

Sentencing Conference 2014

9 October 2014

Opening Address by Chief Justice Sundaresh Menon*

Distinguished Guests

Ladies and Gentlemen

I. Introduction

1 It gives me great pleasure to welcome you to this year's Sentencing Conference. The idea for this conference was mooted in 2011 and what began as a discussion essentially amongst the various domestic stakeholders has since grown to feature the participation of eminent speakers from various parts of the Commonwealth. I am delighted to acknowledge and welcome the Honourable Wayne Stewart Martin, Chief Justice of the Supreme Court of the Western Australia as well as Sir Anthony Hooper, who while still practising at the Bar led me in a case more than 20 years ago and who until quite recently served on the Court of Appeal of England and Wales. Chief Justice Martin and Sir Anthony are but two of the distinguished speakers who have graciously agreed to participate in this Conference.

2 This year's conference is themed "Trends, Tools and Technology". On the issue of technology, there are exciting developments in the State Courts pertaining to the Sentencing Information and Research Repository. This is a sentencing database of the results of cases prosecuted in the State Courts. Selected sentencing

* I am deeply grateful to my law clerk, Leong Yi-Ming, for the considerable assistance she gave me in the research and preparation of this paper.

factors associated with each case will also be captured.¹ This development will help the courts, the Prosecution and the Defence Bar access the precedents that may have a bearing on each case. I am sure we will hear and perhaps see more of this in these two days.

3 I have been invited to deliver the Opening Address this morning and I thought I would begin by speaking about the function and importance of sentencing in the criminal justice system. I then suggest some ways in which we could improve and enhance our sentencing practices so as to better ensure that the punishment imposed fits the offence and the offender. I close with a reminder of the need for us to look beyond sentencing to eventually reintegrating ex-offenders into society.

II. The function of crime and punishment

4 In the criminal justice system, the law usually provides that an offender must be punished. The main strands of thought that explain the basis or the underlying reason for punishment are retribution, deterrence, prevention and rehabilitation. The retributivist believes that free-willed individuals must be held morally responsible for their actions; and that this is best done by ensuring that they are proportionately sanctioned for offending behaviour. The utilitarian considers that punishment is justified because it ought to have a salutary deterrent effect: the pain of punishment and the costs of imposing that pain upon the offender are outweighed by the social benefits that may consequently be enjoyed. Furthermore, punishment might also have a specific deterrent effect in deterring that offender from repeating the offending behaviour having regard to his character, history and circumstances.

¹ Subordinate Courts, Annual Report 2012: "Upholding Justice, Serving Society, Inspiring Trust", p 38.

5 Then there is rehabilitation. Discarding the notions of criminal responsibility and proportionate punishment, proponents scrutinise the moral, mental and physical characteristics of offenders with the aim of setting right aspects of the offender's character and propensities that have disposed him to crime, so that he may be speedily reintegrated into mainstream society.

6 Lastly, punishment may also be justified on the ground of incapacitation, or prevention. Unlike reformation or deterrence, incapacitation is directed simply at restricting the offender's liberty, movements or capacity to do wrong because it is in the public interest that further harm does not occur at the hands of this offender.

7 The interplay of these theories or justifications will differ according to the circumstances of the offenders as well as of the offences.² The rationale behind a probation order directed at a young offender will plainly be very different from that behind a long period of preventive detention for a recalcitrant one even where the two may have engaged in offending behaviour that might, at least on the surface, appear to be identical. Punishment is therefore very much a social construct that cannot exist in a vacuum. Theories of punishment can inform the court's decision on an appropriate punitive response to the offender in the precise circumstances of his offence. The sentencing court should generally be concerned with two questions when deciding on the appropriate sentence: what is it seeking to achieve by punishing this offender; and second, how should it punish the offender so as to best achieve that goal? The first question attempts to identify a general justifying aim;

² See for instance *Public Prosecutor v Kwong Kok Hing* [2008] 2 SLR(R) 684 ("*Kwong Kok Hing*") at [33].

while the second question seeks to calibrate the form and severity of punishment with this justifying aim in mind.³ There are of course other considerations such as consistency with the precedents which aims for overall fairness and equality in the treatment of offenders across the penal system as a whole. But the two questions I have outlined are aimed directly at ensuring that the punishment fits the crime, in the sense that it is appropriate to the offence and the offender.

III. Principles of sentencing

8 To aid sentencing judges in responding appropriately to these questions, a number of sentencing principles can be distilled from our precedents. I propose this morning to recount some of the more important of these. First, our criminal law, for practical purposes, is entirely the product of legislation. Hence, the punishment imposed by the courts should generally be informed by the relevant legislative purpose. For example, a driving disqualification order seeks to punish and deter certain types of offensive driving behaviour and also to protect the public from the risk of harm occasioned by the bad driving of others. In the context of disqualification orders for driving under the influence of alcohol, it would seem to follow from this that the greater the margin by which the driver's blood alcohol limit exceeds the prescribed limit, the longer should be the period of time for which he is disqualified; likewise, if by reason of these circumstances, damage or injury was caused to others.

9 What might well *not* be a factor that affects the length of the disqualification could be the belligerent conduct of the offender upon apprehension, although this

³ L Zedner, *Criminal Justice* (Oxford University Press, 2004), p 85.

would likely be a factor that warrants substantially increasing the fine imposed. This is how I put it in *Edwin s/o Suse Nathen v Public Prosecutor* (“*Suse Nathen*”) ⁴ at [32]:

I accept that belligerent ... conduct upon apprehension is yet another type of aggravating factor that may justify an increased fine or – in exceptional cases – imprisonment. But such conduct would not ordinarily affect the length of the disqualification order as it bears only a minimal relation to the rationale behind the imposition of a disqualification order. To put it another way, such conduct has no bearing in itself on the dangers to road users which is what the offence and in particular the disqualification order is generally meant to address.

The point ultimately is that the sentencing judge, by paying close attention to the object of the statute, which creates the offence and prescribes the punishment, will often be guided as to how best the offender should be punished in order to further that object; and by so doing, the judge will less likely be coloured by factors, which might in fact be tangential to what ought really to be the primary sentencing considerations.

10 Additionally, the legislation will also reveal Parliament’s views as to the gravity of the offence as reflected in the range of sentences that will have been legislated and in particular, in the maximum or minimum sentences that may be imposed. The court’s role is to ensure that the full spectrum of sentences enacted by Parliament is carefully explored in determining the appropriate sentence in the case at hand.⁵ In *Poh Boon Kiat v Public Prosecutor* (“*Poh Boon Kiat*”),⁶ it was noted that in relation to individual vice-related offences, the full range of sentences prescribed by Parliament had not commonly been used in the precedents, and that it was incumbent on the

⁴ *Edwin s/o Suse Nathen v Public Prosecutor* [2013] 4 SLR 1139 (“*Suse Nathen*”).

⁵ *Kwong Kok Hing* at [44]; *Ong Chee Eng v Public Prosecutor* [2012] 3 SLR 776 at [24].

⁶ [2014] SGHC 186.

sentencing judge to note the available range and apply his mind to precisely where the offender's conduct falls within this.⁷ This is important if the courts are in fact going to give effect to Parliament's intention.

11 Second, the sentence must be proportionate. A basic tenet of a just punishment is that the sentence be proportionate to the severity of the offence committed as well as the moral and legal culpability of the offender. In *Mohamed Shouffee bin Adam v Public Prosecutor*⁸ ("Shouffee") this was elaborated on in the specific context of aggregating sentences. The facts of the case bear recounting. The accused was driving through the Woodlands Checkpoint in Singapore when he was stopped and searched. Packets of crystalline substance were found in various parts of his car. The accused was charged with the importation, possession and consumption of various drugs. The accused pleaded guilty. He had a string of previous convictions, all of which were for drug related offences. But one especially notable feature of his criminal history that was not picked up at first instance was that he had remained crime- (and presumptively, drug-) free for a period of 9 years immediately prior to the latest charges. He was sentenced below to an aggregate term of 17 years' imprisonment as a consequence of the judge choosing the two heaviest sentences out of the four possible ones to run consecutively.

12 Under the Criminal Procedure Code, the court is obliged in certain circumstances to impose at least two consecutive sentences.⁹ Sentencing judges have felt from time to time that this statutory imposition can impede their ability to impose a justly proportionate sentence. If true, this would be a concern because

⁷ At [60]–[61]. See also *Public Prosecutor v Hue An Li* [2014] SGHC 171 ("*Hue An Li*") at [59]–[60].

⁸ *Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 ("*Shouffee*").

⁹ Section 307(1), Criminal Procedure Code (Cap 68, 2012 Rev Ed).

justice is undermined when a judge with a sentencing discretion is constrained despite this to impose an aggregate sentence that on the whole, is disproportionate to the circumstances of the offence. Two main principles guide the court in the specific context of dealing with aggregating multiple sentences: the one transaction rule and totality principle. There are also subsidiary rules. Thus, for instance when each sentence has already been calibrated to take account of the aggravating factors relevant to each charge, those factors should not feature again in directing the court to select harsher individual sentences to run consecutively. But I wish to elaborate on the two primary rules.

13 The one-transaction rule is an evaluative rule directed at filtering out those sentences that should not usually be ordered to run consecutively because otherwise, the offender might end up being doubly punished for offences that have been committed simultaneously or so close together and invade the same legally protected interest, that in truth, they constitute a single transaction. Even then, as I noted in *Shouffee*, there may be exceptions.¹⁰

14 The totality principle is a principle of limitation concerned with ensuring that the aggregate sentence is proportionate to the overall criminality of the case.¹¹ This is an important consideration because the overall sentence may be crushing in all the circumstances if the totality principle were not carefully considered. In *Shouffee*, I observed as follows:¹²

¹⁰ *Shouffee* at [41], [45] and [46].

¹¹ *Shouffee* at [52].

¹² At [58], [59] and [63].

The totality principle is a consideration that is applied at the end of the sentencing process. In *Principles of Sentencing ...* Prof Thomas suggests that the principle requires the court to take a “last look” at all the facts and circumstances and assess whether the sentence looks wrong ...

If so, consideration ought to be given to whether the aggregate sentence should be reduced. This may of course be done by re-assessing which of the appropriate sentences ought to run consecutively ... In addition.... it could also be done by recalibrating the individual sentences so as to arrive at an appropriate aggregate sentence.

...

The power of the court to recalibrate the discrete sentences when these are ordered to run consecutively arises from the common law principle of proportionality, to which I have already referred. It is unquestionably true that a sentencing judge must exercise his sentencing discretion with due regard to considerations of proportionality when considering any given case. If this is valid and applicable when sentencing a single offender to a single sentence of imprisonment, then I cannot see how it can cease to be so when the sentencing judge is required in the exercise of his sentencing discretion to impose an aggregate sentence for a number of offences. ...

15 I have recounted this at some length because there is a danger that proportionality can become a convenient expression that sounds good but is shorn of real meaning, if judges and counsel fail to exercise care in what may often seem to be a routine task of selecting which among several sentences should run consecutively. For this reason, in *Shouffee* I laid down a sentencing framework for first instance judges to apply when aggregating sentence as follows:¹³

(a) As a general rule, the sentencing judge should exclude any offences, which though distinct in the sense described above, nonetheless form part of a single transaction. As I have noted above this yields a provisional exclusion

¹³ *Shouffee* at [81].

because there may be circumstances where the sentencing judge may feel that it is necessary to depart from this rule.

...

(c) ... the sentencing judge should then consider which of the available sentences should run consecutively.

(d) The sentencing judge should ensure that the cumulative sentence is longer than the longest individual sentence.

(e) Beyond this, the consideration of which sentences should run consecutively is likely to be a multi-factorial consideration in which the court assesses what would be a proportionate and adequate aggregate sentence having regard to the totality of the criminal behaviour of the accused person.

(f) ... It is important that while the sentencing judge seeks to ensure that he has taken due regard of the overall criminality of the accused, he does not ... “re-input an aggravating consideration at [this] stage, if it has already been fully factored into the sentencing equation during the first stage”.

(g) ... the sentencing judge must be careful not to have regard to any matters which are not the subject of a conviction or which the accused has not consented to being taken into consideration.

(h) The sentencing judge should then apply the totality principle ...

(i) If the sentencing judge considers that the cumulative total is excessive, he may either opt for a different combination of sentences or adjust the individual sentences though in doing so, the sentencing judge must be diligent in articulating his reasons.

(j) In exceptional cases, the sentencing judge may consider imposing more than two sentences consecutively. This may be appropriate in such circumstances as where the accused is shown to be a persistent or habitual offender, where there are extraordinary cumulative aggravating factors, or where there is a particular public interest.

16 For *Shouffee*, the application of this framework was the difference between a term of 17 years' imprisonment at first instance and a term of imprisonment of 12 years and 6 months on appeal.

17 A third principle is that like cases should be treated alike. Common factual situations provide a basis for a corresponding pattern of sentences, which can then be adjusted to accord with the detailed variations of particular cases.¹⁴ Although sentencing is a matter of discretion, that discretion is never to be exercised arbitrarily. Broad consistency in sentencing also provides society with a clear understanding of what and how the law seeks to punish and allows for members of society to have regard to this in arranging their own affairs and making their own choices.

¹⁴ DA Thomas, *Principles of Sentencing* (Heinemann, 1979), p 30.

18 Fourth, the characteristics of the offender and circumstances of the offence will often have a bearing on sentencing. Given that the circumstances of two offences will not be identical, due consideration and weight must be given to these matters so that the punishment can be tailored to the individual. This in turn ties in with the fifth principle, which is that alternative forms of punishment should be considered where applicable. A common example is when considerations of rehabilitation come to the fore as is often the case with youthful offenders. The idea is that the offender at this stage will stand a much better chance of reform and rehabilitation; and if punishment is selected with this end in mind, the chances of preventing a recurrence of offending behaviour is likely to be maximised.

19 In any given case, the sentencing judge would do well to bear in mind these guiding principles when selecting the appropriate punishment. Sentencing in our system is not mechanistic or formulaic. In the United States, pursuant to the Sentencing Reform Act of 1984, the Federal Sentencing Guidelines were devised to guide the federal sentencing court within indicative ranges. These Guidelines operate largely as a grid of interconnected factors including in particular the conduct involved, which offence level the offender has been charged with, and the criminal history of the offender. Admittedly there is some, albeit modest, room to depart to take account of circumstances. The Guidelines emerged as a response to the sense that the courts were exercising sentencing discretion in varying and even disparate ways and their aim was to reduce the unpredictability that was engendered as a result. But criticisms have been levelled at their rigidity and harshness towards certain offences and offenders, even while their effectiveness in reducing

unpredictability remains debatable.¹⁵ The question whether the Federal Sentencing Guidelines have or have not met their intended purpose is ultimately less important to the present discussion than is the fact that in our system, judges have the opportunity and indeed the duty to take due account of all the circumstances in selecting an appropriate sentence.

IV. Providing reasons in sentencing

20 This brings me to the next point and that is the giving of reasons when sentencing. The legislation will in most instances provide for judicial discretion in sentencing. But this is not an unfettered discretion. Courts are accountable for their sentencing decisions and it is therefore incumbent on judges to explain, at least in brief terms, the reasons that underlie the sentencing decision.

21 The judicial duty to give reasons is not a new concept. Lord Denning once observed that “[i]n order that a trial should be fair, it is necessary, not only that a correct decision should be reached, but also that it should be seen to be based on reason; and that can only be seen, if the judge states his reasons.”¹⁶ The duty has been recognised by our courts in a number of authorities,¹⁷ though of course, it should not be overlooked that the degree of detail in which reasons are explained should correspond to that which is necessary to meet the requirements of the case.¹⁸

¹⁵ AW Campbell, *Law of Sentencing* (Thomson West, 2004), p 143.

¹⁶ A Denning, *The Road to Justice* (Stevens, 1955), p 29.

¹⁷ *Thong Ah Fat v Public Prosecutor* [2012] 1 SLR 676 (“*Thong Ah Fat*”), *Mervin Singh and another v Public Prosecutor* [2013] SGCA 20, *Yap Ah Lai v Public Prosecutor* [2014] 3 SLR 180 (“*Yap Ah Lai*”).

¹⁸ *Thong Ah Fat* at [30].

22 Judicial reasoning is all the more important in criminal cases because personal liberties are affected. In general, these reasons should be prepared and delivered with a number of objectives including these in particular:

(a) To enable the accused to understand the basis upon which the judge convicted and sentenced him;

(b) To signal sentencing trends to all stakeholders including the Prosecution, the Defence Bar and, ultimately, the public;

(c) To reflect the due consideration of the issues by the judge and to assure the legitimacy of the judiciary in the eyes of the public. This is how the point was put in *R v Sheppard*:¹⁹

Decisions on individual cases are neither submitted to nor blessed at the ballot box. The courts attract public support or criticism at least in part by the quality of their reasons. If unexpressed, the judges are prevented from judging the judges.

(d) To enable an appellate court to understand the judge's decision with a view to determining whether in all the circumstances, appellate intervention is warranted;²⁰ and

(e) To guide future courts when sentencing offenders for similar offences. Where the judge's reasons for imposing a particular sentence are not made

¹⁹ [2002] SCC 6 at [5].

²⁰ *Yap Ah Lai* at [58].

known, it may not be safe to rely on that precedent. Moreover in such circumstances, the sentencing judge relying on the decision might lose sight of the particular facts and circumstances which are of the first importance in sentencing.²¹

23 Where appellate judges are concerned, the last of the factors noted above assumes particular importance. It must be noted that the State Courts deal with the significant majority of criminal cases in Singapore. In the small proportion of cases that come on appeal, among the primary functions of the appellate judge is to provide guidance and clarity in sentencing law and practice. Appellate judges have the duty to consider and resolve with reasoned judgments, incongruent, contradictory or uneven sentencing precedents and practices. This was the approach taken, for instance, in *Edwin s/o Suse Nather*²² in relation to the offence of driving when intoxicated; in *Yap Ah Lai v Public Prosecutor* (“*Yap Ah Lai*”)²³ in relation to the offence of importing duly unpaid tobacco products; and, most recently, in *Poh Boon Kia*²⁴ in relation to vice-related offences.

24 In recent months, the decisions of the appellate courts have also clarified the position in relation to the relatively straightforward matter of the treatment of aggravating and mitigating factors. At one level, this might seem to be the most basic of considerations for counsel as well as for sentencing judges. Yet, the following seemingly obvious aspects of how these should be dealt with have had to be clarified:

²¹ See *Yap Ah Lai* at 11[d], [39] and [52].

²² [2013] 4 SLR 1139.

²³ [2014] 3 SLR 180.

²⁴ [2014] SGHC 186.

(a) That the absence of an aggravating factor is neutral to sentencing and cannot be equated with or treated as a mitigating factor;²⁵

(b) That offence-specific aggravating and mitigating factors should be identified by the courts and these will generally even if not invariably be linked to the rationale of sentencing that applies in relation to that offence;²⁶ and

(c) That care must be taken to avoid double-counting aggravating factors or taking factors that are already inherent in the definition of the offence as an aggravating aspect of the offence.²⁷

V. Sentencing guidelines

25 I have touched on the important role that appellate courts play by laying down sentencing guidelines. But it would be useful to make some brief observations as to *how* these may best be used. As the very name suggests, these are meant to provide guidance and indicative benchmarks for sentences. The primary object is to provide a degree of predictability as well as to achieve some measure of consistency so that like cases are treated alike. The sentencing guidelines can also help to ensure that the full range of sentencing options is utilised by sentencing judges. But such guidelines are no more than a judicial creation designed to aid the sentencing judge in the discharge of his functions. While seeking to achieve consistency in sentencing, a key element that will always underlie the use of these guidelines is the

²⁵ *PP v Chow Yee Sze* [2011] 1 SLR 481; *Suse Nathen* at [24].

²⁶ See for example *Suse Nathen* at [26]–[33]; *Poh Boon Kiat* at [81]–[87].

²⁷ See for example *Shouffee* at [87].

flexibility with which they must be applied so as to achieve the just outcome in each case.

26 It virtually goes without saying that neither the guidelines and benchmarks in general nor the suggested ranges usually contained within them, can be regarded as rigid or impermeable. They certainly cannot operate as a tally sheet to be unthinkingly applied by sentencing courts. Indeed, this must follow even from the simple fact that these guidelines do not and cannot encompass every conceivable fact or consideration that may bear on the sentencing calculus. For example, the drink-driving benchmark considers only the level of alcohol in the offender's blood or breath and not the manner in which he drove or other mitigating or aggravating circumstances. In effect the benchmarks serve as a starting point from which courts can develop the precise sentence to be imposed in each case after a careful assessment of all the circumstances. Ultimately, even in considering these benchmarks and guidelines, the court must always be aware that in fixing a sentence, the court is exercising a *discretionary* judgment and the guidelines cannot and do not prescribe the exercise of that discretion.

27 To introduce some structure in the development of these guidelines, we formed the Sentencing Council in 2013, chaired by Justice Chao Hick Tin and on which I sit as an *ex-officio* member. The Council aims, among other things, to promote the development of a methodology and framework that will enhance consistency in sentencing by identifying areas in which the issuance of a judgment containing sentencing guidelines might promote coherence or consistency in sentencing. Appeals in these areas may then be assigned for hearing before a

specially designated panel of three judges, with a view to their considering the issuance of guideline judgments. Unlike some other jurisdictions in which sentencing panels or councils have been formed and function in a non-judicial capacity with a focus on data collection and on sentencing trends and practices, our Sentencing Council, which is constituted entirely of judges and judicial officers seeks to identify areas that would benefit from judicial pronouncements at an appellate level. As the jurisprudence of these three-judge panels builds up over time, it is hoped that this will make an important contribution towards consistency and clarity in our sentencing practice. Of course, even aside from this process, the appellate judges can and do prescribe sentencing guidelines whenever they deem it appropriate.

VI. Prospective overruling

28 But the creation of sentencing guidelines and benchmarks can give rise to transitioning problems. This arises because shifts in societal concerns may conceivably cause shifts in sentencing; or at a more mundane level, if it turns out that the previously prevailing sentencing practice was misinformed or mistaken. How should a court approach this without doing violence to the legitimate expectations that offenders may have formed based on previously entrenched precedents that are now considered unreliable?

29 It is a core principle to the Rule of Law that rules are meant to be prospective, open and clear in order to be able to guide conduct.²⁸ This is articulated in Article 11(1) of our Constitution which prohibits punishment on the basis of a retroactive criminal law and in the maxim *nullum crimen sine lege* (which means that conduct cannot be punished as criminal unless some rule of law has already declared

²⁸ *Hue An Li* at [109].

conduct of that kind to be criminal and punishable as such). Those who have conducted their affairs on the basis of a reasonable and legitimate understanding of the law may expect that they should not be penalised if a later judicial pronouncement establishes that the interpretation was wrong. But in the common law system, judicial pronouncements are by default, unbound by time, and apply both retroactively and prospectively. The court's pronouncement of the law would thus affect the specific offender before it as well as those coming subsequently. To balance the tension between the retroactive operation of the common law system and the Rule of Law value of laws being pronounced and applied prospectively, some courts have developed and applied the concept of prospective overruling in selected cases. In Singapore, judicial pronouncements are by default, fully retroactive but the doctrine of prospective overruling is also recognised and has been applied. Appellate courts thus have the discretion to restrict the retroactive effect of their pronouncements by considering the following factors:²⁹

- (a) the extent to which the law or legal principle concerned is entrenched;
- (b) the extent of the change to the law caused by the new ruling;
- (c) the extent to which the change of the law is foreseeable; and
- (d) the extent of reliance on the law or legal principle concerned.

30 A clear example of the application of prospective overruling in Singapore may be found in *Abdul Nasir bin Amer Hamsah v Public Prosecutor* ("Abdul Nasir").³⁰ The appellant had been sentenced to life imprisonment and 12 strokes of the cane for kidnapping. The prevailing practice on the part of the Executive had been to treat a

²⁹ *Hue An Li* at [124].

³⁰ [1997] 2 SLR(R) 842.

sentence of life imprisonment as equivalent to a sentence of 20 years' imprisonment. However, life imprisonment was interpreted by the Court of Appeal in *Abdul Nasir* to mean the whole of the remaining period of the convicted person's natural life. This was a dramatic change from a hitherto well-established and well-known position and would have been crushing if it were applied retroactively. Indeed, the court decided that to apply its ruling to the appellant would be grossly unfair and accordingly held that its decision would only take prospective effect.

31 A more recent decision where the issue was fully considered is *Public Prosecutor v Hue An Li* ("*Hue An Li*").³¹ The accused had fallen asleep at the wheel and collided with a lorry thereby causing the death of a passenger in the lorry. She pleaded guilty to the charge of causing death by a negligent act and was fined \$10,000 and disqualified from driving for five years. The accused placed reliance on a previous decision of the court in *Public Prosecutor v Gan Lim Soon* ("*Gan Lim Soon*"),³² where it had been said that a fine would be sufficient in most cases of causing death by a negligent act. But the relevant section of the Penal Code had been amended in the period since the pronouncement of the court in *Gan Lim Soon* and as a result, it was held that the position in *Gan Lim Soon* was no longer tenable. The court held that the starting point for such an offence was properly, a period of imprisonment for up to four weeks.³³ However, reliance had been placed on *Gan Lim Soon* by various courts at first instance and on appeal, both before and after the amendments to the Penal Code had been made. *Gan Lim Soon* was thus well entrenched in the law and changes in the law in relation to it were not foreseeable.

³¹ [2014] SGHC 171.

³² [1993] 2 SLR(R) 67.

³³ At [60]–[61].

Therefore, prospective effect was given to the court's decision in *Hue An Li* to depart from *Gan Lim Soon*.

32 In *Poh Boon Kiat*³⁴ the same approach was taken on the basis that a revised benchmark which made imprisonment mandatory for first time offenders for certain vice-related offences was contrary to the legitimate expectations of the accused as the entrenched position had been a fine.³⁵

33 Prospective overruling raises some interesting issues as to whether the revised benchmark which is expressly stated to apply prospectively should take such effect immediately upon pronouncement so that trial judges would be bound to apply the revised benchmarks immediately; or only to cases that are commenced after the pronouncement; or only to conduct committed after the pronouncement. There is no straightforward answer and this will have to be resolved in time through case-law. But as a wholly tentative observation offered without the benefit of argument, if the primary underlying concern is that the legitimate expectations, upon which parties have arranged their affairs, should not be defeated, then it would suggest that the new rule would only apply to conduct that takes place after the rule has been pronounced. If however, the focus is instead on the institutional limitations of the judicial role and the concern that judges should not be legislating transitional provisions to cover their pronouncements, then the new rule should be applicable to any case falling for determination after it has been pronounced. These are vexed issue that may have to be dealt with in due course.

³⁴ [2014] SGHC 186.

³⁵ At [112]–[113].

VII. The role of the prosecution in sentencing

34 I have thus far focused on the role and practice of the court in sentencing. Let me turn briefly to consider another major stakeholder in the criminal justice system: the Public Prosecutor. The Prosecution owes a duty to the court and to the wider public to ensure that the factually guilty and only the factually guilty are convicted, and that all relevant material is placed before the court to assist it in its determination of the truth.³⁶ This duty extends to the stage of sentencing where the Prosecution should place all the relevant facts of the offence and the offender before the court. Furthermore, the Prosecution should always be prepared to assist the court on any issues of sentencing.³⁷ But what does this mean in practical terms?

35 It is perhaps possible to extrapolate from those principles that are widely accepted and to arrive at some thoughts about the prosecutorial role in sentencing. First, the Prosecution acts only in the public interest. That immediately distinguishes it from those who appear in a private law suit to pursue the interest of a private client. On this basis, there would generally be no need for the Prosecution to adopt a strictly adversarial position. Second, that public interest extends not only to securing the conviction in a lawful and ethical manner of those who are factually guilty, but also to securing the appropriate sentence.

36 The latter point is a critical one. Private victories tend to be measured by the size of the damages awarded. But the prosecutorial function is not calibrated by that scale. The appropriate sentence will often *not* bear a linear relationship to the circumstances. A sentence of probation in one case may be more appropriate than a

³⁶ *Muhammad bin Kadar and another v Public Prosecutor* [2011] 3 SLR 1205 at [200].

³⁷ *R v Liverpool City Magistrates Court Ex p Atkinson* (1987) 9 Cr App R (S) 216, at 218; *Barbaro v The Queen and another* [2014] HCA 2 at [38]–[39] and [57].

custodial sentence in another. Hence, this calls for the Prosecution to reflect on why it takes a particular view of what sentence is called for in a given case and to articulate those considerations so that the sentencing judge can assess these and assign the appropriate weight. I should emphasise that a rote recitation calling for a deterrent sentence is unlikely to be helpful or well-received.

37 Rather, the Prosecution can play a vital role by identifying to the court:

- (a) The relevant sentencing precedents, benchmarks and guidelines;
- (b) The relevant facts and circumstances of the offence and of the offender that inform where in the range of sentences the case at hand may be situated;
- (c) The offender's suitability and other relevant considerations that may bear upon whether particular sentencing options that might be available should be invoked;
- (d) The relevant aggravating and mitigating considerations;
- (e) The relevant considerations that pertain to aggregating sentences; and
- (f) Where it may be appropriate to order compensation to be paid to the victim, the relevant considerations (including the appropriate quantum).

38 While the Prosecution may take the position that a certain sentencing range is appropriate in the circumstances, it must present all the relevant materials to enable the court to come to its own conclusion as to what the just sentence should be.

39 These broad guidelines can be supplemented with another very practical point. All the relevant facts must be proven beyond a reasonable doubt; and in guilty pleas, the accused must know all the facts on the basis of which he pleaded guilty. For the Prosecution to raise a fact undisclosed in the statement or ask the court to draw an inference from the facts at the stage of sentencing may be unfairly prejudicial to the offender, who cannot be punished for something that is not proven.³⁸ Hence, the statement of facts must be prepared with this in mind.

40 The court's role in arriving at the correct sentence can be greatly assisted by the Prosecution and I would encourage the Prosecution to adopt these suggestions in formulating sentencing submissions.

VIII. Conclusion

41 I began this address by considering some theories of crime and punishment; and then examined some of the basic nuts and bolts of sentencing from the perspective of the courts and the role of the Prosecution in sentencing.

42 Before closing, I would like to make some observations on the need to keep an eye on what happens after the sentence has been served. In most cases, the end goal of punishment must be to reintegrate offenders into society. The criminal justice

³⁸ *Suse Nathen* at [36].

system would not be complete without such a narrative. The reintegration of offenders extends beyond the rehabilitation and reformation of the offender and focuses instead on the re-inclusion or restoration of the offender as a member of society after serving the punishment. It is concerned with allowing full citizenship together with its accompanying rights and responsibilities to resume. The ex-offender should be able to move forward in society³⁹ and not be punished further by being cast aside whether intentionally or otherwise. *Unlike* rehabilitation which often works on the offender through reformatory or curative programmes, reintegration works with the offender so that he can become the agent of his own reform.⁴⁰ There are considerable social benefits that can be traced to successful reintegration efforts, including reducing recidivism and the social costs of crime, and accessing a valuable pool of human resources. How then might we enhance the prospects of reintegration?

43 In traditional sentencing frameworks, the court's role in reintegrating the offender would be to consider the objective of imposing a sentence that would rehabilitate and so promote the reintegration of the offender. Although the Singapore Prisons Service provides academic and vocational training to prisoners in order to improve their prospects of employment upon release,⁴¹ the court may take the view that other types of sentences might be more beneficial to the long term prospects of reintegration and might on this basis choose to order probation, reformatory training or community-based sentences.

³⁹ Maruna and Lebel, "Welcome Home? Examining the 'Reentry Court' Concept from a Strengths-based Perspective", 4 *W Criminology Rev* 91 2002-2003, p 18.

⁴⁰ A Ashworth and M Wasik (eds), *Fundamentals of Sentencing Theory* (Clarendon Press, 1998), p 186.

⁴¹ Singapore Prison Service, Annual Statistics Press Release 2014 (11 February 2014) para 6.

44 Going beyond this, there are plans to extend the emphasis on reintegration by monitoring how offenders progress *after* sentencing and to hold offenders accountable for change. This will be done through a new innovation referred to as the Progress Accountability Court, working in collaboration with the Singapore Prisons Service and the Ministry of Home Affairs. The Progress Accountability Court will consider the offender's present conduct, while being cognisant of his past, and work with him towards securing his future. The offender will be invited to accept responsibility for his own progress and various aspects of his conduct will be pointed out both of and also for improvement.

45 In the case of young offenders there will rarely be any conflict between the public interest and that of the offender. The public have no greater interest than that the youthful offender becomes a good citizen.⁴² There is also often an interest in keeping young offenders out of the prison environment where they are more likely to come into contact with hardened criminal elements and also face stigmatisation after being released.⁴³ To prevent this, alternative sentencing options are available which may better fulfil the dominant objectives of rehabilitation and reintegration in relation to young offenders. As noted in *Public Prosecutor v Mohammad Al-Ansari bin Basri*,⁴⁴ probation and reformatory training are two forms of sentences which are an expression of those dominant objectives.

46 Probation orders do not give rise to a conviction and so these will enable offenders to maintain a crime-free record. The idea is to wean them away from any propensity towards long time involvement in crime, and to enable and encourage

⁴² *R v Smith* [1964] Crim LR 70.

⁴³ *Nur Azilah bte Ithnin v Public Prosecutor* [2010] 4 SLR 731 at [20].

⁴⁴ [2008] 1 SLR(R) 449 at [64].

reform so that they may become self-reliant and useful members of society.⁴⁵ One of the legislative objects of the Probation of Offender Act⁴⁶ is to rehabilitate young offenders. The Parliamentary Debates referred to the fact that young offenders would “benefit from the personal care, guidance and supervision of a Probation Officer”, giving them an opportunity “to turn over a new leaf and become a responsible member of society.”⁴⁷ A probation order is intended to provide support for the individual so as to assist him in avoiding further crime. This in turn advances the greater public interest by helping to protect society as a whole.⁴⁸

47 Reformatory training is a sentencing option which is only available to persons under the age of 21, and can be imposed in lieu of imprisonment, even where the offender already has a criminal record. It thus affords the courts with some flexibility. Offenders are “constructively engaged” during the period of incarceration, and are subject to a compulsory post-release phase during which they will be placed under supervision and are liable to be recalled if they fail to comply with the conditions imposed on them. The regime involves a combined effort on the part of the trainees' mentors, family members and senior re-integration officers from the supervision centre to ensure a smooth return into society.⁴⁹

48 With the new Criminal Procedure Code which came into effect in 2011, our courts have also been empowered to impose community-based sentences which afford the sentencing judge considerable flexibility in dealing with offenders with a

⁴⁵ *Public Prosecutor v Muhammad Nuzihan bin Kamal Luddin* [2000] 1 SLR 34 at [16].

⁴⁶ Cap 252, 1985 Rev Ed.

⁴⁷ *Singapore Parliamentary Debates, Official Report* (10 November 1993) vol 61 at col 932 (Yeo Cheow Tong, Minister for Community Development).

⁴⁸ *Public Prosecutor v Mohammad Al-Ansari bin Basri* [2008] 1 SLR(R) 449 at [41].

⁴⁹ *Public Prosecutor v Saiful Rizam bin Assim and other appeals* [2014] 2 SLR 495 at [20].

view towards enhancing their chances of rehabilitation while maintaining the penal objectives of deterrence, retribution and crime prevention.

49 Reintegration through the use of community-based sentences is enhanced primarily because the offender is not dislodged from society. This minimises stigmatisation and exclusion and makes reintegration much easier. Reintegration might also be enhanced by pairing a sentence of probation with appropriate conditions, thereby providing a more focused rehabilitative and re-integrative structure for the offender.⁵⁰

50 The task of sentencing an offender justly is a complex exercise. This is a question that concerns not only the courts but all the stakeholders in the criminal justice system. With the assistance of the Prosecution and the Defence Bar, the courts can expect to be well-placed to discharge their function of imposing the just and appropriate sentence for each case. But the system would be enhanced if the stakeholders kept firmly in mind the goal of ensuring that after the sentence has been served, ex-offenders are re-integrated into mainstream society. I believe the discussions in the course of this Conference will raise many interesting issues and perspectives and provide excellent material for further debate and study. I wish you all a most fruitful conference. Thank you.

⁵⁰ See for example *Public Prosecutor v Vikneshon Marian s/o Devasagayam* [2013] SGDC 134; *Public Prosecutor v Tan Yong Chang* [2012] SGDC 161.