IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2019] SGCA 62

Criminal Appeal No 10 of 2017

Between

BLV

… *Appellant*

And

Public Prosecutor

… *Respondent*

In the matter of Criminal Case No 58 of 2016

Between

Public Prosecutor

And

BLV

GROUNDS OF DECISION

[Criminal Law] — [Offences] — [Sexual assault by penetration]
[Criminal Law] — [Offences] — [Outrage of modesty of person under 14]
[Criminal Law] — [Statutory offences] — [Children and Young Persons Act]
[Criminal Procedure and Sentencing] — [Sentencing] — [Sexual offences]
[Criminal Procedure and Sentencing] — [Sentencing] — [Principles] — [Abuse of process]

BLV
v
Public Prosecutor

[2019] SGCA 62

Court of Appeal — Criminal Appeal No 10 of 2017
Sundaresh Menon CJ, Andrew Phang Boon Leong JA and Tay Yong Kwang JA
19 January, 12 April 2018, 8 August 2019

8 November 2019

Sundaresh Menon CJ (delivering the grounds of decision of the court):

Introduction

1 The present appeal arose out of heinous acts of sexual abuse which were allegedly committed by the appellant, BLV ("the Appellant"), against his biological daughter ("the Victim") while she was aged between 11 and 13. Among other things, the Appellant was alleged to have penetrated the Victim's mouth and anus with his penis without her consent. The offences allegedly took place in their family home ("the Family Home") over multiple occasions between the end of 2011 and 15 April 2014.

2 One of the principal features of the defence advanced by the Appellant was that it was highly improbable that he could have committed the alleged offences because he had undergone a penis enlargement procedure that had gone wrong, as a result of which his penis was left in a deformed state. He claimed

that the deformity was of such a nature that it was highly improbable that he could have penetrated the Victim's mouth and anus with his penis.

3 The High Court judge ("the Judge") rejected the Appellant's contentions in relation to the alleged deformity of his penis at the time of the offences: see *Public Prosecutor v BLV* [2017] SGHC 154 ("GD") at [71]. Specifically, he found that this ground of defence did not raise a reasonable doubt in the Prosecution's case that the Appellant had carried out the acts of penile penetration. The Judge also rejected the Appellant's other grounds of defence, and convicted him of all ten charges that were preferred against him. In sentencing the Appellant, the Judge imposed an aggregate sentence of 23 years and six months' imprisonment with 24 strokes of the cane. The Appellant subsequently filed the present appeal against both his conviction and his sentence.

4 At the first hearing of this appeal, the Appellant sought an adjournment so that he could file a criminal motion to adduce further evidence in support of his penile deformity defence. The Appellant claimed that he had found a witness who could corroborate his claims in relation to the deformed state of his penis at the time of the offences. We allowed the adjournment and, subsequently, the criminal motion, and remitted the matter to the Judge for additional evidence to be taken. At the conclusion of the remittal hearing, the Judge not only found the further evidence untruthful and "wanting in several respects", but also expressly found that the Appellant had colluded with the witness to falsify the further evidence, and that this amounted to an abuse of the process of the court: see *BLV v Public Prosecutor* [2019] SGCA 6 ("Findings on Remittal") at [15]–[16].

5 Following the remittal hearing before the Judge, we resumed the hearing of this appeal. At the conclusion of the oral arguments, we dismissed the appeal

and gave our brief reasons. We also agreed with the Judge that the Appellant had falsified his evidence and procured another to do the same, and that in so doing, he had abused the process of the court. On that basis, we imposed an uplift of four years and six months' imprisonment in the aggregate sentence that was originally imposed. We indicated that we would elaborate on our reasons and furnish our detailed grounds of decision in due course. This, we now do.

6 In these grounds, we examine the relevant sentencing principles for enhancing an accused person's sentence where, in the course of conducting his defence, be it at first instance or on appeal, he intentionally commits an abuse of the process of the court. We also set out a framework for determining the appropriate uplift in sentence to be imposed in such cases. But first, we deal briefly with the Appellant's appeal.

The factual background

The parties

7 The Appellant is a 45-year-old Singaporean male. He married the Victim's mother ("the Mother") in September 1999, and they were subsequently divorced in December 2014. The Victim, who was born in November 2000, is their eldest daughter. As mentioned at [1] above, she was aged between 11 and 13 at the time of the offences, which took place between the end of 2011 and 15 April 2014. The Appellant and the Mother have two other children: a boy ("the Brother") and a girl ("the Sister").

8 At the time of the offences, the Appellant was residing with the Mother, their three children and a domestic helper at the Family Home, which was a three-bedroom flat. The Appellant, the Mother and the Sister slept in the master bedroom, while the Victim and the Brother each had their own bedrooms. The

Victim's maternal grandparents would also stay at the Family Home on most weekends.

The events relating to the charges preferred

9 The charges that were preferred against the Appellant as well as the facts relating to each of the charges based on the Victim's account of the events are set out in detail in the GD at [5] and [9]–[16]. In summary, the Appellant faced a total of ten charges: five under s 354(2) of the Penal Code (Cap 224, 2008 Rev Ed) ("PC"), four under s 376 of the PC and one under s 7(*a*) of the Children and Young Persons Act (Cap 38, 2001 Rev Ed) ("CYPA").

10 The first incident occurred in the Brother's bedroom, sometime towards the end of 2011, when the Victim was just 11 years old. The Victim frequently gave the Appellant massages, and the Appellant asked the Victim to massage his legs on the day of the offence. While the Victim was massaging the Appellant's upper thigh region, he grabbed hold of her hand and rubbed it across his penis. This formed the subject of the first charge, which was brought under s 7(*a*) of the CYPA.

11 A subsequent incident occurred between the end of 2011 and the end of 2012 while the Victim was alone with the Appellant in the master bedroom. The Appellant instructed the Victim to sit with her knees bent and with the soles of her feet touching each other. While facing the Victim, the Appellant lifted his *sarong* and pulled it over her head. The Victim said that she was shrouded in darkness, and thereafter felt the Appellant's penis rubbing against her forehead for a few minutes. This formed the subject of the second charge, which was brought under s 354(2) of the PC.

12 Based on the Victim's reckoning, over the course of 2012, the Appellant penetrated her mouth with his penis on about ten occasions, with about 2.5 inches of his penis entering her mouth on each occasion. The first incident happened in the early part of 2012, when the Victim was in Primary Six, and the last happened almost a year later just before she started secondary school. Each time, the Appellant would ask the Victim to kneel in the toilet of the master bedroom, and then insert his penis into her mouth for a few minutes. If the Victim resisted, the Appellant would use his hands to force her mouth open. These acts formed the subject of the third and fourth charges, which were brought under s 376(1)(*a*) of the PC and punishable under s 376(4)(*b*) thereof.

13 In two separate incidents between 2012 and 14 April 2014, the Appellant penetrated the Victim's anus, first with his finger and then with his penis. The first incident occurred while the Appellant and the Victim were alone in the master bedroom. The Appellant locked the bedroom door and asked the Victim to lie face down on the bed, with her upper body on the bed and her legs dangling over the side. The Appellant removed all of the Victim's clothes including her undergarments, took a bottle of olive oil from the shelf, and rubbed some of the oil on his fingers as well as on the Victim's anus. The Victim then felt the Appellant pushing his finger into her anus. After a few minutes, the Appellant withdrew his finger from the Victim's anus and penetrated her anus with his penis. The second incident took place in the Victim's bedroom. Similarly, the Appellant first penetrated the Victim's anus with his finger before doing so with his penis. On that occasion, however, the Appellant used the Brother's hair gel as a lubricant instead of olive oil. These acts formed the subject of the fifth and sixth charges, which were brought under s 376(2)(*a*) and s 376(1)(*a*) respectively of the PC and punishable under s 376(4)(*b*) thereof.

14 The Victim also testified that the Appellant took off her clothes and licked her vagina on five to ten occasions between 2012 and 14 April 2014. These incidents happened in either the Victim's bedroom or the master bedroom. What the Appellant usually did on these occasions was to place the Victim's entire body on the bed and then position himself either on top of or beside her. Thereafter, he would remove the Victim's clothes and lick her vagina. The Victim would resist the Appellant by trying to bring her legs together, but the Appellant would press his hands against her thighs to keep them open. These incidents formed the subject of the seventh charge, which was brought under s 354(2) of the PC.

15 On a number of occasions between 2012 and 14 April 2014, while the Victim was in the master bedroom using the family computer for her schoolwork, the Appellant hugged her from behind and massaged her shoulders. While massaging the Victim, the Appellant slipped his hands under her undergarment to grab and squeeze her breasts. He also licked her breasts. These incidents formed the subject of the eighth charge, which was brought under s 354(2) of the PC.

16 The Victim further recounted that on an unspecified number of occasions between 2012 and 14 April 2014, the Appellant asked her to lie face up on the bed with her legs crossed so that he could "check" her vagina. The Appellant then pushed the Victim's crossed legs up towards her chest and used his finger to touch and rub the area outside her vagina. He also attempted to penetrate her vagina with his finger, but stopped when she made hissing noises to indicate that she was in pain. These incidents formed the subject of the ninth charge, which was brought under s 354(2) of the PC.

17 On the night of 15 April 2014, the Victim was in the master bedroom using the family computer. Both the Appellant and the Mother were with her in the master bedroom. The Appellant then asked the Victim to massage him. The Mother left the master bedroom and went to the living room, leaving the Appellant alone with the Victim. The bedroom door was then locked. The Appellant asked the Victim to lie down on the bed, but she refused. The Appellant then pulled her down and made her lie face up on the bed. The Appellant removed the Victim's pants and her underwear, clambered on her, and started to rub his penis against her vagina. When the Victim turned over to try and avoid contact with the Appellant, he rubbed his penis against her anus. This formed the subject of the tenth charge, which was brought under s 354(2) of the PC.

Disclosure of the sexual abuse

18 On 16 April 2014, the day after the events constituting the tenth charge, the Victim disclosed the Appellant's acts of sexual abuse against her to the Mother by way of a WhatsApp text message.

19 The Mother was initially sceptical, and repeatedly asked the Victim whether she was speaking the truth and warned her not to lie. After the Victim reassured the Mother that she was not lying, the Mother told the Victim that she loved her and asked her to come home. On the Mother's instructions, the Victim moved to the house of an aunt the next day, 17 April 2014. The Victim only returned to the Family Home some days later, by which time the Appellant was no longer residing there. On 6 May 2014, the Mother reported the Appellant's acts of sexual abuse against the Victim to the police. The next day, 7 May 2014, the Mother applied for a Personal Protection Order against the Appellant, and also filed for divorce.

The state of the Appellant's penis as at October 2016

20 As alluded to at [2] above, a central plank of the Appellant's defence was that his penis was deformed, which made it highly improbable that he could have penetrated the Victim's mouth and anus with his penis. The Appellant claimed that he had undergone a number of penis enlargement procedures in Johor Bahru between 2005 and 2009. The last of those procedures had gone wrong, resulting in the present deformed state of his penis. The Appellant contended that his penis was already in this state at the time of the offences. In support of this ground of defence, the Appellant adduced two photographs which depicted the state of his penis as at October 2016 ("the October 2016 photos"), along with a medical report from Dr Lee Fang Jann ("Dr Lee") dated 17 October 2016. Dr Lee observed that the Appellant's penis had an "uneven bulbous expansion". He also observed that in both its flaccid and its erect states, the Appellant's penis measured 9.5cm, and the corresponding maximum penile girth at the proximal shaft measured 25cm. He opined that "the large penile girth [made] it unlikely for [the Appellant] to be able to perform penile-vaginal, penile-anal and penile-oral intercourse with a[n] 11 year-old girl".

21 The Victim and the Mother, however, gave a different description of the Appellant's penis at the time of the offences. At the trial, the Victim and the Mother each provided three drawings of the Appellant's penis. All of the Mother's drawings showed some signs of a deformity at the proximal end of the penile shaft, although the penis was of relatively normal girth at the distal end. As for the Victim, her first two drawings showed an undeformed penis, whereas her last drawing showed some signs of a bulbous growth at the proximal end of the penile shaft. The Appellant relied on this inconsistency to assert, first, that the Victim's evidence was not reliable, and, second, that there was evidence to

support his contention that there was already some penile deformity in existence at the time the offences were committed.

The decision below

Conviction

22 The Judge found the Victim's testimony unusually convincing and convicted the Appellant of all ten charges. He acknowledged that there was a clear lack of particulars in relation to the dates and times of the incidents constituting the offences, and that the Victim's evidence contained certain inconsistencies and omissions. Nevertheless, he held that the lack of clear particulars was to be expected because the incidents had spanned a period of time. He was also persuaded by the Victim's ability to give "age-inappropriate descriptions of an entire range of sexual acts" (GD at [26]).

23 The Judge rejected the Appellant's contention that the alleged instances of sexual abuse had been fabricated by the Victim and the Mother because of the Mother's desire to get a divorce, and because the Appellant had given them a harsh scolding prior to the disclosure of the sexual abuse. He pointed out that the Mother had obtained a divorce fairly early in December 2014, and there would have been no need for her to cooperate further in the prosecution of the Appellant if all she had wanted was a divorce (GD at [113). The Judge thought it inconceivable that the Victim and the Mother would have colluded to frame the Appellant because of a mere scolding (GD at [115]).

24 The Appellant argued that there were certain discrepancies between, on the one hand, what the Victim had said in her statement to the police and in her oral testimony in court and, on the other hand, what she was reported to have said in the medical reports that were obtained after the Mother lodged a police

report against the Appellant. These were the medical report of Dr Padma Krishnamoorthy ("Dr Krishnamoorthy") dated 24 June 2014 ("Dr Krishnamoorthy's Report") and the medical report of Dr Parvathy Pathy ("Dr Pathy") dated 21 July 2014 ("Dr Pathy's Report"). Specifically, in Dr Krishnamoorthy's Report, it was recorded that there had been penile-anal penetration on 15 April 2015, contrary to what the Victim had stated in her statement to the police. Dr Krishnamoorthy's Report also stated that the Victim had denied any finger penetration or other forms of sex. The Judge found that these discrepancies were neither so material nor so inexplicable as to impugn the Victim's credibility (GD at [38]). He stressed that the medical reports were primarily intended to ascertain the Victim's fitness to give testimony rather than to obtain a comprehensive account of the alleged facts surrounding each offence. He also accepted the Victim's explanation that she did not think it was necessary to recapitulate the details of the offences when she was interviewed by Dr Krishnamoorthy because she had already made several statements to the police. The Judge found that the discrepancies had likely arisen due to miscommunication between the Victim and Dr Krishnamoorthy (GD at [42]–[43]).

25 The Judge rejected the Appellant's argument that it was unusual for the Victim to have shown no signs of trauma despite the alleged sexual abuse she had endured. He accepted Dr Pathy's explanation that there were several possible reasons to account for why the Victim had remained calm when she was interviewed by Dr Pathy and Dr Krishnamoorthy, such as the rapport that had been built between the Victim and her interviewer, or the Victim's own defence mechanism, which would have been subconsciously activated in order to detach her emotions from a grievously painful memory (GD at [96]).

26 The Judge also rejected the Appellant's contention that the Mother was suspiciously unconcerned following the disclosure of the alleged offences against the Victim. He noted that the Mother's primary concern was that the Victim should get home safely and immediately after she disclosed the Appellant's acts of sexual abuse. There was no need for the Mother to press the Victim for details at once because she could speak to the Victim in person after the Victim returned home. The Mother also explained that she would have gone to pick up the Victim if the Victim had refused to go home (GD at [104]–[105]).

27 As for the delay in reporting the Appellant's acts of sexual abuse to the police, the Judge accepted that the Mother had not known how to react to the complex and sensitive situation that had unexpectedly unfolded before her. She had to weigh the consequences of this turn of events on the family and her marriage, and it was therefore understandable that she did not wish to make a police report hastily (GD at [107]).

28 In relation to the Appellant's argument that it was implausible for the offences to have gone undetected for so long given the size of the Family Home and the number of people who would have been expected to be around, the Judge accepted the Victim's and the Mother's evidence that there would have been occasions when the Victim and the Appellant were alone in the Family Home (GD at [48]). Moreover, even when the other family members were around, the family's habits were such that the other family members would refrain from entering the master bedroom if the Victim and the Appellant were in there and the door was closed (GD at [49]).

29 As regards the Appellant's claim that his penis was deformed and it was therefore highly improbable that he could have penetrated the Victim's mouth and anus with his penis, the Judge held that there was insufficient evidence to

prove that the penile deformity existed at the time of the offences. He noted that the Victim's and the Mother's drawings of the Appellant's penis did not resemble the Appellant's penis as it appeared in the October 2016 photos. He also accepted that the Victim's inaccurate depiction of the Appellant's penis in her first two drawings was because she had mistaken the bulbous growth at the proximal end of the Appellant's penile shaft for his testicles and had therefore excluded it from those drawings. Any misdescription of the Appellant's sexual organs could be explained by the Victim's young age and the fact that she had never seen any other adult male's sexual organ (GD at [73]). In contrast, the Judge found the Appellant's evidence on his penile deformity "inconsistent, unreliable, and incapable of belief" (GD at [71]). The Judge further noted that the Appellant had not raised this deformity at all in the statements which he had given to the police. Instead, he had brought it up for the first time only on 15 April 2016, some two years after giving his first statement to the police, when he filed his Case for the Defence. The Judge therefore held that s 261(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC") applied, and drew an adverse inference against the Appellant for the belated raising of his penile deformity (GD at [80]–[83]).

Sentence

30 On the question of sentence, the Judge held that the primary sentencing considerations were retribution and general deterrence (GD at [128]).

31 With respect to the offence under s 7(*a*) of the CYPA (the first charge), the Judge had particular regard to three factors in imposing a two-year imprisonment term. First, the Victim was only 11 years old at the time of the offence. Second, the Victim had not consented to the act which was committed

against her. Third, the Appellant had abused his position of authority to the "highest order" (GD at [139]).

32 In relation to the sentences for the five offences under s 354(2) of the PC (the second and seventh to tenth charges), the Judge held that a two-year imprisonment term with caning was the appropriate starting point for offences under this provision where the victim's private parts had been intruded upon (GD at [140]). He thus imposed a sentence of two years' imprisonment and six strokes of the cane per charge for the seventh and eighth charges. He further held that the second, ninth and tenth charges warranted imprisonment terms of more than two years per charge because they were especially egregious. Accordingly, he imposed a sentence of: (a) three years' imprisonment and six strokes of the cane per charge for the second and ninth charges; and (b) three years and six months' imprisonment and six strokes of the cane for the tenth charge (GD at [141] and [145]).

33 As for the four offences under s 376 of the PC of sexual assault by penetration, punishable under s 376(4)(*b*) of the PC (the third to sixth charges), the Judge relied on the sentencing framework laid down in *Public Prosecutor v NF* [2006] 4 SLR(R) 849, and held that the offences fell within Category 2 of that framework (GD at [142]). He also held that the offences fell within Band 2 of the sentencing framework established in *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 ("*Terence Ng*") for the offence of rape. He therefore held that a sentence of 15 years' imprisonment and 12 strokes of the cane would have been appropriate for each of these offences (GD at [144]). However, in the light of the totality principle, he ultimately imposed a sentence of ten years' imprisonment and 12 strokes of the cane for each of these offences (GD at [146]).

34 The Judge ordered the sentences for the fourth, sixth and tenth charges to run consecutively, and the sentences for the other charges to run concurrently. This resulted in an aggregate sentence of 23 years and six months' imprisonment with 24 strokes of the cane, that being the maximum number of strokes of the cane permitted under s 328 of the CPC.

The Appellant's application to adduce further evidence

35 At the first hearing of this appeal on 19 January 2018, counsel for the Appellant, Mr Ramesh Tiwary ("Mr Tiwary"), informed us that the Appellant had met an acquaintance, one Mohamed Bin Alwan ("Mohamed"), three days prior to the hearing. During their conversation, it emerged that Mohamed had allegedly seen the Appellant's penis in the toilet of a coffee shop at around the time of the offences, and was willing to testify to the same. Mr Tiwary sought a three-week adjournment for time to file a criminal motion to adduce the evidence of Mohamed in relation to what he had allegedly seen. We granted the adjournment, and directed the Defence to file a criminal motion to adduce further evidence as well as a supporting affidavit from Mohamed by 9 February 2018.

36 It transpired that Mohamed subsequently changed his mind about giving evidence on the Appellant's behalf. But, undeterred by this turn of events, the Defence was still able to file a criminal motion to adduce further evidence pertaining to the Appellant's penile deformity defence and a supporting affidavit, this time, from one Muhammad Ridzwan Bin Idris ("the Witness"), by the 9 February 2018 deadline that we had set. The Appellant had allegedly bumped into the Witness on 3 February 2018, just six days before that deadline. Before this chance encounter, the last time the Appellant had met the Witness

was allegedly in 2015, and they had not kept in touch with each other during the intervening period.

37 The parties appeared before us again on 12 April 2018, at which time Mr Tiwary informed us of the change in circumstances, and that the Witness, instead of Mohamed, would be giving evidence on behalf of the Appellant. The Prosecution contended that the Appellant's criminal motion was an abuse of the court's process in two respects: first, the Appellant was conniving to introduce false evidence in an attempt to exculpate himself, and, second, he was conducting his defence in a piecemeal manner. We recognised that these were legitimate concerns, and indicated that if they were found to be borne out, then the full force of the law should be brought to bear on the Appellant and on those who had come forward to participate in such a scheme. However, we also noted that without the benefit of the relevant witnesses being examined, we could not at that stage make any findings as to whether the Prosecution's concerns were made out. Therefore, despite the objections of the Prosecution, we adjourned the matter to enable the Appellant to adduce the Witness's evidence. We specifically refer to [4] of the Findings on Remittal, which reflects our direction and states:

> The Court of Appeal directed that this Court was to receive additional evidence, consisting of:
>
> > (a) the [Appellant's] evidence, to explain the circumstances in which he found two witnesses within two weeks who had seen his penis at the time of the offences; and
> >
> > (b) the evidence of the Witness.
>
> Specifically, the [Appellant's] evidence was to be received in order to establish whether the [Appellant] was party to any abuse of process.

The Witness's affidavit

38 In his affidavit dated 9 February 2018, the Witness stated that he had known the Appellant since 2012. They had played football together between 2012 and 2013, and had gone fishing together once in 2013. They had also sold snacks together at the Singapore Expo from 1 to 4 August 2013. Apart from that, there were no other details of the Witness's relationship or interactions with the Appellant.

39 The Witness stated that on 3 August 2013, he and the Appellant had gone to the toilet together while they were at the Singapore Expo, and had used adjacent urinals. As they were urinating, the Witness looked down and saw the Appellant's penis, which he described as looking "like a round door knob" with the head of the penis "sticking out of the round part". The Witness noted that the Appellant's penis did not look normal, but did not say anything at the time.

40 On 3 February 2018, the Witness had a chance encounter with the Appellant at Bussorah Street. The Appellant informed the Witness that he had been accused of raping his daughter. The Appellant also told the Witness that he had initially found a witness who could testify to the state of his penis at the time of the offences and prove that the Victim was lying. However, that witness eventually decided not to testify on his behalf. The Witness then told the Appellant that he too had seen the latter's penis in 2013, and agreed to give a statement to the Appellant's lawyer.

41 The Witness also exhibited in his affidavit a drawing of what he had allegedly seen of the Appellant's penis in the toilet at the Singapore Expo on 3 August 2013. This drawing depicted both a frontal and a top-down view of the Appellant's penis.

The Findings on Remittal

42 The Judge rejected the further evidence of the Appellant and the Witness on the basis that it was devoid of credibility. He found that there was considerable doubt as to the veracity of the further evidence, given: (a) the Appellant's failure to ask the Witness any questions about what the latter had allegedly seen of his penis in the toilet at the Singapore Expo on 3 August 2013; (b) the Appellant's failure to inform his lawyer speedily of the information volunteered by the Witness despite the importance of that information to his penile deformity defence; and (c) the discrepancies between the Appellant's and the Witness's respective accounts of the Witness's meeting with the Appellant's lawyer to provide his evidence.

43 The Judge also found that the Witness and the Appellant had lied about the nature and extent of their friendship. He noted that when the Prosecution asked the Witness during cross-examination whether he had ever gone to Malaysia with the Appellant, the Witness initially denied having ever done so. However, when confronted with his travel movement records from the Immigration and Checkpoints Authority ("ICA"), the Witness conceded that he had indeed gone to Malaysia with the Appellant on several occasions, and could suddenly recall what they had done on their trips there and who else they had been with. The ICA travel movement records also indicated that the Appellant and the Witness had already known each other since 2011, which contradicted the Witness's assertion in his affidavit that he had known the Appellant only since 2012. The Judge held that the only reasonable inference to be drawn was that the Appellant and the Witness were downplaying their relationship to safeguard against allegations of collusion (Findings on Remittal at [24]–[28]).

44 In addition, the Judge found the Witness's assertion that he had seen the Appellant's penis doubtful (Findings on Remittal at [29]). First, he found that the Witness's uncanny ability to remember the exact date on which he had allegedly seen the Appellant's penis suggested that his evidence was contrived and manufactured. Second, given the circumstances under which the Witness claimed he had seen the Appellant's penis, it was highly unlikely that he would have been able to describe it in such a precise and accurate manner. Third, the top-down view of the Appellant's penis that the Witness drew would have been different from what he would have been able to see of the Appellant's penis from his vantage point in the adjacent urinal. Finally, the Judge found that the Witness's drawing was strikingly similar to the October 2016 photos, which raised a suspicion that the Witness had merely copied those photographs.

45 The Judge concluded that the Appellant had arranged for false evidence to be presented before the court, and therefore found beyond reasonable doubt that he had abused the process of the court (Findings on Remittal at [16]). However, he declined to comment on whether an uplift in the Appellant's sentence was warranted, given that this was a matter for us to decide (Findings on Remittal at [41]–[42]).

The issues to be determined

46 The issues that we had to determine in this appeal were as follows:

(a) whether there was any merit in the Appellant's main appeal against his conviction;

(b) whether the Judge was correct to find that the further evidence was false and that the Appellant had abused the process of the court in conniving to adduce that evidence;

(c) whether the aggregate sentence imposed by the Judge was manifestly excessive; and

(d) if the Judge was correct to find that the further evidence was false and that the Appellant had connived to adduce that evidence in abuse of the court's process, whether there should be an uplift in the aggregate sentence imposed on the Appellant and, if so, what that uplift should be.

The parties' arguments

On the main appeal against conviction

47 The Appellant's case on his main appeal against his conviction was essentially a repetition of the arguments that he had raised at the trial below. He emphasised the following points in particular:

(a) The Victim's first two drawings of the Appellant's penis did not show the bulbous growth at the proximal end of the penile shaft. Therefore, it was unsafe for the Judge to conclude that the Victim and the Mother had given consistent evidence as to the state of the Appellant's penis at the time of the offences.

(b) The Appellant's evidence that he had not sought medical help for his penile deformity because he was afraid of the corrective procedures could not be dismissed as untrue.

(c) It was not clear from the evidence that the Appellant knew that because of his deformed penis, it was highly improbable that he could have penetrated an 11- to 13-year-old girl's mouth and anus with his penis. Therefore, an adverse inference should not have been drawn

against him for failing to disclose during the course of the investigations a fact which he did not know to be relevant.

(d) It was unsafe to conclude that the discrepancies between Dr Krishnamoorthy's Report and the Victim's evidence as recounted in her statement to the police and her oral testimony in court was due to miscommunication between the Victim and Dr Krishnamoorthy without Dr Krishnamoorthy having testified to what had transpired during her interview with the Victim.

(e) The Mother's delay in reporting the Appellant's acts of sexual abuse to the police and her failure to ask the Victim for further details after she found out about the sexual abuse cast doubt on the credibility of both the Victim and the Mother.

48 In response, the Prosecution argued that the Judge's findings were unassailable and should be upheld.

On the further evidence

49 In relation to the findings made by the Judge at the remittal hearing, Mr Tiwary attempted to persuade us that the Witness's ability to recall with specificity that he had seen the Appellant's penis on 3 August 2013 ought not to be construed as an indication that his evidence was contrived. Rather, the fact that the Witness insisted he had seen the Appellant's penis on that particular date suggested that he was trying to tell the truth. Mr Tiwary also asserted that even though the Witness had only glanced at the Appellant's penis from the side, the unusual size and shape of the Appellant's penis would have left an indelible impression on the Witness's memory. That explained why he could describe and draw the Appellant's penis with such precision. As a concluding

point, Mr Tiwary contended that there was no reason for the Witness to perjure himself.

50 The Prosecution submitted that the Judge was correct to reject the further evidence in its entirety "in view of the litany of inconsistencies and shortcomings in the evidence of both [the Witness] and the Appellant".

51 The Prosecution also argued that if we were to uphold the Judge's finding that the Appellant had been party to an abuse of the process of the court, an uplift in his sentence ought to be effected in order to reflect his utter lack of remorse for his offences. It submitted that an uplift of at least 18 months in the Appellant's aggregate imprisonment term would be warranted in the present case.

Our decision

On the main appeal against conviction

52 Having considered the evidence as well as the parties' submissions, we were satisfied that none of the arguments raised by the Appellant was sufficient to raise a reasonable doubt in the Prosecution's case. The burden which the Appellant had to overcome to convince us to set aside the Judge's factual findings on appeal was an onerous one: see *Public Prosecutor v Muhammad Farid bin Mohd Yusop* [2015] 3 SLR 16 at [54]. Not only did the Appellant fail to advance any new arguments, none of the points he raised were sufficient to establish that the Judge's factual findings were suspect or against the weight of the evidence. In our judgment, there was nothing to impugn the veracity of the Victim's and the Mother's evidence. In comparison, the Appellant's evidence was riddled with both internal and external inconsistencies. We were therefore

of the view that there was no merit in the Appellant's main appeal against his conviction for the following reasons.

53 First, we agreed with the Judge that the discrepancies between Dr Krishnamoorthy's Report and the Victim's evidence as recounted in her statement to the police and her oral testimony in court did not detract from the credibility of the Victim's testimony. We did not find any merit in the Appellant's suggestion that it was inappropriate for the Judge to conclude that the discrepancies were due to miscommunication between Dr Krishnamoorthy and the Victim when Dr Krishnamoorthy had not been asked to testify. In our judgment, the Judge was entitled to and did accept the Victim's explanation as to what it was that she had told Dr Krishnamoorthy, and, as a matter of principle, there was nothing wrong with his decision to do so. The Victim was available to be, and was in fact cross-examined on her interview with Dr Krishnamoorthy. We therefore saw no reason to disturb this aspect of the Judge's findings.

54 Secondly, in relation to the purported delay by the Mother in reporting the Appellant's acts of sexual abuse to the police after they had been disclosed to her by the Victim, we did not think that it was at all unreasonable for the Mother to have taken some time before making a police report. The Mother was placed in the unenviable position of having to choose between reporting the Appellant on one hand, and preserving the family unit on the other. The contemporaneous evidence in the form of the WhatsApp text messages exchanged between the Victim and the Mother after the disclosure of the Appellant's acts of sexual abuse further showed that the Mother was struggling to come to grips with the horrific revelations. She also had to contend with how she was going to face her parents, who thought very highly of the Appellant. Given all of these concerns that the Mother had to deal with, we did not consider

her delay in reporting the Appellant's acts of sexual abuse to the police to be so significant as to detract from her credibility.

55 Thirdly, the Judge was correct to reject the Appellant's assertion that the Victim and the Mother had colluded to fabricate the allegations of sexual abuse in order to advance the Mother's alleged desire for a divorce. Leaving aside the fact that there was nothing to suggest that the Mother had planned to try and obtain a divorce by such means, the Mother, as the Judge noted (GD at [113]; see also [23] above), had obtained a divorce fairly early in December 2014, which would have negated any need for her to cooperate thereafter in the prosecution of the Appellant if all she had wanted was a divorce. It beggared belief that the Victim would have fabricated a series of incidents rich in lewd detail just to get back at the Appellant or to help the Mother to obtain a divorce. Further, if assisting the Mother to obtain a divorce were truly the agenda, there would have been no reason at all for the Victim to fabricate so many instances of sexual abuse.

56 Fourthly, we agreed with the Judge that despite the presence of other people in the Family Home, there were ample opportunities for the Appellant to commit the offences without being detected. As the Judge found, even when the other family members were around, they tended to refrain from entering the master bedroom if the Victim and the Appellant were in there and the door was closed (GD at [49]; see also [28] above). The Victim, the Mother and the Appellant himself were all consistent in their evidence that no one in the family would have questioned the Appellant's being alone with the Victim, who was after all his own biological daughter, in any room in the Family Home. This was partly because it was an accepted family practice for the Appellant to ask for massages from his family members, and partly because the only working computer in the Family Home was located in the master bedroom (GD at [50]).

The Judge also accepted the Mother's evidence that she did not suspect anything untoward whenever she found the door to the master bedroom locked because she assumed that the Victim was inside doing her school work (GD at [53]).

57 Fifthly, we found no merit in the suggestion that it was unusual for the victim of a sexual offence to show no signs of trauma, or that the Victim's good performance in school was inconsistent with someone suffering from trauma. As the Judge noted, the court should not expect there to be "an archetypal victim of sexual abuse, or … any standard as to how a victim of sexual abuse should or should not have aspects of his or her life visibly affected by the abuse" (GD at [102]). Moreover, as Dr Pathy explained, many sexual assault victims presented a calm demeanour as part of a defence mechanism to distance themselves from the trauma of the abuse. She also pointed out that there were many ways in which a victim of sexual abuse could react, and the Victim had not been reacting in an unusual manner in staying calm during her interviews (see [25] above).

58 Finally, we were satisfied that at the time of the offences, the Appellant's penis was not as it appeared in the October 2016 photos. As a preliminary point, the Appellant contended that the burden should be on the Prosecution to prove that at the time the offences were committed, his penis was *not* as it appeared in those photographs. We disagreed. While the Prosecution bears the initial burden of establishing beyond reasonable doubt the charges preferred against an accused person, once it has done so, the burden then shifts to the accused to prove a positive defence that he relies upon: see Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (LexisNexis, 3rd Ed, 2018) at paras 2.24 and 2.27. In the present case, the Prosecution mounted its case on the basis of the Victim's testimony as well as other evidence. If, in response, the Appellant wished to contend, by reason of some

fact known only to him, that it was highly improbable that he could have committed the offences alleged against him, the burden was on him to adduce the relevant evidence.

59 Both the Victim and the Mother gave evidence that at the time of the offences, the Appellant's penis was not as it appeared in the October 2016 photos. We agreed with the Judge that the Victim's inaccurate depiction of the Appellant's penis in her first two drawings was entirely explicable on the basis that she had mistaken the bulbous growth at the proximal end of the Appellant's penile shaft for his testicles and had therefore excluded it from those drawings. It was also understandable that the Mother was able to capture a more accurate likeness of the Appellant's penis, given that she was married to the Appellant at the material time and engaged in regular consensual sexual activity with him. In contrast, the Victim would have been and was traumatised when the offences were carried out against her, and this would likely have marred her recollection of what she saw of the Appellant's penis. In any event, any penile deformity as was evident in the drawings made by the Mother and the Victim was far less pronounced than what could be observed in the October 2016 photos.

60 We also agreed with the Judge that the Appellant's evidence as to the state of his penis at the time of the offences was inconsistent and unreliable. First, aside from the October 2016 photos and the report from Dr Lee (see [20] above), the Appellant did not adduce any evidence as to the state of his penis at the time of the offences or as to his penis enlargement procedures (GD at [75]). Second, the Appellant's testimony that his deformed penis made it difficult for him to have sexual intercourse with the Mother was at odds with his statement to the police in November 2014 that they regularly engaged in sexual intercourse (GD at [76]). Third, it was incredible that the Appellant would have left his deformed penis, which was said to be oozing pus, swollen and causing

him pain, without seeking medical attention for more than seven years since the time the deformity arose in around 2008 or 2009 (GD at [77]). The Appellant claimed that he did not want to seek medical treatment in Singapore because he was "embarrassed to show [his] private parts". We did not accept this. It made no sense that the Appellant would be embarrassed about showing his private parts to a doctor in Singapore when he had already undergone a number of penis enlargement procedures by someone in Malaysia who he could not even be sure was a certified medical practitioner, and who had evidently mishandled the last of those procedures (that being the particular procedure which, according to the Appellant, had gone wrong, resulting in his penis becoming deformed (see [20] above)). Fourth, the Appellant's evidence that his penis enlargement procedures were collagen-based was contradicted by the testimony of his own expert witness, Dr Lee, that a collagen insertion in 2009 was unlikely to have resulted in the state of the Appellant's penis as it appeared in the October 2016 photos (GD at [78]).

61 In addition, the Judge was correct to draw an adverse inference from the Appellant's belated raising of his penile deformity. The Appellant sought to explain that he did not mention this deformity in his statements to the police because he never realised that it could serve as a defence. But the Appellant's testimony was to the contrary. At the trial, he said that he did realise the relevance of his penile deformity, but did not mention it to the police because it was "really embarrassing". Given the gravity of the charges he was facing, we found it incredible that he would have been too embarrassed to disclose this detail to the police if it could have potentially exculpated him.

62 Taken together, we agreed with the Judge that the Appellant was not a credible witness. His evidence was illogical, and it was contradicted by both his

own evidence and the evidence of other witnesses who were correctly assessed to be credible. We therefore saw no reason to disturb the Judge's findings.

On the further evidence

63 We turn now to the further evidence that was adduced by the Appellant. We agreed with the Judge that the further evidence was incredible and should be rejected, and, indeed, that the Appellant's conduct in conniving to adduce that evidence amounted to an abuse of the court's process. We came to this conclusion for the following reasons.

64 First, we found it remarkable and suspicious that the Appellant had (so he claimed) chance encounters with two separate witnesses who had allegedly seen his penis at around the time of the offences. This was all the more so because those chance encounters occurred in extremely close proximity to the first hearing of this appeal on 19 January 2018 as well as the 9 February 2018 deadline which we set at that hearing for the Appellant to file his criminal motion to adduce further evidence and the accompanying supporting affidavit. The Appellant had allegedly encountered Mohamed, the original witness who was supposed to testify on his behalf, on 16 January 2018, just three days prior to the first hearing of this appeal (see [35] above). When Mohamed subsequently changed his mind and no longer wished to give evidence on the Appellant's behalf, the Appellant was nonetheless still able to file his criminal motion to adduce further evidence and a supporting affidavit from the Witness by the 9 February 2018 deadline, having allegedly bumped into the Witness at Bussorah Street on 3 February 2018, just six days before that deadline. Adding to the sheer improbability of all this, it appeared that the last time the Appellant had met the Witness prior to that chance encounter was in 2015, approximately three years earlier, and they had not kept in touch with each other during the

intervening period (see [36] above). Of course, such improbability could be displaced if the further evidence that was led proved to be plausible and consistent.

65 However, and this is our second point, there were significant and material inconsistencies between the evidence of the Appellant and that of the Witness on areas that they both were expected to and did testify to at the remittal hearing before the Judge. At that hearing, although the Appellant and the Witness were able to provide a consistent account of an event that had allegedly happened more than five years earlier on 3 August 2013, there were remarkable differences in their recollection of the circumstances under which they had met just a few months earlier on 3 February 2018.

66 The Appellant's and the Witness's respective accounts of their chance encounter on 3 February 2018 were inconsistent in the following areas:

(a) Where the Appellant had been seated when they met and where they subsequently consumed their drinks: According to the Witness, the Appellant had been seated on a "bench" belonging to a restaurant that was closed for the day when he ran into the Appellant. Thereafter, the Appellant bought drinks from a nearby cafe, and they then proceeded to a "bench" along a walkway opposite the cafe to consume their drinks. The bench was accompanied by a table where they placed their drinks. In contrast, the Appellant said that he had been seated on a "raised pavement" near a restaurant when he chanced upon the Witness. Thereafter, they bought drinks from a nearby coffee shop and went back to the "pavement" to consume their drinks. Crucially, when Mr Tiwary sought to clarify in re-examination whether the "pavement" that the

Appellant was referring to was a "stone bench", the Appellant maintained that it was a "pavement".

(b) The duration of their conversation: The Appellant estimated that it lasted half an hour, while the Witness said that it lasted only ten or 15 minutes.

(c) Whether the Appellant knew what the Witness was doing at Bussorah Street when they ran into each other: The Appellant's evidence was that he did not know whether the Witness was alone or why he was at Bussorah Street. In contrast, the Witness testified that the Appellant had specifically asked him what he was doing there, and that he had told the Appellant he was out for a walk with his wife.

(d) How the Appellant subsequently met Mr Tiwary to provide his evidence: The Appellant's evidence was that he had given the Witness Mr Tiwary's office address and contact number, and the Witness had then gone on his own to meet Mr Tiwary. At no point did the Appellant suggest that he had accompanied the Witness to Mr Tiwary's office. The Witness, on the other hand, testified that he and the Appellant had first met at Peninsula Plaza before proceeding to see Mr Tiwary together.

67 Mr Tiwary sought to persuade us that these inconsistencies were not central to the primary issue of whether the Appellant's penis was indeed deformed at the material time. We disagreed. One of the specific issues which we asked the Judge to examine when we remitted the matter to him pertained to the circumstances in which the Appellant had found within two weeks two witnesses who had both allegedly seen his penis several years earlier at around the time of the offences. This was critical because of the suspicious turn of events in which the Appellant was able to find, within such a short and tactically

important time, two witnesses who were allegedly able to attest to such an improbable matter. For this reason, we highlighted the importance of investigating this point. Central to this inquiry was the question of how the Appellant's alleged chance encounters with these two witnesses had occurred.

68 Further, we agreed with the learned Deputy Public Prosecutor, Mr Mohamed Faizal ("Mr Faizal"), that even if each of the differences between the Appellant's and the Witness's respective accounts of their chance encounter on 3 February 2018 might appear insignificant on its own, when viewed together in the light of the point we have just made at [67] above and the fact that this encounter occurred just a few months prior to the remittal hearing before the Judge, the inexorable inference was that the Appellant did not chance upon the Witness in the manner that he claimed.

69 Thirdly, even where the Appellant's and the Witness's respective accounts of their chance encounter on 3 February 2018 coincided, their narrative was incredible. They both testified that when they met, neither party saw fit to clarify, before they parted ways and before the Witness agreed to give evidence on the Appellant's behalf, what it was that the Witness had allegedly seen while he was at the toilet with the Appellant at the Singapore Expo on 3 August 2013. The Appellant stated that he was "shocked" when the Witness told him that he had seen his penis sometime during the period when they were selling snacks together at the Singapore Expo, and that he "couldn't wait for [the Witness] to see [his] lawyer … because that's what [he] needed at that point in time. Someone to stand for [him]." Despite this, the Appellant admitted that he did not ask the Witness *exactly* what it was that he had seen. It beggared belief that the Appellant would have been content to have the Witness go and meet his lawyer to provide evidence without first verifying if the Witness could indeed give evidence that could potentially exonerate him.

70 Equally surprising was the fact that the Witness agreed to meet the Appellant's lawyer and give evidence on the Appellant's behalf without first clarifying what it was that the Appellant needed help with. The Witness confirmed that he did not ask the Appellant for any details of the case nor about the Victim's allegations against him. Without knowing the nature of those allegations, the Witness could not possibly have known how any evidence he might have been able to give could be relevant to the issues in the case. In these circumstances, it was incredible that the Witness, whom the Appellant had allegedly last met approximately three years prior to their chance encounter on 3 February 2018 and whom the Appellant had not kept in touch with during the intervening period, would have agreed to inconvenience himself by meeting a lawyer with a view to swearing an affidavit and thereafter testifying in court, when he hardly even knew what it was that he was supposed to testify to. It might have been that the Witness thought it could be regarded as suspicious if he and the Appellant had spoken at length about the Appellant's case and the evidence that the Appellant required to exonerate himself. However, it was equally incredible that the Witness would have agreed to go out of his way to help the Appellant without first clarifying what it was that the Appellant needed help with.

71 Fourthly, the Witness's evidence in relation to whether he had previously gone to Malaysia with the Appellant shifted throughout his cross-examination. When asked whether he had ever been to Malaysia with the Appellant, the Witness initially stated that he "[had] not been to Malaysia together with [the Appellant], but … did chance upon him once" in Malaysia. He was then confronted with travel movement records obtained from the ICA, which showed that he had entered Malaysia with the Appellant in the same vehicle on 6 February 2013, 19 March 2013 and 27 March 2013, for four or five

hours on each occasion. When confronted with these travel movement records, the Witness had to admit that he had previously gone to Malaysia with the Appellant. When asked why he had originally denied this, the Witness stated that he could not remember because the trips to Malaysia had taken place in 2013. We make two observations in this regard. First, we found it difficult to accept that the Witness had completely forgotten that he had previously been to Malaysia with the Appellant, especially since they had made several trips there together, and not just one isolated trip. Second, it was also remarkable that the Witness would have forgotten about his trips to Malaysia with the Appellant when he could supposedly remember the *exact date* on which he had seen the Appellant's penis in 2013 and, further, could reproduce an image of it with such specificity. Aside from this, when the Witness was then asked what he and the Appellant had done together in Malaysia during their trips there, he said that "*usually* we will have a meal together" [emphasis added], which again revealed his lack of candour in having earlier claimed that they had never been to Malaysia together. It seemed to us that this was a clear case of a lie being exposed in cross-examination.

72 The ICA travel movement records also revealed other respects in which the Witness and the Appellant had lied about their friendship. In his affidavit, the Witness stated that he had come to know the Appellant in 2012, and that his only interactions with the Appellant consisted of playing football together from 2012 to 2013, going fishing together once in 2013 and selling snacks together at the Singapore Expo from 1 to 4 August 2013. When cross-examined on this, the Witness maintained that apart from these activities which he had listed in his affidavit, he had never had other interactions with the Appellant. The Appellant testified to the same effect, and said that the Witness was "just a casual acquaintance". The impression that the Appellant and the Witness sought

to give was therefore that their relationship was one of casual acquaintanceship with only limited and occasional interaction. However, it was clear from the ICA travel movement records that the Witness and the Appellant were closer than they made themselves out to be, having gone to Malaysia together on at least three occasions in 2013. The ICA travel movement records also revealed that they had entered Malaysia within minutes of each other, albeit in separate vehicles, on 12 March 2011. It could therefore readily be inferred that they had already known each other prior to March 2011, which contradicted their evidence that they had only come to know each other in 2012.

73 Fifthly, it was implausible that the Witness could recall with precision that he had seen the Appellant's penis at a public toilet at the Singapore Expo on specifically 3 August 2013, *the third day* of their stint selling snacks together there all those years ago, when he could not offer any explanation as to how he could remember this with such precision and confidence. According to the Witness, he had never discussed with the Appellant what he had seen, either at the time or in the years since then; nor had he made any written note of what he had seen that he could rely on. Indeed, the Witness gave nothing by way of an explanation or even an association by which he was able to remember the date on which he had seen the Appellant's penis. It was the Appellant's evidence that while he and the Witness were selling snacks together at the Singapore Expo, they would take frequent cigarette breaks throughout the day. Their throats would be dry after smoking, so they would drink water, and thereafter, would need to go to the toilet to relieve themselves. In fact, the Appellant stated that he and the Witness had gone to the toilet together quite a few times during their stint selling snacks together at the Singapore Expo. The Witness, however, could not provide any explanation for why he could remember, even though he had gone to the toilet with the Appellant numerous times during that period, that

it was specifically on 3 August 2013, the third day, that he had seen the Appellant's penis. The explanation offered by the Witness was that he remembered that it was the third day because the Appellant's penis was unusual and he had never seen anything like it before. While this might explain why the image of the Appellant's penis left a lasting impression on the Witness's mind, it did not explain why he could remember that it was specifically on that particular day that he had seen the Appellant's penis.

74 Lastly, given the circumstances under which the Witness had allegedly seen the Appellant's penis, it was highly unlikely that he would have been able to reproduce the Appellant's penis in the manner that he did in the drawing exhibited in his affidavit. The Witness testified that he had "just a glance and [he] happened to see [the Appellant's penis]", and that he did not turn his head to look directly at it because it would be quite embarrassing if the Appellant caught him staring. Additionally, as the Judge observed, based on the Witness's own evidence, he would have glimpsed the Appellant's penis at an oblique angle from the side. The Witness also agreed, when questioned, that he had little more than a fleeting and sidelong glance, which, it bears reiterating, took place more than five years prior to the remittal hearing before the Judge. Despite the extremely brief glance which the Witness had of the Appellant's penis and the fact that he did not look at it directly but only had an awareness of it from the side, the Witness was able to produce both a frontal and a top-down image of it in his drawing (see [41] above). We found this incredible, given that the Witness also stated (as noted at [73] above) that he had not recorded what he had seen of the Appellant's penis, and therefore would not have had anything with which to refresh his memory. Quite apart from that, given his vantage point from the urinal next to that occupied by the Appellant (see [39] above), the Witness could

not possibly have seen the Appellant's penis either from the front or from the top down.

75 In our judgment, having regard to all these factors and the striking similarity between the Witness's drawing of the Appellant's penis and the October 2016 photos, the only inference that could be drawn was that the Witness had been shown and had then copied the October 2016 photos in his drawing.

76 In the circumstances, we were left to conclude that the Witness had falsified various aspects of his evidence, and that the Appellant had procured him to do so. There was no other reason for the Witness to have voluntarily come forward to perjure himself on the Appellant's behalf. As for the October 2016 photos, which (as we have just noted) closely mirrored the Witness's drawing of the Appellant's penis, the Witness could only have obtained those photographs from the Appellant. On the basis of the evidence before us, we were satisfied that the Appellant and the Witness had colluded to present false evidence to the court, and that this amounted to an abuse of the court's process.

On the appeal against sentence

No reduction in the Appellant's aggregate sentence was warranted

77 Turning then to the Appellant's appeal against sentence, we did not see any reason to reduce the individual sentences that were imposed by the Judge, nor to disturb his order that the sentences for the fourth, sixth and tenth charges should run consecutively. We noted that the individual sentences imposed on the Appellant for the four offences under s 376 of the PC had in fact been adjusted downwards by the Judge on account of the totality principle (see above at [33]). With respect, we considered that these sentences might have been on

the low side in view of the Appellant's *actual* criminality (see [82] below). While we were not minded to set aside these sentences and replace them with stiffer sentences, this remained a relevant consideration in relation to the extent of the uplift in sentence that we imposed on the Appellant on account of his abuse of the court's process. In particular, we should highlight that, having regard to the Appellant's *actual* criminality, we were satisfied that the aggregate enhanced sentence that we imposed remained proportionate in the circumstances of this case.

78 We first note that the Judge rendered his decision on sentence before our decision in *Pram Nair v Public Prosecutor* [2017] 2 SLR 1015 ("*Pram Nair*") was issued. In *Pram Nair* at [159], we set out the sentencing bands for the offence of digital-vaginal penetration under s 376(2)(*a*) of the PC. We also stated that we would leave open the question of whether those bands would apply in other sexual assault by penetration cases. Subsequently, in *BPH v Public Prosecutor* (Criminal Appeal No 29 of 2018) and *BVZ v Public Prosecutor* (Criminal Appeal No 19 of 2019), for which the full grounds of our decision have yet to be rendered, we decided that the *Pram Nair* sentencing framework would encompass *all* sexual assault by penetration offences under s 376 of the PC. Therefore, that sentencing framework was the controlling precedent for the Appellant's s 376 offences in this case.

79 Under that framework, the first step is for the court to identify which band the offence in question falls within, having regard to the factors that relate to the manner and mode in which the offence was committed as well as the harm caused to the victim. These are known as the "offence-specific" aggravating factors. In *Pram Nair* at [158], we stated that the offence-specific aggravating factors identified in our earlier decision in *Terence Ng* in respect of rape offences would be equally applicable to offences governed by the *Pram Nair*

framework. We further held in *Pram Nair* at [160] that where an offence of sexual assault by penetration disclosed any of the two statutory aggravating factors in s 376(4) of the PC – meaning where there was use of actual or threatened violence against the victim (s 376(4)(*a*)) or where the victim was under 14 years of age (s 376(4)(*b*)) – the case would fall within Band 2 (or even Band 3 if there were additional offence-specific factors).

80 Thereafter, the second step is for the court to calibrate the appropriate sentence for the offender, having regard to the aggravating and mitigating factors personal to the offender. These "offender-specific" factors relate to the offender's personal circumstances.

81 In our judgment, the present case fell within either the higher end of Band 2 or the lower end of Band 3. This was in fact also the conclusion that the Judge himself reached: see GD at [144]. Given that the offences were committed against the Victim when she was under 14 years of age, the starting point was that the case fell within Band 2. In addition, there was a severe abuse of position and breach of trust in this case, given that the Appellant committed the offences against his own biological daughter in the Family Home. The Victim's WhatsApp text messages to the Mother demonstrated that she held the Appellant in high regard, referring to him as a "pious" person "strong in his religious knowledge" and her "role model". As for the harm caused to the Victim, her victim impact statement clearly showed the emotional turmoil and trauma caused by the offences. She had a constant fear of the Appellant, and this was corroborated by Dr Pathy's Report. Her good performance in school and her ability to remain calm during her medical interviews with Dr Krishnamoorthy and Dr Pathy should not in any way detract from the trauma and lasting damage that she suffered at the hands of the Appellant.

82 In the circumstances, we thought that a sentence of 14 or 15 years' imprisonment with 12 strokes of the cane for each of the Appellant's four s 376 offences would have been warranted. This would have been a sentence that reflected the Appellant's *actual* criminality. However, as we noted at [33] above, the Judge ultimately imposed a sentence of ten years' imprisonment and 12 strokes of the cane for each of these offences, which reflected a substantial discount of four to five years' imprisonment for each offence. In view of these circumstances and the fact that none of the other individual sentences imposed by the Judge was manifestly excessive, we saw no basis at all for reducing the aggregate sentence meted out by the Judge.

Enhancement of the Appellant's aggregate sentence for abusing the process of the court

(1) The bases for the enhancement of sentence

83 Not only were we convinced that the Appellant's aggregate sentence did not warrant any reduction, in the light of his conduct in falsifying evidence and procuring the Witness to give false evidence in court, which conduct we found to be a clear abuse of the process of the court (see [63] and [76] above), we were also satisfied that a significant uplift in his aggregate sentence should be imposed. There were several bases to justify this.

84 First, the need for specific deterrence was prominent in this case, given the lengths the Appellant went to in an attempt to avoid facing the due consequences of his actions. Specific deterrence is "directed at discouraging that particular offender from committing offences in future", and is aimed at "instilling in him the fear of re-offending": see *Lim Ghim Peow v Public Prosecutor* [2014] 4 SLR 1287 at [36]. The punishment imposed must therefore be sufficiently severe to secure that end. Where an offender resorts to such

egregious means as those employed by the Appellant to avoid facing the due consequences of his actions, it reveals a grave lack of remorse and a wilful refusal to acknowledge his wrongdoing. This impedes the prospect of preventing a recurrence of his criminal conduct.

85 A court should generally be slow to infer a lack of remorse, and an accused person should not be penalised for exercising his right to claim trial, or for maintaining his innocence at his trial, or for appealing against a decision. However, if the court is satisfied beyond reasonable doubt that an accused person is unremorseful, such lack of remorse can and should be an aggravating factor: see *Thong Sing Hock v Public Prosecutor* [2009] 3 SLR(R) 47 ("*Thong Sing Hock*") at [56]. In the present case, instead of acknowledging his wrongdoing and accepting his punishment after a trial, the Appellant chose to devise an elaborate scheme to present false evidence to the court as well as to procure someone else to lie in court on his behalf in an attempt to exonerate himself. Such blatant abuse of the court's process was, to us, a clear indicator of an offender who was completely and utterly lacking in remorse, and wholly unrepentant for his actions.

86 Secondly, the interest of general deterrence featured here, in that there was a need to deter individuals such as the Appellant not only from engaging in heinous acts of sexual abuse of the type committed against the Victim, but also from resorting to adducing false evidence in a belated attempt to secure an acquittal. General deterrence is "premised upon the upholding of certain statutory or public policy concerns or alternatively, upon judicial concern or disquiet about the prevalence of particular offences and the attendant need to prevent such offences from being contagious". It is also intended to "create an awareness in the public and more particularly among potential offenders that punishment will be certain and unrelenting for certain offences and offenders":

see *Tan Kay Beng v Public Prosecutor* [2006] 4 SLR(R) 10 ("*Tan Kay Beng*") at [31]. This was a matter of paramount importance here because of the need to uphold the administration of criminal justice and safeguard against disingenuous litigants who might be inclined to make repeated applications to the court in order to prolong criminal proceedings and delay the commencement of their sentence. This, in the end, frustrates the efficient and expeditious conduct of criminal proceedings: see *Chew Eng Han v Public Prosecutor* [2017] 2 SLR 1130 at [3].

87 This is especially so in the context of applications to adduce further evidence on appeal. In *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [72], we introduced the concept of proportionality as a guide for determining whether to allow such applications. This entails the court "assess[ing] the balance between the significance of the new evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional proceedings, on the other" (at [72]). While this approach provides the court with greater flexibility to serve the needs of justice in appropriate cases, it also contains within it the potential for abuse. It is therefore important to deter such abuse in the interests of those offenders who may genuinely and legitimately benefit from the availability of such recourse.

88 Thirdly, the abuse of process in this case, occurring as it did on appeal, attacked the integrity of the judicial process that had been concluded in the court below. While an accused person who has been convicted after a trial has the right to appeal against his conviction and/or sentence to a superior court, that right should be exercised in good faith. In *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135 ("*Kho Jabing*") at [47], we noted that:

> … The concern here is not just with the saving of valuable judicial resources (vital though that is), but also with the integrity of the judicial process itself. Nothing can be as corrosive of general confidence in the criminal process as an entrenched culture of self-doubt engendered by abusive and repetitive attempts to re-litigate matters which have already been decided.

89 While the circumstances in this case were different from those in *Kho Jabing*, the ends were the same. The Appellant sought to fabricate evidence and to induce another to do the same in order to pervert the course of justice. He sought to wrongly exonerate himself, even at the cost of besmirching his wife and his daughter, and without regard to what had already transpired before and been found by the Judge.

90 Before us, Mr Tiwary argued that separate charges should have been preferred against the Appellant for falsifying evidence and procuring another to falsify evidence on his behalf instead of imposing an uplift in his aggregate sentence. He contended that short of a full investigation and trial, it would not be fair to punish the Appellant for crimes that had not been proved beyond reasonable doubt. Indeed, Mr Tiwary submitted, bringing formal charges against the Appellant for the two aforesaid offences would provide procedural safeguards by giving the Appellant proper notice of the offences that were being alleged against him.

91 Notwithstanding Mr Tiwary's arguments, we did not think that it was necessary for separate charges to be preferred against the Appellant in this case. The first point we make is that in enhancing the Appellant's aggregate sentence, we were not sentencing him for separate crimes that he had committed. Therefore, there was no need for the Appellant to be separately charged and tried in order to justify an uplift in his aggregate sentence. Rather, in imposing such an uplift, we were only punishing the Appellant for the very crimes that he

had been charged with and convicted of, but with the entirety of his conduct, including how he had sought to conduct his defence on appeal, taken into account. Where an accused person conducts his defence abusively, be it at first instance or on appeal, this can fairly be taken into consideration for sentencing purposes. This can be seen from *Ong Seng Hwee v Public Prosecutor* [1999] 3 SLR(R) 1, for instance. In that case, the appellant was charged with and convicted of employing and harbouring three immigration offenders. As part of his defence, he alleged that the immigration offenders were actually employed by one Radakrishnan, who had subleased a space at his premises. In support of his defence, he falsified several documents, and also abetted Radakrishnan to make a false statutory declaration. Yong Pung How CJ held at [66] that the appellant's actions in subverting the course of justice by fabricating evidence and abetting the making of a false statutory declaration was aggravating behaviour which justified the trial judge's decision to impose for each charge an additional three months' imprisonment on top of the statutory minimum imprisonment term. Similarly, in *Public Prosecutor v Chua Hock Leong* [2018] SGCA 32 at [9] and *Public Prosecutor v BNO* [2018] SGHC 243 at [195], it was held that the conduct of a defence at a trial in a manner which shamed the victim demonstrated a clear lack of remorse on the part of the accused person, which warranted the imposition of a stiffer sentence.

92 Second, and more fundamentally, it is trite that a court is entitled, based on facts that it is satisfied of, to enhance the sentence of an offender. In the present case, we had directed the Judge to receive (among other evidence) the Appellant's evidence on the circumstances in which he had come to find, within the short span of two weeks, two witnesses who had both allegedly seen his penis at around the time of the offences. This was specifically so that it could be established whether the Appellant had been party to any abuse of the process

of the court. Based on the evidence before him, the Judge expressly found beyond reasonable doubt that there had been an abuse of the court's process, and this finding was upheld by us on appeal (see [63] and [76] above). The Appellant was squarely alive to the fact that part of the inquiry at the remittal hearing before the Judge would be to determine whether he had committed an abuse of the court's process, and it was open to him to lead evidence and make his case so that an adverse finding to this effect would not be made against him. In the circumstances, we saw no need to refer the Appellant to the Public Prosecutor for investigation into possible further charges pertaining to the falsification of evidence, although that was what we did where the Witness was concerned.

93 In this regard, we found the decision of the High Court in *Cheang Geok Lin v Public Prosecutor* [2018] 4 SLR 548 ("*Cheang Geok Lin*") to be of some assistance. There, the High Court was concerned with how the accused person's conduct in absconding while on bail for an offence that he had already been charged with should affect the sentence for that offence. In particular, the question that the High Court considered was how it should view the fact of the accused person's absconding, and whether it could treat that as an aggravating factor even though the Prosecution had not availed itself of the alternative course of bringing a separate charge against the accused, either under s 172 of the PC for absconding to avoid arrest or under s 174 thereof for failure to attend in obedience to an order from a public servant: see *Cheang Geok Lin* at [26]. The High Court held at [27] that it might be permissible, in appropriate circumstances, to regard the fact of an accused person's absconding as an aggravating factor. However, it also cautioned that in doing so, the court should not impose a sentence that was aimed at punishing the accused for an offence that he had not been charged with. Rather, the court's endeavour was to consider

the fact of the accused's absconding for the purposes of assessing his culpability for the offence that he had been charged with. Similarly, we were concerned in the present case with assessing the Appellant's culpability for the offences that he had been charged with and convicted of in the light of the fact that he had abused the court's process on appeal by adducing false evidence in an attempt to exculpate himself.

(2) The extent of the uplift in sentence that we imposed

94 We turn next to the extent of the uplift in sentence that we imposed. The Prosecution sought an uplift of at least 18 months in the Appellant's aggregate imprisonment term, but submitted that it would be open to this court to impose an even more significant uplift if it deemed that to be appropriate in the circumstances. It cited three authorities, namely, *Teo Hee Heng v Public Prosecutor* [2000] 2 SLR(R) 351, *Thong Sing Hock* and *Ang Lilian v Public Prosecutor* [2017] 4 SLR 1072, as reference points for the extent of the uplift to be imposed. We did not find the uplifts that were imposed in those cases helpful in determining the appropriate uplift in this case. We noted that in those cases, the imprisonment sentences that were imposed at first instance ranged from 14 to 30 months' imprisonment, and the uplifts imposed on appeal ranged from two to 18 months' imprisonment. Relative to the sentences originally imposed, those were significant uplifts. In comparison, the aggregate sentence imposed by the Judge in this case was 23 years and six months' imprisonment with 24 strokes of the cane, which was significantly higher than the first-instance imprisonment sentences considered in the aforesaid cases.

95 In our judgment, in determining the extent of the uplift in sentence to be imposed on account of an offender's abuse of the court's process, the court should consider three factors, namely:

(a) the severity of the sentence that is to be enhanced;

(b) the egregiousness of the abuse that has been committed; and

(c) any applicable safeguards to ensure that the uplift imposed is not excessive.

We elaborate on each of these.

96 First, the court must consider the severity of the sentence that is to be enhanced in order to ensure that the uplift imposed is sufficiently significant. As we noted at [84] and [86] above, one of the intended aims of imposing an uplift in sentence where an offender has abused the process of the court is deterrence. The concept of deterrence assumes that a potential offender can and will balance and weigh the consequences before committing an offence: see *Tan Kay Beng* at [32]. Therefore, in order to deter an accused person from abusing the process of the court in an attempt to avoid liability for his wrongdoing, the potential uplift in sentence that he could receive if his ploy were discovered must be sufficient to outweigh the chances of his potentially being exonerated. It follows that if the sentence for the offence alleged against the accused person is objectively lengthy, any uplift in sentence that is imposed must be correspondingly higher in order to achieve the intended deterrent effect.

97 That said, we also accept that "[d]eterrence must always be tempered by proportionality in relation to the severity of the offence committed as well as the moral and legal culpability of the offender": see *Tan Kay Beng* at [31]. As the High Court noted in *Public Prosecutor v Low Ji Qing* [2019] SGHC 174 ("*Low Ji Qing*") at [80]:

> Proportionality prevents an offender from simply being used as a means to an end: see Morris J Fish, "An Eye for an Eye:

> Proportionality as a Moral Principle of Punishment" (2008) 28 OJLS 57, at 68. The principle acts as a *counterweight* against the more goal-driven sentencing considerations of prevention, deterrence and rehabilitation. In essence, proportionality is a check – *pulling back* on the ***extent*** to which the other sentencing considerations weigh into the calculus. [emphasis in italics and bold italics in original]

98 The principle of proportionality in the context of criminal sentencing is in essence a reflection of the principle of retribution: see *Low Ji Qing* at [78]. The latter principle requires the sentence imposed to be commensurate with the offender's culpability and the harm that he has caused: see *Public Prosecutor v ASR* [2019] 1 SLR 941 at [131]. Therefore, in calibrating the appropriate uplift in sentence to be imposed on account of an offender's abuse of the process of the court, the court should also have regard to the egregiousness of the abuse that has been committed.

99 In identifying the relevant indicia of the egregiousness of such abuse where it takes the form of adducing false evidence in an attempt to avoid criminal liability, we derived some assistance from Mr Faizal's submissions. He suggested that some of the non-exhaustive factors that might be considered in this regard included the following:

(a) the significance of the false evidence and the centrality of that evidence to the accused person's guilt;

(b) the extent of planning and premeditation involved;

(c) the level of sophistication, such as whether there was a third party involved; and

(d) whether the false evidence was adduced on appeal, as opposed to at first instance.

100 In relation to factor (d) above, we considered it potentially more egregious for false evidence to be adduced on appeal, as opposed to at first instance, for two reasons. First, the offender would have had sight of the trial court's judgment and would be able to identify points that he might attack by adducing false evidence. Second, if the falsehood had been brought before the trial court, it could have been dealt with relatively expeditiously. In contrast, adducing the false evidence on appeal would almost inevitably lead to a significant delay in the proceedings and detract from the expeditious resolution of the case.

101 Finally, there are some safeguards which we consider necessary in order to ensure that any uplift in sentence that is imposed on account of an offender's abuse of the court's process is not excessive. The first safeguard is that any uplift must not result in a sentence that exceeds the statutorily-imposed maximum sentence for the offence that the offender has been charged with and convicted of. We acknowledge that this could be a problem in cases involving particularly egregious criminal conduct if the sentence that is to be enhanced is already very close to the statutory maximum sentence. Yet, it is precisely in such cases that a more significant uplift might be required. In such cases, the court could instead refer the offender to the Public Prosecutor for further investigations to be carried out so as to ascertain whether separate charges should be brought against him in respect of the conduct constituting the abuse of court process.

102 The second safeguard is one that was identified in *Cheang Geok Lin* at [31]. There, the High Court noted that any enhancement of the accused person's sentence on the basis that he had absconded while on bail would need to be balanced against the extent to which he could have been punished *had a separate charge for absconding been brought*. As a matter of fairness to an offender who has abused the process of the court, the cumulative uplift in his

sentence on account of such abuse must not exceed the maximum sentence that he could have received if a separate charge pertaining to the conduct constituting the abuse had been preferred against him. Although the court is not punishing the offender for a separate offence in imposing an uplift in his sentence, this remains a principle of limitation driven by the need to be fair to the offender.

103 In the light of the foregoing considerations, we explain our reasons for imposing the uplift in sentence that we arrived at in the present case. First, we were cognisant that the individual sentences imposed on the Appellant by the Judge were objectively lengthy, which warranted a correspondingly higher uplift. Second, the Appellant's abuse of the process of the court in this case was especially egregious for the following reasons. The false evidence that the Appellant adduced was clearly central to his guilt, given that if that evidence had been accepted, it would have severely undermined the Victim's and the Mother's evidence about the state of his penis at the time of the offences. There was also significant planning and premeditation on the Appellant's part, in that he actively sought out persons who were willing to give false evidence on his behalf. Even when Mohamed changed his mind and refused to help the Appellant, the Appellant was undeterred and sought out the Witness. Finally, the false evidence adduced by the Appellant was led on appeal.

104 In view of all these circumstances, we increased: (a) the imprisonment sentence imposed for each of the four sexual assault by penetration charges under s 376 of the PC (that is to say, the third to sixth charges) from ten years' imprisonment to 12 years' imprisonment; and (b) the imprisonment sentence for the tenth charge, which was a charge under s 354(2) of the PC, from three years and six months' imprisonment to four years' imprisonment. On the basis of the sentences for the fourth, sixth and tenth charges running consecutively as the

Judge ordered, this was a combined uplift of four years and six months' imprisonment, resulting in an aggregate sentence of 28 years' imprisonment with the statutory maximum 24 strokes of the cane. This did not violate the statutory maximum imprisonment term for each of the individual offences concerned, which, we note, is an imprisonment term of five years for offences under s 354(2) of the PC, and 20 years for offences punishable under s 376(4)(*b*) of the PC. There was also no danger of our acting contrary to what was said in *Cheang Geok Lin* at [31] since the maximum imprisonment sentence that could have been imposed on the Appellant had he been convicted under s 193 of the PC (for intentionally giving false evidence) and/or s 204B(*c*) thereof (for inducing a person to give false evidence) would have been seven years' imprisonment.

105 Finally, we assessed the Appellant's aggregate sentence in the light of the totality principle, and were satisfied that the principle would not be offended even with the uplift. This was not least because of: (a) the total number of charges that the Appellant was convicted of; (b) the low sentences imposed, relative to the Appellant's *actual* criminality, for each of the individual offences for which the sentences were ordered to run consecutively; and (c) the egregious nature of the Appellant's abuse of the court's process. As we indicated at [82] above, the Appellant's *actual* criminality would have warranted an aggregate sentence of more than 30 years' imprisonment on the basis of the sentences for the fourth, sixth and tenth charges running consecutively. In our judgment, the uplift that we imposed was apposite and a sufficient signal that those who attempt to abuse the court's process will be dealt with severely.

106 We mentioned earlier (at [92] above) that, following the disposal of this appeal, we referred the Witness to the Public Prosecutor for investigation into possible offences arising from what appeared to have been acts of perjury on

his part. We emphasise that our decision to do so should not and will not bind a subsequent court should the Witness indeed face any charges arising from our referral.

Conclusion

107 For all of the foregoing reasons, we dismissed the Appellant's appeal and increased his aggregate sentence to 28 years' imprisonment with 24 strokes of the cane.

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

Ramesh Tiwary (Ramesh Tiwary) for the appellant;
Mohamed Faizal, Amanda Chong Wei-zhen, April Phang and James Chew (Attorney-General's Chambers) for the respondent.