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

[2025] SGHC 89

Criminal Case No 64 of 2018

Between

Public Prosecutor

And

Mark Kalaivanan s/o
Tamilarasan

GROUNDS OF DECISION

[Criminal Procedure and Sentencing] — [Sentencing] — [Principles] — [Discretion to impose imprisonment in lieu of caning]

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v
Mark Kalaivanan s/o Tamilarasan

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General Division of the High Court — Criminal Case No 64 of 2018
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14 May 2025

Pang Khang Chau J:

Introduction

1 The offender in this case, Mark Kalaivanan s/o Tamilarasan ("the Offender"), was sentenced to 20 years' preventive detention and 12 strokes of the cane after having been convicted of aggravated sexual assault by penetration ("SAP") and three other related charges. As the Offender was subsequently certified to be unfit for caning, the Prosecution asked that an additional imprisonment term of six months be imposed in lieu of caning. I declined to do so, and the Prosecution has appealed against my decision.

Background

Brief facts

2 On 15 July 2017, after having spent the previous night drinking with some friends at a friend's home and most of the morning drinking with those friends at the void deck of a block of flats, the Offender decided to take a walk by himself. He ended up at Block 18 Marine Terrace ("Block 18") and decided to take the lift up the block. After exiting the lift, he walked along the 10th floor of Block 18 and took a flight of stairs down to the 9th floor, where he found that the front door of a flat was not locked ("the Flat"). He let himself into the Flat and found the domestic helper of the family ("the Victim") ironing clothes in her bedroom. The Offender falsely identified himself as a police officer and asked for the Victim's passport, work permit and money. The Victim tried calling her employer using her handphone but the Offender snatched the handphone away. He then proceeded to grab her left breast and touch her right thigh. Next, the Offender pulled the Victim into the toilet, threatened to hit her, made her sit on the toilet bowl, and inserted his penis into her mouth without her consent.

The charges

3 Arising from the foregoing facts, the Offender was tried before me and convicted of the following four charges:

(a) one charge of aggravated SAP punishable under s 376(4)(*a*)(ii) of the Penal Code (Cap 244, 2008 Rev Ed) (the "Penal Code") ("First Charge");

(b) one charge of house-trespass in order to commit the offence of sexual assault punishable under s 448 of the Penal Code ("Second Charge");

(c) one charge of outrage of modesty punishable under s 354(1) of the Penal Code ("Third Charge"); and

(d) one charge of personating a public officer punishable under s 170 of the Penal Code ("Fourth Charge").

Sentence imposed at first instance

4 For the purposes of sentencing, nine other charges were taken into consideration ("TIC") – namely, two charges of impersonating an immigration officer, one charge of possession of obscene films, one charge of possession of films without a valid certificate, one charge of theft, one charge of voluntarily causing hurt and three charges of being a member of an unlawful society. The first two TIC charges concerned offences which were also committed on 15 July 2017, but against the occupants of a flat on the 10th floor of Block 18, while the remaining TIC charges concerned offences committed on other occasions.[1]

5 The Prosecution sought a sentence of 20 years' preventive detention. The Prosecution noted that, if the Offender were not sentenced to preventive detention, the likely global sentence of imprisonment would be 17 to 18 years, comprising likely sentences of 16 to 17 years for the First Charge and 12 to 15 months for the Third Charge.[2] The Prosecution calculated that, with one-third remission, the Offender would likely be released back into society after about

[1] Prosecution's Sentencing Submissions filed on 3 June 2022 ("PSS") at para 41.

[2] PSS at paras 23–26.

12 years. According to the Prosecution, taking the Offender out of circulation for merely 12 years would not be adequate to meet the need for public protection having regard to his long string of antecedents, his lack of remorse and the high risk of him reoffending.[3]

6 The Defence opposed the imposition of preventive detention and submitted instead that a global sentence of 12 years and eight months' imprisonment and 12 strokes of the cane would be appropriate.

7 I agreed with the Prosecution that this was a suitable case for imposing the maximum preventive detention term of 20 years. In arriving at this view, I took into account the following factors:

(a) The Offender had a long string of antecedents, having been convicted previously no less than six times and been sentenced to a total of no less than 22 years in prison in total.

(b) The Offender had been unresponsive to previous punishment. In 1995, he was convicted of two charges of theft and fined $2,000. The following year, he was convicted of theft in dwelling and imprisoned for six weeks. Later in the same year, he was convicted again of theft in dwelling and sentenced to reformative training. In 1999, he was convicted of theft of motor vehicles and sentenced to two years' imprisonment. In 2003, he was convicted again of theft of motor vehicle and sentenced to four years' imprisonment. Most importantly, later that year, he was convicted of aggravated rape and abetting aggravated rape and sentenced to 16 years' imprisonment and 24 strokes of the cane. Yet the Offender was not deterred from committing another offence of a

[3] PSS at para 26.

similar nature (*ie*, the First Charge) soon after his release from prison in 2014.

(c) According to the preventive detention suitability reports, the Offender's likelihood of reoffending is high.

8 Since the Offender had already been in remand for about six years at the time of sentencing, I considered the question of possible backdating of the preventive detention sentence to take into account the period spent by the Offender in remand. At the time the offences were committed in 2017, there were no express provisions in Criminal Procedure Code (Cap 68, 2012 Rev Ed) (the "CPC") on the backdating of sentence of preventive detention. However, in *Public Prosecutor v Rosli bin Yassin* [2013] 2 SLR 831 ("*Rosli*") at [20], the Court of Appeal held that, notwithstanding the absence of statutory provisions which confer on the court an express power to backdate a sentence of preventive detention, the time which an offender has spent in remand could be a possible factor which the court takes into account in considering the overall length of the sentence of preventive detention to be meted out. However, the Court of Appeal went on to observe that such a factor would probably operate in favour of the offender only in exceptional cases.

9 In 2018, the CPC was amended by s 90 the Criminal Justice Reform Act 2018 (Act 19 of 2018) ("CJRA") to insert a new s 318(3) in the CPC to expressly empower the court to backdate a sentence of preventive detention. Since the present offences were committed in 2017, a question which arose was whether the new statutory power to backdate sentences of preventive detention was applicable to offences committed before the CJRA came into force. As the answer to this question could not be found in the transitional provisions of the CJRA, this would appear to be a question to be resolved by reference to some

of the principles discussed in *Public Prosecutor v CRH* [2024] SGHC 34 at [129]–[134] and [150]–[154]. In the event, both the Prosecution and the Defence accepted the applicability of the new s 318(3) of the CPC to the offences in the present case which were committed before the commencement of the CJRA.

10 However, the Prosecution submitted that, notwithstanding that the new s 318(3) of the CPC applied, the court should continue to be guided by the Court of Appeal's observations in *Rosli* when applying s 318(3) of the CPC, and confine the backdating of preventive detention sentences to exceptional cases. I accepted the Prosecution's submission and decided to take only partial account of the period of remand by reducing the period of preventive detention by two years, without having to backdate the sentence. Consequently, at the hearing on 7 August 2023, I sentenced the Offender to preventive detention for 18 years with no backdating.

11 In addition, as the First Charge carried a mandatory minimum sentence of 8 years' imprisonment and 12 strokes of the cane pursuant to s 376(4) of the Penal Code, I also sentenced the Offender to 12 strokes of the cane for the First Charge.

Offender's appeal to the Court of Appeal

12 The Offender appealed to the Court of Appeal against both conviction and sentence. However, prior to the hearing of his appeal, the Offender withdrew his appeal against conviction and proceeded only with his appeal against sentence. At the hearing on 9 September 2024, the Court of Appeal issued an oral decision in which the Offender's sentence was adjusted by (a) increasing the period of preventive detention to the maximum of 20 years, and (b) giving full effect to s 318(3) of the CPC in backdating the sentence of

preventive detention to 15 July 2017, the date of the Offender's arrest. In doing so, the Court of Appeal endorsed the decision of the three-judge panel of the General Division of the High Court in *Kamis bin Basir v Public Prosecutor* [2024] 3 SLR 1713. The Court of Appeal also ordered the sentence of caning to stand.[4]

13 The effect of the Court of Appeal's decision was that, instead of being released from preventive detention on 7 August 2041 (based on the original sentence of 18 years without backdating), the Offender would be released on 15 July 2037 (more than four years earlier).

Offender certified medical unfit for caning

14 In the meantime, unbeknownst to the Prosecution or the Court of Appeal, the prison medical officer had on 21 August 2024 certified that the Offender was unfit for caning due to multiple medical issues, including cervical spondylosis. Although the Singapore Prison Service transmitted this information to the Registry on 3 September 2024, the matter was brought to the attention of the Prosecution only on 11 September 2024, after the Court of Appeal had heard the Offender's appeal and given its decision.

15 In the light of this development, a hearing was fixed before me pursuant to s 332 of CPC to decide whether to remit the sentence of caning in full or to impose a sentence of imprisonment in lieu of caning.

[4] Minute Sheet of the hearing on 9 Sep 2024 in CA/CCA 14/2023.

Parties' submissions

16 In seeking to apply the principles laid down in *Amin bin Abdullah v Public Prosecutor* [2017] 5 SLR 904 ("*Amin*"), the Prosecution submitted that there is a need to impose an additional term of imprisonment to compensate for the deterrent and retributive effect that is lost by the caning which has been avoided. The Prosecution acknowledged that it was "observed" in *Amin* that where the exemption is unexpected, there "may generally not be a similar need to replace the lost deterrent effect of caning".[5] Nevertheless, the Prosecution submitted that this consideration must be balanced against the severity of the offences committed as well as "other competing considerations" which "pull in the opposite direction and call for an enhancement of the imprisonment term to compensate for the lost deterrent and retributive effect".[6]

17 The Prosecution also acknowledged the guidance in *Amin* that consideration should be given to whether an additional term of imprisonment would be effective in replacing the lost deterrent and retributive effect of caning, bearing in mind that the marginal value of additional imprisonment would generally diminish in relation to the length of the original sentence of imprisonment. Nevertheless, the Prosecution submitted that there was still value in imposing an additional term of imprisonment notwithstanding that a term of preventive detention had already been imposed. The Prosecution drew parallel with the case of *Isham bin Kayubi v Public Prosecutor* [2021] ("*Isham (CA)*") concerning an offender who was sentenced to 32 years' imprisonment in total and 24 strokes of the cane for six sexual offences. In *Isham (CA)*, the Court of Appeal observed that, in the light of the particular egregious circumstances

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5 Prosecution's Sentencing Submission Imposing Caning in lieu of Imprisonment ("PWS") filed on 10 Oct 2024 at para 26.

6 PWS at para 27.

surrounding the offences, the need to compensate for the lost deterrent and retributive effect of caning outweighed the fact that the offender did not know in advance that he would be exempted from caning on medical grounds. The Prosecution submitted that the present case also involved "very egregious circumstances" and so there was a pressing need to enhance the Offender's sentence to compensate for the lost deterrent and retributive effect.

18 The Offender was unrepresented. He filed a hand-written submission from prison, the main points of which were:

(a) The fact that he was found medically unfit for caning was not his fault.

(b) On the one hand, the offence he was convicted of carried the maximum sentence of 20 years' imprisonment and 24 strokes of the cane. So even if he had been sentenced to the maximum of 20 years' imprisonment and 24 strokes of the cane, and the 24 strokes of the cane were converted to 48 weeks of additional imprisonment, he would at the maximum have been subject to only 20 years and 48 weeks' imprisonment. On the other hand, the 18 years of preventive detention imposed on him is without possibility of remission, which means that it is equivalent to a sentence of 27 years' imprisonment in terms of the actual length of incarceration. Thus the effect of the preventive detention sentence imposed on him was way above the maximum which could have been imposed for the offence he was convicted of.

(c) The Offender was already serving a very lengthy sentence and to add another term of imprisonment in lieu of canning would be "making terrible a very bad situation".

19 I should highlight that in the part the Offender's submission summarised at [18(b)] above, the Offender seems to have harboured two misconceptions. The first misconception is that 24 strokes of the cane, if exempted, would translate into 48 weeks of additional imprisonment in lieu of canning, as opposed to one year of additional imprisonment. The second misconception is that he was serving a preventive detention sentence of 18 years, as opposed to 20 years. Therefore, for this part of the Offender's submission to be understood accurately, the reference to "48 weeks" should be read as a reference to "one year", the reference to "18 years" should be read as a reference to "20 years", and the reference to "27 years" should be read as a reference to "30 years".

Applicable legal principles

Relevant statutory provision

20 Section 332 of the CPC provides:

> **332.**—(1) Where a sentence of caning is wholly or partially prevented from being carried out under section 331, the offender must be kept in custody until the court that passed the sentence can revise it.
>
> (2) Subject to any other written law, that court may —
>
> (*a*) remit the sentence; or
>
> (*b*) sentence the offender instead of caning, or instead of as much of the sentence of caning as was not carried out, to imprisonment of not more than 12 months, which may be in addition to any other punishment to which the offender has been sentenced for the offence or offences in respect of which the court has imposed caning (called in this section the relevant offences).
>
> (3) A court may impose a term of imprisonment under subsection (2)(*b*) even though the aggregate of such term and the imprisonment term imposed for any of the relevant offences exceeds the maximum term of imprisonment prescribed for any of those offences.

…

Amin bin Abdullah v Public Prosecutor

21 The interpretation and application of s 332(2) of the CPC was considered comprehensively in *Amin* by a three-judge panel of the High Court, comprising Sundaresh Menon CJ, Chao Hick Tin JA and See Kee Oon J. In delivering the grounds of decision for the court, Menon CJ noted that, up till then, the decided cases had adopted two differing approaches, namely:

(a) an additional sentence of imprisonment *should* be imposed in lieu of caning, unless there are "special circumstances" to justify not doing so; or

(b) an additional sentence will only be imposed if there are grounds to warrant imposing it.

22 The Prosecution favoured the former approach, and submitted that the court should impose additional imprisonment in lieu of caning "as the default position unless exceptional circumstances warrant a departure from such norm" (*Amin* at [55]). This submission was rejected by the court. Noting that the relevant provisions were worded as open-ended discretion-conferring provisions, Menon CJ explained that the Prosecution's position was inconsistent with the way the relevant provisions were worded, as those provisions were not framed in terms that suggested that the imprisonment sentence *shall* be enhanced unless there are special reasons or exceptional circumstances (*Amin* at [54] and [56]). Instead, the choice of legislative language strongly pointed to the conclusion that an offender's term of imprisonment should *not* be enhanced unless there are grounds to do so (*Amin* at [58]).

23 Menon CJ then went on to set out the following non-exhaustive list of factors which may warrant an enhancement of sentence (*Amin* at [59]):

(a) The need to compensate for the deterrent effect of caning that is lost by reason of the exemption.

(b) The need to compensate for the retributive effect of caning that is lost by reason of the exemption.

(c) The need to maintain parity among co-offenders.

24 In seeking to apply the foregoing factors, the court would need to first identity the dominant sentencing objective(s) for the imposition of the sentence of caning for the offence in question (*Amin* at [62]). Thus, where the dominant sentencing objective is deterrence, the court would need to consider whether there is a need to compensate for the deterrent effect of caning that is lost by reason of the exemption. Conversely, where the dominant sentencing objective is retribution, the court would need to consider whether there is a need to compensate for the retributive effect of caning that is lost by reason of the exemption.

25 Where deterrence is identified as a dominant sentencing consideration, the court would need to consider two further questions:

(a) whether an additional term of imprisonment is *needed* to replace the lost deterrent effect of caning; and

(b) whether an additional term of imprisonment would be *effective* in replacing the deterrent effect of caning.

In answering the first question, the focus would be on why the offender was exempted from caning. Where the offender would have known from the outset that he or she would not be caned (*eg*, exemption due to gender or age), an additional term of imprisonment will be more readily seen to be called for. Conversely, it would generally not be necessary to enhance the sentences for an offender exempted on medical grounds as he is less likely to have known that he would not be caned. In answering the second question, the focus would be on the length of the original sentence as the marginal deterrent value of additional imprisonment would generally diminish in relation to the length of the original contemplated term of imprisonment (*Amin* at [65]–[69]).

26 Where retribution is a dominant sentencing consideration, this would be a factor militating in favour of enhancing the offender's sentence, although the weight of this factor should be considered with reference to the length of the existing sentence (*Amin* at [70]).

27 The facts of *Amin* concerned an offender who was convicted in the State Courts of one charge of trafficking in 13.23g of diamorphine and one charge of possession of 0.27g of diamorphine. He was sentenced to the mandatory minimum of 20 years' imprisonment and 15 strokes of the cane for the trafficking charge and three years' imprisonment for the possession charge, with the imprisonment term for both offences running concurrently. The offender was subsequently certified medically unfit for caning, and the district judge enhanced the sentence of imprisonment by 30 weeks in lieu of caning. On the offender's appeal, the High Court held that the sentence should not have been enhanced, giving the following reasons (*Amin* at [95]):

> Our starting point was that the Appellant's sentence should not be enhanced unless there were grounds for it. We found no such grounds on the facts of this case. While we agreed with the general proposition that there was a need to deter drug

> offenders, we failed to see how deterrence was relevant to the Appellant. The Appellant's exemption from caning was on medical grounds. For the reasons stated at [66]–[67] above, we considered that there was no real need to enhance the sentence in the interests of deterrence. Additionally, given the long minimum sentence that was applicable, there was likely to be less of a deterrent effect from any enhancement (see [68]–[69] above).

Application of the approach in Amin's case *by the Court of Appeal*

28 Although *Amin* was a decision of the High Court, the approach articulated in *Amin* has been endorsed and applied by the Court of Appeal on no less than four occasions.

29 The first Court of Appeal case to do so is *Public Prosecutor v BDB* [2018] 1 SLR 127 ("*BDB*"), a case involving abuse of a child by his biological mother resulting in the death of the child. The offender pleaded guilty to two charges of voluntarily causing grievous hurt ("VCGH") under s 325 of the Penal Code and two charges of child ill-treatment under s 5 of the Children and Young Persons Act (Cap 38, 2001 Rev Ed) ("CYPA"). Two other charges were taken into consideration for the purpose of sentencing. The judge imposed seven years' imprisonment for the first VCGH charge (which concerned the offence that resulted in the child's death), two years' imprisonment for the other VCGH charge and six months' and one year's imprisonment respectively for the two CYPA charges. The judge ran the sentences for the first VCGH charge and the second CYPA charge consecutively to arrive at the global sentence of eight years' imprisonment. On the Prosecution's appeal, the Court of Appeal increased the sentence for the first VCGH charge to nine years and six months (including a six-month enhancement in lieu of caning discussed at [30] below) and the sentence for the second VCGH charge to four years, while leaving the sentences for the two CYPA charge undisturbed. In addition, the Court of Appeal decided to run the sentences for the two VCGH charges and the second

CYPA charge consecutively, to arrive at a global sentence of 14 years and six months' imprisonment.

30 In deliberating on the sentence for the first VCGH charge, the Court of Appeal considered that it would have imposed caning of 14 strokes had the offender not been exempted from caning by reason of gender, on the basis that the offence resulted in the child's death. As the offender would have known that she fell into one of the categories of offenders exempted from caning, the Court of Appeal decided to enhance the sentence by six months to compensate for the lost deterrent effect of caning (*BDB* at [127]–[128]).

31 The next Court of Appeal case is *Public Prosecutor v Chua Hock Leong* [2018] SGCA 32 ("*Chua Hock Leong*"). The offender in that case was convicted of fellating a young boy, aged 12 years, without the latter's consent. The offence carried a mandatory minimum sentence of eight years' imprisonment and 12 strokes of the cane. The trial judge imposed the mandatory minimum prison term of eight years and declined to impose an additional imprisonment term in lieu of the caning which the offender was exempted from on account of his age (he was 61 years old at the time he committed the offence). On the Prosecution's appeal, the Court of Appeal increased the sentence of imprisonment to ten years and six months, and also imposed an additional imprisonment term of six months in lieu of caning, to arrive at the global sentence of 11 years' imprisonment. In deciding to enhance the imprisonment term in lieu of caning, the Court of Appeal noted that most offenders of a similar age would know that he cannot be caned. The Court of Appeal added that the offender's conduct offended "the sensibilities of the general public" and a "deterrent sentence [was] therefore necessary and appropriate to quell public disquiet and the unease engendered by such crimes" (*Chua Hock Leong* at [14]).

32 The third Court of Appeal case is *Isham (CA)*. Strictly speaking, *Isham (CA)* is not a case where the Court of Appeal had to decide on whether to impose additional imprisonment in lieu of caning as the issue in that case was whether extension of time should be granted to file an appeal. Nevertheless, in the course of dismissing the offender's application for extension of time to appeal, the Court of Appeal expressed some views on the prospects of the offender's proposed appeal succeeding.

33 The offender in *Isham (CA)* (whom I shall refer to as "Isham") was convicted of six charges – four charges of rape and two charges of SAP committed against two 14-year-old girls. The trial judge sentenced Isham to 16 years' imprisonment and 12 strokes of the cane for each of the four rape charges and 12 years' imprisonment and eight strokes of the cane for each of the two SAP charges (*Public Prosecutor v Isham bin Kayubi* [2020] SGHC 44 ("*Isham (HC)*") at [110]). The trial judge ordered the imprisonment terms for two of the rape charges to run consecutively and the imprisonment terms for the remaining charges to run concurrently, to arrive at a global imprisonment term of 32 years. As for caning, even though the sentences of 12 strokes per offence for each of the six offences would have added up to 64 strokes of the cane, the sentence for caning was limited to 24 strokes pursuant to s 328 of the CPC (*Isham (HC)* at [111]). Subsequently, Isham was certified medically unfit for caning. The matter then went back to the trial judge who decided to impose additional imprisonment of 12 months in lieu of caning. While the trial judge acknowledged that the offender was exempted on medical grounds and could not have known that he would be exempted from caning, the trial judge was equally of the view that an additional sentence of 12 months' imprisonment would serve to compensate for the lost deterrent and retributive effect of caning,

especially given the numerous aggravating factors and the offender's similarly grave antecedents (*Isham (CA)* at [6]).

34 In coming to the view that the offender was unlikely to succeed in his substantive appeal, the Court of Appeal agreed with the trial judge that the need to compensate for both the deterrent and retributive effects of caning (that would otherwise be lost) outweighs, in this case, the fact that the applicant did not know in advance that he would be exempted from caning.

35 The fourth Court of Appeal case is *Mustapah bin Abdullah v Public Prosecutor* [2023] SGCA 30 ("*Mustapah*"). The offender was convicted of three SAP charges involving three teenaged victims under s 376(1)(*a*) of the Penal Code and one charge of SAP of a minor below 16 years of age ("SPOM") under s 376A(1)(*c*) of the Penal Code against a fourth victim. Five other charges were taken into consideration, one of which involved a fifth victim. In the initial part of its reasoning, the Court of Appeal held that the appropriate sentences should be eight and half years' imprisonment and four strokes of the cane for each of the SAP offences and 14 months' imprisonment for the SPOM offence (*Mustapah* at [131] and [134]). Although the offender was 46 years old at the time of the offences, he had turned 50 years old by the time of sentencing and could no longer be caned. The Court of Appeal therefore considered it appropriate to impose two months' imprisonment in lieu of four strokes of the cane for each the SAP offences (*Mustapah* at [132]). In calibrating the global sentence, the Court of Appeal ran the imprisonment term of two of the SAP charges consecutively with the SPOM charge, with the sentence for the remaining SAP charge running concurrently. In addition, when undertaking a final calibration of the sentences to give effect to the totality principle, the Court of Appeal decided that four months' additional imprisonment overall (as opposed to six months) in lieu of the 12 strokes of caning would be adequate

(*Mustapah* at [136]). The final global sentence, including the four months' imprisonment in lieu of caning, was 18 years and 6 months' imprisonment (*Mustapah* at [137]).

Summary of observations

36 It would be useful at this juncture to set out some observations arising from the foregoing survey of *Amin* and the Court of Appeal cases:

(a) When considering whether to impose an additional term of imprisonment to compensate for the lost *deterrent* effect of the caning that has been exempted, the preliminary question to be asked is why the offender was exempted from caning.

(b) Where the offender did not know from the outset that he would not be caned, there would generally be no need to compensate for any lost *deterrent* effect (*Amin* at [67] and [95]).

(c) Where the offender would have known from the outset that he or she would not be caned, an enhancement in sentence would be called for subject to an inquiry into whether an additional term of imprisonment would be *effective* in replacing the deterrent effect of caning. In this regard, a key factor is the length of imprisonment that the offence already carries (*Amin* at [69]).

(d) When considering whether to impose an additional term of imprisonment to compensate for the lost *retributive* effect of the caning that has been exempted, the decision should be considered with reference to the length of the original sentence (*Amin* at [70]).

(e) In weighing the effectiveness of an additional term of imprisonment in replacing lost deterrent and/or retributive effect against the length of the original sentence, it would appear generally from the cases considered above, that original sentences of eight and a half years (*Mustapah*), nine years (*BDB*) and ten years and six months (*Chua Hock Leong*) would not render the marginal deterrent/retributive value of an additional term of imprisonment ineffective, while an original sentence of 20 years (*Amin*) would.

Application to the facts

Issues to be determined

37 In applying the foregoing principles to the facts, the first issue to be determined is the identification of the principal sentencing objective(s) that underlie(s) the imposition of caning for the offence in question.

38 If deterrence is identified as a dominant sentencing objective, the next issue to be determined is whether there is a need to compensate for the deterrent effect of caning that is lost by reason of the exemption. If retribution is identified as a dominant sentencing objective, the further issue to be determined is whether there is a need to compensate for the retributive effect of caning that is lost by reason of the exemption.

39 When deliberating on the foregoing issues, the court ought to be mindful that the appropriate starting point is that *no* enhancement should be ordered unless there are grounds to do so (*Amin* at [87]). If this point is lost sight of, the court risks falling into the error of too readily enhancing the sentences as the default position, which is a position that had been clearly rejected in *Amin* at [55]–[56].

Identifying the principal sentencing objective(s)

40 In *Public Prosecutor v BLV* [2020 3 SLR 166, Aedit Abdullah JC (as he then was) held (at [128]–[129]) that the primary sentencing consideration in serious sexual assaults are retribution and general deterrence. I agreed with this view, and consequently identified both general deterrence and retribution as the principal sentencing objectives underlying the imposition of caning for the First Charge.

Whether to compensate for lost deterrent effect of caning

41 Since I have identified deterrence as a principle sentencing objective, I needed to consider whether to impose additional imprisonment to compensate for the lost deterrent effect of caning. This involves answering the following two questions:

(a) whether an additional term of imprisonment is *needed* to replace the lost deterrent effect of caning; and

(b) whether an additional term of imprisonment would be *effective* in replacing the lost deterrent effect of caning.

42 In considering the first question, the focus would be on why the offender was exempted from caning. In the present case, the Offender was exempted from caning on medical grounds. This means that he would not have known at the outset that he could not be caned. Further, the Offender was 38 years old at the time of the offence. This means that his age was sufficiently far away from the 50-year-old threshold such that there could not be any expectation, at the time he committed the offence, that he may turn 50 by the time of sentencing if he were caught and charged. Applying the guidelines set out in *Amin* at [66]–

[67], I concluded that an additional term of imprisonment is *not* needed to replace the lost deterrent effect of caning in the present case.

43 Given my conclusion on the first question, there was no need for me to go on to consider the second question.

Whether to compensate for lost retributive effect of caning

44 Although I concluded that there is no need to enhance the sentence to compensate for lost *deterrent* effect, that is not the end of the matter. Since I have identified retribution as a principal sentencing objective, I should also consider whether there is a need to enhance the sentence to compensate for the lost *retributive* effect of the caning that had been exempted. In this regard, the following guidance was given in *Amin* (at [70]):

> 70 Where retribution is the dominant sentencing objective behind the imposition of caning, then the need to compensate for the retributive effect of caning lost by reason of the exemption would be a factor militating in favour of enhancing the offender's sentence. As a general observation, and in line with what we have said at [69] above, the weight of this factor should be considered with reference to the length of the existing sentence.

45 Thus, when considering whether to impose an additional term of imprisonment to compensate for lost *retributive* effect, it would not be necessary for the court to consider why the offender was exempted from caning. This much is clear from the lack of any mention of this consideration in *Amin* at [70]. Such a distinction between compensation for lost deterrent effect and compensation for lost retributive effect makes ample sense because deterrence focuses on the offender (*viz*, what it would take to deter someone from offending) while retribution focuses on the harm caused to the victim. Since the level harm suffered by a victim would remain the same irrespective of whether

the offender knew beforehand that he or she would be exempted from caning, it follows that the reason for exemption of caning should not be a relevant consideration when assessing whether the lost *retributive* effect of caning ought to be replaced with additional imprisonment. Therefore, the decision whether to enhance the sentence to compensate for lost *retributive* effect should be considered with reference to the length of the original sentence (to the exclusion of any consideration of why the offender was exempted from caning).

46 In considering the need to compensate for lost *retributive* effect with reference to the length of the original sentence, the analysis should be along the same lines as that to be employed in answering the second question posed at [41] above (see the cross-reference in *Amin* at [70] to *Amin* at [69]) – *viz*, whether the marginal retributive value of additional imprisonment would be effective in replacing the lost retributive effect in relation to the length of the original sentence. (I shall refer to this analysis as the "Effectiveness Analysis".)

47 In the present case, the exempted caning was imposed for the First Charge, which carried a mandatory minimum imprisonment term of eight years. The Offender was sentenced to 20 years' preventive detention. As the usual one-third remission for sentences of imprisonment does not apply to a sentence of preventive detention, the actual period of incarceration which the Offender will be subject to is equivalent to that for an offender sentenced to 30 years' imprisonment.

48 In *Amin*, where the offender was sentenced to 20 years' imprisonment for a drug trafficking offence carrying a mandatory minimum sentence of 20 years' imprisonment and 15 strokes of the cane, the court considered that there was no need to enhance the sentence (*Amin* at [95]). A case similar to *Amin* is *Public Prosecutor v Salzawiyah bte Latib and others* [2021] SGHC 17, which

concerned a female offender who was sentenced to 29 years' imprisonment on a drug trafficking charge that similarly carried a mandatory minimum sentence of 20 years' imprisonment and 15 strokes of the cane. The Prosecution did not seek additional imprisonment in lieu of caning. Tan Siong Thye J agreed with the Prosecution, commenting that this was "an appropriate and fair approach" (at [24]).

49 A case which, like the present case, involves serious sexual offences carrying a mandatory minimum sentence eight years' imprisonment and 12 strokes of the cane is *Public Prosecutor v BQW* [2018] SGHC 136 ("*BQW*"). That case involved an offender who was above 50 years of age and who had pleaded guilty to three charges of SAP of a person below 14 years' of age, an offence under s 376(2)(*a*) punishable under s 376(4)(*b*) of the Penal Code. He was sentenced to 10 years' imprisonment on each charge, with the sentences for two of the charges running consecutively, to arrive at a global sentence of 20 years' imprisonment. As the Prosecution did not ask for additional imprisonment in lieu of caning, Woo Bih Li J (as he then was) unsurprisingly observed that the Prosecution had not identified any factor to support the imposition of an additional imprisonment term. In addition, Woo J also reasoned that, as the offences carried a long minimum term of imprisonment (of eight years), there was no reason to impose an additional term of imprisonment in lieu of caning (at [50]).

50 Comparing the present case with the three cases considered in the preceding two paragraphs, and having regard to the length of the sentence already imposed on the Offender, I assessed that the marginal retributive value of an additional six months' imprisonment would *not* be effective in replacing the lost retributive effect of the 12 strokes of the cane which had been exempted. If the 20-year sentence of preventive detention were to be treated as equivalent

to a 30-year imprisonment term in terms of actual period of incarceration, an additional six months' imprisonment would amount only to a 1.67% enhancement in the Offender's sentence.

51 The Prosecution accepted that an Effectiveness Analysis had to be undertaken, but submitted that "an additional term of around six months' imprisonment in lieu of caning will still have adequate value in replacing the lost deterrent and retributive effect".[7] However, the Prosecution did not give any substantive reasons for this submission other than to assert that parallels may be drawn with *Isham (CA)*. I disagree with the Prosecution that any such parallels may be drawn. As explained below, any perceived parallels between *Isham (CA)* and the present case is more apparent than real.

52 First, while it may be tempting to draw a parallel between the aggregate sentence of 32 years' imprisonment in *Isham (CA)* and the 20-year preventive detention sentence in the present case (equivalent in terms of actual period of incarceration to a 30-year sentence of imprisonment), any attempt to draw such a parallel would be misguided. This is because the 32-year aggregate sentence in *Isham (CA)* is the result of running two 16-year sentences consecutively. The proper way of undertaking the Effective Analysis in a case like *Isham (CA)* is not to assess the deterrent/retributive effect of the total number of strokes imposed for all the offences against the aggregate sentence of imprisonment, but to assess the deterrent/retributive effect of the number of strokes imposed for an offence against the sentence of imprisonment for that particular offence. This is because caning is not an overarching sentence imposed globally in relation to an indistinguishable group of offences. Instead, each sentence of caning is imposed in relation to a distinct offence, with each offence having its

7 PSS at paras 28–29.

own distinct facts and circumstances and own sentencing objectives. The proper approach is illustrated by the case of *Mustapah*, where the Court of Appeal decided on the enhancement of sentence in lieu of caning for each of the three SAP offences separately (at [132]). This is also consistent with choice of language to explain the Effective Analysis in *Amin* at [69] – *viz*, "length of imprisonment that *the offence* already carries", "if *an offence* carries a long minimum term of imprisonment" and "sentence already prescribed for *the offence*" [emphasis added]. Consequently, the marginal deterrent/retributive value of additional imprisonment in *Isham (CA)* is to be assessed in relation to the 16-year imprisonment terms for the individual offences, as opposed to the aggregate sentence of 32 years. Seen in this light, there is little parallel between the individual 16-year sentences in *Isham (CA)* and the single, indivisible sentence of 20 years' preventive detention in the present case.

53 As noted at [5] above, the Prosecution had submitted that, if preventive detention had not been imposed, the likely sentence for the First Charge would have been 16 to 17 years' imprisonment. Had I imposed a sentence of 16 or 17 years' imprisonment on the Offender instead of preventive detention, I might have been more inclined to draw a parallel with *Isham (CA)* and also enhance the sentence in lieu of caning. However, that was not what happened. The decision to sentence the Offender to 20 years' preventive detention makes the circumstances of the present case very different.

54 Second, if my explanation at [52] above is found to be wrong, and if the correct approach is to view the 24 strokes of caning exempted in *Isham (CA)* as a single indivisible overarching sentence to be weighed against the 32-year global sentence instead of as two individual 12-stroke sentences to be weighed against two individual 16-year sentences, then it goes without saying that, even under this view, the 100% difference in quantum between the 24 strokes of the

cane exempted in *Isham (CA)* and the 12 strokes in the present case would so differ in lost deterrent/retributive effect that it would be not be appropriate to draw strict parallels between the two cases.

55 Third, the Prosecution relied on the Court of Appeal's description of Isham's offences as "particularly egregious" and submitted that the present case is also "very egregious". While I agree with the Prosecution that the circumstances surrounding the Offender's offences are very egregious, I do not agree that they are comparable to the circumstances surrounding Isham's offences. As the Court of Appeal noted in *Isham (CA)* (at [24(a)]):

> This is a case sordid to its core. The applicant had raped and sexually penetrated two young girls under the threat of force. We need not repeat the aggravating factors here, save to highlight one significant aspect, which is the fact that the applicant had been convicted of similar offences in 2008; three of those victims were similarly young.

In comparison, the Offender was convicted of one SAP offence against one adult victim and, although the Offender had also been previously convicted of a rape offence, that also involved a single adult victim and not multiple young victims as in Isham's case. The difference in egregiousness between the two cases is also reflected in the fact that the Offender was sentenced to 12 strokes of the cane while Isham's offences attracted 64 strokes of the cane (which was eventually limited to 24 strokes pursuant s 328 of the CPC).

56 In the light of the explanations at [52]–[55] above, I considered that there are sufficient differences between *Isham (CA)* and the present case with the consequence that I was not persuaded that clear parallels may be drawn between the two cases in the manner suggested by the Prosecution. Instead, a detailed comparison of the two cases would bear out the wisdom of the admonition in *Amin* at [67] that "each case must be decided on its own facts".

Conclusion

57 In deciding whether to impose additional imprisonment in lieu of caning, the starting point is that *no* enhancement should be ordered unless there are grounds to do so. This coheres with the principle that the courts should not, in general, exercise punitive powers absent sufficient justification.

58 In the present case, I identified both deterrence and retribution as principal sentencing objectives underlying the imposition of caning for the First Charge. In relation to the need to maintain deterrence, I concluded that there was no need for additional imprisonment to compensate for the lost *deterrent* effect of the exempted caning as the Offender was exempted from caning on medical grounds and he could not have known from the outset that he would not be caned. In relation to the need to achieve due retribution, I considered that there would be a need, in principle, to compensate for lost retributive effect irrespective of whether the Offender knew whether he would be exempted from caning, subject to the Effectiveness Analysis. In undertaking the Effectiveness Analysis, having regard to the length of incarceration which the Offender is already subject to pursuant to the 20-year preventive detention sentence, I concluded that the marginal retributive value of an additional six months' imprisonment would *not* be effective in replacing the lost retributive effect of the 12 strokes of the cane which had been exempted.

59 For the reasons explained above, and having regard to all the circumstances of the case (including giving proper weight to the various aggravating circumstances alluded to by the Prosecution), I decided that this was an appropriate case for me to exercise my discretion under s 332(2) of the CPC to remit the sentence of caning in full without imposing an additional term of imprisonment.

60 I therefore ordered that the sentence of caning be remitted pursuant to s 332(2)(*a*) of the CPC.

Pang Khang Chau
Judge of the High Court

Sheldon Anthony Lim Wei Jie (Attorney-General's Chambers) for the prosecution;
The accused in person.