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

[2024] SGHC 221

Magistrate's Appeal No 9181 of 2023

Between

Ang Boon Han

… *Appellant*

And

Public Prosecutor

… *Respondent*

GROUNDS OF DECISION

[Criminal Procedure and Sentencing — Sentencing — Voluntarily causing hurt which causes grievous hurt — Section 323A Penal Code (Cap 224, 2008 Rev Ed)]

Version No 1: 30 Aug 2024 (12:03 hrs)

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Ang Boon Han
v
Public Prosecutor

[2024] SGHC 221

General Division of the High Court — Magistrate's Appeal 9181 of 2023
Sundaresh Menon CJ
15 May 2024

30 August 2024

Sundaresh Menon CJ:

Introduction

1 Mr Ang Boon Han (the "Appellant") pleaded guilty to and was convicted of a charge under s 323A of the Penal Code (Cap 244, 2008 Rev Ed) (the "Penal Code") for the offence of voluntarily causing hurt with the intention to cause hurt which was not grievous, but which actually caused grievous hurt. The Appellant was sentenced to eight weeks' imprisonment: see *Public Prosecutor v Ang Boon Han* [2023] SGMC 82 (the "GD").

2 The Appellant appealed against the sentence imposed by the district judge (the "District Judge") on the basis that it was manifestly excessive. He also contended that the District Judge had erred in relying on the sentencing framework set out by the District Court in *Public Prosecutor v Loi Chye Heng* [2021] SGDC 90 ("*Loi Chye Heng*"). As I was faced with the prospect of

developing a sentencing framework for an offence under s 323A of the Penal Code, a Young Independent Counsel ("YIC"), Mr Tan Jun Hong ("Mr Tan"), was appointed to assist with the appeal.

3 Having considered the submissions of the parties and Mr Tan, I dismissed the appeal and gave brief reasons for doing so after the hearing. I now furnish the detailed grounds for my decision and set out the approach that might guide the lower courts when sentencing offenders convicted of offences under s 323A of the Penal Code.

Facts

4 The Appellant pleaded guilty to a single charge under s 323A of the Penal Code as follows:

> You,
>
> **ANG BOON HAN** …
>
> are charged that you on 15 May 2021, around 10.30pm, along [*sic*] in the vicinity of bus stop no. 46229 along Woodlands Ave 2, Singapore, did voluntarily cause hurt with the intention to cause hurt which is not grievous, but which actually caused grievous hurt to one Lam Mian Sern, *to wit*, by using both hands to push the chest of the said Lam Mian Sern once, causing him to fall backward and on his right hand, which was used to cushion his impact, resulting in the said Lam Mian Sern suffering fractures of both the distal radius and scaphoid at the right wrist, and you have thereby committed an offence punishable under Section 323A of the Penal Code, Chapter 224.

5 For ease of reference, s 323A of the Penal Code provides:

> **Punishment for voluntarily causing hurt which causes grievous hurt**
>
> **323A.** Whoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is not grievous, but the hurt which he actually causes is grievous, shall be punished with imprisonment for a term which may

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> extend to 5 years, or with fine which may extend to $10,000, or with both.

6 In turn, s 320 of the Penal Code sets out the kinds of hurt which are grievous:

> **Grievous hurt**
>
> **320**. The following kinds of hurt only are designated as "grievous":
>
> (*a*) emasculation;
>
> (*aa*) death;
>
> (*b*) permanent privation of the sight of either eye;
>
> (*c*) permanent privation of the hearing of either ear;
>
> (*d*) privation of any member or joint;
>
> (*e*) destruction or permanent impairing of the powers of any member or joint;
>
> (*f*) permanent disfiguration of the head or face;
>
> (*g*) fracture or dislocation of a bone;
>
> (*h*) any hurt which endangers life, or which causes the sufferer to be, during the space of 20 days, in severe bodily pain, or unable to follow his ordinary pursuits;
>
> (*i*) penetration of the vagina or anus, as the case may be, of a person without that person's consent, which causes severe bodily pain.

7 Before the District Judge, the Appellant admitted to a statement of facts (the "SOF") which set out the relevant facts surrounding the offence.

8 On 15 May 2021, at about 10.30pm, the Appellant alighted from bus service number 168 at a bus stop along Woodlands Avenue 2 (the "Bus Stop"). He was 55 years old at the time. The victim, Mr Lam Mian Sern (the "Victim"), who was 71 years old at the time, and one Mr Ong Puay Woon (the "Witness") had also alighted from the same bus. The Appellant was riding a personal

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mobility device ("PMD") and found himself behind the Victim and the Witness, who were walking along the pavement away from the Bus Stop.

9 The Appellant sounded his horn repeatedly to alert the Victim, the Witness and other pedestrians to make way for him. While the Witness heard the horn and moved to give way to the Appellant, the Victim failed to notice the horn and so did not move out of the Appellant's way. The Appellant then overtook the Victim by travelling on the grass patch beside the pavement before confronting the Victim for failing to give way to him.

10 A dispute ensued between the Appellant and the Victim. In anger, the Appellant got off his PMD and, using both his hands, pushed the Victim once on the chest. The Victim fell backwards as a result. The Appellant got back on his PMD and left the scene after seeing the Victim fall backwards.

11 The next day, on 16 May 2021, the Victim lodged a police report and sought medical attention at Khoo Teck Puat Hospital ("KTPH"). He was diagnosed with fractures of both the distal radius and scaphoid at his right wrist, and abrasions on his right hand. Manipulation and reduction of the Victim's right wrist fracture was performed under sedation, and the Victim was discharged with 14 days of hospitalisation leave. A medical report dated 1 November 2021 stated that, at the time of the Victim's last medical review on 12 August 2021, the Victim continued to suffer from stiffness of the fingers, though the physician thought that this would improve with time.

The District Judge's decision

12 In determining the appropriate sentence to be imposed, the District Judge applied the two-step sentencing framework set out by the District Court in *Loi Chye Heng* (the "*Loi Chye Heng* framework"), which was as follows:

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(a) At the first step, an indicative starting sentence would be determined based on the seriousness of the hurt that was in fact caused (*Loi Chye Heng* at [8]):

Band	**Hurt caused**	**Indicative sentencing range**
1	Low harm: being unable to follow his ordinary pursuits for at least 20 days	Fines or custodial term up to ten weeks
2	Moderate harm: simple fractures or dislocation of bone	Between ten weeks' to 15 months' imprisonment
3	Serious harm: • Injuries which are permanent in nature and/or which necessitate significant surgical procedures (such as multiple fractures) • Hurt which endangers life or causes the sufferer to be in severe bodily pain over at least 20 days • Permanent disfiguration of head or face • Permanent disability/privation of sight/hearing, or destruction of powers of joints, or emasculation • Death (starting point of 48 months' imprisonment)	Between 15 to 48 months' imprisonment

(b) At the second step, an assessment of the offender's culpability and any aggravating and/or mitigating factors would be undertaken. The necessary upward or downward adjustments would then be made to the

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indicative starting sentence derived at the first step of the analysis (*Loi Chye Heng* at [9]).

13 The District Judge considered that the *Loi Chye Heng* framework was appropriate for offences under s 323A of the Penal Code because it was modelled after the sentencing frameworks set out in the decision of the High Court in *Low Song Chye v Public Prosecutor and another appeal* [2019] 5 SLR 526 ("*Low Song Chye*") and of the Court of Appeal in *Public Prosecutor v BDB* [2018] 1 SLR 127 ("*BDB*"). In *Low Song Chye*, the High Court laid down a sentencing framework for the offence of voluntarily causing hurt under s 323 of the Penal Code. In *BDB*, the Court of Appeal laid down a sentencing approach for the offence of voluntarily causing grievous hurt under s 325 of the Penal Code (GD at [30]).

14 The District Judge rejected the Appellant's proposed sentencing framework, which was adapted from the sentencing framework laid down in *Tang Ling Lee v Public Prosecutor* [2018] 4 SLR 813 (the "*Tang Ling Lee* framework"). The District Judge reasoned that the *Tang Ling Lee* framework was inappropriate because it was meant *only* for road traffic offences prosecuted under s 338(*b*) of the Penal Code, which concerned the offence of causing grievous hurt by a rash or negligent act (GD at [31]–[32]). For the avoidance of doubt, the Appellant made clear on appeal that he was no longer proposing a sentencing framework adapted from the *Tang Ling Lee* framework.

15 Applying the *Loi Chye Heng* framework, the District Judge arrived at a sentence of eight weeks' imprisonment (GD at [33]–[34]). In summary:

(a) The District Judge first found that the harm caused (namely, the wrist fracture) was at the low end of the moderate harm category.

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Accordingly, the District Judge derived an indicative starting point of ten weeks' imprisonment.

(b) The District Judge next considered the following offender-specific mitigating and aggravating factors: (i) the Victim was a vulnerable victim in that he was elderly, and the Appellant had used both hands to push the chest of the Victim which could have led to a more serious injury but for the Victim using his hands to break his fall; (ii) the Appellant had pleaded guilty; and (iii) the Appellant suffered from Persistent Depressive Disorder ("PDD"), though this had no causal link to the offending act. The District Judge adjusted the indicative starting point down to eight weeks' imprisonment, having considered all the circumstances.

Submissions on appeal

Mr Tan's submissions

16 Mr Tan, the YIC, submitted that the approach in *Loi Chye Heng* should not be followed because the hurt categorisations in the *Loi Chye Heng* framework were flawed. It grouped harm based on the types of grievous hurt identified under s 320 of the Penal Code (for example, "fracture or dislocation of a bone") even though this may not properly reflect the severity of the harm caused within a particular type (for example, the extent and seriousness of such fractures).

17 Instead, Mr Tan submitted that the sentencing framework for s 323A offences ought to be modelled after the two-step sentencing approach for offences under s 325 of the Penal Code (which is the offence of voluntarily causing grievous hurt) that was set out in *BDB* for two main reasons. First, like

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offences under s 325 of the Penal Code, offences prosecuted under s 323A of the Penal Code involve a broad spectrum of injuries and a wide range of facts and circumstances in which grievous hurt of a particular type could be caused. Second, the *raison d'être* of s 323A of the Penal Code was to provide for more severe punishments where grievous hurt was the result of an offender's intended act of voluntarily causing simple hurt.

18 Mr Tan accordingly proposed the following sentencing approach:

(a) At the first stage of the inquiry, an indicative starting point should be determined based on the seriousness of the injury caused to the victim. This should be assessed along a spectrum that has regard to the nature and permanence of the injury, taking into account the factors set out in *Saw Beng Chong v Public Prosecutor* [2023] 3 SLR 424 ("*Saw Beng Chong*"), a case that concerned s 325 of the Penal Code. The indicative starting point could be derived by having regard to the indicative starting point that would apply if the case at hand had been for a charge under s 325, and then reducing it by half.

(b) At the second stage of the inquiry, this starting sentence may be adjusted upwards or downwards based on an assessment of the offender's culpability, and any applicable aggravating or mitigating factors.

The Appellant's submissions

19 The Appellant similarly took issue with the *Loi Chye Heng* framework for three main reasons. First, the framework was said to be flawed because it operated on the assumption that certain types of grievous hurt were more serious than others, which could lead to unfair results should the application of the

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framework result in a sentence that was not commensurate with the seriousness of the injuries. Second, the court in *Loi Chye Heng* erroneously adapted the framework for offences under s 323 of the Penal Code (as set out in *Low Song Chye*) as a basis for its framework. Unlike an offence under s 323 of the Penal Code which involved less serious hurt such that other factors, including those going towards culpability, may carry greater weight, the inherent mischief underlying an offence under s 323A of the Penal Code was the seriousness of the injury caused. Third, offences under s 323A of the Penal Code were very fact-specific, and the seriousness of the injuries caused could fall within a wide spectrum.

20 Accordingly, the Appellant submitted that a sentencing framework based on that set out in *BDB* should be adopted and concurred with Mr Tan's proposed framework (as outlined at [18] above).

21 Applying the proposed framework, the Appellant initially submitted that an indicative starting sentence of about seven to eight weeks' imprisonment at the first step was appropriate in light of the injuries suffered by the Victim. The Appellant submitted that the injuries in the present case were less serious than the injuries suffered by the victim in *Arumugam Selvaraj v Public Prosecutor* [2019] 5 SLR 881 ("*Arumugam*") which attracted a six-month indicative starting sentence under s 325 of the Penal Code. He also relied on the decision of the High Court in *S Gopikrishnan v Public Prosecutor* [2013] 3 SLR 1158 ("*Gopikrishnan*") in support of his contention that where a fracture was minor, the indicative starting point could be lower than six months' imprisonment. At the hearing of the appeal, however, counsel for the Appellant, Mr Ashwin Ganapathy ("Mr Ganapathy"), conceded that the injury sustained by the victim in *Gopikrishnan* was less serious than the injuries sustained by the Victim here,

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and that the injuries sustained in *Arumugam* were more comparable to those in the present case.

22 At the second step, the Appellant highlighted the fact that he was genuinely remorseful, and that the offence was committed on the spur of the moment and was not premeditated. He also contended that the District Judge placed insufficient weight on his PDD in assessing his culpability, and urged me to reconsider the two psychiatric reports on the record, namely, a report dated 11 October 2022 prepared by Dr Lim Wei Shyan ("Dr Lim"), a Consultant Psychiatrist at KTPH, and another report dated 16 May 2023 by Dr Loh Seng Wei, Adrian ("Dr Loh"), a Senior Consultant Psychiatrist at Promises Healthcare. In view of these, the Appellant contended that the indicative starting sentence of seven to eight weeks' imprisonment ought to be calibrated downwards to three to four weeks' imprisonment or, in the alternative, to five to six weeks' imprisonment.

23 Accordingly, the Appellant submitted that the sentence of eight weeks' imprisonment imposed by the District Judge was manifestly excessive.

The Prosecution's submissions

24 The Prosecution likewise submitted that the framework in *Loi Chye Heng* was inappropriate, for similar reasons to those advanced by Mr Tan and the Appellant. However, while the Prosecution agreed with Mr Tan that the sentencing framework for offences under s 323A of the Penal Code should be aligned with the sentencing framework for the offence under s 325 as laid down in *BDB*, its approach differed from Mr Tan's approach of halving the indicative starting sentences set out in *BDB* in *every* instance. The Prosecution's key concern was that simply halving the indicative starting sentences derived from

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an application of the *BDB* sentencing approach might not adequately address the varying degrees of asymmetry between the fault element (this being the offender's intention to cause simple hurt, or knowledge that the offender is likely to cause such hurt) and the physical element (this being the grievous hurt that actually resulted) of an offence under s 323A of the Penal Code. To illustrate how the asymmetry may feature in different cases even though the grievous hurt ultimately caused was the same, the Prosecution pointed to two hypothetical scenarios:

(a) In the first scenario, an offender forcefully pushes the victim to the ground, and the victim unexpectedly dies after hitting his head on the kerb.

(b) In the second scenario, an offender slaps the victim once, but the victim loses his balance, falls to the ground, and unexpectedly dies after hitting his head on the kerb.

25 The Prosecution pointed to the patent disparity in the culpability of the offender in these two scenarios and therefore proposed an additional step to the modified *BDB* approach that specifically considers what the appropriate reduction from the indicative starting position should be, having regard to the degree of this asymmetry. The Prosecution's proposed four-step framework was as follows:

(a) First, the court should identify the notional starting point having regard to the seriousness of the injury caused to the victim, as if the matter concerned a charge under s 325 of the Penal Code.

(b) Second, the court should specifically consider the degree of asymmetry between the fault element and the physical element

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(meaning the extent of the connection between the severity of grievous hurt that was caused and the type and/or severity of non-grievous hurt that was intended or known to be likely) and make an appropriate adjustment to the starting point. Generally, the reduction would be to around half the notional starting point, reflecting the reduction in the sentencing range from that prescribed under s 325 to that under s 323A. Where the degree of asymmetry was greater, the reduction would typically be greater. In cases where the hurt caused is on either extreme of the spectrum of grievous hurt, it would be necessary to consider whether the reduction should be less or more than half. For example, where the grievous hurt caused was not very serious and would have already attracted a low notional starting point, it may not be appropriate to reduce the sentence to half the notional starting point, because the simple hurt that was intended or known to be likely would likely not have been far off from the grievous hurt which was in fact caused.

(c) Third, the court should consider other factors relating to the offender's culpability and other aggravating or mitigating factors as set out in *BDB*.

(d) Fourth, the court should make adjustments for a plea of guilt, taking into account the Guidelines on Reduction in Sentences for Guilty Pleas issued by the Sentencing Advisory Panel (the "PG Guidelines").

26 Applying its proposed four-step framework, the Prosecution contended that the Appellant's appeal against his sentence should be dismissed as the proposed framework would yield a sentence that would be around or higher than the eight-week imprisonment term that was imposed by the District Judge. At the first step, the notional starting point on account of the injuries would be

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around six to eight months' imprisonment. In this regard, the Prosecution contended that the injuries in the present case were similar in severity to the injuries suffered by the victim in *Arumugam*. In particular, three months after the assault, the Victim continued to feel stiffness in his fingers, faced potential complications and had not fully recovered.

27 At the second step, the Prosecution submitted that the notional starting point of six to eight months' imprisonment would be lowered by around half to around three to five months' imprisonment as the asymmetry between the grievous hurt caused and the hurt intended was not large.

28 At the third and fourth steps, taking into account: (a) the limited role of the Appellant's PDD; (b) the Appellant's unprovoked conduct in pushing the Victim; (c) the fact that the Appellant did not render assistance and instead left the scene despite seeing the Victim fall; (d) the Victim's age and vulnerability; and (e) the Appellant's plea of guilt, the sentence would be adjusted downwards to around or slightly higher than the eight-week sentence that was imposed by the District Judge.

29 In the premises, the Prosecution submitted that the sentence imposed by the District Judge could not be said to be manifestly excessive and the appeal should therefore be dismissed.

My decision

Unsuitability of the Loi Chye Heng *framework*

30 As a starting point, I agreed with the parties and Mr Tan that the *Loi Chye Heng* framework was unsuitable. As I explained in *Saw Beng Chong* (at [1]–[2]), it may not always be possible to place each instance of a given offence

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neatly along a spectrum of sentences precisely reflecting the offender's culpability and/or the harm caused. This was certainly true in relation to offences where grievous hurt is caused, given the possible variance in the nature and extent of harm that may feature. Given that grievous hurt covers different forms of injuries which are highly fact-specific and lie on a continuum of severity, the injuries need to be assessed along a *spectrum*, having regard to their nature and permanence. The *Loi Chye Heng* framework was inconsistent with the established position that it was inappropriate to set out a range of indicative starting points or to categorise grievous hurt into broad categories: see *BDB* at [56] and [58]; *Saw Beng Chong* at [26]; and *Muhammad Khalis bin Ramlee v Public Prosecutor* [2018] 5 SLR 449 ("*Khalis*") at [52] and [56]. Relatedly, the three categories of harm in the *Loi Chye Heng* framework focused only on the *type* of grievous hurt caused based on the types of grievous hurt under s 320 of the Penal Code, but the true seriousness of an injury is likely to be informed by a range of factors.

31 I therefore declined to follow the *Loi Chye Heng* framework. Instead, I agreed with the parties and Mr Tan that the sentencing framework for s 323A offences should be modelled on the two-step sentencing approach in *BDB* for offences under s 325 of the Penal Code.

32 In coming to this view, I begin by setting out the background to the introduction of s 323A of the Penal Code. The Penal Code Review Committee Report (the "PCRC Report") that was released in August 2018 contained a recommendation for a new offence of voluntarily causing hurt *resulting* in grievous hurt to be introduced. The impetus for this was to "provide for more proportionate punishments when severe injuries are caused to the victim" rather than simply prosecuting an offender for causing simple hurt under s 323 of the Penal Code. The PCRC Report noted that a "sense of injustice" may be felt by

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the public where offenders who cause grievous hurt are only prosecuted for causing simple hurt. In the parliamentary debates relating to s 323A of the Penal Code, it was recognised that s 323A of the Penal Code was designed to fill the "gap between hurt and causing grievous hurt with intention" and to adequately deal with what was described as "serious" offences.

33 It follows that the impetus for the introduction of s 323A of the Penal Code was to provide for enhanced punishment having regard to the *seriousness of the outcome* (meaning the grievous hurt) that is *caused*. The seriousness of the injury caused underscores the inherent mischief targeted by both s 323A and s 325 of the Penal Code and would therefore be a good indicator of the gravity of the s 323A offence and can guide the court in determining the indicative starting point for sentencing. Further, as was noted in *BDB* in the context of s 325 offences (at [56]), s 323A too encompasses a broad spectrum of different forms of grievous hurt. Therefore, such injuries have to be assessed along a spectrum of *severity*, having regard to considerations such as the nature and the permanence of the injury, rather than trying to delineate the *types* of harm caused into specific categories: *Khalis* at [56].

34 Before proceeding, I make an observation as to how I situated the offence under s 323A against the related offences under ss 323 and 325 of the Penal Code. Since the provision was specifically introduced to address offences of voluntarily causing hurt where causing simple hurt was intended or known to be likely but where grievous hurt was nonetheless caused (see [32] above), I regarded s 323A of the Penal Code as a provision to *boost* the sentence prescribed for the offence under s 323 of the Penal Code, rather than as one to reduce the sentencing range provided for the offence of voluntarily causing grievous hurt under s 325. This seemed evident from the architecture of the suite of provisions. For each of the primary offences of voluntarily causing hurt or

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voluntarily causing grievous hurt, the offender must intend or know that he will likely cause hurt or grievous hurt, respectively. In the case of offences falling within the scope of s 323A of the Penal Code, the offender causes grievous hurt of the types covered in s 325, but without having intended to do so. Prior to the enactment of s 323A, it would not have been possible to prosecute the offender under s 325 due to the absence of an intention to cause grievous hurt or knowledge that such hurt was likely to be caused. Instead, the offender could only have been prosecuted under s 323 of the Penal Code. I therefore considered that it was to boost the sentence in this situation that s 323A was enacted.

Adaptation of the BDB *sentencing approach*

35 I next considered how the two-step sentencing approach in *BDB* ought to be adapted in the case of s 323A offences. While Mr Tan (with whom the Appellant agreed) and the Prosecution were aligned to the extent that the appropriate sentencing framework for offences under s 323A of the Penal Code should be one which was modelled on the two-step sentencing approach in *BDB*, they differed on how the framework should be adjusted to account for the degree of asymmetry between the fault element (this being the offender's intention to cause simple hurt, or knowledge that the offender was likely to cause such hurt) and the physical element (this being the grievous hurt that actually resulted) in s 323A offences. This "asymmetry", or misalignment between the fault element and the physical element of an offence, came to the fore in an observation I made in a somewhat different context in *Khalis*.

36 *Khalis* involved, amongst others, an offence under s 325 of the Penal Code. The offender delivered a lunging punch from behind the victim, causing him to fall and land heavily on the road with his head and shoulders hitting the kerb. The victim was knocked unconscious by the punch and eventually passed

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away after sustaining severe head injuries. In assessing the offender's culpability, I considered it relevant to have regard to the fact that he had only delivered a single blow. Accordingly, while the harm caused in that case was death, which was the most serious form of harm, and it was immaterial for the purposes of conviction that death was not the harm that was intended, I observed (at [68]) that as a matter of logic, "the less direct the connection between the act of the accused, the harm that he either intended or knew to be likely and the actual harm caused, the more it will be necessary to consider whether to temper the *punishment* to be imposed on the accused" [emphasis in original]. Accordingly, since the highest case that could be mounted against the offender was that he intended to forcefully punch the victim, in circumstances where he knew this was likely to cause a fracture or other grievous hurt, and not death, I moderated the indicative starting sentence where death has been caused, being eight years' imprisonment and 12 strokes of the cane (as provided for in *BDB*), to four and a half years' imprisonment and eight strokes of the cane. This point on asymmetry was relevant in *Khalis* because the offence of voluntarily causing grievous hurt could be made out in a wide range of circumstances. I therefore considered it necessary to go beyond examining the harm caused and to consider the extent to which that harm should be laid at the feet of the accused person, having regard to what he might reasonably have anticipated would ensue from his acts.

37 I return here to the examples cited by the Prosecution (see at [24] above) to illustrate the similar asymmetry between the fault element and the physical element in the context of the offence under s 323A of the Penal Code. In the second of these examples, where an offender slaps a victim who loses his balance and falls unexpectedly and suffers a fatal head injury, the degree of asymmetry would likely be wide, as the offender may not have anticipated,

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much less intended, the fatal head injury or have known it to be likely. But, in the first of these examples, if the offender pushes the victim with sufficient force intending the victim to fall, even if the ensuing death may not have been intended or thought to be a likely consequence, the degree of asymmetry may be narrower because the offender did intend to cause an uncontrolled fall which is inherently more hazardous.

38 As noted earlier, Mr Tan proposed halving the indicative starting points in *BDB* to take this asymmetry into account. In contrast, the Prosecution submitted that it was not appropriate to halve the *BDB* indicative starting points in *every* case, as this assumed that the degree of asymmetry between the fault element and the physical element would be the same in every case, when, as shown in the two examples which I have just mentioned, this clearly may not be so. In the Prosecution's view, rather than simply halving the *BDB* indicative starting points, the court should first assess the indicative starting point *as if* the offence was one under s 325 of the Penal Code before considering the adjustment to be made to this starting point to account for the degree of asymmetry, with the adjustment being generally around half, and the reduction becoming higher if the degree of asymmetry was greater.

39 I agreed with the Prosecution that it was inappropriate to simply halve the *BDB* indicative starting points in all cases, because this assumed that, as long as the same injury is caused, the asymmetry between the fault element and the physical element would always be the same. As I have just noted, this cannot be true since different offenders may have intended to cause hurt of differing severity or have intended to cause hurt in different ways such that the likelihood of more serious injury ensuing should have been anticipated.

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40 Further, as the Prosecution also observed, an offender who *intended* to cause a type of non-grievous hurt would generally be more culpable than an offender who only *knew it to be likely* that he would cause that type of non-grievous hurt. This too may necessitate a further adjustment to the starting sentence.

41 Before me, Mr Tan submitted that the Prosecution's modifications to the *BDB* approach were unnecessary as there would usually be insufficient information on the record to adequately identify the hurt that was intended or known to be likely so as to precisely gauge the asymmetry between the fault and physical elements for meaningful adjustments to be made to the indicative sentences. However, I noted that, in determining whether an injury was intended or known to be likely, an *inference* of the objective acts and circumstances of the offence would be necessary as these would rarely be neatly spelt out in the statement of facts. As I pointed out in *Khalis* at [42]:

> … The law may require that the accused possess certain subjective states of mind for the purposes of an offence, but that does not mean that the accused's intention and knowledge cannot be judged and inferred from his objective conduct and all the surrounding circumstances. Barring a personal admission by the accused, this will often be the only way to ascertain his state of mind …

42 I also considered that, in *assessing* the degree of asymmetry between the fault element and the physical element of an offence under s 323A of the Penal Code *for the purposes of sentencing*, the court is entitled to consider whether the grievous injury that was caused was *reasonably foreseeable* based on the objective acts and circumstances of the offence. This is in line with my observations at [36] above.

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43 Thus, in *Khalis*, although the offender was only appealing against his sentence and not his conviction, he argued that he never intended for the victim to lose consciousness or to fall and suffer a skull fracture. Essentially, his appeal raised a question as to whether the fault element of the offence of voluntarily causing grievous hurt was established. I held that, to satisfy the fault element of the offence of voluntarily causing grievous hurt, it must be shown that the offender intended or knew that his actions were likely to cause some form of grievous hurt, and this entailed an inquiry into the offender's subjective state of mind (at [42]). This did not require the Prosecution to show that the specific type of grievous hurt that was caused was intended. I also clarified at [38] of *Khalis* that the fault element of the offence of voluntarily causing grievous hurt did not include harm that was reasonably foreseeable, this being a "purely objective state which may loosely be compared with the notion of negligence … [and] describes the state of mind which a reasonable person ought to have in relation to the foreseeable consequences of his or her actions and is described in terms of one having reason to believe that the consequence in question was likely": *Khalis* at [37(c)]. This was by virtue of the language of the provision, which specifically required either intention or *knowledge of the likelihood* of causing grievous hurt as the *mens rea* for the offence (*Khalis* at [36]). For convenience, I set out the definition of "voluntarily causing grievous hurt", as set out in s 322 of the Penal Code:

> **Voluntarily causing grievous hurt**
>
> **322**. Whoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes is grievous hurt, is said "voluntarily to cause grievous hurt".

44 It will be noted that the physical element of the offence of voluntarily causing grievous hurt under s 325 of the Penal Code is essentially the same as

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the physical element of the offence under s 323A. Reasonable foreseeability of the grievous hurt that actually results is *not* relevant when determining whether an *offence* under s 323A is made out, because the *mens rea* for the offence under s 323A of the Penal Code is the intent or the knowledge that one is likely to cause *simple hurt*. This, as has just been noted above, corresponds with the position under s 325; see *Khalis* at [37(*c*)]. However, it nonetheless remains relevant to consider the reasonable foreseeability of the actual type of grievous hurt that occurred when it comes to ascertaining the *sentence* for an offence under s 323A of the Penal Code just as it is relevant to do so when it comes to the sentencing of an offence of voluntarily causing grievous hurt under s 325, as I have noted above and as was noted in *Khalis* (at [68]). In both instances, this is necessitated by the very wide range of injuries that may constitute grievous hurt and consequently, the need to ensure that the offender is punished having due regard to outcomes that are a foreseeable consequence of his or her actions.

45 In the case of s 323A, the offender's intent is to cause hurt that is *not* grievous hurt; unfortunately, it is such hurt that in fact ensues. The provision imposes a more onerous punishment than that which obtains for simple hurt, but where in the permissible range the offence is placed will depend on the extent to which the actual injury caused was foreseeable. For convenience, I set out the provision:

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> **Punishment for voluntarily causing hurt which causes grievous hurt**
>
> **323A.** Whoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is not grievous, but the hurt which he actually causes is grievous, shall be punished with imprisonment for a term which may extend to 5 years, or with fine which may extend to $10,000, or with both.

46 In this context too, the inquiry into reasonable foreseeability becomes material only at the sentencing stage, when the sentencing court considers the offender's culpability and the asymmetry between the fault element and the physical element of an offence under s 323A of the Penal Code.

47 I next considered the Prosecution's suggestion that, as part of the sentencing framework for s 323A offences, the court should first assess the indicative starting point as if the offence was one under s 325 of the Penal Code before considering the adjustment to be made to this starting point to account for the degree of asymmetry between the fault element and the physical element in a s 323A offence. While I understood why the Prosecution took this view, it seemed to me that there were some difficulties in doing so without recognising the need for some adjustments to be made. First, there was the obvious problem that the sentencing range for offences under s 325 and s 323A were different. Based on the Prosecution's proposed framework, the indicative starting point sentence at the first step could very well exceed the maximum prescribed punishment of five years' imprisonment for the offence under s 323A. The Prosecution recognised this but suggested that the adjustment that would be made to take into account the degree of asymmetry between the fault element and the physical element would *generally* bring the sentence within the sentencing range of s 323A. The Prosecution also contended that if this did not materialise at the second step, the final sentence would, in any case as a matter of law, be capped at the maximum of five years' imprisonment.

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48 In my judgment, this seemed a less-than-ideal way to arrive at a sentence that falls within the prescribed punishment range for s 323A of the Penal Code. Furthermore, the Prosecution's approach was contrary to the principle that the court's assessment of the indicative starting point for an offence should be informed by the full breadth of the permitted sentencing range: see *BDB* at [59]; and *Saw Beng Chong* at [28]. There was a real risk that the indicative starting point would not be informed by the full breadth of the permitted sentencing range for s 323A offences under the Prosecution's proposed approach, given that s 323A allowed for fines of up to $10,000 to be the *only* sentence imposed while s 325 prescribed mandatory incarceration. It was hard to envisage how a fine would ever be imposed under the Prosecution's proposed framework given that the Prosecution's proposed framework started by considering the indicative sentencing point under s 325 of the Penal Code which does not allow for the imposition of a fine as a sentence.

The applicable framework

49 I therefore concluded that a three-step approach as set out below ought to be adopted when sentencing an offender under s 323A of the Penal Code.

50 At the first step, the sentencing court should determine an indicative starting point, having primary regard to the seriousness of the injury caused to the victim. This should be assessed along a spectrum, having regard to the nature and permanence of the injury. As set out in *Saw Beng Chong* (at [26]), this exercise should be informed by a range of factors which include: (a) the number and seriousness of the injuries; (b) the location and extent of the pain suffered by the victim; (c) the permanence or duration of the injuries; (d) the extent of post-injury care that may be needed; and (e) the degree of disruption experienced by the victim.

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51 The inquiry should be broad-based and, accordingly, as I had said in *Saw Beng Chong* (at [26]), in the context of an offence under s 325 of the Penal Code, it would be unrealistic to expect that the court will in each case finely calibrate the punishment by scrutinising how the injuries in the case before it differs from those in every other broadly comparable precedent. However, it will be helpful, even essential, to have regard to the levels of sentencing applied in relevant analogous situations, particularly precedents under s 325, while keeping in mind the difference in the sentencing ranges for the two offences. Importantly, the sentencing court should have due regard to the full breadth of the permitted sentencing range (including fines) under s 323A in arriving at the indicative starting point: see *Saw Beng Chong* at [28]; and *BDB* at [59]. The indicative starting point will be derived from the overall severity of injury in the case at hand, having regard to the relevant facts and circumstances of that injury: see *BDB* at [56]; and *Khalis* at [56].

52 The sentencing court should then consider whether the indicative starting point should be adjusted either upwards or downwards to arrive at a notional sentence based on the extent of asymmetry between the fault element (this being the offender's intention to cause simple hurt, or knowledge that the offender is likely to cause such hurt) and the physical element (this being the grievous hurt that actually resulted) of the offence. In carrying out this assessment, the court may consider whether the grievous hurt that was actually caused was *reasonably foreseeable* based on the objective acts of the offender and the circumstances of the offence. In general, the greater the degree of asymmetry between the fault element and the physical element, the more this should result in an adjustment of the sentence that is in favour of the offender.

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53 At the second step, the sentencing court should consider whether any adjustments ought to be made to the notional sentence based on the specific aggravating and mitigating factors which feature on the facts.

54 Aside from the common factors, such as relevant antecedents or other prior interventions by the authorities, the other relevant aggravating factors to be considered include: (a) the extent of deliberation or premeditation; (b) the manner and duration of the attack; (c) the victim's vulnerability; (d) the use of any weapon; and (e) whether the attack was undertaken by a group (see *BDB* at [62]).

55 Relevant mitigating factors include the offender's mental condition and any other factors that diminish his culpability or evidence his genuine remorse. For the avoidance of doubt, I do not consider the offender's plea of guilt, if any, at this stage.

56 Instead, at the final step, if the offender has pleaded guilty, this should be taken into account. In considering the offender's plea of guilt, the court may consider the PG Guidelines and assess appropriate reductions to be granted based on the stage of court proceedings when the offender pleads guilty to the charge. I should add that the PG Guidelines were promulgated after the Appellant was sentenced in the court below and were therefore not relevant in the present appeal. However, it is open to and appropriate for me to nonetheless incorporate consideration of the PG Guidelines within the sentencing framework for s 323A offences.

Application of the framework to the present case

57 In the present case, the Victim suffered fractures of the distal radius and scaphoid in the right wrist and received 14 days of hospitalisation leave. The

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Victim's physician observed on 12 August 2021 that the Victim still suffered from stiffness of the fingers at the time, though it was thought that this ought to improve with time. Notably, there was no suggestion in the SOF or anywhere else that the Victim continued to suffer from such stiffness for any further period of time.

58 As I have noted above, both parties relied on the High Court decision in *Arumugam*, although the Appellant suggested that the injuries caused in the present case were less serious than those suffered by the victim in *Arumugam*, while the Prosecution considered that they were similar in nature. In *Arumugam*, the offender and his co-accused were involved in an altercation with the victim who sounded the horn of his lorry when they dashed across a road. The victim suffered a fracture of his right middle finger and bruising over his face and shoulder. The offender was convicted after a trial on a charge of voluntarily causing grievous hurt in furtherance of a common intention with the co-accused under s 325 read with s 34 of the Penal Code. Applying the framework in *BDB*, the trial judge found that the degree of harm was moderate with an indicative sentence of seven to eight months' imprisonment. The High Court allowed the appeal against sentence. Aedit Abdullah J held (at [13]) that while the trial judge correctly identified the degree of harm to be moderate and at the lower end of the range, the injuries caused attracted an indicative starting point of six months' imprisonment.

59 The Appellant contended that the injuries in *Arumugam* which attracted an indicative starting sentence of six months' imprisonment encompassed *not only* the finger fracture, but also all the other injuries suffered by the victim, which included bruising of the right eye and cheeks, bruising of the right shoulder and cheeks, and severe swelling of the lips. On the assumption that the victim there had suffered a single fracture of the finger, an appropriate indicative

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starting point would have been 12 to 14 weeks' imprisonment. In turn, an indicative starting point of about six to seven weeks' imprisonment would be appropriate for a single fracture of the finger in a s 323A offence. In the present case, a slight uplift of the indicative starting point to seven to eight weeks' imprisonment might be warranted in light of the injuries suffered by the Victim.

60 I did not agree with the Appellant. In my judgment, Abdullah J was primarily influenced by the *single fracture* and bruising in arriving at the indicative starting sentence of six months' imprisonment in *Arumugam*. As I pointed out to Mr Ganapathy during the hearing, the injuries in the present case involved *two* fractures at the wrist and abrasions, which resulted in *reduced function for at least three months*. Mr Ganapathy was essentially seeking to draw a distinction which, with respect, did not exist. In my judgment, the nature of the injuries in this case was of a degree of gravity that was, at the minimum, as serious as those in *Arumugam*. In fact, I was of the view that the injuries here were more serious than the single fracture and bruising sustained by the victim in *Arumugam*, especially taking into consideration the length of reduced function in view of the injuries here. Given the indicative starting sentence of six months' imprisonment which Abdullah J arrived at in *Arumugam* for an offence under s 325 of the Penal Code, I would have arrived at an indicative starting point of between seven and eight months' imprisonment at the first step if this had been a case involving a s 325 offence. Given, however, that the Appellant faced a s 323A offence, after taking into account the overall severity of the injury suffered by the Victim in this case and the full range of sentences available under s 323A, I would have arrived at an indicative starting point of three and a half months' imprisonment, or about 14 weeks' imprisonment.

61 I next considered the degree of asymmetry between the fault element and the physical element. The alignment between the fault element and the

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physical element in the present case was high as it appeared that the Appellant intended to knock the Victim to the ground. It was evident from Dr Lim's psychiatric report that the Appellant had assessed the pushing force needed to render the Victim less threatening by intending to cause (and in fact did cause) him to fall to the ground. It was entirely foreseeable that, in pushing a 71-year-old elderly person with sufficient force to make him sustain an uncontrolled fall, he would instinctively break his fall and in the process fracture his wrist. This was precisely what happened in the present case. In view of the alignment between the fault element and the physical element in the present case being rather high, I would not have made any further adjustment to the indicative starting point of 14 weeks' imprisonment.

62 I note that reliance was placed by Mr Ganapathy on the High Court decision of *Gopikrishnan.* The offender in that case was convicted of an offence under s 325 of the Penal Code and was sentenced to eight months' imprisonment at the first instance. He had pulled the victim's finger, causing an avulsion fracture of the right middle finger at the third middle phalanx. On appeal, the High Court noted that the fracture was not as serious as the term "fracture" suggested. This was because the medical expert for that case had described the injury as a "sprain injury'" although the pain could be quite great. The High Court also noted that the victim did not require any hospitalisation and was able to resume work immediately (*Gopikrishnan* at [5]). Considering these factors, the High Court reduced the sentence imposed to two weeks' imprisonment.

63 As a preliminary point, *Gopikrishnan* was decided before *BDB*, and was therefore an unpersuasive precedent because the sentencing court would not have had the benefit of the *BDB* framework. In any case, Mr Ganapathy attempted to rely on the decision to support his contention that minor fractures could attract a starting point of lower than six months' imprisonment. In my

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judgment, *Gopikrishnan* did not assist the Appellant on the facts, because the gravity of the injury suffered by the victim in that case simply pales in comparison to the injuries suffered by the Victim in the present case.

64 With that, I turn to the second step of the framework. I did not place weight on the Appellant's mental condition of PDD as a mitigating factor. Having reviewed both Dr Lim and Dr Loh's psychiatric reports, it was clear that neither report suggested a causal link between any mental health issue that the Appellant was suffering from at the relevant time and his actions on the night in question.

65 I did, however, consider that the starting sentence should be enhanced in the second step to around 18 weeks' imprisonment for the following reasons:

(a) First, it was common ground that the Victim was a vulnerable victim.

(b) Second, it was particularly aggravating that the assault was unprovoked. In my view, the Appellant's conduct resembled road rage. In *Public Prosecutor v Lim Yee Hua and another appeal* [2018] 3 SLR 1106, the High Court made clear (at [29]) that the deterrent sentencing policy underlying road rage violence would apply in cases where the facts disclose violence perpetrated by road users as a result of real or perceived slights by other road users stemming from differences that arise in the course of the shared use of the roads. While the present case was unlike the usual case involving road rage while driving a car, the offence did arise from the shared use of a public walkway and the Appellant's perceived slight by the Victim for failing to give way to him as a PMD rider.

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66 Finally, in the third step, having regard to the fact that the Appellant pleaded guilty which evidenced some remorse and also led to the saving of public resources that would have otherwise been expended in the course of a trial, I would have discounted the starting point to around 13 weeks' imprisonment. I note that the PG Guidelines (though they did not apply in the present case) recommend a discount of up to 30% depending on when an accused person indicates he wishes to plead guilty. In the present case, the Appellant indicated that he wished to plead guilty at the pre-trial stage and would, therefore, have been entitled a discount closer to the upper limit of 30% had the PG Guidelines applied.

67 It was therefore evident that the sentence of eight weeks' imprisonment that was imposed by the District Judge was not manifestly excessive. If at all, the sentence imposed was lenient. However, given that the Prosecution had not filed an appeal against the sentence imposed in the court below, I did not enhance the sentence.

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Conclusion

68 For these reasons, I dismissed the Appellant's appeal.

69 In closing, I would like to record my gratitude to Mr Tan for the assistance that he rendered in this appeal, both in the written submissions as well as the oral arguments he presented. I was greatly assisted by his efforts in coming to my decision in this matter.

Sundaresh Menon
Chief Justice

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