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# THE APPLICATION OF THE TOTALITY PRINCIPLE IN SINGAPORE

When dealing with an offender who has been convicted of two or more distinct offences, the Court is faced with the issue of determining an appropriate aggregate sentence to be imposed. An aggregate sentence may offend the totality principle if it exceeds the length of the sentence imposed for the most serious offence, or if the sentence is "crushing" and not in keeping with the offender's past record and future prospects. In deciding whether to vary a sentence on the grounds of the totality principle, the Courts have considered an offender's overall criminality, advanced age, precedents and the possibility of remission. This paper argues that the articulation of the totality principle ought to be revised to better reflect how it is applied in practice. Furthermore, it is argued that an offender's advanced age and the possibility of remission are factors that are incompatible with the totality principle's emphasis on an offender's rehabilitative prospects. Accordingly, they should not be relevant factors in determining whether a sentence offends the totality principle.

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## I. Introduction

1 In Singapore, the Courts have held that "[t]he aim of criminal justice, subject to some exceptions, is ultimately to secure the rehabilitation, reform and reintegration into society of all offenders without undermining broader societal goals of preserving law and order".[1] In determining the appropriate sentence to impose on an offender, the Courts bear in mind various considerations and "assess which have pre-eminence in a given case".[2] Primarily, the Court will consider the four pillars of sentencing (retribution, rehabilitation, deterrence and prevention) and ensure that any given sentence mirrors

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[1] *Public Prosecutor v Siow Kai Yuan Terence* [2020] 4 SLR 1412 at [1]; *M Raveendran v Public Prosecutor* [2022] 3 SLR 1183 at [45].

[2] *Public Prosecutor v Siow Kai Yuan Terence* [2020] 4 SLR 1412 at [1].

these pillars.[3] Furthermore, the Courts also consider two additional principles when presented with an offender who has committed multiple offences (a "**multiple offender**").

2 The first is the one-transaction rule: generally, it would be inappropriate to impose consecutive sentences in respect of offences that are either proximate as a matter of fact or relate to the violation of the same legally protected interest.[4] However, the Courts have held that this rule is not to be applied rigidly: a sentencing judge may consider a set of offences as forming the same transaction even if they violate different legally protected interests.[5]

3 Additionally, the one-transaction rule is subject to section 307(1) of the Criminal Procedure Code 2010 (the "**CPC**"), which requires at least two sentences to run consecutively if an accused is convicted and sentenced to jail for at least three distinct offences in the same trial.[6] Section 307(2) further provides that where a sentence of life imprisonment is imposed at a trial mentioned in section 307(1), the other sentences of imprisonment must run concurrently with the sentence of life imprisonment.[7]

4 The second is the totality principle, which is a "manifestation of the requirement of proportionality that runs through the gamut of sentencing decisions".[8] After determining the appropriate aggregate sentence, the Court takes a "'last look' at all the facts and circumstances to determine whether the sentence imposed looks wrong".[9] Traditionally, the principle has two limbs. The traditional articulation of the principle is that "[a] cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of sentences for the most serious of the individual offences involved, or if its effect is to impose on the offender a crushing sentence

[3] *Chua Tiong Tiong v Public Prosecutor* [2001] 3 SLR 425 at [31].
[4] *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [30], citing D A Thomas, *Principles of Sentencing* (Heinemann Educational Books, 2nd Ed, 1979) at p 53.
[5] *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [31].
[6] Criminal Procedure Code 2010 s 307(1).
[7] Criminal Procedure Code 2010 s 307(2).
[8] *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [47].
[9] *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [58], citing D A Thomas, *Principles of Sentencing* (Heinemann Educational Books, 2nd Ed, 1979) at p 56.

not in keeping with his record and prospects”.[10] A sentence may be considered crushing if it is so long that it destroys an offender’s rehabilitative prospects.[11]

5 Briefly, this article aims to shed some light on the application of the totality principle in Singapore.[12] This article will be split into two main parts. First, it will outline the relevant legal principles of sentencing for a multiple offender (**Part II**). Second, it will discuss the two limbs of the totality principle, how they are applied in practice, and possible ways to improve upon them (**Part III**).

## II. Sentencing for the multiple offender

### *A. Statutory provisions*

6 As stated above, sections 307(1) and 307(2) of the CPC provide that where an offender is convicted of at least three offences in the same trial, at least two of those sentences must run consecutively unless one of the sentences is a life sentence (the “**CPC Rule**”).[13] Hence, once an offender is convicted of at least three offences in the same trial, the Court must order at least two sentences to run consecutively under section 307(1) of the CPC. This is so even if the resulting sentence is one that offends the totality principle.

7 The Court of Appeal was presented with this very issue in *Kanagasuntharam v Public Prosecutor*[14] (“***Kanagasuntharam***”). In *Kanagasuntharam*, the appellant was convicted of one count of rape with hurt and two counts of carnal intercourse against the course of nature.[15] The Court analysed the relationship between the totality principle and the then-section 18 of the CPC (which is *in pari materia*

[10] *Kanagasuntharam v Public Prosecutor* [1991] 2 SLR(R) 874 at [13], citing D A Thomas, *Principles of Sentencing* (Heinemann Educational Books, 2nd Ed, 1979) at pp 57-58.
[11] *Ang Zhu Ci Joshua v Public Prosecutor* [2016] 4 SLR 1059 at [5]; *Public Prosecutor v Raveen Balakrishnan* [2018] 5 SLR 799 at [78].
[12] There are, however, some discussions on the issue published on the Law Gazette. See, *eg*, Ho Hsi Ming, Shawn, “The Versatility of the Totality Principle” *Singapore Law Gazette* (March 2020) and Ho Hsi Ming, Shawn, “The Centrality of Proportionality: A Golden Thread in Sentencing” *Singapore Law Gazette* (July 2020).
[13] Criminal Procedure Code 2010 s 307(1) and s 307(2).
[14] [1991] 2 SLR(R) 874.
[15] *Kanagasuntharam v Public Prosecutor* [1991] 2 SLR(R) 874 at [1].

with the current s 307 of the CPC) with reference to the following hypothetical:[16]

> A public servant is convicted at one trial of four distinct charges of criminal breach of trust and is sentenced to six years' imprisonment on each charge. Section 18 requires the sentencing court to make at least two of the four terms run consecutively. This means that the offender will serve at least 12 years yet the statutory limit of ten years imposed by s 409 of the Code means that the first limb of the totality principle is breached. To give full effect to the totality principle in such circumstances would be to frustrate the purpose of s 18 and, accordingly, the first limb of the principle has to be qualified.

8 Hence, the first limb of the totality principle must be applied in the context of the CPC Rule. The Court then applied this proposition to the facts before it. It observed that the aggregate sentence of 22 years' imprisonment imposed on the appellant "was in excess of the 20-year maximum term prescribed by s 376(2) for the charge of aggravated rape, the most serious charge".[17] Recalling that the first limb of the totality principle states that a sentence ought not be in excess of the normal level of sentences imposed for the most serious offence,[18] such a sentence would likely offend the first limb of the totality principle.[19] However, the Court held that this would not be wrong in principle given that the Court will apply the totality principle subject to the CPC Rule.[20] Hence, the Court of Appeal upheld the sentence, notwithstanding that the

[16] *Kanagasuntharam v Public Prosecutor* [1991] 2 SLR(R) 874 at [14].
[17] *Kanagasuntharam v Public Prosecutor* [1991] 2 SLR(R) 874 at [17].
[18] *Kanagasuntharam v Public Prosecutor* [1991] 2 SLR(R) 874 at [13], citing D A Thomas, *Principles of Sentencing* (Heinemann Educational Books, 2nd Ed, 1979) at pp 57-58.
[19] In determining whether the aggregate sentence offended the first limb of the totality principle, the Court compared the aggregate sentence to the maximum sentence allowed by statute. However, following the decision of the High Court in *Mohamed Shouffee bin Adam v Public Prosecutor*, the Courts have applied the first limb of the totality principle by comparing the aggregate sentence with the sentence normally imposed for the most serious offence. Further elaboration on the present applications of the totality principle will be provided in a later section.
[20] *Kanagasuntharam v Public Prosecutor* [1991] 2 SLR(R) 874 at [14] and [17].

sentence was likely one that ostensibly offended the totality principle.[21]

9 The CPC Rule does not, however, dictate which sentences are to run consecutively.[22] Therefore, the CPC Rule by itself is insufficient to determine the appropriate sentence to be imposed on a multiple offender. Hence, in determining the appropriate aggregate sentence to impose on a multiple offender, the Courts generally refer to the two guiding principles mentioned above: the one-transaction rule and the totality principle.[23]

### ***B. Relevant principles***

#### *(1) The one-transaction rule*

10 To recapitulate, the one-transaction rule provides that sentences for offences arising from one transaction should generally run concurrently rather than consecutively.[24] In *Mohamed Shouffee bin Adam v Public Prosecutor*[25] ("***Shouffee***"), the High Court noted that, in its previous decision in *Public Prosecutor v Law Aik Meng*[26], it "interpreted the rule in terms of proximity".[27] The Court clarified that, instead, "the real basis of the one-transaction rule is unity of the violated interest that underlies the various offences".[28] Hence, offences that are physically proximate but violate different legally protected interests are not necessarily regarded as forming a single transaction.[29] The Court further clarified that the one-transaction rule is not to be applied rigidly: offences that violate different legally protected interests can nevertheless be regarded as part of the same transaction.[30]

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[21] *Kanagasuntharam v Public Prosecutor* [1991] 2 SLR(R) 874 at [17].
[22] *Kanagasuntharam v Public Prosecutor* [1991] 2 SLR(R) 874 at [10]; *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [25].
[23] *Kanagasuntharam v Public Prosecutor* [1991] 2 SLR(R) 874 at [10]. It is worth noting that this analysis is similar to an analysis of proportionality in sentencing, which will be elaborated upon below.
[24] *Public Prosecutor v Law Aik Meng* [2007] 2 SLR(R) 814 at [52], citing *Maideen Pillai v Public Prosecutor* [1995] 3 SLR(R) 706; *Kanagasuntharam v Public Prosecutor* [1991] 2 SLR(R) 874 at [5].
[25] [2014] 2 SLR 998.
[26] [2007] 2 SLR(R) 814.
[27] *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [29].
[28] *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [31].
[29] *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [31].
[30] *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [31].

11 In *Shouffee* itself, the offender pleaded guilty to the importation of 139.3g of methamphetamine, possession of 6.47g of methamphetamine, possession of not less than 30 tablets of nimetazepam and consumption of methamphetamine.[31] At first instance, the sentences for the importation and consumption of methamphetamine were ordered to run consecutively as they were distinct offences, whereas the sentences for the offences of drug possession were ordered to run concurrently as they were part of and connected to the importation transaction.[32]

12 On appeal, the High Court held that the offences of importation and consumption of methamphetamine were proximate in time and space.[33] However, it also considered that applying the one-transaction rule with a rigid focus on whether there was a diversity of interests invaded by the offences would lead to a "counterintuitive result".[34] Specifically, it would mean that the appellant would have been better off if he possessed both quantities of methamphetamine for importation, since that would mean both offences violate the same legally protected interest.[35] It therefore held that the one transaction rule must be applied with a "common sense approach" and held that running the two sentences consecutively would offend the one-transaction rule.[36]

13 It is also possible for sentences in respect of unrelated offences to be run concurrently rather than consecutively. The totality principle, which will be discussed in greater depth below, is a "recognised qualification" to the one-transaction rule that unrelated offences are generally subject to consecutive sentences.[37] Hence, if running sentences for unrelated offences consecutively would result in an aggregate sentence that offends the totality principle, the Court might instead impose concurrent sentences.

[31] *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [2].
[32] *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [18].
[33] *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [95].
[34] *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [38], citing *Tan Kheng Chun Ray v Public Prosecutor* [2012] 2 SLR 437 at [17].
[35] *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [38], citing *Tan Kheng Chun Ray v Public Prosecutor* [2012] 2 SLR 437 at [17].
[36] *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [95].
[37] *Public Prosecutor v CRH* [2024] SGHC 34 at [184], citing *Public Prosecutor v Raveen Balakrishnan* [2018] 5 SLR 799 at [58] and [65].

14 In *Public Prosecutor v Chua Whye Woon*[38], the accused pleaded guilty to two counts of harassment under section 28(2)(*a*) read with section 28(3)(*b*)(i) of the Moneylenders Act[39], with five other similar charges taken into consideration for the purpose of sentencing.[40] At first instance, the accused was sentenced to 12 months' imprisonment and three strokes of the cane for each of the two proceeded charges.[41] The Court ordered that the sentences were to run consecutively, resulting in an aggregate sentence of 24 months' imprisonment and six strokes of the cane.[42]

15 On appeal, the High Court held that this sentence would offend the second limb of the totality principle.[43] Accordingly, it ordered that the two sentences were to run concurrently.[44] At the same time, it increased the individual sentences for each proceeded charge to 14 months' imprisonment and six strokes of the cane.[45] Hence, in a situation where consecutive sentences may offend the totality principle, the Court may order the sentences to run concurrently instead. It also remains open to the Court to increase the individual sentences to reach an appropriate aggregate sentence.[46]

16 At the same time, the Court has acknowledged that if concurrent sentences were to be invariably imposed for unrelated offences, it may create a perverse incentive on the part of offenders who have committed one offence to commit further offences prior to being charged.[47] This is because such a sentencing regime may result in an offender who has committed multiple unrelated offences to only be punished to a similar extent as an offender who has committed a single offence, thereby receiving "no real punishment" for further offences.[48] The Court may therefore order two sentences to run consecutively even

[38] [2016] SGDC 83.
[39] Cap 188, 2010 Rev Ed.
[40] *Public Prosecutor v Chua Whye Woon* [2016] SGDC 83 at [5].
[41] *Public Prosecutor v Chua Whye Woon* [2016] SGDC 83 at [5].
[42] *Public Prosecutor v Chua Whye Woon* [2016] SGDC 83 at [5].
[43] *Chua Whye Woon v Public Prosecutor* [2016] SGHC 189 at [5].
[44] *Chua Whye Woon v Public Prosecutor* [2016] SGHC 189 at [5].
[45] *Chua Whye Woon v Public Prosecutor* [2016] SGHC 189 at [6].
[46] For examples of the Court engaging in such an exercise, see *Public Prosecutor v Raveen Balakrishnan* [2018] 5 SLR 799 at [108] and *Logachev Vladislav v Public Prosecutor* [2018] 4 SLR 609 at [110].
[47] *Public Prosecutor v BVZ* [2019] SGHC 83 at [80]; *Public Prosecutor v Raveen Balakrishnan* [2018] 5 SLR 799 at [43].
[48] *Public Prosecutor v BVZ* [2019] SGHC 83 at [80].

if they ostensibly form part of a single transaction if an offender would otherwise benefit from the Court's failure to adequately account for the offender's enhanced culpability as reflected in the multiplicity of offences committed by the offender.[49]

17 For instance, in *Public Prosecutor v (1) Woo Yit Hang & (2) Yong Chin Can*[50], the accused persons pleaded guilty to 15 charges each: eight charges under section 420 read with section 109 of the PC, and seven charges under section 474 read with section 467 read with section 109 of the PC.[51] Their charges were based on conspiracy and attempts to use counterfeit credit cards to make fraudulent purchases.[52] The Defence asked for only two sentences to run consecutively, bearing in mind the CPC Rule.[53]

18 Although the Court noted that the offences were committed on the same day over the course of 8.5 hours and were of "the same nature",[54] it imposed three consecutive sentences.[55] This was on the basis of the following factors: (**a**) the public interest in discouraging counterfeit credit card fraud;[56] (**b**) the transnational nature of the criminal activity;[57] (**c**) the multiplicity of victims;[58] and (**d**) the careful planning and organisation behind the conspiracy.[59] Accordingly, the Court held that the imposition of three consecutive sentences was justified given that the overall criminality of the offenders could not be encompassed in two consecutive sentences.[60]

19 It can be seen from the above case that the one-transaction rule is not a rule that lends itself to a sharp categorical distinction based purely on proximity in time and space, but is more of a "pragmatic device for limiting overall sentences".[61] Hence, more than two sentences

[49] *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [41].
[50] [2013] SGDC 191.
[51] *Public Prosecutor v (1) Woo Yit Hang & (2) Yong Chin Can* [2013] SGDC 191 at [1].
[52] *Public Prosecutor v (1) Woo Yit Hang & (2) Yong Chin Can* [2013] SGDC 191 at [1].
[53] *Public Prosecutor v (1) Woo Yit Hang & (2) Yong Chin Can* [2013] SGDC 191 at [28].
[54] *Public Prosecutor v (1) Woo Yit Hang & (2) Yong Chin Can* [2013] SGDC 191 at [31].
[55] *Public Prosecutor v (1) Woo Yit Hang & (2) Yong Chin Can* [2013] SGDC 191 at [2].
[56] *Public Prosecutor v (1) Woo Yit Hang & (2) Yong Chin Can* [2013] SGDC 191 at [32].
[57] *Public Prosecutor v (1) Woo Yit Hang & (2) Yong Chin Can* [2013] SGDC 191 at [33].
[58] *Public Prosecutor v (1) Woo Yit Hang & (2) Yong Chin Can* [2013] SGDC 191 at [34].
[59] *Public Prosecutor v (1) Woo Yit Hang & (2) Yong Chin Can* [2013] SGDC 191 at [36].
[60] *Public Prosecutor v (1) Woo Yit Hang & (2) Yong Chin Can* [2013] SGDC 191 at [41].
[61] See, *eg*, *Public Prosecutor v Firdaus bin Abdullah* [2010] 3 SLR 225 at [28], citing *Public Prosecutor v Law Aik Meng* [2007] 2 SLR(R) 814 at [56].

may be ordered to run consecutively in certain circumstances, especially when "the overall criminality of the offender's conduct cannot be encompassed in two consecutive sentences".[62]

*(2) The totality principle*

20 The basis of the totality principle is proportionality.[63] Where a long sentence is being imposed on a multiple offender, the Court will be sensitive to the fact that an aggregation resulting in a longer sentence carries a compounding effect that "bears more than a linear relation to the cumulative and overall criminality of the case".[64] Therefore, based on the premise that a sentence is meant to proportionately reflect the offender's overall criminality, the Courts will be averse to a "mere arithmetic addition of individual sentences" when deciding the sentence to be imposed on a multiple offender.[65] Such an approach would run the significant risk of the Courts imposing an aggregate sentence that is "disproportionate to the overall criminality presented",[66] reducing the offender's opportunity to lead a worthwhile life after release.[67]

21 It has also been suggested before (by Professor Andrew Ashworth[68]) that without the moderation or limiting effect provided by the totality principle, sentencing would yield absurd results such as a sentence which has a longer duration than that of the offender's expected natural lifespan.[69] The imposition of such long sentences is admittedly not foreign to the common law: for instance, between 2016 and 2021, the American courts imposed 799 sentences of sufficient length to keep the offender in prison for the rest of his or her natural life (*ie*, a *de facto*

[62] *Public Prosecutor v (1) Woo Yit Hang & (2) Yong Chin Can* [2013] SGDC 191 at [30].
[63] *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [47].
[64] *Public Prosecutor v Raveen Balakrishnan* [2018] 5 SLR 799 at [77].
[65] *Public Prosecutor v Raveen Balakrishnan* [2018] 5 SLR 799 at [71].
[66] *Public Prosecutor v Raveen Balakrishnan* [2018] 5 SLR 799 at [71].
[67] Mandeep K. Dhami, "Sentencing Multiple – Versus Single-Offence Cases: Does More Crime Mean Less Punishment?" (2022) *The British Journal of Criminology* 55 at 56, citing Anthony Bottoms, "Five Puzzles in von Hirsch's Theory of Punishment" in *Fundamental Principles of Sentencing Theory: Essays in Honour of Andrew von Hirsch* (A. Ashworth & M. Masik eds) (Oxford University Press, 1998) at 53-102.
[68] Professor Andrew Ashworth was the Vinerian Professor of English Law at the University of Oxford from 1997 to 2013 and is now Emeritus Professor and a Fellow of All Souls College. He was Chairman of the English Sentencing Advisory Panel before it was abolished in 2010.
[69] Andrew Ashworth & Martin Wasik, "Sentencing the Multiple Offender: In Search of a "Just and Proportionate" Total Sentence" in *Sentencing for Multiple Crimes, Studies in Penal Theory and Philosophy* (Jan de Keijser, Julian V. Roberts & Jesper Ryberg eds) (New York, 2017; online edn, Oxford Academic, 19 Oct 2017) at p 213.

life sentence).[70] Nevertheless, Professor Andrew Ashworth's argument applies with particular force in jurisdictions such as Singapore, where the Courts have emphasised the need for the rehabilitation and reintegration of offenders as the "aim of criminal justice".[71]

22 This is not to say that the totality principle is an entirely limiting doctrine. In *Gan Chai Bee Anne v Public Prosecutor*[72] ("***Anne Gan***"), The Honorable the Chief Justice Sundaresh Menon clarified that because the totality principle is a principle based on proportionality, it is logically capable of resulting in a boosting (rather than a limiting) effect on an offender's sentence.[73] This was demonstrated in *Anne Gan* itself, where the appellant pleaded guilty to 10 charges under s 6(*c*) of the Prevention of Corruption Act 1960 (the "**PCA**"), with 144 other charges being taken into consideration for the purpose of sentencing.[74] While the individual charges merited only a fine,[75] the totality of the charges evinced a "calculated course of criminal conduct" embarked on by the appellant.[76] Accordingly, it was held that the totality of the appellant's offending conduct warranted a custodial sentence.[77] In sum, the totality principle finds its roots in proportionality: while a sentence cannot be so long that it is in excess of an offender's criminality, it also cannot be excessively lenient in light of the said criminality.

## III. Application of the totality principle

23 Having generally set out the relevant statutory provisions and principles behind the totality principle, this article will now examine how the totality principle has been applied by the Singapore Courts. To recapitulate, the totality principle finds its roots in proportionality,[78] and traditionally has two limbs. First, a cumulative sentence generally ought not to exceed the normal level of sentences for the most serious of the

[70] United States Sentencing Commission, "Life Sentences in the Federal System" (July 2022) <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220726_Life.pdf> (accessed 28 December 2023) at p 16.
[71] *Public Prosecutor v Siow Kai Yuan Terence* [2020] 4 SLR 1412 at [1].
[72] [2019] 4 SLR 838.
[73] *Gan Chai Bee Anne v Public Prosecutor* [2019] 4 SLR 838 at [20]; *Public Prosecutor v Ng Yi Yao* [2021] SGHC 295 at [199].
[74] *Gan Chai Bee Anne v Public Prosecutor* [2019] 4 SLR 838 at [6].
[75] *Gan Chai Bee Anne v Public Prosecutor* [2019] 4 SLR 838 at [35].
[76] *Gan Chai Bee Anne v Public Prosecutor* [2019] 4 SLR 838 at [74].
[77] *Gan Chai Bee Anne v Public Prosecutor* [2019] 4 SLR 838 at [74].
[78] *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [47].

individual offences.[79] However, the Courts may allow a sentence to exceed the normal level of sentences if it is nevertheless proportionate to the overall criminality of the accused.[80] Second, a cumulative sentence ought not to be one that is crushing and not in keeping with an offender's record and prospects.[81] A survey of the jurisprudence in this regard reveals that this is typically determined by considering factors such as relevant antecedents,[82] an offender's age,[83] and the possibility of remission.[84] Each of these limbs will now be examined in greater detail.

### *A. A sentence must not be substantially above the normal level of sentences for the most serious of the individual offences*

24 The first limb of the totality principle ("**Limb 1**") is that a cumulative sentence ought not to exceed the normal level of sentences for the most serious of the individual offences (the "**Tariff**").[85] Although the Courts used to compare the aggregate sentence with the maximum sentence allowed by statute,[86] the current position is that the aggregate sentence ought to be compared with the Tariff.[87] That said, the Courts have sometimes upheld sentences that ostensibly offend Limb 1, if the case concerns an offender with a high degree of criminality.[88] There are also two cases in which the Court appears to have deviated from the approach of comparing the aggregate sentence to the Tariff. In light of these, it is submitted that the articulation of Limb 1 ought to be refined to better reflect how it is applied in practice, and for greater conceptual clarity.

[79] *Kanagasuntharam v Public Prosecutor* [1991] 2 SLR(R) 874 at [13], citing D A Thomas, *Principles of Sentencing* (Heinemann Educational Books, 2nd Ed, 1979) at pp 57-58.
[80] *Public Prosecutor v Juandi bin Pungot* [2022] 5 SLR 470 at [94].
[81] *Kanagasuntharam v Public Prosecutor* [1991] 2 SLR(R) 874 at [13], citing D A Thomas, *Principles of Sentencing* (Heinemann Educational Books, 2nd Ed, 1979) at pp 57-58.
[82] *Tan Yao Min v Public Prosecutor* [2018] 3 SLR 1134 at [100].
[83] *CJH v Public Prosecutor* [2023] SGCA 19 at [20]; *Public Prosecutor v UI* [2008] 4 SLR(R) 500 at [78].
[84] *Public Prosecutor v Yap Jung Houn Xavier* [2023] SGHC 224 at [75].
[85] *Kanagasuntharam v Public Prosecutor* [1991] 2 SLR(R) 874 at [13], citing D A Thomas, *Principles of Sentencing* (Heinemann Educational Books, 2nd Ed, 1979) at pp 57-58.
[86] *Public Prosecutor v Law Aik Meng* [2007] 2 SLR(R) 814 at [58].
[87] *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [56].
[88] See, *eg*, *Public Prosecutor v Juandi bin Pungot* [2022] 5 SLR 470.

*(1) The aggregate sentence is compared with the Tariff*

25 Prior to the holding in *Shouffee*, the Courts applied the totality principle by comparing the aggregate sentence with the maximum sentence allowed by statute, rather than the Tariff.[89] Later, the High Court in *Shouffee* held that the yardstick against which an aggregate sentence ought to be compared is the "normal sentence that is imposed for the most serious of the individual offences", rather than the maximum permissible sentence.[90] The Court reasoned that the "overriding concern" of the totality principle is to ensure proportionality.[91] Hence, it would be "incongruous to take as a yardstick for comparison a maximum sentence which would usually be reserved for the most serious offenders and which may have no correlation to the actual circumstances in which the offender who is before the court committed the offence in question".[92] As an additional point of note, the Court held that while it may choose which sentences are to run consecutively to give effect to the CPC Rule, it must also ensure that the aggregate sentence must also exceed the longest individual sentence.[93]

26 The Court of Appeal further clarified in *Haliffie bin Mamat v Public Prosecutor and other appeals*[94] ("***Haliffie***") that, in determining the Tariff for the purposes of the totality principle, the Court should compare the aggregate sentence with the "*range* of sentences normally imposed for the most serious of the individual offences rather than a specific sentencing benchmark or starting point".[95] Where the Tariff cannot be determined due to a "dearth of authorities", the Court may consider the "midpoint of the maximum prescribed sentence" as a "useful proxy".[96]

[89] *Public Prosecutor v Law Aik Meng* [2007] 2 SLR(R) 814 at [58]. See also *Low Meng Chay v Public Prosecutor* [1993] 1 SLR(R) 46 at [8], which compared the sentence of seven years, four months and 23 days with the statutory sentence limit of 5 years in determining that the sentence was excessive.
[90] *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [56].
[91] *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [56].
[92] *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [56].
[93] *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [77].
[94] [2016] 5 SLR 636.
[95] *Haliffie bin Mamat v Public Prosecutor and other appeals* [2016] 5 SLR 636 at [79] (emphasis in original).
[96] *Ye Lin Myint v Public Prosecutor* [2019] 5 SLR 1005 at [94].

*(2) Application of the principle*

27 The current position appears to be that a sentence may offend Limb 1 if it is substantially above the Tariff. For instance, in *Shouffee*, the most serious individual offence committed by the appellant was the importation of 139.9g of methamphetamine. The High Court held that a sentence of 12 years' imprisonment, which was the sentence that the Prosecution previously sought and obtained in respect of the importation charge, would already be "at the high end of the range".[97] The aggregate sentence of 17 years' imprisonment was "well in excess of this" and hence offended Limb 1.[98] Accordingly, it reduced the appellant's sentence to 12 years and six months' imprisonment.[99]

28 Conversely, it appears that if an aggregate sentence does not exceed the Tariff, the Court would not find that the sentence offends the totality principle. One example may be found in the decision of the Court of Appeal in *Haliffie*, where the appellant was convicted of one count of rape and one count of robbery.[100] The High Court imposed an aggregate sentence of 13 years' imprisonment and 18 strokes of the cane.[101] On appeal, the Court of Appeal compared the aggregate sentence with the normal level of sentences for a Category 1 rape as per the framework laid out in *Public Prosecutor v NF*[102], which varied from nine to 13 years' imprisonment.[103] Accordingly, it held that the sentence was not "out of sync with the normal level of sentences imposed for the rape charge, nor was it crushing" and dismissed the appeal.[104]

29 More recently in *Public Prosecutor v Yap Jung Houn Xavier*[105] ("***Xavier Yap***"), the accused pleaded guilty to two charges of culpable homicide.[106] The High Court imposed a sentence of seven years' imprisonment for each charge and ordered for them to run consecutively, resulting in an aggregate sentence of 14 years' imprisonment.[107] The Court found that the sentence was "[not] substantially above the

[97] *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [97].
[98] *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [97].
[99] *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [100].
[100] *Haliffie bin Mamat v Public Prosecutor and other appeals* [2016] 5 SLR 636 at [1].
[101] *Haliffie bin Mamat v Public Prosecutor and other appeals* [2016] 5 SLR 636 at [1].
[102] [2006] 4 SLR(R) 849.
[103] *Haliffie bin Mamat v Public Prosecutor and other appeals* [2016] 5 SLR 636 at [80].
[104] *Haliffie bin Mamat v Public Prosecutor and other appeals* [2016] 5 SLR 636 at [90].
[105] [2023] SGHC 224.
[106] *Public Prosecutor v Yap Jung Houn Xavier* [2023] SGHC 224 at [3].
[107] *Public Prosecutor v Yap Jung Houn Xavier* [2023] SGHC 224 at [76].

sentences normally meted out" for culpable homicide (though it did not make explicit reference to a numerical Tariff to which it was comparing the aggregate sentence).[108] This suggests that the Court was of the view that the aggregate sentence was not one that offended Limb 1.

*(3) The Court may not necessarily vary a sentence even if the sentence offends Limb 1*

30 However, even when the Court finds that an aggregate sentence offends Limb 1, it may nevertheless refuse to vary the sentence. This is because in determining whether a reduction in sentence is appropriate on account of the totality principle, the Court usually makes a further comparison between the aggregate sentence and the offender's overall criminality. Thus, the Courts may refuse to reduce a sentence even if the sentence ostensibly offends Limb 1 where the offender's conduct reflected a high degree of criminality.

31 For instance, in *Public Prosecutor v Juandi bin Pungot*[109] ("***Juandi***"), the accused was a former employee of Shell, and had assisted in the misappropriation of marine gasoil ("**MGO**") from Shell's Bukom plant. He was then convicted of:[110]

(a) 20 charges under section 408 read with section 109 of the Penal Code 1871 (the "**PC**") and section 124(4) of the CPC for abetment by engaging in a conspiracy to commit criminal breach of trust;

(b) 10 charges under section 47(1)(*b*) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act 1992 (Cap 65A, 2000 Rev Ed); and

(c) Six charges under section 6(*a*) of the PCA, with 49 other charges taken into consideration.

32 The total value of the MGO involved in the offences was S$93,835,793.49.[111] The global sentence imposed by the High Court

[108] *Public Prosecutor v Yap Jung Houn Xavier* [2023] SGHC 224 at [73].
[109] [2022] 5 SLR 470.
[110] *Public Prosecutor v Juandi bin Pungot* [2022] 5 SLR 470 at [2].
[111] *Public Prosecutor v Juandi bin Pungot* [2022] 5 SLR 470 at [12].

was 29 years' imprisonment.[112] In applying the totality principle, the High Court considered that the global sentence was almost twice the length of the prescribed maximum for the most serious offence (criminal breach of trust).[113] This ostensibly offends Limb 1 (though this was not explicitly stated by the Court). Nevertheless, it held that the sentence was "wholly proportionate to the overall criminality of the accused".[114] This was because the accused's conduct reflected a high degree of criminality,[115] which in turn justified a higher aggregate sentence. In particular, the Court had regard to the accused's "persistence in offending across the years",[116] the large quantum of money involved,[117] and the fact that he was "at the centre of a giant web of criminality of a massive scale".[118] Accordingly, the Court held that the sentence was proportionate to the overall criminality of the accused, [119] notwithstanding that, as earlier explained, it ostensibly offended Limb 1.

33 Even in cases where the Court is satisfied that a reduction of sentence is warranted on the grounds of Limb 1, it may not necessarily vary the sentence to a level that: (**a**) does not offend Limb 1 at all; or (**b**) is more in line with the identified Tariff. In *Public Prosecutor v Loh Cheok San*[120], for instance, the accused pleaded guilty to two charges of criminal breach of trust, each against different parties.[121] The Court imposed a sentence of 35 months' imprisonment for the first charge and 65 months' imprisonment for the second charge, with the sentences ordered to run concurrently.[122] On appeal, the High Court held that the imposition of consecutive sentences was appropriate on the present facts,[123] which would have resulted in a global sentence of 100 months' imprisonment.[124] However, this sentence would have offended the totality principle as it was substantially above the identified Tariff of 33 to 39 months' imprisonment.[125] Hence, the Court instead reduced the

[112] *Public Prosecutor v Juandi bin Pungot* [2022] 5 SLR 470 at [92].
[113] *Public Prosecutor v Law Aik Meng* [2007] 2 SLR(R) 814 at [58].
[114] *Public Prosecutor v Juandi bin Pungot* [2022] 5 SLR 470 at [94].
[115] *Public Prosecutor v Juandi bin Pungot* [2022] 5 SLR 470 at [91].
[116] *Public Prosecutor v Juandi bin Pungot* [2022] 5 SLR 470 at [93].
[117] *Public Prosecutor v Juandi bin Pungot* [2022] 5 SLR 470 at [90].
[118] *Public Prosecutor v Juandi bin Pungot* [2022] 5 SLR 470 at [90].
[119] *Public Prosecutor v Juandi bin Pungot* [2022] 5 SLR 470 at [94].
[120] [2023] 5 SLR 1646.
[121] *Public Prosecutor v Loh Cheok San* [2023] 5 SLR 1646 at [1].
[122] *Public Prosecutor v Loh Cheok San* [2023] 5 SLR 1646 at [7].
[123] *Public Prosecutor v Loh Cheok San* [2023] 5 SLR 1646 at [44].
[124] *Public Prosecutor v Loh Cheok San* [2023] 5 SLR 1646 at [45].
[125] *Public Prosecutor v Loh Cheok San* [2023] 5 SLR 1646 at [60].

sentence for the second charge to 45 months' imprisonment and ordered that the sentences run consecutively, resulting in an aggregate sentence of 80 months' imprisonment.[126] This sentence, while still nearly twice the length of the Tariff, was held to be appropriate given the "overall criminality of the Respondent's conduct across the two amalgamated charges".[127] Hence, it may be said that the goal of the Courts is not to ensure that a sentence does not offend Limb 1 *per se*. Rather, it is more concerned with ensuring that the sentence imposed is proportionate to the offender's overall criminality.

34 If an appellate Court is satisfied that the totality principle had been duly considered by the trial judge, it may also refrain from varying the sentence. This is likely because a sentence imposed after due consideration of the totality principle is one that is already proportionate to the offender's overall criminality and hence does not require appellate intervention. In *Muhammad Alif bin Ab Rahim v Public Prosecutor*[128], the appellant was charged with one count of aggravated rape and two charges of sexual assault by penetration, with seven other charges taken into consideration for the purpose of sentencing.[129] The aggregate sentence imposed was 28 years' imprisonment and 24 strokes of the cane.[130] While this was "significantly longer than the sentence imposed for the most serious individual offence, *ie*, that of rape",[131] the Court of Appeal found that in calibrating the individual offences, the trial judge had not increased the individual sentences despite noting numerous offender-specific aggravating factors.[132] This suggested that the trial judge "had considered these factors, *in conjunction with* the totality principle, in deriving the aggregate sentence imposed on the appellant".[133] Accordingly, the Court held that the sentence ought not to be further reduced.[134]

35 At the same time, if an appellate court is of the opinion that the totality principle had been given *excessive* weight by the trial judge, it

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[126] *Public Prosecutor v Loh Cheok San* [2023] 5 SLR 1646 at [63].
[127] *Public Prosecutor v Loh Cheok San* [2023] 5 SLR 1646 at [63].
[128] [2021] SGCA 106.
[129] *Muhammad Alif bin Ab Rahim v Public Prosecutor* [2021] SGCA 106 at [1].
[130] *Muhammad Alif bin Ab Rahim v Public Prosecutor* [2021] SGCA 106 at [19].
[131] *Muhammad Alif bin Ab Rahim v Public Prosecutor* [2021] SGCA 106 at [34].
[132] *Muhammad Alif bin Ab Rahim v Public Prosecutor* [2021] SGCA 106 at [35].
[133] *Muhammad Alif bin Ab Rahim v Public Prosecutor* [2021] SGCA 106 at [35] (emphasis in original).
[134] *Muhammad Alif bin Ab Rahim v Public Prosecutor* [2021] SGCA 106 at [35].

may increase the sentence imposed. This was the case in *Navaseelan Balasingam v Public Prosecutor*[135] ("***Navaseelan***"), where the accused faced five charges under the Computer Misuse Act 1993 and five charges of theft under the PC, with 258 similar charges taken into consideration.[136] At first instance, the trial judge was careful to ensure that the aggregate sentence was not in excess of the maximum prescribed sentence (seven years' imprisonment) for the most serious offence for which the accused had been convicted on.[137] Accordingly, he imposed a sentence of five years and six months' imprisonment.[138] On appeal, the High Court held that, in light of the then-section 17 of the CPC, the actual jurisdiction of the District Court in that case was twice the amount of punishment which the Court, in the exercise of its ordinary jurisdiction, is competent to inflict.[139] Hence, the actual maximum possible sentence the Court could impose was 14 years' imprisonment.[140] In exercising care to not impose a sentence that did not exceed his ordinary sentencing jurisdiction of seven years' imprisonment,[141] the trial judge was "unduly constrained by the totality principle", resulting in an aggregate sentence that did not quite reflect the severity of the offences in question.[142] Accordingly, the Court increased the sentence imposed to seven years and six months' imprisonment.[143]

36 It is worth noting that the Court in *Navaseelan* considered the maximum punishment that could be imposed to be "five times ten years' punishment", and later held that the maximum possible sentence that could have been imposed by the trial judge was 14 years' imprisonment, having regard to the fact that the sentencing jurisdiction of the District Court is limited to seven years' imprisonment.[144] This appears to suggest two things. Firstly, where the Court has limited jurisdiction, the

[135] [2007] 1 SLR(R) 767.
[136] *Navaseelan Balasingam v Public Prosecutor* [2007] 1 SLR(R) 767 at [1].
[137] *Navaseelan Balasingam v Public Prosecutor* [2007] 1 SLR(R) 767 at [26]. It should be noted that *Navaseelan Balasingam v Public Prosecutor* is a case that pre-dates *Shouffee* and hence makes reference to the statutory maximum rather than the Tariff. Nevertheless, it is helpful in illustrating the point that if an appellate court is of the opinion that the totality principle had been given excessive weight by the trial judge, it may increase the sentence imposed.
[138] *Navaseelan Balasingam v Public Prosecutor* [2007] 1 SLR(R) 767 at [12].
[139] *Navaseelan Balasingam v Public Prosecutor* [2007] 1 SLR(R) 767 at [33].
[140] *Navaseelan Balasingam v Public Prosecutor* [2007] 1 SLR(R) 767 at [27].
[141] *Navaseelan Balasingam v Public Prosecutor* [2007] 1 SLR(R) 767 at [27].
[142] *Navaseelan Balasingam v Public Prosecutor* [2007] 1 SLR(R) 767 at [28].
[143] *Navaseelan Balasingam v Public Prosecutor* [2007] 1 SLR(R) 767 at [39].
[144] *Navaseelan Balasingam v Public Prosecutor* [2007] 1 SLR(R) 767 at [27].

maximum sentence it can impose on a multiple offender is dependent on its sentencing jurisdiction. Secondly, and more pertinently, in cases where there are multiple counts of the most serious offence, the maximum sentence applicable is the maximum sentence allowed by statute for that offence, *multiplied by the number of charges for that offence* (the "**Tariff Proposition**"). Applying this to the facts in *Navaseelan*, the Court observed that the maximum sentence that could be imposed by the trial judge in the District Court was hence 14 years' imprisonment.[145] On the other hand, had the case been decided in the High Court, which has no such limited jurisdiction, the maximum sentence that could have been imposed would have been 50 years' imprisonment.[146]

37 It is respectfully submitted that there are at least two issues with the Tariff Proposition. First, as discussed previously, it appears that the present approach by the Courts is to first consider whether the Tariff is exceeded, before considering whether the sentence is nevertheless proportionate to the overall criminality presented. Insofar as the Tariff is typically calculated with reference to the normal level of sentence imposed for a *single* count of the most serious individual offence,[147] the approach taken in *Navaseelan* appears to be inconsistent with this approach. In a related vein, the second issue is that if the Tariff Proposition were to be adopted, nearly no sentence would offend the totality principle in the case of a multiple offender. That may then run contrary to the purpose of the totality principle, which is in part to avoid the disproportionality that would arise from a "mere arithmetic addition of individual sentences".[148] Hence, it is submitted that the Tariff Proposition finds no support in recent jurisprudence and is conceptually in tension with the totality principle.

38 Despite these criticisms, what is clear from *Navaseelan* is that, if an appellate court concludes that the totality principle has been duly considered by the trial judge, it will avoid varying a sentence even if this sentence ostensibly offends the totality principle. This may be because a sentence imposed after due consideration of the totality principle is one

[145] *Navaseelan Balasingam v Public Prosecutor* [2007] 1 SLR(R) 767 at [27].
[146] *Navaseelan Balasingam v Public Prosecutor* [2007] 1 SLR(R) 767 at [27].
[147] See, *eg*. *Public Prosecutor v Loh Cheok San* as discussed above at paragraph 33: the Court made a comparison between the aggregate sentence and the identified tariff for a single count of criminal breach of trust.
[148] *Public Prosecutor v Raveen Balakrishnan* [2018] 5 SLR 799 at [71].

that is already proportionate to the offender's overall criminality and hence does not require appellate intervention.

### *(4) There are two instances where the High Court appears to not strictly follow the principle set out in* Shouffee

39 It appears that after the decision in *Shouffee*, the Courts have been fairly consistent in their application of Limb 1 by comparing the aggregate sentence to the Tariff rather than some other yardstick such as the statutory maximum. However, there are at least two High Court decisions that do not appear to strictly follow the principle set out in *Shouffee* (and as clarified by *Haliffie*) and are worth pointing out. To reiterate, the principle in *Shouffee* is that the Courts are to compare the aggregate sentence against the "normal sentence … imposed for the most serious of the individual offences", rather than the maximum permissible sentence.[149] This was then clarified in *Haliffie* to mean that the Courts should compare the aggregate sentence with the "*range* of sentences normally imposed for the most serious of the individual offences rather than a specific sentencing benchmark or starting point".[150]

40 The first case is the decision of the High Court in *Logachev Vladislav v Public Prosecutor*[151] ("***Logachev***"), where the appellant pleaded guilty to six charges of cheating at play, in contravention of section 172A of the Casino Control Act 2006.[152] The trial judge sentenced him to an aggregate term of 45 months' imprisonment.[153] On appeal, the High Court held that this sentence "offends the first limb of the totality principle" as it was almost double the sentence imposed for the most serious of the individual offences, which was 24 months' imprisonment.[154] Accordingly, it reduced the sentence to 38 months' imprisonment.[155] It is noted that the indicative sentencing range found by the Court was 12 to 36 months' imprisonment.[156] However, the Court compared the aggregate sentence imposed against the highest individual

[149] *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [56].
[150] *Haliffie bin Mamat v Public Prosecutor and other appeals* [2016] 5 SLR 636 at [79] (emphasis in original).
[151] [2018] 4 SLR 609.
[152] *Logachev Vladislav v Public Prosecutor* [2018] 4 SLR 609 at [1].
[153] *Logachev Vladislav v Public Prosecutor* [2018] 4 SLR 609 at [2].
[154] *Logachev Vladislav v Public Prosecutor* [2018] 4 SLR 609 at [110].
[155] *Logachev Vladislav v Public Prosecutor* [2018] 4 SLR 609 at [110].
[156] *Logachev Vladislav v Public Prosecutor* [2018] 4 SLR 609 at [99].

sentence imposed on the appellant, rather than the indicative sentencing range.[157] It is respectfully submitted that had the High Court compared the aggregate sentence to the indicative sentencing range, the result of the appeal may have been different as the aggregate sentence was only nine months in excess of the indicative sentencing range.

41 The second case is the decision of the High Court in *Juandi* where the Court compared the global sentence of 29 years' imprisonment with the prescribed maximum punishment for the most serious offence (criminal breach of trust) rather than the Tariff or any identified indicative sentencing ranges.[158] It is likely that a comparison with the Tariff rather than the prescribed maximum punishment would not have resulted in a different outcome. This is because even if the sentence exceeded the Tariff, the Court may well have held that this sentence is proportionate to the high degree of criminality demonstrated by the accused.[159] Nevertheless, it is respectfully submitted that the comparison of the aggregate sentence with the prescribed maximum punishment for criminal breach of trust is not in line with the totality principle as explained by the cases of *Shouffee* and *Haliffie*. Rather, for the purposes of conceptual clarity, the Court ought to have first determined the Tariff for criminal breach of trust and, if necessary, the overall criminality of the accused to determine whether the sentence is nevertheless proportionate to his overall criminality.

*(5) Limb 1 should be refined into a two-stage inquiry*

42 With regards to Limb 1, the conclusion to draw from the authorities is that the length of the aggregate sentence *vis-à-vis* the Tariff is inconclusive. In determining whether a reduction in sentence is warranted on account of Limb 1, the Court will also consider the overall criminality of the accused. An appellate court will also consider whether the trial judge had duly considered the totality principle in sentencing. Ultimately, the fact that the Courts generally refer to the overall criminality of the accused suggests that a mere comparison of the aggregate sentence to the Tariff is insufficient.

[157] *Logachev Vladislav v Public Prosecutor* [2018] 4 SLR 609 at [109].
[158] *Public Prosecutor v Juandi bin Pungot* [2022] 5 SLR 470 at [94].
[159] *Public Prosecutor v Juandi bin Pungot* [2022] 5 SLR 470 at [90].

43 The suggestion that this article advances is that for clarity, the Court's application of the totality principle for Limb 1 ought to proceed in two stages. At the first stage, the Court's comparison of an aggregate sentence to the normal level of sentences should be treated as a *threshold question* of whether the aggregate sentence imposed exceeds the Tariff. If this question is answered in the negative, it can be taken that the aggregate sentence does not offend the totality principle. At this point, the inquiry may be disposed of. On the other hand, if the question is answered in the affirmative, the Court should then proceed to the second stage and consider if there are any grounds to refuse to vary the sentence. For example, the Court may consider if the overall criminality of the accused warrants a sentence that is substantially above the Tariff, or if the totality principle has been duly considered by the Court at first instance.

44 To determine the overall criminality of the accused, a variety of factors may be considered. The Court of Appeal in *ADF v Public Prosecutor*[160] helpfully provides a non-exhaustive list of factors that may be considered when determining the overall criminality of an accused and hence whether more than two sentences ought to run consecutively. An order for more than two sentences to run consecutively "ought to be given serious consideration in dealing with distinct offences when one or more of the following circumstances are present":[161]

(a) The Court is dealing with persistent or habitual offenders;

(b) There is a pressing public interest concern in discouraging the type of criminal conduct being punished;

(c) There are multiple victims; and

(d) Other peculiar cumulative aggravating features are present.

45 The proposition that the accused's overall criminality carries the most weight in the final sentencing calculus is not novel. In fact, the High Court in *Jeffery bin Abdullah v Public Prosecutor*[162] ("***Jeffery***")

[160] [2010] 1 SLR 874.
[161] *ADF v Public Prosecutor* [2010] 1 SLR 874 at [146].
[162] [2009] 3 SLR(R) 414.

made explicit reference to a "proportionality principle" in sentencing, which "requires that the overall sentence imposed on an offender should be based on his total culpability in the various offences committed, when viewed as a whole".[163] An example of the Court considering the accused's culpability in its application of the totality principle can also be seen in *Public Prosecutor v Hirris anak Martin and another*[164], where the second respondent was convicted of one count of robbery with grievous hurt and one count of robbery with hurt.[165] The Court of Appeal held that ordering wholly consecutive sentences against the second respondent would not infringe on the totality principle, given the "gravity of his criminal conduct" and his propensity for "wanton violence".[166] Once again, it appears that the Court considered the gravity of the offences before it in determining whether the sentence imposed was appropriate in light of the totality principle.

46 Yet another example is the decision of the Court of Appeal in *Public Prosecutor v ABJ*[167] ("***ABJ***"), where the accused pleaded guilty to nine charges relating to the sexual assault of a girl which began when she was eight years old and continued until she was 15 years old.[168]

47 In that case, the aggregate sentence imposed by the trial judge was 24 years' imprisonment.[169] On appeal, the Court of Appeal held that the original sentence "fails to adequately encapsulate the heinousness of the accused's depraved and wanton conduct".[170] Accordingly, it increased the sentence to 32 years' imprisonment.[171]

48 It should be noted that the two cases immediately above did not specifically refer to the decision in *Jeffery*. However, it is submitted that both cases applied a similar principle by comparing the sentence imposed with the overall criminality of the accused in reaching their respective decisions. Hence, even if it is not stated explicitly, the Courts do place great weight on the overall criminality of the accused in the final sentencing calculus. It is therefore submitted that the suggested

[163] *Jeffery bin Abdullah v Public Prosecutor* [2009] 3 SLR(R) 414 at [16].
[164] [2010] 2 SLR 976.
[165] *Public Prosecutor v Hirris anak Martin and another* [2010] 2 SLR 976 at [1].
[166] *Public Prosecutor v Hirris anak Martin and another* [2010] 2 SLR 976 at [22].
[167] [2010] 2 SLR 377.
[168] *Public Prosecutor v ABJ* [2010] 2 SLR 377 at [3].
[169] *Public Prosecutor v ABJ* [2009] 2 SLR 377 at [5].
[170] *Public Prosecutor v ABJ* [2010] 2 SLR 377 at [20].
[171] *Public Prosecutor v ABJ* [2010] 2 SLR 377 at [21].

reframing of Limb 1 into two stages – the final stage depending on the accused's overall criminality – in fact finds conceptual support in local jurisprudence.

49 There is a further advantage to this suggested reframing of Limb 1, which is that it would better reflect how Limb 1 has been used in practice. Although the fact that an aggregate sentence exceeds the Tariff could lead to the *prima facie* conclusion that the sentence is excessive, as discussed above, there are cases in which the Court has nevertheless refused to vary the sentence on the grounds that the sentence is proportionate to the overall criminality of the accused. Reframing the Limb 1 inquiry in this way would therefore provide greater clarity in the application of the totality principle, where the conceptual articulation of Limb 1 better reflects how it is applied in practice.

### *B. A sentence must not be a crushing sentence not in keeping with an offender's record and prospects*

50 The second limb of the totality principle ("**Limb 2**") is that a cumulative sentence ought not to be one that is crushing and not in keeping with an offender's record and prospects.[172] This is because while there is a general need to punish an offender who has committed a crime, the punishment imposed should not destroy any hope of recovery or reintegration with society.[173] In determining whether a sentence is crushing, the Courts have considered a variety of factors such as the offender's antecedents,[174] age,[175] and the possibility of the offender obtaining a remission in sentence.[176] This section will discuss each factor in turn and, where applicable, advance suggestions to improve the way in which they are dealt with by the Courts.

[172] *Kanagasuntharam v Public Prosecutor* [1991] 2 SLR(R) 874 at [13], citing D A Thomas, *Principles of Sentencing* (Heinemann Educational Books, 2nd Ed, 1979) at pp 57-58; *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [53], citing D A Thomas, *Principles of Sentencing* (Heinemann Educational Books, 2nd Ed, 1979) at pp 57-58.
[173] *Public Prosecutor v Chong Hou En* [2015] 3 SLR 222 at [67]; *Tan Yao Min v Public Prosecutor* [2018] 3 SLR 1134 at [45].
[174] *Tan Yao Min v Public Prosecutor* [2018] 3 SLR 1134 at [100].
[175] *CJH v Public Prosecutor* [2023] SGCA 19 at [20]; *Public Prosecutor v UI* [2008] 4 SLR(R) 500 at [78].
[176] *Public Prosecutor v Yap Jung Houn Xavier* [2023] SGHC 224 at [75].

*(1) Relevance of antecedents*

51 A lack of antecedents does not constitute a mitigating factor and is neutral at best.[177] However, the presence of antecedents can be indicative of escalating criminal behaviour and low rehabilitative prospects,[178] which will militate against a finding that a sentence is crushing.

52 For instance, in *Tan Yao Min v Public Prosecutor*[179], the appellant pleaded guilty to one charge of criminal intimidation under section 506 of the PC, one charge of unlawful stalking under section 7 of the Protection from Harassment Act 2014 ("**POHA**") and one charge of intentionally causing alarm under section 3(1)(*b*) of the POHA.[180] At first instance, the Court imposed a sentence of 18 months' imprisonment.[181] The High Court upheld the sentence on appeal. In particular, it held that the appellant's antecedents demonstrated an "escalation of his previous offending behaviour" and that the sentence was not crushing in view of his past record.[182] Accordingly, the Court dismissed the appeal.

53 Similarly, in *Public Prosecutor v Poopathi Chinaiyah s/o Paliandi*[183], the accused was convicted of three drug-related charges.[184] The aggregate sentence imposed was 30 years' imprisonment and 24 strokes of the cane.[185] The High Court held that the sentence was not crushing, considering the gravity of the offences and the recalcitrance of the accused.[186] In particular, the Court considered that the accused had re-offended just three years after being released from prison for the very same offence of drug trafficking, and that he had "demonstrated his criminal proclivities by trafficking in an even wider variety of drugs than before".[187] Accordingly, the Court upheld the sentence.[188]

[177] *BPH v Public Prosecutor and another appeal* [2019] 2 SLR 764 at [85].
[178] *Tan Yao Min v Public Prosecutor* [2018] 3 SLR 1134 at [101].
[179] [2018] 3 SLR 1134.
[180] *Tan Yao Min v Public Prosecutor* [2018] 3 SLR 1134 at [2].
[181] *Tan Yao Min v Public Prosecutor* [2018] 3 SLR 1134 at [4].
[182] *Tan Yao Min v Public Prosecutor* [2018] 3 SLR 1134 at [100].
[183] [2020] 5 SLR 734.
[184] *Public Prosecutor v Poopathi Chinaiyah s/o Paliandi* [2020] 5 SLR 734 at [2].
[185] *Public Prosecutor v Poopathi Chinaiyah s/o Paliandi* [2020] 5 SLR 734 at [4].
[186] *Public Prosecutor v Poopathi Chinaiyah s/o Paliandi* [2020] 5 SLR 734 at [44].
[187] *Public Prosecutor v Poopathi Chinaiyah s/o Paliandi* [2020] 5 SLR 734 at [46].
[188] *Public Prosecutor v Poopathi Chinaiyah s/o Paliandi* [2020] 5 SLR 734 at [45].

54 It is also possible for an accused to not be treated as a first-time offender even if he or she has no prior antecedents. For instance, the High Court in *Chen Weixiong Jerriek v Public Prosecutor*[189] expressed its reluctance to regard a multiple offender as a first-time offender.[190] The Honourable the Chief Justice Yong Pung How (as he then was) went as far as to state, albeit in *obiter*, that "it is the prerogative of this court to refuse to consider as a first time offender anyone who has been charged with multiple offences, even if he has no prior convictions".[191]

55 On the flip side, the mere fact that an offender has antecedents does not automatically mean that a sentence will not be crushing. For instance, in *Shouffee*, the trial judge considered the appellant's "speedy relapse into drugs", *inter alia*, to justify having the two heaviest sentences run consecutively.[192] However, on appeal, the High Court found that while the offender had prior drug convictions, the last conviction for drug consumption was 14 years ago.[193] This long drug-free period "militated against the easy conclusion that he was a 'hardcore addict'".[194]

56 Similarly, in *Public Prosecutor v Jamilah Binte Mohamed*[195], the offender was convicted of one count of possession of buprenorphine for the purpose of trafficking, one count of possession of buprenorphine and one count of consumption of morphine.[196] The Court imposed a sentence of five years and two months' imprisonment.[197] In reaching its decision, the Court noted that she had several prior drug-related offences.[198] However, the Court also noted that the accused has "made some real effort in the past" to break out of drug addiction,[199] and that she had a long drug-free period of 13 years.[200] Accordingly, the Court held that a long sentence would be crushing and disproportionate.[201] Hence, the presence of antecedents does not necessarily suggest that the

[189] [2003] 2 SLR(R) 334.
[190] *Chen Weixiong Jerriek v Public Prosecutor* [2003] 2 SLR(R) 334 at [17].
[191] *Chen Weixiong Jerriek v Public Prosecutor* [2003] 2 SLR(R) 334 at [17].
[192] *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [18].
[193] *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [86].
[194] *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [86].
[195] [2008] SGDC 137.
[196] *Public Prosecutor v Jamilah Binte Mohamed* [2008] SGDC 137 at [3].
[197] *Public Prosecutor v Jamilah Binte Mohamed* [2008] SGDC 137 at [4].
[198] *Public Prosecutor v Jamilah Binte Mohamed* [2008] SGDC 137 at [5].
[199] *Public Prosecutor v Jamilah Binte Mohamed* [2008] SGDC 137 at [5].
[200] *Public Prosecutor v Jamilah Binte Mohamed* [2008] SGDC 137 at [5].
[201] *Public Prosecutor v Jamilah Binte Mohamed* [2008] SGDC 137 at [22].

offender's rehabilitative prospects are poor. In fact, scrutiny of the antecedents may lead to the opposite conclusion, given the appropriate factual matrix.

57 Construed in this way, the foremost consideration of the Courts here is not the presence of antecedents *per se*, but rather whether the offender is likely to reform and reintegrate into society. In this connection, an analysis of the offender's antecedents is simply one factor that the Courts consider. Accordingly, Limb 2 applies with less force if it can be proven that the offender's rehabilitative prospects are low and vice versa.

*(2) Relevance of an offender's age*

58 When deciding whether a sentence is crushing, the Courts also consider the length of the imposed sentence relative to the offender's age and the age at which they would be released. The consideration here is that while the sentence cannot be so short as to be manifestly inadequate, it must also not be so long that the offender is unable to meaningfully reintegrate into society when they are released.[202] There are two key distinctions within this category: young offenders and offenders of advanced age.

(a) Young offenders

59 As a starting point, young offenders have been defined as offenders aged 21 or below.[203] In general, the Courts prioritise rehabilitative sentences for such offenders.[204] It may be for this reason that the Courts consider the young age of an offender in determining whether a sentence is crushing. For instance, in *CJH v Public Prosecutor*[205] ("***CJH***"), the appellant had initially faced an aggregate term of 18 years' imprisonment for three charges of sexual penetration of a minor below 16 years of age.[206] Six other charges were taken into consideration for the purposes of sentencing.[207] The Court of Appeal

[202] *Public Prosecutor v Noriskhandar bin Ismail* [2019] SGDC 37 at [136]; *Public Prosecutor v Chow Zhi Hong* [2020] SGDC 279 at [195].
[203] *A Karthik v Public Prosecutor* [2018] 5 SLR 1289 at [20].
[204] *Public Prosecutor v Siow Kai Yuan Terence* [2020] 4 SLR 1412 at [42], citing *Public Prosecutor v Lim Cheng Ji Alvin* [2017] 5 SLR 671 at [6] and [7].
[205] [2023] SGCA 19.
[206] *CJH v Public Prosecutor* [2023] SGCA 19 at [9].
[207] *CJH v Public Prosecutor* [2023] SGCA 19 at [3].

considered that the appellant was aged between 15 and 17 at the time of the offences, and 20 at the time of proceedings in the High Court.[208] The Court of Appeal further observed that a total imprisonment term of 18 years represented "almost [the appellant's] whole life up to that point" and was hence a crushing sentence.[209] Accordingly, the Court of Appeal reduced the aggregate sentence to 16 years.[210]

60 It is likely, however, that the fact that the sentence to be imposed nearly represents or exceeds the offender's whole life is only relevant in the case of a young offender. In *Public Prosecutor v Azuar Bin Ahamad*[211] ("***Azuar***"), the 40-year old accused pleaded guilty to three charges of rape and one charge of sexual assault by penetration,[212] with 29 other charges taken into consideration.[213] The Court sentenced the accused to 12 years and six months' imprisonment and 12 strokes of the cane for each charge and ordered that the three rape charges were to run consecutively, resulting in an aggregate sentence of 37 years and six months' imprisonment.[214] The Court held that this sentence was appropriate, having regard to the need to protect the public from a "serial rapist with poor prospects of rehabilitation".[215]

61 As can be seen above, the Court in both *CJH* and *Azuar* imposed a sentence only a few years short of the offender's entire life up to the point of proceedings. However, these similarities did not lead to the same finding of the sentence being crushing. It may be possible that the difference is explained by the fact that *Azuar* involved five victims[216] and significantly more charges, whereas *CJH* involved one victim and relatively fewer charges. Nevertheless, it is pertinent that the Court in *Azuar* did not address the point of the sentence being only a few years short of the offender's entire life up to the point of proceedings. It is therefore fairly (and arguably) possible that the reason behind this apparent difference was simply the age of the offenders in both cases.

[208] *CJH v Public Prosecutor* [2023] SGCA 19 at [20].
[209] *CJH v Public Prosecutor* [2023] SGCA 19 at [20].
[210] *CJH v Public Prosecutor* [2023] SGCA 19 at [21].
[211] [2014] SGHC 149.
[212] *Public Prosecutor v Azuar Bin Ahamad* [2014] SGHC 149 at [5].
[213] *Public Prosecutor v Azuar Bin Ahamad* [2014] SGHC 149 at [6].
[214] *Public Prosecutor v Azuar Bin Ahamad* [2014] SGHC 149 at [132].
[215] *Public Prosecutor v Azuar Bin Ahamad* [2014] SGHC 149 at [133].
[216] *Public Prosecutor v Azuar Bin Ahamad* [2014] SGHC 149 at [23] and [34].

62 It is trite that rehabilitation generally features more strongly than retribution as a sentencing consideration in cases involving offenders below the age of 21.[217] The Court of Appeal in *Public Prosecutor v ASR*[218] articulated two reasons in support of this proposition. First, "a younger offender ought to be given a second chance because of his youthful folly and inexperience".[219] Second, youthful offenders are "more amenable to reform" by virtue of their youth and "society would benefit considerably from their rehabilitation".[220] Furthermore, young offenders are "unduly affected compared to adult offenders when they are exposed to typical punitive sentencing options such as imprisonment".[221] Hence, given the position that rehabilitation features more strongly than retribution in cases involving offenders below the age of 21, it is likely that the analysis in *CJH* only applies to youthful offenders.

63 Despite the Court's emphasis on rehabilitation for younger offenders, the Court may nevertheless impose a long sentence on a youthful offender if the offending conduct was sufficiently egregious. For example, in *Muhammad Anddy Faizul bin Mohd Eskah v Public Prosecutor*[222], the appellant faced 68 charges arising out of sexual offences involving nine victims.[223] He was convicted of nine charges, with the remaining charges being taken into consideration for the purpose of sentencing.[224] He was 18 years old by the date of his last offence.[225] Despite the appellant's youth, the Court of Appeal upheld his sentence of 22 years' imprisonment and 24 strokes of the cane.[226] In reaching its decision, the Court considered that when he was initially apprehended, he had already committed offences against at least nine victims; when released on bail, the appellant committed further offences against ten new victims, all of whom were between the ages of 13 and

[217] *Public Prosecutor v Lim Cheng Ji Alvin* [2017] 5 SLR 671 at [6]; *Public Prosecutor v Siow Kai Yuan Terence* [2020] 4 SLR 1412 at [42].
[218] [2019] 1 SLR 941.
[219] *Public Prosecutor v ASR* [2019] 1 SLR 941 at [122].
[220] *Public Prosecutor v ASR* [2019] 1 SLR 941 at [122].
[221] *Public Prosecutor v ASR* [2019] 1 SLR 941 at [122].
[222] [2020] SGCA 113.
[223] *Muhammad Anddy Faizul bin Mohd Eskah v Public Prosecutor* [2020] SGCA 113 at [1].
[224] *Muhammad Anddy Faizul bin Mohd Eskah v Public Prosecutor* [2020] SGCA 113 at [1].
[225] *Muhammad Anddy Faizul bin Mohd Eskah v Public Prosecutor* [2020] SGCA 113 at [3].
[226] *Muhammad Anddy Faizul bin Mohd Eskah v Public Prosecutor* [2020] SGCA 113 at [1] and [13].

18.[227] The egregiousness of his offences led to the Court imposing a sentence that was in fact longer than the appellant's entire life up to that point, but which "properly reflected the Appellant's culpability".[228]

(b) Offenders of advanced age

64 For offenders of advanced age, a *de facto* life sentence may be considered crushing. While there is no explicit definition of what amounts to an offender of advanced age, the Courts appear to draw the line at about 50 years old (which happens to be the age past which one may not be caned).[229] In *Public Prosecutor v UI*[230] ("***UI***"), the respondent was 55 years old at the time of sentencing.[231] He was convicted of five counts of rape and five counts of outrage of modesty, with the offences happening between 2002 and 2006.[232] The Court of Appeal held that the appropriate sentencing range for the offences would be a sentence of 12 to 15 years' imprisonment.[233] An aggregate sentence of 24 years' imprisonment was subsequently imposed.[234] The Court held that it should not impose a sentence that would effectively amount to a life sentence unless the Legislature had prescribed a life sentence for the offence, and that a 30-year sentence would be crushing.[235] It expressed its hope that the respondent would "be released at an age that should give him some time to spend with his family and to fulfil his wish to make amends to the victim".[236]

65 The proposition that the Courts ought not to impose *de facto* life sentences unless specifically provided for by legislation is, at first blush, attractive. If the goal of the criminal justice system is to secure the rehabilitation and reintegration of offenders into society,[237] the

[227] *Muhammad Anddy Faizul bin Mohd Eskah v Public Prosecutor* [2020] SGCA 113 at [12].
[228] *Muhammad Anddy Faizul bin Mohd Eskah v Public Prosecutor* [2020] SGCA 113 at [12].
[229] Criminal Procedure Code 2010 s 325(1)(*b*).
[230] [2008] 4 SLR(R) 500.
[231] *Public Prosecutor v UI* [2008] 4 SLR(R) 500 at [5].
[232] *Public Prosecutor v UI* [2008] 4 SLR(R) 500 at [6].
[233] *Public Prosecutor v UI* [2008] 4 SLR(R) 500 at [23].
[234] *Public Prosecutor v UI* [2008] 4 SLR(R) 500 at [78].
[235] *Public Prosecutor v UI* [2008] 4 SLR(R) 500 at [78].
[236] *Public Prosecutor v UI* [2008] 4 SLR(R) 500 at [78].
[237] *Public Prosecutor v Siow Kai Yuan Terence* [2020] 4 SLR 1412 at [1]; reiterated in *M Raveendran v Public Prosecutor* [2022] 3 SLR 1183 at [45].

Courts ought to shy away from *de facto* life sentences that inherently prevent an offender from reintegrating into society.

66 However, the issue lies in the fact that *UI* appears to be an anomaly as the Courts have since been very reluctant to reduce a sentence on account of an offender's advanced age. For example, in *Ewe Pang Kooi v Public Prosecutor*[238], the 66-year-old appellant[239] was convicted of 50 charges of criminal breach of trust, which were committed over the course of 10 years.[240] The aggregate sentence imposed was 25 years and 10 months.[241] Citing *UI*, the appellant submitted that the aggregate sentence should be adjusted downwards as it could amount to a life sentence given his advanced age.[242] The Court of Appeal rejected this as his advanced age was a "consequence of the period of time during which [he] was able to keep his fraudulent activities concealed".[243] Further, in *Public Prosecutor v BVR*[244], the accused was convicted of six charges of aggravated rape,[245] with 80 other charges taken into consideration.[246] The High Court imposed a sentence of 45 years' imprisonment on the accused, who was 54 years old at the time of sentencing.[247] The Court held that this would not be effectively imposing a life sentence on him as he would be released when he is around 80 years old, assuming he obtains remission for good behaviour.[248]

67 Similarly in *ABJ*, the accused pleaded to nine charges related to sexual offences, with 35 charges taken into consideration for the purpose of sentencing. The Court of Appeal imposed a sentence of 32 years' imprisonment,[249] meaning that the offender would only be released when he is around 79 to 80 years old. In fact, the Court

[238] [2020] 1 SLR 757.
[239] The appellant was 65 years old in 2019: *Public Prosecutor v Ewe Pang Kooi* [2020] 3 SLR 851 at [39].
[240] *Ewe Pang Kooi v Public Prosecutor* [2020] 1 SLR 757 at [1].
[241] *Ewe Pang Kooi v Public Prosecutor* [2020] 1 SLR 757 at [1].
[242] *Ewe Pang Kooi v Public Prosecutor* [2020] 1 SLR 757 at [10].
[243] *Ewe Pang Kooi v Public Prosecutor* [2020] 1 SLR 757 at [10].
[244] [2022] SGHC 198.
[245] *Public Prosecutor v BVR* [2022] SGHC 198 at [2].
[246] *Public Prosecutor v BVR* [2022] SGHC 198 at [3].
[247] *Public Prosecutor v BVR* [2022] SGHC 198 at [67].
[248] *Public Prosecutor v BVR* [2022] SGHC 198 at [67].
[249] *Public Prosecutor v ABJ* [2010] 2 SLR 377 at [21].

specifically distinguished the case from *UI*, holding that the conduct in *ABJ* was more deliberate, systematic and remorseless than that in *UI*.[250]

68 In all the above cases, the Court appeared willing to impose sentences that came close to or exceeded the offender's remaining life expectancy (though there is no exact number that is pointed to as "the life expectancy of the accused") due to the egregiousness of the offender's conduct. Hence, despite the general rule that the Courts will avoid imposing a *de facto* life sentence unless specifically provided for by legislation, it appears that this consideration is displaced if the offender's behaviour is sufficiently egregious.

69 One possible argument that can be advanced is that the advanced age of an offender should not be taken into consideration by the Courts in assessing whether a sentence is crushing under Limb 2 of the totality principle. This is because the Courts are primarily concerned with ensuring that offenders are able to rehabilitate and reintegrate meaningfully into society.[251] Yet, this consideration should apply with lesser force where the offender's rehabilitative prospects are low. This is because such offenders are less likely to be able to reintegrate meaningfully into society. For example, the Courts are less willing to grant a reduction of sentence to an offender who has failed to reform despite past punishments,[252] as such an offender is likely to have low rehabilitative prospects. A similar analysis applies to offenders of advanced age. By virtue of their advanced age, their capacity to reintegrate meaningfully into society for the rest of their life post-imprisonment is necessarily diminished. The rehabilitative prospects for such advanced-age offenders can be seen as lower when compared to youthful or middle-aged offenders not because of any inherent unwillingness to reform, but simply because of the shorter runway for rehabilitation.

[250] *Public Prosecutor v ABJ* [2010] 2 SLR 377 at [18].
[251] *Public Prosecutor v Siow Kai Yuan Terence* [2020] 4 SLR 1412 at [1].
[252] *Tan Yao Min v Public Prosecutor* [2018] 3 SLR 1134 at [100]; *Public Prosecutor v Poopathi Chinaiyah s/o Paliandi* [2020] 5 SLR 734 at [46]; *Public Prosecutor v Yeo Mong Seng* [2018] SGDC 111 at [13]; *Public Prosecutor v Chen Yi Tao* [2006] SGDC 136 at [12].

*(3) Relevance of possibility of remission*

70 It is an open question whether the possibility of remission should play a part, if any, in determining if a sentence is crushing. Under section 50I(1) of the Prisons Act 1933, a prisoner may be granted a remission order and be released from prison after they have served two-thirds of all the consecutive terms of imprisonment to which he or she was sentenced, or 14 days of the prisoner's sentence, whichever ends later.[253]

71 The possibility of an accused obtaining remission is a factor that has been considered by the Courts in determining whether a sentence is crushing.[254] For instance, in *Xavier Yap*, the defendant pleaded guilty to two charges of culpable homicide not amounting to murder.[255] The High Court sentenced him to seven years' imprisonment for each charge to run consecutively, resulting in an aggregate sentence of 14 years' imprisonment.[256] It held that this sentence cannot be said to be crushing, taking into account any possible remission from which he may benefit.[257] A similar analysis featured in *Public Prosecutor v Tan Kheng Chun Ray*[258], where the High Court held that the aggregate sentence of 27 years was not crushing given the possibility of remission from which he may benefit.[259]

72 However, the Courts have not consistently applied this factor in their analysis of the totality principle. For instance, in *CJH*, the Court of Appeal held that an aggregate sentence of 18 years' imprisonment would be crushing on the 20-year-old appellant as the length of the sentence was comparable to the appellant's entire life up to that point.[260] Accordingly, it reduced the sentence to 16 years.[261] There was no

[253] Prisons Act 1933 s 50I(1).
[254] The possibility of remission has been considered explicitly in a multitude of cases: *Public Prosecutor v UI* [2008] 4 SLR(R) 500 at [78]; *Lim Hock Hin Kelvin v Public Prosecutor* [1998] 1 SLR(R) 37 at [41]; *Public Prosecutor v Tan Kheng Chun Ray* [2011] SGHC 183 at [27]; *Public Prosecutor v Yap Jung Houn Xavier* [2023] SGHC 224 at [75]; *Public Prosecutor v Azuar Bin Ahamad* [2014] SGHC 149 at [133]; *Public Prosecutor v Lai Teck Guan* [2018] 5 SLR 0852 at [67]; *Public Prosecutor v BVR* [2022] SGHC 198 at [67].
[255] *Public Prosecutor v Yap Jung Houn Xavier* [2023] SGHC 224 at [3].
[256] *Public Prosecutor v Yap Jung Houn Xavier* [2023] SGHC 224 at [76].
[257] *Public Prosecutor v Yap Jung Houn Xavier* [2023] SGHC 224 at [75].
[258] [2011] SGHC 183.
[259] *Public Prosecutor v Tan Kheng Chun Ray* [2011] SGHC 183 at [27].
[260] *CJH v Public Prosecutor* [2023] SGCA 19 at [20].
[261] *CJH v Public Prosecutor* [2023] SGCA 19 at [21].

explicit consideration of the possibility of remission. However, considering the counterfactual where the original sentence of 18 years' imprisonment was upheld, the appellant may have been released in 12 years if he had received remission for good behaviour. Calculated in this way, the global sentence may not have been considered crushing. It is submitted that if remission were considered in this case, a different appellate Court may well have upheld the original sentence.

73 It is respectfully suggested that there needs to be consistency in the consideration of the possibility of remission as a relevant factor in sentencing. Foremost, this means that the Courts must elucidate a principled reason as to why remission should be a relevant factor in assessing if a sentence in crushing.

74 It is further submitted that the possibility of remission should not be a relevant factor in sentencing or in assessing if a sentence is crushing. At the outset, if a sentence is not crushing *merely* because there is the possibility of a one-third remission, the conclusion must naturally be that the sentence *is* crushing but for the possibility of a one-third remission. Thus, considering the possibility of remission as a relevant factor in sentencing may lead to some conceptual difficulties.

75 There is a further practical complication with considering the possibility of remission in determining whether a sentence is crushing: if the possibility of remission is a relevant factor in assessing if a sentence is not crushing under Limb 2, it should also be a relevant factor in assessing if a sentence offends Limb 1. In other words, if the relevant aggregate sentence being considered under Limb 2 is one which already takes into account an offender's possible remission, then this same sentence ought, as a matter of consistency, to be considered under Limb 1. However, if this is done, the result would be rather strange. *Ex hypothesi*, an offender would not only have to prove that the aggregate sentence substantially exceeds the "*range* of sentences normally imposed for the most serious of the individual offences rather than a specific sentencing benchmark or starting point", [262] but that the aggregate sentence substantially exceeds two-thirds of the "range" of such sentences. Hence, considering remission in sentencing presents significant complications in the practical application of Limb 2.

[262] *Haliffie bin Mamat v Public Prosecutor* [2016] 5 SLR 636 at [79] (emphasis in original).

76 There is a further conceptual issue with considering the possibility of remission in sentencing. By holding that an aggregate sentence is not crushing on account of the possibility of remission, it is already assumed that an accused will behave well and obtain his or her remission. However, as held by Justice Choo Han Teck in *Public Prosecutor v McCrea Michael*[263], a "sentencing court is only concerned with past conduct and ought not to interfere with the executive discretion in granting remission".[264] It is by this same token that the executive branch is restrained from refusing to order remission on the ground that it views the Court's sentence as inadequate.[265] In short, sentencing and remission are two wholly separate regimes that ought not be conflated (and which fall under the purviews of different branches of Government). At the point of sentencing, the Courts ought to be concerned only with the conduct of the accused up until the point of sentencing, rather than consider any possible improvement in behaviour.

77 Admittedly, in determining the rehabilitative prospects of an offender (which is one of the sentencing considerations), the Court is also making a decision based on a future possibility, where it would likely impose a lighter punishment if it is satisfied that the offender has an "extremely strong propensity for reform".[266] Hence, one potential argument is that if it is acceptable to impose a lighter punishment on the grounds of an extremely strong propensity for reform, it is likewise acceptable to consider the possibility of remission in sentencing.

78 However, a crucial distinction is that while the Court is considering an offender's rehabilitative prospects in making a judgment as to the offender's likely future conduct, the Court's conclusions are still based on past or existing conduct. In *Public Prosecutor v Siow Kai Yuan Terence*[267], the High Court considered three factors in its determination of whether a particular offender has demonstrated an extremely strong propensity for reform:[268]

[263] [2006] 3 SLR(R) 677.
[264] *Public Prosecutor v McCrea Michael* [2006] 3 SLR(R) 677 at [18].
[265] *Public Prosecutor v McCrea Michael* [2006] 3 SLR(R) 677 at [18].
[266] *Public Prosecutor v Siow Kai Yuan Terence* [2020] 4 SLR 1412 at [22].
[267] [2020] 4 SLR 1412.
[268] *Public Prosecutor v Siow Kai Yuan Terence* [2020] 4 SLR 1412 at [55] (emphasis in original).

(a) First, whether the offender has demonstrated a **positive desire to change** since the commission of the offence(s);

(b) Second, whether there are conditions in the offender's life that are **conducive to helping him turn over a new leaf**; and

(c) If, after considering the first two limbs, the Court comes to a *provisional* view that the offender has demonstrated an extremely strong propensity for reform, the Court should then consider, in light of the **risk factors** presented, whether there are reasons to revisit the finding of such a high capacity for reform.

79 The first limb under this framework involves the Court examining the offender's conduct between the time of offending and sentencing,[269] whereas the second limb is concerned with whether the offender's environment provides him with conducive conditions for improvement.[270] Under the third limb, "risk factors" include the offender's association with negative peers, or the presence of bad habit such as an offender's habitual drug use or dependence.[271] It is submitted that under all three limbs, the Court only considers factors that are in existence up until the time of sentencing, rather than factors that may come into existence after sentencing. Hence, even when the Courts are making an extrapolation into the future, their conclusions on the accused's rehabilitative prospects are premised on *past conduct*. This is unlike the consideration of remission, which is an extrapolation to the future that is not premised on past conduct.

80 In sum, it is respectfully submitted that in determining whether a sentence is crushing, the Courts ought to look solely at the sentence that is being imposed without any consideration of remission, which is something entirely dependent on the future conduct of the accused, and which falls under the domain of the executive branch. Otherwise, the possibility of remission (which is meant to reward offenders for good behaviour) runs the risk of turning into a far too easy clutch for the Prosecution to always rely on if it is alleged by an accused that the

[269] *Public Prosecutor v Siow Kai Yuan Terence* [2020] 4 SLR 1412 at [56].
[270] *Public Prosecutor v Siow Kai Yuan Terence* [2020] 4 SLR 1412 at [57].
[271] *Public Prosecutor v Siow Kai Yuan Terence* [2020] 4 SLR 1412 at [58].

Prosecution's proposed global sentence is not in line with the totality principle.

## IV. Conclusion

81 There can be no doubt that the totality principle is a necessary consideration in the sentencing process. At the same time, it is clear that the totality principle is not a rule to be applied mechanistically to reduce or increase a sentence. It is respectfully submitted that there is a need for further clarity in the articulation of the totality principle such that the theoretical articulation of the principle is aligned with how it is applied in practice. To this end, this article has therefore suggested that Limb 1 of the totality principle should be broken into two stages – the first involving a comparison of the aggregate sentence against the relevant Tariff, and the second involving an assessment of whether there are nevertheless any other factors that militate against a variation of the sentence (which substantially exceeds the Tariff). There is also a need to reconsider the factors that are relevant in determining whether a sentence is crushing. This is especially so given the significant potential impact of the totality principle, where it can reduce an offender's sentence by as much as seven years.[272]

[272] *Public Prosecutor v CSK* [2023] SGHC 312 at [144].