IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 227

Criminal Case No 88 of 2017

Between

Public Prosecutor

And

BMF

GROUNDS OF DECISION

[Criminal Law] — [Offences] — [Outrage of modesty]
[Criminal Law] — [Offences] — [Fellatio]
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v
BMF

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27 September 2019

Valerie Thean J:

Introduction

1 The accused faced ten charges. On 2 July 2019, he pleaded guilty to, and was convicted of the following three charges:

(a) one charge of sexual assault by penetration of a person under 14 years of age, an offence under s 376(1)(*a*) of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code") punishable under s 376(4)(*b*) of the same ("the 4th Charge" which I later refer to as "the SAP Charge"); and

(b) two charges of aggravated outrage of modesty, punishable under s 354(2) of the Penal Code ("the 6th Charge" and "the 8th Charge", collectively "the OM Charges").

2 The accused admitted to seven other charges and consented to having these charges taken into consideration for the purposes of sentencing ("the TIC Charges"). The TIC Charges concerned the offence of aggravated outrage of modesty, punishable under s 354(2) of the Penal Code.

3 After considering the accused's mitigation plea, the aggravating factors, the sentencing precedents, the Prosecution and Defence submissions on sentence and the TIC Charges, I imposed the following sentences:

(a) for the 4th Charge, 12 years' imprisonment and 12 strokes of the cane;

(b) for the 6th Charge, 3 years' imprisonment and 6 strokes of the cane; and

(c) for the 8th Charge, 3 years' imprisonment and 6 strokes of the cane.

4 The terms of imprisonment for the 4th Charge and the 8th Charge were ordered to run consecutively, with the term of imprisonment for the 6th Charge to run concurrently. In the result, the aggregate term of imprisonment was 15 years, with effect from the date of remand on 14 May 2019, and 24 strokes of the cane. The accused has appealed against the sentences imposed and I furnish the grounds of my decision.

Facts

5 The material facts are as follows. The accused is presently 42 years old and is the victim's stepfather. The victim is at present 12 years old and was between 8 and 9 years old at the time of the offences. The victim addressed the accused as "Abah", which means father in the Malay language.

6 The accused married the victim's mother, [N], sometime in 2013. The accused moved into [N]'s parents' flat after their marriage ("the Flat"). The accused, [N], the victim and two of the victim's step-siblings shared a bedroom with two beds ("the Bedroom").

7 Although the victim slept on a separate bed from the accused, there were occasions when she slept with the accused and [N] on their bed. On these occasions, the accused would position himself between the victim and the wall. The accused would sleep in the middle, between [N] and the victim. There were also other occasions when the accused and the victim slept alone on either of the two beds.

8 The charges brought, including the TIC Charges, concerned offences which were committed from January 2015 to October 2016 in the Bedroom while everyone else was asleep. On most occasions, the sexual assaults took place while the accused was lying beside his wife on the same bed.

9 The three proceeded charges concerned three different incidents, which I now turn to.

The SAP Charge (the 4th Charge)

10 Sometime in 2015, the victim was lying on her own bed in the Bedroom when there was a heavy thunderstorm. She was scared and called out to the accused, who proceeded to lie down beside the victim on her bed. Thereafter, the victim fell asleep. The accused became sexually aroused and proceeded to engage in various sexual activities with the victim. Although the victim woke up when such activity occurred, she pretended to be asleep and stayed still.

11 The victim then felt something going into her mouth and realised that the accused was putting his penis into her mouth (*ie*, fellatio). While she tried to clamp shut her lips and close her mouth, she was unable to do so. She developed an itching sensation around her mouth as a result of the accused's pubic hair and the pushing of his penis in and out of her mouth. She also felt some liquid in her mouth and was disgusted.

The OM Charges (the 6th Charge and 8th Charge)

12 The OM Charges related to two separate incidents.

13 The 6th Charge concerned an incident which occurred between January 2016 and September 2016. The victim was asleep in the Bedroom when the accused started kissing her. She was awakened by his tongue inside her mouth but pretended to be asleep. The accused pulled the victim's panties down, took out his penis from his shorts and engaged in sexual activity with her. After lifting her onto her side such that her back was towards him, he rubbed his penis against her exposed anus until he ejaculated. The victim felt pain at her anal and vaginal area due to the accused's vigorous rubbing motion.

14 The 8th Charge related to an incident which occurred either on 13 October 2016 or 14 October 2016. As with the 6th Charge, the victim was asleep in the Bedroom when the accused started kissing her. She pretended to be asleep although she had been awakened by his tongue inside her mouth. The accused took out his penis from his shorts and placed her hands on his penis. He also touched her chest and buttocks. Thereafter, the accused pulled the victim's panties down and positioned himself above the victim. He then licked her vagina, such that she felt a tickling sensation. The accused subsequently used his finger and rubbed against the victim's vagina, before re-positioning himself

above her and rubbing his penis against her vagina. Throughout this incident, the victim continued to pretend to be asleep. She felt some pain and an itching sensation at her vagina.

15 On 17 October 2016, shortly after the incident relating to the 8th Charge took place, the victim's biological father was about to send her back to the Flat when she began to cry hysterically. The victim refused to enter the Flat. The victim was brought downstairs when she then revealed that the accused had sexually assaulted her. A police report was lodged on 18 October 2016 and the accused was arrested on the same day.

The parties' submissions on sentence

16 The Prosecution pressed for an aggregate sentence of at least 18 years' imprisonment and 24 strokes of the cane. This comprised the following sentences: at least 14 years' imprisonment and 12 strokes of the cane for the SAP Charge and at least 4 years' imprisonment and 6 strokes of the cane for each of the OM Charges, with the sentence for the SAP Charge running consecutively with one of the OM Charges.

17 The Defence's primary position was that the court ought to exercise judicial mercy on account of the accused's glaucoma resulting in legal blindness. In the alternative, the Defence in written submissions suggested a global sentence of 12 years and 12 strokes of the cane, with 8 years and 12 strokes of the cane for the SAP Charge and 20 months and 3 strokes of the cane for each of the OM Charges. In oral submissions, Mr Skandarajah sought 8 to 10 years' imprisonment for the SAP Charge and a year's imprisonment for each of the OM Charges.

18 For completeness, I mention the history of the Defence's position. The accused's case was first fixed for a plea of guilt on 7 March 2019. On that occasion, the matter did not proceed because the accused disputed a part of the Statement of Facts ("SOF"). Initially the Prosecution wished to then make arrangements for a Newton hearing, but decided subsequently to amend the SOF. After the accused confirmed in a pre-trial conference with a Senior Assistant Registrar that he wished to plead guilty to the SOF, the matter was relisted and a Criminal Legal Aid Scheme ("CLAS") counsel was arranged for the accused. On 14 May 2019, after his plea of guilt was taken and after the SOF was read, the accused disputed parts of the SOF, although he stated that he remained intent on pleading guilty. In the circumstances, I rejected the plea of guilt. Subsequently, the accused then indicated, before the Senior Assistant Registrar in another pre-trial conference, that he was no longer disputing the SOF and confirmed that he wanted to plead guilty. The matter was again relisted on 2 July 2019, when the accused admitted the SOF without any qualification and pleaded guilty. With the CLAS counsel having discharged himself on 14 May 2019, Mr Dhanwant Singh ("Mr Singh"), the new counsel for the accused, asked for an adjournment to prepare a further mitigation, to be used together with the mitigation and submissions that had been filed by CLAS counsel. The case was thus adjourned for mitigation and sentencing on 12 July 2019.

19 Prior to 12 July 2019, Mr Singh filed written submissions that criticised various introductory parts of the SOF. On 12 July 2019, Mr Singh was not present in court. Instructed counsel Mr Skandarajah appeared on behalf of the accused and was unable to explain the written submissions, because it had been filed by Mr Singh. When asked, the accused stated he was not aware of what was stated in the submissions filed. After the case was stood down for the accused to be advised by Mr Skandarajah, both Mr Skandarajah and the accused

confirmed that the accused admitted to the SOF in its entirety, without any qualification as to any part of the SOF. Mr Skandarajah clarified that he was merely inviting the court to "focus on [the] facts relating to the charge[s]" within the SOF. I turn, then, to the charges.

The SAP Charge (the 4th Charge)

The applicable sentencing framework

20 In *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 ("*Terence Ng*") at [47], the Court of Appeal set out a two-step sentencing framework for the offence of rape, involving the use of sentencing bands. The two-step framework in *Terence Ng* was later transposed to the offence of digital penetration in *Pram Nair v Public Prosecutor* [2017] 2 SLR 1015 ("*Pram Nair*"). The sentencing bands were calibrated downwards given that the offence of digital penetration was of a lesser gravity than rape (*Pram Nair* at [159]).

21 At the first step, the court should consider the offence-specific aggravating factors in deciding which sentencing band the offence in question falls under. The court should identify precisely where within that sentencing band the offence falls in order to derive an indicative starting point.

22 In *Pram Nair* at [119], the Court of Appeal highlighted that the court ought to consider both the *number* and *intensity* of the relevant offence-specific aggravating factors. Accordingly, the court is guided not only by the number of offence-specific aggravating factors but also the seriousness of the particular factor *vis-à-vis* the offence committed. By thus identifying and weighing the factors, the court is able to come to a sentence that it is, when viewed holistically, proportionate to the overall criminality involved.

23 As stated in *Terence Ng*, examples of offence-specific aggravating factors include abuse of trust, premeditation, violence, a vulnerable victim and the infliction of severe harm (*Terence Ng* at [44]). In *Pram Nair*, the Court of Appeal adapted the *Terence Ng* framework, and set out three sentencing bands for the offence of digital penetration, which are as follows (*Pram Nair* at [159]):

Band	**Type of cases**	**Sentence**
1	Cases at the lower end of the spectrum of seriousness. These cases feature no offence-specific aggravating factors or are cases where these factors are only present to a very limited extent and have a limited impact on sentence: *Terence Ng* at [50]	7 to 10 years' imprisonment and 4 strokes of the cane.
2	Cases of a higher level of seriousness which usually contain two or more offence-specific aggravating factors: *Terence Ng* at [53]	10 to 15 years' imprisonment and 8 strokes of the cane.
3	Extremely serious cases by reason of the number and intensity of the aggravating factors: *Terence Ng* at [57]	15 to 20 years' imprisonment and 12 strokes the cane.

24 At the second step, the court should have regard to the aggravating and mitigating factors personal to the offender. Aggravating factors would include offences taken into consideration for the purposes of sentencing, the presence of relevant antecedents and an evident lack of remorse. Mitigating factors include the display of evident remorse, youth, advanced age and the plea of guilty (*Terence Ng* at [64]–[71]).

25 A caveat to the two-step framework is the totality principle. In the light of the totality principle, where the offender faces two or more charges, and it is necessary to order one or more sentences to run consecutively, the court can, if

necessary, further calibrate the individual sentences to ensure that the global sentence is appropriate and not excessive (*Terence Ng* at [73(d)]).

26 Both the Prosecution and the Defence referenced *Pram Nair* as the relevant sentencing framework in this case. The *Pram Nair* framework concerned the offence of digital penetration rather than fellatio. The Prosecution submitted that "the fact that fellatio had taken place is particularly aggravating" and that an uplift from the *Pram Nair* sentencing bands was appropriate.

27 In my view, the mere fact that the offence was one of fellatio should not in and of itself warrant an uplift in the sentencing bands set out in *Pram Nair*. In *Public Prosecutor v Bernard Tan Meng Soon* [2019] 3 SLR 1146, I applied the conceptual frame and factors approach of *Pram Nair* to fellatio offences as a useful reference point, as did Hoo Sheau Peng J in *Public Prosecutor v BVZ* [2019] SGHC 83 ("*BVZ*") at [52] and Woo Bih Li J in *Public Prosecutor v Ridhaudin Ridhwan bin Bakri and others* [2019] SGHC 191 ("*Ridhaudin*") at [78]. In *Ridhaudin* at [74], Woo J expressly rejected the same submission by the Prosecution that there should be an upward adjustment to the sentencing bands in *Pram Nair* for fellatio offences. Rather, the severity of a particular sexual penetration offence should be taken into account at the first stage of the *Pram Nair* framework as an offence-specific aggravating factor: see *BVZ* at [56] and *Ridhaudin* at [78]. The Court of Appeal has dismissed the appeal in *BVZ*, and I understand that written grounds will be issued in due course (see *Ridhaudin* at [81]).

The appropriate sentencing band

28 Turning to the facts of this case, I first had to consider the appropriate sentencing band for the SAP Charge, which carried a mandatory minimum sentence of 8 years' imprisonment and 12 strokes of the cane (s 376(4)(*b*) of the

Penal Code). The Prosecution submitted that the SAP Charge fell within the higher end of Band 2, and that a sentence of at least 14 years' imprisonment and 12 strokes of the cane was warranted. The Defence submitted for a term of imprisonment of 8–10 years.

Stage 1

29 The first stage required me to identify the number of offence-specific aggravating factors in this case. I then determined, based on the number and intensity of the aggravating factors, which of the three sentencing bands the case fell under, and the indicative starting sentence (*Pram Nair* at [119]).

(1) Age of victim

30 The victim was 8 years old at the time of the offence. The fact that the offence is committed against a person under 14 years of age is in and of itself a statutory aggravating factor pursuant to s 376(4)(*b*) of the Penal Code. As stated by the Court of Appeal in *Pram Nair* at [160], the presence of this statutory aggravating factor is such that the case "would almost invariably fall within Band 2 (or even Band 3 if there are additional aggravating factors)".

31 Furthermore, while this factor is a statutory aggravating factor, the victim was materially younger than the stipulated age ceiling of 14 at the time of the offence. This goes towards the intensity of the aggravating factor and shows that the victim was especially vulnerable within the class of victims of 14 years and younger. This vulnerability was clear on the facts, as she did not know how to stop the accused despite the distress she was feeling. Her especial vulnerability within the class of minors is an offence-specific factor that ought to be viewed with particular seriousness.

(2) Abuse of trust

32 The accused was the victim's stepfather and was therefore in a position of responsibility towards the victim. That, in and of itself, would constitute an aggravating factor. As stated by the Court of Appeal in *Terence Ng* at [44(b)], there is a "dual wrong: not only has [the accused] committed a serious crime, he has also violated the trust placed in him by society and by the victim". The trust placed upon him by society was as a stepfather, a position of familial authority. In this context, the victim trusted the accused absolutely. She addressed him as "Abah" (meaning father in the Malay language). The facts of the SAP Charge also show the degree of trust. She had called out to the accused when she became scared due to a heavy thunderstorm. There was therefore a grave abuse of trust in this case.

(3) Premeditation and planning

33 As stated by the Court of Appeal in *Terence Ng* at [44(c)], the presence of planning and premeditation reveals a considered commitment towards law-breaking. Premeditation demonstrates a high degree of conscious choice and enlivens the need for a sentence that specifically deters the offender from repeating such conduct (*Gan Chai Bee Anne v Public Prosecutor* [2019] SGHC 42 ("*Anne Gan*") at [70], citing *Public Prosecutor v Law Aik Meng* [2007] 2 SLR(R) 814 at [22]).

34 The Prosecution submitted that there was a sustained and repeated pattern of offending. The acts always took place in the bedroom while everyone was asleep and it was contended that the inference to be drawn was that the accused deliberately waited until he had the opportunity to exploit the victim. To the contrary, the Defence submitted that the offences were committed on impulse.

35 In *Pram Nair* at [138], the Court of Appeal noted that "the kind of premeditation which the law regards as aggravating an offence involves a *significant degree of planning and orchestration*" [emphasis added]. At [137], the Court of Appeal provided various examples of the kind of sexual offences which were premeditated. These examples were:

(a) *Ng Jun Xian v Public Prosecutor* [2017] 3 SLR 933 ("*Ng Jun Xian*"): The victim wanted to return to her hostel, but was persuaded by the offender to rest at a hotel. He reassured her that she would be left alone and allowed to sleep. However, after bringing the victim to the hotel room, he took the opportunity to sexually assault her.

(b) *Public Prosecutor v Lee Ah Choy* [2016] 4 SLR 1300: After observing the victim for a period of time and understanding her morning routine, the offender took the victim to the fourth floor of a nearby HDB block where the offences were committed. He was armed with a paper-cutter which he used to threaten the victim.

(c) *Public Prosecutor v Sim Wei Liang Benjamin* [2015] SGHC 240 ("*Sim Wei Liang Benjamin*"): The offender used the Internet with the intention of ensnaring his victims, luring them to engage in sexual activities with him.

36 More recently, in *Public Prosecutor v BNO* [2018] SGHC 243 ("*BNO*"), where the offence took place while the victim was asleep, See Kee Oon J found that there was a "significant amount of deliberation and premeditation" in the offender's conduct, which was aimed at winning the victim's trust and taking steps to facilitate the commission of his offence (*BNO* at [188]). For example, the offender told the victim not to wear his underwear before going to sleep and asked whether he was a light or heavy sleeper, to which the victim replied that

he was a heavy sleeper for the first two hours after he went to sleep (*BNO* at [8]).

37 I disagreed with the Defence's attempt to characterise the offence as one committed on impulse. In *Pram Nair*, where the Court of Appeal characterised the accused's moves as "hatched on the spur of the moment" (*Pram Nair* at [138]), the accused and victim were strangers to each other before the night in question, and the accused's action only involved separating her from her friends and taking her to the beach. In my view, while every case is different on its specific facts, this accused exhibited as much deliberation as the accused in *BNO* or *Ng Jun Xian*. In those two cases and this one, the accused chose to take advantage of the particular access that they knew would arise out of the circumstances in which they placed the victim. In the present case, the accused knew because of the victim's vulnerability and relationship with him, she would not know how to resist the offences. It was his practice to position the victim between him and a wall or to sleep with her in her bed. This offence was part of and carries the same *modus* as a series of incidents that began in January 2015 with an act of masturbation. Sophisticated planning was not required because of the routine that he put in place and the very trust reposed upon him. But the series of acts were such that there was clearly a plan to exploit the special access offered by the cover of night, the trust reposed upon him and the timidity of the victim. On this occasion, because she was terrified of a storm, he had the opportunity to sleep on her bed. He knew that she would be too weak to resist meaningfully, because of the shock of the storm, her natural timidity, her relationship with him, and her lack of resistance on prior occasions. It would have been plain to him at some point during the commission of the offence that she was pretending to be asleep and attempting to keep her mouth shut while he was fellating. He was not deterred by her tepid resistance because his initiation

of the act, and his continuance to completion, was not borne out of impulse, but the knowledge that he would be able complete his intended plan without any trouble. The context and circumstances clearly show forethought and a deliberate and callous choice to exploit the opportunity presented.

38 Nonetheless, in holding that there was sufficient evidence of a "significant degree of planning and orchestration" such that premeditation ought to be taken into account as an offence-specific aggravating factor, I considered that the intensity of this factor was not as high as, for example, the case of *Sim Wei Liang Benjamin* mentioned by the Court of Appeal at [137] of *Pram Nair*. This is not as serious an aggravating factor as the first two I have found.

(4) Harm to victim

39 In the present case, the Prosecution pointed to the victim having "repeated nightmares" about the accused which indicated that she was "mentally disturbed". The accused's acts "left indelible scars on her psyche and affected the way she interacts with those around her, as evidenced by the counselling and [Child Guidance Clinic] reports". It was also highlighted that the victim had been alienated from the maternal side of the family as the result of the distrust of her maternal relatives that has emanated from the present case.

40 In *Terence Ng*, the Court of Appeal specified that severe harm to a victim could be an offence-specific aggravating factor in the following circumstances (*Terence Ng* at [44(h)]):

> *Severe harm to victim:* … every act of rape invariably inflicts immeasurable harm on a victim … It seriously violates the dignity of the victim by depriving the victim's right to sexual autonomy and it leaves irretrievable physical, emotional and psychological scars. Where the rape results in especially serious

> physical or mental effects on the victim such as pregnancy, the transmission of a serious disease, or a psychiatric illness, this is a serious aggravating factor. In many cases, the harm suffered by the victim will be set out in a victim impact statement.

41 In other words, for this factor, the court looks for harm outside of that expected from the commission of the offence itself, such as pregnancy, the transmission of sexual disease, and psychiatric illness. There is no doubt that the present victim suffered physical and emotional harm due to the acts of the accused. This, nevertheless, is the very reason why SAP offences are treated with such gravity. In each case, harm is invariably inflicted. It could also be said that the younger the victim, the worse the harm, which is why I took into account her especial vulnerability as an aggravating factor (above at [31]). The kind of harm which the law regards as an *offence-specific* aggravating factor is an especially severe category: see, also, *Public Prosecutor v BMR* [2019] 3 SLR 270 at [32] and *Public Prosecutor v Ong Soon Heng* [2018] SGHC 58 at [154]. That particular level of severity was not present in this case. I therefore did not take the harm suffered in this case as an additional aggravating factor, but one that is recognised within the statutory delineation and punishment of the offence itself.

(5) Conclusion on Stage 1

42 In the present case, a statutory aggravating factor under s 376(4)(*b*) was applicable. In *Pram Nair* at [160], the Court of Appeal stated that "[t]hese cases should fall within Band 2 (or even Band 3 if there are additional aggravating factors)". I found that there were, in total, three offence-specific aggravating factors: the age of the victim, the abuse of trust and premeditation. In terms of intensity, the age of the victim and the abuse of trust was seriously aggravating given that the victim was a vulnerable individual materially below the age

ceiling of 14 and did in fact repose significant trust in her stepfather. These factors placed the SAP Charge squarely towards the upper range of Band 2 or even in Band 3 of the *Pram Nair* framework.

Stage 2

43 I next considered the offender-specific aggravating and mitigating factors to determine if there ought to have been any adjustment to the indicative sentence (*Pram Nair* at [119]).

(1) Paedophilia

44 The accused was diagnosed by Dr Jaydip Sarkar ("Dr Sarkar") from the Institute of Mental Health to be suffering from paedophilia at the time he committed the offences (*ie*, a disorder characterised by sexual attraction to and sexual behaviours involving a prepubescent child or children who are generally aged 13 years or younger).

45 A diagnosis of paedophilia in and of itself also does not amount to an offender-specific aggravating factor. The court has to consider whether the accused has a *propensity to reoffend*. In this connection, the following passage by the Court of Appeal in *Lim Hock Hin Kelvin v Public Prosecutor* [1998] 1 SLR(R) 37 at [21] was instructive:

> In considering the appropriate tariffs for sentences, the gravity of the offence and the circumstances in which the offence was committed had to be taken into account:
>
> …
>
> (b) Social danger: Paedophilic offences are by their nature unpleasant and most distressing and the society has to express its marked disapproval for such harm to the young and vulnerable victims. The presumption is that the safety of the child must be paramount *and chronic paedophiles who have a propensity to reoffend, because they are either totally unable or*

> *unwilling to control themselves, have to be put away for long periods.*
>
> [original emphasis omitted; emphasis added in italics]

46 In his report dated 9 October 2017, Dr Sarkar opined on the accused's risk of re-offending. He set out two approaches to assess the risk: a correlation-based statistical approach and a cause-based clinical approach.

47 Correlation-based approaches "look for variables that are associated with sexual violence and benefit from the numerous epidemiological data that is available describing the relationship between the two". Dr Sarkar opined that more confidence could be laid with such approaches. Under the correlation-based statistical approach, the accused's risk of re-offending was low as:

(a) It was his first sexual offence;

(b) It was committed against a victim whom he knew for years (as opposed to a stranger);

(c) He was married, rather than single and devoid of sexual outlets; and

(d) He had no previous antecedents.

48 On the other hand, clinical cause-based approaches assume that sexual offences happen for known reasons and that clinicians would be able to understand those reasons and institute treatments or interventions to prevent further offences. Under the clinical cause-based approach, the accused exhibited various risk factors, such as a high sexual appetite, a lack of control, the rationalisation of internal inhibitions, child abuse and rape supportive beliefs, a preoccupation with sex and the absence of any easily treatable mental disorder.

Given the above clinical risk factors, his risk of re-offending was high and imminent if the following factors operated:

(a) The absence of sexual release with age appropriate adults;

(b) The presence of minors in his immediate vicinity during such periods referred to in (a);

(c) A significant power-differential between him and the victim (*eg,* child-father relationship);

(d) Physical contact with minors even if they were not in the immediate vicinity; and

(e) A tendency to seek out very young commercial sex workers.

49 The Prosecution submitted that the clinical cause-based approach ought to be preferred over the correlation statistical-based approach, such that the risk of re-offending was high and imminent. Given that there were two contradictory results, and that Dr Sarkar opined that in general more confidence could be placed on the correlation-based approach, I was of the view that the accused's paedophilia ought not to be an offender-specific aggravating factor in this case. This did not mean that I preferred the correlation-based approach to the cause-based approach; rather, given that the evidence was mixed and only limited to Dr Sarkar's report, I decided in fairness to the accused not to take this factor into consideration in the present case.

(2) Violence

50 The Defence submitted that one mitigating factor was the "non-involvement or absence of the use of violence, actual or threatened". In my

view, this was not a relevant mitigating factor. The accused did not have to resort to violence: taking advantage of the victim's young age and the trust that she reposed in him, he placed the victim in fear such that she was afraid to resist him. If there was physical violence or the threat of violence, given the vulnerability of the victim, that would have certainly amounted to an offence-specific aggravating factor (see *Terence Ng* at [44(f)]). The absence of any violence or threats against the victim, however, does not amount to a mitigating factor (*Public Prosecutor v UI* [2008] 4 SLR(R) 500 at [74]).

(3) First offender

51 The accused was a first offender. But this was of limited mitigating value in view of the multiple offences committed over more than one and a half years. As Tay Yong Kwang J (as he then was) observed in *Public Prosecutor v Leong Wai Nam* [2010] 2 SLR 284 at [31]: "A clean record may be effective in showing that what an accused did on one or two isolated occasions was totally out of character but carries hardly any mitigating force when an accused person is convicted of a string of offences committed over a spectrum of time. All it means is that the accused person was fortunate not to have been caught by the law earlier."

(4) TIC Charges

52 Although there were seven TIC Charges which concerned the offence of aggravated outrage of modesty, I did not consider this as an aggravating factor for the SAP Charge as on the facts of this case, they were more appropriately considered in determining the sentence for the OM Charges. As stated by the Court of Appeal in *Muhammad Sutarno bin Nasir v Public Prosecutor* [2018] 2 SLR 647 at [17], "[t]he same TIC charges should not be relied upon as a basis

for increasing the sentences for more than one charge, otherwise this could amount to double counting".

(5) Plea of guilt

53 In my view, the only relevant offender-specific mitigating factor was the accused's plea of guilt. I was guided by the Court of Appeal's holding in *Chang Kar Meng v Public Prosecutor* [2017] 2 SLR 68 at [47]:

> … in the context of sexual offences, we think there will often be a further benefit from a plea of guilt – namely, the victim will thereby be spared the trauma of having to relive the experience in court and being cross-examined on it. *We therefore hold that offenders who plead guilty to sexual offences, even in cases where the evidence against them is compelling, ought ordinarily to be given at least some credit for having spared the victim additional suffering in this regard.* [original emphasis omitted; emphasis added in italics]

(6) Conclusion on Stage 2

54 Concluding on the offender-specific factors, I found that the only offender-specific mitigating factor was the accused's plea of guilt. I did not regard the accused's condition of glaucoma as having any mitigating value, a point I return to at [74]–[76] below. In my view, the plea of guilt warranted a discount in the sentence.

Sentence for the SAP Charge

55 Here, the seriousness of the offence meant that a starting point of a high Band 2 or even Band 3 could be considered at the first stage. The Prosecution's suggestion of 14 years' imprisonment and 12 strokes of the cane, which was at the higher end of Band 2, was not inapposite as a starting point. A downward adjustment to the indicative starting sentence because of the plea of guilt was

appropriate, resulting in a mid-Band 2 sentence of 12 years' imprisonment and 12 strokes of the cane.

56 I considered that this sentence was also in line with the reported decisions relating to the offence of sexual assault by penetration. The following three cases were submitted upon by both the Prosecution and the Defence:

(a) *Public Prosecutor v BSR* [2019] SGHC 64 ("*BSR*"): The accused pleaded guilty and was sentenced to 14 years' imprisonment and 12 strokes of the cane for the offence of fellatio. The accused was aroused after having sexual intercourse with his wife and forced his daughter to fellate him. In *BSR*, the victim was younger (6 years old), there was an abuse of trust (father-child relationship), force was used and violence threatened, and the victim had a risk of contracting a sexually transmitted disease (*BSR* at [16]–[20]).

(b) *BNO*: The accused claimed trial and was sentenced to 12 years' imprisonment and 12 strokes of the cane for each of the SAP charges. The accused was the father of the victim's friend. The victim slept at the accused's house after a Halloween party, and the accused fellated him while the victim pretended to be asleep. In *BNO*, the victim was older, being 9, the abuse of trust in that case was not as egregious and the offence was a one-off incident. There was no discount for a plea of guilt.

(c) *Public Prosecutor v AEY* [2010] SGHC 3: The accused pleaded guilty and was sentenced to 12 years' imprisonment and 14 strokes of the cane. The victim was 8 years old and the accused was babysitting her. While the age of victim and abuse of trust factors are similar in this case, it was decided prior to the *Pram Nair* framework being put in place.

57 I would mention that the Prosecution, while seeking a sentence of 14 years' imprisonment and 12 strokes, relied in its written submissions on unreported cases for both the SAP Charge and the OM Charges. I did not take these into account. The danger of placing undue reliance on unreported cases was highlighted by Chan Sek Keong CJ in *Luong Thi Trang Hoang Kathleen v Public Prosecutor* [2010] 1 SLR 707 at [21]. As Chan CJ noted, the court would not be able to properly appraise the facts and circumstances of the particular case, making it difficult to draw any meaningful comparison with the case at hand. Moreover, as observed by Chao Hick Tin JA in *Keeping Mark John v Public Prosecutor* [2017] 5 SLR 627 at [18], sentencing precedents without grounds or explanations are of relatively little precedential value, if at all, as they are unreasoned.

58 This was not the end of the matter. Where the offender faces two or more charges, and it is necessary to run consecutive sentences, a court may calibrate the individual sentences downwards to ensure that the aggregate sentence is not excessive (*Pram Nair* at [171]). I turn therefore to consider the appropriate sentences for the OM Charges.

The OM Charges (the 6th Charge and 8th Charge)

The applicable sentencing framework

59 Turning to the OM Charges, the sentencing framework for the offence of aggravated outrage of modesty is set out in *GBR*. The *GBR* framework can be summarised as follows (*GBR* at [31]–[38]):

Band	Type of cases	Sentence
1	Cases which do not present any (or at most one) of the aggravating factors. Examples of such cases include those that involve a fleeting touch or a touch over the clothes of the victim, and do not involve intrusion into the victim's private parts. Caning is generally not imposed.	Less than 1 year imprisonment.
2	Cases with two or more aggravating factors. Caning will nearly always be imposed, with the suggested starting point being 3 strokes of the cane. The dividing line between the lower and higher end of the spectrum could turn on whether there was skin-to-skin touching of the victim's private parts or sexual organs.	1 to 3 years' imprisonment.
3	Most serious instances of aggravated outrage of modesty. Caning ought to be imposed, with the suggested starting point being 6 strokes of the cane. These would include cases involving the exploitation of a particularly vulnerable victim, a serious abuse of a position of trust and the use of violence or force on the victim.	3 to 5 years' imprisonment.

The applicable sentencing band and sentence

60 The Prosecution submitted that the appropriate sentence for each OM Charge was at least 4 years' imprisonment and 6 strokes of the cane. This would fall within Band 3 of the *GBR* framework. In its written submissions the Defence submitted that the appropriate term of imprisonment for each OM Charge was 20 months' imprisonment and three strokes; in court Mr Skandarajah took the view that a year's imprisonment on each charge was sufficient.

61 Referencing the *GBR* framework, I agreed with the Prosecution that this was a Band 3 case, for the following reasons.

(a) The victim was particularly vulnerable, as a 9-year old at the time of the proceeded OM charges. This was still materially below the age ceiling of 14 (*GBR* at [29(f)]).

(b) The degree of sexual exploitation was high because the victim's private parts were touched, there was skin-to-skin contact and the sexual exploitation continued for a sustained period rather than a fleeting moment (*GBR* at [28]). Here the skin-to-skin contact was particularly egregious, as it involved the continuous contact of the accused's penis and the victim's anus and vagina. For the 6th Charge, the accused rubbed his penis against her exposed anus until he ejaculated. For the 8th Charge, the accused placed the victim's hands on his penis, touched her chest and buttocks, licked her vagina, used his finger and rubbed against the victim's vagina and rubbed his penis against her vagina. These intrusions were prolonged and serious.

(c) There was also a grave abuse of a position of trust: see [32] above (*GBR* at [29(c)]); and

(d) There was premeditation involved, as the accused's conduct in relation to the 6th and 8th Charges stemmed from the series of sexual exploitation of the victim over the period of about one and a half years, which also included the 4th Charge: see [37] above (*GBR* at [29(a)]).

62 As for the offender-specific factors, I considered the TIC Charges to be aggravating. As explained above, they concerned the offence of aggravated outrage of modesty. Each of these were as serious as the proceeded charges,

including use of the victim's hands on the accused's penis to masturbate him until ejaculation, the licking of her vagina, rubbing his penis or his semen with his fingers against her anus or vagina. They were committed over a span of about one and a half years, reflecting a long period of offending (*Anne Gan* at [71]). The aggravating effect of these TIC Charges had to be balanced against the mitigating effect of the plea of guilty.

63 In my judgment, taking into account the offence-specific and offender-specific factors, a sentence of 3 years' imprisonment and 6 strokes of the cane for each OM Charge was appropriate.

64 This sentence was also in line with the following reported cases:

(a) *GBR*: The accused claimed trial to one charge of aggravated outrage of modesty and was sentenced to 25 months' imprisonment and 4 strokes of the cane, therefore falling with Band 2 to Band 3 of the *GBR* framework. The facts of the present case are more aggravated than *GBR*. In *GBR*, although there was premeditation and some psychological harm, the abuse of trust was less severe (uncle-niece relationship), the victim was older (13 years old) and the offence was a one-off incident. The incident concerned the touching of the victim's breasts and touching and licking of her vagina, and there was no contact between the accused's penis and the victim's private parts.

(b) *BNO*: The accused claimed trial and was sentenced to 2 years' imprisonment and 3 strokes of the cane for the offence of aggravated outrage of modesty. The context of the present case are more aggravated than *BNO*, which was discussed at [56(b)] above. The specific act in *BNO* was also less serious, because there the accused touched the

victim's penis with his finger. In the present case there was contact of the accused's penis with the victim's anus and vagina.

The overall sentence

65 Applying *Pram Nair* and *GBR*, I arrived at a sentence of 12 years' imprisonment and 12 strokes of the cane for the SAP Charge and a sentence of 3 years' imprisonment and 6 strokes of the cane for each OM Charge. I decided to run the sentence for the SAP Charge consecutively with the 8th Charge and to run the sentence for the 6th Charge concurrently. This resulted in an aggregate sentence of 15 years' imprisonment and 24 strokes of the cane. I was satisfied that this aggregate sentence was proportionate to the overall criminality presented and was in keeping with the totality principle enunciated in *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998.

Judicial mercy

66 Finally, I turn to the issue of judicial mercy. A letter from Dr Aung Tin ("Dr Aung") from the Singapore National Eye Centre dated 2 April 2019 was appended to the written submissions submitted by the accused's former solicitors. In this letter, Dr Aung stated that the accused was diagnosed with juvenile glaucoma in both eyes and was legally blind. The accused was advised to undergo surgery for his right eye but he was unwilling to do so. Dr Aung noted that without surgery, there was a possibility that the accused would be fully blind due to the advanced nature of the disease.

67 It was on this basis that the Defence contended that the court ought to exercise judicial mercy such that there should be no imprisonment imposed. In the alternative, a nominal imprisonment term was sought. This was

notwithstanding the presence of a mandatory minimum sentence of 8 years' imprisonment for the SAP Charge.

Application of the principles in Chew Soo Chun

68 The principles concerning judicial mercy were set out by the High Court in *Chew Soo Chun v Public Prosecutor and another appeal* [2016] 2 SLR 78 ("*Chew Soo Chun*"), which was heard by a *coram* of three judges.

69 In *Chew Soo Chun*, it was made plain that judicial mercy is an "exceptional jurisdiction". In order for the court to exercise mercy, there *must* be "exceptional circumstances from which humanitarian considerations arise, outweighing the public interests in having the offender punished for what he had done wrong against the law" (*Chew Soo Chun* at [23]).

70 Examining the case law, the High Court observed that judicial mercy would potentially be applicable in two non-exhaustive situations. The first was where the offender was suffering from a *terminal illness* such that he had not much longer to live. The second was where the offender was *so ill that a sentence of imprisonment would carry a high risk of endangering his life or occasion something of equivalent gravity*. In order to establish these exceptional circumstances, there must be "clear evidence" before the court (*Chew Soo Chun* at [22] and [27]).

71 Glaucoma is not a terminal illness. Further, there was no evidence that the accused's medical condition would carry a high risk of endangering his life.

72 In this regard, the Prosecution pointed out that the accused had defaulted in his treatment for some 7 years while he was taking care of his own health. I was assured that the Singapore Prison Service would provide the accused with

adequate medical care and treatment and that he would be able to follow up with his appointments at the Singapore National Eye Centre and receive the necessary medication. An email dated 7 March 2019 from the Singapore Prison Service stated that:

> …
>
> Singapore Prison Service has [an] adequate system of healthcare in place to manage the [accused] should he be admitted to prison and to ensure that his health would not be adversely affected as a result of the incarceration.
>
> All prison inmates are given the appropriate level of medical care and treatment as may be required, including referral to a restructured hospital for treatment and management of serious medical conditions.

73 *Chew Soo Chun* also stands for the proposition that "[i]t would only be proper to exercise judicial mercy if the test of exceptionality has been satisfied *and* there is an absence of overwhelming, countervailing public interest considerations which favour punishment" [emphasis added] (*Chew Soo Chun* at [27]). In my judgment, the public interests that were highlighted in *Chew Soo Chun*, namely retributive justice, the protection of society from the offender and deterrence (*Chew Soon Chun* at [24]) were all relevant considerations in this case given that the offences were grave and heinous. The accused committed repeated sexual assaults over the course of about one and half years against his 8–9 years old stepdaughter. The public interest would therefore militate against the exercise of judicial mercy.

74 Nevertheless, even if the court declines to exercise judicial mercy, ill health can also constitute a mitigating factor warranting a discount in sentence if a "term of incarceration would cause an offender a greater and disproportional impact because of his ill health than it would on an ordinary person who is not suffering from the same medical condition" (*Chew Soo Chun* at [29]).

Generally, this would be constituted "by *a risk of significant deterioration in health* or a *significant exacerbation of pain and suffering*" [emphasis added] (*Chew Soo Chun* at [34]).

75 As with the exercise of judicial mercy, there must be evidence presented to the court which shows a real likelihood of the disproportionate impact of imprisonment on the offender (*Chew Soo Chun* at [36]). No such evidence whether in the form of medical reports or otherwise was produced in this case. A medical report which stated a diagnosis of glaucoma was insufficient: what was required was a medical opinion identifying and explaining the disproportionate impact (if any) in order for the court to apply the discount on a principled basis.

76 In any event, the High Court in *Chew Soo Chun* also noted that wider public interests may exist which countermand any reduction in sentence despite the threshold being met for raising ill health as a mitigating factor. The point made at [73] above therefore applies with equal force even if evidence of disproportionate impact was shown, which it was not.

***Defence reliance on* Myette**

77 I turn then to the Canadian case of *R v Myette* (2013) ABPC 89 (Alta) ("*Myette*"), which was heard in the Provincial Court of Alberta. The Defence raised the case in support of its contention that the court ought to exercise judicial mercy.

78 Myette, a blind man, was convicted of sexual assault by digital penetration. The victim was his friend. It was not disputed that Myette was completely blind in his right eye and could only recognise light perception in his left eye, following optic nerve damage from a serious car accident at the age

of 16. He required 24-hour assistance from his guide dog which could not be accommodated in the prison. The Judge was persuaded that a prison sentence would be unduly harsh due to Myette's visual impairment and held that the appropriate sentence was a period of house arrest of 18 months. She reasoned as follows at [15]:

> … there is nothing even approaching reasonable accommodation in Alberta for Mr. Myette as a blind, accused convicted of sexual assault. If Mr. Myette were to be incarcerated he would be suffering a significant punishment beyond that suffered by other individuals incarcerated in the Corrections system in Alberta. …

79 The Defence relied on this judgment but omitted to mention that *Myette* was overturned on appeal by the Court of Appeal of Alberta in *R v Myette* (2013) ABCA 371 (Alta) ("*Myette (Court of Appeal)*"). Imprisonment rather than house arrest was considered the appropriate sentence. The majority held that the Judge had erred in law and some of the reasons provided were as follows:

(a) The sentence was not proportionate to the gravity of the offence as the sexual assault was serious. It was also not proportionate to the offender's culpability (*Myette (Court of Appeal)* at [26]–[27]).

(b) The offender's circumstances ought not to have been overemphasised to the exclusion of the other aggravating features (*eg*, the breach of trust and the victim's unconscious state) (*Myette (Court of Appeal)* at [28]).

(c) A sentence of house arrest was no longer available for offences of such nature (*Myette (Court of Appeal)* at [29]).

(d) There was no evidence about how Myette functioned outside prison and what needs would be unmet if he was imprisoned.

> Accordingly, the evidence was incapable of supporting the Judge's conclusion that a term of imprisonment would be unduly harsh. Instead, the evidence showed that reasonable accommodation was attainable (*Myette (Court of Appeal)* at [30]–[32]).

80 Nevertheless, while the Court of Appeal of Alberta noted that the sentence for the sexual assault would ordinarily be 18 months' imprisonment, this was reduced to 90 days on account for the time he spent on house arrest (seven months) and the fact that he would "undoubtedly face greater challenges than other inmates due to his disability" (*Myette (Court of Appeal)* at [39]). Myette's medical condition was thus a mitigating factor which warranted a discount in sentence. The facts of the present case are quite different from those in *Myette*, however. The accused in Myette was totally blind. He could not function without his guide dog. The present accused is able to function independently. He could also choose to take the advice of doctors to proceed with the recommended surgery that would improve his sight. Moreover, as the Court of Appeal of Alberta held, the proportionality of the sentence to the gravity of the offence and the offender's culpability still remain relevant considerations. In this connection, the offences in question in this case, which were committed by the accused against his 8–9 years old stepdaughter over a period of about one and a half years, were far more serious than that committed by the offender in *Myette*. In particular, the abuse of trust exhibited affronts societal expectations reposed on individuals in positions of familial authority. Recognition of its seriousness is important because of "[t]he fundamental importance of networks of trust and authority for the smooth operation of society" (Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 5th Ed, 2010) at pp 165–166). A reduction in sentence on

account of the accused's glaucoma would not be in keeping with the public interest.

Conclusion

81 Accordingly, I sentenced the accused to 12 years' imprisonment and 12 strokes of the cane for the 4th Charge, and 3 years' imprisonment and 6 strokes of the cane for each of the 6th and 8th Charges. The terms of imprisonment for the 4th Charge and the 8th Charge are to run consecutively from the date of remand, 14 May 2019.

Valerie Thean
Judge

Kavita Uthrapathy and Amanda Han (Attorney-General's Chambers) for the Prosecution;
Skandarajah s/o Selvarajah (S Skandarajah & Co) (instructed) and Sudeep Kumar (S K Kumar Law Practice LLP) for the accused.