IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC 301

Magistrate's Appeal No 9280 of 2021

Between

Public Prosecutor

… *Appellant*

And

GED

… *Respondent*

Magistrate's Appeal No 9008 of 2022/01

Between

GEH

… *Appellant*

And

Public Prosecutor

… *Respondent*

Magistrate's Appeal No 9008 of 2022/02

Between

Public Prosecutor

… *Appellant*

And

GEH

… *Respondent*

JUDGMENT

[Criminal Law — Offences — Sexual offences — Section 377BE(1) of the Penal Code (Cap 224, 2008 Rev Ed)]
[Criminal Procedure and Sentencing — Sentencing — Benchmark sentences]

Public Prosecutor
v
GED and other appeals

[2022] SGHC 301

General Division of the High Court — Magistrate's Appeal No 9280 of 2021 and Magistrate's Appeal No 9008 of 2022
Sundaresh Menon CJ, Steven Chong JCA and Vincent Hoong J
21 July 2022

1 December 2022 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 Introduced by s 120 of the Criminal Law Reform Act 2019 (Act 15 of 2019) with effect from 1 January 2020, s 377BE(1) of the Penal Code (Cap 224, 2008 Rev Ed) ("the Penal Code") specifically criminalises – for the first time in our law – the distribution of intimate images or recordings of another person without that person's consent. The creation of this specific, standalone offence had been recommended by the Penal Code Review Committee in its August 2018 report, which had noted that a "stronger and more consistent response" was needed to address this social ill as the reliance on a "patchwork of existing provisions" had created the risk of inconsistent legal responses to similar cases. This "patchwork" comprised, for example, s 292(*a*) of the Penal Code, which criminalised the distribution of obscene books; s 383 of the Penal Code, which

provided for the offence of extortion; and s 503 of the Penal Code, which provided for the offence of criminal intimidation (Penal Code Review Committee, *Report* (August 2018) at pp 81–85). Recognising that the distribution of intimate images "ha[s] the potential to cause great harm" to victims, particularly in cases where such distribution is facilitated by modern technology, Parliament enacted s 377BE alongside a host of other specific offence-creating provisions with the intention of "provid[ing] proper framing for such offences and adequate punishments" (*Singapore Parliamentary Debates, Official Report* (6 May 2019) vol 94 (K Shanmugam, Minister for Home Affairs)).

2 In *Wong Tian Jun De Beers v Public Prosecutor* [2021] SGHC 273 ("*Wong Tian Jun De Beers*") at [56] and [58], the General Division of the High Court stressed the importance of utilising the full range of sentences prescribed by s 506 of the Penal Code for the offence of criminal intimidation. The court noted that these observations would apply equally to s 377BE of the Penal Code, for which a sentencing framework should be considered more fully when the opportunity arose in an appropriate case. The Magistrate's Appeals presently before this court – HC/MA 9280/2021 ("MA 9280") and HC/MA 9008/2022/01 and HC/MA 9008/2022/02 ("MA 9008") – provide us with such an opportunity. At present, there is a dearth of reported and reasoned decisions on sentencing for such offences, and the prevailing sentences have tended to be clustered around the lower end of the statutorily prescribed range. We therefore think it important to provide some guidance as to the appropriate sentencing approach and framework that should be applied for the offence under s 377BE(1) (and punishable under s 377BE(3)), which we refer to as "the Actual Distribution Offence". These appeals also usefully illustrate the variety of circumstances in

which the Actual Distribution Offence may be committed, and which the sentencing framework to be adopted must be capable of taking into account.

3 We begin by setting out the relevant background in respect of MA 9280 and MA 9008. We will then turn to consider the appropriate sentencing framework for the Actual Distribution Offence, before giving our decision on the various issues raised in each appeal.

Background

MA 9280

Facts

4 The offender in MA 9280 ("GED") was just under 26 years old at the material time. He was married to the victim ("V1") but had, by the time of the offences, moved out of their matrimonial home.

5 On 6 February 2020, GED went to V1's home (formerly their matrimonial home) and, with V1's permission, used the toilet. V1 was using her mobile phone in the master bedroom at the time. When GED exited the toilet, he snatched V1's mobile phone from her without her consent and ran out of the house. He did this because he suspected that V1 was having an extramarital affair, and he wanted to search for pictures and messages that might confirm his suspicions. Upon accessing V1's mobile phone, he found several intimate images and video recordings of her, and he used his own mobile phone to take photographs and video recordings of these images and videos. He also took images of text conversations between V1 and her supervisor at work ("the Supervisor"). Thereafter, he went back to V1's home to return her mobile phone to her, but did not tell her that he had taken copies of the intimate images and

recordings. The intimate images and recordings in GED's possession were as follows:

(a) a four-second recording of V1's bare breasts, with her face partially visible;

(b) a 16-second recording of V1 fully naked, with her bare breasts and vagina fully visible; and

(c) an image of V1 and the Supervisor engaging in sexual intercourse. V1 was fully naked and her breasts were visible, and the faces of both V1 and the Supervisor were fully visible ("the Image").

6 On 12 February 2020, at around 8.00am, GED posted the Image on his Facebook page under the "Public" setting, together with the Supervisor's name and occupation. He described the Supervisor as a homewrecker and warned people to be aware of him. He also included other images in the post, including photographs of the Supervisor and the images of text conversations between V1 and the Supervisor. We refer to this as "the First Facebook Post".

7 After the First Facebook Post was published, both V1 and the Supervisor were separately told about it by their friends. The First Facebook Post also went "viral". When GED accessed his Facebook account at around 4.00pm that day, it had attracted about 1,000 comments and 3,000 "likes", and it had been shared about 2,000 times by other Facebook users. Upon seeing this, GED decided to remove the First Facebook Post as he had not expected it to receive so much attention. However, because he wanted to draw the attention of the public to what the Supervisor had done, GED decided to publish a new post on his Facebook account containing an edited version of the Image, in which V1's face was blurred but her breasts and the Supervisor's face were fully visible ("the

Second Facebook Post"). The Second Facebook Post was removed one day later.

The proceedings and decision below

8 On 21 September 2021, GED pleaded guilty to two charges:

(a) one charge of theft in dwelling under s 380 of the Penal Code, by taking V1's mobile phone without her permission on 6 February 2020 (DAC-904515-2021) ("the Theft Offence"); and

(b) one charge of distributing an intimate image under s 377BE(1) and punishable under s 377BE(3) of the Penal Code, by publishing the First Facebook Post (containing the Image with V1's face visible) on 12 February 2020 (DAC-904516-2021).

9 GED consented to two other charges being taken into consideration for the purposes of sentencing:

(a) one charge of possession of intimate images and recordings under s 377BD(1)(*b*) and punishable under s 377BD(2) of the Penal Code, by taking pictures and videos of V1's intimate images and videos without her permission on 6 February 2020; and

(b) one charge of distributing an intimate image under s 377BE(1) and punishable under s 377BE(3) of the Penal Code, by publishing the Second Facebook Post (containing the edited Image with V1's face blurred) later on 12 February 2020.

10 On 3 December 2021, the District Judge ("the DJ") sentenced GED to 12 weeks' imprisonment for his Actual Distribution Offence and one week's

imprisonment for the Theft Offence, to run consecutively, such that the aggregate sentence was 13 weeks' imprisonment: see *Public Prosecutor v GED* [2022] SGDC 6 ("the 9280 GD").

11 With regard to the Actual Distribution Offence, the DJ observed that general deterrence had to feature as a dominant sentencing consideration, given the context in which s 377BE was enacted. Further, a retributive element could also be relevant where serious harm was caused to the victim (see the 9280 GD at [32]). The DJ accepted that the offence-specific and offender-specific factors that the Prosecution had proposed in *Public Prosecutor v Shahrul Nizam Bin Kharuddin* [2021] SGDC 67 ("*Shahrul Nizam*") were relevant to sentencing, alongside several other sentencing factors. These factors "had to be weighed and balanced to arrive at a properly calibrated sentence on the facts of each case" (see the 9280 GD at [33]–[35]). The DJ noted that more harm was caused in the present case than in *Shahrul Nizam* because the Image was distributed to a large number of users on Facebook, but held that it was not so much more egregious that it warranted a sentence of 18 months' imprisonment, which the Prosecution sought and which was more than seven times the sentence of ten weeks' imprisonment imposed in *Shahrul Nizam*. The DJ then considered five unreported cases where offenders had been sentenced under s 377BE(1), and where the imprisonment terms had ranged from five weeks to 27 weeks. Although he accepted that unreported cases had "little or no precedential value", he found them helpful for "comparative purposes" in "deriving a broad sensing of what an appropriate sentencing range in the present case might be", in the absence of any reported decisions on s 377BE(1) or any authoritative sentencing guidelines. The DJ concluded in the circumstances that the present case was not so much more egregious than these five cases as to warrant the much higher

sentence sought by the Prosecution, which seemed manifestly excessive (see the 9280 GD at [38]–[46]).

12 The DJ went on to consider the relevant sentencing factors, beginning with four aspects of this case which increased GED's culpability and the potential harm to V1: (a) that the Image itself was highly intrusive; (b) that V1's face was fully visible in the Image and she was easily identifiable; (c) that the Image was distributed to a large number of people; and (d) that GED re-posted the Image with V1's face blurred in the Second Facebook Post, which was only taken down a day later. However, the DJ rejected the Prosecution's submission that the court should also have regard to the harm caused to the *Supervisor*, noting that there was no charge under s 377BE(1) against GED in relation to the Supervisor. The DJ also found that the Prosecution's submission that GED had acted out of malice, and had intended to cause maximum humiliation to V1, was not borne out by the evidence (see the 9280 GD at [48]–[50]).

13 In GED's favour, the DJ accepted that he was a person who was otherwise of good character. He had no antecedents and his offences were a one-off aberration committed under very acute circumstances when he was in despair over V1's infidelity. His offences therefore did not call for specific deterrence. The DJ also took into account: (a) GED's early plea of guilt; (b) the fact that his motivation in posting the Image was not to spite V1 or extort any concession from her, and he did not seek to cause her maximum humiliation; (c) that what was distributed was an image and not a video recording; and (iv) that the present offence did not involve a breach of trust by GED (see the 9280 GD at [51]).

14 Weighing the various offence- and offender-specific factors, and comparing the sentences imposed in past cases, the DJ concluded that an

appropriate sentence for GED's Actual Distribution Offence in this case was 12 weeks' imprisonment (see the 9280 GD at [54]). On 8 December 2021, the Prosecution appealed against this sentence. No cross-appeal was filed by GED.

MA 9008

Facts

15 The offender in MA 9008 ("GEH") was 38 years old at the material time. He and his wife ("B") were undergoing divorce proceedings at the time of the offence. GEH suspected that B was having an extramarital affair.

16 On 7 February 2020 at approximately 10.00pm, GEH and three other persons (whom we refer to as "C", "D" and "E") went to B's home and followed her when she left her home and boarded a car driven by the victim ("V2"). Suspecting that B and V2 were in a relationship, GEH, C, D and E followed V2's car in their respective vehicles. GEH and E then coordinated a driving manoeuvre to trap V2's car. They then alighted from their vehicles to confront V2. V2 did not initially want to step out of his car but he eventually complied after GEH kicked the side mirror of his car and shouted at him. The parties then proceeded to a grass patch by the side of the road.

17 There, GEH and E (later joined by D) attacked V2 for about half an hour, including by punching and kicking his face and body numerous times while E pinned V2 to the ground in a chokehold. As a result of the attack, V2 suffered the following injuries: a facial contusion, a right floor of orbit fracture, a right maxillary hemoantrum, a right periorbital hematoma, a right clavicle fracture and a minor head injury.

18 While the attack was ongoing, GEH, D and E decided to humiliate V2 further by pulling down his pants and underwear to expose his genitals, hurting him further when he attempted to resist. GEH then used V2's mobile phone without his consent to take a 55-second-long video recording both V2's injured face and exposed penis at length while insulting him verbally ("the Video"). At this point, on D's suggestion, GEH sent the Video to more than 500 of V2's contacts by WhatsApp. The recipients included V2's colleagues, friends, neighbours and sporting teammates. This was designed to humiliate him. GEH also sent a copy of the Video to E. There is also video evidence, which GEH does not challenge, of GEH sending a follow-up voice message using V2's phone stating "Please forward to all people! Right? Forward to all everyone!" ("the Follow-up Message").

19 The police received a call alerting them to the situation at about 11.21pm that night, and they subsequently arrived on the scene. Even upon being told by the police officers to calm down and to stop behaving in a rowdy fashion, GEH, D and E continued to conduct themselves in a disorderly manner by shouting derogatory insults at B and singing "happy birthday" loudly to mock her, while standing along a public road. They only stopped shouting at B when they were placed under arrest.

The proceedings and decision below

20 On 18 October 2021, GEH pleaded guilty to three charges:

(a) one charge of voluntarily causing grievous hurt with common intention under s 325 read with s 34 of the Penal Code, by punching and kicking V2's face and body multiple times, together with D and E (DAC-913702-2020) ("the VCGH Offence");

(b) one charge of distributing an intimate recording under s 377BE(1) and punishable under s 377BE(3) of the Penal Code, by sending the Video of V2 to E and more than 500 of V2's contacts by WhatsApp (DAC-913704-2020); and

(c) one charge of disorderly conduct on a public road with common intention under s 20 of the Miscellaneous Offences (Public Order and Nuisance) Act (Cap 184, 1997 Rev Ed) ("the MOA") read with s 34 of the Penal Code, by shouting and using insulting language despite having been told to stop behaving in a rowdy manner by police officers (together with D and E) (MAC-905573-2020) ("the MOA Offence").

21 GEH consented to three other charges being taken into consideration for the purposes of sentencing:

(a) one charge of criminal intimidation with common intention under s 506 read with s 34 of the Penal Code, by threatening to circulate videos online of V2 being beaten and stripped unless he admitted that he was a party to an extramarital affair;

(b) one charge of insulting B's modesty under s 377BA of the Penal Code, by shouting vulgarities relating to B's genitals; and

(c) one charge of insulting modesty with common intention under s 377BA read with s 34 of the Penal Code, by taking videos of V2's exposed penis without his consent (together with D and E).

22 On 13 January 2022, the Principal District Judge ("the PDJ") sentenced GEH to 18 months' imprisonment for his Actual Distribution Offence, 18 months' imprisonment and four strokes of the cane for his VCGH Offence,

and a fine of $1,500 (in default, six days' imprisonment) for his MOA Offence. The imprisonment terms were ordered to run consecutively, such that the aggregate sentence was 36 months' imprisonment, four strokes of the cane and a fine of $1,500 (in default, six days' imprisonment): see *Public Prosecutor v GEH* [2022] SGDC 25 ("the 9008 GD").

23 In relation to GEH's Actual Distribution Offence, the PDJ reasoned as follows:

(a) As both parties agreed that the offence-specific and offender-specific factors set out in *Shahrul Nizam* were a useful guide, the PDJ proceeded on this basis (see the 9008 GD at [98]–[99]). The PDJ rejected GEH's submission that s 377BE was enacted mainly to tackle "revenge pornography" as this was "nothing more than a convenient label pertaining to a certain fact situation and [did] not necessarily cover the whole spectrum of offences contemplated under [s] 377BE(1)". The PDJ also rejected GEH's submission that a video of the victim engaged in sexual activity fully nude would *always* rank worse, in terms of harm, than a video of the victim partially nude as in the present case. Having regard to the offence-specific factors, the PDJ identified 21 months' imprisonment as the starting point (see the 9008 GD at [106]–[109]).

(b) As for the offender-specific factors, the PDJ regarded the two related charges against GEH that were taken into consideration as an aggravating factor. However, the PDJ viewed GEH's plea of guilt, letter of apology and offer of compensation to V2 as mitigating factors (see the 9008 GD at [110]–[111]).

(c) The PDJ rejected the Prosecution's submission that caning should be imposed for GEH's Actual Distribution Offence on the basis

that the facts disclosed an offence under s 354A of the Penal Code (which attracted mandatory caning). The PDJ noted that GEH had not been charged with any offence under s 354A. In any event, as four strokes of the cane had been imposed for GEH's VCGH Offence (as to which see [24] below), the PDJ did not see the need to impose a further sentence of caning for GEH's Actual Distribution Offence (see the 9008 GD at [113]).

24 For GEH's VCGH Offence, the PDJ applied the two-step sentencing framework set out by the Court of Appeal in *Public Prosecutor v BDB* [2018] 1 SLR 127 ("*BDB*" and "the *BDB* Framework"). First, having regard to the seriousness of the injuries suffered by V2 and the sentencing precedents, the PDJ identified 15 months' imprisonment as the indicative starting point (see the 9008 GD at [74]–[90]). After taking into account the relevant aggravating and mitigating factors, the PDJ held that an uplift of three months' imprisonment was appropriate (see the 9008 GD at [91]–[94]). The PDJ did not think there were any exceptional circumstances warranting a departure from the starting point of caning for GEH's VCGH Offence and held that four strokes of the cane would be appropriate (see the 9008 GD at [97]).

25 Finally, for GEH's MOA Offence, the PDJ noted that it had been held in *Public Prosecutor v Gao Zhengkun* [2019] SGDC 241 ("*Gao Zhengkun*") that the usual sentencing tariff for such offences was a fine. The PDJ was of the view that there was no reason to depart from the starting point of a fine, and that a fine of $1,500 (in default, six days' imprisonment) was appropriate in the circumstances (see the 9008 GD at [114]–[117]).

26 On 13 and 14 January 2022 respectively, GEH and the Prosecution filed cross-appeals against the PDJ's decision. GEH's appeal relates to the sentences

imposed for his Actual Distribution Offence, VCGH Offence *and* MOA Offence, while the Prosecution's appeal relates only to GEH's Actual Distribution Offence and VCGH Offence.

Subsequent events leading up to the hearing of these appeals

27 On 9 March 2022, the Prosecution requested that MA 9008 be heard together with MA 9280 as similar issues would be canvassed in both Magistrate's Appeals. In view of the overlap in the issues to be decided and the novel legal questions raised, the court directed that MA 9280 and MA 9008 be heard together before a three-Judge *coram* pursuant to s 386(1) of the Criminal Procedure Code 2010 (2020 Rev Ed) ("the CPC"). A Young *Amicus Curiae* ("YAC"), Mr Victor Yao Lida, was also appointed to address us on the appropriate sentencing framework.

The parties' cases on appeal

MA 9280

28 The Prosecution submits that the sentence of 12 weeks' imprisonment imposed on GED for his Actual Distribution Offence is manifestly inadequate. It contends, as it did before the DJ, that a sentence of at least 18 months' imprisonment should have been meted out for this offence. The Prosecution places emphasis on the high degree of humiliation, alarm or distress suffered by V1, as well as GED's malice in seeking to cause maximum humiliation to V1. The Prosecution also highlights, as aggravating factors, the fact that GED committed related offences which were part of the same course of conduct, and GED's lack of remorse after the First Facebook Post went "viral".

29 GED, on the other hand, submits that the DJ's decision should be upheld. GED argues that the DJ correctly rejected the Prosecution's submission that he had acted out of malice and had intended to cause maximum humiliation to V1, and correctly found that GED was a person of good character and that the offence was a one-off aberration, committed under acutely distressing circumstances when he was in despair at V1's infidelity. Further, GED submits that the sentencing principles of retribution and deterrence are significantly diminished when the present case is approached holistically, and that V1's "morally revolting conduct" should be "condemned". Finally, GED submits that the DJ was correct to reject the Prosecution's submission that the harm to the Supervisor was an aggravating factor in this case.

MA 9008

The Prosecution's case

30 In GEH's case, the Prosecution contends that the sentences of 18 months' imprisonment for his Actual Distribution Offence, and 18 months' imprisonment and four strokes of the cane for his VCGH Offence, are manifestly inadequate.

31 For GEH's Actual Distribution Offence, the Prosecution submits that a sentence of at least 36 months' imprisonment and three strokes of the cane should have been imposed. The Prosecution contends that severe harm was caused to V2, given the high degree of humiliation, alarm and distress caused; the tangible financial loss suffered; and the fact that he was in a highly vulnerable position when the offence was committed against him. With regard to GEH's culpability, the Prosecution highlights his motivation of revenge in committing the offence and the fact that his offending involved a direct, lengthy and forcible confrontation.

32 For GEH's VCGH Offence, the Prosecution submits that the PDJ erred in applying the *BDB* Framework in two respects. First, the PDJ erred in calibrating the indicative starting point of 15 months' imprisonment, by inaccurately holding that the injuries in the present case were less serious than those in the precedents referred to. Second, the PDJ failed to give due weight to the aggravating factor that the offence was committed in a public place, for which an uplift of at least six months was appropriate. The Prosecution therefore submits that a sentence of at least two years and six months' imprisonment (together with four strokes of the cane) should be imposed for this offence.

33 Taking into account the totality principle, the Prosecution argues (as it did before the PDJ) that an aggregate sentence of at least four years and six months' imprisonment and six strokes of the cane would be appropriate.

GEH's case

34 GEH, on the other hand, argues that the sentences imposed on him by the PDJ are manifestly excessive based on past precedents. He contends that the PDJ did not place enough weight on all the mitigating factors in his case, such as his letter of apology to V2; his attempt to pay V2 compensation; his decision to plead guilty at the first instance and not to question the veracity of V2's victim impact statement; and the fact that he is a first-time offender who co-operated fully with the authorities. GEH also urges the court to take cognisance of the extent to which his mental and emotional state was affected when the offence was committed. In this regard, GEH highlights that he was enraged and shattered by his discovery of evidence of V2 and B's affair (such as B's lingerie found in V2's car and the intimate exchanges between B and V2 in V2's mobile phone) and by their continued denial of the affair. In the circumstances, GEH submits that the aggregate sentence should be nine months' imprisonment with

a $500 fine (in default, one day's imprisonment), comprising the following individual sentences: (a) six months' imprisonment (and no caning) for his VCGH Offence; (b) three months' imprisonment for his Actual Distribution Offence; and (c) a fine of $500 (in default, one day's imprisonment) for his MOA Offence.

Issues to be determined

35 MA 9280 and MA 9008 raise two broad issues for our determination:

(a) First, what is the appropriate sentencing framework for the Actual Distribution Offence under s 377BE(1) and punishable under s 377BE(3) of the Penal Code?

(b) Second, applying that framework, what are the appropriate sentences for GED in MA 9280 and GEH in MA 9008? It should be noted that in MA 9008, the appropriate sentences for GEH's VCGH Offence and MOA Offence will also need to be considered.

36 These issues will be addressed in turn.

The appropriate sentencing framework for the Actual Distribution Offence

37 We begin by setting out the text of s 377BE of the Penal Code in full:

> **Distributing or threatening to distribute intimate image or recording**
>
> **377BE.**—(1) Any person (*A*) shall be guilty of an offence who —
>
> (*a*) intentionally or knowingly distributes an intimate image or recording of another person (*B*);
>
> (*b*) without *B*'s consent to the distribution; and

(*c*) knows or has reason to believe that the distribution will or is likely to cause *B* humiliation, alarm or distress.

(2) Any person (*A*) shall be guilty of an offence who —

(*a*) knowingly threatens the distribution of an intimate image or recording of another person (*B*);

(*b*) without *B*'s consent to the distribution; and

(*c*) knows or has reason to believe that the threat will or is likely to cause *B* humiliation, alarm or distress.

(3) Subject to subsection (4), a person who is guilty of an offence under subsection (1) or (2) shall on conviction be punished with imprisonment for a term which may extend to 5 years, or with fine, or with caning, or with any combination of such punishments.

(4) A person who commits an offence under subsection (1) or (2) against a person (*B*) who is below 14 years of age shall on conviction be punished with imprisonment for a term which may extend to 5 years and shall also be liable to fine or to caning.

(5) In this section, "intimate image or recording", in relation to a person (*B*) —

(*a*) means an image or recording —

(i) of *B*'s genital or anal region, whether bare or covered by underwear;

(ii) of *B*'s breasts if *B* is female, whether bare or covered by underwear; or

(iii) of *B* doing a private act; and

(*b*) includes an image or recording, in any form, that has been altered to appear to show any of the things mentioned in paragraph (*a*) but excludes an image so altered that no reasonable person would believe that it depicts *B*.

Illustrations

(*a*) *A* copies, crops, and pastes an image of *B*'s face onto the image of a body of a person who is engaging in a sexual act.

> This image has been altered to appear to show that *B* actually engaged in a sexual act. This is an intimate image.
>
> (*b*) *A* pastes an image of *B*'s face on a cartoon depicting *B* performing a sexual act on *C*. No reasonable person would believe that *B* was performing the sexual act depicted on *C*. This is not an intimate image.

38 As we have already stated, we consider it appropriate to establish a sentencing framework for the Actual Distribution Offence. This is a relatively new offence, s 377BE having come into force only on 1 January 2020. A sentencing framework would assist in providing structure and guidance for future sentencing courts and assist in the "quest for broad parity and consistency in sentencing" (*Abdul Mutalib bin Aziman v Public Prosecutor and other appeals* [2021] 4 SLR 1220 at [40]), while also helping to ensure that the full range of sentences prescribed in s 377BE(3) of the Penal Code is adequately utilised.

39 Before we turn to consider the individual components of this sentencing framework, we make two preliminary points regarding the scope and overall form of this framework.

Preliminary points

Scope of the sentencing framework

40 One of the questions posed to the YAC was whether the sentencing framework developed for the Actual Distribution Offence should also apply to the offence of *threatening* to distribute intimate images or recordings under s 377BE(2) and punishable under s 377BE(3) of the Penal Code (which we refer to as "the Threatened Distribution Offence"). The YAC suggested that the same sentencing approach and matrix should be adopted for *both* the Actual

Distribution Offence and the Threatened Distribution Offence. This was also the view of the Prosecution and GED.

41 As we explained to counsel at the hearing, we disagree. We recognise that s 377BE(3) prescribes the same sentencing range for both the Actual Distribution Offence and the Threatened Distribution Offence, and that – depending on the precise facts and circumstances – the harm and culpability involved in a case of threatened distribution may be similar to, or even greater than, in a case of actual distribution. In other words, neither offence is inherently or invariably more or less serious than the other. In that regard, we do not agree with the District Judge's observations at [35] of *Shahrul Nizam* that cases involving a threat to distribute, and where there is no actual distribution, would generally fall into the slight harm-low culpability category. That said, we do not think it would be appropriate for us to lay down a sentencing framework for the Threatened Distribution Offence in the present case, for reasons of practicality. It would also generally be undesirable as a matter of principle for us to do this. Taking the latter point first, it is not the role of the court – being a judicial rather than legislative or quasi-legislative body – to lay down sentencing frameworks for offences that are not before it. Both MA 9280 and MA 9008 involve the Actual Distribution Offence, and no question of sentencing in relation to the Threatened Distribution Offence arises in either appeal. More importantly in this case, as a matter of *practicality*, we do not think that these appeals provide a suitable forum for making any determination as to the sentencing framework that should apply to the Threatened Distribution Offence, because any submissions on this point would be hypothetical and neither relevant to nor necessary for the disposal of the cases at hand. The possible factual matrices in which the Threatened Distribution Offence may be committed are highly varied. Without the facts of an actual case involving the Threatened Distribution

Offence before us, it would be difficult to anticipate how the various considerations might or should feature in the court's approach to sentencing, or what significance should be accorded to those considerations, in that context.

42 We therefore leave the sentencing framework for the Threatened Distribution Offence to be decided in an appropriate future case where it arises squarely for determination. In so far as the sentencing framework and considerations that we will set out in respect of the Actual Distribution Offence are thought to be relevant in a future case involving the Threatened Distribution Offence, it will be open to the parties to make the necessary submissions to the court dealing with that issue as to whether and how the framework we lay down here could be modified and applied.

43 For similar reasons, we reject the suggestion made by counsel for GED, Mr Wee Hong Shern ("Mr Wee"), that for the purposes of determining the appropriate sentencing framework for the Actual Distribution Offence in s 377BE*(1)* and punishable under s 377BE*(3)*, a conceptual distinction ought to be drawn between cases involving victims who are 14 years of age or above, and cases involving victims below the age of 14. Mr Wee submitted that the sentencing framework laid down by this court should provide for a *significantly lower* starting point for offences involving victims *above* 14 years of age; that an imprisonment term "is only a certainty when the victim is below 14 years old"; and that the statutory maximum imprisonment term of five years "would realistically only be met in egregious cases involving victims below the age of 14". This suggestion fails to take account of the fact that the commission of either the Actual Distribution Offence or the Threatened Distribution Offence against a victim who is below 14 years of age has its own *distinct sentencing range* under s 377BE(4) of the Penal Code. Under s 377BE(4), although the same maximum imprisonment term of five years applies, there is a mandatory

requirement of a term of imprisonment, which may also be accompanied by a sentence of a fine or caning. The fact that the victim of an Actual Distribution Offence is 14 years of age or above should not constrain the courts' utilisation of the full sentencing range prescribed by s 377BE(3) for *that* offence, and nor should the mere fact that s 377BE(4) prescribes the same maximum imprisonment term as s 377BE(3) for a presumptively more aggravated *category* of offences (see, in this connection, *Wong Tian Jun De Beers* at [58]). The sentencing framework for offences under s 377BE(4), as with the Threatened Distribution Offence, should be reserved for consideration and development in an appropriate future case. In the present appeals, no offence under s 377BE(4) is before the court since the victims in both cases were above 14 years of age.

Overall form of the sentencing framework

44 As for the overall form of the sentencing framework for the Actual Distribution Offence, it is largely common ground between the YAC and the parties that this framework should be modelled on the two-stage, five-step sentencing framework set out in *Logachev Vladislav v Public Prosecutor* [2018] 4 SLR 609 ("*Logachev*"). We agree. In our judgment, such a framework would best accommodate the wide variety of the *circumstances* in which the Actual Distribution Offence can be committed and also of the *consequences* of such offences. Such a framework would also facilitate the qualitative and contextual analysis of both harm and culpability that is required to assess the gravity of these offences, and would provide a structured framework for determining the appropriate sentence in each case.

45 With these preliminary points in mind, we now turn to consider the individual components of the sentencing framework to be laid down for the

Actual Distribution Offence, which correspond to the five steps of the framework adopted in *Logachev*.

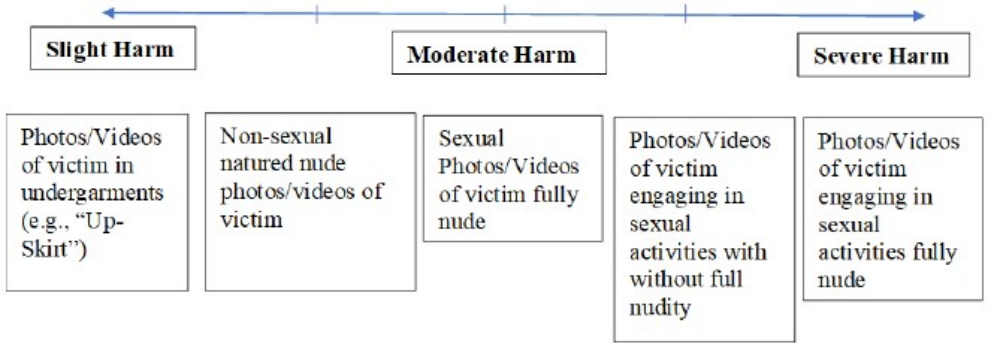
Step 1: Offence-specific factors

46 At the first step, the court will have regard to the relevant offence-specific factors and identify: (a) the level of *harm* caused by the offence, and (b) the level of the offender's *culpability* (see *Logachev* at [76]). Various non-exhaustive lists of offence-specific factors going towards harm and culpability have been suggested by the YAC and by the parties. These are largely uncontroversial, but – as we indicated to counsel during the hearing – we prefer a more structured approach to harm and culpability. We deal with the offence-specific factors going towards harm and culpability in turn.

Factors going towards harm

47 As alluded to at [1] above, the harm caused to victims is a critical element of the mischief targeted by the Actual Distribution Offence. The central focus of the inquiry into harm is on the "humiliation, alarm or distress" caused to the victim by the distribution of the intimate image or recording (see s 377BE(1)(*c*) of the Penal Code). In our judgment, this inquiry can be helpfully structured with reference to four broad categories: (a) objective aspects of harm; (b) subjective aspects of harm; (c) other related harm; and (d) other factors relevant to harm. Of these, the first two categories – namely, the objective and subjective aspects of harm – will usually be the dominant considerations.

48 Before we elaborate on each of these categories, we deal with the submission made by counsel for GEH, Mr Luke Netto ("Mr Netto"), that the nature of intimate images and recordings can be placed on a spectrum corresponding to different levels of harm, as set out below:



49 This submission was rejected by the PDJ, who "did not agree that the level of harm was so cut and dried so as to be able to be compartmentalised in such an ascending order" and thought this was "necessarily a fact-sensitive exercise and much would turn on the context of each case" (see [104]–[105] of the 9008 GD). We agree with the PDJ and likewise reject this submission. Mr Netto's proposed spectrum presupposes that the sexual nature of the image or recording in question should be the main determinant of the extent of harm suffered by the victim, such that the fact that the image or recording is *not* sexual in nature would *necessarily* place the level of harm in the "slight" category. In this regard, at the hearing before us, Mr Netto relied on the fact that s 377BE is situated in the section of the Penal Code which focuses on sexual offences. We disagree with this approach. As will be seen in our analysis that follows, the assessment of harm in this context should be more nuanced and textured than the linear relationship that is assumed in the proposed spectrum, and whether the image or recording is sexual in nature is only *one* relevant consideration.

(1) Objective aspects of harm

50 We deal first with the objective aspects of harm. Such objective aspects would include, but would not be limited to, the matters set out below.

51 The first objective aspect of harm is the *nature of the image or recording*. This entails a consideration of: (a) what parts of the victim's body were shown, and how exposed the body parts were (whether bare or covered); (b) what acts were depicted; and (c) the medium used (whether a still image or a video recording). With regard to (a) and (b), the more intrusive and the more overtly sexual the nature of the acts (and/or the victim's body parts) shown in the intimate image or recording, the higher the degree of objective harm that will generally be caused, all else being equal. For example, more harm is likely to be caused by a recording of the victim engaged in penetrative sexual intercourse while fully nude and with his or her genitalia exposed. As for (c), in capturing movement and sound, a video recording is, by its nature, capable of containing more information that is intrusive and distressing compared to a still image. But no generalisation can be made as to the relative harmfulness of the two media; instead, the harmfulness of each image or recording must be individually evaluated based on its *content*.

52 The second objective aspect of harm is the *degree of identifiability of the victim*. The more identifiable the victim, the higher the degree of harm that will generally be caused. Ascertaining the degree of identifiability would require a consideration of whether the victim's face or any other identifying features are shown in the image or recording, and whether the victim's name, online profiles, or other forms of identification are disclosed in (or together with) the image or recording.

53 The third objective aspect of harm is the *nature and extent of the distribution*. This will require the court to consider: (a) how widely the intimate image or recording was distributed; (b) whether the image or recording was distributed to certain recipients known to the victim; and (c) how long the image or recording was left accessible for. With regard to (a) and (b), the precise

impact of the number and identity of recipients on the harm caused will depend on the circumstances of each case. The more widely the image or recording is distributed, the more harm is generally likely to be caused. However, the distribution of the image or recording to specific recipients known to the victim would also, in most cases, aggravate the harm caused to the victim. For example, targeted distribution to the victim's family, friends and colleagues may cause just as much (if not more) harm to the victim than distribution to a large number of strangers on a pornography website. With regard to (c), all other things being equal, an image or recording that is made available for a longer period can be viewed more times or by more people, which would generally aggravate the harm caused to the victim.

54 We add that it is the nature and extent of the *actual or eventual distribution* of the intimate image or recording that is relevant to the analysis of harm, rather than the manner and extent of distribution that the offender may have *originally intended or known was likely to result*. For example, if the image or recording is widely shared and goes "viral" for reasons beyond the offender's direct control, this would generally cause far greater harm to the victim which should be taken into account, even if this was not anticipated or intended by the offender. This follows from the fact that the offender's initial actions have made the wider circulation possible, even if that wider circulation was not specifically intended.

55 These objective aspects of harm would serve as indicia of the gravity of the harm caused which may be *objectively* inferred from the content of the image or recording in question and the circumstances of its distribution. These indicia must be weighed and considered holistically in order to appreciate the degree of harm caused to the individual victim.

(2) Subjective aspects of harm

56 As for the subjective aspects of harm, these may be either disclosed by the victim or inferred from the circumstances, and may in appropriate cases need to be corroborated by evidence (including expert evidence). The subjective aspects of harm include any particular aspects of the victim's suffering that would shed light on the degree of humiliation, alarm or distress subjectively experienced by the victim as a result of the offence, including any impact on the victim's mental health (such as the development of conditions like depression or post-traumatic stress disorder). In this regard, evidence in the form of victim impact statements and medical reports will be useful.

57 Mr Wee rightly acknowledged, on GED's behalf, the importance of taking into consideration how the particular victim may have been subjectively affected by the commission of the offence. However, he went on to suggest that the degree of harm inferred from the objective indicia outlined above should be *calibrated downwards* where no evidence is adduced of how the specific victim was subjectively affected. We reject this suggestion. In our judgment, the typical harms caused by the Actual Distribution Offence are objectively appreciable, and evidence of the subjective aspects of harm suffered by an individual victim should generally only go towards *enhancing* the degree of harm that is objectively inferred from the circumstances of a particular case.

58 The need to take into consideration the circumstances and sensitivity of the particular victim may be usefully illustrated by the facts of the English case of *R v Bostan (Amar)* [2018] EWCA Crim 494 ("*Bostan*"), where the offender sent a single still image of the victim, who had just turned 18 years of age, to her mother. In the image, the victim was naked above the waist only and she was not doing anything overtly sexual. She had allowed the offender to have the

photograph as a private matter in the context of their romantic relationship. The appellant knew that the victim was from a conservative family and that her mother would be shocked and ashamed that her daughter had allowed the offender to have such a photograph of her (see *Bostan* at [14]–[15]). In such a case, the *objective* considerations – such as the fact that the nature of the acts depicted in the photograph were not especially intrusive or sexual, the fact that only a single still image was distributed, and the fact that the extent of distribution was limited to the victim's mother – would have to be considered alongside the greater *subjective* harm that may have been suffered by this particular victim owing to her family background and circumstances, where there is sufficient evidence of these subjective aspects of harm.

(3) Other related harm

59 In cases involving the Actual Distribution Offence, other related harm of at least two forms may be suffered by the victim. The first is consequential harm other than the emotional and psychological consequences of the distribution of the intimate image or recording, including loss of employment and other economic consequences (such as where the victim expends sums of money in an attempt to take down the intimate image or recording, as contemplated by the UK Law Commission in *Intimate Image Abuse*, Consultation Paper 253 (26 February 2021) at paras 5.47–5.50). These consequential harms should be taken into account in assessing harm in so far as a sufficient causal link can be established between the distribution and the consequential harm suffered.

60 The second form of related harm envisioned here is harm caused to the victim *in the course of obtaining* the intimate image or recording, such as where the victim suffers physical injuries inflicted by the offender in order to forcibly

capture the image. This may be labelled "prior harm" or "prerequisite harm" for convenience. In these cases, the extent of such harm will also be a relevant consideration in assessing the overall harm that is caused by the Actual Distribution Offence. This will, however, be subject to the principles governing the relevance of uncharged offending and the rule against double counting, which we return to at [82]–[97] below.

(4) Other factors relevant to harm

61 Beyond considering the three aspects of harm set out above, the court ought also to consider any other factors that further aggravate those aspects of harm. This may include considerations such as the vulnerability of the victim, which may arise if the victim is young, has any pre-existing mental health conditions, or has a relationship with the offender that renders the victim susceptible to being manipulated or taken advantage of.

Factors going towards culpability

62 We turn to the offence-specific factors going towards the offender's culpability. As with the inquiry into harm, we structure the inquiry into culpability with reference to three broad categories: (a) the offender's motive for committing the offence; (b) the offender's method of obtaining the intimate image or recording; and (c) other aspects of the offender's culpability.

(1) Motive for committing the offence

63 First, the offender's *motive* for committing the Actual Distribution Offence will be relevant in ascertaining his culpability. This refers to *why* the offender committed the offence, and ought not to be confused with the

offender's *mens rea* in doing so (see *Ye Lin Myint v Public Prosecutor* [2019] 5 SLR 1005 ("*Ye Lin Myint*") at [52]).

64 In *Ye Lin Myint*, a case involving criminal intimidation by anonymous communication punishable under s 507 of the Penal Code, the High Court considered how the offender's motive would be analysed as a factor going towards culpability, and observed, with reference to the relevant authorities, that an offender who acts out of self-interest, greed, malice or spite is likely to be regarded as more culpable, while one who commits the offence due to fear or pressing financial need may be regarded as less blameworthy (see *Ye Lin Myint* at [51]). In the context of the Actual Distribution Offence, there are two principal considerations which, in our view, warrant special note.

65 The first consideration is whether the offence was committed for the offender's *personal gain*, which need not be limited to monetary gain. For example, an offender who distributes the victim's intimate image or recording to others in exchange for remuneration, or who does so in order to elicit money, property, concessions or favours from the victim, will generally be regarded as more culpable.

66 The second consideration is whether the offender acted *for the purpose of harming the victim*, and in particular whether his actions were *calculated to inflict such harm*. The Actual Distribution Offence may be committed if the distribution is done "intentionally or knowingly", with an offender who "knows or has reason to believe" that the distribution will or is likely to cause humiliation, alarm or distress to the victim (see ss 377BE(1)(*a*) and s 377BE(1)(*c*) of the Penal Code). Acting "intentionally" refers to acting deliberately (see s 26C(1) of the Penal Code), while acting "knowingly" means to act with awareness that a circumstance exists or that an effect will be caused,

or being "virtually certain" that this will be the case, and this includes wilful blindness (see ss 26D(1)–26D(3) of the Penal Code). These provisions therefore encompass a few different mental states on the part of the offender. Where the distribution is done not only with the *knowledge* that the distribution will or is likely to cause the victim humiliation, alarm or distress, but is done with the *intention* and indeed for the *purpose* of causing such harm to the victim, it follows that the offender will be regarded as more culpable.

67 Whether the offender did indeed act for such a purpose will often be clear from the circumstances of the offence. For example, where the distributed image or recording is accompanied by abusive or degrading captions or commentary about the victim, or by or exhortations to others to harass the victim further, it will be readily inferred that the offender acted for the purpose of harming the victim. This will also be the case where the offender has chosen a particular platform or targeted particular recipients in distributing the intimate image or recording, knowing or believing that distribution on that platform or to these recipients will cause greater humiliation, alarm or distress to the victim.

68 We digress to note that s 74(1) of the Penal Code (read with s 74(2)(*a*)) provides that, where the commission of an offence under s 377BE is racially or religiously aggravated (including where the offence is motivated by hostility towards members of a racial or religious group), the court may sentence the offender to one and a half times the amount of punishment to which he would otherwise have been liable for the offence. Where such motivations form part of the offender's motive for committing the Actual Distribution Offence, and this provides the factual basis for the statutory mechanism in s 74(1) for the enhancement of the sentence, these motivations should not be separately taken into account again in assessing the offender's motive as a factor going towards his culpability for his Actual Distribution Offence. To do otherwise would

offend the rule against double counting: see *Public Prosecutor v Raveen Balakrishnan* [2018] 5 SLR 799 ("*Raveen Balakrishnan*") at [85].

(2) Method of obtaining the intimate image or recording

69 Second, the offender's *method of obtaining* the intimate image or recording in question will be relevant to his culpability. Although the Actual Distribution Offence is an offence centred around the *distribution* of an intimate image or recording, the offender's method of obtaining the intimate image or recording is a *precondition* to its distribution and is fundamental to a holistic assessment of the offender's culpability in relation to the offence. In our view, the analysis of this factor can be helpfully organised in the following manner, with reference to the victim's consent (or lack thereof) at three different stages: the *capture* of the image or recording; the offender's *possession* of that image or recording; and the offender's *distribution* of that image or recording.

70 The base or paradigmatic case is where the image or recording is captured with the victim's consent, and the victim also consents to the offender being in possession of the same, but the offender then goes on to *distribute* the image or recording without the victim's consent. These cases will almost invariably involve a breach of the trust placed in the offender by the victim, and the typical case will be one where the victim and the offender have had an intimate relationship and the victim has entrusted the offender with possession of the intimate images or recordings. An example is *Shahrul Nizam* (albeit that this case involved the *Threatened* Distribution Offence), where in the course of their romantic relationship, the victim had consented to the offender recording three video clips of the victim masturbating herself and fellating the accused, but the parties agreed that these recordings were to be kept between themselves. After the parties' relationship ended, the offender threatened to distribute these

recordings to the victim's family, her friends, and her ex-husband and his family (see *Shahrul Nizam* at [4]–[6] and [40]).

71 Although such cases undoubtedly involve a serious violation of the victim's trust, we regard this as the base or paradigmatic case because the victim's lack of consent to the distribution is a necessary element of the offence under s 377BE(1)(*b*) of the Penal Code. The offender's culpability would then be *aggravated* in cases involving departures from this base or paradigmatic case, where the victim's consent to the *capturing* of the image or recording and/or the offender's *possession* of the same is also absent or vitiated. These departures can be visualised as concentric circles emanating from this base or paradigmatic case, each increasing the gravity of the offence.

72 We begin with the category of cases where the image or recording has been captured with the victim's consent (or indeed voluntarily created by the victim himself or herself) and kept among the victim's private files, and the image or recording later comes into the offender's *possession* without the victim's consent. Cases within this category where the offender will be regarded as more culpable include: where the offender surreptitiously extracts the intimate image or recording without the victim's knowledge, or otherwise obtains it through theft; where the offender deceives or blackmails the victim into providing it to him; and where the offender obtains possession of the image or recording by using violence.

73 We next move on to the category of cases where the image or recording has been *captured* without the victim's consent, in which it would also follow that the victim does not consent to the offender being in *possession* of the same. An example of such a case would be where the offender surreptitiously installs a camera in the victim's home to capture the intimate image or recording. This

category of cases will generally evince a higher level of culpability than the previous category because the victim never even intended to create the image or recording or to be featured in it. Within this category of cases, the most serious cases will be those where the image or recording is captured *by force*, such as where the offender uses violence to subdue the victim in order to capture the image or recording which is later distributed. Where force is used, the fact that such force was inflicted by a group (as opposed to an individual offender acting alone) will generally be even more aggravating.

74 We note that there may be some overlap between the offender's method of obtaining the intimate image or recording as a factor going towards his *culpability*, and the prior or prerequisite harm caused to the victim by the offender in order to obtain the image or recording as a factor going towards *harm* (see [60] above). The court must therefore take particular care to avoid the double counting of these factors against the offender. Thus, where the offender's method of obtaining the image or recording is taken into account in assessing his culpability, the prior or prerequisite harm caused to the victim in this process should not be taken into account again in assessing harm, and *vice versa*.

(3) Other aspects of culpability

75 Other than the offender's motive and method of obtaining the intimate image or recording, there are several further considerations which may shed light on his culpability. These primarily go towards showing the offender's commitment to offending and to evading detection.

76 The first is the *degree of planning, preparation and premeditation* displayed by the offender. An offence committed with planning and

premeditation will generally be more aggravated than one which is committed opportunistically or on impulse because the presence of planning and premeditation "evinces a considered commitment towards law-breaking and therefore reflects greater criminality": see *Logachev* at [56], citing *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 ("*Terence Ng*") at [44(c)]. An illustrative example of facts that would disclose a high degree of planning and premeditation in the present context may be found in the Canadian case of *R v JB* (2018) ONSC 4726 ("*JB*"), where the offender had created a fake Facebook profile using the victim's full name and photograph, and then sent Facebook "friend" requests from that fake profile to at least 96 of the victim's friends, family members and co-workers, so that they could view the intimate images he had posted on that profile. As the Ontario Superior Court of Justice noted, this "clearly involved sustained planning and effort" (see *JB* at [13] and [44(iv)]).

77 The second is the *level of sophistication* employed by the offender in obtaining the image or recording (particularly where this was done surreptitiously) and distributing the image or recording thereafter. All other things being equal, an offence committed by sophisticated means (for example, if the offender makes carefully orchestrated efforts and takes elaborate steps to avoid detection) will be more aggravated than one which is committed simplistically: see *Logachev* at [57].

78 The third is the *duration and persistence of the offending behaviour*. An offence perpetrated over a sustained period of time will generally be more aggravated than a one-off offence: see *Logachev* at [59]. This will include, as suggested by the Prosecution, the offender's repeated efforts to keep the intimate image or recording available for viewing – a factor expressly taken into account by the UK Sentencing Council in its guidelines on the offence of

disclosing private sexual images under s 33 of the Criminal Justice and Courts Act 2015 (c 2) (UK).

79 The fourth is whether there was any *abuse of position* by the offender in committing the offence, such as where the offender takes advantage of a victim who is disadvantaged in relation to the commission of the offence by reason of his or her age, relationship to the offender, or any imbalance in power and authority between them. In particular, this will apply if the offender is in a position of responsibility towards the victim – for example, parents and their children, medical practitioners and their patients, or teachers and their pupils – or where the offender is a person in whom the victim has placed trust by virtue of his office of employment (for example, policemen or social workers). Where such an abuse of position is present, this will aggravate the offender's culpability: see *Terence Ng* at [44(b)] and *Logachev* at [62].

80 The fifth is the *use of anonymity* by the offender. In *Ye Lin Myint*, in the context of the offence of criminal intimidation by anonymous communication punishable under s 507 of the Penal Code, the High Court explained that the use of anonymity is aggravating because the recipient of the threat suffers a heightened sense of unease from being unable to identify the person behind the threat, and consequently to assess its gravity or when and how it might manifest. In the present context, the use of anonymity may enhance the offender's culpability in two ways: the offender may have deliberately concealed his identity to heighten the alarm and distress caused to the victim, and/or the offender may have taken steps to hide behind a veil of anonymity in an attempt to evade detection and avoid being held accountable for his actions.

81 We highlight one further aspect of culpability which is of particular relevance in relation to the Actual Distribution Offence, and which runs through

both the offender's motive for and his method of committing the offence. If there is evidence of *cruelty* on the part of the offender in relation to his offending, this will be regarded as aggravating. This relates especially to cruelty in how the intimate image or recording was obtained, and how it was used and distributed.

Uncharged adjacent offending

82 We next deal with the more conceptual question of how uncharged adjacent offending should be taken into account by the sentencing court in assessing the harm and culpability involved in the offence. By "uncharged adjacent offending", we mean the facts surrounding the commission of the Actual Distribution Offence which could have given rise to separate charges against the offender, but in respect of which no charges were brought by the Prosecution.

83 In *Cheang Geok Lin v Public Prosecutor* [2018] 4 SLR 548 ("*Cheang Geok Lin*") at [27]–[30], the High Court explained that when determining the appropriate sentence for the offence with which an offender *has* been charged, it may fairly have regard to relevant facts that may constitute a separate offence that he has not been charged with, provided the facts have been admitted or proved, are relevant to his overall culpability and implicate a relevant sentencing consideration. Such facts must, however, have a *sufficient nexus* to the offence for which the offender is being punished. What will constitute a sufficient nexus is a fact-sensitive inquiry, depending on the circumstances of each case, and in particular on the degree of temporal and spatial proximity between the uncharged offending and the charged offence (*Chua Siew Peng v Public Prosecutor and another appeal* [2017] 4 SLR 1247 at [84]). These facts can then be taken into consideration *even if* they could also constitute a separate

offence for which the offender was not charged. Similar principles were laid down in *Public Prosecutor v Bong Sim Swan Suzanna* [2020] 2 SLR 1001 ("*Suzanna Bong*") at [65]–[66], where the Court of Appeal went on to note the importance of "consider[ing] the totality of the circumstances of a charged offence in order to have a true flavour of the offence as the overall perspective may have an impact on the level of the offender's culpability and the extent of the victim's suffering", albeit that the court in applying this principle "must take a common-sense and contextual approach when considering the importance of the proved relevant facts" (*Suzanna Bong* at [73]).

84 However, the position set out above is subject to two important qualifications. First, the court cannot and must not impose a sentence that is aimed at punishing the offender for an offence that he has not been charged with, even if such an offence is disclosed on the facts. In other words, as we explained during the hearing, the taking into account of the uncharged adjacent offending cannot in effect allow the Prosecution to achieve the effect of aggregating the sentences imposed for both the offence with which the offender has been charged and another with which he has not. Second, as a matter of fairness to the offender, any enhancement on this basis would need to be balanced against the extent to which the offender *could have been* punished had a separate charge been brought (see *Cheang Geok Lin* at [27] and [31]; see also *Suzanna Bong* at [64]).

85 In the context of the Actual Distribution Offence, there are at least two ways in which uncharged adjacent offending may be in issue.

86 The first is where the intimate image or recording in question depicts more than one person who has not consented to the distribution, and in respect of which the other elements of the Actual Distribution Offence are satisfied – in

other words, where there is *more than one victim* of the Actual Distribution Offence. In such cases, separate charges under s 377BE(1) could have been brought for each person depicted. However, where the Prosecution chooses not to bring any charges in respect of one or more of those persons, the position is less straightforward and the court will then need to consider how these facts (assuming they are admitted or proved) should be taken into account. For convenience, we refer to the victim who is named in the charge as the "primary victim" and a victim who is not so named as a "secondary victim".

87 In our judgment, where an offender is charged with an Actual Distribution Offence against a primary victim, and the intimate image or recording that forms the subject of that charge *also* depicts a secondary victim, there is plainly a sufficient nexus between the charged offence and the uncharged offending against the secondary victim. In these circumstances, the charged offence and the uncharged offending should be regarded as part of a *single indivisible transaction* as it would be wholly artificial to ignore the presence of the secondary victim in the intimate image or recording. This will generally go towards enhancing the offender's *culpability* for the Actual Distribution Offence, in so far as the offender will have knowingly or intentionally set out to cause harm to more than one person in committing the offence at hand. The fact that more than one victim is depicted in the intimate image or recording will generally also aggravate the *harm* caused by the offence at two levels. First, the harm suffered by the secondary victim will need to be borne in mind in assessing the overall harm caused by the offence. Second, in so far as the presence of the secondary victim means that the acts depicted are more overtly sexual in nature, and may constitute a greater intrusion into the primary victim's privacy by revealing his or her relationship with the secondary victim, the harm suffered by the *primary victim* will usually also be aggravated.

88 The second situation involving uncharged adjacent offending is where the facts relevant to the offence-specific factors set out above could themselves have formed the basis of a charge for a *separate offence*, but no such charge is brought. For instance, physical harm caused to the victim by the offender in order to forcibly capture the intimate image or recording which forms the subject of the Actual Distribution Offence could be relevant to harm and culpability (see [60] and [73] above), and would also almost invariably provide the factual basis for a separate hurt offence. In such cases, these facts (again assuming that they are admitted or proved) will plainly have a sufficient nexus to the Actual Distribution Offence and should be regarded as part of a single transaction, such that these facts may be taken into account for the purpose of determining the appropriate sentence for the Actual Distribution Offence. However, as the YAC pointed out, more difficulty will arise in cases where the uncharged offending is less temporally and spatially proximate to the Actual Distribution Offence and where commission of the separate offence is unrelated to the commission of the Actual Distribution Offence – such as where the offender used force to capture the intimate image but formed no intention of distributing that image until some time later. In those cases, there may not be a sufficient nexus between the earlier acts of offending and the subsequent commission of the Actual Distribution Offence, such that it may then not be appropriate for those earlier acts to be taken into account in assessing the harm and culpability involved in the Actual Distribution Offence. Determining whether this is so in a particular case will involve a fact-sensitive inquiry, which the sentencing court should undertake having regard to all the circumstances of the case before it.

Adjacent offending which forms the subject of a separate charge

89 A related difficulty arises where facts which feature as sentencing considerations for the Actual Distribution Offence *are* the subject of separate charges against the offender. This situation is the obverse of that discussed at [88] above. In such cases, the court will need to guard against the risk of double counting. We elaborate.

90 As was explained in *Raveen Balakrishnan* at [91], "the central concern of the rule against double counting is that a sentencing factor should be given only its due weight in the sentencing analysis and nothing more"; and if a particular factor already forms the basis of a separate charge framed against the offender, the "due weight" that should be given by the court to that factor in sentencing will generally be "none". The rule against double counting applies across all stages of the sentencing analysis and underlies all aspects of sentencing (*Raveen Balakrishnan* at [92] and [98(d)]).

91 The risk of double counting where a factor is taken into account in sentencing even though it has already formed the factual basis of other charges brought against the offender may be illustrated with reference to the facts of *Public Prosecutor v Nelson Jeyaraj s/o Chandran* [2011] 2 SLR 1130 ("*Nelson Jeyaraj*"). In that case, the offender had pleaded guilty to six charges under the Moneylenders Act (Cap 188, 2010 Rev Ed), of which five related to acts of harassment by fire committed at residences located all over Singapore. In considering the public disquiet caused by the offences, Steven Chong J (as he then was) observed that an offence affecting a larger number of people covering a wider geographical area would be more serious than one that affects few people in a limited area, and noted that the offences in this case had a wide geographical reach across several neighbourhoods. However, Chong J went on

to caution that "this should not typically be viewed as an independent aggravating factor as it would be taken care of in sentencing by virtue of the multiple charges for which two or three would be ordered to run consecutively", such that "to treat it as an independent aggravating factor would amount to double counting" (see *Nelson Jeyaraj* at [33]–[34]).

92 In the present context, one category of cases in which the risk of double counting is likely to arise are cases where the offender's acts of forcibly obtaining the intimate image or recording from the victim form the subject of a separate charge against the offender for a *hurt offence*. The applicable sentencing frameworks for the offences of voluntarily causing hurt under s 321 (and punishable under s 323) of the Penal Code and voluntarily causing grievous hurt under s 322 (and punishable under s 325) of the Penal Code both take the *seriousness of the hurt caused* as their primary reference point:

(a) For the offence of *voluntarily causing hurt*, the court will first situate the offence within one of three broad sentencing bands based on whether the hurt caused was low, moderate, or serious. The court will determine where the particular case falls within the corresponding indicative sentencing range, again with reference to the hurt caused by the offence, to arrive at the appropriate indicative starting point. Next, the court will make the necessary adjustments to the indicative starting point sentence based on its assessment of the offender's culpability as well as all other relevant factors (see *Low Song Chye v Public Prosecutor* [2019] 5 SLR 526 at [77]–[78]).

(b) For the offence of *voluntarily causing grievous hurt*, the court will first identify the indicative starting point based on the seriousness of the injury caused, before considering the necessary adjustments based

on an assessment of the offender's culpability and the presence of relevant aggravating and mitigating factors (see *BDB* at [55]–[59]).

93 Thus, where the prior or prerequisite physical harm caused to the victim by the offender in the course of forcibly obtaining the intimate image or recording in question forms the basis of a separate charge for voluntarily causing hurt or grievous hurt (as the case may be), it will often be fully taken into account in the course of determining the appropriate sentence for *that offence*, and as such should not also be taken into account as a factor aggravating the harm suffered by the victim as a result of the *Actual Distribution Offence* or the offender's culpability in committing it. At the same time, even where the offender is separately charged for a hurt offence, it may be artificial to ignore the violence inflicted on the victim in assessing the gravity of the Actual Distribution Offence. In particular, where violence is used to *capture* the intimate image or recording which is thereafter distributed, this seems to us to confer on the Actual Distribution Offence a *qualitatively different character* which may not be adequately taken into account by the sentence for the separate hurt offence. To put it another way, the combination of the violence with the act of obtaining the image in order to distribute it, results in a sum that is greater than the parts. In such cases, in our judgment, the relevance of the facts giving rise to the separate hurt offence in determining the appropriate sentence for the Actual Distribution Offence ought to be delimited in the following manner.

94 With regard to harm, the *severity of the injuries* suffered by the victim – including both physical and non-physical injuries – should not be taken into account in so far as this is fully taken into consideration by the sentence for the separate hurt offence. This pays heed to the aspect of the rule against double counting which requires that, if a sentencing factor has been *fully* taken into account at one stage in the sentencing analysis, it should generally not feature

again at another stage (see *Raveen Balakrishnan* at [87]). However, where there is evidence of trauma suffered by the victim, over and above the non-physical harms caused by the separate hurt offence, specifically as a result of the offender's *use of violence to capture an intimate image or recording which he would otherwise have been unable to obtain*, this *aggravation* of the humiliation, alarm or distress experienced by the victim will be relevant to the assessment of the harm caused by the Actual Distribution Offence. Hence, as alluded to earlier, the emotional and psychological harm caused to the victim by the acts of violence and distribution *in combination* may well be greater than the sum of the harm caused by each of these acts taken individually.

95 With regard to culpability, where the offence-specific factors outlined at [62]–[81] above are fully taken into consideration as offence-specific factors for the separate hurt offence, they should generally not be taken into account again in aggravating the offender's culpability for the Actual Distribution Offence. This is subject to one general qualification. Where the offender commits the separate hurt offence *for the purpose of* capturing the intimate image or recording by force, *with a view to the eventual distribution of that image or recording*, this fact may be taken into account as a distinct aspect of his culpability in relation to the Actual Distribution Offence, in that it is indicative of the lengths to which the offender was prepared to go to obtain the image or recording for distribution against the victim's will. This may also provide evidence of the offender's cruelty.

96 Another category of cases in which the prospect of double counting may arise are cases where the offender acquires possession of the intimate image or recording by committing the offence of theft. In such cases, the fact that the image or recording in question was obtained by theft will usually be fully taken into account by the sentence imposed for the separate offence of theft (the

essence of which is the dishonest taking of property without the victim's consent: see s 378 of the Penal Code), and should not be double counted by the sentencing court *also* taking it into account as a factor going towards the offender's culpability for the Actual Distribution Offence. However, this is subject to a similar qualification to that set out at [95] above: where the offender commits the theft *for the purpose of* obtaining possession of the intimate image or recording, *with a view to the eventual distribution of that image or recording*, this may be taken into account as a distinct aspect of his culpability in relation to the Actual Distribution Offence, in so far as it demonstrates the lengths to which the offender was prepared to go in order to obtain the image or recording for distribution against the victim's will.

97 We have dealt above with how the court ought to guard against the risk of double counting in two specific categories of cases, involving possible overlaps between the facts that form the background to the Actual Distribution Offence and (a) the facts that form the subject of a separate charge for a *hurt offence*, or (b) the facts that form the subject of a separate charge for *theft*. Further questions on how to avoid the risk of double counting in other categories of cases will no doubt arise for consideration in the future as more instances of the Actual Distribution Offence come before the courts. For example, the potential factual overlap between the Actual Distribution Offence and the offence of voyeurism under s 377BB of the Penal Code may arise where the offender captures the intimate image or recording surreptitiously without the victim's consent. These questions should be considered more fully at that stage, having regard, where appropriate, to the guidance we have set out above.

Concluding remarks on the offence-specific factors

98 Based on the offence-specific factors discussed above, the court ought to assess whether the harm caused by the offence is slight, moderate or severe, and whether the culpability of the offender is low, medium or high. It should be stressed that there is no arithmetic method for measuring harm and culpability, and that these should instead be assessed broadly and in the round.

99 Before we turn to the next step of the sentencing framework, we make some concluding remarks on the offence-specific factors.

100 The first is that the categories of factors going towards harm and culpability are not closed, and it will be important for courts and prosecutors in future cases to be alive to other relevant factors that should also be taken into consideration as the case law on the Actual Distribution Offence develops.

101 The second is that the boundaries between the offence-specific factors that we have set out above may not be hermetically sealed, and the different factors may overlap. This is a point we have alluded to at [74] above, but it bears emphasis that in such cases, the court must be vigilant in guarding against double counting. As was observed in *Ye Lin Myint* at [58], the sentencing court "should be careful to give the appropriate weight to each factor as would ensure that the offender's culpability is properly assessed, and should be wary of assessing the offender's culpability merely by the number of factors that are enlivened by the facts".

Steps 2 and 3: Indicative sentencing ranges and starting point

102 At the second and third steps of the sentencing framework, the court will identify the applicable *indicative sentencing range*, and thereafter identify the appropriate *starting point* within that range (see *Logachev* at [78]–[79]).

The applicable sentencing matrix

103 The full statutory sentencing range prescribed in s 377BE(3) for the Actual Distribution Offence is imprisonment for a term of up to five years, a fine, caning, or any combination of such punishments. As mentioned at [2] above, the sentencing framework adopted should make full use of the available statutory sentencing range, so that sentencing decisions do not become arbitrarily clustered around a particular range when there is no normative basis for this based on the overall harm engendered and culpability disclosed (see *Wong Tian Jun De Beers* at [56] and [58]).

104 In our judgment, with the statutory sentencing range in mind, the following sentencing matrix would be appropriate for the Actual Distribution Offence:

Harm / **Culpability**	**Slight**	**Moderate**	**Severe**
Low	Fine and/or up to 6 months' imprisonment	6–15 months' imprisonment	15–30 months' imprisonment (with the option of caning)

Medium	6–15 months' imprisonment	15–30 months' imprisonment (with the option of caning)	30–45 months' imprisonment (with the option of caning)
High	15–30 months' imprisonment (with the option of caning)	30–45 months' imprisonment (with the option of caning)	45–60 months' imprisonment (with the option of caning)

105 It will be observed that the indicative sentencing ranges set out in the sentencing matrix above are not evenly distributed: the narrowest range is prescribed for cases involving slight harm and low culpability, a slightly wider range for cases involving moderate harm and low culpability and slight harm and medium culpability, and the widest range for the remaining categories of cases falling on the higher end of the sentencing matrix. As the Prosecution and the YAC rightly acknowledged, the court's decision on the appropriate distribution is guided by factors such as where more cases are foreseeably likely to fall. In our judgment, given the nature of the Actual Distribution Offence, there will be relatively fewer cases that will fall within the slight harm and low culpability, slight harm and medium culpability, and moderate harm and low culpability categories. In contrast, the other categories are likely to encapsulate both a large number and a wide variety of cases. As we explained in *Public Prosecutor v Manta Equipment (S) Pte Ltd* [2022] SGHC 157 ("*Manta Equipment*") at [29], "a wider range of indicative starting sentences is warranted for the myriad situations that might be encapsulated" in certain categories of cases. This distribution would allow the sentencing court more flexibility in calibrating the appropriate term of imprisonment in each case.

106 Moreover, as we explained to the parties at the start of the hearing, caning should be an option considered by the sentencing court in *all cases other than the three least severe categories*. This would once again allow the sentencing courts greater discretion and flexibility in determining whether caning is appropriate in all the circumstances of each case. A sentence of caning may be imposed to meet the sentencing objectives of deterrence and/or retribution: see *Amin bin Abdullah v Public Prosecutor* [2017] 5 SLR 904 at [62]. General deterrence is likely to be the dominant sentencing consideration for the Actual Distribution Offence, as was held in *Shahrul Nizam* (at [32]–[33]) as well as by the DJ (at [32] of the 9280 GD) and the PDJ in MA 9008 (at [101] of the 9008 GD). Retribution may also be relevant where serious harm is caused to the victim (as the DJ noted at [32] of the 9280 GD), or where the offender's conduct evinces a high degree of culpability. We agree with the Prosecution's submission that the harm or the culpability *alone* in a given case may be sufficiently egregious that an additional level of deterrence or retribution is warranted in the form of caning.

107 We also agree with the Prosecution that caning will presumptively be warranted in certain situations. At this stage, we highlight two such situations: (a) where the offender uses criminal or violent means to capture images or recordings of bare skin in intimate regions of the victim's body (by which we mean the victim's genital or anal region or breasts, as specified in ss 377BE(5)(*a*)(i) and 377BE(5)(*a*)(ii) of the Penal Code); and (b) where the offender widely disseminates (for example, on pornographic websites) images or recordings depicting the victim's bare skin in such intimate regions or the victim engaging in a sexual act, and where the victim is identifiable or expressly identified. Other situations where caning will presumptively be warranted should be considered and developed by the courts in appropriate future cases.

108 On the other end of the spectrum of possible punishments, we did not agree with Mr Wee's submission on GED's behalf that cases involving slight harm and low culpability should be punished *only* with a fine, and that fines should be a sentencing option in all other cases involving slight harm and in cases involving moderate harm and low culpability. At the hearing before us, Mr Wee retracted this position and took the view that a fine would only be the presumptive sentence in cases involving slight harm and low culpability. In our view, given the gravity inherent in the Actual Distribution Offence, it will only be in the least severe cases, involving slight harm and low culpability, that fines will even be an appropriate *option* for the sentencing court to consider. In all other cases, as the YAC submits, a custodial term will generally be warranted in view of the gravity of the offence.

Situating a case within the sentencing matrix

109 Based on its assessment of harm and culpability at the first step of the sentencing framework, the court will situate the case before it within the appropriate cell of the sentencing matrix and identify the applicable indicative sentencing range. The court will then identify the appropriate starting point within that range, having regard once again to the harm caused by the offence and the offender's culpability.

Step 4: Offender-specific factors

110 At the fourth step of the framework, the court will make such adjustments to the starting point as may be necessary to take into account the relevant offender-specific aggravating and mitigating factors (see *Logachev* at [80]). Offender-specific factors are generally applicable across all criminal offences and are therefore "well settled in our criminal jurisprudence" (*Logachev* at [63]), and they are also generally undisputed by the parties and the

YAC in this case. It suffices for us to set out the following non-exhaustive list of relevant offender-specific factors:

Offender-Specific Factors	
Aggravating	***Mitigating***
(a) Offences taken into consideration for sentencing (b) Relevant antecedents (c) Evident lack of remorse (d) Offending while on bail	(a) Guilty plea (b) Co-operation with the authorities (c) Psychological factors with causal link to the commission of the offence (d) Ill health, which would make the contemplated term of imprisonment markedly disproportionate (e) Remorse

111 There are two points regarding these offender-specific factors that we highlight at this juncture.

112 The first point concerns the relevance of the offender's antecedents, or lack thereof. Although the *presence* of relevant antecedents will be taken into account as an *aggravating* factor, the *absence* of such antecedents will not in itself be a *mitigating* factor: see *Edwin s/o Suse Nathen v Public Prosecutor* [2013] 4 SLR 1139 at [24]. The fact that an individual who commits the Actual Distribution Offence is a first-time offender will therefore only be a neutral factor. This view is fortified by the seriousness of the Actual Distribution Offence. As the Court of Appeal explained in *Purwanti Parji v Public Prosecutor* [2005] 2 SLR(R) 220 ("*Purwanti Parji*") at [38]–[39], the absence of antecedents must be "weighed in the balance against other factors, the first and foremost of which … is the public interest". It would not be in the public

interest to be lenient and merciful in sentencing where a first-time offender commits a serious offence, as was the case in *Purwanti Parji* itself (which involved culpable homicide). At [33] of *Purwanti Parji*, the Court of Appeal also noted that there had been "a worrying trend of domestic workers inflicting violence on their employers and/or family members", and that a heavier sentence was needed "to attempt to curb this new wave of socially disruptive behaviour". Given the context in which s 377BE was enacted and the social ills it was intended to curb (as summarised in our introductory observations at [1] above), we think a similar approach should apply here as well. Thus, the fact that an offender is a first-time offender will not, in and of itself, be a mitigating factor for the Actual Distribution Offence. It will generally only be relevant in cases involving more than one offence when the court turns to consider the second limb of the totality principle, which requires an examination of whether the effect of the aggregate sentence on the offender is crushing and not in keeping with his past record and future prospects. We return to the totality principle at [117] below.

113 The second point relates to the third mitigating factor in the list above: psychological factors with a causal link to the commission of the offence. The key question in this regard is whether the nature of the offender's mental condition is such that the offender "retained substantially the mental ability or capacity to control or restrain himself at the time of his criminal acts", and simply "chose not to exercise self-control". If so, the offender's mental condition would have little or no mitigating value (see *Chang Kar Meng v Public Prosecutor* [2017] 2 SLR 68 at [30] and [33]).

114 It follows that, in the absence of any psychiatric condition or mental disorder, the mere fact that an offender's state of mind was highly emotional at the time of the offence will carry very little (if any) mitigating weight. We agree

in this regard with the District Judge's observations in *Shahrul Nizam* at [41]. This emotional state may often take the form of the offender's feelings of betrayal, humiliation, distress or indignation as a result of the prior actions of the victim, whether real or perceived. Such emotions – however acutely felt by the offender – will not ameliorate the gravity of the offender's decision to commit the Actual Distribution Offence.

Step 5: The totality principle

115 The fifth and final step of the framework applies where the offender has been convicted of multiple charges. At this step, the court will need to consider two connected points.

116 The first is whether the sentences of imprisonment imposed should be ordered to run consecutively or concurrently. Where the offender is convicted and sentenced to imprisonment for at least three distinct offences, the court *must* order the sentences for at least two of those offences to run consecutively, pursuant to s 307(1) of the CPC. In other cases, however, the court will have some discretion in this regard (see s 306(2) of the CPC). In deciding *which* sentences are to run consecutively, the court must have particular regard to two principles: namely, the one-transaction rule and the totality principle (*Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 ("*Shouffee*") at [25]). As the one-transaction rule is well established and was discussed at length in *Shouffee* at [27]–[46], we do not propose to elaborate on it further here.

117 We focus our attention instead on the totality principle, on account of which further adjustments may need to be made to the aggregate sentence by adjusting the individual sentences imposed on the offender for each charge (see *Logachev* at [81]). This is the second point that the court will need to consider

at the fifth step of the sentencing framework, and indeed is the *overarching* consideration guiding the analysis at this step. The totality principle ensures that the aggregate sentence imposed is "sufficient and proportionate to the offender's overall criminality" (*Raveen Balakrishnan* at [73]). It is well established that the totality principle has two limbs (see *Raveen Balakrishnan* at [73], citing *Shouffee* at [54] and [57]):

> (a) First, the court must examine whether the aggregate sentence is substantially above the normal level of sentences for the most serious of the individual offences committed.
>
> (b) Second, the court must examine whether the effect of the aggregate sentence on the offender is crushing and not in keeping with his past record and future prospects.

118 Notably, although the totality principle has generally been regarded as "a principle of limitation" (see *Shouffee* at [47]), in the sense that it operates to prevent the court from imposing an excessive overall sentence, it is "equally capable of having a boosting effect on individual sentences where they would otherwise result in a manifestly inadequate overall sentence": see *Gan Chai Bee Anne v Public Prosecutor* [2019] 4 SLR 838 at [20].

Our decision on MA 9280

119 We now consider how the sentencing framework we have set out above for the Actual Distribution Offence ought to apply to the facts of MA 9280, and thereafter MA 9008. As a preliminary point, given that a new sentencing framework has now been laid down for the Actual Distribution Offence, the sentences imposed for that offence may be revised even if they are not manifestly excessive or manifestly inadequate. As we recently held in *Manta*

Equipment at [48], "the fact that the approach taken below to derive the sentence has now been revised suffices for a re-evaluation of the sentence in principle".

120 We begin with the offence-specific factors going towards harm and culpability in MA 9280. To recapitulate, the offence in issue here is the charge against GED for committing the Actual Distribution Offence by publishing the First Facebook Post.

Step 1: Offence-specific factors

121 We agree with the Prosecution's submission that this is a case of *moderate* harm and *medium* culpability.

122 A consideration of the objective aspects of harm indicates that the harm suffered by V1 was plainly serious. The Image posted in the First Facebook Post was of a highly intrusive and overtly sexual nature – it showed V1 and the Supervisor engaging in sexual intercourse, with V1 fully naked and her breasts exposed. V1 was also readily identifiable in the Image, in which her face was fully visible. As the Prosecution points out, the fact that V1 was notified about the First Facebook Post by her friends shortly after it was published also shows that she was indeed identified. Further, with regard to the nature and extent of the distribution, the First Facebook Post was posted on GED's Facebook page under the "Public" setting (such that it could be viewed by anyone, including strangers) and garnered extensive attention – it attracted approximately 1,000 comments, 3,000 "likes", and 2,000 "shares" within the eight hours it was made available for (before it was removed by GED). Moreover, it was viewed by persons V1 knew personally, such as her friends who called to inform her about the post. Even though GED may not have expected or intended for the First Facebook Post to receive so much attention, the fact that it did certainly

aggravated the humiliation suffered by V1. Although there is no evidence before us as to the degree of humiliation, alarm or distress subjectively experienced by V1 as a result of the offence, or of any consequential or prior or prerequisite harm suffered by V1, the considerations we have outlined above, considered in the round, are in our view sufficient to place the level of harm caused to V1 at the higher end of the moderate range.

123 As for GED's culpability in relation to the offence, we are satisfied that he acted out of malice, to humiliate and punish V1 for what he regarded as "morally revolting" conduct on her part. While he may not have intended that the First Facebook Post would attract so much attention, the fact that he chose to publish it on the "Public" setting with V1 depicted in such a compromising position suggests that he wished to cause her to suffer considerable humiliation, even if he might not have anticipated or intended its full extent. The fact that images of private text conversations between V1 and the Supervisor were included in the First Facebook Post, together with the Image, further suggests that GED's motive was to humiliate both of them. Having said this, we note that GED removed the First Facebook Post containing the Image after he saw how much online attention it had garnered, and thereafter replaced the Image with an edited version with V1's face blurred in the Second Facebook Post. GED also did not distribute the two intimate recordings of V1 which were also in his possession (which included a 16-second recording of V1 fully naked with her bare breasts and vagina fully visible), and chose to post only the Image. The DJ found that these actions showed that GED had not intended to maximise the humiliation to V1 (see the 9280 GD at [50]), and we do not think the DJ erred in so finding.

124 Further, the evidence does not suggest that the publication of the First Facebook Post was planned or premeditated, nor were any sophisticated means

employed by GED. Moreover, although he allowed the First Facebook Post to remain available for viewing for around eight hours, there were no demonstrable efforts on his part to keep the Image available for viewing (as opposed to simply omitting to take down the First Facebook Post until he saw how much attention it had attracted). GED also did not veil himself behind anonymity, having published the First Facebook Post on his own Facebook page.

125 We note that the Image was obtained by GED through the theft of V1's mobile phone. This formed the subject of a separate charge for his Theft Offence, for which the DJ imposed a sentence of one week's imprisonment. In arriving at his decision on this aspect of GED's sentence, the DJ took into account the fact that GED committed this theft only to access the mobile phone to look for pictures and messages to confirm his suspicions of V1's adultery (see the 9280 GD at [29]). It has not been suggested that GED stole V1's mobile phone *for the purpose of obtaining the Image with a view to the eventual distribution of the same*. The fact that the First Facebook Post was posted on 12 February 2020, six days after the theft was committed on 6 February 2020, further suggests that the theft was not committed for the purpose of GED's Actual Distribution Offence. Thus, applying the reasoning set out at [96] above, we do not take the method of obtaining the Image into consideration in determining the appropriate sentence for GED's Actual Distribution Offence, and we agree with Mr Wee's submission in this regard.

126 There is one further point to be made with regard to harm and culpability in GED's case. Although no separate charge was brought against GED in respect of the Supervisor, the fact that the Image depicted both V1 *and* the Supervisor cannot be ignored. This forms part of the single indivisible transaction that constituted GED's Actual Distribution Offence in this case. This goes towards enhancing GED's *culpability*, in that he selected an intimate image

that showed both V1 and the Supervisor, and it can be inferred from the surrounding circumstances that his actions were calculated to harm the Supervisor: not only was the Supervisor's face was fully visible in the Image, the First Facebook Post also included the Supervisor's name and occupation, a description of the Supervisor as a homewrecker, photographs of the Supervisor, and images of text conversations between the Supervisor and V1. Further, although GED edited the Image so that V1's face was blurred in the Second Facebook Post, the Supervisor's face in the Image remained fully visible. This also goes towards aggravating the *harm* caused by the offence in two ways. First, further harm would have been suffered by the Supervisor, in addition to the harm suffered by V1. Although, as the DJ noted (at [48] of the 9280 GD), the admitted facts do not mention the humiliation allegedly suffered by the Supervisor following the distribution of the Image and no evidence had been placed before the court of the harm caused to him, the facts from which this harm can be *objectively inferred* are before the court and have been admitted to by GED in the Statement of Facts. Second, the Supervisor's presence in the Image revealed that V1 was having an extramarital sexual affair with her supervisor at work, and this would have aggravated the harm caused to V1 herself. We therefore agree with the Prosecution that the fact that two victims were depicted in the Image is a relevant offence-specific factor. However, this is of course subject to the qualification that the sentence imposed cannot be aimed at punishing GED for a *separate Actual Distribution Offence* against the Supervisor, given that no charge was brought by the Prosecution for this separate offence.

Steps 2 and 3: Indicative sentencing range and starting point

127 Given that GED's Actual Distribution Offence involved moderate harm and medium culpability, the applicable indicative sentencing range is 15 to 30

months' imprisonment, with the option of caning. Having regard to the various offence-specific factors we have considered above, we consider that an appropriate starting point would be 18 months' imprisonment, just below the mid-point of this range.

128 It immediately follows that the sentence of 12 *weeks'* imprisonment imposed by the DJ for GED's Actual Distribution Offence was grossly low and manifestly inadequate. This may be explained by the fact that the DJ derived this sentence principally by analogising from precedents. Other than *Shahrul Nizam*, which the DJ found to be of limited assistance given that it involved the Threatened Distribution Offence under s 377BE(2) instead of the Actual Distribution Offence under s 377BE(1) (see the 9280 GD at [38]), the precedents relied on by the DJ were all unreported and unreasoned cases. The DJ compared the facts of GED's case with those cases to determine the appropriate sentence (see the 9280 GD at [46] and [54]). However, as the YAC observed, the sentences imposed in those five unreported cases and in *Shahrul Nizam* were clustered towards the lower end of the sentencing range, ranging from five to 27 weeks' imprisonment. While the DJ's approach is understandable given the dearth of reported decisions under s 377BE(1) at the time of his decision, this illustrates the dangers of the "anchoring effect" recently referred to by See Kee Oon J in *Tan Song Cheng v Public Prosecutor and another appeal* [2021] 5 SLR 789 at [26]. It is also well established and oft repeated that sentencing precedents without written grounds are of relatively little (if any) precedential value because they are unreasoned: see, for example, *Keeping Mark John v Public Prosecutor* [2017] 5 SLR 627 at [18].

Step 4: Offender-specific factors

129 We next consider whether any adjustments to the starting point of 18 months' imprisonment are necessary on account of the relevant offender-specific factors. In our view, these do not warrant any such adjustments in the present case.

130 There are two relevant aggravating factors. First, GED committed two closely related offences which were taken into consideration for sentencing: a charge under s 377BD for taking pictures and videos of V1's intimate images and recordings from her mobile phone, and a separate charge under s 377BE(1) for the publication of the Second Facebook Post, which was removed only a day later. Although we have upheld the DJ's finding that the removal of the First Facebook Post and the blurring of V1's face in the Image in the Second Facebook Post suggests that GED had not intended to maximise the humiliation to V1 (see [123] above), the fact that the GED chose to publish the Second Facebook Post *at all* itself constitutes a separate instance of the Actual Distribution Offence which should be taken into account in sentencing.

131 Second, we consider that there is an evident lack of remorse on GED's part. GED states that he is "remorseful for his wrongdoing", and this is evidenced to some extent by his plea of guilt and co-operation with the authorities (which will be considered in more detail at [132] below). However, his mitigation plea before the DJ included various allegations regarding V1's "*Haram*" and "lecherous" lifestyle; stated that what he had posted on Facebook was "nothing but the truth, exposing [V1] and [the Supervisor]'s immoral affair"; and even sought to argue that V1 "[had] not come to the police with clean hands" and that *he* "[had] been the victim and suffered greatly for [V1's] moral shortcomings", which he argued "should not be condoned". He also

asserted in his mitigation plea that V1 was "not of good character and had already uploaded licentious photographs of herself (though not in the nude) in the past". These allegations are irrelevant and inappropriate, and they belie GED's claim that he is truly remorseful for his actions. Even on appeal, he has continued to argue that V1 "abused [his] trust" and "committed sacrilege by engaging in sexual intercourse with another man"; "had the audacity to immortalise her sacrilege by recording and keeping a recording of her sexual intercourse with another man"; and that "such morally revolting conduct should be condemned". These acts of victim-blaming by GED suggest that he is not genuinely remorseful for his actions in respect of his Actual Distribution Offence.

132 On the other hand, GED's early plea of guilt carries some mitigating weight because it spared V1 the trauma of having to testify in court and relive the humiliation she suffered as a result of the offence. The mitigating value of GED's guilty plea is, however, qualified in this case by his lack of remorse, which we have noted at [131] above.

133 As for GED's submission that he committed his Actual Distribution Offence under "very acute circumstances when he was in despair at the infidelity of his wife", we consider that this carries little mitigating value for the reasons set out at [114] above, and because the circumstances of the offence do not suggest that GED's acts were committed in a mere moment of folly. Moreover, although GED also submits that that he developed Major Depressive Disorder as a result of V1's infidelity, there is no suggestion or evidence that this was a psychological factor with a causal link to his commission of the Actual Distribution Offence. Indeed, the medical report dated 4 May 2020 from Resilienz Clinic which GED relies on, and which recorded his diagnosis of Major Depressive Disorder, contained no mention of this condition having

influenced his commission of the Actual Distribution Offence. Furthermore, for the reasons explained at [112] above, we do not regard the fact that GED is a first-time offender as a mitigating factor for his Actual Distribution Offence.

134 Accordingly, we would not have reduced GED's sentence on the ground of any of the offender-specific factors that arise for consideration in this case.

Step 5: The totality principle

135 Turning to consider the aggregate sentence, we agree with the DJ that the sentence for GED's Actual Distribution Offence and the sentence of one week's imprisonment for the Theft Offence should run consecutively, given that these were distinct offences committed on separate occasions. Taking into account the sentence we have arrived at for GED's Actual Distribution Offence, the aggregate sentence would therefore be an imprisonment term of 18 months and one week. In view of the short sentence imposed for the Theft Offence, we do not think this aggregate sentence would offend either limb of the totality principle, and as such no adjustments to the sentence for GED's Actual Distribution Offence are necessary at the fifth step of the framework. Accordingly, we allow the Prosecution's appeal in MA 9280 in respect of GED's Actual Distribution Offence and substitute the sentence of 12 weeks' imprisonment imposed by the DJ for this offence with a sentence of 18 months' imprisonment.

Our decision on MA 9008

136 We next consider the cross-appeals in MA 9008. As we have noted at [26] above, both GEH and the Prosecution have appealed against the sentences imposed by the PDJ for GEH's Actual Distribution Offence and VCGH Offence, and GEH additionally appeals against the PDJ's decision on sentence

for his MOA Offence. The sentences imposed for *all three offences* for which GEH was convicted are therefore in issue in MA 9008.

GEH's Actual Distribution Offence

137 We deal with GEH's Actual Distribution Offence first.

Step 1: Offence-specific factors

138 The present case was, in our judgment, one of *moderate* harm and *high* culpability.

139 Starting with the objective aspects of harm, the nature of the Video was highly intrusive. In the Video, V2's pants and underwear had been removed, and his exposed penis was shown for approximately five seconds continuously. Although no sexual acts were depicted, the fact that V2's exposed genitalia were clearly visible in the Video would have considerably heightened the harm caused by the offence. V2 was also readily identifiable. His face was shown at the start of the Video, which began with GEH saying "this is your friend, Mr [V2]"; he was referred to by name again at another point in the Video; and the Video was distributed from V2's own mobile phone to his contacts and chat groups. Related to this last point is the nature and extent of the distribution: the Video was sent by GEH to *over 500 of V2's contacts* over WhatsApp (including V2's colleagues, friends, neighbours and sporting teammates). Further, as the Prosecution points out, the Video was far more likely to be viewed by these recipients because it was sent from V2's own mobile phone, as they would have believed it to be a legitimate message from V2 himself. Even if these recipients were unlikely to circulate the Video further or derive any kind of perverse pleasure from viewing it (a point which GEH places emphasis on), this does not

detract from the harm that V2 would have suffered from the distribution of the Video to these recipients.

140 V2 also suffered prior or prerequisite harm in the present case, in the form of the injuries inflicted on him in the course of obtaining the Video. Given that the severity of these injuries will be taken into account by the sentence for GEH's VCGH Offence, we do not take these into account as an offence-specific factor going towards the harm caused by GEH's Actual Distribution Offence, so as to avoid double counting (see [94] above). In this connection, we also do not take the *non-physical harms* suffered by V2 into account at this stage as evidence of the subjective aspects of harm caused by GEH's Actual Distribution Offence. In his victim impact statement, V2 stated that he became afraid of crowds and of driving (and became traumatised if any vehicle followed him from behind), had difficulty sleeping at night for several months, and kept reliving the incident in his mind (see the 9008 GD at [24]). However, based on V2's victim impact statement, it is not possible to separate the emotional and psychological harms attributable to GEH's Actual Distribution Offence from those attributable to GEH's VCGH Offence. To avoid double counting, we take these non-physical harms – which appear to have been caused by the combination of both offences – into account in calibrating the sentence for GEH's VCGH Offence. We therefore return to this point at [162] below.

141 The Prosecution further submits that V2 suffered two forms of what we have labelled consequential harm: he incurred a total of $1,365.87 for his medical bills, and due to the extended hospitalisation leave V2 took following this incident, his company did not renew his contract of employment and he became unemployed. However, once again, we think these harms are more appropriately taken into account in determining the appropriate sentence for GEH's VCGH Offence, which – as will be seen – will be determined with regard

to factors including the extent of post-injury care required and the degree of disruption experienced by the victim (see [158] below). In any event, the causal link between these consequential harms *and the distribution of the Video* has, in our view, not been sufficiently established. It is not suggested by V2 that, for instance, his loss of employment was *a result of* the distribution of the Video to his colleagues.

142 Considering the offence-specific factors going towards harm in the round, we assess the harm caused by GEH's Actual Distribution Offence as being moderate. Turning to GEH's culpability, we regard this as being high for the reasons that follow.

143 First, it is clear to us that GEH's motive in committing his Actual Distribution Offence was to humiliate and punish V2 for his relationship with B. The Statement of Facts, which was admitted by GEH, stated plainly that GEH, D and E "decided to humiliate [V2] further" whilst attacking him by pulling down his pants and underwear to expose his genitals, and then taking photographs and videos of V2's genitals. In his mitigation plea before the PDJ, GEH further stated that his motive in *sending* the Video to V2's contacts was "solely to humiliate" V2. The video evidence surrounding the taking of the Video, his decision to send the Video to over 500 of V2's contacts (including his colleagues and friends) using V2's mobile phone, and his decision to send the Follow-up Message all plainly show that he acted out of malice and spite towards V2. The Follow-up Message, in particular, clearly demonstrates GEH's mental state: he wanted the Video to be distributed as widely as possible. Moreover, the Video began with GEH stating "this is your friend, Mr [V2]", emphasising V2's personal familiarity with the recipients, and was overlaid with abusive and degrading oral commentary about V2, such as D and E commenting "small cock" and GEH calling him "*Kepala butoh*", a Malay vulgarity

translating to "dick head"). These all appear to have been acts calculated by GEH to maximise the humiliation suffered by V2.

144 In GEH's written submissions on appeal, and in Mr Netto's submissions at the hearing before us, it was argued that GEH's true motivation at the time the offence was committed was to gather evidence of B's infidelity for use in divorce proceedings in the Syariah Courts. We find this argument to be wholly without merit. While this motivation may have been the driving force behind GEH's decision to follow and confront B and V2 on the evening of the offence, we fail to see how the acts which formed the basis for GEH's Actual Distribution Offence could possibly have assisted him in the Syariah Courts, and Mr Netto eventually conceded as much. On the contrary, it is obvious from the transcript of the Video that it was recorded for the purpose of distribution, and it is patently clear from the admitted facts that GEH's commission of the Actual Distribution Offence was motivated by malice and the desire to humiliate V2. At the hearing, Mr Netto ultimately also agreed that the purpose of taking the Video was indeed to humiliate V2.

145 Second, GEH's method of obtaining the Video was forceful and violent. The Video was taken in the course of a physical assault on V2 by GEH and his co-offenders, and was plainly captured without V2's consent; indeed, he had to be forcibly pinned down and his pants and underwear stripped off before it could be taken. The seriousness of the injuries suffered by V2 will be taken into account in determining the appropriate sentence for GEH's VCGH Offence (see [**Error! Reference source not found.**]–[168] below), and the fact that the attack against V2 was undertaken by a group, and the manner and duration of the attack, will be taken into consideration as aggravating factors in that latter context (see [170]–[172] below). We therefore do not take these considerations into account here. However, what *is* relevant for the purposes of GEH's Actual

Distribution Offence is that he and his co-offenders *forcibly stripped V2 and held his legs open*, while V2 was *pinned down*, so that pictures of V2's exposed penis – and thereafter the Video – could be taken. In our view, this is an aspect of GEH's culpability in relation to his Actual Distribution Offence which is *distinct from* his culpability in relation to his VCGH Offence, showing the lengths to which GEH was prepared to go to capture the Video against V2's will. In the circumstances, V2 was utterly helpless to prevent either the taking of the Video or its subsequent distribution, and GEH capitalised on this to maximise his humiliation. The abhorrent nature of such conduct cannot be understated.

146 We add that there was clear evidence of cruelty on the part of GEH in relation to both the method of obtaining the Video and the manner of its subsequent distribution. We have set out above the specific points which go towards either GEH's motive or his method, but the relevant portion of the translated transcript of the video evidence surrounding the recording of the Video should be set out in full, to provide a flavour of the overall character of the offence in this case. The following exchange took place immediately after GEH discovered that B's number was saved in V2's mobile phone as "My Lurve":

> [GEH]: You still don't want to admit ah! You messaged my wife, my love, ah!
>
> [E]: Take, take video of all the conversation! Eh, make sure you get the number also! Open up the contact and make sure verify the number is formal (?) one!
>
> [GEH]: This is to verify that this guy just texted [B] as My Love.
>
> …
>
> [E]: Did you get the number or not?
>
> …
>
> [C]: Yes.

[D]: His phone number taken already?

[C]: Record already.

[D]: Take! Then take his picture, send to all his contacts! Find group! Find group quick! Picture of his cock, his face with his cock! I slept with someone's wife! Send all to group!

…

[V2]: … [M]y hand in pain!! Ah, hand in pain!!

[GEH]: Now you cry!! Ah? Now you want to cry!

[D]: Forward quick! His nude picture!

[GEH]: How to video this? Come here!

[At this point, the recording of the Video began.]

[GEH]: Ok, this is your friend, Mr [V2]. He already fuck somebody's wife! Going to JB! All right? All naked! Okay!

[E]: (Cross talk) Small cock! See the small cock!

[D]: Ok! Look at the small cock!

[GEH]: Ok, we caught …

[E]: (Cross talk) Open up, open up his legs!

[GEH]: We caught him! Ok, we caught him! Ok! He and another person's wife, ok, a mother of two kids! Look at all these things! Right, look at all these things! They are going to JB, all right!

[D]: For dinner!

[GEH]: They're running away to JB! Now what do you want to say to all your members? You talk ah! Ah? [V2], right?

[V2]: Call police, call police

[D]: Look for someone's wife? *Mantat* [*ie*, have sex with] someone's wife?

[GEH]: Eh, *Mat*! You are the second one *lah*, *sial*, to be made naked in Singapore! *Kepala butoh lah Mat*, ehhh!!!

[E]: Eh, look again at his cock!

[GEH]: Embarrassing *lah*, *sial*!

[E]: Expose his cock again!

[GEH]: Eh, embarrassing *lah*!

[E]: Small cock, you look!

…

147 It is clear from the exchange above that GEH and his co-offenders acted with cruelty, and appeared to take a savage form of pleasure in mocking V2 in the dehumanising manner that they did. We regard this as substantially aggravating GEH's culpability in relation to his Actual Distribution Offence.

148 On the other hand, we accept Mr Netto's submission that any planning and premeditation demonstrated by GEH and his co-offenders does not appear to have been directed towards the commission of his Actual Distribution Offence. Instead, GEH appears to have been spurred on by D and E, as the confrontation escalated, to film V2's exposed penis in the Video and send the Video on to V2's contacts. Nor did GEH use any sophisticated means or make any attempt to preserve his anonymity in committing his Actual Distribution Offence.

149 Nevertheless, on balance, the offence-specific factors going towards culpability that we have discussed at [143]–[147] above are seriously aggravating. We would therefore assess GEH's culpability in relation to his Actual Distribution Offence as being high.

Steps 2 and 3: Indicative sentencing range and starting point

150 As GEH's Actual Distribution Offence involved moderate harm and high culpability, the applicable indicative sentencing range is 30 to 45 months' imprisonment, with the option of caning. In our judgment, this case falls in the middle to high end of this range, and an appropriate starting point would be 40 months' imprisonment.

Step 4: Offender-specific factors

151 At the fourth step of the framework, however, we would reduce the sentence by four months, from 40 months' imprisonment to 36 months' imprisonment, on account of the offender-specific factors in this case.

152 As an aggravating factor in relation to GEH's Actual Distribution Offence, we take into account the offences taken into consideration for the purposes of sentencing (see [21] above). Two out of three of these offences – namely, criminal intimidation of V2 and insulting V2's modesty – were serious and of a similar nature, and indeed were part of the same course of conduct as GEH's Actual Distribution Offence.

153 On the other hand, there are two mitigating factors that, in our view, warrant a downward adjustment of the sentence. The first is GEH's remorse, as demonstrated by his letter of apology to V2 and his offer of substantial compensation of $1,300 (albeit that this offer was made only on 15 July 2021, nearly a year and a half after the offences were committed, and this offer was rejected by V2). The second is the fact that GEH pleaded guilty at the first instance, thereby sparing V2 the trauma of testifying in court about his ordeal, and co-operated fully with the authorities. This stands in contrast with the decision of his co-accused persons, D and E, to claim trial (see [110] of the 9008 GD). However, for the reasons set out at [114] above, GEH's emotional state at the time of the commission of the offence carries no mitigatory weight. Further, as was the case with GED, we do not regard the fact that GEH is a first-time offender as a mitigating factor in relation to his Actual Distribution Offence, for the reasons explained at [112] above.

154 In addition to the imprisonment term of 36 months, we consider that caning should be imposed in the present case. As we have stated at [107] above, caning will presumptively be warranted where the offender uses criminal or violent means to capture images or recordings of bare skin in intimate regions of the victim's body. We also highlight the high degree of culpability evinced by GEH's conduct, which we have discussed above. In these circumstances, the sentencing considerations of general deterrence and retribution are engaged. In our view, two strokes of the cane would be appropriate, in addition to the term of imprisonment.

155 This brings the individual sentence to be imposed on GEH for his Actual Distribution Offence to 36 months' imprisonment and two strokes of the cane. This is very close to the sentence of 36 months' imprisonment and three strokes of the cane suggested by the Prosecution. We note that this is, once again, significantly higher than the sentence of 18 months' imprisonment imposed below by the PDJ, which we consider to be manifestly inadequate.

156 We return to the fifth step of the framework and the totality principle at [181]–[**Error! Reference source not found.**] below, after considering the appropriate individual sentences for GEH's VCGH Offence and MOA Offence.

GEH's VCGH Offence

157 We turn to GEH's VCGH Offence. The statutory sentencing range prescribed in s 325 of the Penal Code for the offence of voluntarily causing grievous hurt is imprisonment for up to ten years, as well as a fine or caning. The parties do not dispute that the applicable sentencing framework for the VCGH Offence is that set out by the Court of Appeal in *BDB* at [55]–[59]. The *BDB* Framework has two steps:

(a) First, the court should determine an *indicative starting point* for sentencing, based on the seriousness of the injury caused to the victim as an indicator of the gravity of the offence. This should be assessed along a spectrum, having regard to considerations such as the nature and permanence of the injury. The indicative starting point should also reflect the full breath of the permitted sentencing range.

(b) Second, after the indicative starting point has been identified, the court should consider the necessary *adjustments* upwards or downwards based on an assessment of the offender's culpability and the presence of relevant aggravating and/or mitigating factors. These were outlined at [62] and [71] of *BDB* respectively.

158 More recently, in *Saw Beng Chong v Public Prosecutor* [2022] SGHC 175 ("*Saw Beng Chong*"), the General Division of the High Court laid down further guidance as to the sentencing approach to be adopted for the offence of voluntarily causing grievous hurt. The court explained that the assessment of the seriousness of the injury is "informed by a range of factors, including [a] the number and seriousness of any fractures, [b] the location and extent of the pain suffered by the victim, [c] the permanence or duration of the injuries, [d] the extent of post-injury care that may be needed, and [e] the degree of disruption experienced by the victim" (see *Saw Beng Chong* at [26]). However, it was emphasised that the wide range of possible forms and permutations of grievous hurt would render the first step of the *BDB* Framework "necessarily and inherently … broad-based". It would be impossible and unrealistic for the court in each case to "finely calibrate the punishment by scrutinising how the injuries in the instant case differ from those in every other broadly comparable precedent". Instead, a *broad-based approach* should be adopted whereby the court considers the factors outlined above to arrive at a

broad sense of what a suitable indicative starting point would be for the offence at hand, within the full breadth of the overall sentencing range (see *Saw Beng Chong* at [2] and [26]–[28]).

159 These points bear emphasis in the present case. Comparisons between the injuries suffered in different cases will necessarily be imprecise because, although the seriousness of injury should be assessed along a spectrum, the "possible variances of the nature and extent of harm" (as highlighted in *Saw Beng Chong* at [2]) do not lend themselves to fine-grained calibration along a purely linear, one-dimensional scale. The inquiry into harm is better understood as being a multi-dimensional one, which requires both a *qualitative* assessment of each of the five factors outlined at [158] above and a *holistic* perspective on how they interact in a given case. In this regard, we stress that it will rarely be sufficient or helpful to compare the *number* of fractures suffered by the victim in each case, and that attention should also be paid to *what sort* of fractures are suffered and *which part of the body* the fractures are located at. It must be remembered that lawyers and courts are not medical professionals, and our task is to achieve broad consistency and predictability in sentencing outcomes – not to approach the classification of injuries as a mathematical or scientific exercise.

160 With these principles in mind, we consider each step of the *BDB* Framework in turn.

Step 1: Identifying the indicative starting point

161 We begin by setting out the injuries suffered by V2. V2 suffered two fractures as a result of GEH's VCGH Offence: namely, a right floor of orbit fracture (in the eye region) and a right clavicle fracture (in the shoulder region).

His other injuries were a facial contusion, a right maxillary hemoantrum, a right periorbital hematoma, and a minor head injury.

162 Beyond these physical injuries, the PDJ also took into account the psychological harm suffered by V2, as recorded in his victim impact statement: specifically, his trauma and shame due to his injuries, his fear of crowds and driving, and his difficulty sleeping (see [76] of the 9008 GD). In our view, the PDJ was correct in principle to do so. As the Court of Appeal recognised in *Public Prosecutor v Kwong Kok Hing* [2008] 2 SLR(R) 684 ("*Kwong Kok Hing*") at [26]–[28], it "has long been established that hurt can extend to non-physical injury, *eg*, mental harm", and long-term psychological and emotional trauma suffered by the victim is a relevant sentencing consideration. In this regard, we are unable to accept GEH's submission that "in the absence of expert medical opinion, full weightage or consideration cannot be afforded to the mental harm suffered" as recorded in the victim impact statement. In *Kwong Kok Hing* itself (at [27]), the victim impact statement was referred to as evidence of the victim's continued flashbacks, fear and psychological trauma. Although the Court of Appeal noted that "[e]xpert psychiatric evidence could *also* perhaps have been tendered to evaluate the longer-term impact of the incident on the victim" [emphasis added] (*Kwong Kok Hing* at [28]), we do not think this was envisaged as a strict *requirement* before such forms of non-physical harm may be taken into account in assessing the severity of the victim's injuries.

163 Having regard to the degree and nature of the injuries caused to V2, we consider that an indicative starting point of 16 months' imprisonment would be appropriate.

164 In our judgment, the submission of eight months' imprisonment made by GEH is too low. This submission was based on a number of precedents in

which imprisonment terms ranging from four to 13 months had been imposed in cases where the victim suffered fractures in the facial region, and in particular the nose and eye regions. However, V2 in this case also suffered a right clavicle fracture – a fracture of his collarbone. As we pointed out to Mr Netto during the hearing, we would regard such injuries to the shoulder as being serious in nature. There also seems to have been significant disruption to V2's life, in that he was given 19 days of hospitalisation leave and nine days of outpatient leave thereafter, with an additional 30 days of hospitalisation leave offered to him but which he rejected because he needed to return to work (see the 9008 GD at [74] and [76]). He also reported that he had no energy to work when he returned. He obtained a poor record in his company due to his long hospitalisation leave and his contract was ultimately not renewed, leading to his dismissal in April 2020 (see the 9008 GD at [76]). In terms of post-injury care, V2's medical report stated that he was "treated conservatively"; but when his condition was reviewed on 16 March 2020 after his outpatient leave ended, it was noted that he had residual upper limb weakness and limitation of his range of movement, and that he was referred to the orthopaedic surgery department for follow-up (even though it appears that he did not attend this follow-up appointment). The psychological harm suffered by V2, as outlined at [162] above, should additionally be taken into consideration.

165 *Saw Beng Chong* provides a useful reference point. In that case, the victim had suffered bruises over his right eye and nasal bridge; a mildly displaced nasal bone fracture; an undisplaced fracture of the left anterior eighth rib; and a minimally displaced right inferior posterior orbital wall fracture. He was given six days of hospitalisation leave and, when he was reviewed at the end of this period, his facial bruising and swelling were found to have resolved and he was advised that his facial fractures could be managed conservatively

(see *Saw Beng Chong* at [11]–[12]). In that case, the court held that where there are multiple fractures that are not of a more serious nature, and that cause a victim to suffer some degree of disruption and persistent pain, a starting point of between nine and 14 months' imprisonment would be appropriate. On the facts of *Saw Beng Chong*, it was thought that the District Judge had not erred in identifying an indicative starting point of 12 or 13 months' imprisonment (see *Saw Beng Chong* at [40]). The injuries suffered by V2 in the present case are plainly more severe than those suffered by the victim in *Saw Beng Chong*, particularly in view of the type of fractures in issue, the persistence of the effects of the injuries for more than a month after the offence, the significantly greater post-injury care necessitated, and the higher degree of disruption experienced. The indicative starting point identified for the imprisonment term to be imposed on GEH should therefore be higher than 12 or 13 months.

166 On the other hand, the Prosecution's proposed indicative starting point of two years' imprisonment would be too high. In this regard, the Prosecution relies on *Public Prosecutor v Muhammad Fuad Kamroden* [2019] SGDC 287 ("*Fuad*"), where an indicative starting point of two years' imprisonment was identified (see *Fuad* at [28]). However, we do not think the comparison is apposite. The injuries suffered by the relevant victim in *Fuad* included facial fractures concentrated on the nose area (specifically involving the anterior, medial and lateral walls of the left maxillary sinus, left medial and lateral pterygoid plates, and medial wall of the right maxillary sinus), and the victim underwent open reduction and internal fixation of these fractures. The victim was admitted to the hospital for a period of six days. In the present case, although V2's fractures included one to the vulnerable eye region and he was offered a significant period of leave (see [164] above), no such surgical intervention appears to have been required. In the circumstances, we do not

think the PDJ erred in concluding that the injuries suffered by V2 were less serious than those in *Fuad* (see [90] of the 9008 GD).

167 Another useful reference point in this regard is the decision in *Public Prosecutor v Pettijohn William Samuel* [2019] SGDC 290 ("*Pettijohn*"), which was not cited by the parties in MA 9008 but which was referred to in *Saw Beng Chong*. In *Pettijohn*, the victim sustained mildly displaced fractures of the left orbital floor and anterior and lateral maxillary walls with small hemoantrum, and a left zygomatic arch fracture. The victim had to undergo surgery to reconstruct his eye socket using titanium plates; lost sensation in his face from underneath his nose up to his cheekbone; had to go for follow-up appointments once a month initially, and then once every three months, one and a half years after the incident; and also suffered from long-term impairment of his vision (peripheral diplopia). The District Judge in *Pettijohn* rightly regarded the harm inflicted on that victim as being in the serious category (see *Pettijohn* at [3], [16] and [132]), and identified a suitable starting point as being at least 18 months' imprisonment (see *Pettijohn* at [130]). Having regard to the factors outlined at [158] above, and in particular the permanence of the injuries and the extent of post-injury care required, the injuries suffered by the victim in *Pettijohn* were more serious than those of V2 in the present case. The indicative starting point for the imprisonment term to be imposed on GED should thus be lower than 18 months.

168 Having regard to the severity of V2's injuries and the sentencing precedents in *Fuad*, *Pettijohn* and most recently *Saw Beng Chong*, we consider that an indicative starting point of 16 months' imprisonment would be appropriate. We note that this is a slightly higher indicative starting point than that identified by the PDJ, which was 15 months' imprisonment (see [90] of the 9008 GD).

Step 2: Adjustments to be made

169 At the second step of the *BDB* Framework, the indicative starting point is to be adjusted upwards or downwards based on the offender's culpability and the relevant aggravating and mitigating factors. The PDJ held that an uplift of three months' imprisonment was warranted (see [94] of the 9008 GD). In our judgment, an uplift of five months' imprisonment would be appropriate, in the light of the serious aggravating factors that are present in this case and which outweigh the applicable mitigating factors.

170 The first aggravating factor is the fact that the attack against V2 was *undertaken by a group*. The existence of a group element in the present case is clear from both the admitted facts and the fact that GEH's VCGH Offence itself was for voluntarily causing grievous hurt *with common intention*.

171 As explained in *Public Prosecutor v Ong Chee Heng* [2017] 5 SLR 876 ("*Ong Chee Heng*") at [36], the mere fact that there was a group element in the facts and circumstances of the offence does not mean that the commission of the offence is necessarily aggravated. To determine whether this is so, the court should consider whether the group element of the offence aggravated (or had the potential to aggravate) the offence committed because, for instance, it resulted in (a) a higher degree or a greater likelihood of fear to the victim; (b) had the effect of encouraging, facilitating or perpetuating the continued commission or escalation of the offence; and/or (c) resulted in a higher degree of actual and potential harm to the victim (*Ong Chee Heng* at [34]). In the circumstances of GEH's VCGH Offence, it cannot seriously be disputed that the group attack on V2 by GEH, D and E heightened the fear he experienced, encouraged the continuation and escalation of the attack, and resulted in a higher degree of actual and potential harm to him. In our judgment, the PDJ was

therefore correct to take this into account as an aggravating factor (at [91] of the 9008 GD).

172 The second aggravating factor is the *manner and duration of the attack*, which was sustained and brutal. The attack lasted for about half an hour, with GEH and his co-offenders punching and kicking V2's face and body numerous times while V2 was pinned to the ground in a chokehold and thus helpless to fight back or defend himself. The attack against V2 also persisted notwithstanding B pleading with GEH to stop and V2 saying at several points that he could not breathe. It is also clear from the video recordings of the attack that it was carried out in a vicious manner, with the intention of extracting a confession from V2 regarding his relationship with B and punishing him for this.

173 Before we turn to consider the mitigating factors, we deal briefly with two potential aggravating factors on which we do *not* place much weight in the circumstances of this case. The first is the degree of premeditation involved in the offence. The parties adopted diametrically opposing views on this, with the Prosecution submitting that the attack was "extensively premeditated" and GEH submitting that there was no deliberation or premeditation as the decision to attack V2 was made only after the confrontation began. In our judgment, there is insufficient evidence for us to conclude that the *attack* on V2 was indeed premeditated. It is clear from the admitted facts that GEH and his co-offenders formed a coordinated plan to follow B (in three separate cars) when she left her home and boarded V2's car, and thereafter trapped V2's car so as to confront him before making him exit from his car and proceed to the grass patch where the attack later took place. However, it cannot be said that the facts support the inference that any deliberation or premeditation on the part of GEH and his co-accused persons was directed towards the object of attacking V2. We therefore

decline to take this into account as an aggravating factor enhancing GEH's culpability.

174 The second potential aggravating factor is the fact that GEH's VCGH Offence was committed in a public place. The Prosecution argues that the PDJ failed to give due weight to this factor. However, in our judgment, the PDJ was correct to place less weight on this as an aggravating factor (see [92] of the 9008 GD). As explained in *Ong Chee Heng* at [45], the fact that an offence – particularly a violence-related offence – is committed in a public place will be an aggravating factor if it causes *public fear and alarm* and/or if it poses a *threat to the health and safety of the public*. What is required is an assessment of whether, on the facts and circumstances of the case and having regard to the nature of the offence committed, the offender's conduct "had the potential to cause fear and alarm and/or to pose a danger to the public given the particular location at which it occurred". In the present case, although the offences took place in a public place (on a grass patch beside a road), it does not appear that any others were present, and little actual or potential alarm or danger appears to have been caused to members of the public.

175 As for the mitigating factors, the PDJ correctly took into account GEH's guilty plea, letter of apology and offer of compensation to V2 (see the 9008 GD at [93]). In particular, we accept that GEH's letter of apology and offer of compensation to V2 go towards demonstrating his remorse, as we have also noted at [153] above in relation to his Actual Distribution Offence.

176 However, as we have held in relation to his Actual Distribution Offence (see [153] above), GEH's highly emotional state as a result of what he discovered about B and V2's relationship, and what he perceived as B's infidelity, should be given no mitigatory weight. We agree with the PDJ that

this provided "absolutely no excuse" for GEH's acts (see the 9008 GD at [93]). As explained in *BDB* at [72], whether mitigating value will be attributed to an offender's mental condition will turn firstly on "whether the evidence establishes that the offender's mental responsibility for his criminal acts was substantially diminished at the time of the offence by reason of his mental condition", and medical evidence will be important to establish a *causal connection* between the mental condition and the commission of the offence. There is no such evidence in the present case. GEH's reliance on *Tan Rui Leen Russell v Public Prosecutor* [2009] 3 SLR(R) 979 ("*Russell Tan*") at [34] is also misplaced. Unlike in *Russell Tan*, where there was medical evidence to show that the victim's provocative conduct had triggered the offender's "acute stress reaction" at the time of the offence (see *Russell Tan* at [33]), here there is no evidence beyond GEH's bare assertion to support his claim that he committed his VCGH Offence as a result of a loss of self-control brought about by provocation. Furthermore, as the Court of Appeal observed in *BDB* at [75], the "difficult personal circumstances" (such as personal financial or social problems) faced by an offender at the time of the offence "will rarely, if ever, have mitigating value".

177 On balance, the aggravating factors that are present in this case far outweigh the mitigating factors. In the circumstances, we consider that this warrants a significant uplift of five months from the indicative starting point of 16 months' imprisonment, such that the imprisonment term for GEH's VCGH Offence ought to be 21 months.

178 On the issue of caning, we see no reason to interfere with the PDJ's decision (at [97] of the 9008 GD) to impose four strokes of the cane for GEH's VCGH Offence. In our view, there are no exceptional circumstances that would warrant a departure from the starting point of caning, and four strokes is

reasonable having regard to the severity of the injury suffered as well as the various aggravating and mitigating factors in the present case. Accordingly, the individual sentence we would impose on GEH for his VCGH Offence is 21 months' imprisonment and four strokes of the cane.

GEH's MOA Offence

179 We briefly address GEH's appeal against the sentence imposed on him by the PDJ in respect of his MOA Offence. In our view, this aspect of the appeal is wholly unmeritorious.

180 Section 20 of the MOA provides that first-time offenders under that provision are liable to a fine not exceeding $2,000 or imprisonment for up to six months, or both. We see no reason to depart from the view set out in *Gao Zhengkun* at [123] that the typical sentence for such offences will be a fine. Having regard to the relevant sentencing precedents, there is also no basis for us to disturb the PDJ's decision on the appropriate quantum of the fine imposed. In the present case, GEH (together with D and E) shouted derogatory insults at B and mocked her by singing "happy birthday" loudly, disregarding the police officers' instructions to calm down and stop behaving rowdily. This took place close to midnight, along a public road (see [19] above). In our view, GEH's behaviour is of comparable severity to that of the offender in *Public Prosecutor v Manfred Wu Jing Jie* [2019] SGDC 126 ("*Manfred Wu*"), where a fine of $1,500 (in default, six days' imprisonment) was imposed for the offence under s 20 of the MOA. In that case, the accused had shouted vulgarities towards members of the public and gesticulated wildly at a public bus stop in the early hours of the morning, despite being given multiple warnings not to do this (see *Manfred Wu* at [13], [280] and [297]). In these circumstances, the fine of $1,500

(in default, six days' imprisonment) imposed by the PDJ for GEH's MOA Offence cannot be said to be manifestly excessive.

The aggregate sentence

181 We finally consider the appropriate aggregate sentence that should be imposed on GEH. We have held that the appropriate individual sentences for each of the three offences in issue in MA 9008 would be: 36 months' imprisonment and two strokes of the cane for his Actual Distribution Offence; 21 months' imprisonment and four strokes of the cane for his VCGH Offence; and a fine of $1,500 (in default, six days' imprisonment) for his MOA Offence. Although GEH's Actual Distribution Offence and VCGH Offence may be said to have been committed as part of a single transaction, so as to engage the one-transaction rule, we agree with the PDJ that both sentences of imprisonment should run consecutively as they violated different legally protected interests (see the 9008 GD at [119]–[120], applying the guidance in *Shouffee* at [30]). This would yield a provisional aggregate sentence of 57 months' (or four years and nine months') imprisonment, six strokes of the cane and a fine of $1,500 (in default, six days' imprisonment).

182 In our judgment, this provisional aggregate sentence is on the high side. Although it cannot be said to be substantially above the normal level of sentences for the most serious of the individual offences committed, and the first limb of the totality principle is therefore not breached, the second limb of the totality principle may be implicated because the effect on GEH of the provisional aggregate imprisonment term (of 57 months' imprisonment) may be crushing. Here, it should be borne in mind that GEH is a first-time offender with an otherwise clean past record and shows promise for rehabilitation and reform, especially given the remorse he has demonstrated to date. At the same time, as

in *Logachev*, the downward adjustment should be modest because GEH's serious offences must be met with a correspondingly substantial custodial term (see *Logachev* at [110]).

183 On the basis of the totality principle, we would adjust the aggregate imprisonment term downwards by six months, to 51 months (or four years and three months). This would be achieved by reducing the imprisonment terms imposed for GEH's Actual Distribution Offence and VCGH Offence by three months each, to 33 months' imprisonment and 18 months' imprisonment respectively. These adjustments would result in an aggregate sentence of four years and three months' imprisonment, six strokes of the cane and a fine of $1,500 (in default, six days' imprisonment). This aggregate sentence would, in our view, be sufficient and proportionate to GEH's overall criminality. We note that this is just below the aggregate sentence sought by the Prosecution.

Conclusion

184 For the foregoing reasons, we set aside the sentence imposed by the DJ on GED and by the PDJ on GEH for their Actual Distribution Offences. We substitute these with the following sentences:

Offender	Charge	Original sentence	Sentence on appeal
GED	DAC-904516-2021	12 weeks' imprisonment	18 months' imprisonment
GEH	DAC-913704-2020	18 months' imprisonment	33 months' imprisonment and two strokes of the cane

185 We do not disturb the sentences imposed by the PDJ on GEH in respect of his VCGH Offence (18 months' imprisonment and four strokes of the cane) and his MOA Offence (a fine of $1,500 and in default, six days' imprisonment). As we have stated at [181] above, the imprisonment sentences imposed on GEH for his Actual Distribution Offence and VCGH Offence are to run consecutively. The aggregate sentence to be imposed on GEH is therefore four years and three months' imprisonment, six strokes of the cane and a fine of $1,500 (in default, six days' imprisonment).

186 Accordingly, we allow the Prosecution's appeals in MA 9280 and MA 9008 to the extent set out above, and we dismiss GEH's cross-appeal in MA 9008. We will hear the parties on the appropriate dates of commencement of GED and GEH's respective sentences of imprisonment.

187 It remains for us to thank counsel for their submissions. In particular, we record our appreciation to the YAC, Mr Yao, for the thorough written and oral submissions he made before us. These were of considerable assistance to us.

Sundaresh Menon
Chief Justice

Steven Chong
Justice of the Court of Appeal

Vincent Hoong
Judge of the High Court

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