**IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

**[2018] SGHC 148**

Magistrate's Appeal No 9330 of 2017/01

Between

Public Prosecutor

… *Appellant*

And

Raveen Balakrishnan

… *Respondent*

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# GROUNDS OF DECISION

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[Criminal Procedure and Sentencing] — [Sentencing] — [Unrelated offences]
[Criminal Procedure and Sentencing] — [Sentencing] — [Totality principle]
[Criminal Procedure and Sentencing] — [Sentencing] — [Rule against double counting]

# Public Prosecutor
# v
# Raveen Balakrishnan

**[2018] SGHC 148**

High Court — Magistrate's Appeal No 9330 of 2017/01
Sundaresh Menon CJ
8 March 2018

26 June 2018

**Sundaresh Menon CJ:**

## Introduction

1 In recent years, the appellate courts have endeavoured to provide sentencing frameworks and benchmarks for a range of offences from violent crimes, to financial wrongdoings, to drug-related offences. As I explained during my opening address at the Sentencing Conference 2014, the primary object of these frameworks is to provide a degree of predictability as well as to achieve some measure of consistency so that, as far as it may reasonably be possible, like cases are treated alike.

2 Apart from developing the appropriate framework for the sentencing of particular offences, however, a no less important issue is the proper approach to be taken in determining the aggregate sentence for offenders convicted of multiple charges. This issue arises frequently and when it does, it exerts a

significant influence on the sentence ultimately faced by the offender. Yet, despite its importance and prevalence, commentators have observed it to be a "neglected and awkward topic" (*Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch* (Andrew Ashworth & Martin Wasik eds) (Clarendon Press, 1998) ("*Fundamentals of Sentencing Theory*") at p 4). In recent times, the courts have generally been guided in this regard by the framework I laid down in *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 ("*Shouffee*"). But a number of issues remain unresolved and the present appeal concerned some of them.

3 The accused in this appeal committed two offences which were clearly *unrelated*, the second of which he committed while he had been released on bail for the first. The district judge, appearing to give weight to the interest of rehabilitation, held that the two individual sentences were to run concurrently. The Prosecution appealed. The principal questions before me were whether sentences for wholly unrelated offences, as those in this case were, should generally be ordered to run concurrently or consecutively, and if the latter, whether this should be the position in this instance. Issues concerning the totality principle and the rule against double counting of sentencing factors were also raised. After hearing the parties, I allowed the appeal in part and I now set out my grounds.

## Background facts

4 On 10 October 2017, the respondent, Raveen Balakrishnan ("the Accused"), pleaded guilty to the following two charges:

> **First charge**: You … are charged that you, on 9th day of October 2016, at about 5.40 am, at pathway near to the entrance of St James Power Station, No 3 Sentosa Gateway, did voluntarily cause hurt to one Sean Lavin Pasion Emile, by means of a knife, an instrument for stabbing or cutting, to wit by cutting the said

> Sean Lavin Pasion Emile on his right cheek and causing him to suffer a[n] 11 cm in length laceration from his lateral upper lip to his right ear, and you have thereby committed an offence punishable under Section 324 of the Penal Code, Chapter 224.
>
> **Second charge**: You … are charged that you, on the 22nd day of April 2017, at or about 8:36 p.m., at Blk 51 Merchant Road, Merchant Square, Singapore, was part of an unlawful assembly, together with Divagaran S/O Kesavan, M/19 years old, Parthiban S/O Tamil Selvan, M/21 years old, K Vicknesh, M/18 years old and Vighnaharin Maran, M/18 years old, whose common object was to cause hurt to Shanjais Mathiazgan, M/18 years old, and in the prosecution of the common object of the said assembly, all of you did use violence on him, to wit, by punching and kicking at him, and you have thereby committed an offence of rioting, punishable under Section 147 of the Penal Code, Chapter 224.

5 At the time of the offences, the Accused was a 23-year-old Singaporean. He was serving his national service at the time of the first offence, and was a first year polytechnic student at the time of the second offence.

6 The facts constituting the two offences were recorded in the Statement of Facts which the Accused admitted to without any qualification.

### *The first offence*

7 The first offence was one of voluntarily causing hurt ("VCH") by dangerous weapons or means under s 324 of the Penal Code (Cap 224, 2008 Rev Ed) ("PC"). The victim was a 20-year-old male. In the early morning of 9 October 2016, the victim and two of his friends were at a night club. At about 2.00am, one of the victim's friends, Melvish s/o Rajendran ("Melvish"), was chatting with a friend in the vicinity of the club when the Accused suddenly punched him on his head. A mutual friend intervened. The Accused repeatedly asked whether Melvish was from a particular local gang. Police officers on patrol intervened and conducted checks on the parties. Thereafter, Melvish and

the Accused went their separate ways and Melvish told the victim what had happened.

8 Later, at about 5.40am, Melvish and the victim were standing outside the club when Melvish noticed the Accused leaving the club premises and pointed him out to the victim. The Accused saw that and confronted Melvish. One of the Accused's friends tried to mediate. The Accused challenged the victim to a fight and asked the victim to follow him, which the victim did for a few steps. The Accused then produced a knife, at which point the victim suggested they talk things out. This did not find favour with the Accused who used the knife and cut the victim on his right cheek.

9 The Accused then fled the scene and threw the knife away. The knife was not recovered. According to the Accused, it was a pocket knife around the size of a pen.

10 In the meantime, the victim was conveyed to the emergency department of a nearby hospital. The victim's medical report prepared by a resident of the Department of Plastic, Reconstructive and Aesthetic Surgery stated that he suffered an 11cm right facial laceration from his upper lip to his right ear. It was a "full thickness skin laceration with injury to the underlying fascia and two buccal nerve branches". The victim underwent repair of the laceration and buccal branch of his facial nerve. He was hospitalized for three days and given nine days of medical leave. As a result of the assault, the victim will bear a permanent scar on the right side of his face.

***The second offence***

11 The second offence for rioting under s 147 of the PC occurred several months later, while the Accused was on bail for the first offence. Two groups

of persons were involved: the Accused was part of one group, while the victim, who was an 18-year-old male, was part of the other.

12 On the evening of 22 April 2017, members of the two groups (except the Accused who was not initially there) were drinking at separate tables in a bar. An altercation broke out between the victim and one of those in the other group, named Divagaran s/o Kesavan ("Divagaran"), as a result of a long-held grudge between them. They were stopped by the others present and both groups thereafter separated.

13 Subsequently, the victim called one of the Divagaran's companions and asked to meet again. Divagaran and his companions in turn called the Accused whom they considered "their older friend". The Accused arrived within 20 minutes and was apprised of the earlier altercation. He advised Divagaran that they might as well resolve the matter once and for all, rather than having no closure on this issue.

14 Sometime later, the victim saw Divagaran and confronted him. The victim chased Divagaran who led the victim to where the Accused and his companions were waiting. Upon seeing the group, the victim stopped chasing Divagaran; but the Accused and his companions charged at the victim and they punched and kicked him, causing him to fall to the ground. One of the victim's friends tried to stop the assault but was unable to do so.

15 The assault was recorded by closed-circuit television cameras in the area. From the footage, it was evident that the Accused was the most aggressive of the assailants, landing a total of seven punches on the victim's chest and back and 11 kicks. All 11 kicks were delivered while the victim was on the ground. Three of these kicks were to the victim's head, and four of them involved the

Accused stamping on the victim's head. The Accused also held the victim's collar while punching him, allowing the others to strike the victim while he was restrained and unable to defend himself. Even when the others started to leave, the Accused continued to stamp on the victim's head. The assault lasted about 20 seconds. The Accused and his companions then fled the scene.

16 The victim was conveyed to the emergency department of a nearby hospital. The medical report stated that the victim suffered:

(a) initial giddiness;

(b) tenderness over the left thumb and right supraorbital region with bruising;

(c) a swollen left lower lip with superficial laceration; and

(d) a facial contusion with a possible nasal bone fracture.

17 Subsequently, the Accused's companions were each issued a 12-month conditional warning for rioting. The victim and another person in his group were issued stern warnings for affray.

***The antecedents***

18 The Accused had some antecedents. His first brush with the law was in 2009, when he was 15 years of age. Excluding the present offences, he had been sentenced previously for three sets of offences:

(a) In May 2009, he was sentenced to 21 months' probation with time restrictions and 100 community hours for mostly property and driving-related offences.

(b) In April 2012, he was sentenced to fines totaling $1,300 as well as a 12-month driving disqualification order for driving or riding a motor vehicle without a driving licence and without insurance coverage.

(c) In January 2014, he was sentenced to reformative training and a 12-month driving disqualification order in respect of seven offences, including two counts of rioting armed with a deadly weapon, one count of voluntarily causing grievous hurt with common intention, and one count of robbery with common intention. In addition, amongst other charges, one count of unlawful assembly armed with a deadly weapon and one count of VCH were taken into consideration for the purpose of sentencing.

**The proceedings below**

19 On 17 October 2017, sentencing submissions were heard by the learned district judge in the State Courts ("the DJ").

***The Prosecution's sentencing submissions***

20 The Prosecution submitted that the principal sentencing consideration in this case were specific and general deterrence. Several aggravating factors were identified and various sentencing precedents were cited in relation to the offences. On this basis, the Prosecution urged the DJ to impose the following sentences:

(a) for the first offence of VCH by dangerous weapons or means, at least three and a half years' imprisonment and six strokes of the cane; and

(b) for the second offence of rioting, at least two years' imprisonment and three strokes of the cane.

21 The Prosecution further submitted that consecutive sentences were appropriate. The one-transaction rule did not apply because the two offences arose from unrelated incidents. As for the totality principle, the aggregate sentence sought was not substantially above the normal level of sentences for the most serious of the individual offences; it was also not crushing, taking into account the record and prospects of the Accused.

22 In the circumstances, the Prosecution sought an aggregate sentence of at least five years and six months' imprisonment, with at least nine strokes of the cane.

***The submissions of the Defence***

23 The Defence did not expressly identify a primary sentencing consideration, but appeared to place emphasis on the rehabilitative prospects of the Accused. Amongst others points raised, the Defence submitted that the offences were not premeditated but were committed on the spur of the moment; the Accused had cooperated with the authorities; and he was willing to apologize to the victims in the event that he was given the opportunity to do so. The Defence further submitted that the antecedents of the Accused could be distinguished; and finally, that in relation to the second offence there should be parity between the Accused's sentence and the conditional warnings issued to his companions.

24 As to how the sentences should be ordered to run, the Defence highlighted that s 307(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC") did not apply and there was therefore no obligation on the court to

order that the individual sentences run consecutively. It further submitted that consecutive sentences would contravene the totality principle as it would have a crushing effect on the Accused who deserved another chance. Finally, it was submitted that on account of the totality principle, on any basis, the aggregate imprisonment term should not be more than 24 months.

25 The Defence accordingly proposed two alternative sentencing positions:

(a) 18 and 15 months' imprisonment for the first and second offences respectively, and for the two individual sentences to run *concurrently*, resulting in an aggregate sentence of 18 months' imprisonment.

(b) Alternatively, 12 months' imprisonment for each of the offences, run *consecutively*, resulting in an aggregate 24 months' imprisonment term.

***The DJ's decision***

26 The DJ sentenced the Accused on 17 October 2017 and subsequently released his grounds of decision on 31 October 2017 in *Public Prosecutor v Raveen Balakrishnan* [2017] SGDC 292 ("GD").

27 The DJ first considered the appropriate individual sentences.

(a) In relation to the first offence, the DJ agreed with the aggravating factors identified by the Prosecution and held that there were no offence-specific mitigating factors (GD at [8] and [10]). He distinguished the precedents cited by the Defence and found greater factual similarity between the present case and the precedents cited by

the Prosecution (GD at [11]–[24]). A sentence of three and a half years' imprisonment and six strokes of the cane, as urged by the Prosecution, was thus imposed.

(b) In relation to the second offence, the DJ agreed with the aggravating factors identified by the Prosecution (GD at [25]). Relying on the precedent cited by the Prosecution, and distinguishing that raised by the Defence, the DJ adopted the Prosecution's sentencing position of two years' imprisonment and three strokes of the cane (GD at [29]–[34]).

28 The DJ then held that the primary sentencing considerations were specific and general deterrence, as well as retribution. Even though the Accused was of relatively young age, "rehabilitation should be accorded lower priority than deterrence and retribution" since the Accused had already undergone probation and reformative training for his violence- and property-related antecedents. Further, in relation to the present offences, he had committed the first offence a mere four months after the completion of his reformative training stint, and the second offence while he was on bail (GD at [35]). Finally, the Accused had similar violence-related antecedents (GD at [36]).

29 The DJ then held that the individual sentences were to run concurrently. He opined that while it "would have been defensible" in terms of the one-transaction rule to run the sentences consecutively, that would not be "in keeping with the Accused's future prospects", which he believed to be promising (GD at [43]). In this regard, the DJ highlighted the following four factors:

(a) The Accused was not "beyond any hope for reform and rehabilitation", referring to the Accused's handwritten mitigation plea which expressed remorse (GD at [37]).

(b) The Accused had sought to improve himself in the past two years and had done well in the O-Level examinations which he sat for while he was undergoing reformative training (GD at [38]).

(c) There was a "decrease in [the Accused's] rate of offending". Based on his antecedents, he faced 13 charges in January 2014, including charges that were taken into consideration (see [18(c)] above). In the present proceedings, however, he faced only two charges "albeit similarly violent ones" (GD at [39]).

(d) The Accused might have lost his sense of direction or purpose when he discovered, at a time when he was only 14 years old and lacked emotional maturity, that he was an adopted child (GD at [40]–[41]). The Accused's present reformative prospects "are good, if only he resolves his anger and finds peace within himself, and walks away from the web of toxic friendships and build constructive ones" [original emphasis omitted] (GD at [42]).

30 Accordingly, even though the individual sentences imposed aligned with those urged by the Prosecution, the DJ ran the sentences concurrently to derive a significantly lower aggregate sentence of three and a half years' imprisonment and nine strokes of the cane (GD at [43]). The sentences imposed may be tabulated as follows (GD at [44]):

| S/N | Offence | Sentence imposed |
|---|---|---|
| First | s 324 of the PC | 3.5 years' imprisonment and |

| | | |
|---|---|---|
| offence | VCH by dangerous weapons or means | 6 strokes of the cane |
| Second offence | s 147 of the PC<br>Rioting | 2 years' imprisonment and<br>3 strokes of the cane |
| **Aggregate sentence** | | **3.5 years' imprisonment (with the sentences run concurrently) and 9 strokes of the cane** |

31 The commencement date of the imprisonment term was backdated to the date of initial remand, being 2 August 2017.

## The parties' cases on appeal

### *The Prosecution's case*

32 The Prosecution appealed against the sentence imposed. Its primary argument was that the DJ should have ordered the two individual sentences to run consecutively. Specifically, four grounds of appeal were raised:

(a) The DJ failed to appreciate the following three factors justifying the imposition of consecutive sentences:

(i) that the offences were committed on separate occasions against separate victims;

(ii) that the second offence was committed while the Accused was on bail for the first offence; and

(iii) that by ordering concurrent sentences, the Accused to a substantial degree avoided being punished for the unrelated second offence.

(b) The DJ failed to adequately consider the need for specific deterrence, particularly given the Accused's violence-related antecedents and his prior stint of reformative training.

(c) The DJ erred in law when he appeared to credit the Accused for a "decrease in his rate of offending".

(d) The DJ placed undue weight on the factors raised in the Accused's mitigation plea, including his good O-Level examinations results.

33 For these reasons, the Prosecution submitted that the aggregate sentence imposed was manifestly inadequate and did not reflect the Accused's culpability and recalcitrance. The Prosecution further submitted that the totality principle would not be infringed if the two individual sentences were run consecutively. Finally, the Prosecution contended that if there was any concern over the result of imposing consecutive sentences in a case like this, the court could recalibrate the aggregate sentence by adjusting the individual sentences, or antedating the commencement date of the sentence for the second offence of rioting.

***The case for the Defence***

34 The Defence, on the other hand, submitted that the sentence imposed by the DJ ought not be disturbed for the following main reasons:

(a) there was no requirement at law for the two individual sentences to be ordered to run consecutively;

(b) the aggravating factors cited by the Prosecution had been taken into account in relation to the individual sentences and should not be counted again in deciding how the sentences should run;

(c) the DJ did not place excessive weight on the factors raised in the Accused's mitigation plea; and

(d) the totality principle justified the decision of the DJ to run the sentences concurrently.

**The issues**

35 The primary issue in this appeal was whether the DJ had erred in running the two sentences concurrently rather than consecutively. This issue, while easy to frame, in turn implicated three nuanced principles concerning the sentencing of an offender who has been convicted of multiple offences. These may be broadly framed as follows:

(a) How should the individual sentences for unrelated offences be ordered to run as a matter of principle?

(b) How should the aggregate sentence be adjusted to take into account the totality principle and what is the conceptual justification for such an adjustment?

(c) How should the sentencing factors that affect more than one individual sentence be taken into account without counting them over again?

36 I will discuss these issues in turn, before applying the framework derived from this discussion to the present appeal. For ease of reference, I will refer to an offender who is to be sentenced for convictions on multiple offences as a "multiple offender".

## My decision

### *Running of the sentences*

37 Where a multiple offender comes before a sentencing court, the first task for the court is the determination of the appropriate individual sentences for each of the offences committed (see *Shouffee* at [26]). Once those have been determined, the next question is how the individual sentences should be ordered to run so as to derive a suitable aggregate sentence (see *Shouffee* at [27]).

*The general rule of consecutive sentences for unrelated offences*

38 The Prosecution submitted that the starting point in this context should be that sentences for *unrelated* offences should run consecutively. If this was not the case, the effect would be to grant such an offender an unwarranted discount since by having the sentences run concurrently, the offender would escape at least in part, if not entirely, punishment for the corresponding offences. The Defence, on the other hand, argued that a presumptive imposition of consecutive sentences for unrelated offences ran contrary to the precedents and was supported by neither s 307(1) of the CPC nor the one-transaction rule.

39 I previously elaborated on the one-transaction rule in *Shouffee*, and it contemplates that where two or more offences form part of a single transaction, all sentences in respect of those offences should in general run concurrently rather than consecutively (at [27], citing *Public Prosecutor v Law Aik Meng* [2007] 2 SLR(R) 814 at [52]). The question of whether the various offences form part of a single transaction in turn depends on whether they entail a "single invasion of the same legally protected interest" (at [30], citing D A Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2nd Ed, 1979) ("*Principles of Sentencing*") at

p 53). In determining this, the proximities in time, place, continuity of action, and continuity in purpose or design all have utility (at [28] and [34]). The premise is that if there is a single invasion of a legally protected interest, then even if this might give rise to several offences, it is, in the final analysis, the violation of that single interest that is being punished and concurrent sentences would thus ordinarily suffice to reflect the seriousness of the offences. In effect, the one-transaction rule serves "as a filter to sieve out those sentences that ought not as a general rule to be ordered to be run consecutively" (at [27]). The rule ought to be applied in a commonsensical manner (at [40]), and indeed, in some situations it might be appropriate to impose consecutive sentences even if that would mean a deviation from the rule (at [45]).

40 In this appeal, we were concerned with the converse situation in that the offences, rather than forming part of a single transaction, were unrelated. In that sense, the Defence was correct to say, at least as a matter of strict logic, that the one-transaction rule did not in itself mandate a presumptive imposition of consecutive sentences for unrelated offences. However, it also did not follow that the Prosecution's submission was incorrect.

41 In my judgment, *as a general rule*, a multiple offender who has committed unrelated offences should be separately punished for each offence, and this should be achieved by an order that the individual sentences run consecutively. I will, for ease of reference, henceforth refer to this rule as "the general rule of consecutive sentences for unrelated offences". This general rule is, to my mind, well justified as a matter of principle and policy for the following reasons.

42 First, this should be so as a matter of first principle. Since the offences are unrelated, each offence committed by a multiple offender should attract its

own distinct consequence. There is no reason in principle why a second or subsequent offence should attract less or possibly no distinct consequence just by reason of the fact that it is one of a number of separate offences for which the offender is being sentenced. All else being equal, a multiple offender bears greater culpability and will have caused greater harm than an offender who has committed only a single offence. As observed in *Sentencing Practice in the Subordinate Courts* (LexisNexis, 3rd Ed, 2013) ("*Sentencing Practice*") (at p 21), "[m]ultiple wrongdoing by a multiple wrongdoer, as a general rule, must be viewed more severely than single offending involving similar offences. The community (and the victim(s)) have suffered more because of the greater harm done." Single offenders and multiple offenders therefore ought not in principle be treated in like manner, and the sentencing approach should reflect this.

43 Secondly, in many situations, concurrent sentences for unrelated offences would not adequately serve, and in fact may undermine, the sentencing considerations that underlie the individual sentences comprising the aggregate term. For one thing, the imposition of concurrent sentences for unrelated offences would afford an offender who has already committed an offence less or no real incentive to refrain from committing a further offence, insofar as such a sentencing position would result in the offender not having to bear any real consequence for the further offending. This creates a distorted incentive that detracts from the deterrent value of the individual sentences notionally imposed. In *Seng Foo Building Construction Pte Ltd v Public Prosecutor* [2017] 3 SLR 201 ("*Seng Foo*"), I identified such an effect as one justification for departing from the one-transaction rule (at [67]):

> It is also important to note that the [one-transaction] rule is not mandatory. In *Shouffee*, I pointed out (at [81(b)]) that there could be circumstances where the court may well order two sentences to run consecutively even though the offences do form part of the same transaction. *Such circumstances would*

> *include ensuring that the sentence reflects the increased culpability of the accused from multiple offending or gives sufficient weight to the interest of deterrence so as to discourage the behaviour in question* and to ensure that the punishment is commensurate with the gravity of the offence. … [emphasis added]

44 If the need to give sufficient weight to deterrence can afford a justification for a sentencing court to depart from the one-transaction rule and impose consecutive sentences for *related* offences, then the same interest should logically justify and indeed call for the imposition of consecutive sentences in relation to *unrelated* offences. Furthermore, from the retributivist perspective, imposing concurrent sentences for unrelated offences would mean that the second or later legally protected interest that was infringed would have no apparent vindication in law. Neither would the duration of imprisonment adequately reflect the greater need for public protection against a multiple offender who cannot claim to have acted in an isolated instance of misjudgment.

45 Thirdly, the imposition of consecutive sentences for unrelated offences accords with the alternative scenario, which involves the offender being separately sentenced for each of these offences. If that had been done, the offender would have received separate and in fact aggravated sentences for the later offences, taking into account that his earlier offences would have been considered antecedents in relation to these later offences. Whether an offender is sentenced for unrelated offences altogether at a single sitting, or for each offence separately in different sittings, is a matter that often depends on extraneous factors unrelated to his criminality, such as the time needed for investigations, or expediency, or scheduling issues. There is no reason in principle why the operation of any of these factors should entitle the offender to

a materially more lenient or more serious sentence depending just on whether the sentencing occurs on separate occasions or at a single sitting of the court.

46 Fourthly, and perhaps most intuitively, allowing a multiple offender to be punished less seriously, or even not at all, for a second or further offending would be a perverse outcome that flies in the face of any notion of justice. As I will elaborate at [81] below, public confidence in the administration of criminal justice requires the court to avoid any suggestion or impression that a multiple offender may benefit from some sort of bulk discount in sentencing. Indeed, it seems especially wrong in circumstances such as the present – where the offender committed the second offence while on bail for having committed the first offence, but the first sentence is longer in duration than the second sentence – to run the second sentence concurrently with the first. This would effectively mean imposing no consequence in terms of imprisonment for the second offence, when the fact that the second offence was committed on bail would ordinarily have been an offence-specific aggravating factor.

47 I should add that the general rule discussed here is not novel. In the UK, the Sentencing Council's guidelines set out in *Offences Taken Into Consideration and Totality: Definitive Guideline* (11 June 2012) ("2012 UK Guidelines") establishes a four-stage approach to sentencing multiple offenders (see pp 6-8). Read together with UK Sentencing Council, *A Short Guide: Sentencing for multiple offences (Totality)* (15 September 2011), which is a publication designed to complement the Sentencing Council's consultation exercise that eventually led to the 2012 UK Guidelines, the approach may be summarised as follows:

(a) First, the court should consider the appropriate individual sentences. To do so, the court may refer to the sentencing framework that applies for each offence.

(b) Secondly, the court should consider whether the sentences should be ordered to run concurrently or consecutively. Generally, concurrent sentences are appropriate where the offences arise out of the same incident or facts, or where the offences are a series of the same or similar kind, especially when committed against the same person. Conversely, consecutive sentences are generally appropriate if:

(i) the offences arise out of unrelated facts or incidents;

(ii) the offences are of a similar kind but the overall criminality will not be sufficiently reflected by concurrent sentences; or

(iii) one or more of the offences qualifies for a statutory minimum sentence and concurrent sentences would improperly undermine that minimum.

(c) Thirdly, the court should then consider whether the overall sentence is just and proportionate. In particular, if the court determines that concurrent sentences are appropriate, it must ensure that the overall sentence reflects the overall criminality and to this end, one option is to adjust the individual sentences to reflect the commission of other offences that are not being separately punished. Conversely, if consecutive sentences are more appropriate, the court must consider whether the aggregate sentence, once the individual sentences have been added up, is just and proportionate. If the aggregate sentence is not, the individual sentences may have to be adjusted.

(d) Fourthly, the court should consider whether the sentence is structured in a way that will be best understood by all concerned with it.

48 In Singapore, it does not appear that express guidance has, until now, been given to the effect that *consecutive* sentences should generally be ordered in relation to unrelated offences. Indeed, while the authors of *Sentencing Practice* acknowledge (at p 21) that "[c]oncurrent sentences are ordinarily called for when there is a single episode of criminality which results in a number of offences having been committed", they do not state any general rule for the converse situation where unrelated offences are concerned. In my judgment, there ought to be a general but displaceable rule in favour of consecutive sentences for unrelated offences as it would better balance the need for consistency and flexibility, and would also be preferred as a matter of principle and policy.

49 Undoubtedly, our courts have imposed consecutive sentences on the basis that it is necessary to reflect the added criminality of further unrelated offending. For instance, in *Public Prosecutor v AUB* [2015] SGHC 166 ("*AUB*"), the accused pleaded guilty to one count of sexual assault by penetration under s 376(2)(*a*) of the PC and one count of obscene act under s 7(*a*) of the Children and Young Person's Act (Cap 38, 2001 Rev Ed) ("CYPA"). One other charge under s 7(*a*) of the CYPA was taken into consideration. In considering whether the two sentences should run concurrently or consecutively, Tay Yong Kwang J (as he then was) reasoned as follows (at [25]):

> … I also decided that both terms of imprisonment should run consecutively. The two offences were clearly not part of the same transaction as they were committed on different occasions although they occurred in the same location and against the

> same victim. The rationale for the one-transaction rule is that consecutive sentences are not appropriate if the various offences involve a single invasion of the same legally protected interest … Although the two offences involved an unwelcome invasion of the victim's bodily integrity, particularly her vagina, I think it would be against good sense to regard them as a single invasion of the same legally protected interest in the circumstances here. In any case, as mentioned earlier, the two offences occurred on different days and were not part of a continuum of events. *Not ordering consecutive imprisonment term in such a situation is to give an unwarranted discount to the accused for multiple assaults.* [emphasis added]

50 Even though *AUB* made no reference to a general rule of consecutive sentences for unrelated offences, Tay J's reasoning is substantively aligned with, and in support of, the general rule that I have articulated.

51 I turn now to the submissions of the Defence on this issue. The Defence argued that since there were only two offences in the present case, s 307(1) of the CPC did not apply and therefore there was no statutory obligation on the court to run any sentences consecutively. This much was true, but it simply missed the point. Section 307(1) of the CPC provides:

> **Consecutive sentences in certain cases**
>
> **307.**—(1) Subject to subsection (2), if at one trial a person is convicted and sentenced to imprisonment for at least 3 distinct offences, the court before which he is convicted must order the sentences for at least 2 of those offences to run consecutively.

52 The general rule of consecutive sentences for unrelated offences does not contravene s 307(1) or render it otiose. The provision retains its relevance in that it operates regardless of whether the multiple offences are related or otherwise. Therefore, even if all or some of the offences are related, s 307(1) applies to require that at least two sentences should run consecutively. Indeed, in my judgment, s 307(1) of the CPC, the one-transaction rule, and the general rule of consecutive sentences for unrelated offences should be regarded as

complementary principles that collectively help a court decide how sentences should be ordered to run in relation to a multiple offender.

53 Take, for instance, a situation where an offender is to be sentenced for three offences. If all three offences form part of a single transaction, the general rule of consecutive sentences for unrelated offences has no necessary application, but s 307(1) would operate as an exception to the one-transaction rule such that two sentences must nonetheless be run consecutively. If two of the three offences are related, then the one-transaction rule and the general rule should operate in tandem such that the sentence for one of the related offences and the sentence for the sole unrelated offence should be ordered to run consecutively (with the sentence for the remaining related offence to run concurrently). This would also satisfy the requirements of s 307(1). If all three offences are unrelated, then the general rule of consecutive sentences for unrelated offences would operate for all three individual sentences to run consecutively. This would also comply with s 307(1).

54 Extrapolating this situation further, in a case where an offender is to be sentenced for more than three offences, the same principles would in general apply: sentences for unrelated offences should run consecutively, while sentences for related offences forming part of a single transaction should run concurrently, subject to the requirement for at least two sentences to run consecutively under s 307(1) of the CPC. Where there is a mix of related and unrelated offences, then the sentences for those offences that are unrelated should generally run consecutively with one of the sentences for the related offences. However, as I will elaborate further below, all of this is in turn subject to at least three qualifications, including a critical check on the proportionality of the aggregate sentence by applying the totality principle (see [65]–[67] and [71]–[81] below).

55 Given the many and varied fact patterns that might come before a sentencing court, these general rules may not be applicable in a strict sense in all situations (see [66] below). Nevertheless, the point remains that there is nothing inherently incompatible between s 307(1), the one-transaction rule, and the general rule of consecutive sentences for unrelated offences.

56 The Defence also submitted that precedents such as *Public Prosecutor v Goh Lee Yin* [2005] SGDC 179 ("*Goh Lee Yin (DC)*") and *Chua Whye Woon v Public Prosecutor* [2016] SGHC 189 ("*Chua Whye Woon (HC)*") demonstrate that individual sentences have been and can be run concurrently, even if the offences happen to be unrelated.

57 I begin with *Chua Whye Woon (HC)*, which in my judgment, did not assist the Defence. The decision of the High Court is brief and should be read together with the decision of the District Court in *Public Prosecutor v Chua Whye Woon* [2016] SGDC 83 ("*Chua Whye Woon (DC)*"). There, the accused pleaded guilty to two counts of harassment under s 28(2)(*a*) read with s 28(3)(*b*)(i) of the Moneylenders Act (Cap 188, 2010 Rev Ed) ("Moneylenders Act"). Five other similar charges were taken into consideration for the purpose of sentencing. The district judge sentenced the accused to 12 months' imprisonment and three strokes of the cane for each of the two proceeded charges, and ordered that the sentences run consecutively. On appeal by the accused, the High Court judge raised the individual sentences to 14 months' imprisonment and six strokes of the cane, but ran the two sentences concurrently to yield a lower aggregate sentence. The High Court judge explained his reasons for the concurrent sentences as follows (at [5]):

> However, I find that it is appropriate for the two sentences to run concurrently rather than consecutively. In making this finding, I have considered the principles identified by CJ Menon in [*Shouffee*]. The totality principle requires the court to take a

> 'last look' at all the facts and circumstances and assess whether the overall sentence looks wrong. In my view, an overall sentence of 24 months' imprisonment and 6 strokes of the cane would be crushing and out of proportion to the appellant's past record and future prospects … The appellant is only 30 years old and has no prior convictions. He continued committing harassment offences on behalf of unlicensed moneylenders because they threatened physical harm to him and his mother. He was forced into assisting the unlicensed moneylenders despite having borrowed only $500 from them.

58 It is clear from the passage that it was the operation of the totality principle, which is concerned with ensuring proportionality between the aggregate sentence and the overall criminality, that led the High Court judge to conclude that a concurrent sentence was more appropriate. This is not inconsistent with the general rule of consecutive sentences for unrelated offences. Indeed, as I elaborate below, the totality principle constitutes an important qualification to the operation of this general rule (see [65] below).

59 I add a further observation. In *Chua Whye Woon (DC)*, the district judge reasoned at [5]:

> … As the 2 proceeded charges involve harassments at 2 different premises and there are 5 other similar charges taken into consideration, the court ordered that the sentences for the 2 charges are to run consecutively. …

60 The district judge provided two reasons for ordering the sentences to run consecutively. Leaving aside the second reason relating to the five charges that were taken into consideration, the district judge's first reason for ordering the sentences to run consecutively was that the offences occurred at different premises. This line of reasoning suggests that consecutive sentences are to be imposed where the offences are unrelated. On this premise, the district judge's reasoning is consistent with the proposition that sentences for unrelated offences should generally be ordered to run consecutively.

61 Turning to *Goh Lee Yin (DC)*, there, the offender pleaded guilty to two counts of theft in dwelling under s 380 of the PC, one committed on 16 May 2005 at about 4.00pm at the Cold Storage supermarket in Novena Square, and the other committed on the same day, forty minutes later at the Metro departmental store in Paragon Shopping Centre. Four other charges for similar property-related offences were taken into consideration. The district judge sentenced the offender to two and a half months on each of the two charges proceeded with, and ordered the sentences to run concurrently.

62 I accepted the submission of the Defence that the two offences in *Goh Lee Yin (DC)*, even though they were both property-related, should be considered unrelated offences as they were committed at two different places, at different times, involved unrelated items, and did not share a proven unity of purpose or design. The two offences also involved distinct infringements of the legally protected interests of two different stores in their respective property. Thus, at least presumptively, consecutive sentences should have been imposed.

63 Having said that, I did not consider that much weight could be placed on the case. First, it is notable that the decision of the district judge was overturned on appeal, with the sentence varied to one of 24 months' probation: see *Goh Lee Yin v Public Prosecutor* [2006] 1 SLR(R) 530 at [1]. Second, the central issue before both the sentencing and appellate courts was the relevance of the offender's condition of kleptomania. The question of whether the two sentences should run concurrently or consecutively did not squarely arise and was not specifically considered or addressed by either court. The case cannot therefore be taken as support for the normative proposition that concurrent sentences are principled and justified even where the offences are unrelated.

*Qualifications to the general rule*

64 Having set out the justifications for the general rule of consecutive sentences for unrelated offences, I turn to the three qualifications that limit its operation. These are of some significance because a strict and uncompromising application of the general rule might result in unjustifiably long custodial terms.

65 The first and most important qualification to the general rule is the totality principle. As was noted in *Shouffee*, in circumstances where the court is inclined to order sentences to run consecutively, it is necessary for the court to run a final check to ensure that the aggregate sentence is proportionate to the overall criminality presented and not excessive. This is done by applying the totality principle, which I will discuss in greater detail later (see [71]–[81] below).

66 The second qualification is that the general rule of consecutive sentences for unrelated offences, like the one-transaction rule, is neither invariable nor mandatory (see *Shouffee* at [39]; see also *Seng Foo* at [66]–[67]). It may sometimes be appropriate for a court to choose *not* to run the sentences for unrelated offences consecutively. But as a matter of principle, the court should consciously consider whether this is appropriate and if so, at least briefly explain its reasons. This discretion provides the flexibility necessary for a sentencing court to deal with the myriad of facts it may be faced with, albeit in as transparent a manner as possible (see [48] above).

67 The third qualification is the need to give effect to any statutory provision that abridges the operation of the general rule. For instance, s 307(2)

of the CPC provides that a sentence of life imprisonment must ordinarily be ordered to run concurrently with other custodial sentences:

> (2) Where a sentence of life imprisonment is imposed by the High Court at a trial mentioned in subsection (1), the other sentences of imprisonment must run concurrently with the sentence of life imprisonment, except that where the Court of Appeal sets aside or reduces the sentence of life imprisonment then the Court of Appeal may order any of the other sentences of imprisonment to run consecutively.

*Whether offences are "unrelated"*

68 One implication of the general rule of consecutive sentences for unrelated offences is that some importance will likely attach to the logically anterior question of whether the offences can be said to be unrelated in the first place.

69 To be clear, this is not a novel question and in any event has to be answered in the application of the one-transaction rule, where the inquiry is whether the offences committed formed part of a single transaction (see [39] above). In this regard, to say that two offences are "unrelated" means that they are *not* "part of a single transaction"; conversely, to describe them as "part of a single transaction" means they are *not* "unrelated". The two inquiries are two sides of the same coin. This is unsurprising because the general rule of consecutive sentences for unrelated offences shares a core common rationale with the one-transaction rule. As I stated in *Seng Foo*, the one-transaction rule is essentially a rule of fairness resting on the notion that an offender should not be doubly punished for what is essentially the same conduct, even though that conduct might disclose several distinct offences at law (at [65]; see also [39] above). In my judgment, this is congruent with the rationale underlying the general rule of consecutive sentences for unrelated offences: this too is a rule of fairness resting on the notion that an offender should not receive an unwarranted

discount for what are essentially distinct offences at law, even if the offences arise out of the same conduct.

70 In the present case, it was evident that the two offences committed were unrelated and not part of a single transaction (see [102] below). More difficult situations will have to be clarified with the incremental development of case law. It suffices for present purposes to stress that the question of whether the offences are related or otherwise should be addressed with due sensitivity to the facts and a healthy dose of common sense. In this regard, I reiterate what I said in *Seng Foo* at [66]:

> The courts have said on many occasions that the one-transaction rule is neither an inflexible nor rigid principle. To determine whether this rule is engaged, I suggested in *Shouffee* (at [40]) that it might be useful to have regard to such factors as proximity in time, proximity of purpose, proximity of location of the offences, continuity of design and unity (or diversity of the protected interests). These are simply signposts and it can be a difficult task in some cases to evaluate if certain offences form part of the same transaction. However, the determination is ultimately one of common sense …

***The totality principle***

71 The totality principle is a pivotal qualification to the general rule of consecutive sentences for unrelated offences (see [65] above) and is, in my judgment, the main concern on the present facts. A mere arithmetic addition of individual sentences might, in many situations and despite the fact that the offences are unrelated, lead to aggregate sentences that are disproportionate to the overall criminality presented. As was observed in the 2012 UK Guidelines (at p 5 RHC):

> … it is usually impossible to arrive at a just and proportionate sentence for multiple offending simply by adding together notional single sentences. It is necessary to address the offending behaviour, together with the factors personal to the offender as a whole.

72 In the same vein, Professor Andrew Ashworth has explained the relevance of the totality principle to consecutive sentences in his seminal treatise, *Sentencing and Criminal Justice* (Cambridge University Press, 6th Ed, 2015) ("*Sentencing and Criminal Justice*"), as follows (at p 277):

> … Simply to add up the sentences for the separate offences might lead to a total wildly out of proportion to sentences for other offences [*sic*]. The overall sentence would violate ordinal proportionality, placing several less serious offences (e.g. seven burglaries) alongside a much more serious offence (e.g. rape). In order to avoid this, the courts developed a principle which David Thomas called 'the totality principle', which requires a court to consider the overall sentence in relation to the totality of the offending and in relation to sentence levels for other crimes. …

73 As I explained in *Shouffee*, the totality principle is a principle of limitation and a manifestation of the requirement of proportionality that runs through the gamut of sentencing decisions (*Shouffee* at [47]). The principle is generally to be applied at the end of the sentencing process, and it requires the sentencing judge to take a "last look" at all the facts and circumstances and be satisfied that the aggregate sentence is sufficient and proportionate to the offender's overall criminality (*Shouffee* at [58]; *Seng Foo* at [75]). Specifically, the principle has two limbs: first, to examine whether the aggregate sentence is substantially above the normal level of sentences for the most serious of the individual offences committed, and second, to examine whether the effect of the aggregate sentence on the offender is crushing and not in keeping with his past record and future prospects (*Shouffee* at [54] and [57]). If an aggregate sentence is considered excessive, the sentencing judge may opt for a different combination of sentences to run consecutively or adjust the individual sentences (*Shouffee* at [59]; *Seng Foo* at [75]).

74 An application of the totality principle usually results in an aggregate sentence that is less serious than the sum of its components. Some observers

might thus consider the principle to operate as a "bulk discount" on multiple offending. In an essay titled "Why Bulk Discounts in Multiple Offence Sentencing?" ("*Bulk Discounts*"), which is Professor Nils Jareborg's contribution to *Fundamentals of Sentencing Theory*, Professor Jareborg cited empirical research based on the German sentencing experience and made the following observation (at p 135):

> The most interesting discovery was that the severity of the separate punishments and the amount of discount were explained by the same factors. Paradoxically, these factors were the harmfulness of the crime and culpability of the offender. Desert theory dominates sentencing when the punishment is determined for a separate crime. *When the total sentence is determined, desert theory seems to be turned upside down: the more serious the aggregate criminality is (the more harm and culpability there is), the greater is the bulk discount.* [emphasis added]

75 While Professor Jareborg's essay raises several interesting issues, one point must be made clear: the totality principle is emphatically not an excuse for a bulk discount to be given to multiple offending. Such a discount would run against the grain of the various justifications set out above in support of the general rule of consecutive sentences for unrelated offences. In this regard, the following passage from the New South Wales Court of Criminal Appeal in *R v MAK, R v MSK* [2006] NSWCCA 381 ("*MAK*") at [15]–[18] is pertinent to explain the real rationale underlying what might otherwise be misunderstood as some sort of a bulk discount:

> 15 The Court noted the importance of the principle of totality to the task that was before Hidden J in relation to the sentencing of MMK. It was the application of that principle that required that the Crown appeal be dismissed in his case. It is a fundamental sentencing principle that Hidden J was, and this Court is, legally obliged to apply. Whenever the Court sentences an offender for multiple offences, including when there are different victims, or sentences an offender who is already serving a sentence after conviction for other offences, it is necessary for the judge to ensure that the aggregation of all of

> the sentences is a 'just and appropriate measure of the total criminality involved': *Postiglione v The Queen* (1997) 189 CLR 295 at 307-308 per McHugh J. The need to maintain an appropriate relationship between the totality of the criminality involved in a series of offences and the totality of the sentences to be imposed for those offences arises for at least two reasons.
>
> 16 The severity of a sentence is not simply the product of a linear relationship. That is to say severity may increase at a greater rate than an increase in the length of a sentence. As Malcolm CJ said in *R v Clinch* (1994) 72 A Crim R 301 at 306:
>
> > … the severity of a sentence increases at a greater rate than any increase in the length of the sentence. Thus, a sentence of five years is more than five times as severe as a sentence of one year. Similarly, while a sentence of seven years may be appropriate for one set of offences and a sentence of eight years m[a]y be appropriate for another set of offences, each looked at in isolation. Where both sets were committed by the one offender a sentence of 15 years may be out of proportion to the degree of criminality involved because of the compounding effect on the severity of the total sentence of simply aggregating the two sets of sentences.
>
> 17 The second matter that is considered under the totality principle is the proposition that an extremely long total sentence may be 'crushing' upon the offender in the sense that it will induce a feeling of hopelessness and destroy any expectation of a useful life after release. This effect both increases the severity of the sentence to be served and also destroys such prospects as there may be of rehabilitation and reform. Of course, in many cases of multiple offending, the offender may not be entitled to the element of mercy entailed in adopting such a constraint.
>
> 18 A sentencing court must, however, take care when applying the totality principle. Public confidence in the administration of justice requires the Court to avoid any suggestion that what is in effect being offered is some kind of a discount for multiple offending: *R v Knight* (2005) 155 A Crim R 252 at [112]. For similar reasons in a case such as the present where an offender who is already serving other sentences comes to be sentenced for additional offences, the impression must not be given that no, or little, penalty is imposed for the additional offences.

76 In my judgment, that extract helpfully summarises a number of principles that apply in considering the totality principle.

77 First, it clarifies that any mitigation of the aggregate sentence by virtue of the totality principle is justified *not as a bulk discount on account of multiple offending*, but rather as a recognition of the fact that *an aggregation resulting in a longer sentence is going to carry a compounding effect that bears more than a linear relation to the cumulative and overall criminality of the case.* To paraphrase the words of Malcolm CJ in *R v Clinch* (1994) 72 A Crim R 301, the severity of a sentence increases at a greater rate than an increase in the length of the sentence. It is therefore not the case, as Professor Jareborg's comment may be taken to suggest (see [74] above), that the longer the aggregate sentence, the greater any "bulk discount" that the courts will grant to the multiple offender. With respect, that observation rested on the erroneous supposition that there is a simple and direct linear relationship between the severity of the sentence and its length.

78 Second, the extract proffers a further rationale for the totality principle, which is that an extremely long aggregate sentence may induce a feeling of hopelessness that destroys all prospects of the offender's subsequent rehabilitation and reintegration. This rationale is not controversial. Indeed, it aligns closely with the second limb of the totality principle – that the court should examine whether the effect of the aggregate sentence on the offender is crushing and not in keeping with his past record and future prospects (see [73] above).

79 One corollary of recognising these two rationales as underlying the totality principle is that the principle should ordinarily apply with *greater* force in cases that involve *longer* aggregate sentences. This would include situations, for instance, where the offender is to be sentenced for numerous offences in a single sitting of the court, or where the individual sentences are themselves relatively lengthy. For ease of reference, this proposition may be referred to as

the "aggregation principle". To illustrate, if sentences of days or weeks are run consecutively, the totality principle may not have any noticeable effect, as it is unlikely that the relatively short length of the aggregate sentence would induce any such sense of hopelessness that would negate the offender's rehabilitative prospects, and the compounding severity of a lengthy sentence would not yet have set in. In contrast, if the individual sentences are each of several years or even decades, the concern over proportionality would weigh more heavily on the sentencing judge's mind when assessing whether the aggregate sentence offends the totality principle.

80 On account of the aggregation principle, sentencing courts in applying the totality principle should bear in mind that the longer the aggregated sentence, the greater the risk of a disproportionate sentence. It appears, at least provisionally, that the aggregation principle operates as a facet of the second limb of the totality principle which guards against the imposition of excessive and crushing aggregate sentences (see, for instance, *Omar Zreika v R*; *Mohamed Elsaj v R* [2016] NSWCCA 177 at [53]). In this regard, it should also be recognised that an element of judgment is inherent in the application of the aggregation principle and, to that extent, the decision of the sentencing judge should not be interfered with lightly.

81 A final point to be drawn from *MAK* is the court's observation that public confidence in the administration of justice requires the avoidance of any impression or suggestion that no or little penalty is to be imposed for further offences committed after the first (see [75] above). I agree with this observation, and as I mentioned above (at [46]), not only is this a reason to avoid the rationalising of the totality principle around any notion of a bulk discount for multiple offending, it is also a justification for the general rule of consecutive sentences for unrelated offences.

***Double counting***

82 The next issue that arose in the appeal concerned the submission of the Defence that if the two individual sentences were run consecutively on account of the antecedents of the Accused and the need for specific deterrence, that "would clearly flout the totality principle as the [Accused] had clearly already received a substantially higher imprisonment sentence for his [offence under s 324 of the PC for VCH by dangerous weapons or means] as a form of specific deterrence" [original emphasis omitted]. In this regard, the Defence cited a passage from *Shouffee* in which I had stressed that "where the court is dealing with multiple sentences, the sentencing judge must be vigilant to ensure that aggravating factors are not counted against the accused twice over" (at [78]).

83 The rule against double counting is well established, but it is a rule that is perhaps easier to state than to apply given the fluid nature of the analysis inherent in sentencing matters.

84 I begin by examining the circumstances under which the rule against double counting may be said to have been infringed. One clear situation in which double counting occurs is when a factor that is an essential element of the charge is taken also as an aggravating factor enhancing the sentence within the range of applicable sentences for that charge. As the Court of Appeal said in *Chang Kar Meng v Public Prosecutor* [2017] 2 SLR 68 at [25], "[i]t is well established that the court cannot treat a constituent ingredient of an offence as an aggravating factor in sentencing". For instance, in *Guay Seng Tiong Nickson v Public Prosecutor* [2016] 3 SLR 1079 ("*Nickson Guay*"), the offender pleaded guilty to causing death by negligent act under s 304A(*b*) of the PC. On appeal against the sentence imposed by the district judge, one of the arguments raised by the Defence was that the district judge had erred in double counting the

severity of the harm to the victim as an aggravating factor going towards sentence, when the victim's death was itself an element of the charge. The Prosecution conceded that it would amount to double counting if the extent of the victim's injuries were taken into account both as a factor enhancing the sentence and as an element of the charge (at [75]), and I did not disagree with this concession.

85 Another clear instance of double counting is where a factor is expressly or implicitly taken into account in sentencing even though it has already formed the factual basis of a statutory mechanism for the enhancement of the sentence, or of other charges brought against the offender. In *Loo Pei Xiang Alan v Public Prosecutor* [2015] 5 SLR 500, Chao Hick Tin JA rejected the notion that, insofar as repeat drug offenders were concerned, mere financial profit or an appearance of greater involvement than a mere "courier" were significant aggravating factors as the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) already prescribed a mandatory minimum sentence for such repeat offenders (at [27]):

> … repeat traffickers are by definition highly unlikely to be naïve and incidental participants in the drug trade. It is to be expected such repeat traffickers are in the business for the money either to feed their own drug addiction or to make money for some other purposes. Thus *I consider that the fact of financial profit* per se *and the fact that the offender cannot be characterised as inexperienced and ignorant in the world of illicit drugs have already been taken into account as aggravating factors in the prescription of a mandatory minimum sentence, and it would generally be double-counting to consider them aggravating factors that warrant a further increase beyond that minimum.* It may not be double-counting where a repeat trafficker's trade is unusually lucrative or where he is particularly experienced or established in the drug trade. Even so, it is likely that the quantity of drugs involved will be larger and that in turn will undoubtedly attract a higher sentence. [emphasis added]

86 As a further illustration, in *Public Prosecutor v Nelson Jeyaraj s/o Chandran* [2011] 2 SLR 1130 ("*Nelson Jeyaraj*"), the offender pleaded guilty

to six charges under the Moneylenders Act, of which five related to acts of harassment at residences located all over Singapore. Steven Chong J (as he then was) observed that it would be double counting to consider the wide geographical reach of the offender's conduct as aggravating, if these instances of offending had each already formed the basis for a separate charge (at [34]):

> Furthermore, his offences had a wide geographical reach, from Woodlands and Yishun in the North, Hougang and Anchorvale (Sengkang) in the North East, and Geylang Bahru in the Central area, to Geylang East in the East. He therefore encroached on the safety and serenity of more than one neighbourhood. That said, 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. Indeed in the present case, the District Judge ordered three of the sentences to run consecutively. Therefore to treat it as an independent aggravating factor would amount to double counting.

87 A third aspect of the rule against double counting is that if a factor has been *fully* taken into account at one stage in the sentencing analysis, it should generally *not* feature again at another stage. Hence, on the facts of *Nelson Jeyaraj*, Chong J observed (at [34]) that a sentencing factor that had featured in the decision to run the sentences consecutively should not be accounted for again in relation to the length of an individual sentence. Similarly, the Court of Appeal warned in *ADF v Public Prosecutor and another appeal* [2010] 1 SLR 874 (at [92]) that a sentencing factor that has been "fully factored" into the sentencing equation in the first stage where the individual sentences are calibrated should not be taken into account again at the second stage where the aggregate sentence is determined (at [92]):

> … As the possibility of an overlap may occur in some cases, care must be taken not to re-input an aggravating consideration at the second stage, *if it has already been fully factored* into the sentencing equation during the first stage. [emphasis added]

88 A fourth instance of double counting occurs where two or more nominally different sentencing factors share the same normative substance. These situations are admittedly difficult to identity and often turn on issues of judgment. One illustration may be found in *Nickson Guay* (see [84] above), where the district judge had placed weight on the damage caused to the vehicles in determining the appropriate individual sentence. The Prosecution submitted that the district judge did not err since the extent of damage to the vehicles indicated that the offender had approached the relevant junction at excessive speed, which was itself an aggravating factor. On the facts of that case, I did not accept this submission (at [78]):

> … I have difficulty accepting [the Prosecution's submission] because the [district judge] had ample evidence as to the manner in which the appellant approached the junction and had already taken this into account in assessing the degree of the appellant's negligence … To take the speed of his approach into account again as an aggravating factor under the guise of considering the damage to the vehicles as a separate consideration would amount to double counting.

89 Another example may be found in *Poh Boon Kiat v Public Prosecutor* [2014] 4 SLR 892, where the offender pleaded guilty to eight charges under Part XI of the Women's Charter (Cap 353, 2009 Rev Ed), with a further 12 similar charges taken into consideration for the purpose of sentencing. On appeal against sentence by the offender, I observed that the district judge had, to some degree, double counted the significance of the large number of offences committed because this had already been taken into consideration in relation to another sentencing factor, namely, the sophistication and scale of the criminal operation in question (at [98]):

> It will be recalled from [12(a)] above that the District Judge considered the large number of offences committed as significant in calibrating the appropriate sentence. A quick perusal of the schedule of the 20 offences which were initially brought reveal that the appellant was charged with five counts

> of procuring a prostitute, five counts of harbouring a prostitute and five counts of receiving a prostitute. In effect, the appellant was charged for three different offences by employing each of the five prostitutes. The appellant was also initially charged with three counts of living on immoral earnings and two counts of managing a brothel (one charge for each location that he rented). *In my judgment, taking into account the number of offences in this case as an aggravating factor entailed some degree of double counting since these facts had already been taken into account when considering the integral role played by the appellant and the scale and sophistication of the operation. I am therefore satisfied that the District Judge had erred by viewing this factor as a separate aggravating factor.* [emphasis added]

90 In this regard, it should be noted that *mitigating* factors too may be subject to the same stricture. In *Public Prosecutor v Sakthikanesh s/o Chidambaram and other appeals and another matter* [2017] 5 SLR 707, in considering the appropriate sentencing framework for offences under the Enlistment Act (Cap 93, 2001 Rev Ed), a three-judge bench of the High Court explained that, in relation to such offences, the fact that an offender had voluntarily surrendered and had also pleaded guilty should not be considered distinct mitigating factors as these factors shared the same normative substance (at [83]):

> The Prosecution submitted, and we agreed, that the mitigating value of an NS defaulter's plea of guilt and voluntary surrender should be considered holistically, with a single discount being applied. This was because there was considerable overlap in their mitigating value – both were mitigating in so far as they reveal contrition on the NS defaulter's part. Treating them as distinct mitigating factors would present a real risk of double-counting and excessive weight being placed on them. In our view, this approach of considering a plea of guilty and voluntary surrender holistically with the application of a single discount should be taken in cases involving NS defaulters who voluntarily surrendered and then pleaded guilty. …

91 These instances of double counting are not exhaustive; nor can they be rigidly analogised to any set of facts. In my judgment, 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. If a factor already forms the basis of a charge framed against the offender or of a statutorily enhanced sentence (see, for instance, situations one and two above at [84]–[86]), the "due weight" that should be given by the court to that factor in sentencing will generally be "none". In other situations (such as situations three and four above at [87]–[89] above), the "due weight" that should be accorded entails a greater degree of judgment. In this regard, some degree of deference should be accorded to the sentencing judge. The mere fact that mention is made of a sentencing factor in separate parts of a decision should not, without more, be taken to constitute double counting. In particular, if a sentencing judge had in furnishing his reasons for the sentence imposed directed his mind to the danger of double counting and explained how his consideration of a particular sentencing factor did not offend the rule against double counting, the appellate court should be slow to interfere unless it is satisfied that the analysis in question was wrong in principle.

92 Save for one qualification, which I turn to momentarily, the rule against double counting underlies all aspects of sentencing. It applies to both aggravating and mitigating factors, and it may arise in cases dealing with a single offence as it does in cases involving multiple offending.

93 The qualification arises in the context of the interface between the rule against double counting and the totality principle. In this regard, it does not necessarily violate the rule against double counting if a fact constituting a mitigating factor, such as the youth of the offender, is again taken into account in the application of the totality principle even though it has been given effect to elsewhere in the sentencing analysis. Indeed, this is an intended feature of the second limb of the totality principle, one facet of which examines whether the

aggregate sentence is crushing in the light of the offender's past record and future prospects. As Professor D A Thomas explained in his oft-cited treatise, *Principles of Sentencing* (at p 59):

> The second limb of the totality principle represents an extension of the practice of mitigation. This part of the principle appears to require a sentencer who imposes a series of consecutive sentences to consider the mitigating factors in relation to the totality of the sentence, even though they have already been considered in relation to the individual component parts. A factor which has carried no weight in relation to the component sentences may justify some reduction in the totality, *and a factor for which allowance has been made in calculating the length of the component sentences may have further value when considered against the combined length of all the sentences*. [emphasis added]

94 I add two observations in relation to this qualification. First, the qualification can cause no prejudice to the offender because it relates only to mitigating factors, and because it operates in the context of the totality principle, which is a principle of limitation. Secondly, the qualification may not be considered a "true exception" to the rule against double counting insofar as the mitigating factor is *not* being given *undue* weight even if it may have been considered both in relation to the second limb of the totality principle and elsewhere. This is because it is precisely the role of the sentencing court, in applying the totality principle, to take a "last look" at *all the facts and circumstances* and assess whether the overall sentence is sufficient and proportionate to the offender's overall criminality (see [73] above). A macroscopic reconsideration of the facts, including the mitigating factors that might have been accounted for elsewhere, is thus inherent in the design of the sentencing regime.

95 In the present case, it was not disputed that the DJ had taken into account the Accused's antecedents in calibrating the individual sentences. For the first

offence, in finding that the present case had "more similarities" with the precedent cited by the Prosecution rather than the Defence, the DJ had observed that "both accused [here and in the precedent cited by the Prosecution] had violence and public order-related antecedents prior to committing the section 324 Penal Code offence" (GD at [23]). In relation to the second offence, the DJ had again compared the antecedents of the Accused with that of the offender in the precedent cited by the Prosecution (GD at [30]). Although the DJ did not expressly say so, it was evident from his grounds that he had relied on the sentences imposed in the precedents cited by the Prosecution as the primary basis on which both the individual sentences were calibrated. There was no reference to any sentencing framework or any other mode of reasoning by which the individual sentences could have been derived.

96 In that context, I saw some force in the Defence's argument that it would be double counting *if* the relevant antecedents of the Accused were taken into consideration in relation both to the calibration of the individual sentences and to how the sentences should run (that is to say, either consecutively or concurrently). Indeed, that would have been an instance where a factor is given undue weight at two separate stages of the sentencing analysis, analogous to the observation of Chong J in *Nelson Jeyaraj* (see [87] above).

97 However, as I indicated to counsel for the Accused at the hearing of this appeal, the premise of this submission is flawed. The Prosecution's primary submission, which I accepted, was that sentences should run consecutively because the offences were unrelated, and *not* because of the presence of any aggravating factor such as the antecedents of the Accused. In other words, the two individual sentences should run consecutively as a matter of principle, independently of any particular aggravating factor. On this basis, there was no question of any double counting.

***Summary of analytical framework in sentencing multiple offenders***

98 In summary, the relevant principles in sentencing a multiple offender are as follows:

(a) The first stage of the sentencing analysis is for the sentencing court to consider the appropriate sentence for each offence. This may be done in a number of ways, including by application of a sentencing framework or benchmark, or by analogy to precedents. In arriving at the individual sentences, the sentencing court will generally have to consider the relevant aggravating and mitigating factors that bear upon each discrete sentence (see [37] above).

(b) The second stage of the sentencing analysis is to determine how the individual sentences should run. In this regard, the starting point of the analysis is whether the offences are unrelated and this is determined by considering whether they involve a single invasion of the same legally protected interest (see [68]–[70] above). As a general rule, sentences for unrelated offences should run consecutively, while sentences for offences that form part of a single transaction should run concurrently, subject to the requirement in s 307(1) of the CPC. If there is a mix of related and unrelated offences, the sentences for those offences that are unrelated should generally run consecutively with one of the sentences for the related offences (see [53]–[55] above). This general rule may be departed from so long as the sentencing court applies its mind to consider whether this is appropriate and explains its reasons for doing so. Statutory provisions may also abridge the operation of the general rule (see [64]–[67] above).

(c) The third stage of the sentencing analysis is to apply the totality principle and take a "last look" at all the facts and circumstances to ensure that the aggregate sentence is sufficient and proportionate to the offender's overall criminality (see [73] above). Specifically, there are two limbs to the totality principle. First, the court should examine whether the aggregate sentence is substantially above the normal level of sentences for the most serious of the individual offences committed. Second, the court should examine whether the effect of the sentence on the offender is crushing and not in keeping with his past record and future prospects. The court should also bear in mind the aggregation principle which provides that the totality principle ordinarily applies with greater force in cases that involve longer aggregate sentences (see [79]–[80] above). If an aggregate sentence is considered excessive, the sentencing court may opt for a different combination of sentences to run consecutively or adjust the individual sentences (see [73] above). In this regard, while it is within the court's power to select sentences other than the longest individual sentence to run consecutively, the aggregate of such sentences must exceed the longest individual sentence (see *Shouffee* at [77]) and, if appropriate, the court should state explicitly the individual sentence that would otherwise have been imposed for the offence but for the adjustment on account of the totality principle (see *Shouffee* at [66]).

(d) Across all stages of the analysis, the sentencing court should be careful not to offend the rule against double counting. The central concern of this rule is that a sentencing factor should be given only its due weight in the sentencing analysis and nothing more. The rule underlies all aspects of sentencing. It applies to both aggravating and mitigating factors, and it may arise in cases involving single offences as

> it does in cases involving multiple offending. However, it does not necessarily violate the rule against double counting if a fact constituting a mitigating factor is again taken into account in the application of the totality principle even though it has been given effect to elsewhere in the sentencing analysis (see [91]–[94] above).

99 It will be noted that this analytical framework for the sentencing of a multiple offender is broadly similar to the approach proposed by the UK Sentencing Council (see [47] above).

***Application to the facts***

100 I now explain my decision in this case in the light of this framework.

101 The first step was to consider the appropriate individual sentences. The Accused committed two offences which each carried a multitude of aggravating factors. The first offence entailed the victim sustaining a very serious facial wound which would scar him for life as a result of the Accused having used a knife. The Accused initiated the attack and he targeted the face of the victim, which is an especially vulnerable part of the body. As to the second offence, this was a premeditated group attack carried out in a vicious and aggressive manner in a public space. The Accused had actively encouraged the assault relying on his position as the older friend of the others in the group. Notably, this was done while the Accused was out on bail for the first offence. In relation to both sentences, it was also notable that the Accused had violence-related antecedents and had only just been released from his reformative training stint months prior to the offences. In these circumstances, there was no reason to suggest, and indeed no such submission was made, that the DJ had erred in imposing the individual sentences that he arrived at. While the individual sentences were each

perhaps on the high side as compared to some of the precedents, they simply reflected the gravity and the circumstances of the offences.

102 The second and key question was how the two sentences should be ordered to run. On the facts, the two offences were plainly separate and unrelated: they took place on different occasions about six months apart, at different locations, and they involved different victims. There was no unity of purpose or design between the offences. Indeed, the Accused had violated the distinct interests in bodily integrity of the two victims. In such circumstances, pursuant to the general rule of consecutive sentence for unrelated offences, the sentences should presumptively have been ordered to run consecutively. The DJ gave a number of reason why he decided against doing this, opining that:

(a) The Accused was not "beyond any hope for reform and rehabilitation", referring to the Accused's handwritten mitigation plea which expressed remorse (GD at [37]).

(b) The Accused had sought to improve himself in the past two years and had done well in his O-Level examinations which he sat for while undergoing reformative training (GD at [38]).

(c) The Accused exhibited a "decrease in his rate of offending". For his antecedents, he faced 13 charges in January 2014, including charges that were taken into account for the purpose of sentencing. In the present proceedings, however, he faced only two charges at present "albeit similarly violent ones" (GD at [39]).

(d) The Accused may have lost his sense of direction or purpose after finding out that he was an adopted child when he was 14 years old. His present reformative prospects were thought to be "good, if only he

> resolves his anger and finds peace within himself, and walks away from the web of toxic friendships and build constructive ones" [original emphasis omitted] (GD at [40]–[42]).

103 I was satisfied that the DJ was wrong in principle and that his reasons for running the sentences concurrently simply did not stand up to scrutiny.

104 I begin with the first two reasons. As the DJ himself had observed earlier in his GD (see [28] above), rehabilitation was not the primary concern in the present case given the antecedents of the Accused and his commission of the second offence while on bail. Nothing in the Accused's handwritten mitigation plea raised any issue such as would warrant concurrent sentences. Indeed, given the familiarity of the Accused with the criminal justice process, I did not consider the letter to evidence any genuine remorse on his part. Even if he had erred on the spur of the moment in relation to the first offence, that could not explain the second offence which involved premeditation and was committed while he was on bail for the first offence. Further, while attempts at self-improvement should ordinarily be encouraged, these attempts by the Accused were made during his reformative training stint which preceded the commission of the present offences. As the Prosecution submitted, the efforts and achievements of the Accused lost much of their probative value as indicators of future potential in the light of the present offences committed *after* he seemed to have made some progress.

105 As for the third reason, the DJ's observation regarding the purported "decrease in [the Accused's] rate of offending" was, with respect, simply wrong in law. Reoffending must, in principle and as a matter of policy, be considered aggravating, whatever the number of charges brought. As the Prosecution noted, it may be that if the Accused had managed to remain *crime-free* for a long

period, the consideration of specific deterrence would apply only in an attenuated way. But that was not the case here. In fact, specific deterrence remained of paramount importance given that the Accused had reoffended within four months of his release after serving his previous sentence.

106 As for the DJ's reliance on the Accused having come to learn that he was adopted, this too was erroneous. First, these observations were speculative. There was no evidence at all on the impact of these events on the criminal disposition of the Accused, and the sentencing court should refrain from drawing such conclusions without any basis. Secondly, there was a significant lapse of about a decade between the supposed realization of the Accused that he was adopted (when he was 14 years old) and the commission of the present offences (when he was 23 years old). This rendered the relevance of this factor even more tenuous. Thirdly, it is well established that personal circumstances are no excuse for criminal conduct. The law has consistently considered the vicissitudes of life, however traumatic and stressful, as non-mitigating save, perhaps, events that are of a truly exceptional nature. Here, there was no evidence of any such exceptional circumstances.

107 The main argument advanced on appeal by the Defence against consecutive sentences was that the court should not double count aggravating factors, such as the antecedents of the Accused, which had already been accounted for by the DJ in arriving at the individual sentences, as a basis for running the sentences consecutively. However, as I have explained above (see [97]), this was beside the point, because the true basis for running the sentences consecutively was the fact that the offences were separate and unrelated.

108 The third step was to consider the totality principle. A strict addition of the two individual sentences in the present case would give an aggregate

sentence of five and a half years' imprisonment and nine strokes of the cane. Having regard to the totality principle, I considered that an aggregate custodial sentence of four years' and six months' imprisonment would be appropriate in light of the overall criminality presented. I achieved this by reducing the sentence for the second offence from two years' imprisonment to one year's imprisonment, not because the sentence imposed by the DJ for that offence was wrong on the facts, but because the adjustment of that sentence was warranted having regard to the likelihood that the original aggregate sentence would have been crushing to the Accused given his record and prospects. In this regard, I considered the relative youth of the Accused, the hope that he remained amenable to reform and rehabilitation, and the fact that it was appropriate to do so having regard to the aggregation principle. The sentence for the first offence was to remain in place, as was the caning sentence that was imposed in respect of both offences.

109 In summary, I ordered the Accused's sentences to run as follows:

| S/N | Offence | Sentence imposed |
|---|---|---|
| First offence | s 324 of the PC<br>VCH by dangerous weapons or means | 3.5 years' imprisonment and<br>6 strokes of the cane |
| Second offence | s 147 of the PC<br>Rioting | 2 years' imprisonment and<br>3 strokes of the cane<br>(reduced on account of the totality principle to<br>1 year's imprisonment and<br>3 strokes of the cane) |
| **Aggregate sentence** | | **4.5 years' imprisonment (with the sentences run consecutively and backdated to 2 August 2017) and 9 strokes of the cane** |

**Additional observations**

110 I add two final observations in relation to the parties' submissions.

111 First, one submission that the Defence made before the DJ was that, in relation to the second offence, there should be parity between the Accused's sentence and the 12-month conditional warnings issued to his companions who also participated in the offending conduct (see [17] above). Although the Defence did not specifically raise this argument on appeal, I will briefly discuss the relevance of the principle of parity since the second offence was a group offence.

112 I have elaborated on the principle of parity in *Chong Han Rui v Public Prosecutor* [2016] SGHC 25 ("*Chong Han Rui*"). There, I noted that the principle of parity in sentencing between co-offenders urges that sentences meted out to co-offenders who are party to a common criminal enterprise should not be unduly disparate from each other: "those of similar culpability should receive similar sentences, while those of greater culpability should generally be more severely punished" (at [1]). In determining whether the parity principle is engaged, the question is "whether the public, with knowledge of the various sentences, would perceive that the [offender] had suffered injustice", and not whether the offender would feel aggrieved that his co-offenders had been treated more leniently (at [47]). The central concern of the principle is "the need to preserve and protect public confidence in the administration of justice" (also at [47]).

113 In my view, the principle of parity was simply not engaged in the present case because there can be no comparison made between a sentence imposed by the court and a stern or conditional warning issued by the relevant authorities in

the exercise of prosecutorial discretion. In this regard, the following observations regarding the nature of a warning by Woo Bih Li J in *Wham Kwok Han Jolovan v Attorney-General* [2016] 1 SLR 1370 are apposite (at [34]):

> … [A warning is] no more than an expression of the opinion of the relevant authority that the recipient has committed an offence. It does not bind the recipient. *It does not and cannot amount to a legally binding pronouncement of guilt or finding of fact. Only a court of law has the power to make such a pronouncement or finding* … [emphasis added]

114 On that premise, Woo J held that a warning has no legal effect in sentencing and may not be treated as antecedent or aggravating factor (at [44]):

> I agree that *a court is not entitled to treat a warning as an antecedent or as an aggravating factor since it has no legal effect and is not binding on the recipient.* Indeed, as the learned author of Kow Keng Siong, *Sentencing Principles in Singapore* (Academy Publishing, 2009) noted in his commentary on the relevancy of previously administered warnings for the purpose of sentencing (at para 21.184):
>
> > In this regard, note that *stern warnings are not judicial findings of culpability*. Accused persons accept stern warnings for a variety of personal reasons, and such conduct does not always reflect an unqualified admission of guilt. *Similarly the police administer stern warnings for various reasons, one of these being the weakness of their case.*
>
> This is all the more so in the present case where Mr Wham disputes that he has committed the offence in question.
>
> [emphasis added]

115 The fact that a "co-offender" (in the loose sense of the term) has been issued a warning is *not* an indicator of the co-offender's guilt or degree of culpability, and therefore cannot be used as the basis to calibrate the severity of the offender's judicially determined sentence on account of the principle of parity. For this reason, the Accused could not as a matter of principle rely on

the warnings issued to his companions to argue that he should receive something "lighter". Simply put, the warning and the sentence are incomparable.

116 In any event, the Accused's conduct was far more egregious than that of his companions. Despite being the older friend that his companions looked up to, he actively encouraged the retaliatory attack on the victim and was also the most aggressive of the assailants during the assault. Notably, he committed the offence when he was on bail and ought to have taken far greater care in keeping his conduct in check. There was no indication that there was any offender-specific aggravating factor in relation to the companions that made their cases more serious than the Accused's. In the circumstances, the principle of parity, even if it applied, could not assist the Defence.

117 The second observation relates to the Prosecution's submission that the court had the power under s 318 of the CPC to antedate the later of the consecutive sentences of imprisonment so that it runs partially concurrently with the earlier sentence (see [33] above). The Prosecution cited several cases involving such power being exercised by the Australian courts, including *Mill v The Queen* (1988) 166 CLR 59, *The Queen v Smith and Shoesmith* (1983) 32 SASR 219, and *R v Clinton John Colson* (1999) 73 SASR 407. The Prosecution also submitted that s 322(1) of the CPC applies only to a person sentenced to imprisonment at *two discrete hearings,* and not to one sentenced *at a single hearing to several terms of imprisonment*. Thus, s 322 is no bar to antedating. In *Shouffee*, the same issue was raised and I left it open (at [73]). Similarly here, as there was no need to rely on this doctrine and the arguments did not focus on the issue, I express no view and leave the issue for consideration on another occasion.

**Conclusion**

118 For these reasons, I allowed the Prosecution's appeal to the extent I have stated.

Sundaresh Menon
Chief Justice

Sarah Shi and Tan Wen Hsien (Attorney-General's Chambers) for the appellant;
Tan Chao Yuan (Esvaran & Tan) for the respondent.