held that the frequent abuse was responsible for the Victim's enfeebled physical state and concluded that the Respondent's acts on 17 May 2015 actually caused further injury in the form of blindness. However, the Judge was of the view that while the Victim's problems with her vision were a consequence of the Injuries, the evidence did not show that the Respondent's

acts on 17 May 2015 caused the Injuries: HC GD at [45]–[46]. Instead, the evidence showed that the Injuries (particularly the main injury of the retinal detachment) probably occurred before the incident: HC GD at [46]–[47].

25 Although the eggshell skull rule allowed the court to take into account the full extent of the harm caused by a particular act even though part of the harm would not have been suffered but for the victim's pre-existing conditions, there must still be a causative link between the Respondent's acts on 17 May 2015 and the Injuries: HC GD at [48]. The evidence showed that the retinal detachment and the cataracts were pre-existing conditions which might have been caused by the previous instances of abuse but the Respondent was not charged for those previous instances: HC GD at [50]. Dr Chee's evidence was not sufficient to prove that the Respondent's acts on 17 May 2015 did make the Victim's existing condition worse. The evidence therefore did not establish a causative link and did not support the Trial Judge's conclusion that the 17 May 2015 incident caused further injury to the Victim in the form of blindness: HC GD at [51]. It was wrong to sentence the Respondent by taking into account the Injuries as it would be punishing her for the previous instances of abuse when she was not charged for those: HC GD at [52].

26 The Trial Judge regarded as an aggravating factor the fact that the Respondent chose to strike the Victim near her eye despite knowing about the previous assaults to the same region and the Victim's worsening vision: HC GD at [53]. There were limitations to the proposition in *Chua Siew Peng* that previous conduct could be taken into consideration if the facts were relevant to the accused's state of mind: HC GD at [54]. The basis for an accused's knowledge of a victim's vulnerability was important. The knowledge should not be taken into consideration unless it could be established independently of any potentially criminal conduct for which an accused person was not charged.

Where such knowledge was attributed to an accused person solely from the fact that the accused had committed the previous uncharged acts, reliance on such knowledge would be no different from taking the uncharged acts into consideration. There was a more fundamental principle that a person could not be punished for an offence that he was not charged with: HC GD at [58]–[59].

27 On the facts, it was wrong to take into consideration the Respondent's knowledge of the Victim's vulnerability if such knowledge was based solely on the fact that she had previously struck the Victim in the same place: HC GD at [60]. However, the Judge agreed with the Trial Judge that the Respondent was aware of the Victim's worsening eyesight based on the Victim's complaints and this awareness was an aggravating factor that could be taken into consideration as it did not require the court to take the previous assaults into consideration: HC GD at [61].

28 On the evidence, the only injury that could be said to have been caused by the Respondent on 17 May 2015 was the bruise on the Victim's face, which fell within the "less serious" category in the sentencing framework: HC GD at [62]. The Judge agreed with the Trial Judge that the psychological harm was in the "less serious" category as it was not particularly humiliating or degrading. The appropriate indicative sentence was therefore five months' imprisonment: HC GD at [62]. There were no mitigating factors: HC GD at [63]. The aggravating factors were the Respondent's awareness of the Victim's worsening eyesight based on the Victim's complaints and the fact that the Respondent had used a weapon (the glass bottle) on a vulnerable part of the Victim's body. Accordingly, the indicative sentence was adjusted upwards by three months for a final sentence of eight months' imprisonment: HC GD at [64].

29 As the only injury that could be said to have been caused by the Respondent on 17 May 2015 was the bruise and there was no evidence of any medical expenses incurred or any loss of earnings suffered as a result of the bruise, the compensation order was set aside. Instead, the Respondent was ordered to pay the Victim $1,000 (in default, three days' imprisonment) for pain and suffering in respect of the bruise: HC GD at [68]–[69].

The Respondent's earlier criminal motion

30 On 20 February 2020, we heard the Respondent's application in Criminal Motion No 23 of 2019 ("CM 23") for leave to refer the following two questions to the Court of Appeal pursuant to s 397(1) of the CPC:

> (a) whether allegations of offences, for which no charges have been brought against the accused, can be relied upon by a trial judge in deciding whether the Prosecution has discharged its burden of proof; and
>
> (b) whether a trial judge's failure to refer to and assign reasons for rejecting arguments on key or major issues that affect the question of whether the Prosecution has discharged its burden of proof is an error of law that justifies appellate intervention.

31 We dismissed CM 23 as we were satisfied that neither question raised a question of law of public interest suitable to be answered in a criminal reference. The real nature of the first question was the Respondent's objection to the weight that had been placed on certain evidence, specifically the alleged prior incidents of abuse, in relation to other matters such as the Victim's credibility. The Respondent's dissatisfaction was not with the admissibility of the evidence but with the weight that had been placed on it. However, the weight that a trial judge placed on particular pieces of evidence would be a complaint as to that

judge's findings of fact and that would not give rise to a question of law, much less one of public interest.

32 The second question similarly did not give rise to any question of law of public interest. The issue of the duty of a judge to give reasons and the consequences of a failure to do so are settled law (see *Thong Ah Fat v Public Prosecutor* [2012] 1 SLR 676 and the decisions of the High Court in *Yap Ah Lai v Public Prosecutor* [2014] 3 SLR 180 and *Lim Chee Huat v Public Prosecutor* [2019] 5 SLR 433). The highest that the case could be put by the Respondent was that she disagreed with the reasons given by the Trial Judge and the Judge but that would not give any basis for a criminal reference.

The questions in the present criminal reference

33 On 9 December 2019, pursuant to s 397(2) of the CPC, the Prosecution filed the present criminal reference to refer the following questions to the Court of Appeal:

> (a) Question 1: In establishing a causal link between an act and a subsequent injury (in this case, a worsening of the retinal detachment), does the Prosecution bear the burden of eliminating other possibilities of how such injury could be sustained even if these were not raised in evidence?
>
> (b) Question 2: In applying the sentencing framework for a maid abuse offence punishable under s 323 read with s 73 of the Penal Code set out in *Tay Wee Kiat*, should the court take into account psychological harm that arises from a sustained pattern of abuse, *ie*, multiple incidents of the offender causing hurt to the domestic maid, even though separate charges were not preferred for the other incidents of abuse?

(c) Question 3: Does the fact that an offender knew, or was aware of the likelihood, of a victim's pre-existing injury or particular vulnerability when he assaulted the victim on that particular part of the body constitute an aggravating factor in sentencing?

The parties' submissions

The Prosecution's submissions

34 The Prosecution submitted that all three questions should be answered as they satisfied the requirements set out in s 397(1) of the CPC. It argued that the Judge adopted positions which were contrary to established jurisprudence and introduced a layer of uncertainty into sentencing issues pertinent to domestic helper abuse cases that would benefit from clarification by this court.[1]

35 The Prosecution submitted that Question 1 should be answered in the negative. Where the evidence clearly suggested an exacerbation of injuries due to an act, this sufficed to establish a causal link in the absence of any alternative reasonable hypotheses.[2] The Judge ignored evidence that proved a causal link between the Respondent's acts on 17 May 2015 and the worsening of the Victim's retinal detachment.[3] The totality of the Victim's testimony, Dr Chee's medical opinion and the absence of any contrary evidence established clearly that the final assault on 17 May 2015 exacerbated the retinal detachment, even though the precise degree of aggravation could not be determined.[4] The Judge erred in requiring a definitive medical opinion instead of relying on the entirety

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1 Prosecution's submissions at para 29.

2 Prosecution's submissions at para 4.

3 Prosecution's submissions at para 32.

4 Prosecution's submissions at para 35.

of the evidence before him and his approach suggested that a causal link could not be established unless and until the Prosecution eliminated other possibilities of how such injury could be sustained even if these were not raised in evidence.[5]

36 Some injuries could not be understood as binary and the severity of the Victim's retinal detachment lay along a spectrum.[6] Under the eggshell skull rule, the sentencing court had to take into account the full extent of harm caused by a particular act, even though part of the harm would not have been suffered but for the victim's pre-existing conditions.[7] Had the Judge recognised the impossibility of proving causation on medical evidence alone, he would have found that the Respondent's acts on 17 May 2015 worsened the Victim's retinal detachment and her eyesight and by virtue of the eggshell skull rule, the Respondent should be liable for the full extent of the Victim's injuries.[8]

37 The Judge's approach raised uncertainty as to how causation could be established by cumulative assaults to the same part of the body. In domestic helper cases, the acts of abuse often occurred over an extended period of time, which made it impossible to particularise every assault.[9] The approach led to the perverse outcome that the longer an offender perpetrated abuse, the less likely it was that subsequent injury might be attributed to him.[10] Instead, a

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5 Prosecution's submissions at paras 37–38.

6 Prosecution's submissions at para 43.

7 Prosecution's submissions at para 45.

8 Prosecution's submissions at para 46.

9 Prosecution's submissions at para 50.

10 Prosecution's submissions at para 50.

common-sense approach that considered each act of abuse against the background of abuse and the totality of the harm should be preferred.[11]

38 The Prosecution dealt with Questions 2 and 3 together as both questions related to ambiguity in the law pertaining to how uncharged offending should be taken into consideration at the sentencing stage in domestic helper abuse cases.[12] It submitted that both these questions should be answered in the affirmative.[13] Domestic helper abuse occurred in a unique context with a pattern of abusive conduct over a period of time and this backdrop of abuse had to be considered to appreciate the totality of the harm suffered by a victim.[14]

39 In relation to Question 2, the Judge's remarks at the hearing of MA 9255 suggested that he did not place any weight on the Respondent's exploitative and degrading treatment of the Victim.[15] It was therefore unclear how a sentencing court should assess psychological harm in domestic helper abuse cases, where oppressive and exploitative behaviour might constitute uncharged offending conduct.[16] The court should adopt a common-sense approach and recognise greater psychological harm where charged offending conduct took place within a generally exploitative relationship. The fact that such exploitative conduct might constitute further charges should not bar the court from taking them into consideration.[17]

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11 Prosecution's submissions at para 51.

12 Prosecution's submissions at para 55.

13 Prosecution's submissions at para 4.

14 Prosecution's submissions at paras 56–57.

15 Prosecution's submissions at paras 80–81.

16 Prosecution's submissions at para 82.

17 Prosecution's submissions at para 83.

40 As for Question 3, the Prosecution argued that the Judge's decision added a further requirement that the Prosecution had to prove the offender's state of mind independently from uncharged offending.[18] It was absurd to expect a domestic helper in a vulnerable position to voice complaints to the same person who abused her. It was also entirely unprincipled to predicate sentencing on the artificial basis of whether a victim had complained about the abuse.[19] The Respondent's knowledge that the Victim was more susceptible to injury related to her culpability and did not constitute separate punishment for uncharged offending.[20] The Respondent was fully aware that the Victim's eyesight was worsening, not merely because of the Victim's complaints but also because she was the one who had attacked the Victim before.[21] This made her more culpable than an offender without that knowledge for the incident on 17 May 2015.

The Respondent's submissions

41 The Respondent submitted that this court should not exercise its substantive jurisdiction to answer the three questions as they were not questions of law of public interest.[22]

42 Question 1 was a question of fact because the extent to which a causal link had to be established depended on the act and the injury in question.[23] Question 1 could also be answered by reference to established principles of law,

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18 Prosecution's submissions at paras 67–68.

19 Prosecution's submissions at para 68.

20 Prosecution's submissions at para 71.

21 Prosecution's submissions at para 73.

22 Respondent's submissions at para 3.

23 Respondent's submissions at para 18.

specifically, that the burden of proof was on the Prosecution to establish all elements of the charge beyond reasonable doubt.[24] Possibilities which were real rather than fanciful must be eliminated by the Prosecution.[25] Question 1 also did not arise on the facts of the case because the Prosecution was given every opportunity to prove the causal link between the act and the injury but the Judge found the evidence to be inadequate.[26] In any event, Question 1 should be answered in the affirmative as the Prosecution bore the burden of eliminating other possibilities even if these were not raised in evidence.[27] The Prosecution's evidence had to be strong enough to establish the causal link and eliminate possibilities raised by the Prosecution's own evidence or the Defence.[28]

43 As for Question 2, it was an impermissible attempt to reopen or change established principles of law, namely, that uncharged offences could not be taken into account in sentencing.[29] The answer was patently obvious as psychological harm based on a sustained pattern of abuse for which no charges had been framed could not be taken into consideration as an aggravating factor.[30] In any event, Question 2 should be answered in the negative as the court could not consider psychological harm that arose from uncharged conduct.[31]

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24 Respondent's submissions at para 26.

25 Respondent's submissions at para 30.

26 Respondent's submissions at paras 33, 37.

27 Respondent's submissions at para 41.

28 Respondent's submissions at para 44.

29 Respondent's submissions at para 48.

30 Respondent's submissions at paras 49–50.

31 Respondent's submissions at para 60.

44 Question 3 was a question of fact as the extent of an offender's knowledge of an existing vulnerability and whether this knowledge was an aggravating factor would depend on the evidence.[32] Knowledge should not be attributed to the offender solely from the fact that he or she had committed prior uncharged acts.[33] In any event, the answer would simply be that it depended on the facts and the Judge had already taken into account the Respondent's awareness of the Victim's worsening eyesight as an aggravating factor.[34]

Our decision

The criminal reference procedure

45 Pursuant to s 397(2) of the CPC, leave is not required for the Prosecution to file a criminal reference. However, this does not affect the court's substantive jurisdiction to determine whether to answer the questions referred to it (*Public Prosecutor v GCK* [2020] SGCA 2 ("*GCK*") at [60]). The Court of Appeal is not invariably bound to answer the questions placed before it.

46 Questions of law that are referred by the Prosecution are deemed to be questions of public interest by virtue of s 397(6)(*b*) of the CPC. As we recently stated in *GCK*, the combined effect of ss 397(2) and 397(6)(*b*) is to facilitate the bringing of a question by the Public Prosecutor but the four conditions that must be present for the court to answer the questions referred remain applicable (*GCK* at [64]):

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32 Respondent's submissions at paras 68, 72.

33 Respondent's submissions at para 69.

34 Respondent's submissions at para 75.

(a) First, the reference must be made in relation to a criminal matter decided by the High Court in exercise of its appellate or revisionary jurisdiction.

(b) Second, the reference must relate to a question of law of public interest.

(c) Third, the question of law must have arisen from the case which was before the High Court.

(d) Fourth, the determination of the question of law by the High Court must have affected the outcome of the case.

Question 1

47 Any question framed at a certain level of abstraction may appear to raise issues of law at first glance but to amount to a genuine question of law, the proposition posed must be more than just descriptive and specific to the case at hand. It should also contain normative force (*Public Prosecutor v Teo Chu Ha* [2014] 4 SLR 600 at [31]).

48 Question 1 did not appear to us to be a question of law. This question concerns the Judge's finding that the Prosecution had not established adequately the causal link between the Respondent's actions on 17 May 2015 and the Victim's Injuries. At the hearing, Mr Mohamed Faizal SC ("Mr Faizal") for the Prosecution accepted that a question on whether the High Court erred in finding that the Injuries were not caused by the Respondent's acts on 17 May 2015 would be a factual one and would not be suitable for a criminal reference on questions of law. He submitted, however, that the Trial Judge and the Judge took distinct evidential approaches to the issue of causation in the present case.

The Trial Judge took a common-sense approach and accepted that the Respondent's acts on 17 May 2015 worsened the Injuries. There was only one narrative that could plausibly explain the Injuries and by rejecting that narrative, the Judge placed the burden on the Prosecution to eliminate all other possibilities although they were not raised in evidence.

49 In our view, this was not an issue about different evidential approaches but of different findings on the evidence presented in court. The Judge did not think that the Prosecution's case was supported by the evidence adduced. Instead, he found that some of the Injuries were pre-existing conditions: HC GD at [46] to [50]. He held that Dr Chee's evidence was not sufficient to prove that the Respondent's acts on 17 May 2015 made the Victim's existing condition worse. Therefore, Dr Chee's evidence did not establish a causative link between the incident on 17 May 2015 and the Injuries and did not support the Trial Judge's conclusion that the said incident caused further injury in the form of blindness: HC GD at [51]. The Judge reached this conclusion based on Dr Chee's evidence that the retinal detachment could have occurred due to trauma that had occurred weeks before it was diagnosed and that it was unlikely to have occurred less than three weeks from the date of the first check-up on 1 June 2015. This would place the trauma at some time before the incident on 17 May 2015.[35] Dr Chee also testified that the vitreous haemorrhage, cataracts and macular hole could have occurred spontaneously but opined that this was unlikely in a young patient and it was possibly a result of trauma.[36] Essentially, the Judge made a number of findings on causation that departed from the conclusions made by the Trial Judge. Even if we do not agree with the Judge's

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35 ROP Vol 1 pp 339–340 (NEs 12 Oct 2017 pp 45–46), p 343 (NEs 12 Oct 2017 p 49).

36 ROP Vol 1 pp 319–321 (NEs 12 Oct 2017 p 25–27).

findings, this is not an appeal and the criminal reference procedure is not intended for the Court of Appeal to review findings of fact.

50 Question 1 also did not arise from the case that was before the Judge. He certainly did not propound the principle that the Prosecution bore the burden of eliminating other possibilities of how an injury could be sustained even if no such possibilities were not raised in evidence. The Judge simply did not accept that the Prosecution had proved the case that it was advancing in court. To the extent that Question 1 suggests that no other possibilities were raised in evidence, that is not correct. Other possibilities were raised by the Respondent, although they were not pursued vigorously and were dismissed readily by Dr Chee.[37] They included the suggestion that the Victim could have hit her head on a door or had inflicted the Injuries on herself in an attempt to frame the Respondent.[38]

51 For these reasons, we do not see any need to answer Question 1. We note that at the hearing before us, Mr Faizal conceded that if we did not answer Question 1, which dealt with the full extent of the physical harm, then there was nothing more to be said on the Victim's Injuries. In any case, the answer to any question as to what the Prosecution must prove would almost invariably be answered by the principle that the Prosecution must prove the case that it is asserting in court beyond reasonable doubt. The "beyond reasonable doubt" standard is difficult to articulate and its application will vary on the facts of each case (see *GCK* ([45] *supra*) at [126] to [128]). On the facts here, if other possible causes of the Injuries appear plausible from the Respondent's evidence or even

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37 ROP Vol 1 pp 335 (NEs 12 Oct 2017 p 41); p 340 (NEs 12 Oct 2017 p 46).

38 ROP Vol 1 pp 171, 179–180 (NEs 7 Jul 2017 p 81, 89–90).

from the Prosecution's own evidence, it is only logical that the Prosecution must eliminate those possibilities in order to remove any lingering reasonable doubt. This it can do by cross-examination of the Respondent and her witnesses or by introducing contrary evidence.

Questions 2 and 3

52 Questions 2 and 3 deal with psychological harm and culpability. We discuss them together as they concern the application of the sentencing framework in *Tay Wee Kiat*.

Whether Questions 2 and 3 should be answered

53 In our view, Question 2 raised a question of law of public interest. In reaching his decision, the Judge applied the principle that a sentencing judge must take into account all circumstances relevant to the commission of the offence and the "more fundamental principle" that a person cannot be punished for an offence that he has not been charged with: HC GD at [59]. Although these principles are well-settled, Question 2 raised a normative issue of the correct application of those principles in the context of the court's assessment of psychological harm and culpability. Question 2 was not merely specific to the present case as it had broader implications and provided an opportunity to clarify the relationship between the *Tay Wee Kiat* framework and the principle concerning uncharged offending.

54 We also take the view that Question 2 arose out of the case before the High Court. The Judge agreed with the Trial Judge that the psychological harm was in the "less serious" category: HC GD at [62]. However, the Judge was of the view that the Respondent's awareness of the Victim's worsening eyesight had to be established independently of any potentially criminal conduct for

which the Respondent was not charged: HC GD at [58]. That is the issue of law that Question 2 seeks to challenge.

55 In respect of Question 3, we do not think it should be answered in the way that it was posed by the Prosecution. As Question 3 now stands, it could only yield a "Yes" answer. An offender's knowledge of a victim's pre-existing injury or particular vulnerability is obviously an aggravating factor if he chooses to assault the victim on the injured or the vulnerable part of the body as it increases the offender's culpability. In *Chua Siew Peng*, the High Court observed that the court's consideration of the accused's knowledge gave effect to the "relativity principle" – the notion that between two offenders convicted of the same offence, if all things are equal, the one who is more culpable ought to receive a heavier sentence (*Chua Siew Peng* at [71]). Question 3 as framed also did not arise on the facts of the case because the High Court had already accepted that the Respondent's awareness of the victim's worsening eyesight, based on the Victim's complaints and not on the uncharged previous assaults, was an aggravating factor: HC GD at [61] and [64].

56 However, as was evident in the Prosecution's submissions, when framing this question, what the Prosecution had in mind was the Judge's view that the principle in *Chua Siew Peng* – that an offender's knowledge arising out of uncharged prior offending was relevant to culpability – had to be modified and that the Prosecution had to establish an independent basis for the offender's knowledge which did not include the offender's uncharged prior offending. In our view, that modification raised issues similar to Question 2 on the application of the *Tay Wee Kiat* framework – specifically, how should a sentencing court view uncharged prior offending when considering the offender's culpability?

57 During the hearing before us, we therefore proposed reframing Question 3 to the following:

> Does the fact that an offender knew, or was aware of the likelihood, of a victim's pre-existing injury or particular vulnerability that arose from previous proved incidents which could have been but were not made the subject of separate charges, when he assaulted the victim on that particular part of the body constitute an aggravating factor in sentencing?

In our view, this captured the essence of what the Prosecution was concerned about which was not simply the offender's knowledge of the victim's prior injury or particular vulnerability but the sources of that knowledge, in particular, when one such source was the offender's uncharged prior offending against the victim. At the hearing, Mr Faizal agreed with the reframed question.

58 As we mentioned at the hearing, we were initially doubtful that Question 3 arose from the case before the High Court. As Mr Sui Yi Siong ("Mr Sui") for the Respondent highlighted, the Judge had already taken the Respondent's knowledge of the Victim's vulnerability into account as an aggravating factor in his written grounds of decision: HC GD at [61]. The Respondent was aware of that vulnerability because the Victim had complained about her worsening eyesight. As her knowledge had been established on an "independent basis", it was taken into consideration. Mr Faizal submitted, however, that the basis or source of knowledge is relevant because it could affect the extent of the Respondent's culpability.

59 We will therefore discuss Question 2 as originally framed by the Prosecution and Question 3 as modified above.

The Tay Wee Kiat framework

60 In *Tay Wee Kiat*, the three-Judge High Court set out a sentencing framework for offences under s 323 read with s 73 of the Penal Code. The first step for the sentencing court under the framework is to determine whether the harm caused to the victim was predominantly physical or both physical and psychological. If the charge concerns a single instance of hurt that does not form part of a broader trend or history of abusive conduct or particularly degrading or humiliating treatment, the harm would be predominantly physical and the sentencing court should consider the degree of harm as well as other aggravating and mitigating factors (*Tay Wee Kiat* at [70]).

61 If the harm is both physical and psychological, the second step for the court is to identify the degree of harm caused in relation to each charge. The follow table sets out the indicative sentencing range based on physical and psychological harm (*Tay Wee Kiat* at [71]):

	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

62 The third step for the court is to adjust the sentence for each charge in the light of aggravating or mitigating circumstances (*Tay Wee Kiat* at [73]–[74]). Aggravating factors identified by the court in *Tay Wee Kiat* include the use of a weapon, efforts to prevent the victim from seeking help, motive and premeditation. Mitigating factors include genuine remorse, cooperation with authorities and the fact that the offender was suffering from a mental illness.

63 Having determined the sentences for each charge, the final step is for the court to decide which sentences to run consecutively and which to run concurrently in accordance with the principles set out in *Mohamed Shoufee bin Adam v Public Prosecutor* [2014] 2 SLR 998 (*Tay Wee Kiat* at [75]).

Uncharged prior offending

64 A principle of sentencing is that an offender cannot be punished for an offence for which he was not charged or convicted (see *Vasentha d/o Joseph v Public Prosecutor* [2015] 5 SLR 122 at [62], *Public Prosecutor v Tan Thian Earn* [2016] 3 SLR 269 at [62]). If the Prosecution wants the sentencing court to consider the offender's prior acts and these acts might also be the subject of criminal charges, the onus is on them to draw up the necessary charges and proceed with them at trial or apply for them to be taken into consideration for the purpose of sentencing pursuant to s 148 of the CPC.

65 In *Chua Siew Peng*, the High Court observed that while a sentencing court generally could not take into account uncharged offences, it was entitled to and in fact should consider the aggravating circumstances in which the offence was committed, even where those circumstances could technically constitute separate offences (*Chua Siew Peng* at [81]). There was conduct that could constitute a separate offence but which was so closely intertwined with the specific charge before the court that it should be considered at sentencing (*Chua Siew Peng* at [83]). One example was the offence of drink-driving where the sentencing court might recognise aggravating factors such as speeding or driving recklessly, notwithstanding that each of those facts could amount to a separate charge (*Chua Siew Peng* at [83]). A fact with a sufficient nexus to the commission of the offence could be considered at the sentencing stage, irrespective of whether this fact could also constitute a separate offence for

which the accused was not charged. What constituted a sufficient nexus was a fact-sensitive inquiry that depended on the circumstances of each case and the degree of proximity of time and space to the charged offence. A sufficient nexus would generally be present if it concerned a fact in the immediate circumstances of the charged offence or was a fact relevant to the accused's state of mind at the time of committing the offence (*Chua Siew Peng* at [85]).

66 We agree with the above principles stated in *Chua Siew Peng*. If the facts are relevant and proved, they may be, and indeed ought to be, considered by the sentencing court (see also *Edwin s/o Suse Nathen v Public Prosecutor* [2013] 4 SLR 1139 at [24] and [27]). Although the principles are not in dispute, their application could yield different results. We now consider three cases that deal with the principles in the context of domestic helper abuse.

67 In *Rosman bin Anwar*, two offenders were convicted on multiple charges of voluntarily causing hurt to a domestic helper in their employment. The charges concerned five incidents stretching from August 2011 to March 2013, which was nearly the entire period of the victim's employment. In sentencing the offenders, the High Court took the view that the degree of pain and suffering endured by the victim was not to be measured by reference only to the visible injuries and the severity of the assaults on her but had to take into account the prolonged nature of the abuse and the psychological and emotional toll that it took on her (*Rosman bin Anwar* at [49]). The High Court agreed with the District Judge that the abuse suffered was not limited to the specific incidents that comprised the subject matter of the charges but included other unspecified instances and those instances were a source of a considerable amount of distress (*Rosman bin Anwar* at [49]).

68 The second case is that of *Chong Yee Ka v Public Prosecutor* [2017] 4 SLR 309 ("*Chong Yee Ka*"). The offender was charged with three counts of voluntarily causing hurt over a duration of nearly 20 months. The Prosecution elected to proceed on two charges that involved incidents in April 2015 and applied for one charge that involved an incident in 2013 to be taken into consideration for the purpose of sentencing. The appellant pleaded guilty and acknowledged that there had been offending conduct over a period of time. The High Court held that the "prolonged period of physical and mental abuse" was not an aggravating factor (*Chong Yee Ka* at [42]). Although the offender's admission of offending conduct over a period of time could give rise to the inference of past instances of physical and mental abuse, there were no particulars about the incidents and, as a matter of fairness, the sentencing court had to disregard this evidence (*Chong Yee Ka* at [44]–[45]). The court declined to consider the particulars of other possible offences for which the offender was not charged or treat it as an aggravating factor (*Chong Yee Ka* at [45]–[47]).

69 Finally, in *Chua Siew Peng*, the offender was convicted of voluntarily causing hurt to and wrongful confinement of a domestic worker in her employment. The offender was charged with slapping the victim repeatedly on 29 October 2012. During the incident, she also pulled the victim's hair. The next day, the offender locked the victim in the home and the victim climbed out of the window to escape, sustaining multiple fractures in the process. Prior to that incident, the victim had been locked in the house many times before. The High Court accepted that the act of pulling the victim's hair was an aggravating factor because it occurred contemporaneously with the slap and formed part of the immediate circumstances of the offence (*Chua Siew Peng* at [67] and [87]). The previous instances of wrongful confinement were not part of the immediate circumstances but were relevant to the offender's knowledge and therefore her

culpability (*Chua Siew Peng* at [65]). In knowingly prolonging the victim's wrongful confinement, the offender increased the risk that the victim would suffer injuries owing to the conditions of the confinement and the offender's actions drove the victim to take the drastic step of escaping through a window (*Chua Siew Peng* at [65]). The previous instances of confinement had a close nexus with the offence as they made the victim's mental state more vulnerable and the offender committed this offence knowingly on a victim with a significantly weakened mental state (*Chua Siew Peng* at [91]). The High Court also opined that had the previous acts of wrongful confinement been carried out by someone else, with the offender's knowledge, the offender would still be equally culpable (*Chua Siew Peng* at [66] and [92]).

70 Evidently, the application of the principles has not been completely consistent. It seems that in an attempt to adhere to the principle that an offender should not be punished for an offence for which he has not been charged, the courts have sometimes opted to exclude consideration of conduct that might amount to uncharged prior offences. We see two problems with this approach.

71 First, evidence relating to a charge often involves background facts and incidents that may form the subject matter of one or more separate offences. There is no controversy that this evidence is admissible as long as it is relevant under the provisions of the Evidence Act (Cap 97, 1997 Rev Ed). The courts have used this evidence when considering whether the Prosecution has proved the elements of the offence beyond a reasonable doubt. For example, in the present case, the Trial Judge found that evidence on the prior offending conduct was relevant as it allowed her to assess the credibility of the Victim and the Respondent. Similarly, the Judge also accepted that such background facts could be relied upon to convict the Respondent: HC GD at [26] and [27]. Given that these proved background facts were relevant and admissible at the

conviction stage, it would seem contradictory to state that once the accused person has been convicted, the court must then disregard those same proved facts at the sentencing stage on the ground that they could also form the subject matter of offences that are not before the court. Any astute lawyer acting for an accused will probably be able to fit most of such relevant prior conduct into some offence, whether serious or minor, and assert that it should therefore be disregarded when the court is deliberating on the proper sentence. The outcome would be a strange one where proved uncharged prior conduct is relevant for conviction (even if it is only for credibility) but is totally irrelevant for sentencing.

72 Second, such an approach may create a perverse situation which benefits serial offenders. Such offenders whose prior conduct would probably amount to some offence in law will have the benefit of excluding that conduct from sentencing considerations before the court. However, an offender whose prior conduct falls short of criminality will not have that benefit.

73 In our opinion, the sentencing court must be able to consider all the circumstances of a case in order to assess it realistically. Where the Prosecution has proved relevant facts, we do not see why the court should pay no heed to them when considering the appropriate sentence on the sole ground that they might also amount to offences. We think it is important to consider the totality of the circumstances of a charged offence in order to have a true flavour of the offence as the overall perspective may have an impact on the level of the offender's culpability and the extent of the victim's suffering. Naturally, in applying this principle, the court must take a common-sense and contextual approach when considering the importance of the proved relevant facts.

Psychological harm in the Tay Wee Kiat framework

74 Given the principles discussed above, we turn to consider Question 2. This concerns the issue of whether the court should take into account psychological harm that arises from a sustained pattern of abuse even though separate charges were not preferred in respect of the other incidents of abuse.

75 The first step of the sentencing framework in *Tay Wee Kiat* gives equal weight to psychological harm and physical harm because the High Court there recognised that psychological abuse was often what characterised egregious instances of domestic helper abuse and made those instances especially abhorrent (*Tay Wee Kiat* at [66]). The dimension of psychological abuse might be under-emphasised in cases of domestic helper abuse and the sentencing framework was intended to give due weight to the emotional trauma arising from abuse (*Tay Wee Kiat* at [67] and [69]). The High Court was fully aware of the fact that psychological harm is often inflicted over a period of time. At [69], the court observed:

> These same conditions create a hostile environment which opens up opportunities for both physical and psychological abuse. Some offenders may seek to "punish" domestic maids for perceived underperformance by subjecting them to humiliating and degrading treatment and denying them the basic dignity of a human being. Others may routinely subject domestic maids to working conditions that border on slave-like, treating the victim as chattel. Even incidents of physical or verbal abuse that might seem individually mild can have a profound psychological impact upon the victim if they form part of a pattern or campaign of abusive conduct that is sustained over a period of time. Offenders may also exploit the victim's vulnerability by manipulation and intimidation, by lying to her and threatening her, causing her to believe that her situation is helpless and hopeless. The psychological harm and mental anguish that a domestic maid can suffer from being trapped in a situation of fear, abuse and oppression can be just as acute and enduring as physical harm, if not more. As observed by the Court of Appeal in *PP v Kwong Kok Hing* [2008] 2 SLR(R) 684 at [26]–[28], extreme psychological harm can be characterised as

> a form of "infirmity" within the definition of hurt contained in s 319 of the Penal Code. For this reason, the emotional trauma resulting from psychological abuse is a critical sentencing consideration where the abuse of domestic maids is concerned, particularly where the abuse is deliberate and relentless.

76 The sentencing framework considered psychological harm that might arise within a "broader trend or history of abusive conduct" (*Tay Wee Kiat* at [70]) or "in the context of a working relationship which is generally oppressive and exploitative" (*Tay Wee Kiat* at [71]). There would be a higher degree of psychological harm where there was behaviour calculated to oppress and bully the victim and this might be part of the facts relating to a particular offence or could also occur in the broader framework of systematic oppression (*Tay Wee Kiat* at [72(a)]).

77 Bearing in mind the principle in *Chua Siew Peng* that facts with a sufficient nexus may be considered, we think that a modified approach should be adopted in cases of psychological harm. The courts have interpreted "immediate circumstances" of an offence with particular emphasis on proximity of time and space to the charged offence (*Chua Siew Peng* at [84]). However, there is no reason to limit it in this way for psychological harm which is often cumulative and built up over time, sometimes weeks or months and, occasionally, years. A fair assessment of the degree of psychological harm suffered requires the court to have consideration of the entire background relationship, irrespective of whether certain acts could also form the subject matter of criminal charges. As Mr Faizal highlighted, taking the Respondent's argument to its logical conclusion would mean that the dimension of psychological harm in *Tay Wee Kiat* would have little room for application because the court may have regard to the charge alone and what occurred immediately before and after but not the context or the relationship in which it

occurred. As we have said above, sometimes the relationship may be a fairly lengthy one.

78 What we have set out does not undermine the principle that a person cannot be punished for an offence for which he has not been charged and convicted. The charged offence has to be seen in the context of the relationship. Concomitant with psychological harm suffered by a victim is the level of culpability exhibited by an offender. As a matter of common sense, if there has been a sustained pattern of abuse, it would be wrong for a sentencing judge to disregard that fact and view the charge in isolation because that would surely give a false assessment of the suffering of the victim and of the offender's culpability. The aim of the sentencing court is to punish the offender for the offence that has been committed in the light of the harm and the culpability involved and to do so, the court should look at all the surrounding facts so long as they are relevant and proved. This will help the court to assess the true gravity of the offence in relation to the harm to the victim and the level of culpability of the offender. The offender is not being punished for a separate uncharged offence.

79 Question 2 therefore should be answered in the affirmative. In assessing the degree of psychological harm, the court can and should have regard to the background facts notwithstanding that they may also amount to uncharged offences. In relation to offences such as the case here, the fact that the sole offence charged was not an isolated incident and not an aberration in the offender's character would definitely be relevant for the court to assess the type and the level of punishment.

80 Applying the above principle to the facts of the present case, the Respondent's acts on 17 May 2015 took place in context of a sustained pattern

of abuse that began shortly after the Victim started working for the Respondent. For almost two years, the Victim was subjected to physical abuse and oppressive working conditions. Although the Victim was fair to the Respondent by acknowledging that she was sometimes good to her, that could not detract from what she had to endure for the period of her employment. The Victim testified that her decision to call the police the day after the assault was motivated by her thoughts of how she had been mistreated the entire time. In our view, the Trial Judge was correct to state that the incident on 17 May 2015 was the proverbial straw that broke the camel's back.

81 In this context, we find it puzzling that the Trial Judge concluded that the psychological harm here was in the category of "less serious psychological harm" in the sentencing framework, although it was said to be in the "higher range" of that category: MC GD at [106]. The Trial Judge considered that the act of physical hurt contained in the single charge was not a one-off incident but occurred in the context of a sustained pattern of abusive behaviour: MC GD at [102]. The Trial Judge also found that the physical treatment of the Victim took place within a working relationship which was generally exploitative and that the Respondent's behaviour and her treatment of the Victim reinforced the Respondent's authority over the Victim and served to oppress and bully the Victim: MC GD at [103]. However, the Trial Judge concluded that the Respondent's treatment of the Victim was not particularly humiliating or degrading because there was no evidence that she had been subjected to treatment "that stripped her of her basic dignity as a human being". The Trial Judge also took into consideration that the Respondent had celebrated the Victim's birthday with her once and had involved the Victim when the Respondent celebrated her own birthday. The Trial Judge noted that it was not all dark periods during the Victim's employment with the Respondent even

though it might be predominantly so because the Victim had testified that there were "good times, happy times and angry time" and "maybe one day good, happy and the next day, she will be unhappy and angry": MC GD at [104]–[105].

82 The Judge agreed with the Trial Judge that the Respondent's awareness of the Victim's worsening eyesight was an aggravating factor. However, he proceeded only on the basis of the Victim's complaints about it and not on the basis of the Respondent's past potentially criminal conduct: HC GD at [58]–[61]. The Judge saw no reason to disturb the Trial Judge's finding that the Respondent's treatment of the Victim was not particularly humiliating or degrading and agreed that the psychological harm was in the "less serious" category: HC GD at [62].

83 The sentencing framework in *Tay Wee Kiat* contemplated considerations on psychological harm that might arise within a "broader trend or history of abusive conduct" or "in the context of a working relationship which is generally oppressive and exploitative" (*Tay Wee Kiat* at [70]–[71]). Clearly, the facts in the present case would fit into such considerations. These included the Victim's working hours, lack of food and of proper sleeping arrangements and the fact that she was not paid until after the incident on 17 May 2015 came to light. In our opinion, any intermittent good times enjoyed must be measured against the persistent bad times endured. During those bad times, when the Respondent was angry or upset with the Victim, she would unleash her violence on the Victim and would often assault her at the same area of her face. It would not be an exaggeration to think that a person in the Victim's situation would be on constant tenterhooks, not knowing when the employer would have another outburst and over what matter and anticipating that in those outbursts, the employer was likely to attack her at the same vulnerable area of her face. We

find it hard to accept that such a victim would not be experiencing a high degree of despondency and anxiety most of the days and therefore suffering a high level of psychological harm. The only difference between the Trial Judge's and the Judge's conclusions about the psychological harm was the basis of the Respondent's awareness about the Victim's worsening eyesight. Nevertheless, both of them did consider such awareness to be an aggravating factor. Therefore, even if we disagree with the findings on the level of psychological harm, they are essentially findings of fact and, as we have indicated earlier, such findings are not within the province of a criminal reference on questions of law.

Culpability in the Tay Wee Kiat framework

84 The indicative starting ranges in the *Tay Wee Kiat* sentencing framework do not factor in the offender's level of culpability. Instead, culpability is relevant to the third step of the framework. That step allows the court to take into account increased culpability in the form of premeditation or motive (*Tay Wee Kiat* at [73]) and a higher level of culpability will naturally lead to a larger increase from the indicative starting range.

85 As mentioned, the Judge accepted that the Respondent was aware about the Victim's vulnerability in the present case only because the Victim had complained to her before 17 May 2015 about her worsening eyesight: HC GD at [61]. He also agreed with the Trial Judge that such awareness was an aggravating factor to take into consideration in sentencing. The Judge found that the only physical injury caused on 17 May 2015 was the bruise on the Victim's face and that it would be in the "less serious physical harm" category in the sentencing framework (and not the "more serious" category as found by the Trial Judge). The Judge accepted the Trial Judge's decision that the psychological harm was in the "less serious psychological harm" category. The

Judge also agreed with the Trial Judge that there were no mitigating factors and that the fact that a weapon (in the form of the medicated oil bottle) was used to inflict injury on a vulnerable part of the Victim's body was an aggravating factor.

86 However, on the twin bases that the Respondent had such awareness because she was the one who had been hitting the Victim at that area of her face and because the Victim had complained about her worsening eyesight which the Respondent dismissed callously as "bullshit", the Trial Judge found the Respondent to be "highly culpable": MC GD at [107]). The Judge made no mention about the Trial Judge's finding that the Respondent was "highly culpable" when he decided on the sole basis for the Respondent's awareness of the Victim's deteriorating eyesight and before he decided on the final sentence of eight months' imprisonment.

87 We mentioned earlier that our initial concern about Question 3 was that the Judge did consider that the Respondent's awareness about the Victim's particular vulnerability was an aggravating factor, thereby already answering Question 3 in the way desired by the Prosecution. However, Mr Faizal argued that the Judge had considered the Respondent's awareness based solely on the "independent basis" of the Victim's complaint. He submitted that such a general complaint about worsening vision would not have increased the Respondent's culpability by much (as contrasted to knowledge of the Victim's condition from the fact that the Respondent was the one responsible for it in the first place).

88 We have stated that an accused's knowledge arising from uncharged prior offending conduct is relevant and, if such conduct is proved, should be considered in sentencing as part of the total circumstances. Applying that principle to the present case, we agree that the Respondent's culpability would

have been significantly higher had the Judge considered that she was aware of the Victim's particular vulnerability because she was the very person who had been inflicting those earlier injuries to that area of the Victim's face. If the sole source of the Respondent's awareness were the Victim's complaints, the Respondent would at least be less morally reprehensible for being sceptical about the Victim's honesty and being dismissive about her complaints by calling them "bullshit". Having been found to have assaulted the Victim at the area of the face near her eye at least several times before the charged incident of 17 May 2015, the Respondent's brusque response to the Victim's complaints painted a picture of a heartless employer who literally added insult to injury. The Respondent would also appear to have a malicious streak when she struck the Victim near her left eye again on 17 May 2015 despite being aware of the Victim's worsening eyesight. Her culpability should therefore be at a much higher level than if her awareness of the Victim's worsening eyesight had come solely from what the Victim told her, as if the Respondent had nothing to do with it.

89 The Judge's decision to make the upward adjustment of an additional three months' imprisonment (from the indicative sentence of five months that he arrived at after concluding that both the physical harm and the psychological harm were in the respective "less serious" categories) could be justified if the Respondent's culpability was pegged to the sole source of knowledge of the Victim's worsening vision as found by him. However, in the light of what we have said above, it was an error of law to disregard the Respondent's previous abusive acts against the Victim for the purpose of sentencing, with the result that her culpability was not pegged at the correct level. In these circumstances, we think that the additional imprisonment of three months does not reflect the true level of the Respondent's culpability.

Conclusion

90 Subject to what we have discussed above, we therefore respond to the Questions in the following manner:

(a) Question 1: In establishing a causal link between an act and a subsequent injury (in this case, a worsening of the retinal detachment), does the Prosecution bear the burden of eliminating other possibilities of how such injury could be sustained even if these were not raised in evidence?

Answer: We do not see the need to answer this question.

(b) Question 2: In applying the sentencing framework for a maid abuse offence punishable under s 323 read with s 73 of the Penal Code set out in *Tay Wee Kiat*, should the court take into account psychological harm that arises from a sustained pattern of abuse, *ie*, multiple incidents of the offender causing hurt to the domestic maid, even though separate charges were not preferred for the other incidents of abuse?

Answer: Yes, there is no requirement that the psychological harm must be proved through a source independent of the offender's own previous acts even though those acts could also amount to other offences.

(c) Question 3 (as reframed by the court at [57] above): Does the fact that an offender knew, or was aware of the likelihood, of a victim's pre-existing injury or particular vulnerability that arose from previous proved incidents which could have been but were not made the subject of separate charges, when he assaulted the victim on that particular part of the body constitute an aggravating factor in sentencing?

Answer: Yes, the offender's knowledge or awareness is relevant when considering the level of harm, both physical and psychological, suffered by the victim and the culpability of the offender.

91 As discussed during the hearing before us, the parties are to submit on the consequential orders in respect of the imprisonment term and the compensation order ordered by the Judge, in the light of our answers to the Questions posed. The parties are to file and exchange their written submissions, subject to a maximum of twelve pages, within fourteen days from the date of our judgment. Thereafter, we will inform the parties whether there is a need for a further hearing or if we will only re-convene to announce our decision on the consequential orders.

Sundaresh Menon Chief Justice	Andrew Phang Boon Leong Judge of Appeal	Tay Yong Kwang Judge of Appeal

Mohamed Faizal SC, Li Yihong and Sheryl Yeo (Attorney-General's Chambers) for the applicant;
Sui Yi Siong, William Khoo Wei Ming and Flora Koh Swee Huang (Eversheds Harry Elias LLP) for the respondent.