

BLV v Public Prosecutor [2019] SGCA 62:
Sentencing Framework for Abuse of the Court's Process

I. Executive Summary

BLV was convicted in the High Court (“the **HC**”) for heinous acts of sexual abuse against his biological daughter (“the **victim**”). BLV was sentenced to 23 years and six months’ imprisonment, with 24 strokes of the cane. BLV then appealed to the Court of Appeal (“the **CA**”) against both his conviction and his sentence. One of his main arguments was that it was highly improbable that he could have committed the offences, because he had undergone a botched penis enlargement procedure, resulting in his penis being deformed. BLV claimed that the deformity was of such a nature that he could not have committed the alleged offences. On appeal, he was allowed to produce further evidence in support of this penile deformity defence, and even procured a witness (“the **Witness**”) to testify on his behalf in this respect.

The matter was remitted to the HC for the Witness’s evidence to be assessed. The CA agreed with the HC that BLV had in fact falsified his evidence, and even procured a third party to do the same. The CA also held that in so doing, BLV had abused the process of the court. The CA thus not only upheld BLV’s conviction, but also imposed an additional sentence (“**uplift**”) of four years and six months’ imprisonment to the original aggregate sentence, resulting in a total of 28 years’ imprisonment with 24 strokes of the cane.

II. Material Facts

BLV’s sexual abuse against the victim in the family home, which included penile penetration of her mouth and anus, spanned three years (from 2011 to 2014), when she was aged between 11 and 13. BLV’s actions came to light after the victim disclosed his actions to her mother in April 2014. Her mother subsequently reported him to the police, and he was later charged with ten offences.

At trial, one of the key features of BLV’s defence was that his penis was deformed. He claimed he had undergone a number of penis enlargement procedures in Johor Bahru between 2005 and 2009, the last of which had gone wrong and resulted in his penis’ deformed state. BLV alleged that his penis was already in this deformed state at the time of the offences, and therefore it was highly improbable he could have penetrated the victim’s mouth and anus. He also provided photos of his deformed penis as of October 2016 (“**October 2016 photos**”), along with a medical report supporting his claim. However, the victim and her mother gave a different description of BLV’s penis at the time of the offences.

The HC found the victim’s testimony unusually convincing, and convicted BLV of all ten offences relating to outrage of modesty, sexual assault by penetration, and sexual exploitation of a minor. The HC also held there was insufficient evidence to prove that BLV’s penile deformity existed at the time of the offences. The HC found BLV’s evidence on his penile deformity “inconsistent, unreliable, and incapable of belief”. Indeed, BLV had not raised the deformity at all in his police statements (around 2014), instead bringing it up for the first time only in 2016, when he filed his defense. The HC sentenced BLV to an aggregate of 23 years and six month’s imprisonment, with 24 strokes of the cane. BLV then filed an appeal to the CA.

At the first hearing of the appeal, BLV sought to introduce further evidence in support of his penile deformity defense. He alleged that he had met an acquaintance (the “**Acquaintance**”) on 16 January 2018, three days prior to that first hearing. The Acquaintance had allegedly seen his penis at around the time of the offences, in the toilet of a coffee shop, and was willing to testify to the same. The Acquaintance subsequently changed his mind about giving evidence. However, he then obtained a

supporting affidavit from the Witness. BLV had allegedly bumped into the Witness six days before the filing deadline for producing further evidence (9 February 2018). The parties had allegedly last met in 2015.

In his affidavit, the Witness stated that on 3 August 2013, when BLV and he were working at the Singapore Expo, they had gone to the toilet together and used adjacent urinals. The Witness looked down and saw BLV's penis, noting that it did not look normal. On 3 February 2018, when they apparently met by chance, BLV told the Witness about the charges he was facing, and that the Acquaintance who originally agreed to give evidence on his behalf had decided not to testify. The Witness then told BLV that he too had seen the latter's penis in 2013, and agreed to give a statement to BLV's lawyer. The Witness also included a drawing of what he had allegedly seen of BLV's penis – this was both a frontal and top-down view. The CA then remitted this matter back to the HC, for the HC to consider the further evidence of the Witness and BLV. In doing so, the CA specifically directed the HC to establish whether BLV was party to any abuse of the court's process.

Upon remittal, the HC rejected the further evidence because it was devoid of credibility. It also found that the Witness and BLV had lied about the nature and extent of their friendship, with the reasonable inference that the two were downplaying their relationship to safeguard against allegations of collusion. Moreover, the HC found doubtful the Witness's assertion that he had seen BLV's penis. Thus the HC concluded that BLV had arranged for false evidence to be presented, and found beyond reasonable doubt that BLV had abused the court's process.

III. Issues on Appeal

The CA determined the following issues:

- (a) whether there was any merit in BLV's appeal against his conviction;
- (b) whether the HC correctly found that the evidence regarding BLV's deformity was false, and that he had abused the court's process in conniving to produce that evidence;
- (c) whether the aggregate sentence imposed by the HC was manifestly excessive; and
- (d) if the HC did correctly find that the evidence was false and BLV had connived to produce that evidence in abuse of the court's process, whether there should be an uplift in BLV's aggregate sentence and (if so) what that uplift should be.

(a) BLV's appeal against his conviction

The CA held that none of BLV's arguments raised a reasonable doubt in the Prosecution's case. There was nothing to impugn the veracity of the victim's and her mother's evidence, while BLV's evidence was riddled with inconsistencies. *First*, while there were discrepancies between the victim's evidence to the police and her oral testimony in court, and what she was reported to have said in certain medical reports, such discrepancies did not detract from the credibility of her testimony. *Second*, the CA rejected the argument that it was unreasonable for her mother to have taken some time before making the police report. The mother had to choose between reporting BLV and preserving the family unit, not to mention come to grips with the horrific revelations and contend with how to face her parents. *Third*, the CA rejected BLV's assertion that the victim and her mother had colluded to fabricate the allegations of sexual abuse, to advance her mother's desire for a divorce. Her mother had already obtained a divorce in December 2014, which would have negated any need for her to cooperate thereafter in the prosecution of BLV. It also beggared belief that the victim would have fabricated a series of incidents rich in lewd detail just to get back at BLV, or to help her mother obtain a divorce. *Fourth*, despite the presence of other people in the family home, due to the family's habits there were ample opportunities for BLV to commit the offences without being detected. *Fifth*, the CA rejected BLV's suggestion that it was unusual

for a victim to show no signs of trauma. The CA stressed that there was no archetypal victim of sexual abuse. Moreover, many sexual assault victims presented a calm demeanor, to distance themselves from the trauma of the abuse.

Finally, the CA agreed with the HC that at the time of the offences, BLV's penis was *not* as it appeared in the October 2016 photos. Any deformity, as shown in the victim's and her mother's drawings, was far less pronounced than what was seen in the photos. The CA also agreed that BLV's evidence in this regard was inconsistent and unreliable. Aside from the October 2016 photos and the accompanying medical report, BLV did not produce any evidence of such deformity at the time of the offences or as to the enlargement procedures. His testimony that his deformity made it difficult for him to have sexual intercourse with the mother contradicted his statement to the police that they regularly had sexual intercourse. The CA also found it incredible that BLV would have left his deformed penis, allegedly oozing pus, swollen and causing him pain, without seeking medical attention for more than seven years (since the time his deformity arose in 2008 or 2009). Finally, BLV's evidence that his enlargement procedures were collagen-based was contradicted by his own expert witness's testimony. Further, the CA agreed that the HC had correctly drawn an adverse inference from BLV's belated raising of his penile deformity. Taken together, the CA agreed with the HC that BLV was not a credible witness.

(b) HC's findings on the additional evidence, and whether BLV had abused the court's process

The CA agreed with the HC that the further evidence that BLV produced was incredible and should be rejected, and further that his conduct in conniving to produce that evidence amounted to an abuse of the court's process. It was remarkable and suspicious that BLV had (so he claimed) chance encounters with *two* separate witnesses who had allegedly seen his penis at around the time of the offences, especially since those encounters occurred so close to the various hearings and filing deadlines. The last time BLV met the Witness prior to this chance encounter was in 2015, approximately three years earlier, and they had not kept in touch during the intervening period.

Moreover, there were significant inconsistencies in BLV's and the Witness's evidence. While BLV and the Witness were able to provide a consistent account of an event that had allegedly occurred more than five years ago (in August 2013), there were remarkable differences in their recollection of their meeting just a few months ago (in February 2018). For instance, regarding the Witness' meeting with BLV's lawyer, BLV claimed to have given the Witness his lawyer's office address and contact, and that the Witness had gone on his own to meet the lawyer. However, the Witness testified that he and BLV had first met at Peninsula Plaza, before meeting the lawyer together. The CA also identified three other inconsistencies, which were central to the issue that the HC had been asked to examine, i.e. the circumstances in which BLV had found, within two weeks, two witnesses who had both allegedly seen his penis several years earlier at around the time of the offences. These inconsistencies, when viewed together, together with the fact that the encounter with the Witness occurred just a few months prior to the remittal hearing before the HC, led to the inexorable inference that BLV did not chance upon the Witness in the manner claimed.

Their account of their chance encounter was also incredible. *First*, they both testified that when they met, neither clarified what exactly it was that the Witness had (allegedly) seen in the toilet at the Singapore Expo. It beggared belief that BLV would have been content for the Witness to meet his lawyer to provide evidence, without first verifying if the Witness could indeed produce evidence that could exonerate him. *Second*, equally surprising was the fact that the Witness agreed to meet BLV's lawyer, without first clarifying what it was BLV needed help with. It was incredible that the Witness, who had allegedly last met BLV three years prior, would have agreed to inconvenience himself by meeting a lawyer, swearing

an affidavit, and testifying in court, when he did not even know what it was that he was supposed to testify to.

Third, the Witness was not truthful about his trips to Malaysia with BLV. While initially denying ever travelling to Malaysia with BLV, he altered his testimony when confronted with evidence that he had entered Malaysia together with BLV on at least three occasions, for four or five hours each time. The evidence also showed that they were more than just “casual acquaintances”, as they had testified. *Fourth*, the CA found it implausible that the Witness could recall seeing BLV’s penis on specifically 3 August 2013, the third day of their stint selling snacks together, when he could not explain *how* he could remember this with such precision and confidence. *Fifth*, given the circumstances under which he had allegedly seen BLV’s penis – i.e. a fleeting glimpse at an oblique angle from the side – it was highly unlikely that he could have provided a top-down and a frontal drawing of the penis. Thus the CA concluded that the Witness had falsified various aspects of his evidence, and that BLV had procured him to do so.

Furthermore, as the Witness’s drawing was strikingly similar to the October 2016 photos, the only inference that could be drawn was that the Witness had been shown and then copied the October 2016 photos in his drawing. Therefore, the CA held that BLV and the Witness had colluded to present false evidence to the court, which was an abuse of the court’s process.

(c) Was the sentence imposed by the HC manifestly excessive?

The CA upheld the HC’s sentence. Specifically, it noted that the HC had already adjusted downwards the individual sentences imposed for the four sexual assault by penetration offences, due to the totality principle.¹ Indeed, these sentences might have been on the low side, in view of BLV’s actual criminality.

In this regard, the CA stated that the sexual assault by penetration offences fell within the sentencing framework set out in *Pram Nair v Public Prosecutor* [2017] 2 SLR 1105 (“*Pram Nair*”). Although *Pram Nair* set out the sentencing bands for the offence of digital-vaginal penetration, the CA subsequently decided, in a later case, that the *Pram Nair* sentencing framework would encompass all sexual assault by penetration offences under section 376 of the Penal Code (Cap 224, 2008 Rev Ed).² The actual band which the offender would fall under would depend on “offence-specific” aggravating factors, such as the manner and mode of the offence and the harm caused to the victim, as well as the victim’s age. However, cases of sexual assault by penetration which included any of two statutory aggravating factors (including if the victim was under 14 years of age) would, as a starting point, fall within Band 2. The court would then look at “offender-specific” factors, i.e. those relating to the offender’s personal circumstances to further calibrate the appropriate sentence.

As the offences were committed when the victim was under 14 years of age, the starting point was that the case fell within Band 2. In addition, there was a severe abuse of position and breach of trust, as well as harm caused to the victim through emotional turmoil and trauma. Thus, a sentence of 14 or 15 years’ imprisonment with 12 strokes of the cane, for each of the four sexual assault by penetration offences,

¹ This is the principle that a sentence meted out by the courts should be proportionate to the offender's overall criminality.

² Band 1 involved cases at the lower end of the spectrum of seriousness, and attracted sentences of 7-10 years’ imprisonment and four strokes of the cane. Band 2 comprised cases of a higher level of seriousness, and attracted sentences of 10-15 years’ imprisonment and eight strokes of the cane. Band 3 comprised extremely serious cases with aggravating factors, such as serious levels of violence paired with perversities, victims with high degrees of vulnerability, and a compelling public interest to deter potential offenders and protect the public. Such cases usually attracted sentences of between 15–20 years’ imprisonment and 12 strokes of the cane.

would have been warranted to reflect BLV's *actual* criminality. However, the HC had actually imposed a sentence of 10 years' imprisonment and 12 strokes of the cane for each of these offences, which reflected a substantial discount for each offence. In view of this, and since none of the other individual sentences imposed by the HC was manifestly excessive, the CA found no basis for reducing BLV's aggregate sentence.

(d) ***Uplift in BLV's aggregate sentence?***

i. Basis for enhancement of sentence

In light of BLV's conduct in falsifying evidence and procuring the Witness to give false evidence in court, the CA held that a significant uplift in his aggregate sentence should be imposed.

First, the need for specific deterrence (to discourage BLV from re-offending) and general deterrence (to deter individuals such as BLV from not only engaging in such acts of sexual abuse, but also from producing false evidence) was prominent here. With regard to *specific deterrence*, the punishment imposed must be sufficiently severe to secure that end, especially where (as here) an offender resorts to such egregious means to avoid facing the due consequences of his actions. BLV had devised an elaborate scheme to present false evidence to the court, as well as procure someone else to lie in court on his behalf. Such blatant abuse of the court's process showed an offender who was utterly lacking in remorse, and wholly unrepentant for his actions.

General deterrence was also important, because of the need to uphold the administration of criminal justice and safeguard against litigants who wished to make repeated applications to the court, to prolong criminal proceedings and delay commencement of their sentence. This frustrates the efficient and expeditious conduct of criminal proceedings. This was especially so in the context of applications to produce further evidence on appeal. The approach taken by the court in determining whether to allow further evidence to be produced provided the court with greater flexibility to serve the needs of justice, but it also contained the potential for abuse. It was therefore important to deter such abuse in the interest of those offenders who might genuinely and legitimately benefit from such recourse. Moreover, the abuse of process here, on appeal (rather than at trial), attacked the integrity of the judicial process in the trial court.

With regard to BLV's argument that (instead of an uplift) he should be separately charged for falsifying evidence and procuring another to falsify evidence on his behalf (which would require a full investigation and trial), the CA held that such was not necessary. He was not being sentenced for separate crimes. He was only being punished for the very crimes that he had been charged with and convicted of, but with the entirety of his conduct taken into account.

Moreover, a court is entitled to enhance an offender's sentence based on facts that it is satisfied of. Here, the CA had specifically directed the HC to establish whether BLV had been party to any abuse of the court's process. The HC had expressly found, beyond reasonable doubt, that there had been an abuse of the court's process, and this finding was upheld by the CA on appeal.

ii. Extent of uplift

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

- (a) the severity of the sentence that is to be enhanced;
- (b) the egregiousness of the abuse that has been committed; and
- (c) any applicable safeguards to ensure that the uplift imposed is not excessive.

With regard to *severity*: in order to deter an accused person from abusing the court's process in an attempt to avoid liability for his wrongdoing, the potential uplift in sentence must be sufficient to outweigh the chances of his potentially being exonerated. Thus if the sentence to be enhanced is already lengthy, any uplift imposed must be correspondingly higher to achieve the intended deterrent effect.

With regard to *egregiousness*: deterrence must be tempered by proportionality. The sentence imposed must be commensurate with the offender's culpability and the harm caused (reflecting the principle of retribution). Thus the court should also consider the egregiousness of the abuse committed. In cases of producing false evidence to avoid criminal liability, that could include: the significance of the false evidence and its centrality to the accused person's guilt; the extent of planning and premeditation involved; the level of sophistication (e.g. whether there was a third party involved); and whether the false evidence was produced on appeal rather than at trial. On the last point, it was potentially more egregious for false evidence to be adduced on appeal, as the offender would have the trial court's judgment and be able to identify points that he might attack by producing false evidence. Producing false evidence on appeal (rather than at trial) would also lead to a significant delay in proceedings, and detract from expeditious resolution of the case.

Finally, with regard to *safeguards*, the CA provided two. *First*, the uplift must not result in a sentence that exceeds the statutorily-imposed maximum sentence for the offence that the offender has been charged with and convicted of. The CA acknowledged that this could be a problem in cases involving particularly egregious criminal conduct if the underlying sentence is already very close to the statutory maximum sentence, yet it is precisely in such cases that a more significant uplift might be required. In such cases, the court could refer the offender to the Public Prosecutor for further investigations, to determine whether separate charges should be brought against him for abusing the court's process. *Second*, the cumulative uplift of sentence, on account of such abuse of process, must not exceed the maximum sentence that the accused person could have received if a separate charge pertaining to the conduct constituting the abuse had been preferred against him. This limit was driven by the need to be fair to the offender.

Applying these principles to BLV's case, the CA imposed a total uplift of four years and six months' imprisonment on the aggregate sentence. *First*, the individual sentences already imposed on BLV were objectively lengthy, which warranted a correspondingly higher uplift. *Second*, BLV's abuse of process was particularly egregious. The false evidence that he produced was clearly central to his guilt: if that evidence had been accepted, it would have severely undermined the victim's and her mother's evidence about the state of his penis at the time of the offences. There was also significant planning and premeditation on his part, in that he actively sought out persons willing to give false evidence on his behalf. Even when the Acquaintance changed his mind, BLV was undeterred and sought out the Witness. Finally, the false evidence he produced was given on appeal (rather than at trial).

Third, the combined uplift of four years and six months' imprisonment resulted in an aggregate sentence of 28 years' imprisonment and statutory maximum of 24 strokes of the cane. This did not violate the statutory maximum imprisonment term for each of the offences concerned. Moreover, the maximum imprisonment term that could have been imposed had BLV been convicted under separate charges (for giving or inducing false evidence) would have been seven years' imprisonment.

Finally, the CA assessed BLV's aggregate sentence in light of the totality principle. It was satisfied that the totality principle would not be offended even with the uplift, because of: the total number of charges BLV was convicted of; the low sentences imposed (relative to BLV's actual criminality); and the

egregious nature of BLV's abuse of the court's process. Indeed, BLV's actual criminality would have warranted an aggregate sentence of more than 30 years' imprisonment. The CA decided that the uplift would be a signal that those who attempted to abuse the court's process would be dealt with severely.

The CA further referred the Witness to the Public Prosecutor, for investigation into possible offences arising from what appeared to be acts of perjury.

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