Public Prosecutor v UI
[2008] SGCA 35

Case Number : Cr App 10/2007

Decision Date : 05 August 2008

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Daniel Koh and Charlene Tay (Attorney-General's Chambers) for the appellant; Respondent in person

Parties : Public Prosecutor — UI

Courts and Jurisdiction – High court – Principles regarding use of sentencing precedents – General principle that not proper for court to depart from sentencing precedents without cogent reasons

Criminal Procedure and Sentencing – Charge – Outstanding offences – Principles regarding taking outstanding offences into consideration for purposes of sentencing – General principle that offences to be taken into account should have effect of increasing sentence which court would otherwise have imposed for offences actually proceeded with – Section 178 Criminal Procedure Code (Cap 68, 1985 Rev Ed)

Criminal Procedure and Sentencing – Mitigation – Age as mitigating factor – General principle that mature age of offender will carry little weight in sentencing – Exception where sentence was long term of imprisonment – Court should not impose sentence that effectively amounted to life sentence unless Legislature had prescribed life sentence for offence

Criminal Procedure and Sentencing – Mitigation – Forgiveness of offender by victim as mitigating factor – General principle that forgiveness should have little weight as mitigating factor – Possible exception to general principle where sentence aggravated distress of victim – Possible exception to general principle where forgiveness provided evidence that victim's psychological and/or mental suffering as result of offender's criminal conduct must be very much less than would normally be the case

Criminal Procedure and Sentencing – Sentencing – Aggravating factors – Offence of rape of woman below age of 14 under s 376(2) of the Penal Code – Age of victim per se not being additional aggravating factor – Familial relationship of authority and trust between offender and victim being aggravating factor – Serial nature of offences being aggravating factor – Extra acts of perversion being aggravating factor

Criminal Procedure and Sentencing – Sentencing – Appeals – Offence of rape of woman below age of 14 under s 376(2) of the Penal Code – Minimum sentence of 16 years' imprisonment meted out by trial judge – Sentence overly lenient and unprecedented – Sentence increased to 24 years' imprisonment

Criminal Procedure and Sentencing – Sentencing – Benchmark sentences – Principles regarding use of sentencing precedents – General principle that not proper for court to depart from sentencing precedents without cogent reasons – Offence of rape of woman below age of 14 under s 376(2) of the Penal Code – Benchmark sentencing range of 12-15 years' imprisonment

5 August 2008

Chan Sek Keong CJ (delivering the grounds of decision of the court):

Introduction

1 This was an appeal by the Prosecution against the sentence imposed for the offence of rape of a woman under the age of 14 (which we will also refer to as "rape of a young girl"). This offence,

which is a form of aggravated rape, is punishable under s 376(2) of the Penal Code (Cap 224, 1985 Rev Ed) with imprisonment for a term of not less than eight years and not more than 20 years, as well as with caning of not less than 12 strokes (*cf* the punishment for rape *simpliciter*, which is "imprisonment for a term which may extend to 20 years ... and ... fine or ... caning" (see s 376(1) of the Penal Code)).

2 The respondent in the present appeal ("the Respondent") pleaded guilty to three charges of rape under s 376(2) of the Penal Code ("the Rape Offences"), and agreed that the court should take into account, for the purposes of sentencing, two other charges of rape under s 376(2) of the Penal Code and five charges of outrage of modesty under s 354 of the Penal Code (collectively referred to as "the Outstanding Offences"). The offences set out in these ten charges were committed by the Respondent against his natural daughter ("the Victim") when she was aged between ten and (below) 14.

3 The trial judge ("the Judge") sentenced the Respondent to the minimum punishment mandated by s 376(2) of the Penal Code, *viz*, eight years' imprisonment, for each of the Rape Offences (see *PP v UI* [2007] 4 SLR 270 ("the Judgment")). Two of the imprisonment terms were ordered to run consecutively as required by s 18 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed). Accordingly, the total punishment meted out to the Respondent was 16 years' imprisonment, and this was backdated to his date of remand (*ie*, 31 December 2006). The punishment of caning was not applicable to the Respondent as he was above the age of 50 at the date of his conviction (see s 231(*c*) of the Criminal Procedure Code).

4 The Prosecution appealed against the sentence on the ground that it was manifestly inadequate having regard to, *inter alia*, the sentencing precedents for similar offences. (Indeed, the present case was the first instance of the High Court imposing the minimum sentence for the offence under s 376(2) of the Penal Code.) At the conclusion of the hearing, we allowed the appeal and increased the term of imprisonment for each of the Rape Offences to 12 years, with two of the terms of imprisonment to run consecutively, making a total of 24 years' imprisonment. We now give the reasons for our decision.

The facts

5 The Respondent is a male Eurasian aged 55. Prior to his arrest, he worked as a part-time security guard. He married in 1984 and had a son in 1986. He subsequently became estranged (but not divorced) from his wife and began cohabiting with a former colleague in 1990. This latter relationship led to the birth of the Victim in 1992 and the Victim's sister in 1997.

6 The Respondent's sexual offences against the Victim began in 2002 when she was ten years old. Investigations revealed that the Respondent raped the Victim on at least four occasions in 2005 and one occasion in 2006, and outraged her modesty on no less than five occasions between 2002 and 2006. Arising from these incidents (which the Respondent admitted to), the Respondent was charged with the following:

(a) one count of outrage of modesty by inserting a finger into the Victim's vagina, committed sometime in 2002;

(b) one count of outrage of modesty by inserting a finger into the Victim's vagina, committed sometime in 2003;

(c) one count of rape, committed sometime between January 2005 and February 2005;

(d) one count of rape, committed sometime between March 2005 and April 2005;

(e) one count of rape, committed sometime in June 2005;

(f) one count of rape, committed sometime between November 2005 and December 2005;

(g) one count of outrage of modesty by inserting a finger into the Victim's vagina, committed sometime between January 2006 and March 2006;

(h) one count of rape, committed sometime in March 2006;

(i) one count of outrage of modesty by inserting a finger into the Victim's vagina, committed sometime between April 2006 and 13 June 2006; and

(j) one count of outrage of modesty by inserting a finger into the Victim's vagina, committed sometime in November 2006.

7 The offences came to light in December 2006 when the Victim was reprimanded for misbehaviour by a maternal aunt. The aunt told the Victim that she should not misbehave as her parents loved her. In response, the Victim retorted that she did not like the love that her father (*ie*, the Respondent) gave to her. When questioned on what she meant, the Victim told the aunt about the various sexual acts committed against her by the Respondent. The aunt informed the Victim's mother of what the Victim had told her. After a discussion, they reported the matter to the police.

8 The Respondent, when arrested on 31 December 2006, readily confessed to having raped and outraged the modesty of the Victim. In the High Court, he pleaded guilty to the third, fifth and eighth of the charges enumerated at [6] above (*ie*, the Rape Offences). The facts relating to these offences were similar. During the material period, the Victim shared a double-decker bed with her sister and slept on the top deck. The Respondent would enter the Victim's bedroom at night while everyone else was asleep and would proceed to touch the Victim's body while standing on the bed frame of the lower deck. After touching the Victim's body for some time, he would remove her shorts and panties, spread her legs and penetrate her vagina with his penis. After a while, he would withdraw his penis and make the Victim masturbate him with her hands until he ejaculated.

The proceedings in the High Court

Submissions on sentencing

9 In the High Court, the Prosecution pressed for a deterrent sentence as it felt that this was warranted, given the nature of the Rape Offences and the relationship between the Respondent and the Victim. For guidance and assistance in determining the appropriate sentence, the Prosecution provided the Judge with a series of similar cases from the last decade where the courts had consistently imposed sentences which were much higher than the mandatory minimum sentence prescribed by s 376(2) of the Penal Code. The most pertinent cases (some of which were not actually cited directly by the Prosecution, but were instead to be found within the cases provided) included the following:

(a) In *PP v Radhakrishna Gnanasegaran* Criminal Case No 14 of 1999 (27 April 1999) (unreported), the offender raped his daughter over a period of ten years from the time when she was seven years old. He was convicted of, *inter alia*, four charges of aggravated rape under s 376(2) of the Penal Code and was sentenced, on each charge, to 15 years' imprisonment and

12 strokes of the cane. Two of the sentences were ordered to run consecutively, making a total of 30 years' imprisonment and 24 strokes of the cane (*id* at [138]). This sentence was subsequently affirmed by this court in Criminal Appeal No 9 of 1999.

(b) In *PP v Peh Thian Hui* [2002] 3 SLR 268, the offender raped his girlfriend's daughter over a period of five years which began from the time when she was nine years old. He pleaded guilty to, *inter alia*, five charges of aggravated rape under s 376(2) of the Penal Code and was sentenced, on each charge, to 12 years' imprisonment and 15 strokes of the cane. Three of the sentences were ordered to run consecutively, making a total of 36 years' imprisonment and (as a result of s 230 of the Criminal Procedure Code) 24 strokes of the cane. The offender's appeal to the Court of Appeal (*viz*, Criminal Appeal No 8 of 2002) was dismissed.

(c) In *PP v MW* [2002] 4 SLR 912, the offender raped his daughter on several occasions when she was just below the age of 14 as an act of revenge against her mother for divorcing him. He pleaded guilty to three charges of aggravated rape under s 376(2) of the Penal Code and was sentenced, on each charge, to 12 years' imprisonment and 12 strokes of the cane. Two of the sentences were ordered to run consecutively, making a total of 24 years' imprisonment and 24 strokes of the cane.

(d) In *PP v MV* [2002] SGHC 161, the offender raped his stepdaughter on several occasions when she was aged between eight and 13. He pleaded guilty to three charges of aggravated rape under s 376(2) of the Penal Code and was sentenced, on each charge, to 12 years' imprisonment, with two of the sentences to run consecutively, making a total of 24 years' imprisonment. As he was above the age of 50, the punishment of caning was not applicable.

(e) In *PP v MX* [2006] 2 SLR 786, the offender pleaded guilty to, *inter alia*, four charges of aggravated rape under s 376(2) of the Penal Code. The victims were his five daughters from his various wives (he had a total of four legal wives and six contractual wives). Two of his daughters became pregnant as a result of the rapes. He was sentenced, on each charge, to 12 years' imprisonment and 12 strokes of the cane. One of these sentences was ordered to run consecutively with two of the sentences imposed in respect of five charges of rape *simpliciter* under s 376(1) of the Penal Code. (The offender had likewise pleaded guilty to the charges under s 376(1), and had been sentenced to ten years' imprisonment and eight strokes of the cane for each of these charges.) The total sentence was thus 32 years' imprisonment and (as a result of s 230 of the Criminal Procedure Code) 24 strokes of the cane.

(f) In *PP v NF* [2006] 4 SLR 849 (where the offence in question was rape *simpliciter* under s 376(1) of the Penal Code, as opposed to aggravated rape under s 376(2)), V K Rajah J expressed the opinion that a review of the sentencing practice for rape cases was necessary. To this end, Rajah J set out four broad categories of rape, as follows (at [20]–[21]):

> (i) at the lowest end of the spectrum, rape that featured no aggravating or mitigating circumstances ("Category 1 rape");
>
> (ii) rape where specific aggravating factors (listed at [20] of *PP v NF*) were present, including rape of a vulnerable victim and rape committed by a person in a position of responsibility towards the victim ("Category 2 rape");
>
> (iii) repeated rape on different occasions of the same victim or of multiple victims ("Category 3 rape"); and

(iv) rape where the offender had displayed perverted or psychopathic tendencies or gross personality disorder, and where he was likely, if at large, to remain a danger to women for an indefinite period of time ("Category 4 rape").

Rajah J then proceeded to set out a benchmark sentence for each category, as follows:

(i) For Category 1 rape, the benchmark sentence would be ten years' imprisonment and not less than six strokes of the cane, in view of the decision of the Court of Criminal Appeal in *Chia Kim Heng Frederick v PP* [1992] 1 SLR 361 ("*Frederick Chia*") (see *PP v NF* at [24]).

(ii) For Category 2 rape, the benchmark sentence would be 15 years' imprisonment and 12 strokes of the cane (*id* at [36]).

(iii) For Category 3 rape, the benchmark sentence would be the same as that for Category 2 rape, *ie*, 15 years' imprisonment and 12 strokes of the cane (*id* at [37]). Rajah J explained (*ibid*) that there was no overriding need for judges to commence sentencing at a higher benchmark in respect of Category 3 rape. This was because the Prosecution would, in most cases, proceed with multiple charges against the offender and, where the offender was convicted of three or more distinct offences, the sentencing judge would have to order at least two (with the discretion to order more than two) of the sentences to run consecutively.

(iv) For Category 4 rape, the maximum sentence of 20 years' imprisonment and 24 strokes of the cane was, in Rajah J's view, "not ... inappropriate ... if the circumstances so dictate[d]" (see *PP v NF* at [38]).

The above categories of rape and the corresponding benchmark sentences were recently endorsed by this court in *PP v Mohammed Liton Mohammed Syeed Mallik* [2008] 1 SLR 601 ("*Liton*") in the context of rape *simpliciter* under s 376(1) of the Penal Code. Although (as mentioned earlier) *PP v NF* likewise concerned the offence under s 376(1) of the Penal Code, we are of the view that the benchmarks proposed by Rajah J are equally applicable to the offence of aggravated rape under s 376(2), subject to the requisite modifications to take into account the mandatory minimum sentence prescribed by the latter subsection. Under Rajah J's approach, the applicable benchmark sentence for the Respondent's offences would be 15 years' imprisonment for each of the Rape Offences as these instances of rape, having been committed by a person in a position of responsibility towards the victim, constituted Category 2 rape.

10 By way of mitigation, counsel for the Defence argued that the Respondent had previously had a hard life and had been under stress as he had to cope with the strain of maintaining his two families. The Defence also tendered several letters from the Victim and her mother in which they expressed their forgiveness of the Respondent and pleaded for leniency. The Victim had written, *inter alia*, a personal letter (dated 6 August 2007) addressed to the court, while her mother had written a personal letter (dated 6 August 2007) to the court as well as an e-mail (dated 17 July 2007) to the Prosecution. The Victim and her mother had also written a joint letter (dated 14 March 2007) addressed to "whom it may concern" stating their willingness to forgive the Respondent and pleading for "a lesser sentence" for him. The Prosecution, in response to these letters, argued that forgiveness was a private matter which the court should not take into account.

The Judge's reasons for imposing the minimum punishment

11 In a brief judgment, the Judge explained his reasons for meting out the minimum punishment

to the Respondent as follows:

(a) The Judge felt that the sentencing precedents referred to by the Prosecution, which "involved sentences of 12 to 15 years [*sic*] imprisonment for each of the charges there concerned" (see [4] of the Judgment), were "useful so far as guides go" (*id* at [5]). He then commented (*ibid*):

> If there were any inadequacy, it is that guidelines on how to use guidelines are lacking. *Guidelines or precedents can never replace the statutory range set by the Legislature.* If Parliament had set the range between eight years' and 20 years' imprisonment, no court should reduce that range in any way because *courts should not exercise their discretion in such a way as to amend the statutory limit*. Statutory amendments must be left to the Legislature. Within the statutory range, courts may formulate principles in order that the appropriate sentence might be imposed. These principles are principles of law and must, like every such principle, apply to the facts of the case in question. Legal principles are not the same as administrative guidelines which are intended to apply broadly within denoted cases, and unless an administrative discretion is reserved, the individual facts are of little significance. Legal principles must be applied judicially. One important principle in law is that like cases ought to be treated alike, but an equally important one is that the punishment must fit the crime. These two principles must constantly feature when determining what the appropriate sentence ought to be. In considering them, the court would then consider the incidents of aggravating factors and balance them against the mitigating ones, but *always with its sight fixed firmly on the facts of the case that is before it, keeping the facts of similar cases within sight, as "guides", and not the principal determinants. It is the facts of each case that will determine whether a lighter or harsher sentence should be imposed*. [emphasis added]

No further mention of sentencing precedents was made by the Judge thereafter.

(b) The Judge felt that the fact that the offences in question had taken place over a period of four years was not an aggravating factor in itself as (see [6] of the Judgment):

> The incidents concerned during this period have all been the subject matter of a charge, and each charge is being dealt with in the same proceedings.

(c) The Judge acknowledged that the Respondent had agreed to have the Outstanding Offences taken into consideration for the purposes of sentencing, but felt that this did not oblige him to impose a harsher sentence as (*ibid*):

> Bearing in mind that no details would have been established in relation to [the Outstanding Offences], in taking them into account, the court may – not must – impose a sentence that is harsher than [the sentence which] it might otherwise have imposed.

(d) The Judge was of the view that the nature and the number of both the charges proceeded with as well as the charges not proceeded with were relevant, although caution had to be exercised when taking these factors into account as the decision as to which charges should be proceeded with in any given case was "entirely a matter of prosecutorial discretion" (*ibid*).

(e) With regard to the Victim's age (which was one of the specific aggravating factors cited by the Prosecution), the Judge was of the opinion that the age of the victim concerned, in itself,

was not an aggravating factor (see [7] of the Judgment). This was because the victim's age would already have been taken into account by the offender being charged under s 376(2) of the Penal Code, which laid down, based on (*inter alia*) the victim's age, a harsher punishment than that applicable to the offence of rape *simpliciter* under s 376(1) of the Penal Code (*ibid*).

(f) The Judge also rejected the Prosecution's submission that the fact the Respondent was the natural father of the Victim was in itself an aggravating factor. He regarded this particular factor, instead, as (see [8] of the Judgment):

> ... a fact that raise[d] the level of opprobrium and sanction against the [Respondent] ... and that ha[d] to be reviewed in the context of all other relevant facts of the case.

(g) As for the harm caused to the Victim by the series of rapes and molestations (which was another aggravating factor cited by the Prosecution), the Judge held that this factor should not be given special consideration as there had been no proof of "severe post-rape trauma" (*id* at [9]) suffered by the Victim.

(h) In respect of the Prosecution's submission that the forgiveness ostensibly expressed by the Victim and her mother was a private matter (see [10] above), the Judge accepted this proposition (see the Judgment at [10]), but was of the opinion that forgiveness nonetheless (*ibid*):

> ... should not be dismissed merely as such. Punishment has many purposes and aims, not least of which is the correction of the criminal and the appeasement of his victim. Where, as here, the victim has forgiven her remorseful offender, the law can further help them on their way back to rehabilitation and normalcy. Forgiveness is a universal virtue and is balm to giver and recipient alike; it is, in the words of some unknown sage, "the scent the rose leaves on the foot that crushes it". So let it not be said that forgiveness is a virtue more preached than practised, or that in applying the law impartially and rationally, a court is incapable of recognising such virtues and the good they bring.

Legal principles relating to the appellate review of sentences

12 It is, of course, well established (see, *inter alia*, *Tan Koon Swan v PP* [1986] SLR 126 and *Ong Ah Tiong v PP* [2004] 1 SLR 587) that an appellate court will not ordinarily disturb the sentence imposed by the trial court except where it is satisfied that:

(a) the trial judge erred with respect to the proper factual basis for sentencing;

(b) the trial judge failed to appreciate the materials placed before him;

(c) the sentence was wrong in principle; or

(d) the sentence was manifestly excessive or manifestly inadequate, as the case may be.

13 For the purposes of the present appeal, it will be sufficient for us to elaborate briefly on what is meant by a sentence which is "manifestly excessive" or "manifestly inadequate", the latter being the main contention raised by the Prosecution. A succinct explanation can be found in *PP v Siew Boon Leong* [2005] 1 SLR 611, where Yong Pung How CJ stated (at [22]):

> When a sentence is said to be manifestly inadequate, or conversely, manifestly excessive, it

means that the sentence is unjustly lenient or severe, as the case may be, and *requires substantial alterations rather than minute corrections* to remedy the injustice … [emphasis added]

Similar sentiments were expressed in *Liton* ([9] *supra*), where Andrew Phang Boon Leong JA, who delivered the judgment of this court, stated the following (at [84]):

> [I]t bears repeating that an appellate court should only intervene where the sentence imposed by the court below was "manifestly" inadequate – that in itself implies a *high threshold before intervention is warranted*. In the light of the highly discretionary nature of the sentencing process and the relatively circumscribed grounds on which appellate intervention is warranted, the prerogative to correct sentences should be tempered by a certain degree of deference to the sentencing judge's exercise of discretion. [emphasis in original omitted; emphasis added]

The issues raised in this appeal

14 We had the impression that the Judge had disregarded the sentencing precedents cited by the Prosecution. For one, his consideration of the sentencing precedents, as reflected at [4]–[5] of the Judgment (see [11] above), gave the impression that he did not find the sentencing precedents cited by the Prosecution particularly useful in assisting him to determine what the proper sentence should be. In our view, whilst sentencing precedents technically have no binding effect, the Judge's approach raised an important issue as to the extent to which a lower court is entitled to disregard established sentencing precedents, especially where such precedents have been established by this court.

15 Even if our impression of the Judge's treatment of the sentencing precedents was wrong – *ie*, even if the Judge had given due consideration to these precedents – he had, as indicated by [10] of the Judgment (see [11] above), in our view, at the very least given an unduly expansive mitigating role to the forgiveness expressed by the Victim and her mother, thereby reducing by an inappropriate extent the severity of the punishment that should (in accordance with the applicable sentencing precedents) have been meted out to the Respondent. While forgiveness is a *virtue*, its role as a *mitigating factor* in sentencing practice is quite a different matter. In this regard, the Judge also made several findings on the nature of aggravating and mitigating factors for sentencing purposes which did not seem to accord with accepted legal principles.

16 We will now address these issues *seriatim*.

General principles relating to sentencing precedents

17 Dealing, first, with the issue of the extent to which a lower court is entitled to disregard the guidance given by established sentencing precedents (which commonly set out "guidelines" or "benchmarks"), in our view, it would not be proper for a trial judge to depart from such precedents without, at the very least, giving cogent reasons as to why they should not be applied in the case before him. This approach is based on two basic principles. The first is that a lower court should respect the guidance given by a higher court in similar cases, even though the judge may not personally agree with the views of the higher court. As Roch LJ stated in *R v David Angus Johnson* (1994) 15 Cr App R (S) 827 (at 830):

> [A] judge when sentencing must pay attention to the guidance given by this Court [*ie*, the English Court of Appeal] and sentences should be broadly in line with guideline cases, unless there are factors applicable to the particular case which require or enable the judge to depart

> from the normal level of sentence. In such special cases the judge should indicate clearly the factor or factors which in his judgment allow departure from the tariff set by this Court.

In our view, the proper approach where a judge disagrees with the guidance provided by a higher court would be for the judge to express his disagreement in his judgment and suggest that the guidelines or benchmarks in question be reconsidered by the higher court. The second principle, which the Judge had expressly recognised (see [5] of the Judgment), is that like cases should be treated alike. The corollary of this principle is *consistency in sentencing*, which is achievable only by a lower court adhering, over a period of time, to sentencing guidelines or benchmarks set by a higher court.

18 In the local context, sentencing precedents (*ie*, both benchmarks and guidelines) have been used and applied by the courts for the purposes of achieving consistency in sentencing. In *Abu Syeed Chowdhury v PP* [2002] 1 SLR 301, Yong CJ said (at [15]):

> A 'benchmark' is a sentencing norm prevailing on the mind of every judge, ensuring consistency and therefore fairness in a criminal justice system. … It … provides the *focal point against which sentences in subsequent cases, with differing degrees of criminal culpability, can be accurately determined.* A good 'benchmark' decision therefore lays down carefully the parameters of its reasoning in order to allow future judges to determine what falls within the scope of the 'norm', and what exceptional situations justify departure from it. [emphasis added]

In *Dinesh Singh Bhatia s/o Amarjeet Singh v PP* [2005] 3 SLR 1 ("*Dinesh Singh Bhatia*"), Rajah J likewise declared (at [24]):

> Benchmarks and/or tariffs (these terms are used interchangeably in this judgment) have significance, standing and value as judicial tools so as to help achieve a certain degree of consistency and rationality in our sentencing practices. They provide the vital frame of reference upon which rational and consistent sentencing decisions can be based.

19 A high level of consistency in sentencing is desirable as the presence of consistency reflects well on the fairness of a legal system. In contrast, the presence of inconsistency in sentencing diminishes the idea of justice being equal to all in a legal system; it also leads to public cynicism about the legal system in question and, eventually, to the loss of public confidence in the administration of justice. In this regard, the observations of Mason J in *Lowe v The Queen* (1984) 154 CLR 606 are especially pertinent (at 610–611):

> Just as consistency in punishment – a reflection of the notion of equal justice – is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice.

Mason J's *dicta* was quoted *ex curia* by the Honourable J J Spigelman, Chief Justice of New South Wales, in his keynote address, "Consistency and Sentencing", at the Sentencing 2008 Conference (8 February 2008) (available at <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speeches#CJ> (accessed 4 July 2008)), after which Spigelman CJ himself added:

> Nothing is more corrosive of public confidence in the administration of justice than a belief that criminal sentencing is primarily determined by which judge happens to hear the case.

20 The desirability of consistency does not, of course, detract from the need for individualised justice, *viz*, the need to sentence an offender based on the facts of the particular case in question. As Yong CJ emphasised in *Viswanathan Ramachandran v PP* [2003] 3 SLR 435 (at [43]):

> It is clear that any precedent cases can always be [distinguished] on the facts. Despite all this, precedent cases are useful in serving as guidelines for the sentencing court. However, that is all that they are: guidelines. *At the end of the day, every case turns on its own facts. The sentencing court must look to the facts of each case and decide on an appropriate sentence based on those facts.* [emphasis added]

In a similar vein, in *Dinesh Singh Bhatia* ([18] *supra*), Rajah J cautioned against excessive obeisance to sentencing precedents, as follows (at [24]):

> [Sentencing precedents] ought not, however, to be applied rigidly or religiously. No two cases can or will ever be completely identical or symmetrical. The lower courts, while obliged to pay careful and thoughtful attention to tariffs and/or sentencing precedents, must not place them on an altar and obsessively worship them.

21 Nonetheless, the need to sentence an offender based on the facts of the case in question does not give a court the mandate to disregard sentencing precedents wholesale. As Spigelman CJ profoundly stated in "Consistency and Sentencing" ([19] *supra*), sentencing precedents (which he termed "sentencing patterns") "play the critical role in reconciling the principle of individualised justice and the principle of consistency". Without reference to sentencing precedents, guidance on the appropriate sentence in the circumstances would be lacking, and sentencing would be a lottery in which justice turns on an individual judge's subjective view.

2 2 One observation by the Judge, which might be construed as a reason for disregarding sentencing precedents, was that the lack of "guidelines on how to use guidelines" (see the Judgment at [5]) was an "inadequacy" (*ibid*) in this area of the law. In our view, this is not borne out by past cases. In *Frederick Chia* ([9] *supra*) at 368, [23], the Court of Criminal Appeal laid down, in the context of sentencing for the offence of rape under s 376(1) of the Penal Code, a starting point of ten years' imprisonment and caning of six strokes, and subsequently considered the various mitigating factors and aggravating factors present in deciding whether the benchmark sentence should be reduced or enhanced. We dare say that this approach (which, for convenience, will be referred to as "the conventional approach") – *ie*, considering, first, the applicable sentencing guidelines or benchmarks and, second, any aggravating factors and/or mitigating factors present – has been adopted by all sentencing courts in Singapore, even if it has not always been expressly stated. One example of a case where the conventional approach was clearly articulated would be *PP v Fernando Payagala Waduge Malitha Kumar* [2007] 2 SLR 334. In that case, Rajah J held (at [75]) that the benchmark sentence for the offence in question should be considered first, following which the mitigating factors and aggravating factors present should then be assessed in deciding whether the sentence ought to be discounted or enhanced. As a point of interest, a similar approach has been espoused by courts in other jurisdictions. For example, in the Canadian case of *R v Sandercock* (1985) 22 CCC (3d) 79, Kerans JA, who delivered the judgment of the Alberta Court of Appeal, stated (at 83):

> This court has a duty to offer guidance in the form of a statement of typical cases and starting-points. Sentencing courts, in turn, are asked to acknowledge the starting-point and then summarize the relevant factors before passing sentence. We thus have not the injustice of uniform sentences but the justice of a uniform approach. Dangerous rigidity is avoided because there are no arbitrary end-points. Nor is there real disparity, because all sentences of the same

genre start at the same point and differences are rationally explained.

The applicable sentencing precedents in the present case

The benchmark sentence

23 In the present case, the sentencing precedents referred to at [9] above clearly establish a sentencing benchmark of 12–15 years' imprisonment per charge for each of the Rape Offences. In our view, this harsh sentencing range appropriately reflects the extreme reprehensibility of rape of a young girl by her own father. Rape *simpliciter* is already "an inherently odious and reprehensible act" (see *PP v NF* ([9] *supra*) at [46]) that exacts "irretrievable physical, emotional and psychological scars on [the] victim" (*id* at [47]). Where the rapist and the victim are related (as in the present case), the psychological suffering of the victim is likely to be greater. As the UK Sentencing Advisory Panel ("the Sentencing Advisory Panel") stated in *Sexual Offences Act 2003: The Panel's Advice to the Sentencing Guidelines Council* <http://www.sentencing-guidelines.gov.uk/advice/index.html#sex2003> (accessed 4 July 2008) at para 16:

> The psychological trauma caused by sexual offences can be so deep-seated that it can have a permanent impact on a victim's ability to function in society. This can particularly be the case where sexual violation has been perpetrated over a long period of time, especially where the perpetrator is a family member or a person in a position of trust. Existing personal relationships may break down and victims often find it extremely difficult to develop intimate relationships in the future.

24 In *PP v MW* ([9] *supra*), Tay Yong Kwang JC highlighted other concerns (at [18]), as follows:

> Sexual offences committed against one's own family members often have repercussions well beyond the trial. The victim may feel bad because her father has been sent to prison because of her complaint. Other family members may unjustly blame the victim for causing the incarceration of their provider. I certainly hope this will not be the case here as the wrongdoing here was [the offender's] and [the offender's] alone. Further, when the [the offender] is finally released from prison, the daughter may have to meet him within family circles again and perhaps re-live the pain of the rapes. Such offences must therefore be punished severely.

25 Severe sentences to reflect the concepts of general deterrence and specific deterrence are therefore appropriate for cases such as the present; all the more so when recent statistics show that the number of rape cases involving rapists who are known to their victims remains unacceptably high. From June 2006 to December 2007, out of 12 cases of rape, attempted rape, abetment of rape or carnal intercourse heard in the High Court, the offenders knew their victims in ten cases, and these were only the known cases. Statistics also show that a significant proportion of the cases involving the above-mentioned sexual offences that were heard in the High Court in recent years involved victims under the age of 14. Specifically, out of a total of 47 of such cases heard in the High Court between 2003 and 2007, 21 (representing approximately 44.7% of the total number of cases) involved victims aged below 14.

26 The essential facts in the present case were the same as those in the sentencing precedents mentioned at [9] above, *viz*:

(a) the offender was in a position of trust *vis-à-vis* the victim;

(b) the victim was under the age of 14 and had been raped over a period of time;

(c) multiple offences were committed against the victim; and

(d) the offences were discovered fortuitously.

As such, the appropriate term of imprisonment for the Respondent would, *prima facie*, fall within the benchmark sentence of 12–15 years for each of the Rape Offences. In line with the conventional approach (see [22] above), we considered all the aggravating factors and mitigating factors as the imposition of the minimum sentence prescribed by s 376(2) of the Penal Code could still be justified, notwithstanding the benchmark sentence established by the sentencing precedents. At the end of our analysis, we were of the view that the mitigating factors in the present case clearly did not warrant any departure from the sentencing benchmark indicated by the sentencing precedents. There was little room for the Judge to depart from these sentencing precedents without setting an inconsistent practice and (consequently) breaching the principle that like cases should be treated alike. We will now explain in greater detail our reasons for coming to this conclusion, beginning with the aggravating factors which featured in this case. We would also emphasise that if the intention of the Judge was to lay down a new benchmark sentence for cases such as the present, he should, at the *very least*, have given cogent reasons as to why the established sentencing precedents should not be followed.

Aggravating factors

Aggravating factors for the offence of rape in general

27 The aggravating factors which are pertinent to sentencing for the offence of rape were dealt with extensively in two English Court of Appeal cases. In *R v Roberts* [1982] 1 WLR 133 ("*Roberts*"), Lord Lane CJ set out the following aggravating factors (at 135):

> Some of the features which may aggravate the crime are as follows. Where a gun or a knife or some other weapon has been used to frighten or injure the victim. Where the victim sustains serious injury, whether that is mental or physical. Where violence is used over and above the violence necessarily involved in the act itself. Where there are threats of a brutal kind. Where the victim has been subjected to further sexual indignities or perversions. Where the victim is very young or [very] elderly. Where the offender is in a position of trust. Where the offender has intruded into the victim's home. Where the victim has been deprived of her liberty for a period of time. Where the rape, or succession of rapes, is carried out by a group of men. Where the offender has committed a series of rapes on different women, or indeed on the same woman.

In *R v Millberry* [2003] 1 WLR 546 ("*Millberry*"), Lord Woolf CJ laid down a similar list of aggravating factors (referred to hereafter as "Lord Woolf's list in *Millberry*"). This list, which was based on the Sentencing Advisory Panel's written advice dated 24 May 2002 to the English Court of Appeal on sentencing guidelines for rape offences ("the Panel's Advice") (available at <http://www.sentencing-guidelines.gov.uk/advice/index.html#rape> (accessed 4 July 2008)), was as follows (see *Millberry* at [32]):

> (i) the use of violence over and above the force necessary to commit the rape; (ii) use of a weapon to frighten or injure the victim; (iii) the offence was planned; (iv) an especially serious physical or mental effect on the victim ... [including], for example, a rape resulting in pregnancy, or in the transmission of a life-threatening or serious disease; (v) further degradation of the victim ... (vi) the offender has broken into or otherwise gained access to the place where the victim is living ... (vii) the presence of children when the offence is committed ... (viii) the covert use of a drug to overcome the victim's resistance and/or [to] obliterate his or her memory of the

offence; (ix) a history of sexual assaults or violence by the offender against the victim.

28 Apart from considering the above aggravating factors in assessing the sentence imposed by the Judge, we also took into account this court's decision in *Liton* ([9] *supra*), where Phang JA stated that there were "three broad principles" (*id* at [95]) which the court should also have regard to when assessing the appropriate sentence to impose. These "three broad principles", which were enunciated by the Sentencing Advisory Panel at para 9 of the Panel's Advice, are as follows:

(a) the degree of harm to the victim;

(b) the level of culpability of the offender; and

(c) the level of risk posed by the offender to society.

Aggravating factors in the present case

(1) The Victim's age and the Respondent's abuse of his position of trust and authority

29 At [8] of the Judgment, the Judge expressed certain views on what constituted an aggravating factor for the purposes of sentencing *vis-à-vis* the offence of rape, as follows:

> An aggravating factor that merits a harsher punishment on its own is difficult to define because that suggests that an aggravating factor is different from a fact that makes the rape in question more serious and warrants a heavier sentence. I am doubtful that a distinction between these two notions should be made. The Legislature ha[s] already differentiated between rape *simpliciter* [which is punishable under s 376(1) of the Penal Code] and rape where hurt [is] caused, or where the victim [is] put in fear of death, or where the victim is below the age of 14 [which is punishable under s 376(2) of the Penal Code]. These are statutory provisions for aggravated rape. Any fact other than the ones just mentioned would have to be taken into account by the court when it determines the sentence. It is the sum of all the facts, statutorily indicated as well as any other relevant ones, that, considered in totality, presents the final picture from which the court determines what sentence would be appropriate. Hence, the fact that the [Respondent] [is] the father of the [V]ictim is not an aggravating factor in itself, but may be taken as a fact that raises the level of opprobrium and sanction against the [Respondent]; and that has to be reviewed in the context of all other relevant facts of the case.

30 This passage appears to make two different points. The first point (which the Judge had also made at [7] of the Judgment (see [11] above)) would be that, for the offence under s 376(2) of the Penal Code, the victim's age, in itself, cannot be an aggravating factor because it cannot be distinguished from the same factor which is the basis upon which the Legislature has prescribed a heavier punishment for that offence (as compared to the punishment for the offence of rape *simpliciter* under s 376(1) of the Penal Code). We agreed with this proposition. The age of the victim *per se* cannot be an additional aggravating factor for the offence of rape of a young girl under s 376(2) of the Penal Code as it has already been factored into the punishment prescribed for that offence. Of course, as the Judge observed, "[this] is not to say that the court may not impose a higher sentence if the [victim's] age was much lower [than 14], or even if the victim was just 13 years old" (see the Judgment at [7]).

31 The second point would be that the Respondent's relationship with the Victim (*viz*, a familial relationship of authority and trust) was not an aggravating factor in itself, but only "a fact that raise[d] the level of opprobrium and sanction" (see [8] of the Judgment) against the Respondent. The

Judge justified this distinction by the differentiation made in the Penal Code between rape *simpliciter* on the one hand and rape of a young girl (*inter alia*) on the other. We were unable to accept this proposition as we did not see any distinction in substance between an aggravating factor and what the Judge termed (at [8] of the Judgment) "a [factor] that raise[d] the level of opprobrium and sanction against the accused". Any factor that raises the level of opprobrium and sanction against the offender is, in a general sense, an aggravating factor. The Judge appears to have conflated an *aggravated offence* with an *aggravating factor*. The offence under s 376(2) of the Penal Code is an aggravated offence, *viz*, aggravated rape. That it is committed by a father against his young biological daughter must, in our view, further aggravate this (already) aggravated offence and, therefore, the punishment must reflect the further aggravation.

32 It is, in fact, a matter of common sense that a rapist in any position of trust and authority *vis-à-vis* the victim should receive a harsher punishment. As this court stated in *Lim Hock Hin Kelvin v PP* [1998] 1 SLR 801 (at [25]), "those who have charge of children cannot [be allowed to] abuse their positions for the sake of gratifying their sexual urges". Likewise, Rajah J stated in *PP v NF* ([9] *supra*) at [42]:

> [O]ur courts would be grievously remiss if they did not send an unequivocal and uncompromising message to all would-be sex offenders that abusing a relationship or a position of authority in order to gratify sexual impulse will inevitably be met with the harshest penal consequences. In such cases, the sentencing principle of general deterrence must figure prominently and [must] be unmistakably reflected in the sentencing equation.

Similar sentiments were also expressed in *R v Derek Roy Taylor* (1977) 64 Cr App R 182 ("*Taylor*") by Lawton LJ (at 185):

> What does not seem to have been appreciated by the public is the wide spectrum of guilt which is covered by the offence known as having unlawful sexual intercourse with a girl under the age of sixteen. At one end of the spectrum is the youth who stands in the dock … who has had what started off as a virtuous friendship with a girl under the age of 16. That virtuous friendship has ended with them having sexual intercourse with one another. *At the other end of the spectrum is the man in a supervisory capacity, a school-master or social worker, who sets out deliberately to seduce a girl under the age of 16 who is in his charge*. [emphasis added]

33 The ultimate relationship of trust and authority is that between a parent and his or her child. There exists between them a human relationship in which the parent has a moral obligation to look after and care for the child. In our view, the level of confidence and trust that a child naturally reposes in his or her parent entails that a parent who betrays that trust and harms the child stands at the *furthest* end of the spectrum of guilt referred to by Lawton LJ in *Taylor* (see the quotation at [32] above). It must therefore also follow that such a parent must *a fortiori* receive a heavier punishment. As Lawton LJ went on to state in *Taylor* (at 185) after setting out the two extreme ends of the spectrum of guilt:

> The penalties appropriate for the two types of case [*sic*] ... which I have just referred to are very different indeed. Nowadays, most judges would take the view, and rightly take the view, that when there is a virtuous friendship which ends in unlawful sexual intercourse, it is inappropriate to pass sentences of a punitive nature. What is required is a warning to the youth to mend his ways. At the other end, a *man in a supervisory capacity who abuses his position of trust for his sexual gratification, ought to get a sentence somewhere near the maximum allowed by law* … [emphasis added]

34 We noted that the Judge did state expressly (at [8] of the Judgment) that he regarded the Respondent's position as the Victim's father as a factor that raised the level of opprobrium and sanction against the Respondent. But, this did not appear to be borne out as he ultimately only imposed the mandatory minimum sentence on the Respondent. *Ex facie*, it was as if this factor played no part in the totality of the punishment that was meted out to the Respondent.

(2) The Outstanding Offences

35 The legal basis for considering the Outstanding Offences for the purposes of sentencing is set out in s 178 of the Criminal Procedure Code, which provides:

> **Outstanding offences.**
>
> **178.**—(1) Where in any criminal proceedings instituted by or on behalf of the Public Prosecutor the accused is found guilty of an offence, the court, in determining and in passing sentence, may, with the consent of the prosecutor and the accused, take into consideration any other outstanding offence or offences which the accused admits to have committed:
>
> Provided that, if any criminal proceedings are pending in respect of any such outstanding offence or offences and those proceedings were not instituted by or on behalf of the Public Prosecutor, the court shall first be satisfied that the person or authority by whom those proceedings were instituted consents to that course.
>
> (2) When consent is given as in subsection (1) and an outstanding offence is taken into consideration, the court shall enter or cause an entry to that effect to be made on the record and upon sentence being pronounced the accused shall not, unless the conviction which has been had is set aside, be liable to be charged or tried in respect of any such offence so taken into consideration.

For ease of discussion, we will refer to offences which are taken into consideration pursuant to s 178 of the Criminal Procedure Code as "TIC offences".

36 There is little authority on how TIC offences are to be reflected in the sentences imposed for the offences actually proceeded with by the Prosecution ("offences proceeded with"). In Nigel Walker, *Aggravation, Mitigation and Mercy in English Criminal Justice* (Blackstone Press Ltd, 1999), the practice relating to TIC offences is described (at p 41, in a chapter titled "Statutory and Miscellaneous Aggravations") as a practice "established by custom, not statute". It saves the Prosecution from the necessity of proving what can be a significant number of similar offences committed by the offender. The offender, conversely, is able to protect himself from being charged on a later occasion with the TIC offences. He can also be fairly sure that, despite the TIC offences being considered by the sentencing court, the increase in the severity of his sentence for the offences proceeded with will be less draconian than the sentence which he would have received had the Prosecution proceeded with the TIC offences as well.

37 More often than not, when TIC offences feature in a case, the sentence for the offences proceeded with will have to be increased. As Andrew Ashworth observed in his book, *Sentencing and Criminal Justice* (4th Ed, 2005, Cambridge University Press) ("Ashworth"), "[t]he offences … taken into consideration do not rank as convictions, but the court is likely to increase the sentence [for the offences proceeded with] in order to take account of them" (at pp 241–242). The TIC offences may, however, also have little or no impact on the sentence ultimately imposed for the offences proceeded with. As Sir Igor Judge P stated in the English Court of Appeal case of *R v Gary Dean Miles* [2006]

EWCA Crim 256 (at [11]):

> [T]he way in which the court deals with offences to be taken into consideration depends on context. In some cases the offences taken into consideration will end up by adding nothing or nothing very much to the sentence which the court would otherwise impose. On the other hand, offences taken into consideration may aggravate the sentence and lead to a substantial increase in it. For example, the offences may show a pattern of criminal activity which suggests careful planning or deliberate rather than casual involvement in a crime. They may show an offence or offences committed on bail, after an earlier arrest. They may show a return to crime immediately after the offender has been before the court and given a chance that, by committing the crime, he has immediately rejected. There are many situations where similar issues may arise.

38 Section 178(1) of the Criminal Procedure Code does not mandate that, where TIC offences are present, the court must increase the sentence which would normally have been imposed for the offences proceeded with in the absence of TIC offences. But, if there are TIC offences to be taken into account, the effect, in general, would be that the sentence which the court would otherwise have imposed for the offences proceeded with would be increased (see *Sentencing Practice in the Subordinate Courts* (LexisNexis, 2nd Ed, 2003) at p 77). This is commonsensical as the offender, by agreeing to have the TIC offences in question taken into consideration for sentencing purposes, has in substance admitted that he committed those offences. This would *a fortiori* be the case where the TIC offences and the offences proceeded with are similar in nature (*eg*, if both sets of offences consist of sexual offences against the same victim). As Tay Yong Kwang J stated in *Navaseelan Balasingam v PP* [2007] 1 SLR 767 (at [17]):

> While it may be said that by admitting the charges taken into consideration, the [offender] had saved [the] court time and the Prosecution the trouble of proving [those charges], the counterbalancing effect of having admitted such charges would be that *the [offender] had committed many more similar offences and that fact must aggravate the charges proceeded with*. The benefit to the [offender] would be his immunity from being charged or tried for the offences taken into consideration (see s 178(2) of the [Criminal Procedure Code]) and he would therefore not have to face further punishment in respect of those offences. [emphasis added]

That is *not* to say, however, that the court *must* increase the sentence imposed for the offences proceeded with where TIC offences are present. As stated by Yong CJ in *PP v Mok Ping Wuen Maurice* [1999] 1 SLR 138 at [19], "[u]ltimately, it is the court's discretion whether to consider the [TIC] offence or not". However, if the sentencing court decides not to consider the TIC offences as aggravating the offences proceeded with where it is clear that the former offences should be so considered and does not justify its decision in this regard, the only conclusion which can be reached by an appellate court is that the sentencing court erred in its treatment of the TIC offences.

39 In the present case, the Judge appeared to have given insufficient weight to the Outstanding Offences. As the Judge ultimately imposed only the mandatory minimum sentence on the Respondent, *ex facie*, it was as though the latter had not committed the Outstanding Offences at all. The Judge had noted that there were no details established in relation to those offences and reasoned, on that basis, that he did not have to impose a harsher sentence (at [6] of the Judgment):

> Bearing in mind that no details would have been established in relation to [the Outstanding Offences], in taking them into account, the court may – not must – impose a sentence that is harsher than [the sentence] it might otherwise have imposed.

With respect, we found this reasoning unconvincing. The lack of details in relation to the Outstanding

Offences should not have prevented them from being taken into account as they were themselves sexual offences of a serious nature, although it might be said that they were not – at least where the five counts of outrage of modesty (see [2] above) were concerned – of the same degree of moral opprobrium as the Rape Offences.

(3) The serial nature of the Respondent's offences

40 The Rape Offences and the Outstanding Offences formed a chain of serial sexual abuse inflicted on the Victim by the Respondent over a period of four years. The Judge held (at [6] of the Judgment) that the fact that these offences had taken place cumulatively over a period of four years was not an aggravating factor because the Respondent had been charged separately for each offence and would be punished accordingly. We disagreed with this reasoning, particularly in the context of s 376(2) of the Penal Code, which imposes a mandatory minimum sentence for *any one* incident of (*inter alia*) rape of *any one* female below the age of 14. On the Judge's logic, the number of offences committed by an offender, however large, would never be an aggravating factor. This cannot be right (see, *inter alia*, item (ix) of Lord Woolf's list in *Millberry* at [27] above).

(4) The Respondent's extra acts of perversity

41 The odiousness and depravity of the Respondent's sexual intercourse with the Victim aside, the facts relating to the Rape Offences (see [8] above) indicate that the Respondent's sexual urges were not satiated on each occasion when he penetrated the Victim. He also made the Victim masturbate him with her hands. The Prosecution submitted that these extra acts of perversion, which were not present in previous cases, ought to be regarded as aggravating factors. We accepted this submission in view of, *inter alia*, the English Court of Appeal's decision in *R v Billam* [1986] 1 WLR 349 ("*Billam*"), where Lord Lane CJ held (at 351) that the fact that the victim had been subjected to further sexual indignities or perversions constituted an additional aggravating factor (see also *Frederick Chia* ([9] *supra)* at 376, [20]; *Roberts* ([27] *supra*) at 135; and item (v) of Lord Woolf's list in *Millberry*). However, the Judge did not take this factor into account in sentencing the Respondent.

(5) Harm caused to the Victim

42 The Judge also discounted the possibility of harm having been caused to the Victim as a result of the serial rapes over a period of four years. In reaching this view, he placed considerable weight on the following comments in the report dated 1 February 2007 by Dr Cai Yiming ("Dr Cai"), the psychiatrist who examined the Victim on 31 January 2007:

> She [*ie*, the Victim] said the father [*ie*, the Respondent] was a nice man and she had no fear of seeing him. She had no signs and symptoms of a post traumatic stress disorder.

However, Dr Cai's report also contained the following remarks on which the Judge made no comment:

> According to the [Victim's] mother, she [*ie*, the Victim] had a change of [behaviour] in the second half of 2005 when she cut her hair short and [bound] her breasts down. In June 2006, she cut her wrist and would not disclose to the mother the reason. In September 2006, she stole money from her classmate.

The Judge dismissed the significance of these remarks after the Prosecution conceded that the change in the Victim's behaviour had not been attributed to the Respondent's conduct by the Victim or her mother or Dr Cai.

43 We were not entirely satisfied that the Prosecution was in a position to make this concession unless it was aware that the issue of a possible causal link between the Victim's change in behaviour and the Rape Offences had been put to Dr Cai *and* Dr Cai had discounted such a link. In fact, the Prosecution had submitted in the High Court that the possibility of there being such a causal link should not be discounted. We do not wish to go so far as to say that the Judge was wrong in his view of the Victim's change in behaviour, but we would say that the issue of whether there was a causal link between the change in the Victim's behaviour and the Respondent's offences should not have been determined by just reading Dr Cai's report alone. Dr Cai should have been called to explain and be examined on his report if this issue were material to the sentence to be imposed.

44 Indeed, it was not beyond the bounds of probability that, in the present case, there might have been a causal link between the Victim's change in behaviour and the sexual abuse which she had been subjected to. There are psychiatric studies which show that homosexuality (and, likewise, lesbianism) is one of the common consequences of child sexual abuse (see, *eg*, Nathaniel McConaghy, *Sexual Behavior: Problems and Management* (Plenum Press, 1993) at p 253). Indeed, in *PP v Lim Beng Cheok* [2003] SGHC 54, where the offender had turned to homosexuality after being sexually assaulted by his neighbour as a boy, expert evidence was given by a psychiatrist that "the development of [the offender's] sexual orientation [had been] affected by his upbringing and the early sexual victimization by his neighbour" (*id* at [37]). Similarly, the cutting of wrists is a form of self-mutilation that has been recognised to be a common consequence of traumatic experiences such as rape. In *PP v NF* ([9] *supra*), the victim was reported to have cut her wrists several times after she was raped. In this connection, Rajah J noted (at [51]) that psychological trauma often manifested itself in self-destructive behaviour. He then went on to quote (*ibid*) the following extract from Judith Lewis Herman, *Trauma and Recovery* (Basic Books, 1997) at pp 108–109:

> [A] great many survivors develop chronic anxiety and depression which persist into adult life. …
>
> This emotional state … cannot be terminated by ordinary means of self-soothing. Abused children discover at some point that the feeling can be most effectively terminated by a major jolt to the body. The most dramatic method of achieving this result is through the deliberate infliction of injury. The connection between childhood abuse and self-mutilating behaviour is by now well documented. …
>
> Survivors [of child abuse] who self-mutilate consistently describe a profound disassociative state preceding the act. … The mutilation continues until it produces a powerful feeling of calm and relief; physical pain is much preferable to the emotional pain that it replaces. …
>
> Self-injury is also frequently mistaken for a suicidal gesture. …

As can be seen from the above passage, there is a body of expert opinion that self-injury is intended not to kill, but, rather, to relieve unbearable emotional pain, and many victims of child abuse (which includes rape of a young girl) regard it, paradoxically, as a form of self-preservation.

45 In making these points, we would like to emphasise that we are *not* saying that there was indeed a causal link between the Victim's change in behaviour and the Respondent's many years of sexual assault against her or that the Victim had developed lesbian tendencies. While lesbianism may be a common consequence of sexual abuse, it is not an *inevitable* consequence. It is also possible to attribute the Victim's self-mutilation to behaviour brought about by normal adolescent hormonal changes. As Wendy Harvey and Paulah Edwards Dauns cautioned in *Sexual Offences Against Children and the Criminal Process* (Butterworths, 1993) when discussing behavioural problems (including self-mutilation) exhibited by child victims of sexual offences (at pp 29–30):

> The indicators described above [including, *inter alia*, a deterioration in school performance, difficulties in making friends and clinical depression] should only alert the professional as to the possibility of a trauma such as child sexual assault. The professional is obligated, when faced with suspicious behaviour, to investigate if abuse has occurred and/or is occurring.
>
> The child may exhibit only a few or a great many of the behavioural indicators mentioned. *The behaviours can be seen in children of all ages and in children of both sexes and, except for sexually acting out, are not specific to child sex abuse*.
>
> [emphasis added]

The point that we wish to make is that judges are not psychiatrists. The mere fact that a psychiatrist has not said that there is a causal link between two events does not necessarily mean that there is indeed no causal link (for instance, the psychiatrist might not, in the first place, have been asked about the possibility of a causal link existing between the events in question). Greater care, in our view, should have been taken in dealing with the issue of possible harm to the Victim as a result of the Respondent's offences in the present case.

Mitigating factors

Forgiveness

46 As we pointed out earlier (see [26] above), in any particular case of rape of a young girl, there may be mitigating factors that would justify a sentencing judge imposing the minimum sentence mandated by s 376(2) of the Penal Code. In the present case, the Judge did point to a few factors which he considered to be sufficient to justify the mandatory minimum sentence (see [10] of the Judgment). In this regard, as mentioned earlier (at [15] above), the mitigating factor on which the Judge appears to have placed the greatest emphasis was that of the forgiveness expressed by the Victim and her mother *vis-à-vis* the Respondent. The Judge, at [10] of the Judgment (reproduced at [11] above), was of the view that forgiveness was a virtue that was more often preached than practised, and extolled it as a balm to both the person forgiving (*ie*, the victim) as well as the person being forgiven (*ie*, the offender). He considered the Victim's and her mother's forgiveness of the Respondent relevant and, furthermore, it would appear, sufficient to justify imposing the minimum punishment on the Respondent.

47 There are two aspects of the Judge's acceptance of forgiveness as a mitigating factor that we wish to address. The first is the concept of forgiveness and its proper role in sentencing; the second is the problem of establishing forgiveness as a genuine fact.

(1) Forgiveness as a mitigating factor in sentencing

48 In our view, whilst forgiveness is a great force for good to the extent that the act of forgiving often has a beneficial effect on the victim (such as enabling him or her to let go of the pain and hurt inflicted by the offender), there is little place for forgiveness in the field of criminal law, which punishes offenders on the basis that they have committed criminal acts against the State.

49 Many legal scholars have conceptualised forgiveness as an internal change on the part of the individual victim that does not bring about any external or public consequences. For example, one scholar has described forgiveness as an attitude characterised by the presence of good will or a lack of personal resentment on the part of the victim towards the offender for the wrong done (see Kathleen Dean Moore, *Pardons: Justice, Mercy, and the Public Interest* (Oxford University Press,

1989) at p 184). The concept of forgiveness as an *internal* change would, *ex hypothesi*, mean that the victim's *forgiveness* of the offender *may have no bearing on society's (external) demand for punishment* (see Susan Bandes, "When Victims Seek Closure: Forgiveness, Vengeance and The Role of Government" (2000) 27 Fordham Urb L J 1599 at 1603). Indeed, *one may punish and forgive*, as "forgiveness is solely concerned with a change of heart or attitude while ... [punishment] is a legal, public relationship" (see P E Digeser, "Justice, Forgiveness, Mercy and Forgetting: The Complex Meaning of Executive Pardoning" (2003) 31 Cap U L Rev 161 at 165).

50 In a similar vein, Judge Richard Lowell Nygaard of the US Court of Appeals for the Third Circuit, writing *ex curia* in "On the Role of Forgiveness in Criminal Sentencing" (1997) 27 Seton Hall L Rev 980, noted that forgiveness did not release the offender from his liability for punishment. He explained (at 984):

> A pardon is an executive act that relieves an offender from some penalty he is enduring. Amnesty releases one from even the accused status and actually results in the offending act being considered acceptable. *Forgiveness is at once more and less. It is more than an act – it is an attitude. It is less, however, than a release from prosecution or penalty.* [emphasis added]

Likewise, Robert D Enright and Bruce A Kittle, in their article, "Forgiveness in Psychology and Law: The Meeting of Moral Development and Restorative Justice" (2000) 27 Fordham Urb L J 1621, have pointed out (at 1631) that:

> Forgiveness is *not a substitute for justice*. If an offender apologises and if a victim accepts that apology through forgiving, the *offender still has a debt to pay, whether to the victim, to the state, or [to] both*. [emphasis added]

51 We agree with the above views. The forgiveness shown by the victim to the offender should not impinge on the sentence to be passed by the court as forgiveness bears no relation to liability for punishment. We recognise, however, that forgiveness may have a significant role in sentencing where the concept of restorative justice features in the legal system in question. This theory of criminal justice seeks to restore the familial or social relationship between the victim and the offender which has been broken or damaged by the offence committed by the latter. The victim's forgiveness of the offender may bring about the reconciliation between the parties that is necessary for the restoration of their relationship. In short, restorative justice focuses on the well-being of the immediate parties affected by the offence, rather than that of society as a whole.

52 Centuries ago, the criminal justice system in England adopted a restorative approach. The emphasis was on healing and reconciliation as between the victim and the offender, even for severe offences. With the reign of William the Conqueror, the criminal justice system, as it then stood, changed drastically. A distinction was created between liability for private wrongs and liability for public wrongs. Sir William Blackstone explained clearly the distinction between public wrongs and private wrongs in *Commentaries on the Laws of England* (A Strahan, 15th Ed, 1809) vol 4, as follows (at p 5):

> [P]rivate wrongs, or civil injuries, are an infringement or [a] privation of the civil rights which belong to individuals, con[s]idered merely as individuals: public wrongs, or crimes and [misdemeanours], are a breach and violation of the public rights and duties, due to the whole community, con[s]idered as a community, in [its social] aggregate capacity.

As a result of the above change in the English criminal justice system, where a public wrong was committed, the individual victim was replaced by the State. The offence was considered to be

committed against the State and the liability of the offender was, accordingly, owed first and foremost to the State. This is the criminal justice system which Singapore has inherited and maintains to this day. Restorative justice, therefore, does not have a major role to play in our present system (save, perhaps, in respect of juvenile offences, where the Community Court conducts victim-offender mediation).

53 Where restorative justice is not one of the main aims of the criminal justice system in question, there may be hesitation in allowing the victim's forgiveness of the offender to have an influence on the sentence to be imposed on the latter. As observed in Ashworth ([37] *supra*) at p 356:

> In the context of a sentencing system whose primary aim is not restorative ... there must be grave doubts about allowing a victim to voice an opinion as to sentence. It is unfair and wrong that an offender's sentence should depend on whether the victim is vindictive or forgiving: in principle, the sentence should be determined according to the normal effects of a given type of crime, without regard to the disposition of the particular victim. If it is then said that allowing the victim to make a statement on sentence is not the same as allowing the victim to determine the sentence, one wonders about the point of the exercise. Victims' expectations might be unfairly raised and then dashed if a court declines to follow the suggestions made, and the whole process might appear to victims as a cruel pretence.

54 Drawing from this passage, the general view on the role of forgiveness as a mitigating factor in jurisdictions where restorative justice is not an objective of the criminal justice system (such as England and Singapore) is that the victim's forgiveness of the offender should not prevent the court from meting out what would otherwise be the appropriate sentence. This is demonstrated by the following English cases:

(a) In *R v William John Buchanan* (1980) 2 Cr App R (S) 13, the offender was sentenced to two years' imprisonment for attacking his domestic partner with a knife. He appealed against the sentence. One of the points raised by the Defence in the appeal was that the victim had written a "long and loving letter expressing her feelings and her forgiveness" (*id* at 14). Bridge LJ, delivering the judgment of the English Court of Appeal, held that the offence committed by the offender was a serious one; thus, notwithstanding the victim's letter, the court had to impose a sentence appropriate to the gravity of the offence.

(b) In *Attorney-General's Reference No 18 of 1993* (1994) 15 Cr App R (S) 800, the offender was sentenced at first instance to two years' probation for using an iron bar to strike a pregnant woman and her three-year-old nephew. The trial court placed considerable emphasis on the letters of forgiveness from the victims' family, which stated, *inter alia*, that the offender had been forgiven and had already been punished sufficiently by being remanded in custody pending trial. The Crown appealed against the leniency of the sentence. The English Court of Appeal held that the trial court had been overly influenced by the letters of forgiveness and that a sentence of imprisonment should have been imposed. However, because there were exceptional circumstances (in the form of a further letter from the victims' family pleading for leniency as well as a probation report indicating that the offender had responded favourably to the regime imposed upon him in the six months since he was sentenced to probation), the court held that no useful purpose would be served by sending the offender to prison.

(c) In *R v Adam John Nunn* [1996] 2 Cr App R (S) 136 ("*Nunn*"), the English Court of Appeal was of the opinion that the victim's views should generally have no impact on sentencing. Judge J stated as follows (at 140):

> We mean no disrespect to the mother and [the] sister of the deceased, but the opinions of the victim, or the surviving members of the family, about the appropriate level of sentence do not provide any sound basis for reassessing a sentence. If the victim feels utterly merciful towards the criminal, and some do, the crime has still been committed and must be punished as it deserves. If the victim is obsessed with vengeance, which can in reality only be assuaged by a very long sentence, as also happens, the punishment cannot be made longer by the court than would otherwise be appropriate. Otherwise cases with identical feature[s] would be dealt with in widely differing ways leading to improper and unfair disparity, and even in this particular case, as the short judgment [of the trial judge] has already indicated, the views of the members of the family of the deceased are not absolutely identical.
>
> If carried to its logical conclusion the process would end up by imposing unfair pressures on the victims of crime or the survivors of a crime resulting in death, to play a part in the sentencing process which many of them would find painful and distasteful. This is very far removed from the court being kept properly informed of the anguish and suffering inflicted on the victims by the crime.

This passage from *Nunn* has been referred to with approval in *R v Gerard Martin Roche* [1999] 2 Cr App R (S) 105 ("*Roche*"), *R v James Benjamin Perks* [2001] 1 Cr App R (S) 19, *R v Christopher Webster* [2001] EWCA Crim 389, *R v James Arthur O'Brien* [2001] 1 Cr App R (S) 22, *Attorney-General's Reference No 11 of 1998* [1999] 1 Cr App R (S) 145, *R v Stuart Brown Matthews* [2003] 1 Cr App R (S) 26 and *R v Emrah Joseph Thompson* [2000] 1 Cr App R (S) 85.

55 A similar position has been adopted by the New South Wales Court of Criminal Appeal. In *R v Palu* (2002) 134 A Crim R 174, the offender fought with his friend while drunk and inflicted grievous bodily harm on the latter. Both parties, however, remained friends. The trial judge, although of the view that the offender was guilty, adjourned the proceedings and granted bail to the offender under s 11 of the Crimes (Sentencing Procedure) Act 1999 (NSW) (this provision allowed the trial judge to defer sentencing for the purposes of, *inter alia*, allowing the offender to demonstrate that rehabilitation had taken place). The Crown was dissatisfied with the trial judge's decision and appealed. The New South Wales Court of Criminal Appeal observed that the trial judge appeared to have been unduly influenced by the fact that the victim and the offender were still friends notwithstanding the incident, and held (at [37]):

> *The attitude of the victim cannot be allowed to interfere with a proper exercise of the sentencing discretion. This is so whether the attitude expressed is one of vengeance or of forgiveness*: *R v Glen* (unreported, Court of Criminal Appeal, NSW, No. 60738 of 1993, 19 December 1994). Sentencing proceedings are *not* a private matter between the victim and the offender, not even to the extent that the determination of the appropriate punishment may involve meting out retribution for the wrong suffered by the victim. *A serious crime is a wrong committed against the community at large* and *the community is itself entitled to retribution*. In particular, crimes of violence committed in public are an affront to the peace and good order of the community and require deterrent sentences: *R v Henderson* (unreported, Court of Criminal Appeal, NSW, 5 November 1997). Matters of general public importance are at the heart of the policies and principles that direct the proper assessment of punishment, the purpose of which is *to protect the public, not to mollify the victim*. [emphasis added]

This passage has since been applied by the Supreme Court of New South Wales in *R v Huynh* [2003] NSWSC 1066 and *R v Newman* (2004) 145 A Crim R 361.

56 We share the same views as those expressed in Ashworth ([37] *supra*) (see the passage

reproduced at [53] above) as well as those of the English and the Australian courts in the aforementioned cases at [54]–[55] above. The forgiving attitude of the victim should not affect the sentence to be imposed by the court. It is a private matter between the victim and the offender, and should not be allowed to influence the appropriate sentence to be imposed on the latter. With respect to aggravated rape in the form of rape of a young girl by her own father (which is a sexual offence of a depraved and heinous nature), the Legislature has settled the gravity of this offence by mandating a minimum sentence of eight years' imprisonment and caning of not less than 12 strokes (see s 376(2) of the Penal Code). The nature and gravity of the minimum sentence mandated by law, in itself, speaks against the victim's forgiveness having any mitigating weight where this particular offence is concerned.

57 Our opinion on the *general* significance of forgiveness in sentencing having been stated, we do acknowledge, however, that some English cases have established that forgiveness may be taken into account (outside the context of restorative justice) to moderate the punishment in two situations drawn from, *inter alia*, a case commentary on *Nunn* ([54] *supra*) in the Criminal Law Review (see [1996] Crim L R 210 ("the Criminal Law Review commentary")). These two situations were summarised by Lord Bingham CJ in *Roche* ([54] *supra*) at 108–109 as follows:

> (a) situations where the sentence imposed on the offender was aggravating the victim's distress; and
>
> (b) situations where the victim's forgiveness provided evidence that his or her psychological and/or mental suffering as a result of the offender's criminal conduct must be very much less than would normally be the case.

58 The first situation was considered in *Nunn*. That case involved a young man who had caused the death of his best friend by dangerous driving. He was sentenced at first instance to four years' imprisonment; he was also disqualified from driving for five years and was ordered to retake his driving test. The offender appealed against the sentence imposed. While there was no evidence of forgiveness on the part of the deceased victim's family, the English Court of Appeal was given lengthy written statements from the mother and one of the sisters of the deceased victim asserting, in essence, that the length of the sentence imposed on the offender had made it more difficult for the mother and the sister to come to terms with the loss and grief which they suffered following the death of the victim. Judge J held that this was "clear evidence" (*id* at 141) that the length of the sentence was causing the deceased victim's family additional grief, and thus justified the court reducing the sentence while being consistent with its continuing public duty to impose appropriate sentences for the offence of causing death by dangerous driving. The offender's term of imprisonment was accordingly reduced to three years.

59 The first situation had no relevance to the present appeal. We found that there was no clear evidence that the meting out of the appropriate sentence on the Respondent would aggravate the distress of the Victim. The Victim appeared to pity the Respondent more than anything else. In her letter to the court dated 6 August 2007, the Victim wrote: "I [felt] very sorry and sad for him when I saw him in court … as he had grown so thin and looked frail and weak". The rest of her letter contained her declaration of her forgiveness of the Respondent and her request that the Respondent be treated with leniency. Pity, rather than the possibility of any aggravation of distress, was likewise seen in the Victim's most recent letter to this court (dated 7 January 2008). In that letter, the Victim stated:

> One year had [*sic*] passed and we would like to carry on with our life and also I do not want to see him [*ie*, the Respondent] in prison for many[,] many years as he is already old and hope [*sic*]

> that his sentence will not be prolong [*sic*].
>
> Whatever ... has happened with regards to my daddy, I have forgiven him. I still care for my daddy and me [*sic*] my mom, my sister visted [*sic*] him on X'mas [*sic*] eve and we have corresponded too.

The other letters from the Victim and her mother (see [10] above) contained the same themes of pity, forgiveness and leniency. This was in marked contrast with the fact situation in *Nunn*, where the victim's mother had told the court, via a written statement, that (*id* at 140):

> While ... [the offender] remains in prison, *I will remain concerned about him, worrying about him and this will continue to be a source of additional grief to me*. [emphasis added]

6 0 The second of the two exceptions outlined at [57] above stems from the English Court of Appeal's decision in *R v James Kevin Hutchinson* (1994) 15 Cr App R (S) 134 ("*Hutchinson*"). In that case, the offender was charged with the rape of his former domestic partner. The victim attempted to withdraw the charges before as well as during the course of the trial; she also told the court that she still loved the offender. The offender was, however, convicted of the offence and sentenced to six years' imprisonment. On appeal by the offender, Owen J, who delivered the judgment of the English Court of Appeal, observed (at 137):

> It seems that the fact of [the victim's] forgiveness [of the offender] must mean that the psychological and mental suffering must be very much less in those circumstances than would be the case in respect of a woman who very understandably could not forgive such an offence as that with which we are dealing [*ie*, the offence of rape]. Accordingly, some mitigation must be seen in that one factor.

Owen J then proceeded to order that the original sentence be quashed and substituted with a sentence of five years' imprisonment. That having been said, the boundaries of this exception are still murky. In *Roche* ([54] *supra*), Lord Bingham CJ quoted (at 109), without disapproval, the analysis in the Criminal Law Review commentary ([57] *supra*) of the decision in *Hutchinson*, as follows (see the Criminal Law Review commentary at 212):

> The victim had attempted to withdraw the charges and had forgiven the appellant; the Court, while accepting that this was not in itself a major consideration as the offence was "not only committed against [the victim] but against the whole peace of the country", found that the "fact of forgiveness must mean that the psychological and mental suffering [of the victim] must be very much less in those circumstances" than in the normal case of rape. In other words, although the victim's forgiveness is not in itself a reason for mitigating the sentence, for the reasons given in this judgment, it may – *probably in a limited range of offences only* – be treated as evidence that the damage done by the offence to the victim is less than would normally be the case. [emphasis added]

The above interpretation of the decision in *Hutchinson* raises the question of what offences would constitute the "limited range of offences" referred to in the Criminal Law Review commentary. In our view, the "limited range of offences" would surely not include the offence of rape of a young girl, especially if the victim is the offender's own child, as this offence is one of the most reprehensible offences which a person can commit. Whenever this particular offence is committed, the public interest requires that the offender be punished with what he deserves, regardless of whether or not the victim, to whom the law imputes an inability to consent to the sexual acts committed against her (as she is a minor), displays a (relative) lack of suffering.

(2) Forgiveness and mercy distinguished

61 Unlike forgiveness (which does not impinge on the offender's liability to punishment (see [51] above)), mercy is inexorably linked to punishment in that mercy entails the reduction of punishment *out of compassion*. As *The Oxford English Dictionary* (Clarendon Press, 2nd Ed, 1989) vol 9 states (at p 626), mercy is "kind and compassionate treatment in a case where severity is merited or expected". Forgiveness and mercy are distinct concepts. There can be forgiveness without mercy, and *vice versa* (see Stephanos Bibas, "Forgiveness in Criminal Procedure" [2007] 4 Ohio St J Crim L 329 at 333). In the present case, the undue emphasis which the Judge placed on the forgiveness shown by the Victim and her mother as justification for meting out the mandatory minimum sentence required under s 376(2) of the Penal Code indicates that the Judge might have conflated mercy with forgiveness and assumed that the former was *ipso facto* a consequence of the latter (and *vice versa*). If the Judge did indeed do so, he erred in his approach.

62 William Shakespeare famously wrote in *The Merchant of Venice* (in Act IV, Scene I, lines 184–187) that:

> The quality of mercy is not strain'd,
>
> It droppeth as the gentle rain from heaven
>
> Upon the place beneath: it is twice bless'd,
>
> It blesseth him that gives and him that takes ...

This passage was a poetical plea by Portia to Shylock to show mercy to Antonio by not demanding a pound of Antonio's flesh pursuant to a bond executed by Antonio in Shylock's favour (Antonio had executed the bond as security for a loan to his friend, Bassanio, by Shylock). Unmoved, Shylock replied, "I crave the law" (*id* at Act IV, Scene I, line 206). Bassanio then urged Portia to (*id* at Act IV, Scene I, lines 215–216):

> Wrest once the law to your authority:
>
> To do a great right, do a little wrong ...

Portia, however, declined, stating (*id* at Act IV, Scene I, lines 218–222):

> It must not be. There is no power in Venice
>
> Can alter a decree established:
>
> 'Twill be recorded for a precedent,
>
> And many an error by the same example
>
> Will rush into the state. It cannot be.

Portia justifiably took the view that the law could not be disregarded to deprive Shylock of his contractual rights, and that any mercy which might be shown to Antonio could only issue from Shylock by his own *private* choice.

63 In contrast, the prosecution of the Respondent for the Rape Offences in the instant case was a *public* matter. It was not a private matter either between the Respondent and the Victim and their family, or between the Judge and the Respondent. It is, of course, impossible to eliminate completely the influence which compassion may have on a particular judge when determining the severity or otherwise of the sentence to be imposed on an offender in a particular case. However, compassion due to the personal make-up or sensibility of the judge should not be allowed to intrude too much into the sentencing process as it might otherwise lead to unprincipled sentencing. Therefore, judges must exercise great caution in not letting mercy influence the sentences which they impose as there is a risk that sentencing could otherwise degenerate into an exercise of personal whim or indulgence. The purpose of sentencing guidelines or sentencing precedents is to provide consistency in order to eliminate precisely this risk.

64 We acknowledge, however, that there is room for mercy to be taken into account as a legitimate factor in the sentencing process where restorative justice is the primary objective of the sentencing regime in question. But, even then, there will be difficulty in determining how the relationship between the victim and the offender can truly be restored, especially where the offence concerned is (as in the present appeal) rape of a young girl by her own father.

(3) Establishing forgiveness as a fact

65 We turn now to the difficulty of proving forgiveness as a fact. The Judge accepted the Defence's mitigation submission that the Victim and her mother had forgiven the Respondent (see [10] of the Judgment). Be that as it may, we would like to observe that determining the truth or otherwise of an act of forgiveness is not an easy task. Given the subjective nature of forgiveness, it would invariably be difficult to ascertain the veracity of the forgiveness expressed by the victim *vis-à-vis* the offender, particularly where there is a familial relationship between them. In *R v Hester* [2007] VSCA 298 (a decision of the Supreme Court of Victoria), Neave JA observed (at [27]) that in domestic violence cases, it was common for the perpetrators of domestic violence to express penitence and persuade their victims to reconcile. Victims, as a result, often ended up being assaulted on several occasions before they finally managed to pluck up the courage to leave an abusive relationship. These matters, according to Neave JA, should be considered by the trial judge in considering the weight to be given to the victim's avowed forgiveness of the offender, and "evidence of forgiveness of the victim of domestic violence should be treated with extreme caution" (*ibid*).

66 We agree entirely with these observations, which are applicable to families all over the world. Where offences involving (*inter alia*) sexual abuse within a familial context are concerned, judges should exercise caution in taking expressions of forgiveness by the victim and/or the victim's family members as the truth. The danger of undue influence being placed on the victim to forgive the offender is exacerbated where the former is a young child. In the present case, as the Prosecution submitted, it was not beyond reasonable contemplation that the Victim might have penned her letters to the court in the misguided hope of keeping her family intact, or as a result of indirect pressure by other family members to forgive the Respondent and start afresh.

(4) Summary of our views on forgiveness as a mitigating factor

67 To draw the various threads of analysis set out above (at [48]–[66]) together, the victim's forgiveness of the offender should not have any effect on the sentence to be imposed on the offender, subject, possibly, to the two exceptional situations outlined at [57] above. On the facts of the present appeal, it was clear that little weight, if any, should have been accorded to the forgiveness expressed by the Victim and her mother *vis-à-vis* the Respondent.

Other mitigating factors relied on by the Judge

68 We consider, next, the other mitigating factors (apart from forgiveness) which the Judge took into account in deciding to impose on the Respondent the mandatory minimum sentence, namely:

(a) the Respondent's previous good behaviour;

(b) the hardship and stress experienced by the Respondent in his daily life;

(c) the Respondent's remorse for his conduct; and

(d) the lack of violence in the commission of the offences in question.

(1) The Respondent's previous good behaviour

69 It is well established that little weight should be given to the offender's previous good behaviour where serious offences are concerned. This factor and the offender's lack of antecedents were discussed in the Panel's Advice ([27] *supra*), and it was concluded (at para 46) that they were of little mitigating value:

> The [English] Court of Appeal said, in *Billam* [([41] *supra*)], that the defendant's previous good character was of 'only minor relevance', and the [Sentencing Advisory] Panel agreed, in its consultation paper [*ie*, the consultation paper issued by the Sentencing Advisory Panel on 12 September 2001 setting out its provisional views on sentencing for the offence of rape], that good character should not be treated as a significant mitigating factor in relation to such a serious offence as rape. There was a large measure of agreement with this view among respondents [to the consultation paper]. Some pointed out that absence of a criminal record was not necessarily to be equated with positively good character. The [Sentencing Advisory] Panel agrees that neither should be accorded much importance for sentencing in the context of rape.

(2) The hardship and stress experienced by the Respondent

70 The Judge referred (at [3] of the Judgment) to the Respondent's hard life and daily stress in considering defence counsel's mitigation submissions. In our view, while these factors may possibly have some mitigating effect in minor offences such as shoplifting or simple theft of consumer goods to relieve the offender's personal needs, they certainly cannot mitigate the moral depravity and penal gravity of the offence of rape of a young girl – especially where the victim is the offender's own daughter – no matter how strong the offender's sexual urges might have been since there are other ways of satisfying such urges without causing harm to others.

(3) The Respondent's guilty plea and remorse

71 In *Frederick Chia* ([9] *supra*), the Court of Criminal Appeal stated (at 367, [20]), in the context of the offence of rape *simpliciter* under s 376(1) of the Penal Code, that a guilty plea which saved the victim further embarrassment and suffering would be an important consideration and would merit a reduction of one-quarter to one-third of the sentence. However, a plea of guilt does not *ipso facto* entitle the offender to such a discount in his sentence. Whether an early plea of guilt is to be given any mitigating value depends on whether it is indicative of genuine remorse, as assessed based on a holistic overview of the continuum of relevant circumstances (see *Angliss Singapore Pte Ltd v PP* [2006] 4 SLR 653 at [77]).

72 The court should also carefully examine the conduct of the offender after the commission of the offence in order to determine whether the latter is genuinely contrite. In *PP v NF* ([9] *supra*), the offender surrendered himself to the police and apologised for his actions. However, on a closer examination of the facts, Rajah J was not satisfied that there was any manifestation of sincere contrition on the offender's part which would warrant a reduction in the sentence. The offender had apologised for the rape only after it had been exposed and, prior to that, had tried to deny the incident. Moreover, he had surrendered to the police only after the victim's teacher had lodged a report against him. Rajah J held that if the offender had been genuinely contrite for his depraved actions, he would not have hesitated to apologise to the victim. Indeed, if the victim had not unexpectedly revealed to her mother that she had been raped by the offender, the offender might well have been content to pretend that nothing was amiss. For these reasons (see *PP v NF* at [58]), Rajah J felt that he could not accord significant weight to the offender's plea of guilt, save as an indication of the offender's apparent willingness to facilitate the course of justice.

73 In the present case, the Respondent had informed this court, through a letter dated 8 January 2008, that he regretted what he had done and was sorry. In the letter, he stated:

> I am deeply remorseful and sorry for the crime and the sins that I have committed against my daughter and her mother. The pain and the shame in my heart will remain with me till the day I leave this world. There are no amount of words that could justify this indispicable [*sic*] act. I am still going through a lot of pain in my heart for the tragedy that I have brought upon my own daughter and her mother.

We noted, however, that, like the offender in *PP v NF*, the Respondent did not own up to his misdeeds of his own volition. Instead, it was the Victim's aunt and the Victim's mother who reported his offences to the police. The Respondent's attitude towards the Victim can be seen from his conduct after she told him, sometime between October 2006 and November 2006, that she did not like what he had been doing to her and told him to stop his perverse acts. At that time, the Respondent assured the Victim that he would not do anything untoward to her again. Despite this promise, the Respondent subsequently outraged the Victim's modesty again in November 2006 (that incident was the subject matter of the last of the charges enumerated at [6] above). His abuse of the Victim stopped only when he was finally arrested. The Judge made no reference to these facts in assessing whether the Respondent had shown genuine remorse. In our view, the Respondent's plea of guilt, notwithstanding his letter to this court, should have been accorded little or no weight.

(4) The lack of violence in the commission of the offences

74 The Judge referred (at [3] of the Judgment) to the Defence's mitigation submission that the Respondent had not used any violence or threats against the Victim while committing the offences in question. While the presence of violence would undoubtedly be an aggravating factor (see, *inter alia*, *Roberts* ([27] *supra*) and item (i) of Lord Woolf's list in *Millberry* at [27] above), it does not follow that the absence thereof would be a mitigating factor. This factor, accordingly, should not have been taken into account as a mitigating factor in the present case.

Our decision as to the appropriate sentence

75 We agreed with the Prosecution that the sentence imposed by the Judge was overly lenient and unprecedented for this type of rape. There was no justification for imposing only the mandatory minimum sentence on the Respondent as it was inconsistent with sentencing precedents to do so. The imposition of the minimum sentence breached the principle of consistency in sentencing in a way that was not warranted on any view of the aggravating factors present in this case, which far

outweighed the mitigating factors.

76 We further noted that s 376(2) of the Penal Code mandates that a *single* offence of rape of a young girl is to be punished with a minimum sentence of eight years' imprisonment and 12 strokes of the cane. A minimum sentence, in general, is meant for an offender who exhibits the least degree of culpability, *ie*, who commits the crime in question in the absence of any aggravating factors. The Respondent, in contrast, committed one of the cruellest (psychologically) and vilest (morally) sexual offences known to civilised society He sexually abused his biological daughter over a period of four years when the latter was aged between ten and (below) 14. Surprisingly, the enormity of this conduct did not appear to have any effect on the Judge's evaluation of the appropriate sentence on the Respondent. Furthermore, the Judge also gave insufficient weight to the aggravating factors, whilst placing, at the same time, too much weight to factors (such as the forgiveness shown by the Victim and her mother) which he regarded as mitigating the Respondent's offences. In so doing, the Judge treated these offences as having been committed with the least degree of culpability. In our view, this approach rendered the sentence imposed by the Judge wrong in principle (and also, ultimately, manifestly inadequate).

77 As mentioned earlier (at [23] above), the sentencing precedents have established a sentencing benchmark of 12–15 years' imprisonment per charge for the offence of rape of a young girl by a family member. This harsh range reflects the extreme repulsiveness of this offence. The mandatory minimum sentence of eight years' imprisonment and 12 strokes of the cane prescribed by the Legislature for this offence must also be given due regard; *ex hypothesi*, when the offence involves familial rape, the sentence for the offender must be enhanced. Although, on the evidence, the Respondent posed a low level of risk to society if he were released earlier (which is a valid consideration (see [28] above)), we did not think that this factor alone justified a departure from the sentencing precedents.

78 Taking into account all the relevant factors and the sentencing precedents, we were of the view that imprisonment of 12 years for each of the Rape Offences, with two of the terms running consecutively as required by s 18 of the Criminal Procedure Code – *ie*, a total of 24 years' imprisonment – was appropriate and necessary to serve the purposes of retribution and deterrence in the instant case. We would add that due to the age of the Respondent (*ie*, 55 years old), we were of the opinion that a sentence at the higher end of the sentencing benchmark, *viz*, 15 years' imprisonment per charge (which would result in a total of 30 years' imprisonment based on the sentences for two of the Rape Offences running consecutively), was not appropriate. In this regard, we would add that, in general, the mature age of the offender does not warrant a moderation of the punishment to be meted out (see *Krishan Chand v PP* [1995] 2 SLR 291 at 294, [8]). But, where the sentence is a long term of imprisonment, the offender's age is a relevant factor as, unless the Legislature has prescribed a life sentence for the offence, the court should not impose a sentence that effectively amounts to a life sentence. Such a sentence would be regarded as crushing and would breach the totality principle of sentencing. In the present case, the Respondent will, with remission for good behaviour, be released at an age that should give him some time to spend with his family and to fulfil his wish to make amends to the Victim.

Conclusion

79 For the foregoing reasons, we allowed the present appeal and substituted the sentence imposed by the Judge with a sentence of 12 years' imprisonment for each of the Rape Offences, with two of the sentences to run consecutively so as to make a total of 24 years' imprisonment.