Jali bin Mohd Yunos *v* Public Prosecutor
[2014] SGCA 50

Case Number	: Criminal Reference No 4 of 2013
Decision Date	: 09 October 2014
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; Tay Yong Kwang J
Counsel Name(s)	: Eugene Thuraisingam (Eugene Thuraisingam) for the applicant; Tai Wei Shyong, Ng Yiwen and Crystal Tan (Attorney-General's Chambers) for the respondent.
Parties	: Jali bin Mohd Yunos — Public Prosecutor

Criminal Law – Road Traffic Offences

9 October 2014 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 This criminal reference relates to the determination of the following question ("the Question"):

> Does a finding of rashness in road traffic offences require consciousness as to risk?

The Facts

2 The applicant ("the Applicant") pleaded guilty to the following charge under s 66(1) of the Road Traffic Act (Cap 276, 2004 Rev Ed) ("the Act"):

> You, Jali bin Mohd Yunos, …
>
> are charged that you, on the 11th day of November 2010 at about 12.40 pm, along Still Road towards Eunos Link at the signalized cross junction of Joo Chiat Place, Singapore, being the driver of a motor car SJG 9381 K, did cause the death of a one Lai Liok Khim, female 75 years old, by driving the said motor car in a manner which was dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic which was actually at the time, or which might reasonably be expected to be on the road, to wit, by failing to conform to the traffic red light signal in your direction and entering into the junction, thus resulting in a collision with a motor car SFP 1730 P that was entering into the cross junction from your left, from Joo Chiat Place on a green light, thus resulting in a collision with the said motor car and thereafter caused your motor car to veer into the pedestrian crossing along Still Road after the junction, colliding onto the said Lai Liok Khim who was then crossing the road along the pedestrian crossing, thereby causing the death of the said Lai Liok Khim and you have thereby committed an offence punishable under Section 66(1) of the Road Traffic Act, Chapter 276.

3 The Applicant admitted to the Statement of Facts without qualification, the salient parts of which are as follows. On 11 November 2010, at about 12.40pm, the Applicant was driving his motorcar along Still Road in the direction of Eunos Link. At the same time, another motorcar, driven by one

Abdul Majid Bin Omar Harharah ("Majid"), was travelling along Joo Chiat Place towards Telok Kurau Road.

4 As Majid approached the junction between Still Road and Joo Chiat Place, the traffic light turned from red to green in his favour. When Majid proceeded to enter the junction, the vehicle driven by the Applicant suddenly appeared in his path. There was a collision between the two vehicles which caused the Applicant's vehicle to spin out of control and hit the victim ("the Victim"). The Victim was injured and she succumbed to her injuries on the same day.

5 The Applicant *did not dispute* the fact that the traffic light was indeed red against him when he entered the junction. When entering the junction between Still Road and Joo Chiat Place, the Applicant *did not check to see whether the traffic light was green in his favour*. Instead, he *followed the vehicle in front of him*.

The Proceedings Below

6 At first instance, a district judge ("the DJ") sentenced the Applicant to four months' imprisonment and disqualified the Applicant from obtaining or holding a licence for all classes of vehicles for a period of seven years. The grounds for the DJ's decision are reported as *Public Prosecutor v Jali bin Mohd Yunos* [2012] SGDC 302 ("the GD").

7 In sentencing, the DJ noted that in cases of dangerous driving, general deterrence remained the principal sentencing consideration (see the GD at [12]). The seriousness of such offences was reflected in the fact that imprisonment was mandatory and that the length of imprisonment could extend to five years.

8 On the evidence, the DJ noted that the Applicant did not even bother to check whether the traffic lights were in his favour. Instead, he blindly followed the vehicle in front of him. In the DJ's view, this amounted to "a blatant and flagrant disregard of basic safety requirements" (see the GD at [13]).

9 In the same vein, the DJ disagreed with the Applicant's contention that his actions reflected a momentary lapse of judgment on his part and that he was *merely negligent* (see the GD at [9] and [14]). She found that it was "a fundamental safety requirement that a prudent driver ought to check the state of the traffic lights before proceeding to enter a signalised and major traffic junction" (see the GD at [13]). Given that it was in the afternoon, visibility was clear, and the traffic flow was light, there was no reason for the Applicant not to do so.

10 The DJ also noted that the Applicant had admitted to failing to conform to the red light against him when he entered the junction. Given the Applicant's admission, she found it surprising that the Applicant now took the position that he was merely negligent (see the GD at [14]).

11 Finally, the DJ addressed the defence's submission that she was bound by the Singapore High Court decision of *Lim Hong Eng v PP* [2009] 3 SLR(R) 682 ("*Lim Hong Eng*") to impose a sentence of one day's imprisonment (see the GD at [16]–[17]). The DJ distinguished *Lim Hong Eng* on the basis that the accused in that case had thought that the lights were green in her favour. The DJ noted that the Applicant had conceded that this was not the situation in the present case. Moreover, the Applicant did not know of the state of the lights before he had entered the junction as he did not check. The DJ hence found that the facts of the case before her were more consistent with those in *Sankar Jayakumar v PP* [2010] SGHC 190 ("*Sankar*") where a sentence of four months' imprisonment was imposed instead.

12 The Applicant's appeal against sentence in Magistrate's Appeal No 169 of 2012 was dismissed by a High Court judge ("the Judge") without written grounds being delivered. However, from his notes of evidence, it appears that the Judge shared the DJ's view that *Lim Hong Eng* was distinguishable from *Sankar* on the ground that, in *Lim Hong Eng*, the offender had thought that the light was green in her favour. The Judge also noted that the Applicant had entered the signalised junction without checking the lights. In these circumstances, he did not accept the Applicant's argument that he was only negligent as opposed to being rash.

13 The Applicant then applied to this court, *vide* Criminal Motion No 105 of 2012, for leave to refer questions of public interest to this court under s 397 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed). Having re-framed the question originally posed, we granted leave to refer the Question for this Court's determination.

Our decision

14 To recapitulate, the Question before this court is as follows:

> Does *a finding of* ***rashness*** in ***road traffic*** *offences* ***require consciousness as to risk*** ? [emphasis added in italics, bold italics and underlined bold italics]

15 The issue before this court arises in the context of *sentencing* with regard to *road traffic* offences – a point on which both parties are *ad idem*. That having been said, we note that relevant offences under the Act relate to the concept of *recklessness* (instead of rashness) (see, for example, s 66 of the Act ("s 66"), under which the Applicant was charged). Whilst the issue of *sentence* is *conceptually separate and distinct* from that of *liability*, there is still, in our view, *at least some relationship* between the two. We also note that the Applicant was charged under what we would term the "dangerous driving" limb of s 66(1) of the Act (in contrast with what we would term the "reckless driving" limb of the same). In this regard, s 66 reads as follows:

> **Causing death by reckless or dangerous driving**
>
> **66.**—(1) Any person who *causes the death* of another person *by the driving of a motor vehicle on a road* ***recklessly*** , ***or*** *at a speed or in a manner which is* ***dangerous*** *to the public*, ***having regard to all the circumstances of the case*** *, including* the nature, condition and use of the road, and the amount of traffic which is actually at the time, *or which might* ***reasonably be expected to be*** , on the road, shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding 5 years.
>
> (2) [*Deleted by Act 15/2010 wef 02/01/2011*]
>
> (3) If upon the trial of a person for an offence under this section the court is not satisfied that his driving was the cause of the death, but is satisfied that he is guilty of driving as specified in subsection (1), it shall be lawful for the court to convict him of an offence under section 64.
>
> [emphasis added in italics, bold italics and underlined bold italics]

16 Interestingly, s 66(2) of the Act, which (as indicated in the preceding paragraph) was deleted by the Criminal Procedure Code 2010 (Act 15 of 2010), read as follows:

> (2) Section 280 of the Criminal Procedure Code (Cap. 68) shall apply to any offence under this section *as it applies to the offence of causing death by a* ***rash*** *or negligent act.* [emphasis added

in italics and bold italics]

17 The above (deleted) provision is of some significance in the context of the present proceedings as there is a reference to the concept of "rashness" (presumably pursuant to relevant provisions under the Penal Code (Cap 224, 2008 Rev Ed) ("the Penal Code")) by analogy. This might buttress the argument to the effect that there might at least be some connection (if not coincidence) between the concept of "recklessness" under the Act on the one hand and that of "rashness" (under the Penal Code) on the other. For the purposes of the present proceedings, we will assume that both are coincident. However, if that be the case, then the (further) question arises as to whether or not – at the level of *liability* (here, with respect to s 66) – the "reckless driving" limb and the "dangerous driving" limb are to be treated as *legal equivalents*. This is particularly significant as the Applicant was in fact charged under the "dangerous driving" limb of s 66, although it is entirely possible that the same facts might enable the Prosecution to prosecute the accused concerned under *either or both* limbs. (In this regard, reference may also be made to s 65 of the Act, which appears to relate *only* to negligent driving (the precise language of this provision refers to driving "without due care or attention" or "without reasonable consideration for other persons using the road").)

18 The points in the previous paragraph are also relevant in the context of the present proceedings in the following manner: If we assume that there is at least a correlation – if not a coincidence – between the concept of "recklessness" on the one hand and the concept of "rashness" on the other *and* given the fact that the Applicant was charged under the "*dangerous* driving" limb (*instead of* the "*reckless* driving" limb), one is entitled to assume that, if the element of rashness (or recklessness) can be established, the Applicant *could also* have been charged under the "*reckless* driving" limb had the Prosecution been minded to bring a charge against the Applicant under that particular limb. *However*, as we have already noted, the issue of rashness (or recklessness) is, in the context of the present proceedings, to be analysed in the context of the relevant *sentence* to be meted out to the Applicant. And this brings us squarely to the question that has to be answered by this court in the present proceedings (set out above at [14]). Put simply, what is *the precise nature* of the test for *rashness* (*or recklessness*) – particularly in the context of *sentencing* with respect to *road traffic offences*? The simplicity of the question as well as its related issue is, in fact, more apparent than real. As we shall see, the answer to the aforementioned question is far from simple.

19 The Applicant's argument is a relatively straightforward one: There can be no rashness on his part if he was not (and this is the crux of his argument) *subjectively* conscious of the risk he took when he drove his vehicle across the traffic junction concerned. In this regard, he emphasised that he did *not* possess this *subjective* consciousness as he merely followed the vehicle in front of him and did not have, at any time, the state of the traffic lights in mind. Therefore, at most, he was only *negligent* and should be meted out a lighter sentence.

20 Not surprisingly, the Respondent's argument was to the contrary. Citing, *inter alia*, the House of Lords decision of *Regina v Reid* [1992] 1 WLR 793 ("*Reid*") (in the context of road traffic offences), cases and materials in relation to the meaning of rashness under the Penal Code, as well as the relatively recent article by District Judge Toh Yung Cheong (Toh Yung Cheong, "Revisiting Rash Driving" (2011) 23 SAcLJ 271), the Respondent argued that, *in addition to* the situation where the accused concerned was *subjectively* conscious of the risk he took, the accused would *also* be *considered to have been rash* if he *ought, as a reasonable person, to have been aware of, and therefore taken cognisance of, the risk*. The former situation would be the paradigm or mainstream model of rashness or recklessness (see, for example, *per* Sundaresh Menon CJ, delivering the judgment of a special three-judge coram in the Singapore High Court decision of *Public Prosecutor v Hue An Li* [2014] SGHC 171 ("*Hue An Li*") at [45])). The latter extension of the concept of rashness introduces an *objective* basis and has been referred to as "*inadvertent* risk taking" (as opposed to the

former which has been referred to as "*advertent* risk taking").

21 We pause to observe that the terminology just utilised is possibly somewhat misleading. In particular, the reference to "*inadvertent* risk taking" suggests that the accused (the Applicant in this case) did not in fact (consciously) take any *risk* at all. This is not, strictly speaking, correct. In such a situation, the accused *cannot* be said to have acted *without any consciousness* of the consequences of his actions (like, for example, an automaton). In the present case, for instance, the Applicant *knew* that he was driving across a junction *which was controlled by traffic lights*. *However*, he *did not bother to check the lights*, claiming that he had followed the vehicle in front of him instead. He claims that this last-mentioned *omission merely* constituted negligence instead of rashness. With respect, there is no reason in principle why an *omission* to do something (here, to check the traffic lights at a signalised traffic junction) could *not* constitute rashness. The concept of rashness connotes *a heedlessness or indifference towards risk*. In the present case (and, indeed, in all such similar cases), the *risk* is *clear*: If a driver drives into the junction when the traffic lights are not in his favour, there would be a clear possibility of an accident as well as other undesirable (even horrendous) consequences ensuing (including damage to property and/or personal injury or even (as was the case here) death). If a driver drives in such a manner, how can it be said that he had not *taken a conscious and deliberate risk* that the consequences just mentioned might in fact (and, in this case, did) result?

22 The Applicant chose to focus – in a *literal* fashion – on the fact that he had followed the vehicle in front of him and, hence, his omission to check the state of the traffic lights (which were in fact *against* him). With respect, this is *only part* of *the entire context*. What *is* relevant is whether or not, *by doing what he did*, the Applicant *took a conscious and deliberate risk* of the consequences which resulted from his action. In our view, there is no doubt that the Applicant *did* indeed take such a risk and, hence, was either *rash or reckless*. In this regard, *it is clear and axiomatic that when a driver drives into a signalised traffic junction, he must ensure that the traffic lights are in his favour in order to avoid the dire (or even tragic) consequences that might ensue if they are not, in fact, in his favour. If he chooses to drive into such a junction and does not bother to check the state of the traffic lights, he is not merely negligent; he has committed a rash or reckless act.* In this particular case, the Applicant claimed that he had not checked the state of the traffic lights because he assumed they were in his favour as he was following the vehicle in front of him. In our view, the Applicant had not, *literally*, checked the state of the traffic lights *precisely because he was using an alternative "criterion" instead*, *viz*, the vehicle in front of him. If (as it in fact turned out) that this was *not* an appropriate "criterion", the Applicant *cannot* utilise a *literal* omission in order to *justify* what was, in both substance as well as form, a *deliberate act that was, in the circumstances, not merely careless but rash or reckless in nature*.

23 Let us take another hypothetical situation. What if the accused did not (as in the present case) follow the vehicle in front of him? What if the accused *simply did not bother to check the lights at all*, and drove into the signalised traffic junction without more? In our view, that would clearly be a *rash or reckless* act. It is clear that to drive into *a signalised traffic junction without checking the state of the traffic lights (for whatever reason)* would be to consciously and deliberately do an act with the knowledge that this might cause damage and/or personal injury, or even death. It is a conscious and deliberate act that demonstrates *a heedlessness or indifference towards the risks just mentioned*. It is not merely negligence or carelessness; it is *rashness or recklessness*.

24 The approach which we have adopted is in fact not novel. In this regard, the following observations by Lord Keith of Kinkel in *Reid* (at 795–796) might be usefully noted:

> My Lords, the question principally debated at the hearing of this appeal was whether the

formulation by Lord Diplock in *Reg. v. Lawrence* [1982] A.C. 510 of the meaning of "driving recklessly" in section 1 of the [UK] Road Traffic Act 1972 (as amended) was incorrect, so that the decision in that case should be departed from under the *Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234. It was argued for the defendant that the formulation was mistaken in respect that Lord Diplock expressed the mens rea for the statutory offence as including not only a state of mind where the accused drove as he did recognising that his action created a risk of injury or of substantial damage to property but nevertheless went on to take that risk, *but also a state of mind where the accused drove as he did without giving any thought to the possibility of there being any such risk, notwithstanding that the risk was obvious*. In truth, so it was maintained, it was only the former state of mind which constituted the relevant mens rea.

In common with my noble and learned friends, Lord Ackner and Lord Goff of Chieveley, I am satisfied that, for the reasons they give, the argument is unsound. Lord Diplock described the actus reus of the offence as driving a vehicle in such a manner as to create an obvious and serious risk of causing physical injury to some other person who might happen to be using the road or of doing substantial damage to property. *The important thing here is that the risk created must be an obvious and serious one.* No criticism has been or could be made of that. *The precise state of mind of a person who drives in the manner indicated must in the vast majority of cases be quite incapable of ascertainment.* ***Absence of something from a person's mind is as much part of his state of mind as its presence. Inadvertence to risk is no less a subjective state of mind than is disregard of a recognised risk.*** If there is nothing to go upon apart from what actually happened, the natural inference is that the driver's state of mind was one or other of those described by Lord Diplock. It would, however, be quite impossible for any juryman to say which it was, and in particular for him to be satisfied beyond reasonable doubt that it was the first state of mind rather than the second. So logically, if only the first state of mind constituted the relevant mens rea, it would be impossible ever to get a conviction. There is no room for doubt, in my opinion, that a large proportion of drivers who drive in such a manner as to create the relevant sort of risk do so without giving any thought to the possibility of risk. Indeed, the very attempt to exclude such drivers from the ambit of the statutory offence recognises that this must be so. ***Driving a motor vehicle is potentially an extremely dangerous activity, requiring a high degree of self-discipline. Those who fail to display the requisite degree of self-discipline through failing to give any thought to the possibility of the serious risks they are creating may reasonably be regarded as no less blameworthy than those who consciously appreciate a risk but nevertheless go on to take it.*** The word "reckless" in its ordinary meaning is apt to embrace the former category no less than the latter, and I feel no doubt that Parliament by its use intended to cover both of them.

[emphasis added in italics and bold italics]

25 In a similar vein, the following observations by Lord Goff of Chieveley in the same decision (at 810–812) may also be usefully noted:

It is not difficult to give example of cases of this kind in the context of driving. I can for example see no difficulty in envisaging a driver who drives at high speed in traffic or in a built up area or both, just not caring whether any risk of personal injury or damage to other vehicles exists or not. It does not matter whether in such a case he is indifferent to the existence of the risk, or whether he has closed his mind to any such thing; ***the point is that in such circumstances he may not even address his mind to the possibility of risk*** . Likewise, when driving down the motorway many of us must have seen small groups of motorcyclists weaving in and out of the traffic at enormous speeds, with their eyes apparently glued to their speedometers to see how

fast they are going. Again, these young men may very well not even address their minds to the possibility of risk, concentrating only on the speed at which they are travelling. Then there are the young joyriders who take other people's cars, often fast cars such as GTIs, and drive them at high speed around housing estates. They, too, may well give no thought to the possibility of risk to other people or other vehicles in the vicinity. These are everyday examples of cases which we have either seen ourselves on the road or have read about in the newspapers. I cannot help thinking that in ordinary speech all these people would be described as driving recklessly. ***Certainly, I do not think that ordinary people would regard it as a relevant inquiry to ascertain whether these drivers had in fact addressed their minds to the possibility of risk before they could be said to have acted recklessly*** . Indeed, I would go further and say that this category of recklessness on the roads may well be as prevalent as the category in which the driver actually foresees the risk and decides to disregard it. This is because on the roads decisions to act, for example to overtake or to go for a gap, are often split-second decisions which may be taken virtually without thought. In retrospect after the event, a driver may say "Yes, I did think about it and I did realise that there was a risk;" but he may be just as likely, if not more likely, to say "I am afraid that I just did not think but, if I had done, I would have realised that there was a risk." In circumstances such as these, an inquiry into the existence of actual foresight of the risk would seem to be unrealistic for the purpose of assessing blameworthiness or criminality. ***Indeed, it can be argued with force that, in many cases of failing to think, the degree of blameworthiness to be attached to the driver can be greater than that to be attached in some cases to the driver who recognised the risk and decided to disregard it.*** This is because the unspoken premise which seems to me to underlie Lord Diplock's statement of the law in *Lawrence* (and perhaps also in *Caldwell*) is that the defendant is engaged in an activity which he knows to be potentially dangerous. Every driver knows that driving can be dangerous; and if when a man is in fact driving dangerously in the sense described by Lord Diplock, he does not even address his mind to the possibility of risk, then, absent special circumstances (to which I will refer later) it is right that he should, if the risk was obvious, be held to have been driving recklessly, even though he was not in fact aware of the risk. ***It cannot be right that in such circumstances he should be able to shelter behind his ignorance, or be given preferred treatment as compared with another person who, having recognised and considered the risk, has wrongly decided to disregard it*** . If the policy underlying this category of recklessness were to be explained to a jury, I would be surprised if they had difficulty in understanding it.

…

I recognise that it has been suggested that, if this is right, driving recklessly cannot be so sharply differentiated from careless driving, i.e. driving without due care and attention, as it would be if the purely subjective test were to be adopted as the sole criterion of recklessness, in which case a clear distinction could be drawn between cases where the defendant was aware of the risk and nevertheless disregarded it, and cases where the defendant failed to advert to the relevant risk. But the answer to this criticism is, I believe, as follows. ***First, as I have already said, we have to recognise that there are cases where, although the defendant is unaware of the risk, his conduct coupled with his state of mind is such that, in ordinary speech, he can properly be described as driving recklessly.*** Second, these cases can be differentiated from mere careless driving, because they are cases in which the defendant's driving would be described as dangerous in the sense that he was driving in such a manner as to create a serious risk of causing physical injury to other people or substantial damage to other people's property, and yet he did not even address his mind to the possibility of there being any such risk. ***This is different from a case where, for example, momentary inadvertence happens incidentally to create a risk; for the recklessness arises from the combination of the***

dangerous character of the driving coupled with failure by the driver even to address his mind to the possibility of risk. I for my part see no real difficulty, in practice, in perceiving a sufficiently clear differentiation between cases of this kind and cases of driving without due care and attention, which we see happening so often on the roads and of which many of us may, I fear, be guilty from time to time . …

[emphasis added in bold italics]

26 We pause to observe that we accept the Respondent's argument to the effect that the apparently different approach taken by the House of Lords with regard to the UK Criminal Damage Act 1971 (notably, where *Regina v G and another* [2004] 1 AC 1034 ("*R v G*") overruled the earlier decision of the House in *Commissioner of Police of the Metropolis v Caldwell* [1982] AC 341) is to be confined to that particular statute. Put simply, the concept of "recklessness" ought to be interpreted *differently* in the context of road traffic offences as compared to offences involving criminal damage (see also *per* Lord Browne-Wilkinson in *Reid* (at 816–817)). More importantly, the following observations by Lord Bingham of Cornhill in *R v G* (at [28]) ought to be noted:

> The task confronting the House in this appeal is, first of all, one of statutory construction: what did Parliament mean when it used the word "reckless" in section I(I) and (2) of the 1971 Act? In so expressing the question I mean to make it as plain as I can that ***I am not addressing the meaning of "reckless" in any other statutory or common law context*** . In particular, but perhaps needlessly since "recklessly" has now been banished from the lexicon of driving offences, ***I would wish to throw no doubt on the decisions of the House in R v Lawrence (Stephen) [1982] AC 510 and R v Reid [1992] 1 WLR 793*** . [emphasis added in bold italics]

In a similar vein, Lord Rodger of Earlsferry, in the same decision, observed thus (at [69]):

> It does not follow, however, that Lord Diplock's broader concept of recklessness was undesirable in terms of legal policy. On the contrary, there is much to be said for the view that, if the law is to operate with the concept of recklessness, then it may properly treat as reckless the man who acts without even troubling to give his mind to a risk that would have been obvious to him if he had thought about it. ***This approach may be better suited to some offences than to others*** . For example, in the context of reckless driving the House endorsed and re-endorsed a more stringent version: *R v Lawrence (Stephen)* [1982] AC 510; *R v Reid* [1992] 1 WLR 793. ***I refer in particular to the discussion of the policy issues by Lord Goff of Chieveley in R v Reid*** at pp 808H–812C. … [emphasis added in bold italics]

27 Whilst it is true that there is an *element* of *objectivity* in the analysis proffered above inasmuch as the law places *an obligation* on the accused (here, the Applicant) to *do* what *any reasonable person ought to do*, the crux of the matter is this: What is the *nature* of the accused's *omission* to do what any reasonable person ought to do? It is undoubtedly the case that, given the *almost infinite variety as well as permutations of fact situations, the court must draw the line between acts which are merely negligent and acts which are rash or reckless*. There is a point at which there is no longer a difference in degree but a difference in *kind* instead. In this regard, it must be emphasised that we are here concerned with *road traffic offences*. This particular context is of the first importance because it means that it is not only appropriate but also principled and commonsensical to place an *objective* obligation on *all* drivers (or motorcyclists, as the case may be) *to check the state of the traffic lights when travelling across a signalised traffic junction* (see also the observations by Lord Keith and Lord Goff in *Reid*, quoted above at [24] and [25], respectively). A driver or motorcyclist who *chooses (for whatever reason) not to do so and drives into such a junction when the traffic lights are not in his favour drives*, in our view, in a manner that is *rash or reckless*.

2 8 *However*, in fairness to the Respondent, it did acknowledge (in its further submissions) that "the test should not be read in a strictly objective way with reference to an immutable hypothetical reasonable man". In our view, this is correct – particularly in view of the almost infinite variety as well as permutations of fact situations referred to in the preceding paragraph. In this regard, the Respondent also cited the following observation by Lord Keith in *Reid* (at 796):

> The substance of Lord Diplock's formulation of a specimen jury direction is accordingly apt, in my opinion, to cover *the generality of cases.* ***But I do not rule out that in certain cases there may be special circumstances which require it to be modified or added to*** *, for example where the driver acted under some understandable and excusable mistake or where his capacity to appreciate risks was adversely affected by some condition not involving fault on his part. There may also be cases where the driver acted as he did in a sudden dilemma created by the actions of others*. … [emphasis added in italics and bold italics]

29 The analysis as well as observations cited in the preceding paragraph ensure that, in applying an objective test in the manner set out in this judgment, the court concerned will nevertheless possess *the requisite flexibility not* to find rashness or recklessness in *exceptional fact situations* in which there is a plausible reason for the accused concerned to act in the way he did (for example, in not checking the state of the traffic lights at a signalised traffic junction).

30 We also note that the court in the very recent decision of *Hue An Li* observed (at [45]) that, whilst "advertence to risk will *generally* be an *essential* element of rashness", "there remains a class of cases where the risks may be said to be so obvious had the offender paused to consider them that it would be artificial to ignore this fact" [emphasis in original]. This is, in fact, precisely one of those cases. We also pause to note, parenthetically, that this last-mentioned definition of rashness is one which we would endorse and adopt. It should also be noted that in *Hue An Li*, Menon CJ then proceeded to observe that "[w]e leave it open as to whether advertence to risk must actually be proved before a finding of rashness can be made in this class of cases" and that "it would be best to develop this issue by case law rather than by a pre-emptive statement of principle" (see *ibid*).

31 Finally, we also note that even though the late Prof Glanville Williams was highly critical of an objective approach adopted with regard to the concept of recklessness, he was willing to make an exception in respect of reckless *driving* (see Glanville Williams, "Recklessness Redefined" [1981] CLJ 252, especially at 279).

32 To conclude, the Question referred to this court is answered as follows:

(1) A finding of rashness in sentencing in road traffic offences requires consciousness as to the risk by the accused (who is in charge of the vehicle concerned). In this regard, rashness and recklessness are treated as interchangeable concepts.

(2) Such consciousness includes:

(a) Situations in which there was in fact subjective appreciation of the risk by the accused; and

(b) Situations in which the risk is so obvious that the accused ought, as a reasonable person, to have known of it inasmuch as had he paused to consider it, it would have been artificial to have ignored such a risk.

(3) However, in Situation 2(b) above, there might nevertheless be no finding of rashness or

recklessness on the part of the accused where there exist exceptional circumstances, for example, where the accused acted under some understandable and excusable mistake or where his capacity to appreciate risks was adversely affected by some condition not involving fault on his part. There may also be cases where the accused acted as he did in a sudden dilemma created by the actions of others.

33 Having answered the Question, it is important, in our view, *to place (or locate) the answer in its wider context.* In other words, it is of the first importance to note what *the true legal significance* of this answer is in relation to *the broader issue of sentencing* in the context of *the Act*. This is especially needful in light of the fact that counsel for the Applicant, Mr Eugene Thuraisingam ("Mr Thuraisingam"), appeared to assume (as well as suggest) that a finding of *rashness* (as opposed to negligence) would result in a *harsher* sentence. As we shall elaborate upon in a moment, this is *not necessarily* the case. We would also observe that this exercise is also needful in light of what appears to be a similar approach in *Lim Hong Eng.*

34 We will proceed to set out the significance of the answer to the Question first before elaborating on why both the assumption by Mr Thuraisingam as well as in the decision of *Lim Hong Eng* are *at variance* with the aforementioned approach and, to that extent, do *not*, with respect, represent the correct legal position.

The legal significance of the answer to the Question stated

35 Rashness in road traffic offences, as elaborated upon in the answer to the Question (set out above at [14]), is *merely one (albeit an often important) factor that is taken into account by the court in determining the appropriate sentence that ought to be meted out to the accused* (in this case, the Applicant). *However*, the approach to sentencing in any given case (including one involving offences under the Act) is, in the final analysis, *a fact-centric one*. At this juncture, it is appropriate to refer, first, to Mr Thuraisingam's assumption.

A finding of rashness (as opposed to negligence) will not invariably result in a harsher sentence being meted out against the accused

36 As already alluded to above, Mr Thuraisingam's assumption is that, as between rashness on the one hand and negligence on the other, the former state of mind on the part of the accused would attract *a heavier sentence* than the latter state of mind. Whilst this might well be the case, *all other things being equal*, it is of the first importance to note that *this need not necessarily be the case*. *Depending on the precise facts before the court, an accused who is negligent might be meted out a higher sentence compared to an accused who has been rash. As just mentioned, everything depends ultimately upon the relevant facts, in particular, the nature of the risk created by the offender's conduct as well as the presence (or absence) of mitigating and aggravating factors* This is especially the case in the context of road traffic offences. It bears reiterating that driving is *an inherently dangerous activity*. It is also a *privilege* accorded to persons who, through a series of properly administered tests, have demonstrated that they are capable of meeting the standards expected of a reasonably competent driver. Hence, when they elect to drive a vehicle, they should expect the law to hold them to these standards. Indeed, this is an integral part of the analysis which we have taken into account in answering the Question stated (see also above, especially at [20]–[22] and [27]).

37 This approach is in fact supported by a very pertinent observation by Menon CJ in *Hue An Li.* Although this observation was made in the context of s 304A of the Penal Code, it is in fact of *general application*. In this regard, the learned Chief Justice observed as follows (at [62]):

We pause at this juncture to make another observation. *The dichotomous sentencing regimes for the negligence and the rashness limbs of s 304A entail the possibility of a conviction under the rashness limb carrying a more lenient sentence than a conviction (of a different person in different circumstances) under the negligence limb.* ***This is because it is entirely plausible for a person to be advertent to the potential risks that might arise from his conduct, and yet be less culpable than another who is oblivious to such risks. We emphasise that it is <u>the presence of mitigating and/or aggravating factors, and not merely the categorisation of an offender's conduct as rash or negligent</u>, that will be determinative of the actual penal consequences that follow upon the commission of a s 304A offence.*** [emphasis added in italics, bold italics and underlined bold italics]

Lim Hong Eng revisited

38 It would be appropriate, at this juncture, to consider briefly the facts as well as holding in *Lim Hong Eng* which, as alluded to above, appears to reflect the same approach as that advocated by Mr Thuraisingam in the context of the present proceedings.

39 In *Lim Hong Eng*, the appellant had driven across a controlled junction when the traffic light was red against her. This resulted in a collision with a motorcycle. The motorcyclist suffered a compound fracture to his left leg and his pillion rider was killed. The appellant was charged with one count of causing death by dangerous driving under s 66(1) of the Act and one count of causing grievous hurt by doing a rash act under s 338 of the Penal Code.

40 The trial judge convicted the appellant of the charges and sentenced her to a total of 18 months' imprisonment and a disqualification from holding or obtaining a driving licence for all classes of vehicles for 10 years with effect from her release from prison. Pertinently, the trial judge found that the appellant had been rash without first finding that the appellant was conscious of the risk of her actions.

41 On appeal, the High Court judge disagreed with the trial judge that the appellant had acted rashly. He noted the trial judge's finding that the appellant was not aware that the light was red against her and that the motorcycle was passing through the junction. He also noted that the prosecution had conceded that the appellant did not intentionally disregard the red light at the traffic junction. He concluded that the appellant's conduct was more negligent than rash. We would observe, parenthetically, that such a finding might not be appropriate on similar facts in future cases in light of our analysis above.

42 Returning to the facts of *Lim Hong Eng*, the High Court Judge therefore substituted, in relation to the charge of s 338 under the Penal Code, the less serious charge of dangerous driving *simpliciter* under s 64(1) of the Act. In so far as the charge under s 66(1) of the Act was concerned, the High Court judge reduced the appellant's sentence to one day's imprisonment, observing as follows (at [7]):

> *…[T]he state of mind of the appellant would have an impact on her culpability, and thereby, her punishment*. In the present case, the Prosecution conceded that the appellant did not intentionally disregard the red light at the Junction. It seemed clear from the evidence and the trial judge's findings that *the nature of the appellant's culpability lay in her failure to keep a proper lookout*. That, in my view, did not merit a harsh custodial sentence. *A long custodial sentence for a traffic offence is appropriate when the offender endangered the lives of others in a rash or reckless manner (such as driving at an excessive speed) and not when her conduct was merely negligent*. [emphasis added]

43 Whilst we agree that the state of mind of the accused would ordinarily be a factor to be taken into account for the purposes of sentencing (in this case, in relation to road traffic offences), as already explained above (at [36]–[37]), this may not be the only (let alone crucial) factor which determines what sentence ought to be meted out to the accused concerned. It bears reiterating that much will depend on the precise facts before the court. To the extent that *Lim Hong Eng* also appears to suggest that *negligence* should attract a relatively low sentence compared to *recklessness* (consistently with the approach advocated by Mr Thuraisingam in the present proceedings), we would respectfully differ for the reasons set out above (at [36]–[37]).

44 In summary, it bears repeating that the process of sentencing in general and sentencing in the context of the Act in particular is fact-centric and that the answer to the Question, whilst legally significant, would differ in its importance, depending on the precise fact situation before the court concerned.

Conclusion

45 In conclusion, we would affirm the sentence imposed by the courts below. Both the DJ and the Judge were correct in finding that, on the facts, the Applicant had been rash as opposed to merely negligent (see also above, especially at [22]). They also considered *all* the facts and circumstances of the case and did not confine their analysis only to the Applicant's state of mind. In these circumstances, we see no grounds for interfering with the Applicant's sentence.