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

[2024] SGHC 34

Criminal Case No 66 of 2022

Between

Public Prosecutor

And

CRH

GROUNDS OF DECISION

[Criminal Procedure and Sentencing — Sentencing — Applicability of mandatory minimum sentence to an attempt to commit the offence of aggravated statutory rape]
[Statutory Interpretation — Penal statutes — Presumption against retrospective operation]

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Public Prosecutor
v
CRH

[2024] SGHC 34

General Division of the High Court — Criminal Case No 66 of 2022
Pang Khang Chau J
18 November 2022, 19 April 2023, 29 January 2024

5 February 2024

Pang Khang Chau J:

Introduction

1 The Accused pleaded guilty to two charges of *attempted* aggravated rape of his biological daughter ("the Victim"). The offences were committed in or around 2013 but came to light only in 2021. Between these two dates, certain amendments were made to the provisions of the Penal Code (Cap 224, 2008 Rev Ed) (the "PC") concerning the punishment for attempts to commit offences.

2 The punishment for aggravated rape under s 375(3)(*b*) of the PC is imprisonment for a minimum term of eight years and a maximum of 20 years, and caning with a minimum of 12 strokes. In the version of the PC in force at the time of the offences (the "Pre-2019 Amendment PC"), s 511(1) provided that an attempt to commit an offence shall "be punished with such punishment as is provided for the offence", while the relevant part of s 511(2) provided that

the longest imprisonment term that may be imposed shall not exceed "one-half of the longest term provided for the offence". This meant that the maximum imprisonment term which may be imposed for *attempted* aggravated rape was ten years. An issue which arose for decision in this case was whether the minimum sentence of eight years prescribed for aggravated rape also applied in its entirety to the offence of *attempted* aggravated rape, with the result that the sentence which could be imposed for *attempted* aggravated rape was confined to the rather narrow range of eight to ten years ("Issue A").

3 Section 511 of the Pre-2019 Amendment PC had been repealed by the Criminal Law Reform Act 2019 (Act 15 of 2019) (the "CLRA"), which enacted the new ss 511 and 512 in its place. The new s 512(3)(*a*) now expressly provides that, where a minimum sentence is prescribed for an offence, the court is not bound to impose the said minimum when sentencing for an *attempt* to commit that offence. A second issue which arose for decision in this case was: whether*, assuming Issue A was answered in the affirmative*, s 512(3)(*a*) could be applied retrospectively to the Accused's benefit such that the court was not bound to impose on the Accused the minimum imprisonment term of eight years prescribed for (completed) aggravated rape ("Issue B").

4 For the reasons given in these grounds, I answered both Issue A and Issue B in the negative. In the light of my answer to Issue A, I sentenced the Accused to a global sentence of 13 years' imprisonment and 16 strokes of the cane, comprising six years and six months' imprisonment and eight strokes of the cane for each of the proceeded charges with the imprisonment terms running consecutively.

The charges

5 The two charges which the Accused pleaded guilty to (the "First Charge" and the "Third Charge") each alleged that, sometime in or around 2013, the Accused committed attempted aggravated rape of the Victim, who was then under 14 years of age, by attempting to penetrate the Victim's vagina with his penis without her consent, thereby committing an offence under s 375(1)(*b*) read with s 511(1), punishable under s 375(3)(*b*) read with s 511 of the Pre-2019 Amendment PC.

6 The Accused consented to having three other charges taken into consideration ("TIC") for the purposes of sentencing. These were:

(a) one charge for use of criminal force on the Victim, who was then under 14 years of age, with intent to outrage her modesty sometime in or around 2013, contrary to s 354(1) and punishable under s 354(2) of the PC (the "Second Charge"); and

(b) two charges each for intentionally recording an image of the genitals of the Victim, who was then under 14 years of age, without her consent sometime between 7 April 2020 to 1 June 2020 contrary to s 377BB(5) and punishable under s 377BB(8) of the PC (the "Fourth Charge" and the "Fifth Charge").

The relevant statutory provisions

7 Section 375(1)(*b*) read with s 375(3)(*b*) of the Pre-2019 Amendment PC provided:

> **Rape**
>
> **375.**—(1) Any man who penetrates the vagina of a woman with his penis —

> (*a*) without her consent; or
>
> (*b*) with or without her consent, when she is under 14 years of age,
>
> shall be guilty of an offence.
>
> …
>
> (3) Whoever —
>
> …
>
> (*b*) commits an offence under subsection (1) with a woman under 14 years of age without her consent,
>
> shall be punished with imprisonment for a term of not less than 8 years and not more than 20 years and shall also be punished with caning with not less than 12 strokes.

8 Section 511 of the Pre-2019 Amendment PC provided:

> **Punishment for attempting to commit offences**
>
> **511.**—(1) Subject to subsection (2), whoever attempts to commit an offence punishable by this Code or by any other written law with imprisonment or fine or with a combination of such punishments, or attempts to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code or by such other written law, as the case may be, for the punishment of such attempt, *be punished with such punishment as is provided for the offence*.
>
> (2) The *longest term of imprisonment that may be imposed* under subsection (1) shall not exceed —
>
> (*a*) 15 years where such attempt is in relation to an offence punishable with imprisonment for life; or
>
> (*b*) *one-half of the longest term provided for the offence* in any other case.
>
> …
>
> [emphasis added]

9 With effect from 1 January 2020, s 167 of the CLRA repealed s 511 of the Pre-2019 Amendment PC, and replaced it with the new ss 511 and 512. In the version of the PC in force from 1 January 2020 ("the Post-2019 Amendment

PC"), s 511 defined the scope and elements of the offence of attempting to commit offences, while s 512 dealt with the punishment for attempting to commit offences. Section 512 of the Post-2019 Amendment PC read:

> **Punishment for attempting to commit offences**
>
> **512.**—(1) A person who attempts to commit an offence punishable by this Code or by any other written law with death or imprisonment for life, shall, where no express provision is made by this Code or by such other written law for the punishment of such attempt, be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to fine or to caning.
>
> [… *illustration omitted …*]
>
> (2) Subject to subsection (3), any person who attempts to commit an offence punishable by this Code or by any other written law (other than an offence mentioned in subsection (1)), shall, where no express provision is made by this Code or by such other written law for the punishment of such attempt, be punished with such punishment as is prescribed for that offence.
>
> (3) *Despite subsection (2),* where the punishment prescribed for an offence mentioned in that subsection is fixed by law, a specified minimum sentence or a mandatory minimum sentence of imprisonment or fine or caning, the court sentencing the person who attempted to commit the offence —
>
> > (*a*) *shall not be bound to impose such fixed, specified or mandatory minimum sentence*; and
> >
> > (*b*) may sentence the offender to such sentence or combination of sentences as the court thinks fit but not exceeding the maximum punishment prescribed for that offence.
>
> [emphasis added]

The parties' initial sentencing submissions

10 At the first sentencing hearing, the Prosecution sought a sentence of eight and a half to nine years' imprisonment and 12 strokes of the cane for *each* proceeded charge (*ie*, of attempted aggravated rape), with the imprisonment terms to run concurrently, for a global sentence of eight and a half to nine years'

imprisonment and 24 strokes of the cane.[1] In arriving at this submission, the Prosecution proceeded on the basis that the minimum sentence of eight years prescribed for a (completed) aggravated rape offence applied fully, without any reduction, to an offence of *attempted* aggravated rape.

11 The Defence submitted that a sentence of imprisonment for six and a half years and 12 strokes of the cane for *each* proceeded charge would be appropriate, with the sentences to run concurrently, for a global sentence of imprisonment for six and a half years and 24 strokes of the cane.[2] In arriving at this submission, the Defence argued that the minimum sentence of eight years prescribed for the (completed) aggravated rape offence should be halved to four years when applied to the offence of *attempted* aggravated rape.

Issues to be determined

12 Given the dispute between parties over whether a minimum sentence prescribed for a completed offence was imported in its entirety by s 511 of the Pre-2019 Amendment PC to an attempt to commit that offence, I directed parties to file further submissions on the following two issues:

(a) **Issue A:** Whether s 511 of the Pre-2019 Amendment PC operated to apply the mandatory minimum sentence for a completed offence to an attempt to commit the offence.

(b) **Issue B:** If Issue A was answered in the affirmative, whether in any event s 512(3)(*a*) of the Post-2019 Amendment PC can be applied retrospectively for the Accused's benefit, such that the Court was not

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1 Prosecution's written submissions dated 8 November 2022 at para 3.

2 Defence's written submissions and mitigation plea filed on 8 November 2022 at para 14.

bound to impose the mandatory minimum sentence under s 375(3)(*b*) of the PC for each of the Accused's attempted aggravated rape offences.

13 A Young Independent Counsel ("YIC"), Mr Chin Yan Xun, was also appointed to assist the court on these two issues. The parties' further submissions and the YIC's submissions on the respective issues are outlined and discussed below.

A note about terminology

14 The issues arising in this case concerned the punishment for attempts to commit offences. To distinguish an attempted offence (which itself is an offence – *eg*, the offence of *attempted* aggravated rape in the present case) from the offence being attempted (*eg,* the offence of aggravated rape), I refer to the latter as either the "primary offence" or the "(completed) offence", depending on which of these two expressions flow better with the surrounding language of the passage in which they appear. In terms of meaning and substance, the expressions "primary offence" and "(completed) offence" are used interchangeably in these grounds.

Issue A: Whether section 511 of the Pre-2019 Amendment PC operated to apply the mandatory minimum sentence for a completed offence to an attempt to commit the offence

The submissions

15 The Prosecution began its submission by referring to the phrase "be punished with such punishment as is provided for the offence" in s 511(1) of the Pre-2019 Amendment PC. In the rest of these grounds, I shall refer to this phrase as the "Phrase in Question". The Prosecution submitted that the only possible meaning of the Phrase in Question was that the punishment provision

for the primary offence would *apply in its entirety* to an attempt to commit that offence, including any minimum imprisonment term prescribed in the said punishment provision.[3] Since s 511(2)(*b*) of the Pre-2019 Amendment PC only halved the maximum imprisonment term and was silent concerning the minimum imprisonment term, it must have meant that any minimum imprisonment term made applicable by s 511(1) remained unaffected by s 511(2)(*b*). The Prosecution also highlighted that there were a number of Singapore cases, beginning with *Public Prosecutor v Ho Wee Fah* [1998] SGHC 128 ("*Ho Wee Fah*"), which regarded the minimum sentence prescribed for the primary offence as being applicable to an attempt to commit that offence. Noting that s 511 underwent amendment in 2007, the Prosecution submitted that if Parliament had been of the view that the decision in *Ho Wee Fah* did not reflect Parliament's intention, Parliament would have had the opportunity to make this clear in 2007, but did not do so.

16 The YIC reached the same conclusion as the Prosecution, but for slightly different reasons. The YIC noted that the expression "such punishment" in the Phrase in Question could refer either to the *type* of punishment or the *amount* of punishment. If "such punishment" referred only to the type of punishment, it would support an interpretation which did not apply the minimum sentence prescribed for the primary offence to an attempt to commit that offence. Conversely, if the expression referred also to the amount of punishment, it would support an interpretation which applied the minimum sentence completely to an attempt. The YIC submitted that the former reading would lead to an "unworkable or impractical" result in that a court sentencing for an attempt to commit an offence would then not be bound by any upper limit as to the

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[3] Prosecution's written submissions dated 5 January 2023 at paras 3(a); 21(c), 22 and 58.

amount of fine or caning it could impose.[4] This was because, while s 511 prescribed the maximum imprisonment term which could be imposed (*ie*, one-half of that prescribed for the completed offence), there were no provisions in s 511 prescribing the maximum for fine or caning (unless the expression "such punishment" is read as referring also to the amount of punishment). The YIC further submitted that the Defence's preferred interpretation, that s 511 had the effect of halving the minimum sentence, was not one which the text of the provision could bear.[5] In relation to the amendments made to s 511 in 2007, the YIC similarly submitted that if *Ho Wee Fah* had been wrongly decided, Parliament could have legislated otherwise in 2007, but did not do so.[6]

17 In its written submissions, the Defence took the position that s 511 of the Pre-2019 Amendment PC operated to reduce the minimum imprisonment term when applied to an attempt to commit the offence.[7] This would avoid the "theoretical anomalous situation" where halving the maximum term of imprisonment prescribed for the completed offence could result in it becoming less than the minimum term applicable.[8] Further, in cases where the minimum term was exactly half of the maximum prescribed for the completed offence, applying the minimum term to an attempt without any reduction would result in the court not having any discretion to pass different sentences to distinguish between cases of different seriousness.[9] The Defence also referred to a number of cases from India, decided under s 511 of the Indian Penal Code 1860 (Act

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4 YIC's written submissions dated 10 March 2023 at para 45(a).

5 YIC's written submissions dated 10 March 2023 at para 26–28.

6 YIC's written submissions dated 10 March 2023 at para 76.

7 Defence's written submissions dated 5 January 2023 at para 6.

8 Defence's written submissions dated 5 January 2023 at para 6(a).

9 Defence's written submissions dated 5 January 2023 at paras 6(b) and 27–28.

XLV of 1860) (the "IPC"), which treated the minimum sentence as being halved (or as not being applicable) when sentencing for an attempt.

18 At the second sentencing hearing, the Defence took the position that the minimum sentence prescribed for a completed offence would have no application at all to an attempt to commit the offence.[10] The Defence submitted that the Phrase in Question referred only to the *type* and not the *amount* of punishment. The Defence further argued that, as the Phrase in Question was first introduced into s 511 in 1933, at a time when there were no mandatory minimum sentences in the PC, it would be anachronistic to read into the Phrase in Question an intention to make mandatory minimum sentences applicable to the punishment of attempts.[11] Finally, the Defence submitted that an attempt to commit an offence was less serious than the completed offence, as the fact that the offence was not completed meant that less harm was caused. It therefore could not be the case that the same mandatory minimum sentence was applicable to both a person guilty of committing the completed offence and a person merely guilty of attempting to commit that offence, as the latter was clearly less culpable.[12]

Analysis

19 It would not go unnoticed that an assumption underlying the submissions on Issue A was that the applicable punishment provision in the present case was s 511 of the Pre-2019 Amendment PC (and not s 512 of the Post-2019 Amendment PC). This was a natural and obvious assumption to make, as it is a general principle of law that the legal consequences of an act or

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10 Transcript of 19 April 2023 at p 67 (lines 10 to 11) and p 80 (lines 14 to 21).

11 Transcript of 19 April 2023 at p 69 (lines 13 to 17).

12 Transcript of 19 April 2023 at p 70 (lines 26 to 31).

omission should be based on the law prevailing at the time of such act or omission. Whether this assumption held true in the specific circumstances of the present case was a matter to be explored under Issue B, and not a matter which arose under Issue A. Therefore, the discussion below *on Issue A* proceeded on the assumption that s 511 of the Pre-2019 Amendment PC was the applicable punishment provision, without prejudice to the discussion on and outcome of Issue B.

Structure of this section

20 I begin this part of the discussion by outlining the applicable principles of statutory interpretation. As the parties and the YIC have, in the course of their submissions, referred to some Singapore and Indian case law and also referred to the various amendments which s 511 of the PC had undergone over the years, I next considered the cases cited by the parties followed by an examination of the legislative evolution of s 511 of the PC. I then proceed with my own analysis of Issue A in accordance with the applicable principles of statutory interpretation.

The applicable legal principles in statutory interpretation

21 Pursuant to s 9A of the Interpretation Act 1965 (2020 Rev Ed) (the "Interpretation Act"), an interpretation of a provision of a written law that would promote the purpose or object underlying the written law is to be preferred to an interpretation that would not. This approach to the interpretation of statutes is known as "purposive interpretation". According to *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 ("*Tan Cheng Bock*"), the court's task, when undertaking a purposive interpretation of a legislative provision, involved the following three steps (at [37]):

(a) First, ascertain the possible interpretations of the provision, having regard not just to the text of the provision, but also to the context of that provision within the written law as a whole.

(b) Second, ascertain the legislative purpose or object of the statute.

(c) Third, compare the possible interpretations of the text against the purposes or objects of the statute.

I elaborate on the relevant considerations which guide the application of each of these three steps at the appropriate junctures in these grounds.

The relevant case law

22 The Prosecution cited five cases where the Singapore High Court had treated the mandatory minimum sentence prescribed for the primary offence as applying without reduction to an attempt to commit the offence. These are *Ho Wee Fah*, *Public Prosecutor v Huang Shiyou* [2010] 1 SLR 417 ("*Huang Shiyou*"), *Public Prosecutor v Shamsul bin Sa'at* [2010] 3 SLR 900, *Public Prosecutor v Tan Jun Hui* [2013] SGHC 94 and *Public Prosecutor v BZT* [2022] SGHC 148.

23 Ordinarily, the fact that a particular interpretation was adopted in five previous High Court cases would constitute strong persuasive authority for me to do the same. However, upon closer examination of these cases, it became apparent that, apart from *Ho Wee Fah*, none of the other cases gave any reasons for adopting the interpretation they did.

24 According to LawNet, *Ho Wee Fah* is an unreported oral judgment. An inspection of the case file revealed that the present issue was not put in dispute

in that case and the court did not have the benefit of the parties' submissions on it, not least because the defence counsel conceded in his mitigation plea that the minimum sentence applied there.

25 The reasons given in *Ho Wee Fah* were as follows (at [5]):

> … For an attempt to rape, the maximum sentence I can impose on you is one not exceeding one half of the longest term provided for the offence itself which means 10 years. However, I would like to point out that s 376(2) of the Penal Code under which you are charged provides for a minimum mandatory sentence of 8 years imprisonment. Whilst the punishment for attempts under s 511 provides for a sentence not exceeding half of the longest or maximum term provided for the offence, *there is no similar restriction for the minimum mandatory sentence provided under any of the substantive offences in the Penal Code including s 376(2). S 511 therefore makes no inroad on the minimum mandatory sentence of imprisonment or the number of strokes of the cane* under s 229 of the Criminal Procedure Code which provides for a maximum of 24 strokes.
>
> [emphasis added]

As is apparent from the passage quoted above, the reasoning in *Ho Wee Fah* began and ended with the literal or grammatical meaning of the text of s 511. There was no examination of the context and no consideration of object and purpose. As noted in Diggory Bailey & Luke Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation* (LexisNexis Butterworths, 8th Ed, 2020) ("*Bennion*") at 378:

> **Distinction between grammatical and legal meaning**
>
> The distinction between the grammatical and legal meaning lies at the heart of statutory interpretation. An enactment consists of a verbal formula. Unless defectively worded, this has a grammatical meaning in itself. The unwary reader of this formula (particularly if not a lawyer) may mistakenly conclude that the grammatical meaning is all that is of concern. If that were right, there would be little need for books on statutory interpretation.
>
> The key issue is the effect that the interpretative criteria, also referred to as the guides to legislative intention, may have on

> the meaning of the enactment (see Code s 11.1). There needs to be brought to the grammatical meaning of the enactment due consideration of relevant matters drawn from the context of the enactment (using that term in its widest sense). Consideration of the enactment in its context may raise factors that pull in different directions. For example, the desirability of applying a clear grammatical meaning may conflict with the fact that this does not remedy the mischief that the legislature intended to deal with. Lastly, the relevant interpretative factors need to be considered, and given due weight.
>
> Having said that, the grammatical and legal meanings often coincide, and the ordinary linguistic meaning of the words used is the *starting point* in statutory interpretation.
>
> [emphasis added]

Thus, although the grammatical meaning of a text might serve as a starting point, it need not necessarily be the end point, after taking into account relevant interpretative factors such as context and object and purpose.

26 The lack of consideration of the context and object and purpose in the reasoning in *Ho Wee Fah* meant that, if I were to faithfully apply the three-step framework laid down in *Tan Cheng Bock*, I could not at the same time follow *Ho Wee Fah* uncritically. It might well be that, after applying the *Tan Cheng Bock* framework, I could arrive at the same conclusion as *Ho Wee Fah*. But if I did, it would be the result of an exercise in purposive interpretation, undertaken according to the *Tan Cheng Bock* framework, and not because I followed the reasoning articulated in *Ho Wee Fah*.

27 I turn next to the four Indian cases cited by the Defence.[13] These cases were decided between 1999 and 2013 and concerned offences of attempted rape committed between 1984 and 2012. At the material time the minimum sentence prescribed for the offence of rape under s 376(1) of the IPC was imprisonment

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13 Defence's written submissions dated 5 January 2023 at paras 11–15.

of either description for seven years, while the minimum sentence prescribed for the offence of aggravated rape under s 376(2) of the IPC was rigorous imprisonment for ten years. At the material time, these were presumptive rather than mandatory minimum sentences, in the sense that the legislation expressly provided that the court may "for adequate and special reasons to be mentioned in the judgment" impose a sentence below the prescribed minimum.

28 The first case was *Rafat Mian v State of U.P.* 2000 CriLJ 3039 (All) ("*Rafat*"), a decision of the Allahabad High Court on appeal from the Bareilly Sessions Court. The Sessions Judge had convicted the accused of attempted rape and sentenced him to three years of rigorous imprisonment. The High Court dismissed the accused's appeal against conviction, and affirmed the sentence awarded by the Sessions Judge. The second case was *Nand Lal v State of H.P.* 2000 CriLJ 3106 (HP) ("*Nand Lal*"), a decision of the Himachal Pradesh High Court on appeal from the Solan Sessions Court. The Sessions Judge had convicted the accused of attempted rape and sentenced him to three years of rigorous imprisonment and a fine of 3,000.00 Indian Rupees ("Rs"). The High Court dismissed the accused's appeal against conviction, and affirmed the sentence awarded by the Sessions Judge. The third case was *Sri Amarappa S/O Sri Yellappa v State by Women Police Davanagere* Crl.A 2447/06 (4 March 2013) ("*Sri Amarappa*"), a decision of Karnataka High Court on appeal from the Davanagere Sessions Court. The Sessions Judge had convicted the accused of attempted *aggravated* rape and sentenced him to 3.5 years of rigorous imprisonment and a fine of Rs 10,000.00. The High Court allowed the accused's appeal against conviction for attempted aggravated rape, and convicted the accused of the lesser charge of outrage of modesty. In all three cases, the judgments did not give reasons for the sentences imposed. In particular, none of these judgments discussed whether the presumptive minimum sentence

prescribed for the primary offence were applicable for the sentencing of an attempt to commit that offence.

29 The fourth case was *Barkatullakha v State of Maharashtra* 2002 CriLJ 427 (Bom) ("*Barka*"), a decision of the Bombay High Court on revision from the Khamgaon Sessions Court. The Sessions Judge convicted the accused of attempted rape and sentenced him to two years' rigorous imprisonment and a fine of Rs 7,000.00. The accused brought revision proceedings in the Bombay High Court to set aside his conviction and sentence. The judgment of the High Court recorded that (at [2]):

> The learned Additional Sessions Judge, had examined the question of imposing minimum sentence of 3½ years on the applicant, but was of the opinion that sentence of 2 years of [rigorous imprisonment] and sentence of fine of Rs. 7000/- would meet the ends of justice.

The High Court dismissed the accused's revision application and affirmed his conviction. As for sentence, the High Court held that the Sessions Judge did not have "adequate and special reasons" to go below the minimum sentence prescribed and decided that "this is a case where minimum sentence prescribed in law should have been awarded by the learned Additional Sessions Judge, ie, to say 3½ years of imprisonment" (*Barka* at [14]).

30 The Prosecution also brought the court's attention to the case of *The Public Prosecutor, High Court of Andhra Pradesh v Lingisetty Sreenu* (AP/0188/1997) ("*Lingisetty*"), a decision of the Andhra Pradesh High Court on appeal from the Tenali Sessions Court. The Sessions Judge acquitted the accused on the charge of rape and convicted him for outrage of modesty instead. On appeal, the High Court set aside the Sessions Court judgment and convicted the accused of attempted rape. In deciding to sentence the accused to rigorous

imprisonment for three years and a fine of Rs 5,000.00, the court gave the following reason (at [22]):

> … the minimum sentence u/S. 376, IPC would be not less than 7 years, and in view of Section 511, IPC, *such sentence may be up to half of the sentence imposable for the offence in question.*
>
> Having regard to the circumstances of this case that the accused is a young man, I propose to take the minimum sentence imposable u/S. 376, IPC at 7 years and half of the same would come to three and half years. However, the ends of justice would be met if I convict him with Rigorous Imprisonment for 3 years and a fine of Rs. 5,000/-…
>
> [emphasis added]

31 The following observations may be made about the foregoing five Indian cases:

(a) In *Barka*, both the Sessions Court and the High Court expressly took the position that the minimum sentence of seven years for rape was halved when applied to attempted rape. However, there was no explanation in the judgment as to how, as a matter of statutory interpretation, the minimum sentence would be halved when applied to an attempt.

(b) In *Lingisetty*, the High Court similarly took the position that the minimum sentence of seven years for rape was halved to 3.5 years when applied to attempted rape, but decided to exercise its discretion to go below the presumptive minimum of 3.5 years to impose a sentence of three years. There was no detailed discussion in the judgment on how, as a matter of statutory interpretation, the minimum sentence would be halved when applied to an attempt.

(c) There could be at least two possible explanations for the sentence of three years imposed by the courts in *Rafat* and *Nand Lal*. The first is

> that, like the court in *Lingisetty*, they considered the minimum sentence to be halved to 3.5 years but found "adequate and special reasons" to go below 3.5 years. The second is that they considered the minimum sentence to be of no application at all when sentencing for attempts. In the absence of any reasons recorded in the judgments, we cannot be certain how the sentence of three years was arrived at in these two cases. The same may be said of the decision of the Sessions Court in *Sri Amarappa*.

32 Both the Prosecution and the YIC noted that the Indian cases were of little assistance as s 511 of the IPC was worded differently from s 511 of the PC.[14] Section 511 of the IPC read:

> Whoever attempts to commit an offence punishable by this Code with imprisonment for life or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, *be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence*, or with such fine as is provided for the offence, or with both.
>
> [emphasis added]

It did not contain the Phrase in Question, on which the submissions of the Prosecution and the YIC were founded. Instead, it contains the phrase "be punished with imprisonment … for a term which may extend to … one-half of the longest term of imprisonment provided for that offence", which easily lent itself to the interpretation that a minimum sentence prescribed for the primary offence had no application at all to an attempt to commit the offence. A further

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[14] Prosecution's written submissions dated 5 January 2023 at para 42; YIC's written submissions dated 10 March 2023 at paras 32–33.

observation might be made that this phrase in s 511 of the IPC did not appear to lend itself easily to the interpretation adopted in *Barka* and *Lingisetty* without resort to strained construction. In the light of the foregoing observations, I agreed with the Prosecution and the YIC that not much assistance could be derived from the Indian authorities.

The legislative evolution

33 To set out the relevant context, I examine the various amendments which s 511 of the PC had undergone over the years. In the course of doing so, some of the submissions made by parties on certain aspects of the legislative evolution is referred to in order to flesh out the significance of those aspects of the legislative evolution.

34 The parties and the YIC have referred to the legislative evolution of s 511 in their submissions as the "legislative history". I have chosen to use the term "legislative evolution" instead, in order to avoid a possible confusion that was helpfully identified by Ruth Sullivan, *Sullivan on the Construction of Statutes* (LexisNexis Canada, 6th ed, 2014) ("*Sullivan*") in the following passage (at pp 660–661):

> 23.18 **Legislative evolution distinguished from legislative history.** The evolution of a legislative provision consists of the successive enacted versions of the provision from its inception to the version in place when the relevant facts occur. Some provisions are rooted in the common law, so that it is necessary to look to pre-enactment case law to establish the initial rule. Other provisions originate as part of a legislative scheme and their initial formulation must be understood in that context. In either case, the evolution of a provision consists of its initial formulation and all subsequent formulations which are enacted either as amendments or as re-enactments, until the moment of application.
>
> 23.19 *Confusion is apt to occur because the term "legislative history" is widely used to refer both to the legislative evolution of a provision as defined above and to the range of extrinsic*

> *materials relating to the conception, preparation and passage of a provision, from the earliest proposals for legislative change to royal assent.* Legislative history in the later sense can include everything from white papers and Commission reports to remarks recorded in *Hansard*. It is not helpful to use the same expression to refer to these two types of evidence, since they are actually quite different and their use is governed by different considerations.
>
> 23.20 Even though legislative evolution is generally dealt with under the heading "extrinsic aids", *the legislative evolution of a provision is not really extrinsic. It consists of the legislative text itself – or more precisely, the succession of enacted texts in which the law has been embodied over time. This contrasts with other forms of legislative history, which express the opinion of participants in or commentators on the legislative process or set out facts from which the intention of the legislature might be inferred. Because the legislative evolution of a provision consists exclusively of enacted text, it raises none of the theoretical problems created by legislative history materials.* These differences are unhelpfully obscured by treating legislative evolution as a type of legislative history and an extrinsic aid.
>
> [bold text in original; emphasis in italics added]

As explained in the foregoing passage from *Sullivan*, since the legislative evolution of a provision consists of the legislative text itself, it is not really extrinsic material.

(1) Section 511 of the Penal Code as originally enacted in 1871

35 When the PC was first enacted in 1871 (Ordinance 4 of 1871), s 511 read:

> **Punishment for attempting to commit offences punishable with penal servitude or imprisonment**
>
> **511.** Whoever *attempts to commit an offence punishable by this Code with penal servitude or imprisonment*, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, *be punished with penal servitude or imprisonment of any description provided for the offence, for a term of penal servitude or imprisonment which may extend to one-half of the*

> *longest term provided for that offence*, or with such fine as is provided for the offence, or with both.
>
> [emphasis added]

36 I shall refer to this 1871 version of s 511 as the "1871 Provision". Two observations might be made about the 1871 Provision. First, it applied only to PC offences punishable by penal servitude or imprisonment. This meant that the 1871 Provision did not apply to non-PC offences and also did not apply to PC offences which were punishable by fine only. Second, the 1871 Provision did not contain the Phrase in Question. Instead, the operative punishment provision in the 1871 Provision read:

> … be punished with *penal servitude or imprisonment of any description provided for the offence*, for a term of penal servitude or imprisonment which may extend to one-half of the longest term provided for that offence, or with *such fine* as is provided for the offence, or with both.
>
> [emphasis added]

In this context, the phrase "penal servitude or imprisonment of any description provided for the offence" clearly referred only to the *type* and not the *amount* of punishment (to employ the YIC's "type vs amount" analysis alluded to at [16] above). This was because the only relevant reference to the amount of penal servitude or imprisonment was already found in the phrase "which may extend to one-half of the longest term". There was thus neither purpose in nor justification for interpreting the phrase "penal servitude or imprisonment of any description provided for the offence" as also referring to the amount of punishment. However, as the Prosecution rightly pointed out, the phrase "such fine" in the 1871 Provision could, and probably should, be read as referring to the amount of fine.

(2) The 1933 amendment

37 Section 511 of the PC was amended in 1933 by s 27 of the Penal Code (Amendment) Ordinance (No 35 of 1933) (the "1933 Ordinance") to read:

> **Punishment for attempting to commit offences**
>
> **511.** Whoever attempts to commit an office punishable by this Code or *by any other written law with penal servitude or imprisonment or fine or with a combination of such punishments*, or attempts to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code or by such other written law, as the case may be, for the punishment of such attempt, *be punished with such punishment as is provided for the offence*: Provided that any term of penal servitude or imprisonment imposed shall not exceed one-half of the longest term provided for the offence.
>
> [emphasis added]

The first change made by the 1933 amendment was the expansion of the scope of s 511 to cover non-PC offences as well as PC offences punishable by fine only. The second change was the replacement of the operative punishment provision in the 1871 Provision (as quoted at [36] above) with the following new punishment provision:

> *… be punished with such punishment as is provided for the offence*: Provided that any term of penal servitude or imprisonment imposed shall not exceed one-half of the longest term provided for the offence.
>
> [emphasis added]

This new punishment provision introduced the Phrase in Question into s 511 for the first time.

38 The Prosecution submitted that this newly inserted Phrase in Question was intended to encompass both the type and amount of the punishment prescribed for the completed offence, regardless of what the original position in

the 1871 Provision might have been. The Prosecution pointed out that the expression "such punishment" in the Phrase in Question harked back to the expression "such fine" in the 1871 Provision, and therefore ought to similarly be read as referring to the amount of punishment.[15]

39 The Defence submitted that the amendment effected by the new punishment provision was merely consequential to the expansion of s 511's scope to include offences punishable by fine only, and was not evidence of a separate intention to fundamentally alter how the punishment provision in s 511 operated.[16] In this regard, the Defence submitted that there was continuity from the position in 1871, in that the new phrase was effectively a summary of the phrase "be punished with penal servitude or imprisonment of any description provided for the offence ... or with such fine as is provided for the offence, or with both" in the 1871 Provision. Further, the concept of minimum sentences could not have been within the contemplation of the drafters at the time, as there were no minimum sentences in the PC in 1933. It would therefore be anachronistic to read into the Phrase in Question an intention to refer to minimum sentences, which was something entirely unheard of in 1933.

40 I will evaluate the relative strengths of these submissions when I go through the steps of the *Tan Cheng Bock* framework for purposive interpretation in a later part of these grounds.

(3) The 1955 amendment

41 Section 511 was next amended in 1955 to remove the references to penal servitude in the light of the abolition of penal servitude by the Criminal Justice

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15 Transcript of 19 April 2023 at pp 9 (lines 27) to 10 (line 4).

16 Transcript of 19 April 2023 at p 69.

(Punishment — Amendment) Ordinance (No 20 of 1954). This amendment was not effected by way of primary legislation, but through the exercise of the Law Revision Commissioners' powers when publishing the 1955 Revised Edition of the Laws. It was common ground that the 1955 amendment had no impact on the meaning and interpretation of the Phrase in Question. After the 1955 amendment, the text of s 511 remained unchanged until 2007.

(4) Introduction of mandatory minimum sentences in Singapore

42 In 1973, mandatory minimum sentences were introduced into our law with the enactment of the Misuse of Drugs Act 1973 (Act 5 of 1973) (the "MDA"), the Arms Offences Act 1973 (Act 61 of 1973) (the "Arms Offences Act 1973") and the Penal Code (Amendment) Act 1973 (Act 62 of 1973) (the "Penal Code (Amendment) Act 1973"). The Penal Code (Amendment) Act 1973 introduced mandatory minimum *caning* for a number of robbery-related offences. In 1984, mandatory minimum *prison terms* were introduced into the PC by the Penal Code (Amendment) Act 1984 (Act 23 of 1984) (the "Penal Code (Amendment) Act 1984").

(5) The 2007 amendment

43 In 2007, s 104 of the Penal Code (Amendment Act) 2007 (No 51 of 2007) (the "Penal Code (Amendment) Act 2007") amended s 511 to read:

> **Punishment for attempting to commit offences**
>
> **511.**—(1) Subject to subsection (2), whoever attempts to commit an offence punishable by this Code or by any other written law with imprisonment or fine or with a combination of such punishments, or attempts to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code or by such other written law, as the case may be, for the punishment of such attempt, be punished with such punishment as is provided for the offence.

> (2) The longest term of imprisonment that may be imposed under subsection (1) shall not exceed —
>
> > (*a*) 15 years where such attempt is in relation to an offence punishable with imprisonment for life; or
> >
> > (*b*) one-half of the longest term provided for the offence in any other case.

44 The 2007 amendment effected two changes to s 511. The first was a structural change, by moving what was previously in the proviso ("Provided that any term of imprisonment imposed shall not exceed one-half of the longest term provided for the offence") into a newly created sub-section (2). The second change was the insertion of an express provision on the maximum prison term to be imposed on an attempt to commit an offence punishable with life imprisonment (in the form of the new s 511(2)(*a*)). This insertion resulted from the repeal of s 57 of the PC by s 13 of the Penal Code (Amendment) Act 2007.

45 Prior to its repeal in 2007, s 57 of the PC provided that:

> In calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for 20 years.

The effect of s 57 was that, when the expression "one-half of the longest term provided for the offence" in s 511 was applied to an attempt to commit an offence punishable by life imprisonment, it would be treated as referring to ten years (being half of 20 years) (see *Abdul Nasir bin Amer Hamsah v Public Prosecutor* [1997] 2 SLR(R) 842 at [29]–[31]). Thus, the presence of s 57 of the PC meant that there was no need for express provisions in s 511 on the maximum punishment for attempts to commit offences punishable by life imprisonment. Conversely, with the repeal of s 57 in 2007, it became necessary for s 511 to deal expressly with the maximum punishment for attempts to commit offences punishable by life imprisonment. This was done through the

insertion of the new s 511(2)(*a*). In doing so, Parliament took the opportunity to increase this maximum to 15 years (from the previous maximum of ten years).

46 It was relevant for present purposes that:

(a) the Phrase in Question was retained in s 511, unamended by the 2007 amendment; and

(b) it was common ground that the shifting of the former proviso into a new subsection (2) was a change of form rather than substance, and that 2007 amendment did not change the meaning and interpretation of the Phrase in Question.[17]

After the 2007 amendment, the text of s 511 remained unchanged until its repeal in 2019.

Application of the Tan Cheng Bock *framework for purposive interpretation*

47 Having undertaken the foregoing survey for the purpose of understanding the relevant context, I turned next to the application of the *Tan Cheng Bock* framework for purposive interpretation. As noted above, this framework involved the following three steps:

(a) First, ascertain the possible interpretations of the provision.

(b) Second, ascertain the legislative purpose or object of the statute.

(c) Third, compare the possible interpretations of the text against the purposes or objects of the statute.

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17 Prosecution's written submissions dated 24 March 2023 at para 5.

(1) Step 1: Ascertaining possible interpretations of the provision in context

48 In the first step, the court ascertains the possible interpretations of the provision, having regard not just to the text of the provision, but also to the context of that provision within the written law as a whole. As explained by the Court of Appeal in *Tan Cheng Bock* (at [38]):

> The first of these steps is fairly uncontroversial. It requires a court to ascertain the possible interpretations of the provision. A court does so by determining the ordinary meaning of the words of the legislative provision. It can be aided in this effort by a number of rules and canons of statutory construction, all of which are grounded in logic and common sense. We mention two rules which we will refer to in due course. One is that Parliament shuns tautology and does not legislate in vain; the court should therefore endeavour to give significance to every word in an enactment (see *JD Ltd v Comptroller of Income Tax* [2006] 1 SLR 484 at [43]). Another relevant rule is that Parliament is presumed not to have intended an unworkable or impracticable result, so an interpretation that leads to such a result would not be regarded as a possible one (see *Hong Leong Bank Bhd v Soh Seow Poh* [2009] 4 SLR(R) 525 at [40]).

49 Based on the parties' and the YIC's submissions, there were three contending interpretations of the punishment provision of s 511 of the Pre-2019 Amendment PC:

(a) the minimum sentence prescribed for a primary offence applies completely to an attempt to commit the offence (the "First Interpretation");

(b) the minimum sentence prescribed for a primary offence has no application at all to an attempt to commit the offence (the "Second Interpretation"); and

(c) the minimum sentence prescribed for a primary offence is halved when applied to an attempt to commit the offence (the "Third Interpretation").

50 The Third Interpretation might be quickly disposed of as not being a possible interpretation of the provision. This was not an interpretation which the text of the provision could bear. The only reference to halving of sentence in s 511 was in relation to the maximum term of imprisonment. The Third Interpretation would therefore require the reading in of words which did not exist in the statutory provision. Although there were some Indian cases which adopted this interpretation, I did not find them persuasive for the reasons discussed at [32] above. Finally, while the Defence was initially in favour of the Third Interpretation, this was no longer the Defence's position by the time of the second sentencing hearing, during which the Defence submitted in favour of the Second Interpretation.[18]

51 The First Interpretation construed the expression "such punishment" in the Phrase in Question as referring:

(a) to both the type of punishment and the amount of punishment; and

(b) in respect of amount, to all aspects of the concept of amount including any minimum sentence prescribed for the primary offence.

In my view, the First Interpretation would likely be a "possible interpretation of the provision" (as that phrase is understood under the *Tan Cheng Bock* framework), since it reflected the literal and grammatical meaning of the text.

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[18] Transcript of 19 April 2023 at p 80 (lines 14 to 21).

However, as ascertaining possible interpretations requires the court to not just have regard to the text of the provision but also the context of that provision *within the written law as a whole*, the question of whether the First Interpretation was a "possible interpretation of the provision" required further analysis. I will embark on this analysis after introducing the Second Interpretation.

52 As for the Second Interpretation, both the Prosecution and the YIC did not consider it to be a possible interpretation of the provision. The YIC's submission proceeded on the basis that adopting the Second Interpretation would require the Phrase in Question to be read as referring only to the type and not the amount of punishment.[19] The YIC then reasoned that reading the Phrase in Question as referring only to the type of punishment would be untenable. This was because s 511(2)(*b*) of the Pre-2019 Amendment PC (as well as the proviso in the pre-2007 version of s 511) imposed only an upper limit on the term of imprisonment and said nothing about the upper limits for fine and caning. If the Phrase in Question were to be read as referring to the type of punishment only, a court passing a sentence under s 511 would be allowed to impose sentences of fine and caning which are in excess of the maximum fine or maximum caning prescribed for the primary offence. This would be "an unworkable or impracticable result".[20] The Prosecution similarly submitted that the Phrase in Question could not be referring to the type of punishment only.

53 While I agreed with the Prosecution and the YIC that the Phrase in Question referred to both the type and the amount of punishment, I did not agree that the Second Interpretation could only be arrived at by reading the Phrase in

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19 YIC's written submissions dated 10 March 2023 at para 41.

20 YIC's written submissions dated 10 March 2023 at para 45(a).

Question as referring solely to the type of punishment. In my view, the Second Interpretation could also be reached by considering that although the Phrase in Question referred to both the type and the amount of punishment, the "amount" being referred to in this context would concern only the maximum sentence and would not encompass the concept of minimum sentences. As noted by the Court of Appeal in *Public Prosecutor v ASR* [2019] 1 SLR 941 ("*ASR*") (at [77]):

> One aspect of the principle that words in a legislative enactment are to be given their ordinary meaning is that words mean what they were understood to mean at the time they were adopted by the Legislature. There is, after all, no other objective basis upon which to construe the meaning which the framers of the legislation intended the legislative text to have.

Back in 1933, the Phrase in Question would have been understood by the framers of the legislation, insofar as it referred to the amount of punishment, as referring to the maximum sentence. In other words, the ordinary meaning of the Phrase in Question at the time it was adopted by the Legislature in 1933 would not have encompassed the notion of a minimum sentence.

54 Thus, under the Second Interpretation, the expression "such punishment" in the Phrase in Question referred:

(a) to both the type of punishment and the amount of punishment; and

(b) in respect of amount, to only the maximum sentence prescribed for the primary offence.

55 Having sketched out the First Interpretation and the Second Interpretation, I proceeded to consider the arguments for and against each interpretation. In doing so, I was aided by the relevant rules and canons of statutory construction.

(A) PRESUMPTION OF CONSISTENT EXPRESSION

56 The first canon of statutory construction I considered was the presumption of consistent expression – *ie*, where the same word or phrase is used in different places within the same written law, they are presumed to have the same meaning. In this regard, the Prosecution submitted that it would be pertinent to consider whether there were other provisions in the Pre-2019 Amendment PC which contained a phrase similar to the Phrase in Question.[21] The provision which the Prosecution identified for this purpose was s 109 of the PC, which reads:

> 109. Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, *be punished with the punishment provided for the offence*.
>
> [emphasis added]

57 The effect of s 109 was that, where a person abets an offence (the "primary offence"), and the primary offence *was committed* as a result, that person (the "abettor") shall be punished with the punishment provided for the primary offence. The Prosecution referred me to three reported cases decided under s 109 which involved primary offences that were subject to mandatory minimum sentences: *Low Khoon Hai v Public Prosecutor* [1996] 1 SLR(R) 958 (abetment of robbery with hurt by conspiracy under s 394 read with s 109 of the PC), *Ang Ser Kuang v Public Prosecutor* [1998] 3 SLR(R) 316 (abetment by conspiracy to commit robbery with hurt under s 394 read with s 109 of the PC) and *Tay Chi Hiong v Public Prosecutor* [2003] 1 SLR(R) 650 (two charges under s 8(1)(*b*) of the Moneylenders Act (Cap 188, 1985 Rev Ed) read with s 109 of the PC). In all three cases, the court applied the mandatory minimum

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21 Prosecution's written submissions dated 24 March 2023 at paras 11–12.

sentence prescribed for the primary offence when sentencing the abettor under s 109. Arising from this, the Prosecution submitted that the Phrase in Question should be interpreted to similar effect as the similarly worded phrase in s 109 had been.

58 In my view, the court should not be too quick to draw parallels between the Phrase in Question in s 511 and the similarly worded phrase in s 109. Although the two phrases may look similar, the context of the two provisions are different. Section 109 concerns what is known as "complete abetment" – *ie,* a *successful* abetment where the primary offence was *completed*, while s 511 concerned an *unsuccessful* attempt where the primary offence was *not completed*. Since s 109 concerns an abettor who had *succeeded* in achieving what he set out to do, in a situation where the *harm* arising from the *completion* of the primary offence *had been caused*, it was clear that the object and purpose of s 109 was to punish the abettor as though he had personally committed the primary offence. In this context, it would be entirely consistent with a purposive interpretation of s 109 for the sentencing court to apply the minimum sentence prescribed for the primary offence without any discount. The same reasoning did not translate easily to the context of s 511, where the primary offence was *not completed* and the potential *harm of the primary offence did not materialise*. This was because, as a general rule, a person who attempted an offence should not be punished as though he had actually completed the offence. There were two reasons for this. First, the fact that the offence was not completed meant that less harm (or even no harm) was caused. Second, depending on the reason for the attempt not succeeding, a person who did not complete the offence might be less culpable than one who did.

59 Given the differences in context between s 511 and s 109, I held that any presumption that the Phrase in Question in s 511 should carry the same meaning as the similar phrase in s 109 had been adequately rebutted.

(B) PRESUMPTION OF COHERENCE

60 The second canon of statutory construction I considered was the presumption of coherence. As noted in *Bennion* at p 395:

> The legislature is taken to be a rational, reasonable and informed legislature pursuing a clear purpose in a *coherent and principled manner*.
>
> [emphasis added]

Sullivan described the presumption of coherence in this way (at p 337):

> It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework; and because the framework has a purpose, the parts are also presumed to work together dynamically, each contributing something toward accomplishing the intended goal.

61 In this regard, it was relevant to consider s 116 of the Pre-2019 Amendment PC, which read:

> 116. Whoever abets an offence punishable with imprisonment shall, if that offence is not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, *be punished with imprisonment for a term which may extend to one-fourth part of the longest term provided for that offence*, or with such fine as is provided for that offence, or with both; and if the abettor or the person abetted is a public servant, whose duty it is to prevent the commission of such offence, the abettor shall *be punished with imprisonment for a term which may extend to one-half of the longest term provided for that offence*, or with such fine as is provided for that offence, or with both.
>
> [emphasis added]

Section 116 criminalises what is known as "inchoate abetment". This means that, unlike s 109 which concerns successful abetment, s 116 concerns *unsuccessful* abetment, where the offence abetted was *not committed*. Section 116 provides that:

> (a) an unsuccessful abetment is to be punished by imprisonment which may extend to *one-quarter* of the maximum prison term prescribed for the primary offence; and
>
> (b) if the abettor or person abetted is a public servant whose duty is to prevent the commission of the primary offence, the unsuccessful abetment is to be punished by imprisonment which may extend to *one-half* of the maximum prison term prescribed for the primary offence.

62 The phrases "be punished with imprisonment for a term which may extend to one-fourth part of the longest term provided for that offence" and "be punished with imprisonment for a term which may extend to one-half of the longest term provided for that offence" did not make the minimum sentence prescribed for the primary offence applicable to an inchoate abetment of that primary offence. It is clear from the text and context of s 116 that s 116 did not import the minimum sentence prescribed for the primary offence. In fact, any attempt to read s 116 as importing the minimum sentence prescribed for the primary offence would lead to absurdity. One only needs to consider the offence of aggravated rape, where the minimum sentence is eight years and the maximum sentence is 20 years. One quarter of 20 years (*ie*, five years) is less than the minimum sentence of eight years. Thus, if s 116 is read as importing the minimum sentence for the primary offence, we would end up with an anomalous situation whether the minimum sentence for an offence of

unsuccessfully abetting aggravated rape is eight years while the maximum for the very same offence is only five years.

63 Unlike the relationship between s 109 and s 511, there was a clear parallel between the nature of the offence criminalised by s 116 and the nature of the offence criminalised by s 511. Just as s 511 concerned the unsuccessful attempt to commit a primary offence, s 116 similarly involves the unsuccessful attempt by the abettor to instigate, conspire with or aid another person to commit a primary offence. In both cases, the offence was inchoate in the sense that the primary offence was not committed and the harm from the primary offence did not materialise. In both cases, the offender was being punished principally for his subjective culpability – *ie,* the taking of some steps towards the commission of the primary offence (which fell short of actually bringing about the completion of the primary offence) with the relevant *mens rea*. It would therefore be neither coherent nor consistent for one of these provisions to import the minimum sentence prescribed for the primary offence while the other did not. Since it was clear that s 116 did not import the minimum sentence for the primary offence, the presumption of coherence would favour the Second Interpretation.

(C) *BARRAS* PRINCIPLE

64 The YIC pointed out that *Ho Wee Fah* was decided prior to the 2007 amendment. Therefore, if *Ho Wee Fah* were wrongly decided, Parliament could have legislated as much in 2007, but did not do so.[22] At the second sentencing hearing, the Prosecution echoed this submission and referred the court to a

22 YIC's written submissions dated 10 March 2023 at para 76.

principle of statutory interpretation known as the "*Barras* principle".[23] The Prosecution also made a separate but related submission that it was significant that Parliament, knowing of the existence of mandatory minimum sentences in the PC in 2007, nevertheless said nothing about mandatory minimum sentences not applying to attempts when enacting the 2007 amendment.

65 The *Barras* principle was described in *Bennion* in the following terms (at p 719):

> (1) Where an Act uses a word or phrase that has been the subject of previous judicial interpretation in the same or a similar context it may be possible to infer that the legislature intended the word or phrase to bear the same meaning as it had in that context. This is sometimes known as the *Barras* principle.

The principle takes its name from the case of *Barras v Aberdeen Steam Trawling and Fishing Co Ltd* [1933] AC 402 (the "*Barras* case") where Viscount Buckmaster stated (at p 411):

> It has long been a well-established principle to be applied in the consideration of Acts of Parliament that where a word of doubtful meaning has received a clear judicial interpretation, the subsequent statute which incorporates the same word or the same phrase in a similar context, must be construed so that the word or phrase is interpreted according to the meaning that has previously been assigned to it.

Although Viscount Buckmaster's statement had been applied in some subsequent cases, it has also been doubted and qualified in other cases.

66 In *Royal Crown Derby Porcelain v Russell* [1949] 2 KB 417, Denning LJ stated (at 429):

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[23] Transcript of 19 April 2023 at pp 22–25.

> I do not believe that whenever Parliament re-enacts a provision of a statute it thereby gives statutory authority to every erroneous interpretation which has been put upon it. The true view is that the court will be slow to overrule a previous decision on the interpretation of a statute when it has long been acted on, and it will be more than usually slow to do so when Parliament has, since the decision, re-enacted the statute in the same terms. But if a decision is, in fact, shown to be erroneous, there is no rule of law which prevents it being overruled.

In *Farrell v Alexander* [1977] AC 59, Lord Wilberforce said (at 91):

> To pre-empt a court of construction from performing independently its own constitutional duty of examining the validity of a previous interpretation, the intention of parliament to endorse the previous judicial decision would have to be expressed or clearly implied. Mere repetition of language which has been the subject of previous judicial interpretation is entirely neutral in this respect – or at most implies merely the truism that the language has been the subject of judicial interpretation for whatever (and it may be much or little) that is worth.

67 More recently, in *R (on the applications of ZH and CN) v London Borough of Newham and London Borough of Lewisham* [2015] AC 1259, in relation to an alleged situation where "Parliament [had] failed to take what might have seemed an obvious opportunity to legislate", Lord Carnwath commented that (at [85]):

> Absence of legislation may be governed by many factors which have nothing to do with the perceived merits of a possible change, not least Parliamentary time and other government priorities.

In a similar vein, Baroness Hale stated in her dissenting opinion in the same case that (at [167]):

> Parliament can always legislate to change a decision of the higher courts should it wish to do so, but no conclusions can be drawn from the fact that it has not. There must be many, many decisions which the Parliament of the day finds surprising, inconvenient or downright wrong, but has done nothing to correct. The reasons for inaction may range from

> ignorance, indifference, lack of Parliamentary time or Whitehall resources, to actual approval. Moreover, Parliament's failure to act tells us nothing about what Parliament intended when the legislation was passed, which is what this court must decide …

68 Accordingly, the authors of *Bennion* caveated that the *Barras* principle "is at most a presumption the strength of which will vary according to context" (at p 719). They went on to elaborate as follows (at p 719):

> The legislature is normally presumed to legislate in the knowledge of, and having regard to, relevant judicial decisions. In construing a word or phrase in one statute reliance may therefore be placed on how the word or phrase has been construed in an earlier statute, *although previous judicial interpretations should be viewed as no more than a starting point.*
>
> …
>
> *The likelihood that the legislature intended to adopt a previous interpretation may be greater where the earlier decision is settled or well-recognised.*
>
> [emphasis added]

69 Of the five cases cited by the Prosecution, four were decided after the 2007 amendment (see [22] above). The only one decided before the 2007 amendment was *Ho Wee Fah*. This observation was important because, in applying the *Barras* principle to the 2007 amendment, only cases pre-dating the 2007 amendment were relevant. Being the sole pre-2007 decision on point and being an unreported judgment, it could not be said that the interpretation adopted in *Ho Wee Fah* was either "settled" or "well-recognised" at the time of the 2007 amendment. I therefore did not think that any clear conclusions could be drawn from the lack of legislative action in 2007 in reaction to *Ho Wee Fah*. I thus declined to accept the submission based on the *Barras* principle. Further, for the reasons articulated by Lord Carnwath and Baroness Hale in the passages quoted at [67] above, I did not accept the Prosecution's related submission based

on lack of Parliamentary action to address the applicability of minimum sentences to attempts when enacting the 2007 amendment.

(D) PRESUMPTION AGAINST "ABSURD" RESULTS

70 In *Tan Cheng Bock*, the Court of Appeal referred (at [38]) to the presumption against unworkable or impractical results, citing *Hong Leong Bank Bhd v Soh Seow Poh* [2009] 4 SLR(R) 525 ("*Soh Seow Poh*") as authority for this presumption. The presumption against unworkable or impractical results is one aspect of the broader presumption against "absurd" results. This presumption was explained in *Soh Seow Poh* in the following terms (at [40]):

> Finally, counsel for Soh also pointed to the rule of statutory construction, as stated in F A R Bennion, *Bennion on Statutory Interpretation* (LexisNexis, 5th Ed, 2008) ("*Bennion*") at Part XXI, *viz*, that Parliament is presumed not to have intended an absurd result – which could mean an unworkable or impracticable result, an inconvenient result, an anomalous or illogical result, a futile or pointless result, an artificial result or a disproportionate counter-mischief (at p 969). The courts have given a wide meaning to the phrase "absurd results" that goes beyond the plain English meaning of being silly or ridiculous. The extent to which the presumption applies depends "on the degree to which a particular construction produces an unreasonable result [and the] more unreasonable a result, the less likely it is that Parliament intended it" (per *Lord Millett in R (on the application of Edison First Power Ltd) v Central Valuation Officer* [2003] 4 All ER 209 at 238) …

The Defence raised a number of arguments in relation to this presumption. I discuss the three more pertinent ones.

71 First, the Defence argued that the First Interpretation would lead to an absurd or unworkable result if applied to a case where the minimum sentence prescribed for the primary offence was more than half of the maximum

prescribed for that offence.[24] In that event, the minimum sentence for an attempt to commit that offence would be higher than the maximum sentence. This would be an anomalous result. Although this argument was logically attractive, the truth is that there were no offences on our statute books where the minimum sentence prescribed exceeded half of the maximum. This argument was therefore grounded on a hypothetical anomaly. As noted in *Bennion* at p 495: "The court will pay little attention to a proclaimed anomaly if it is purely hypothetical, and unlikely to arise in practice".

72 Second, the Defence referred to s 9(5) of the Immigration Act (Cap 133, 2008 Rev Ed) (the "IA"), which provided that any person who enters or remains in Singapore in contravention of a prohibition of entry order issued under s 9(1) of the IA is punishable with a minimum imprisonment term of two years and maximum of four years as well as a fine not exceeding $6,000. As the minimum prison term prescribed in s 9(5) of the IA was exactly half of the maximum, the Defence argued that a real (as opposed to hypothetical) anomaly would arise if s 511 of the Pre-2019 Amendment PC was read as importing the minimum sentence prescribed for the primary offence. This was because, if the minimum sentence was imported, an attempt to commit an offence under s 9(5) of the IA would be punishable with only one sentence – *ie*, a fixed sentence of four years' imprisonment, irrespective of the actual aggravating or mitigating circumstances applicable to the offence and the offender. The Prosecution's response to this second argument, which the YIC agreed with, was that there was "nothing intrinsically or normatively objectionable to fixed sentences".[25] The Prosecution also noted that the Defence had not identified any other

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24 Defence's written submissions dated 5 January 2023 at para 6(a).

25 Prosecution's written submissions dated 24 March 2023 at para 26.

instance on our statute books where the minimum sentence prescribed was exactly half of the maximum.

73 I was not entirely persuaded by the Prosecution's response to the Defence's second argument. It is one thing to say that there was nothing intrinsically or normatively wrong *with Parliament enacting a law* to prescribe a fixed sentence when that was the clearly expressed intention of Parliament. It is quite another thing to say that the court should, through statutory interpretation, bring about a fixed sentence situation by preferring an avoidable interpretation of the relevant provision, where there appeared to be another valid interpretation which did not bring about such a situation. I therefore found some force in the Defence's second argument.

74 The third argument made by the Defence is that, since an unsuccessful attempt involved less harm than the (completed) offence, it would be anomalous for a person who merely attempted to commit an offence to be subject to the same mandatory minimum sentence as a person who had committed the (completed) offence.[26] The Prosecution submitted that there was "nothing unusual or antithetical" about this as there were eight other provisions in the PC (namely, ss 354A, 385, 387, 391, 393, 397, 459 and 460) which "specifically criminalised attempts to commit particular offences and provided for such attempts to attract the same mandatory minimum sentence (including mandatory imprisonment terms) as the (completed) offences".[27]

75 I did not agree that ss 354A, 391, 397, 459 and 460 of the PC fit the description given to them in the passage from the Prosecution's submission

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[26] Transcript of 19 April 2023 at p 70 (line 25) to p 71 (line 14).

[27] Prosecution's written submissions dated 5 January 2023 at paras 53–54.

which I quoted in the previous paragraph, as they were not provisions punishing attempts to commit any particular offence. For example, although s 354A contains the phrase "attempts to cause to that person death, or hurt, or wrongful restraint, or fear of instant death, instant hurt or instant wrongful restraint", that phrase is used in s 354A to spell out a statutory aggravating factor for the offence of outrage of modesty prescribed in s 354, and not for the purpose of making s 354A a provision for the punishment of attempts to cause death or hurt or wrongful restraint, *etc*. However, I accepted that s 393 fits the description as it provides that attempts to commit robbery shall be punished with imprisonment for a term of not less than two years and not more than seven years and caning with not less than six strokes. In comparison, s 392 provides that the (completed) offence of robbery (other than robbery by night) be punished with imprisonment for a term of not less than two years and not more than ten years and caning with not less than six strokes. In addition, I considered that ss 385 and 387 arguably also fit the description. Section 385 punishes the offence of putting a person in fear of harm in order to commit extortion while s 387 punishes the offence of putting a person in fear of death or grievous hurt in order to commit extortion. These two offences amount, in substance, to attempts to commit extortion even though they are not expressly described in this manner in the PC. They are both punishable with imprisonment for a term of not less than two years, which is the same minimum sentence applicable to the primary offences of extortion under ss 384 and 386. What this means is that, while there is some force in the Defence's third argument, such force is somewhat blunted by the presence of ss 385, 387 and 393.

76 To conclude on the presumption against "absurd" results, although there is some force in the Defence's second and third arguments, it does not follow

that I should automatically exclude the First Interpretation as a "possible interpretation of the provision". As noted in *Bennion* at p 476:

> The strength of the presumption depends on the degree to which a particular construction produces an unreasonable result. The more unreasonable the result, the less likely it is that the legislature intended it, and accordingly the clearer the wording needed to produce that result.

In my view, the results referred to in the Defence's second and third arguments are not so unreasonable as to warrant excluding the First Interpretation as a possible interpretation of the provision at this stage of the analysis.

(E) PRINCIPLE OF UPDATING CONSTRUCTION

77 As noted above, the Second Interpretation was based on the notion that the expression "such punishment" in the Phrase in Question, insofar as it referred to the amount of punishment, would have been understood by the framers of the 1933 amendment as referring only to the maximum sentence prescribed for the primary offence (see [53] above). This was because the concept of minimum sentences was not known to Singapore law at the time. This naturally gave rise to the question whether the expression "such punishment" could be given an updated construction to encompass subsequent changes to the law to introduce minimum sentences. A further but related question was, since the similarly worded phrase in s 109 of the PC had been given precisely such an updated construction without controversy (see [57] above), why could the same not apply to the Phrase in Question in s 511?

78 The principle of updating construction was recently considered by the Court of Appeal in *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 ("*Wong Souk Yee*"), a case concerning the interpretation of Art 49(1) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint). The

question before the court was whether a by-election must be called to fill a vacancy resulting from *one* Member of Parliament, out of a team of Members of Parliament in a group representation constituency ("GRC"), vacating his seat.

79 The Court of Appeal noted that, at the time Art 49 was enacted, there were only single member constituencies ("SMCs") in Singapore and no GRCs. The concept of GRC was only introduced later in 1988. The Court of Appeal therefore held that, as a starting point, the words "seat of a Member" in Art 49(1) would only refer to seats in SMCs. The Court of Appeal went on to comment (at [31]–[32]):

> 31 However, we also clarified in *ASR* that the mere fact that a particular concept did not exist at the time a provision was originally enacted did not automatically mean that the words of the provision could not refer to the new concept. This is because it would not have been possible to say that the provision was not intended to refer to the new concept, given that such an intention could not have been formed at the time of the provision's enactment in the first place (see *ASR* at [80]). Thus, in the context of determining whether the concept of mental age, which emerged in 1905, could fall within the ordinary meaning of the word "age" in s 83 of the Penal Code (Cap 224, 2008 Rev Ed), we considered whether the ordinary meaning of this word at the time the Penal Code was adopted in 1872 could logically extend to the new concept (see *ASR* at [81]).
>
> 32 Focusing on whether the ordinary meaning of the words of a provision can logically be extended to a new concept is appropriate *in the context of new phenomena that arise out of factors independent of the intervention of Parliament, such as the development of new technology*. However, the central focus of all statutory and/or constitutional interpretation questions remains the directive contained in s 9A of the Interpretation Act (Cap 1, 2002 Rev Ed) ("the IA") to interpret the provision concerned in a way that gives effect to the intent and will of Parliament (see *Tan Cheng Bock* ([22] supra) at [35]). As such, *in the special context where new concepts arise out of changes made by Parliament to a statute or the Constitution*, it is not sufficient to merely show that the ordinary meaning of the words of the provision concerned can logically be extended to the new concepts. *Instead, the focus should be on whether the ordinary meaning of those words, read in their context (especially in the context of the amendments made by Parliament), express*

> *an intention that the provision should encompass the new concepts*.
>
> [emphasis added]

In the foregoing passage, the Court of Appeal drew a distinction between how the principle of updating construction would apply in the context of "new phenomena that arise out of factors independent of the intervention of Parliament" and how the principle would apply in the context where "new concepts arise out of changes made by Parliament". In the former case, the test was whether the ordinary meaning of the words of the provision could logically be extended to the new concepts. In the latter case, the focus was instead on whether the ordinary meaning of those words, read in their context (especially in the context of the amendments made by Parliament), expressed an intention that the provision should encompass the new concepts.

80 In the present case, the new concept in question was the introduction of mandatory minimum sentences. This did not arise out of factors independent of the intervention of Parliament but arose precisely out of changes made by Parliament to a statute. Therefore, the test was not whether the ordinary meaning of the Phrase in Question could logically be extended to the concept of minimum sentences. Instead, the focus should be on whether the ordinary meaning of the Phrase in Question, read in context (especially in the context of the amendments introducing minimum sentences), expressed an intention that the Phrase in Question should encompass minimum sentences.

81 The provisions of the Pre-2019 Amendment PC were silent on whether a minimum sentence prescribed for a primary offence should also apply to an attempted offence punishable under s 511 of the Pre-2019 Amendment PC. As for the provisions introducing mandatory minimum sentences into the PC in 1984, those provisions were similarly silent on whether a minimum sentence

prescribed for a primary offence should also apply to an attempted offence punishable under s 511 of the Pre-2019 Amendment PC. However, two arguments might be made from the context surrounding those provisions.

82 In favour of the First Interpretation, it might be argued that the presence of ss 385, 387 and 393 of the PC (referred to at [75] above) meant that Parliament had intended, when introducing mandatory minimum sentences into the PC in 1984, that attempts to commit offences should be subject to the same minimum sentences as those prescribed for the corresponding primary offences. Against this view, the YIC submitted that it could conversely be argued that the fact that Parliament specifically provided for attempts to have the same mandatory minimum sentences as the primary offences in these particular instances meant that, under s 511 of the Pre-2019 Amendment PC, attempts and completed offences did not attract the same mandatory minimum sentence.[28]

83 In favour of the Second Interpretation, reference could be made to the second reading speech given by the Minister for Home Affairs on the Penal Code (Amendment) Bill 1984 (*Singapore Parliamentary Debates, Official Report* (26 July 1984) vol 44 (Chua Sian Chin, Minister for Home Affairs)), in which the Minister stressed that, even after the introduction of mandatory minimum sentences for certain offences "the very wide discretion of the courts in sentencing those convicted of these offences still remains". As explained in more detail at [108]–[111] below, this assurance from the Minister tended to support the view that there was no intention on the part of Parliament to apply the minimum sentences to attempts to commit offences because doing so would significantly narrow the "discretion of the courts in sentencing" attempts to commit a number of these offences.

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[28] YIC's written submissions dated 10 March 2023 at para 68.

84 In the light of the foregoing, I concluded that s 511 of the Pre-2019 Amendment PC read in context, including the context of the amendment introducing minimum sentences in 1984, was ambiguous on its face as to whether a minimum sentence prescribed for a primary offence applies to an attempt commit that offence.

85 Before leaving the discussion on the principle of updating construction, I should return to the further question posed earlier (at [77] above) regarding the similarly worded phrase in s 109 of the PC. The answer to that question lay in the differences of context and purpose between s 109 and s 511. Section 109 punished a successful abettor as though he had personally committed the primary offence. In that context, the case for giving an updated construction to apply the minimum sentence prescribed for the primary offence to s 109 was compelling, and would leave no room for ambiguity. In contrast, the case for coming to the same conclusion in the context of s 511 was far less compelling, since s 511 concerned an inchoate offence.

(F) CONCLUSION ON STEP 1

86 To summarise the foregoing discussion:

(a) the presumption of consistent expression did not favour the First Interpretation over the Second Interpretation;

(b) the presumption of coherence favoured the Second Interpretation over the First Interpretation;

(c) the *Barras* principle did not favour the First Interpretation over the Second Interpretation;

(d) the presumption against "absurd" results did not exclude the First Interpretation as a possible interpretation of the provision; and

(e) the principle of updating construction did not favour the adoption of the First Interpretation to the exclusion of the Second Interpretation, but left both the First Interpretation and the Second Interpretation as possible interpretations of the provision.

87 In the light of the foregoing, I concluded for the purpose of Step 1 of the *Tan Cheng Bock* framework that both the First Interpretation and the Second Interpretation were possible interpretations of the provision.

(2) Step 2: Ascertaining the legislative purpose or object of the statute

88 As noted by the Court of Appeal in *Tan Cheng Bock* (at [54(c)(ii)]), the purpose or object of a statute should ordinarily be gleaned from the text itself. The court must first determine the ordinary meaning of the provision in its context, which might give sufficient indication of the objects and purposes of the written law, before evaluating whether consideration of extraneous material is necessary. Consideration of extraneous material may only be had in three situations (*Tan Cheng Bock* at [54(c)(ii)–(iii)]):

(a) If the ordinary meaning of the provision (taking into account its context in the written law and purpose or object underlying the written law) is clear, extraneous material can only be used to confirm the ordinary meaning but not to alter it.

(b) If the provision is ambiguous or obscure on its face, extraneous material can be used to ascertain the meaning of the provision.

(c) If the ordinary meaning of the provision (taking into account its context in the written law and the purpose or object underlying the written law) leads to a result that is manifestly absurd or unreasonable, extraneous material can be used to ascertain the meaning of the provision.

89 In deciding whether to consider extraneous material, and if so what weight to place on it, the court should have regard to the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision (taking into account its context in the written law and the purpose or object underlying the written law), and the need to avoid prolonging legal or other proceedings without compensating advantage. The court should also have regard to (a) whether the material is clear and unequivocal; (b) whether it discloses the mischief aimed at or the legislative intention underlying the statutory provision; and (c) whether it is directed to the very point of statutory interpretation in dispute (*Tan Cheng Bock* at [54(c)(iv)]).

(A) FORMULATIONS OF LEGISLATIVE PURPOSE BY PARTIES AND YIC

90 The YIC submitted that the purpose of s 511 of the Pre-2019 Amendment PC is "for attempts to be punished as if the offence had actually been committed, save for a limitation on the maximum imprisonment that can be imposed".[29] The Prosecution submitted that the purpose of the provision is "to criminalise attempts as well as to provide the punishment for attempts (where not expressly provided for elsewhere)".[30] The Defence did not put forth

[29] YIC's written submissions dated 10 March 2023 at paras 50 and 102(a).

[30] Prosecution's written submissions dated 5 January 2023 at para 48.

its own formulation of the legislative purpose, presumably because the Prosecution's formulation is equally compatible with all three interpretations.

91 I did not accept the YIC's formulation of the legislative purpose, principally because the phrase "as if the offence had actually been committed" in the YIC's formulation was not a concept which could be gleaned from the text of s 511 of the Pre-2019 Amendment PC. Nowhere in s 511 was it stated or implied that a person who merely attempted an offence must be punished as if he had *actually* committed the (completed) offence.

92 To appreciate the significance of the phrase "as if the offence had actually been committed" and why it has no place in a formulation of the legislative purpose of s 511, reference might be made to the discussion in *Lau Cheng Kai and others v Public Prosecutor* [2019] 3 SLR 374 ("*Lau Cheng Kai*"). The accused persons in *Lau Cheng Kai* were each convicted of conspiracy to commit corruption punishable under s 5(*b*)(i) read with s 31 of the Prevention of Corruption Act (Cap 241, 1993 Rev Ed) (the "PCA"). The maximum punishment prescribed for a (completed) offence under s 5 of the PCA was imprisonment not exceeding five years and fine not exceeding $100,000. As for s 31 of the PCA, the provision read:

> 31. Whoever is a party to a criminal conspiracy, within the meaning of the Penal Code [Cap. 224], to commit an offence under this Act *shall be deemed to have committed the offence* and shall be liable on conviction to *be punished with the punishment provided for that offence.*
>
> [emphasis added]

93 At first instance, the learned district judge (the "DJ") sentenced two of the accused persons to three months' imprisonment, one accused person to one month's imprisonment and the remaining accused person to two weeks'

imprisonment. Both sides appealed to the High Court. The DJ's reasoning was summarised in the judgment of the High Court in the following manner (at [15]):

> In coming to his decision on sentence, the Judge first considered the interpretation of s 31 of the PCA. The Judge held that on a plain reading of the provision, conspirators are only liable to the same *maximum* punishment prescribed for the offence (GD at [88]). This is in contrast to the interpretation advanced by the Prosecution, which was that the conspirators should be punished *as if they had actually* paid out the bribes and committed the offence. The Judge then went on to state that an "incomplete, inchoate offence such as a simple conspiracy would generally involve a lower degree of culpability and harm than a completed offence" and that the sentence therefore "ought to be commensurately lower" (GD at [89]).
>
> [emphasis in original]

94 In allowing the Prosecution's appeal, Chan Seng Onn J held (at [29]) that the phrase "shall be deemed to have committed the offence" was a deeming provision, the effect of which was that "an offender who is convicted under s 31 of the PCA is statutorily *deemed* to have committed the PCA offence that he conspired to commit, notwithstanding that he did not *factually* commit it" (emphasis in original). Chan J went on to comment that the DJ's interpretation of s 31 of the PCA would render the deeming provision otiose. Since Parliament is presumed not to legislate in vain, Chan J held that the correct interpretation was that (at [30(b)] and [31]):

> … an offender convicted under s 31 of the PCA must be punished on the basis that the criminal conspiracy as planned is *deemed to have been successfully carried out and that the intended PCA offence that the conspirators conspired to commit is deemed to have been committed* by them as a consequence of their criminal conspiracy.
>
> [emphasis added]

Chan J then added (at [30(b)]) that, on this interpretation, "the sentencing judge *cannot give a discount on the basis that the offence is factually not committed*

and therefore any harm that would have been associated with having committed that PCA offence is in fact absent" (emphasis added).

95 Although *Lau Cheng Kai* concerned conspiracy, Chan J also commented that the same reasoning would apply to s 30 of the PCA, which concerned attempts. Section 30 of the PCA likewise contained a deeming provision and read:

> 30. Whoever attempts to commit an offence punishable under this Act *shall be deemed to have committed the offence* and shall be liable on conviction to be punished with the punishment provided for that offence.
>
> [emphasis added]

According to Chan J (at [38]):

> … With regard to attempts under the PCA, the deeming provision makes it clear that the attempted offence is deemed by law to have been committed. The legal effect of this is that pursuant to s 30, *the attempted PCA offence is no longer treated as an attempt* per se *but a completed offence*. In other words, the attempted PCA offence is simply taken to have been committed by virtue of the deeming provision in s 30. *The attempt is treated as having succeeded or carried out to fruition.* It therefore makes little sense for the sentencing judge to subsequently disregard the deeming provision completely in s 30 by acknowledging that the attempted PCA offence is factually not committed, and then give a sentencing discount on that basis.
>
> [emphasis added]

96 Returning to s 511 of the Pre-2019 Amendment PC, it would be immediately apparent that s 511 does not contain a deeming provision similar to that found in ss 30 and 31 of the PCA. There is simply no basis to infer, from the text of s 511, that the purpose of the provision was to punish an attempted offence "as if the offence had actually been committed". In fact, the existence of s 511(2), which expressly provided for lower maximum sentences in the case

of attempts as compared to the (completed) offence, clearly and unequivocally displaced any inference that the purpose of s 511 was to punish an attempted offence "as if the offence had actually been committed".

97 As for the Prosecution's formulation of the legislative purpose ("to criminalise attempts as well as to provide the punishment for attempts (where not expressly provided for elsewhere)"), this seemed to fall into the same error that the Prosecution did in the case of *Public Prosecutor v Takaaki Masui and another and other matters* [2022] 1 SLR 1033 ("*Takaaki Masui*"). The provision to be interpreted in *Takaaki Masui* was s 13(1) of the PCA, which read:

> **When penalty to be imposed in addition to other punishment**
>
> 13.—(1) Where a court convicts any person of an offence committed by the acceptance of any gratification in contravention of any provision of this Act, then, if that gratification is a sum of money or if the value of that gratification can be assessed, the court shall, in addition to imposing on that person any other punishment, order him to pay as a penalty, within such time as may be specified in the order, a sum which is equal to the amount of that gratification or is, in the opinion of the court, the value of that gratification, and any such penalty shall be recoverable as a fine.

98 The Prosecution submitted that the legislative purpose of s 13 of the PCA was "to ensure that the recipient of gratification pays, to the State, a sum of money equivalent to the value of that gratification received in respect of PCA offence(s) which the recipient has been convicted of" (*Takaaki Masui* at [90]). The Court of Appeal's response was (at [90]):

> … We reject this rather tautological submission because it rests on a *literal* rather than a *purposive* interpretation of s 13(1) of the PCA. It is generally unhelpful to frame the legislative purpose of a statutory provision as the very action or mechanism provided for by that provision.

[emphasis in original]

The Court of Appeal then held (at [91]) that the legislative purpose of s 13(1) was "to prevent corrupt recipients from *retaining* their ill-gotten gains" (emphasis in original).

99 By the same token, the Prosecution's formulation of the legislative purpose of s 511 was unhelpful as it did not go beyond merely restating "the very action or mechanism provided for by that provision". As will be demonstrated below, a key deficiency of the Prosecution's formulation was that it did not engage with the existence of s 511(2).

(B) LEGISLATIVE PURPOSE GLEANED FROM THE TEXT OF THE LEGISLATION

100 The text of s 511 of the Pre-2019 Amendment PC may be divided into two main parts – an offence-creating provision and a punishment provision. The offence-creating provision takes up most of the text of s 511(1), while the punishment provision begins with the final phrase of s 511(1) (*ie*, the Phrase in Question) and extends into s 511(2), the provisions of which qualified the Phrase in Question. The provisions of s 511(2) were clearly an integral part of the legislative scheme created by s 511, and should not be ignored when one attempts to glean the legislative purpose of s 511 from its text. The clear policy underlying both s 511(2)(*a*) and s 511(2)(*b*) was that an attempt should not be punished as severely as the (completed) offence. Therefore, taking all aspects of the text of s 511 into account, including the textual analysis undertaken in the discussion on Step 1 above, I held that the legislative purpose of s 511 was to criminalise and punish attempts to commit offences while not punishing such attempts as severely as the (completed) offences.

(C) LEGISLATIVE PURPOSE DISCERNED FROM RELEVANT EXTRANEOUS MATERIAL

101 According to s 9A(4) of the Interpretation Act, in determining whether consideration should be given to extraneous material, regard must be had to the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision. In the present case, I did not think it was necessary to consider any extraneous material because the legislative purpose of the provision, as articulated in the previous paragraph, emerged clearly from the ordinary meaning conveyed by the text of the provision. As noted in *Tan Cheng Bock* (at [44]), if a provision is well-drafted, its purpose will emanate from its words. Nevertheless, I discuss below the extraneous material referred to in the parties' and the YIC's submissions in the interest of completeness. Given my conclusion (at [84] and [87] above) that the Phrase in Question, when read in the context of the PC as a whole, was ambiguous in the sense that there were two possible interpretations, the extraneous material might be used in the present case to ascertain the meaning of the provision. In this regard, there were three categories of extraneous material to consider:

(a) extraneous material regarding the enactment of s 511 of the PC and amendments thereto, up to and including the 2007 amendment;

(b) extraneous material regarding the introduction of mandatory minimum sentences; and

(c) extraneous material regarding the 2019 amendment.

(I) EXTRANEOUS MATERIAL REGARDING THE ENACTMENT OF SECTION 511 AND AMENDMENTS THERETO

102 As noted above, the PC was enacted in 1871, and s 511 was in the PC when first enacted. However, neither the parties nor the YIC had presented any

materials concerning the legislative process in 1871 which may touch on the purpose of s 511.

103 When the PC was amended in 1933, the Legislative Council debates did not touch on the amendments to s 511. The only relevant legislative material was the Statement of Objects and Reasons accompanying the Penal Code (Amendment) Bill (G.N. No 1867/1933) (the "1933 Bill") which merely explained that the amendment "extends the scope of section 511 of the Code which at present applies only to attempts to commit offences punishable under the Code itself". While the Defence submitted that it was significant that there was no indication in the Statement of Object and Reasons that the 1933 Bill also intended to reform the punishment provision in s 511,[31] I did not think this was sufficiently clear and unequivocal to form the basis of any proper conclusion.

104 There were no relevant materials concerning the 1955 amendment since that amendment had been effected by way of law revision, and not by primary legislation. The legislative materials concerning the 2007 amendment did not touch on the purpose of s 511 or its punishment provision.

105 Overall, no assistance could be gleaned from extraneous material concerning the enactment of s 511 and amendments thereto up to and including the 2007 amendment.

(II) EXTRANEOUS MATERIAL REGARDING THE INTRODUCTION OF MANDATORY MINIMUM SENTENCES

106 As submitted by the YIC, insofar as we were looking at the question of whether the mandatory minimum sentence ought to apply to s 511, it was logical

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[31] Transcript of 19 April 2023 at p 69 (lines 3–10).

to also look at the legislative history, intention and purpose behind mandatory minimum sentences. As noted at [42] above, mandatory minimum sentences were first introduced with the enactment of the MDA, the Arms Offences Act 1973 and the Penal Code (Amendment) Act 1973. The Penal Code (Amendment) Act 1973 introduced only mandatory minimum *caning*. It was only in 1984 that mandatory minimum *prison terms* were introduced into the PC by the Penal Code (Amendment) Act 1984. The Parliamentary debates on the Arms Offences Bill 1973, the Penal Code (Amendment) Bill 1973 and the Penal Code (Amendment) Bill 1984 all did not discuss the interaction between these new mandatory minimum sentences and s 511 of the PC. (The Parliamentary debates on the MDA are not relevant as the MDA has its own provision for punishing attempted offences, which means that attempts to commit offences under the MDA were not governed by s 511 of the PC.)

107 The YIC submitted that the purpose of mandatory minimum sentences was deterrence. That might well be true, but saying that the purpose was deterrence did not by itself lead clearly and unequivocally to the conclusion that a minimum sentence prescribed for an offence must be applied to an attempt to commit that offence. A strong argument could be made that the deterrent effect of the minimum sentence was intended for the (completed) offence only since there was nothing in the relevant Parliamentary debates which disclosed an intention to apply the minimum sentence to attempts. Additionally, it could be argued that *not* applying the minimum sentence to attempts may better further the purpose of deterring commission of the (completed) offence by giving a person attempting the offence an incentive to change his mind and desist voluntarily from completing the offence.

108 In fact, the message given by the Minister for Home Affairs in the second reading speech on the Penal Code (Amendment) Bill 1984 was more

nuanced than a bare message of deterrence (*Singapore Parliamentary Debates, Official Report* (26 July 1984) vol 44 (Chua Sian Chin, Minister for Home Affairs)). The Minister had begun by noting that there was a rapidly increasing crime rate for certain offences. Next, the Minister noted that this coincided with a downward trend in sentences imposed by the courts in respect of *those* offences. Then, the Minister stated that one consequence of the more lenient sentences is that it signalled to criminals that the risk of committing those offences had become much more worth taking than before. Finally, in a section of the speech under the heading "Need for Guidelines in Law on Sentencing", the Minister said (at col 1866):

> … in a way, inadequate sentences meted out by the courts are understandable. Where there is inadequate guidance in law on sentencing, the temptation to play for safety will be strong.
>
> To redress the situation, we have chosen to ask Parliament, which reflects the general views of the people of Singapore, to stipulate a minimum sentence to be imposed by law for certain offences which have caused the most concern and alarm to the public. *I must, however, stress that the very wide discretion of the courts in sentencing those convicted of these offences still remains.*
>
> [emphasis added]

109 This was again reiterated in the Minister's response to a question posed by the Member for Anson, who had voiced the concern that the introduction of minimum sentences "besides enhancing the punishment, takes away the discretion that is … traditionally vested in the courts" and that "the sentence must not only fit the crime but must fit the offender" (*Singapore Parliamentary Debates, Official Report* (26 July 1984) vol 44 at col 1873 (J B Jeyaretnam, Minister for Anson). In reply, the Minister stated (at col 1879):

> [The Member for Anson] was making a lot of play *on the taking away of the fundamental principles of giving the courts discretion in sentencing.* This is only a minimum sentence. *There still remains a very wide discretion on the part of the courts to*

> *determine the appropriate sentence*. But what we are doing here is just to provide certain guidelines which Parliament, as the legislative body representing the people of Singapore, has a duty if it thinks fit to provide such guidelines. And that in no way interferes with the administration of justice.
>
> [emphasis added]

110 The Minister's assertion that, even after the introduction of mandatory minimum sentences for certain offences, "the very wide discretion of the courts in sentencing those convicted of these offences still remains", tended to support the view that there had been no intention on the part of Parliament to apply the minimum sentences to attempts. For a number of these offences, applying the mandatory minimum sentence to an attempt would significantly narrow the "discretion of the courts in sentencing". One example would be the offence of attempted aggravated rape which forms the subject matter of the present case. The maximum sentence for (completed) aggravated rape is 20 years. With the mandatory minimum of eight years, the sentencing range available to the court for (completed) aggravated rape is 12 years. This was entirely consistent with the Minister's assertion that a "very wide discretion … still remains". If the mandatory minimum sentence of eight years were to be applied to attempted aggravated rape, and with the maximum sentence halved to ten years, the sentencing range available to the court would only be two years. This cannot, by any stretch of imagination, be described as a "very wide discretion".

111 Another example was s 9(5) of the IA referred to at [72] above. The minimum sentence for that offence was exactly half of the maximum, thus leaving the court absolutely no discretion in sentencing *if* the minimum sentence were applicable to an attempt to commit that offence. The amendment to the IA to introduce the mandatory minimum sentence for this offence was taken through Parliament by the same Minister on 20 November 1984, less than four months after he gave the speech in Parliament quoted at [108] above. Since it is

inconceivable that the Minister would have forgotten by November 1984 what he told Parliament in July earlier that year, it would be a reasonable and natural inference that the Minister never intended any of these mandatory sentences to apply to attempts punishable under s 511.

(III) EXTRANEOUS MATERIAL REGARDING THE 2019 AMENDMENT

112 The authors of *Bennion* noted (at p 769):

> Where, however, the legal meaning of an enactment is doubtful, a later Act may be treated as of persuasive authority if it indicates that Parliament took a particular view of the existing law. Similarly, where Parliament passes an Act which on one (but not the other) of two disputed views of the existing law is unnecessary, this may be taken to suggest that the other view is correct.

The question to be asked in relation to the 2019 amendment was whether it indicated that Parliament took a particular view of s 511 of the Pre-2019 Amendment PC.

113 To recapitulate, s 511 of the Pre-2019 Amendment PC was repealed in 2019 and replaced with two provisions – a new s 511 and a new s 512. The new s 511 is devoted entirely to defining the scope and elements of the offence of attempting to commit an offence. The punishment provision for attempts to commit offences is set out in the new s 512. The key change in sentencing approach brought about by s 512 was the removal of the one-half limit on the maximum sentence of imprisonment. Instead, s 512 provided that the maximum punishment for an attempt was the same as that prescribed for the primary offence. Section 512 also contains a new provision which clarifies, among other things, that a court sentencing for an attempt "shall not be bound to impose" a minimum sentence prescribed for the primary offence (s 512(3)(*a*)).

114 The Prosecution noted that s 512(2) of the Post-2019 Amendment PC contains the phrase "be punished with such punishment as is prescribed for the offence". The Prosecution then submitted that, since Parliament saw fit in 2019 to enact s 512(3)(*a*) to expressly carve out minimum sentences, this meant that the phrase "be punished with such punishment as is prescribed for the offence" in s 512(2) if the Post-2019 Amendment PC would have obliged the court to impose the minimum sentence prescribed for the primary offence, *but for* the carve out in s 512(3)(*a*).[32] Since this phrase was virtually identical to the Phrase in Question found in s 511(2) of the Pre-2019 Amendment PC, it must have meant that Parliament had also taken the view that the Phrase in Question in s 511 would have made minimum sentences applicable to attempts. The YIC agreed with the Prosecution's submission. The Defence submitted that s 512(3)(*a*) merely clarified what was already the position under s 511 of the Pre-2019 Amendment PC.[33]

115 I did not agree with the Prosecution's submission. The fallacy of the Prosecution's submission would be apparent once we glance one line down from s 512(3)(*a*) to consider s 512(3)(*b*), which provided that the sentence imposed may not exceed the maximum punishment prescribed for the primary offence. Going by the logic of the Prosecution's submission, the fact that Parliament chose to enact s 512(3)(*b*) would also indicate that Parliament was of the view that the phrase "be punished with such punishment as is prescribed for the offence" would allow the court to pass sentences in excess of the maximum sentence prescribed for the primary offence in the absence of s 512(3)(*b*).

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32 Prosecution's written submissions dated 5 January 2023 at paras 26–28.

33 Transcript of 19 April 2023 at p 69 (line 30) to p 70 (line 3).

116 I found some force in the Defence's submission, although I would not frame it in exactly the same manner. In my view, the key difference between s 511 of the Pre-2019 Amendment PC and s 512 of the Post-2019 Amendment PC is that the latter enhanced or made more severe the punishment for attempts by removing the statutory one-half limit. Parliament had, in making the punishment for attempts more severe, not made the minimum sentence applicable to s 512 of the Post-2019 Amendment PC. It would be logical that the minimum sentence would similarly not be applicable to s 511 of the Pre-2019 Amendment PC, which punished attempts less severely than s 512 of the Post-2019 Amendment PC.

(IV) CONCLUSION ON THE EXTRANEOUS MATERIAL

117 The extraneous material regarding the enactment of and amendments to s 511 did not lead to any particular conclusion. The extraneous materials regarding mandatory minimum sentences and regarding the 2019 amendment to the PC pointed towards the Second Interpretation as the correct interpretation. While there might be some debate on whether the inferences to be drawn from extraneous material regarding the 2019 amendment were sufficiently clear and unequivocal for the court to place reliance on, I did not think there was any doubt that the inferences to be drawn from the extraneous material regarding mandatory minimum sentences were sufficiently clear and unequivocal. In any event, even if we assumed, for the sake of argument, that those inferences were not sufficiently clear and unequivocal, what remained clear was that none of the extraneous material pointed away from the legislative purpose gleaned from the text of s 511 in context, as articulated at [100] above.

(D) CONCLUSION ON STEP 2

118 In the light of the foregoing, I concluded that the legislative purpose of s 511 of the Pre-2019 Amendment PC was to criminalise and punish attempts to commit offences while not punishing such attempts as severely as the (completed) offences.

119 Depending on one's perspective, there could be initial concerns that this formulation of the legislative purpose might be seen as a call for leniency in the treatment of attempts to commit offences. Any such perception would be mistaken. This formulation clearly spelled out that a key purpose was to "punish attempts to commit offences". The purpose to punish encompasses the purposes of prevention, deterrence, retribution and rehabilitation, all of which should be given due weight and emphasis. The statement "not punishing such attempts as severely as the (completed) offences" merely gave effect to the words of the provision by spelling out the policy underlying those words, and did not detract from the overarching purpose to "punish attempts to commit offences".

(3) Step 3: Comparing the possible interpretations of the text against the legislative purpose

120 In the third step, the possible interpretations of the provision were compared against the ascertained legislative purpose. The interpretation which furthered the legislative purpose should be preferred to the interpretation which did not (*Tan Cheng Bock* at [54(c)]).

121 The key difference between the two interpretations was that the First Interpretation would apply the same minimum sentence to both a person who merely attempted an offence and a person who has committed the (completed) offence, while the Second Interpretation did not. Thus, while both

interpretations would equally further the purpose of punishing attempts to commit offences, the Second Interpretation would better further the legislative purpose of not punishing attempts as severely as the (completed) offence. The Second Interpretation is therefore the interpretation which should be preferred.

Conclusion on Issue A

122 For the reasons above, I answered Issue A in the negative, and held that, under s 511 of the Pre-2019 Amendment PC, the mandatory minimum sentence for a completed offence had no application to an attempt to commit the offence.

Issue B: Whether s 512(3)(*a*) of the Post-2019 Amendment PC can be applied retrospectively for the accused's benefit

123 The question of principle underlying Issue B was: if a person had attempted to commit an offence *before* s 512 of the Post-2019 Amendment PC came into force and was convicted and sentenced only *after* it came into force, *and assuming Issue A is answered in the affirmative*, whether s 512(3)(*a*) could be applied retrospectively for that person's benefit.

124 It was a premise of Issue B that Issue A was assumed to have been answered in the affirmative. If Issue A were answered in the negative, then the law on the point arising under Issue A (whether the court is bound to apply the minimum sentence prescribed for the primary offence when sentencing for an attempt) would be the same both before and after the 2019 amendment. In that event, no purpose would be served by exploring whether s 512(3)(*a*) could be applied retrospectively. Thus, given my decision to answer Issue A in the negative, it was strictly not necessary for me to consider Issue B. Nevertheless, given the time and effort devoted by the parties and the YIC on Issue B, I dealt with it for completeness. In order for the discussion on Issue B in the rest of

these grounds to make sense, the discussion proceeds on the *hypothetical* basis that Issue A had been answered in the affirmative.

Overview of relevant legal principles

125 At this point, it would be useful to provide, by way of background, an overview of some of the legal principles that might be relevant for the resolution of Issue B, before introducing the parties' and the YIC's submissions.

126 The starting point is Art 11(1) of the Constitution of the Republic of Singapore (2020 Rev Ed) ("Constitution"), which provided that:

> No person shall be punished for an act or omission which was not punishable by law when it was done or made, and *no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.*
>
> [emphasis added]

The effect of the second limb of Art 11(1) of the Constitution is that, if the prescribed punishment for an offence is enhanced *after* the offence was committed but *before* the offender is sentenced, it would be unconstitutional for the sentencing court to impose the enhanced punishment. Instead, the sentencing court was required by the Constitution to impose the punishment prescribed by the law in force at the time of commission of the offence. However, the converse was not true. If the prescribed punishment for an offence was reduced or made more lenient after the offence was committed but before the offender was sentenced, Art 11(1) of the Constitution would *not* prohibit the sentencing court from applying the new punishment provision.

127 Sometimes, Parliament expressly legislates that a reduced punishment should apply retrospectively. For example, when the Penal Code (Amendment) Act 2012 (No 32 of 2012) ("Penal Code (Amendment) Act 2012") repealed and

re-enacted s 302 to reduce the punishment for murder under limbs (*b*), (*c*) and (*d*) of s 300 from mandatory death penalty to discretionary death penalty, the transitional provisions in s 4(1)(*b*) of the Penal Code (Amendment) Act 2012 expressly provided for the new reduced punishment to apply to an offence *committed before* the coming into force of the Penal Code (Amendment) Act 2012. In these situations, there was no doubt that the court may and should apply the new, reduced punishment when sentencing for an offence committed before the law prescribing the reduced punishment had come into force.

128 At other times, Parliament reduces the punishment prescribed without enacting relevant transitional provisions. One example was the Penal Code (Amendment) Act 2007, which removed the mandatory minimum sentences for four offences (*ie*, the offences under ss 379A, 411, 414 and 454 of the PC). The Penal Code (Amendment) Act 2007 contained no transitional provisions. In these situations, a question would arise as to whether the court may apply the reduced punishment when sentencing for an offence committed before the law prescribing the reduced punishment had come into force. While it appeared that this question had not been considered in any published decisions of the Singapore courts, it is one which the English courts have grappled with and given an answer for.

UK sentencing practice where prescribed punishment is reduced after commission of offence but before sentencing

129 The English courts sentence according to the *law prevailing at the time of sentencing*, irrespective of when the offence was committed, subject only to the rule that the sentence should not exceed the maximum prevailing at the time the offence was committed. What this means is that, if the prescribed punishment had been reduced between the time of commission of the offence

and the time of sentencing, the court would sentence according to the reduced punishment. The English position may be illustrated by reference to three cases.

130 The first case is *R v Shaw* [1996] 2 Cr App R (S) 278 ("*Shaw*"). The offender in that case pleaded guilty to four counts of theft. The maximum penalty for theft was reduced from ten years to seven years with effect from 1 October 1992 by s 26(1) of the Criminal Justice Act 1991 (c 53) (UK) (the "CJA 1991"). It appears from the judgment that some, if not all, of the four offences were committed before 1 October 1992. The sentencing judge, in granting leave to appeal, raised the question whether the reduced maximum sentence of seven years should be applied. The English Court of Appeal answered the question in the affirmative. In deciding to apply s 26(1) of the CJA 1991 to offences committed before its commencement, the English Court of Appeal noted that the transitional provisions of the CJA 1991 provided that s 26(3) and (4), which *enhanced* the penalty for some other offences, shall not apply to offences committed before the commencement of those subsections but those transitional provisions were silent on whether s 26(1) applied to offences committed before its commencement.

131 The second case is *R v H (J) (Practice Note)* [2012] 1 WLR 1416 ("*R v H (J)*"), a case concerning appeals against sentences by eight different offenders who were convicted of sexual offences committed many years before the offences were uncovered and prosecuted. During the intervening years, the legislative provisions concerning the punishment of these offences had undergone several changes. After considering the relevant authorities, the English Court of Appeal provided the following guidance (at [47]):

> 47 (a) *Sentence will be imposed at the date of the sentencing hearing, on the basis of the legislative provisions then current,* and by measured reference to any definitive sentencing

> guidelines relevant to the situation revealed by the established facts.
>
> (b) Although sentence must be limited to the maximum sentence at the date when the offence was committed, it is wholly unrealistic to attempt an assessment of sentence by seeking to identify in 2011 what the sentence for the individual offence was likely to have been if the offence had come to light at or shortly after the date when it was committed. *Similarly, if maximum sentences have been reduced, as in some instances, for example theft, they have, the more severe attitude to the offence in earlier years, even if it could be established, should not apply.*
>
> …
>
> [emphasis added]

132 The third case is *R v Docherty (Shaun)* [2017] 1 WLR 181 ("*Docherty*"). In that case, the offender was convicted on 13 November 2012 for two counts of wounding with intent to do grievous bodily harm, contrary to s 18 of the Offences against the Person Act 1861 (c 100) (UK). The maximum sentence for this offence is life imprisonment. At the sentencing hearing on 20 December 2012, the offender was sentenced to an indeterminate sentence of imprisonment for public protection ("IPP") under the Criminal Justice Act 2003 (c 44) (UK) (the "CJA 2003"). By then, the provisions in the CJA 2003 concerning IPP had already been repealed by s 123 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (c 10) (UK) (the "LASPO") with effect from 3 December 2012. However, the transitional provisions set out in the commencement order for the LASPO expressly provided that the coming into force of s 123 was "of no effect in relation to a person convicted before 3 December 2012". As the offender was convicted before 3 December 2012, this transitional provision preserved the court's power to impose an IPP sentence on the offender even after the repeal of the IPP provisions.

133 In his appeal against sentence, the offender argued that the transitional provisions in the commencement order were unlawful. One of the grounds he raised was that, since the LASPO implemented a new sentencing scheme that was less severe than the earlier scheme of IPP, it would be contrary to the international principle of *lex mitior*, which was binding on the English courts pursuant to the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "ECHR"), for the court to apply the earlier scheme. Given the focus of the offender's submission, the UK Supreme Court naturally devoted a significant portion of its judgment to discuss the *lex mitior* principle and how it had been applied under the ECHR, which I will not go into. What is of relevance for present purposes is the passage in the UK Supreme Court's judgment that summarised the English courts' *common law* sentencing practice (at [42] and [44]):

> 42 … English criminal courts *sentence according to the law and practice prevailing at the time of sentence, whenever the offence was committed*, subject only to scrupulous observance of the lex gravior principle of article 7 [of the ECHR], namely that no sentence must be imposed which exceeds that to which the defendant was exposed that the time of committing the offence. The Scottish practice is the same.
>
> …
>
> 44 Thus:
>
> (a) if the maximum sentence has been increased by statute since the offence was committed, the English court cannot sentence beyond the maximum which applied at the time of the offence, because that is the sentence to which the defendant was at that time exposed (lex gravior);
>
> (b) *if the maximum sentence has been reduced by statute since the offence was committed, the English court will sentence within the now current maximum …*
>
> (c) if sentencing practice as to the assessment of the gravity of an offence has moved downwards since the offence was committed, the court should sentence according to the now current view …

> (d) if a new sentencing option which is arguably less severe is added by statute or otherwise to the menu of available sentences after the commission of the offence but before the defendant falls to be sentenced, that new option will be available to the court in his case, unless the statute expressly otherwise directs; in the Canadian case *R v Johnson* [2003] 2 SCR 357 the menu of sentencing options for those presenting a future risk had had added to it a new, and for some offenders a possibly less severe, option of post custody supervision in the community; this was applied to the defendant although his offence had been committed before the change in the law; if such circumstances were to occur in England the result would be the same.
>
> [emphasis added]

134 For brevity, I shall refer to the English courts' common law sentencing practice outlined in the preceding paragraphs as the "English Sentencing Practice".

Principles governing retrospective effect of legislation

135 In *ABU v Comptroller of Income Tax* [2015] 2 SLR 420 ("*ABU*"), the Court of Appeal, while affirming the presumption against retrospective application as an established common law principle of statutory interpretation, eschewed the "highly technical and formulaic body of rules" precipitated by case law over the years. Instead, determining whether legislation should have retrospective application entails "a single overarching enquiry as to parliamentary intent" which is to be found in the words of the law, its context, and the relevant extrinsic aids to statutory interpretation (*ABU* at [76]). Only if ambiguity persists may the court proceed to the second step of considering the various presumptions concerning the retrospective application of legislation (*ABU* at [76]). In this regard, the Court of Appeal endorsed (at [76]) Lord Mustill's formulation of the presumption against retrospectivity in *L'Office Chefifien Des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486 ("*Yamashita-Shinnihon Steamship Co Ltd*") at 525–526: whether or not

the presumption of retrospectivity should apply is a question of *fairness*. This question, in turn, required an assessment of several factors including the degree of retrospective effect, the purpose of the legislation and the hardship of the result.

136 With the foregoing legal landscape in mind, I turn next to the parties' and the YIC's submissions.

The submissions

137 In summary, the Prosecution submitted that s 512 (including s 512(3)(*a*)) of the Post-2019 Amendment PC could not be applied retrospectively, whereas the Defence and the YIC both took the position that s 512(3)(*a*) could be applied retrospectively for the accused's benefit.

The Defence's submissions

138 The Defence relied on the two-step framework laid down in *ABU*. At the first step, the Defence submitted that an ambiguity exists, as the text of the CLRA is silent on the temporal application of s 512(3)(*a*) of the Post-2019 Amendment PC, and the extrinsic material also does not shed light on legislative intent.[34] At the second step, the Defence submitted that the presumption against retrospectivity would not apply in the present case since applying s 512(3)(*a*) of the Post-2019 Amendment PC retrospectively does not occasion any hardship.[35]

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34 Defence's written submissions dated 5 January 2023 at paras 33–35.

35 Defence's written submissions dated 5 January 2023 at paras 36–37.

139 The Defence also made an alternative submission based on what the Defence described as the "*lex mitior* doctrine". Referring to *Docherty* at [44(b)] and [44(d)] (quoted at [133] above), the Defence submitted that:

> (a) the principle articulated in that passage should be considered by the Singapore courts; and
>
> (b) if a less severe maximum sentence available at the time of sentencing (but not at the time of commission of the offence) ought to be applied, then the same should apply in relation to minimum sentences also.[36]

Although the Defence described this as a submission based on *lex mitior*, it is clear from the Defence's reliance on the passages from *Docherty* quoted at [133] above that this is, in fact, a submission based on the English Sentencing Practice.

The Prosecution's submissions

140 The Prosecution also applied the *ABU* framework but did not examine the second step because it submitted that no ambiguity exists at the first step – *ie,* a purposive interpretation of s 512 of the Post-2019 Amendment PC indicates that it was not to operate retrospectively.[37] The key plank of the Prosecution's submission is the assertion that s 512(3)(*a*) cannot be taken in isolation from the rest of s 512. Section 512 was intended to be implemented holistically, with both sub-sections (*a*) and (*b*) of s 512(3) operating in tandem to achieve the

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36 Defence's written submissions dated 5 January 2023 at paras 38–39.

37 Prosecution's written submissions dated 5 January 2023 at para 74.

legislative intent of conferring maximal discretion on the sentencing courts.[38] Since s 512(1) and s 512(3)(*b*) cannot be given retrospective effect without contravening Art 11(1) of the Constitution, s 512(3)(*a*) was similarly not intended to have retrospective effect. (I shall refer to this as the "package" argument.)

141 As for the English Sentencing Practice, the Prosecution submitted that there is no evidence that such sentencing practice is part of the sentencing practice of the Singapore courts. Furthermore, the Prosecution submitted that there is *no scope* for the English Sentencing Practice in the Singapore context, where questions pertaining to the retrospective application of legislation turn on a purposive interpretation of the legislative provision, subject to constitutional supremacy.[39]

The YIC's submissions

142 The YIC agreed with the Defence that it was unclear either way whether Parliament's intention was for s 512(3)(*a*) of the Post-2019 Amendment PC to apply retrospectively. As for the Prosecution's "package" argument, the YIC contended that it is not uncommon for the court to address its mind to the question of whether a *specific* part of a provision can have retrospective application.[40] The YIC therefore agreed with the Defence that there was ambiguity such that the second step of the *ABU* framework is engaged. Noting that whether or not the presumption against retrospectivity should apply was a question of fairness, the YIC submitted that it was "fair" to not apply the presumption in the present case because the s 512(3)(*a*) conferred a benefit on

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38 Prosecution's written submissions dated 24 March 2023 at paras 32–38.

39 Prosecution's written submissions dated 5 January 2023 at para 83.

40 YIC's written submissions dated 10 March 2023 at paras 125–126.

the accused, *ie*, it was 'beneficial' legislation. No injustice or prejudice arose out of the retrospective application of such legislation and it would instead be "arbitrary and unfair if an accused did not get the benefit of such 'beneficial' legislation".[41]

143 Lastly, the YIC pointed out that there was nothing which suggested that the *lex mitior* principle or the English Sentencing Practice could not be considered or adopted in Singapore, pursuant to the framework set out by the Court of Appeal in *ABU*.[42] The YIC further submitted that applying s 512(3)(*a*) of the Post-2019 Amendment PC retrospectively would be consistent with the purpose behind the provision, which was to allow for greater judicial discretion in sentencing attempts.[43]

Analysis

144 As the Defence raised two alternative submissions, one based on application of the *ABU* framework and one based on the English Sentencing Practice, I discuss these two submissions in turn.

Application of the two-step ABU *framework*

145 The first step of the *ABU* framework involved the purposive approach to statutory interpretation to determine the temporal application of the legislation. Section 512 of the Post-2019 Amendment PC was introduced by s 167 of the CLRA. The operative part of s 167 of the CLRA simply read: "Section 511 of the Penal Code is repealed and the following sections

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41 YIC's written submissions dated 10 March 2023 at paras 140–143.

42 YIC's written submissions dated 10 March 2023 at paras 153–155.

43 YIC's written submissions dated 10 March 2023 at para 165.

substituted therefor …". It did not expressly state whether s 512 or any part of it should or should not apply retrospectively. The transitional provisions of the CLRA were found in s 191. None of the transitional provisions dealt expressly with whether s 512 (or any part of it) should or should not apply retrospectively.

146 Returning to the text of s 512(3)(*a*), while the text of that provision did not indicate whether it should or should not apply retrospectively, the text of the provision could not be considered in isolation. Regard must be had to the context of the provision within the written law as a whole. To begin with, the context of s 512(3)(*a*) within s 512 as a whole needed to be considered. As previously noted, the effect of s 512(2) read with s 512(3)(*b*) was to abolish the statutory one-half limit and align the maximum punishment for an attempt with the maximum prescribed for the primary offence. Given that this amounted to an enhancement of the maximum penalty for attempts to commit offences, it was quite clear that Parliament could not have intended s 512(2) read with s 512(3)(*b*) to have retrospective effect. It was therefore extremely unlikely that Parliament could have intended for s 512(3)(*a*) to alone have a different temporal application from the rest of s 512(3) or, for that matter, from the rest of s 512.

147 In fact, s 167 of the CLRA introduced two new provisions in place of the repealed s 511 of the Pre-2019 Amendment PC – a new s 511 and a new s 512. The new s 512 set out the punishment for the offence of attempting to commit an offence. The new s 511 spelled out the elements of the offence in more detail and also clarified the scope of the offence. There is little doubt that, in overhauling the definition of the offence of attempting to commit an offence in this manner, the new s 511 could not be intended by Parliament to have retrospective application. In the circumstance, the new ss 511 and 512 together put in place a new scheme for criminalising and punishing attempts to commit

offences, and the pieces of this new scheme were intended to work together. This provided further support for the view that the entire scheme, including s 512(3)(*a*), was intended to have prospective effect only. This conclusion was not contradicted by anything in the parliamentary debates on the CLRA or anything in the report by the Penal Code Review Committee ("PCRC"), whose proposals gave rise to the amendment contained in s 167 of the CLRA.

148 In this regard, s 512(3)(*a*) might be contrasted with the examples mentioned at [128] and [130] above (*ie*, a simple amendment to remove the mandatory minimum sentence for certain offences or the simple reduction of the maximum penalty for an offence), where a reasonably strong argument could be made that there existed some ambiguity at the end of the first step as to whether retrospective application was intended. In contrast, given how s 512(3)(*a*) was situated within the context of s 512(3) and also within the larger context of ss 511 and 512 taken together, I held that a purposive interpretation of s 512(3)(*a*) led unambiguously to the conclusion that it was not intended to have retrospective application. As such, there was no need to embark on the second step of the *ABU* framework of considering the various presumptions relating to retrospective application of legislation, including the principle of beneficial legislation referred to in the YIC's submissions.

Reasoning from the English Sentencing Practice

149 The Defence's submission based on the English Sentencing Practice raised a question concerning the extent to which this English practice represented the position under Singapore law or, alternatively, the extent to which it ought to be adopted in Singapore.

150 There is a dearth of local authorities dealing specifically with the issues raised in the English cases of *Shaw*, *R v H (J)*, and *Docherty*. Most of the local cases which touch on changes to the amount of penalty between the time an offence was committed and the time of sentencing concern cases where the penalty had been enhanced. The reason for this could be that, while legislative amendments to enhance prescribed penalties was a common occurrence in Singapore, amendments to reduce the penalty was comparatively rare. The dearth of local authorities is, by itself, no obstacle to the adoption of the sentencing practice illustrated by *Shaw*, *R v H (J)*, and *Docherty*. It is not uncommon for Singapore courts, when faced with novel issues, to consider the sentencing practice of the English courts and to adopt or adapt those practices where appropriate to local circumstances.

151 That being said, there are a couple of local cases which merit consideration. The first case is *Kalaiarasi d/o Marimuthu Innasimuthu v Public Prosecutor* [2012] 2 SLR 774 ("*Kalaiarasi*"), where the offender pleaded guilty in 2011 to three offences under the Bankruptcy Act (Cap 20, 2009 Rev Ed) which were committed in 2002 and 2003. Between these two dates, ss 335–354 of the Criminal Procedure Code 2010 (Act 15 of 2010) (the "CPC 2010") introduced certain new sentencing options known as "community-based sentences". At first instance, the District Judge sentenced the offender to eight week's imprisonment. On appeal to the High Court, V K Rajah JA set aside the sentence of imprisonment and granted a conditional discharge pursuant to the Probation of Offenders Act (Cap 252, 1985 Rev Ed). In his reasoning Rajah JA extensively discussed whether one of the new community-based sentences should be applied. In the end, he decided that, on the facts, it would not appropriate to do so as rehabilitation was not a particularly strong consideration in the circumstances. Nevertheless, the reasoning in that case demonstrates that

Rajah JA proceeded on the basis that community-based sentences were applicable to the offender notwithstanding that her offences were committed before the enactment of community based sentences (although Rajah JA did not give any reasons in his judgment as to why this should be so).

152 The second case was *Public Prosecutor v Loy Zhong Huan, Dylan* [2019] SGDC 139 ("*Dylan Loy*"), where the offender pleaded guilty in 2019 to an offence of voluntarily causing grievous hurt committed in 2016. Between those two dates, s 88(*b*) of the Criminal Justice Reform Act 2018 (Act 19 of 2018) and reg 16 of the Criminal Procedure Code (Reformative Training) Regulations 2018 came into force, and reduced the minimum detention period for reformative training from 18 months to six months. At first instance, the district judge sentenced the offender to reformative training with a minimum detention period of six months. This sentence was affirmed on appeal to the High Court (*Loy Zhong Huan Dylan v Public Prosecutor* [2019] SGHC 283 ("*Dylan Loy (HC)*")). Neither the district judge nor the High Court provided any reasons for applying the lower minimum detention period of six months even though the offence was committed before this lower minimum came into force.

153 The Prosecution noted that, despite the absence of relevant explanation in the respective judgments, both of these cases could be explained on the basis of the relevant transitional provisions – *ie*, s 429 of the CPC 2010 and reg 2 of the Criminal Procedure Code (Transitional Provisions – Further Proceedings and Joint Trials) Regulations 2011 in the case of *Kalaiarasi* and reg 3 of the Criminal Procedure Code (Reformative Training) Regulations 2018 in the case of *Dylan Loy*. The Prosecution therefore submitted that the position taken by the courts in these two cases were the result of *legislative design*, and not

evidence of judicial sentencing practice.[44] I agree with this submission. In fact, a further example of such legislative design was referred to at [127] above.

154 The existence of these examples of legislative design in our law raised the question whether the substantive principles underlying these legislative examples would provide an impetus for the courts in Singapore to develop or adopt a sentencing practice similar to the English Sentencing Practice. As noted by Lord Diplock in *Erven Warnink BV v J Townsend & Sons (Hull) Ltd* [1979] AC 731 (at 743):

> Where over a period of years there can be discerned a steady trend in legislation which reflects the view of successive Parliaments as to what the public interest demands in a particular field of law, development of the common law in that part of the same field which has been left to it ought to proceed upon a parallel rather than a diverging course.

The High Court of Australia had similarly observed in *Esso Australia Resource Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at [19] that:

> Significant elements of what now is regarded as "common law" had their origin in statute or as glosses on statute or as responses to statute. For example, in *Peters v The Queen*, McHugh J explained the derivation of the criminal law of conspiracy from statutes enacted in the thirteenth century. … The Statute of Limitations in its terms does not operate directly upon equitable remedies, but, as Dixon J put it in *Cohen v Cohen*, "such remedies are barred in courts of equity by analogy to statute". …

155 It was not necessary for me to form a definitive view on the question raised in the previous paragraph or, indeed, on the broader question framed at [149] above. This was because, as explained below, even if I were to accept that the English Sentencing Practice applied in Singapore, I did not think it should apply in the case of s 512(3)(*a*) of the Post-2019 Amendment PC.

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44 Prosecution's written submissions dated 25 May 2023 at paras 8 and 18.

156 The rationale for the English Sentencing Practice was explained by the UK Supreme Court in *Docherty* at [42] as the courts "abstaining from imposing a sentence now recognised as excessive". The Defence also cited a case from the State of New York, where a similar sentencing practice applies, which explained the rationale for this sentencing practice in the following terms (*The People of the State of New York v Jerome Walker* 81 N.Y.2d 661 (1993); 623 N.E.2d 1 (N.Y. 1993) at 5):

> …where a reduction in the penalty for a crime indicates a legislative judgment that the lesser penalty adequately meets all the legitimate ends of the criminal law, imposing a harsher penalty would be an exercise in vengeance, which the law does not permit …

These two formulations of the rationale essentially said the same thing – where a legislative amendment to provide a lighter punishment indicates a legislative judgement that the previous sentence is now recognised as excessive, the court should sentence according to the new, lighter punishment. While this rationale would likely fit the examples referred to at [127], [128], [130], [151] and [152] above, it did not fit s 512(3)(*a*) easily.

157 Section 512 of the Post-2019 Amendment PC was enacted to give effect to the recommendation of the PCRC that "attempts should generally be punishable with the same prescribed punishments as the primary offence, save where express provision is made by the Penal Code or any other written law" (Penal Code Review Committee Report 2018 (the "PCRC Report"), at 201). In recommending the removal of the statutory one-half limit, the PCRC Report explained (at 202) that "[t]here is no reason in principle why someone who attempts an offence is only half as blameworthy as someone who has completed the offence". The PCRC Report went on to refer (at 202) to the case of *Huang Shiyou* in which the accused pleaded guilty and was convicted on five charges

including one charge of attempted rape. In that case, the victim's evidence, in relation to the charge of attempted rape, was that she felt something poking her vagina about ten times before the offender desisted and left (*Huang Shiyou* at [8]). To the PCRC, *Huang Shiyou* illustrated the arbitrariness of the statutory one-half limit because the culpability of the offender in that case was "not, by any measure, half of the culpability of a person who had completed the offence" (at 202).

158 Thus, s 512 of the Post-2019 Amendment PC came about because the PCRC regarded the punishment prescribed in s 511 of the Pre-2019 Amendment PC as inadequate. In the circumstances, the enactment of s 512(3)(*a*) did *not* indicate a legislative judgement that the previous sentence was now recognised as excessive. For this reason, I held that there was no room for applying the English Sentencing Practice (even assuming it represents the legal position in Singapore) to s 512(3)(*a*).

Section 16(1) of the Interpretation Act

159 Section 16(1)(*d*) and (*e*) of the Interpretation Act provide:

> **16.**—(1) Where a written law repeals in whole or in part any other written law, then, unless the contrary intention appears, the repeal does not —
>
> …
>
> (*d*) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any written law so repealed;
>
> (*e*) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed.

At first blush, s 16(1)(*d*) appears to preclude giving retrospective effect to a new legislative provision which enacts a lighter punishment for an existing offence, and consequently preclude an affirmative answer to Issue B.

160 As the parties' and the YIC's written submissions did not refer to s 16(1)(*d*) of the Interpretation Act, I directed parties and the YIC to submit on the relevance and impact of s 16(1)(*d*) to the resolution of Issue B at the second sentencing hearing. The Prosecution submitted that the effect of s 16(1)(*d*) and (*e*) taken together is that any punishment incurred under a repealed law would still apply unless the contrary legislative intention appears. The exercise of determining whether such contrary intention exists would be no different from the exercise to be carried out under the *ABU* framework. Referring to the Court of Appeal's citation of s 16(1) of the Interpretation Act in *ABU* at [57], the Prosecution submitted that s 16(1) statutorily enshrines the principle that the court will lean against interpreting statutes as having retrospective application unless clear words are stated to this effect.[45] The Defence submitted that s 16(1)(*d*) did not affect the resolution of Issue B because the word "incurred" in the provision refers to a sentence that had already been imposed. Since the court had not yet imposed any sentence in the present case, s 16(1)(*d*) of the Interpretation Act had no application in the present case.[46] The YIC submitted that the purpose of s 16(1)(*d*) is to keep intact liabilities incurred under a repealed provision prior to its repeal. It is therefore a provision dealing with the continued application of a repealed provision, and not so much with the retrospectivity of newly enacted provisions. Section 16(1)(*d*) therefore had no

45 Transcript of 19 April 2023 at pp 31 to 33.

46 Transcript of 19 April 2023 at p 72.

application to the question of retrospectivity of s 512(3)(*a*) of the Post-2019 Amendment PC.[47]

161 Section 16(1)(*d*) and (*e*) of the Interpretation Act were modelled after s 38(2)(*d*) and (*e*) of the UK's Interpretation Act 1889 (c 63) (the "Interpretation Act 1889 (UK)"), which were subsequently repealed and re-enacted as s 16(1)(*d*) and (*e*) of the UK's Interpretation Act 1978 (c 30) (the "Interpretation Act 1978 (UK)"). The mischief sought to be addressed by s 38(2) of the Interpretation Act 1889 (UK) and, by extension s 16(1) of the Interpretation Act 1978 (UK), is explained in the following passage from *Craies on Legislation* (Daniel Greenberg gen ed) (Thomson Reuters, 12th Ed, 2020) (at p 814):

> The effect of a repeal unless savings are made is expressed in the following dicta –
>
> > "I take the effect of repealing a statute to be to obliterate it as completely from the records of Parliament as if it had never been passed; and it must be considered as a law that never existed except for the purpose of those actions which were commenced, prosecuted and concluded while it was an existing law." [*fn*: Tindal CJ in *Kay v Goodwin* (1830) 6 Bing. 576, 582]
> >
> > It has long been established that, when an Act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed." [*fn*: Lord Tenterden in *Surtees v Ellison* (1829) 9 B. & C. 750, 752]
>
> The result is that an offence committed against a penal Act while it was in force could not be prosecuted after the repeal of the Act. [*fn*: *R v M'Kenzie* (1820) Russ. & R. 429] And pending proceedings could not be further continued after the repeal, even to the extent of applying for a certificate for costs. [*fn*: *Morgan v Thorne* (1841) 7 M. & W. 400; *Butcher v Henderson* (1868) L.R. 3 Q.B. 335]
>
> The position is altered by the Interpretation Act 1978, [*fn*: 1978 c.30; and similar provisions were included in the Interpretation Act 1889 c.63] ss. 15 and 16 of which deal with

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47 Transcript of 19 April 2023 at pp 103 to 104.

> the construction and application of one provision which repeals another.

Thus s 16(1)(*d*) and (*e*) of the Interpretation Act were enacted to reverse the common law rule that an offence committed against a penal provision while it was still force could not be proceeded with after the repeal of the provision.

162 I begin by observing that the existence of provisions equivalent to s 16(1)(*d*) and (*e*) of the Interpretation Act in the Interpretation Act 1978 (UK) has not precluded the English courts from passing sentence according to the punishment provisions prevailing at the time of sentencing, irrespective of when the offence was committed. Although the three cases considered at [130]–]133] above did not discuss the relationship between s 16(1)(*d*) and (*e*) of the Interpretation Act 1978 (UK) and the English Sentencing Practice, this issue was discussed in the earlier case of *Potter v Manning* [1984] Lexis Citation 2023, (1984) Times, 23 March ("*Potter v Manning*"). That case concerned changes to the system for disqualification of repeat traffic offenders made by the Transport Act 1981 (c 56) (the "Transport Act 1981 (UK)") with effect from 1 November 1982. The change involved replacing what was known as the "toting up" system under s 93(3) and (5) of the Road Traffic Act 1972 (c 20) with a "penalty points" system introduced by s 19 of the Transport Act 1981 (UK). The accused was charged with an offence committed on 23 October 1982 and the question was whether the court should apply the old "toting up" system or the new "penalty points" system. In deciding that the new "penalty points" system applied, Glidewell J held that s 16(1)(*d*) and (*e*) of the Interpretation Act 1978 (UK) had "no applicability" to the question at hand, reasoning that:

> …sub-paragraph (d) relates to any penalty or punishment incurred in respect of any offence committed against that enactment, that is to say, the enactment repealed. Sub-paragraph (e) relates to any such penalty or punishment, which can only mean, reading back, a penalty or punishment of the

> kind referred to in sub-paragraph (d), that is to say, for an offence committed against a repealed enactment.
>
> In this case the enactment with which we are concerned which has been repealed, that is to say, section 93(3) and (5) of the Road Traffic Act 1972, is not an enactment which creates or in any way deals with an offence. That section, as my lord has made clear, was part of a group of sections dealing with a particular penalty which might result for the commission of an offence, the penalty being the disqualification from holding a driving licence for a given period of time. Thus, in my view, this case is not concerned in any way with the matter dealt with in section 16(1)(d) and (e) of the Interpretation Act 1978, that is to say, the repeal of a statutory provision which creates or contains within it an offence.

163 The decision in *Potter v Manning* is summarised in *Bennion* in the following terms (at p 301):

> …s 16(1)(d) and (e) do not apply where a penalty-creating provision is repealed, but the offence creating provision is not. They only save a penalty, etc for an offence *against the enactment repealed.*
>
> [emphasis in original]

Since s 511 of the Pre-2019 Amendment PC was not just a penalty-creating provision but also an offence creating provision, it would seem from the foregoing that s 16(1)(*d*) and (*e*) of the Interpretation Act *are applicable* to the repeal of s 511 of the Pre-2019 Amendment PC. A further question which might be asked is whether s 16(1)(*d*) and (*e*) of the Interpretation Act, assuming they apply to the repeal of s 511 of the Pre-2019 Amendment PC, merely apply to preserve the ability to prosecute an offence committed against the repealed s 511 (without also preserving the prescribed punishment) or preserve both the ability to prosecute and the punishment prescribed under the repealed s 511.

164 It is not necessary for me to reach a definitive view on this further question. This is because in either case, the answer to Issue B would still be in the negative. On the one hand, if s 16(*d*) and (*e*) of the Interpretation Act were

inapplicable to preserve the continued application of the prescribed punishment under the repealed s 511 of the pre-2019 Amendment PC, the answer to Issue B would fall to be determined without regard to s 16(*d*) and (*e*) of the Interpretation Act – *ie,* the answer would be determined through the analysis undertaken at [145]–[158] above, which analysis would lead to Issue B being answered in the negative. On the other hand, if s 16(*d*) and (*e*) of the Interpretation Act were applicable to preserve the continued application of the prescribed punishment under the repealed s 511 of the pre-2019 Amendment PC in the present case, this would point towards a negative answer for Issue B "unless a contrary intention appears". As submitted by the Prosecution, the determination of whether a contrary intention exists would involve an inquiry similar to that applicable under the *ABU* framework. Alternatively, it might involve an inquiry along the lines pursued at [156]–[158] above. Both lines of inquiry would lead to the conclusion that no contrary intention appears, with the result that the negative answer to Issue B is not displaced by any contrary intention.

165 Before leaving the discussion on s 16(1)(*d*) and (*e*) of the Interpretation Act, I should make two observations about the Defence's and the YIC's submissions. First, I did not agree with the Defence that the term "incurred" in s 16(1)(*d*) of the Interpretation Act refers to a punishment that has already been imposed by the court as opposed to a punishment which the accused is merely liable to receive from the court in upcoming or pending proceedings for an offence previously committed. Reading the provision in the way suggested by the Defence would leave little or no scope for s 16(1)(*d*) to apply and effectively render the provision otiose. Second, while I agreed with the YIC that s 16(1)(*d*) and (*e*) of the Interpretation Act are framed as provisions dealing with the continued application of a repealed provision after its repeal and not a provision

dealing with the retrospective application of a new provision enacted in place of the repealed provision, I did not think that this distinction was of practical significance in the present case. The question of continued application of the repealed s 511 of the pre-2019 Amendment PC and the question of retrospective effect of s 512(3)(*a*) of the post-2019 Amendment PC are really two sides of the same coin.

Conclusion on Issue B

166 Irrespective of whether Issue B is analysed through the lens of the *ABU* framework or through the lens of the English sentencing practice, and irrespective of whether s 16(1)(*d*) and (*e*) of the Interpretation Act are factored into the analysis, the conclusion is the same – s 512(3)(*a*) could not be applied retrospectively. Consequently, I answered Issue B in the negative.

The sentence to be imposed

Brief facts

167 According to the Statement of Facts, the offences under the First Charge and the Third Charge took place a few weeks apart in or around 2013, when the Victim was only 4 to 5 years old. The *modus operandi* for both offences were similar. When the Victim's mother was not at home, the Accused asked the Victim to follow him into one of the bedrooms in their flat.[48] After removing the Victim's shorts and panties, the Accused attempted to penetrate her vagina with his penis, but was unable to do so because her vagina was too small.[49] In relation to the First Charge, the Statement of Facts recorded that the Victim told the Accused that it was painful when the Accused was trying to put his penis into

48 Statement of Facts at paras 4 and 9.

49 Statement of Facts at paras 5 and 9.

her vagina.[50] In relation to the Third Charge, the Statement of Facts did not expressly mention pain, but recorded that the Accused "rubbed his penis against the Victim's vagina, and the Victim cried".[51] On both occasions, the Accused ejaculated outside the Victim.[52]

168 It was also recorded in the Statement of Facts, and therefore undisputed, that there were subsequent occasions, up till the time the Victim was in early primary school, where the Accused committed acts of attempted rape against the Victim, but the Victim was unable to particularise these other incidents due to the passage of time and her young age.[53]

169 It was also pertinent to note that two of the TIC offences, which the accused admitted to, involving the accused taking photographs of the Victim's genitals without her consent, were committed in 2020, seven years after the events of the First Charge and Third Charge.

170 As a result of these offences, the Victim suffered severe psychological harm. She was diagnosed with Adjustment Disorder with Mixed Anxiety and Depressed Mood.[54] She blamed herself for what the accused did to her. She engaged in self-harm. She had intrusive memories of the incidents and exhibited negative feelings of disgust and discomfort. She suffered from attentional and sleep difficulties. Her mood and daily functioning had been affected.

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50 Statement of Facts at para 6.

51 Statement of Facts at para 9.

52 Statement of Facts at paras 6 and 9.

53 Statement of Facts at para 11.

54 Statement of Facts at para 17.

Parties' submissions

171 As noted at [10]–[11] above, the Prosecution sought a sentence of eight and a half to nine years' imprisonment and 12 strokes of the cane for each proceeded charge, with the imprisonment terms running concurrently, while the Defence's initial written submissions argued for a sentence of six and a half years' imprisonment and 12 strokes of the cane for each charge, also running concurrently. However, in its third set of written submissions, the Defence submitted that the sentence should be three and a half years and six strokes of the cane for each charge, by analogy with the sentence imposed in *PP v BLV* [2020] 3 SLR 166 ("*BLV*") for the offence of aggravated outrage of modesty under s 354(2) of the PC.[55]

172 The Defence reasoned that, since the acts of the Accused in the present case was virtually indistinguishable from that in *BLV* (where the facts involved the accused rubbing his penis against the vagina and anus of the victim), there should not be a huge uplift in the present case compared to the sentence meted out in *BLV*. The Defence further clarified that this new sentencing submission was made on the basis of the Second Interpretation. If, however, the court were to favour the Third Interpretation, it would stick with its initial submission for six and a half years' imprisonment on each charge.[56]

Dominant sentencing considerations

173 Given that the proceeded charges concern sexual offences and given the youth and vulnerability of the Victim, general deterrence was a dominant sentencing consideration in this case. Moreover, given the premeditated nature

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55 Defence's written submissions dated 24 March 2023 at paras 7–8 and 12.

56 Transcript of 19 April 2023 at pp 75 to 77.

of the offences and the significant number of TIC charges, specific deterrence was also a relevant consideration. Finally, retribution was also a relevant consideration given the severe psychological harm suffered by the Victim.

Relevant sentencing framework

174 In *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 ("*Terence Ng*"), the Court of Appeal laid down a three-band sentencing framework for the offence of rape (the "*Terence Ng* framework"). In the light of the statutory one-half limit in s 511 of the Pre-2019 Amendment PC, it was decided in *Public Prosecutor v Ridhaudin Ridhwan bin Bakri and others* [2020] 4 SLR 790 ("*Ridhaudin*") that, in the case of attempted rape, the sentence should be determined by adapting the *Terence Ng* framework through halving the sentencing ranges for each of the three sentencing bands of the *Terence Ng* framework (at [100] and [102]). I refer to this modified *Terence Ng* framework as the "*Ridhaudin* framework". The sentencing bands for attempted rape offences under the *Ridhaudin* framework are summarised below:

Band 1	5 – 6.5 years' imprisonment and 3 strokes of the cane
Band 2	6.5 – 8.5 years' imprisonment and 6 strokes of the cane
Band 3	8.5 – 10 years' imprisonment and 9 strokes of the cane

175 As noted at [171]–[172]]above, the Defence's final submission was that the sentence should be three and a half years and 6 strokes of the cane for each charge, by analogy with the sentences for aggravated outrage of modesty. I did

not accept this submission. While it may be true that, in certain fact situations, the physical acts involved in an offence of outrage of modesty may be very similar to the physical acts involved in an attempted rape offence, the key difference between the two offences is the *mens rea*. This difference in *mens rea* fundamentally affects the seriousness of the offence and the culpability of the offender, thereby calling for different levels of punishment. Instead, the correct approach is to determine the appropriate sentence by applying the *Ridhaudin* framework. As I have answered Issue A in the negative, I applied the *Ridhaudin* framework without regard to any minimum sentences prescribed for the primary offence of aggravated rape.

Offence-specific aggravating factors

176 The offence-specific aggravating factors in the present case were:

(a) Grave abuse of position and authority: The Accused was the Victim's father. This parent-child relationship was the ultimate relationship of trust, which the Accused had betrayed and abused.

(b) Youth and vulnerability of the victim: The Victim was only four to five years old at the time. She was at an age when she was practically defenceless and could not understand what the Accused was trying to do to her.

(c) Premeditation: The Accused committed the offences when the Victim's mother was not at home, and he isolated the Victim by luring her into the bedroom, and closed and locked the door. In the incident which was the subject of the First Charge, the Accused distracted the

Victim by instructing her to watch YouTube videos on his mobile phone while he attempted to penetrate her vagina with his penis.[57]

(d) Severe psychological harm: This was explained at [170] above.

177 These offence-specific factors would place both proceeded charges in Band 2 of the *Ridhaudin* framework, with a sentencing range of 6.5 to 8.5 years' imprisonment and 6 strokes of the cane (see [174] above). As the Court of Appeal noted in *Terence Ng* (at [53]):

> Band 2 comprises cases of rape which are properly described as being of a higher level of seriousness. Such cases would usually contain two or more of the offence-specific aggravating factors (such as those listed at [44] above), thus underscoring the seriousness of the offence. A paradigmatic example of a band 2 case would be the rape of a particularly vulnerable victim coupled with evidence of an abuse of position (such as where the rape took place in a familial context, as was the case in *PP v NF*) ([1] *supra*). Cases which contain any of the statutory aggravating factors and prosecuted under s 375(3) of the Penal Code will almost invariably fall within this band. At the middle and upper reaches of this Band are offences marked by serious violence and those which take place over an extended period of time and which leave the victims with serious and long-lasting injuries physical or psychological injuries.

178 It was undisputed that the offences committed by the Accused on the Victim took place over an extended period of time (see [169] above) and that the Victim was left with long-lasting psychological injuries. This would place the present case in the "middle and upper reaches" of Band 2. There were two other relevant considerations arising from the fact that we are sentencing for *attempted* offences, the punishment for which was subject to the statutory one-half limit. First, the severity of the *psychological* harm suffered by the Victim in the present case appeared to be not dissimilar in nature and gravity to those

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57 Statement of Facts at paras 4–6.

suffered by victims of rape. Therefore, although there was reduced harm by virtue of the inchoate nature of the offences (*ie*, no actual penetration took place), the psychological harm caused to the Victim was by no means insubstantial. This was relevant for determining the indicative starting sentence. Second, it was also relevant to consider the reasons the attempt did not proceed to completion, and the extent that the attempt had progressed towards completion before it was stopped or called off as that would affect the court's assessment of the culpability of the offender. In the present case, the attempts had progressed almost to completion and were unsuccessful because the Victim's vagina was too small.

179 In the circumstances, I considered that an appropriate indicative starting sentence of imprisonment would be eight and a half years for each of the proceeded charges, which was at the top end of Band 2 of the *Ridhaudin* framework. As for the appropriate indicative starting sentence of caning, I noted that the *Ridhaudin* framework halves the sentence for caning as compared to the *Terence Ng* framework, even though s 511 of the Pre-2019 Amendment PC only halved the maximum imprisonment term and did not halve the maximum number of strokes of the cane. I did not think it was wrong in principle for the *Ridhaudin* framework to halve the number of strokes of the cane in this way, as doing so gave effect to the purpose of not punishing an attempt as severely as the completed offence. Nevertheless, since the maximum number of strokes of the cane had not been halved by s 511, there is scope for a sentencing court to exercise greater flexibility in departing from the indicative starting sentence of caning in the *Ridhaudin* framework in appropriate cases. This would allow the court to more accurately capture the seriousness of the offence and culpability of the offender. It would also enable the court to make use of the full range of the sentence of caning prescribed. In this regard, I considered it appropriate to

adopt nine strokes as the indicative starting point for each of the proceeded charges in order to take proper account of the factors highlighted at [178] above and send a strong message that society will not tolerate sexual abuse of a child by someone occupying a position of trust and authority over the child.

Offender-specific factors

180 The three TIC offences were relevant offender-specific aggravating factors. In this regard, I took the Second Charge into consideration for the sentencing of the First Charge and took the Fourth Charge and Fifth Charge into consideration for the sentencing for the Third Charge.

181 The Prosecution also submitted that the Accused's paedophilic disorder is a relevant aggravating factor.[58] In the absence of psychiatric evidence indicating that the Accused's condition would lead to a higher risk of re-offending, I did not give much weight to this as an aggravating factor.

182 The Prosecution accepted that the Accused elected to plead guilty at a relatively early stage in the proceedings.[59] This ought to be accorded due mitigating weight.

183 Balancing the offender-specific aggravating factors against the offender-specific mitigating factors, I calibrated the sentence for each of the proceeded charges downwards to 8 years' imprisonment and 8 strokes of the cane (subject to possible subsequent adjustments on account of the totality principle).

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58 Prosecution's written submissions dated 8 November 2022 at para 22.

59 Prosecution's written submissions dated 8 November 2022 at para 23.

Global sentence

184 As the two proceeded charges concerned offences which took place a few weeks apart, they were considered unrelated offences which were subject to the general rule of consecutive sentences for unrelated offences (*Public Prosecutor v Raveen Balakrishnan* [2018] 5 SLR 799 ("*Raveen Balakrishnan*") at [41]). In its written submissions, the Prosecution proposed that the imprisonment terms of the two proceeded charges should run concurrently on account of the totality principle.[60] The totality principle is a recognised qualification to the general rule of consecutive sentences for unrelated offences (*Raveen Balakrishnan* at [58] and [65]). In addition, as the general rule of consecutive sentences for unrelated offences is neither invariable nor mandatory, it is sometimes appropriate for a court to choose *not* to run the sentences for unrelated offences consecutively (*Raveen Balakrishnan* at [66]).

185 At the second sentencing hearing, the Prosecution explained its decision to seek concurrent sentences by pointing out that, if the court were to accept the Prosecution's submission to impose a sentence of eight and a half to nine years for each charge, an aggregate sentence of 17 to 18 years arrived at by running the two sentences consecutively would not be consistent with the totality principle.[61] The Prosecution also submitted that, if the court were to accept the Defence's submission to impose a sentence of six and a half years on each charge, an aggregate sentence of 13 years would not offend the totality principle, and it would be appropriate to run the two sentences consecutively.[62] The Defence objected to this latter submission by referring to the Prosecution's

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60 Prosecution's written submissions dated 8 November 2022 at paras 3 and 26.

61 Transcript of 19 April 2023 at p 57 (lines 17 to 20).

62 Transcript of 19 April 2023 at p 57 (lines 27 to 28) and p 58 (lines 6 to 8).

indication to the Defence, before the Accused decided to plead guilty, that the Prosecution would be asking for the sentences to run concurrently.[63] Although the Prosecution responded by explaining that their representation to the Defence was made on the basis of the Prosecution's sentencing position of eight and a half to nine years, the Prosecution also indicated to the court that they would not be pursuing the point concerning consecutive sentences.[64]

186 I agreed with the Prosecution that the effect of an aggregate sentence of 17 to 18 years would not be consistent with the totality principle. By the same token, an aggregate sentence of 16 years, by running consecutively the two eight-year sentences I had decided to impose, would similarly not be consistent with the totality principle. I also agreed with the Prosecution that an aggregate sentence of 13 years would be proportionate to the offender's overall criminality; *ie* it would not offend the totality principle. I therefore had the option to adjust the individual sentences downwards and run them consecutively so as to arrive at an aggregate sentence of 13 years or thereabouts (see *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [59] and [61]). As an aside, this option would not have been available had I answered Issue A in the affirmative, as it would then not be possible for me to adjust the individual sentences below eight years. This probably explained why the Prosecution, having taken the position that Issue A should be answered in the affirmative, was constrained to submit that the sentences should run concurrently.

187 I next considered the significance of the Defence's indication that the Accused had pleaded guilty on the basis of the Prosecution's representation that it was not seeking an aggregate sentence higher than nine years, and the

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63 Transcript of 19 April 2023 at p 58 (lines 15 to 25).

64 Transcript of 19 April 2023 at p 64 (line 21) to p 65 (line 13).

Prosecution's indication to the court that it would not be seeking consecutive sentences even if the individual sentences imposed by the court were lower than eight and a half years each (see [185] above). It was held in *Janardana Jayasankarr v Public Prosecutor* [2016] 4 SLR 1288 at [12] that, because sentencing is ultimately a matter for the court, the defence's submissions on sentence is not necessarily the lower limit of the sentence which the court may impose and the Prosecution's submissions on sentence is not the upper limit of the sentence that may be meted out. Consequently, I considered that I was not obliged to run the sentences concurrently, despite both the Prosecution's and the Defence's submissions to the contrary.

188 In the light of the foregoing, I decided that the appropriate course of action was to adjust the individual sentences down to six and a half years each, and run them consecutively to arrive at the aggregate sentence of 13 years, which I considered to be proportionate to the Accused's overall criminality.

Conclusion

189 For reasons given above, I sentenced the Accused to:

(a) six years and six months' imprisonment and eight strokes of the cane for the First Charge; and

(b) six years and six months' imprisonment and eight strokes of the cane for the Third Charge.

190 The sentences were to run consecutively. The global sentence was therefore 13 years' imprisonment and 16 strokes of the cane. The commencement of the imprisonment term was backdated to 27 January 2022, the date of his arrest.

191 It remains for me to record my appreciation to counsel for the Prosecution, counsel for the Accused and the YIC for their able submissions and for the invaluable assistance they have provided to the court.

Pang Khang Chau
Judge of the High Court

Kristy Tan Ruyan SC and Sivanathan Jheevanesh (Attorney-General's Chambers) for the Prosecution;
Akesh Abhilash (Harry Elias Partnership LLP) for the accused;
Chin Yan Xun (WongPartnership LLP) as young independent counsel.