IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 230

Magistrate's Appeal No 9073 of 2020

Between

Public Prosecutor

… *Appellant*

And

David John Kidd

… *Respondent*

Criminal Motion No 34 of 2020

Between

Public Prosecutor

… *Applicant*

And

David John Kidd

… *Respondent*

GROUNDS OF DECISION

[Criminal Procedure and Sentencing] — [Sentencing] — [Principles]

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v
Kidd, David John and another matter

[2020] SGHC 230

High Court — Magistrate's Appeal No 9073 of 2020 and Criminal Motion No 34 of 2020
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See Kee Oon J:

Introduction

1 The respondent pleaded guilty in a District Court to five charges of falsification of accounts under s 477A of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code"). Seven similar charges were taken into consideration for the purpose of sentencing.

2 The District Judge ("DJ") imposed sentences of 12 weeks' imprisonment for four charges, and 24 weeks' imprisonment for the fifth charge, which involved the highest amount of loss ($558,010) to Lukoil Asia-Pacific Pte Ltd ("Lukoil"), the respondent's employer. The DJ's grounds of decision are reported as *Public Prosecutor v David John Kidd* [2020] SGDC 83 ("GD"). He took into account the two weeks that the respondent had spent in remand and

ordered two imprisonment terms of 12 and 24 weeks to run consecutively. The aggregate sentence was therefore 36 weeks' imprisonment.

3 The prosecution appealed against the sentence, and submitted that the sentences were manifestly inadequate and an enhanced sentence of at least 18 months' imprisonment in total was warranted. This is consistent with the sentence that was sought below.

4 After hearing the parties' submissions, I dismissed the appeal. I gave brief reasons orally for my decision at the hearing on 20 August 2020, and I now set out my full grounds of decision.

Facts

5 The respondent admitted to the Statement of Facts ("SOF") without qualification. At the material time, he was a 30-year old Singaporean permanent resident and a British citizen, employed as a fuel oil trader with Lukoil.

6 In or around March 2016, Lukoil entered into a contract with a buyer, Transocean, for the sale and purchase of high sulphur fuel oil. Under the contract, Transocean would order oil in tranches from Lukoil. To trigger the delivery of each tranche, Transocean would inform Lukoil of the quantity of oil it wanted to purchase for that order. The price of the oil purchased was based on the date on which the trigger (*ie,* purchase) was declared by Transocean.

7 The respondent was the sole trader in charge of the contract with Transocean. The respondent was tasked to contemporaneously enter the details of each trade into Lukoil's internal record system, including the time, quantity, price and/or exposure for that trade. He also had to contemporaneously carry out back-to-back trades in order to hedge the trade and cover pricing exposure

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resulting from the trade on the same day, in order to prevent Lukoil from suffering huge losses. However, the respondent failed to contemporaneously hedge all the trades relating to the Transocean contract which were carried out between 6 April and 29 July 2016. Instead, he attempted to wait for a more favourable price to hedge the trades in order to gain a financial advantage for his fuel oil book. The respondent's delayed entering of the trigger declarations received from Transocean and his consequent late hedging at a correspondingly higher price resulted in losses to Lukoil. Of the 18 irregular trades performed, 17 trades led to losses amounting to S$1,024,208 in total. This figure was based on further clarificatory evidence adduced by way of Criminal Motion 34 of 2020 brought by the appellant, which I had allowed.

8 Lukoil used daily mark-to-market updates to monitor its trading position and risk exposure. The mark-to-market updates were intended to provide Lukoil with a realistic appraisal of its financial situation based on prevailing market conditions. However, the respondent entered false mark-to-market updates projecting gains into Lukoil's system, so as to negate or mitigate the losses caused by the irregular trades. These false updates therefore concealed the losses resulting from the late hedging. The respondent's recording of false mark-to-market updates in Lukoil's system was the subject of the charges under s 477A of the Penal Code. In respect of the five proceeded charges, the false entries were made from 17 May to 1 July 2016.

9 The respondent later cancelled the Transocean contract prematurely without the approval or knowledge of Lukoil's management, and resigned from Lukoil a day after having done so, on 29 July 2016. These events led to internal investigations, which were carried out by Lukoil, and the subsequent discovery of the offences. A police report was lodged on 3 February 2017 with the

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Commercial Affairs Department, alleging that the respondent had backdated trades that resulted in losses for Lukoil.

10 As the respondent did not cooperate with police investigations, significant investigative resources had to be expended between March 2017 and April 2018. The respondent eventually admitted to the offences on 28 April 2018. The respondent also gave false information in his statements that his colleagues could have performed the irregular trades.

The decision below

11 The DJ held that the following sentencing considerations identified in *Tan Puay Boon v Public Prosecutor* [2003] 3 SLR(R) 390 ("*Tan Puay Boon*") at [47] and [50] were applicable to the present case:

(a) whether there was deviousness or surreptitious planning;

(b) whether the falsifications were committed for one's personal gain;

(c) whether there was abuse of trust; and

(d) the quantum of monies involved.

12 Applying these considerations, the DJ opined that while the respondent had repeatedly keyed in false updates and the offences were premeditated, his actions were not as "sophisticated, surreptitious or egregious" as the precedent cases cited by the appellant. As to whether the respondent had committed offences for personal gain, the DJ noted that the respondent did not receive any direct monetary benefit. While the respondent was entrusted with responsibility over the contract, he did not occupy a high position in Lukoil's hierarchy, and

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he was also not employed for as long as the offenders in the cases cited by the appellant. The DJ noted that while the offences did not directly cause the losses to Lukoil, the concealment had allowed the irregular trades to continue since the false updates were made to conceal losses caused by the late hedging. In this regard, the DJ found that while the losses caused to Lukoil were significant, they were significantly less than the amounts involved in the precedent cases referenced to by the parties.

13 The DJ disagreed with the appellant's submission that the case of *Sabastian s/o Anthony Samy v Public Prosecutor* (Magistrate's Appeal No 343 & 346 of 1985 (unreported)) ("*Sabastian Anthony Samy*") supported the sentence of 18 months' imprisonment. *Sabastian Anthony Samy* was an unreported decision and based on the facts that could be gathered about the case, the offences were significantly more aggravated than those in the present case. Therefore, the DJ did not find *Sabastian Anthony Samy* to be a particularly useful precedent.

14 The DJ also compared the facts in the present case to those of *Public Prosecutor v Takahashi Masatsugu* [2009] SGDC 265 ("*Takahashi Masatsugu"*), *Public Prosecutor v Noriyuki Yamazaki* [2009] SGDC 118 ("*Noriyuki Yamazaki"*) and *Public Prosecutor v Takayoshi Wada* [2009] SGDC 162 ("*Takayoshi Wada")* (collectively, the "Mitsui oil cases") in calibrating the appropriate global sentence. Finally, the DJ considered the case of *Public Prosecutor v Lim Lee Eng Jansen* [2001] SGDC 188 ("*Jansen Lim*") where a sentence of 12 weeks' imprisonment was imposed. The DJ held that, compared to the present case, the facts in *Jansen Lim* were less serious and there were stronger mitigating factors. The offender in *Jansen Lim* had also cooperated fully with the authorities, unlike the respondent. As such, the sentence imposed in *Jansen Lim* was not a suitable reference point.

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15 Accordingly, the DJ found that an aggregate sentence of 36 weeks' imprisonment was appropriate, taking into account the two weeks the respondent had spent in remand, and having regard to the sentences imposed in precedents including *Jansen Lim* and the Mitsui Oil cases.

Issues to be determined on appeal

16 The main grounds of appeal were first, that the DJ had failed to give due weight to the relevant aggravating factors; second, that the DJ had been overly influenced by the absence of direct pecuniary benefit to the respondent; and third, that the DJ had failed to appreciate and give due weight to the relevant sentencing precedents. I address each issue in turn.

Weight to be given to aggravating factors

The arguments on appeal

17 The appellant argued that the sentence imposed was inadequate as a deterrent, as the DJ had not given due weight to the aggravating factors. Among these were the scale of the offences and number of similar offences committed over a fairly sustained period, the level of premeditation, execution and concealment, and the fact that the respondent occupied a high position of trust as the sole trader for Lukoil's Transocean account. The respondent had entered irregular trades into Lukoil's internal system, falsified mark-to-market updates to cover up the losses, and persisted in repeating this process, resulting in losses to the company being compounded. The false projected gains were factored into Lukoil's profit and loss statements, helping to conceal the losses caused by the late hedging. The appellant submitted that the respondent knew what Lukoil's risk department would be looking for in the company's profit and loss statements, and deployed a method that would circumvent detection, revealing

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some level of deviousness.

18 The appellant also argued that the DJ had erred in placing too much emphasis on the respondent's position in the company's hierarchy, instead of the amount of trust placed in him as the sole trader in charge of the Transocean contract. The DJ's reasoning that the abuse of trust was less egregious than other precedent cases on the basis of the respondent's relative position in the company's hierarchy was flawed, as the court should look to substance and not form in determining the level of trust reposed in a person, in line with *Lim Ying Ying Luciana v Public Prosecutor and another appeal* [2016] 4 SLR 1220 at [65]. In addition, the DJ failed to give due weight to the fact that the respondent was highly uncooperative and had deliberately impeded investigations for about a year, including deflecting possible blame to his colleagues, before eventually coming clean in 2018. Finally, the respondent did not make any restitution.

19 The respondent argued that the loss caused to the company was relatively low when compared to the monthly volume and value of trades transacted by the company. The respondent also averred that the commission of the offences was premeditated but unsophisticated, and that the company could have easily detected these offences had reconciliation been done in a timely manner. Further, even though the respondent used his position as an employee in order to commit the offences, he was not placed in an elevated position of trust. It was submitted that the appellant had overstated the case by arguing that an international conglomerate like Lukoil with its own system of checks and balances had reposed a high degree of trust and confidence in a trader whose job was primarily to enter data into the system. The respondent submitted that his role was entirely administrative or clerical in nature.

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My decision

20 The losses caused by the respondent's irregular trades were substantial, and he resorted to falsification of accounts to conceal these losses. However, I agreed with the respondent that the loss caused to Lukoil was relatively low, when viewed in the context of the aggregate volume and value of trades transacted by Lukoil. This context is relevant when assessing the extent and actual impact of the loss that the respondent had caused. The offences were premeditated but unsophisticated in their execution, and it was a matter of time before Lukoil would have been able to uncover the respondent's actions.

21 I accepted that the respondent was undoubtedly in a position of trust as the sole trader for the Transocean account. I also accepted that in determining the severity of the abuse of trust, the court should look to substance and not to form. Nevertheless, the respondent was a junior and relatively inexperienced trader, and having regard again to the context of Lukoil's volume and value of trades transacted, he was not placed in a particularly elevated position of trust or authority. I was not persuaded that his abuse of trust was a particularly strong aggravating factor. I did not agree however with his attempt to further downplay his responsibility by suggesting that he was merely performing an administrative or clerical role.

22 It cannot be disputed that the respondent was uncooperative when investigations began, and that significant investigative resources had to be expended as a result. Notwithstanding that, he did eventually cooperate and had elected to plead guilty. The lack of cooperation given by an offender to the authorities, such as by not providing information, would not generally be an aggravating factor (see, *eg*, *Public Prosecutor v Muhammad Ikrimah bin Muhammad Adrian Rogelio Galaura* [2020] SGHC 107 at [58]). It is possible

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that in an appropriate case with more egregious facts, an offender's lack of cooperation could be an aggravating factor, such as where he deliberately furnishes false information, where he attempts to wrongly divert blame to others, or where he attempts to conceal or dispose of evidence. Much depends on the facts of each case.

23 In the present case, it was revealed in the SOF that the respondent did not provide information to the authorities, such that significant investigative resources had to be expended. He had also falsely stated in his statements that his colleagues could have performed the irregular trades. However, the SOF did not specify the extent or particulars of such falsehoods, and the respondent was also not charged with an offence of furnishing false information to a public servant under s 182 of the Penal Code. From the facts available before the court, it is not clear that the extent of the respondent's lack of cooperation had gone significantly beyond his failure to provide information. It would not be appropriate in this case for the respondent's admitted lack of cooperation to be an aggravating factor.

24 In this connection, the DJ had also pertinently noted (at [1]–[4] and [30] of the GD) that 18 other cheating charges were initially preferred against the respondent, resulting in him facing 30 charges in total. The 18 cheating charges were eventually all withdrawn on the date the respondent pleaded guilty, as they may not have amounted to offences at all. Conceivably, considerable investigative resources were channelled into these 18 charges when they were not sustainable. At any rate, there was no suggestion that the respondent's lack of cooperation had caused such investigations to be undertaken.

25 That said, the respondent's lack of cooperation would have implications on the mitigating weight that would have been afforded by his decision to plead

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guilty. In *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 ("*Ng Kean Meng Terence*") at [71], it was held that the court should have regard to the justifications set out in *Regina v Millberry* [2003] 1 WLR 546 ("*Millberry*") together with all other offender-specific factors in assessing the mitigatory weight to be accorded to a plea of guilt. One of the *Millberry* justifications for reducing sentence on the basis of a plea of guilt was where the plea could be a "subjective expression of genuine remorse and contrition, which [could] be taken into account as a personal mitigating factor" (*Ng Kean Meng Terence* at [66]). Here, any mitigatory weight that would have been accorded to the respondent on the basis that he had pleaded guilty out of remorse would be unpersuasive, although it still could be said that the respondent's plea of guilt saved resources that would otherwise have been expended on a trial. I note that the DJ justifiably did not place significant mitigating weight on the respondent's plea of guilt.

26 The respondent did not make any restitution as he did not have the means to do so. Moreover, it should be borne in mind that he was convicted of charges involving falsification of accounts; the charges did not involve personal enrichment, theft or dishonest misappropriation of Lukoil's funds and he did not actually obtain any pecuniary benefit from his offences. It would not be correct to characterise his failure to make restitution as an aggravating factor on the facts in this case.

Absence of direct pecuniary benefit

The arguments on appeal

27 The appellant submitted that the DJ failed to recognise that the respondent's offences were motivated by financial benefit, and that significant

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imprisonment terms had been imposed on offenders in precedent cases even where they did not receive direct pecuniary benefit. According to the appellant, the respondent was gambling with his employer's money in the hope that larger profits would be earned, such that he would be rewarded with a bonus at the end of the year.

28 The respondent argued that his motive was to help the company, and that he did not commit the offences for personal gain. Whilst it was generally true that a company's performance could factor into the quantum of an employee's bonus, the SOF revealed that the respondent would likely lose his job if the performance on his book remained poor. The respondent was therefore merely trying to improve the book's performance so as to retain his job. The respondent further submitted that he had already accepted a job offer at Trafigura by the time his late hedging resulted in the largest loss of $558,010, which showed that he was not motivated by the hopes of gaining any profit for himself. The respondent's actions should be characterised as a misguided attempt to benefit Lukoil even though he would not himself be around to gain from any improvement in the company's performance.

My decision

29 While the respondent had admitted that the prospect of some possible financial benefit was among his motivations for committing the offences, it would appear that he was principally motivated to help Lukoil improve its bottom line. The fact that Lukoil's fuel oil team was performing poorly and had its accounts in the red in 2016 was not disputed by the appellant. It was also not disputed that the respondent risked losing his job given these circumstances. Hence it could not be fairly said that because the respondent was looking out for himself, he was incentivised to commit the offences largely for financial

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gain.

30 Nevertheless, the respondent's decision to resign from Lukoil (ostensibly because he had been headhunted by Trafigura) and unilaterally terminate the Transocean contract prematurely after recording the highest loss amount of $558,010 betrayed a cynical and desperate attempt to avoid the consequences of his conduct. I did not see how it could seriously be suggested that his resignation in such circumstances would corroborate his purported lack of interest in any potential bonus payout.

31 The DJ had rightly taken into account the various considerations that would go toward assessing whether the respondent had committed the offences for his personal benefit. The DJ considered that while the respondent might be financially rewarded if the company made a profit and was concerned about losing his job, he did not receive any actual monetary benefit from committing the offences. I did not think that the DJ had erred in finding that the respondent did not commit the offences primarily for personal gain, and therefore rightly did not place any aggravating weight on this factor. As for the precedent cases cited by the appellant, those cases were clearly distinguishable on the facts. I elaborate on this point at [53]–[59] below.

The sentencing precedents

The arguments on appeal

32 The appellant argued that the DJ had failed to give due weight to the sentencing precedents. In particular, it was submitted that the facts of *Sabastian Anthony Samy* were similar to the present case and hence the sentence imposed ought to have been adopted as the reference point. Both cases involved high levels of premeditation and concealment of losses, both offenders did not gain

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direct pecuniary benefit and huge losses were caused to both companies. The shorter duration of time over which the offences were committed in the present case had been taken into account by the appellant in the calibration of the proposed sentence. It was submitted that the DJ also erred in adopting the case of *Jansen Lim* as a reference point in determining the sentence, given that the DJ had found that there were material differences between *Jansen Lim* and the present case. Finally, the DJ erred in relying on the Mitsui oil cases (of which two sentences were reduced on appeal without grounds of decision rendered) when the DJ himself had cautioned against over-reliance on unreported cases.

33 The respondent argued that the DJ had rightly considered the Mitsui oil cases, where the offenders similarly did not receive any direct financial benefit. In particular, the respondent's culpability was lower than that of the offender in *Noriyuki Yamazaki*. Further, the DJ had considered and given due weight to the case of *Sabastian Anthony Samy*. The appellant had overstated the similarities between the present case and *Sabastian Anthony Samy.* Even though both the respondent and the offender in *Sabastian Anthony Samy* did not gain direct pecuniary benefit, the latter would have been rewarded by his company for his efforts, and could not be said to have similar motivations as the respondent.

My decision

34 It was discernible from the GD that the DJ had endeavoured to analyse the analogous precedents and derive the applicable principles in a systematic and methodical fashion.

35 In my opinion, the DJ had rightly referred to the three Mitsui oil cases in calibrating the respondent's sentences. The offenders in those cases also did not receive any direct financial benefit, and a far higher amount of loss was

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involved. In particular, the respondent's culpability was much lower than that of the offender in *Noriyuki Yamazaki*, who was characterised as a mastermind and main trader. The DJ had also duly considered *Sabastian Anthony Samy* and was doubtful of its persuasiveness. Comparing that case with the respondent's case based on the available case information, it would appear that the respondent's culpability was much lower.

36 Having reviewed the sentencing precedents, the DJ reasoned that the global sentence should be higher than the 20 weeks' imprisonment imposed in *Takayoshi Wada*, but significantly lower than the 18 months and two years' imprisonment imposed respectively in *Takahashi Masatsugu* and *Noriyuki Yamazaki*. He further found the present case to be more aggravated than *Jansen Lim*, and the sentence therefore had to be higher than the six months' imprisonment that would have been imposed on the offender in that case (without taking into account the remand period). With these considerations in mind, he eventually decided on the sentences of 12 and 24 weeks' imprisonment, resulting in the aggregate sentence of 36 weeks.

37 I agreed with the DJ's finding that the gravity of the offences in the present case was not as serious as in other precedent cases where offenders had acted in their own self-interest and for direct personal benefit, and/or where they had embarked upon more egregious, sophisticated and surreptitious schemes involving far more criminal charges and caused huge losses while occupying positions of greater trust and accountability. I turn next to examine the relevant precedent cases more closely.

The Mitsui Oil cases

38 I begin with the Mitsui Oil cases. These cases do provide some guidance

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on the appropriate sentence to be imposed in the present case, even though no Grounds of Decision were issued by the High Court to shed light on the reasoning behind the reduced sentences on appeal in the cases of *Noriyuki Yamazaki* and *Takahashi Masatsugu*.

39 In *Noriyuki Yamazaki*, the offender was convicted of 10 charges under s 477A of the Penal Code. The 99 remaining charges, also under s 477A, were taken into consideration for sentencing. The offender was the main naphtha trading manager in Mitsui Oil (Asia) Pte Ltd ("MOA"). MOA was required to send a daily mark-to-market ("MTM") report to Mitsui Tokyo to provide the latter with a summary of the realised and unrealised profits and losses made by MOA. Between April and October 2006, the offender falsified the prices of naphtha swaps that he was responsible for keying into an Excel spreadsheet, knowing that the middle office staff in MOA would rely on these prices in their preparation of the daily MTM reports. By entering false swap prices, he concealed losses of about US$5 million to US$12 million on each occasion in respect of the proceeded charges. The concealment of these losses allowed the offender to continue to trade beyond the loss limits set by Mitsui Tokyo. The losses eventually snowballed to a significant amount, amounting to at least US$71 million. The offender was sentenced to one year's imprisonment per charge. On appeal, the individual sentences were upheld, but the global sentence was reduced from five years' imprisonment to two years.

40 In *Takahashi Masatsugu*, the offender was convicted of 20 charges under s 477A of the Penal Code. 110 charges under s 477A were taken into consideration for sentencing. He was the Executive Vice President of MOA and was in charge of the middle office. The offender's role was to approve the daily MTM reports to be sent to Mitsui Tokyo, and to give an explanation should the daily fluctuations of the daily MTM profit and loss figures exceed a certain

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quantum. The offender directed his assistant, one Thoh, to alter the profit and loss figures to reflect lower MTM losses than actually sustained, so as to avoid large fluctuations in the profit and loss figures. As a result, Mitsui Tokyo did not have an accurate picture of MOA's performance. In respect of the 20 proceeded charges, the offender falsified the profit and loss figures from April to October 2006, and under-reported losses totalling US$73.6 million. He was sentenced to nine months' imprisonment per charge. On appeal, the individual sentences were upheld, but the global sentence of 36 months' imprisonment was reduced to 18 months.

41 In *Takayoshi Wada*, the offender was convicted of three charges of abetting the making of false entries under s 477A read with s 109 of the Penal Code. 14 similar charges were taken into consideration for sentencing. The offender was the general manager of trading, and he abetted Noriyuki Yamazaki by conspiring with him in the making of false entries in respect of the naphtha swaps' prices. Yamazaki reported to him at the material time. In September 2006, the offender came to know that Yamazaki was falsifying information entered into the Excel spreadsheets, but agreed not to disclose the matter to Mitsui Tokyo. In respect of the three proceeded charges, the offender had abetted the concealment of losses between about US$10 to 12 million for each charge in October 2006. The offender was sentenced to ten weeks' imprisonment for each charge, and a global sentence of 20 weeks' imprisonment.

42 The three Mitsui oil cases are similar to the present case in that they involved charges that relate to the falsification of information to either conceal trading losses or fluctuations in profit and loss amounts from the company, and where such provision of false information prevented the company from being aware of the true state of its accounts. This thereby paved the way for trading to

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continue and for losses incurred to increase. In the present case, the falsification of the mark-to-market updates prevented Lukoil from knowing about the losses caused by the respondent's persistent decision to not hedge contemporaneously, thereby allowing the irregular trading to continue and eventually causing Lukoil a substantial amount of loss.

43 As noted at [36] above, the DJ had found the present case to be more aggravated than *Takayoshi Wada*, but less so than *Takahashi Masatsugu* and *Noriyuki Yamazaki.* Unlike the offenders in *Takahashi Masatsugu* and *Noriyuki Yamazaki*, the respondent occupied a significantly lower position in the company's hierarchy, falsified information over a shorter period of time and on far fewer occasions, and concealed losses of much smaller quantums. In particular, the offender in *Noriyuki Yamazaki* was the main trader in MOA, and was given full control over the execution of his own trades. By falsifying information such that he could exceed the loss limits set by the company, he had abused the trust that had been reposed in him, and exposed MOA to a significant risk of incurring colossal losses – an outcome which did eventually come to pass. In contrast with the offender in *Takahashi Masatsugu*, the respondent did not operate with an accomplice and did not hold a senior supervisory role. As for *Takayoshi Wada*, the offender in that case did not personally orchestrate the falsification of any information. Thus, the respondent's culpability was clearly higher. I saw no error in the DJ's approach in considering the Mitsui Oil cases to determine the appropriate sentence in the present case.

Sabastian Anthony Samy

44 The appellant relied heavily on *Sabastian Anthony Samy*, arguing that this case was the most appropriate reference point in determining the sentence for the present case. It was submitted that *Sabastian Anthony Samy* was the

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closest case comparison because both offenders had committed the s 477A offences for the same purpose, that being to conceal losses they had caused to their respective companies. However, I did not agree that *Sabastian Anthony Samy* should be considered the most relevant precedent.

45 As *Sabastian Anthony Samy* was an unreported decision, the following summary of facts of the case is drawn from *Noriyuki Yamazaki* as a secondary source (see [48] – [57]). The offender was convicted on his plea of guilt to two charges under s 477A of the Penal Code, with 140 similar charges taken into consideration for sentencing. The offender was the general manager of the company. Primarily due to his poor judgment, the Limited Exposure Trading ("LET") accounts for trading in gold futures suffered a huge loss. He told this to one Chan in November 1982 and together, they decided not to disclose this loss to the Melbourne office but instead to try to recoup the loss. In order to continue trading, they signed letters of instruction to effect unauthorised transfers of funds from other portfolio accounts to the LET accounts. The duo then altered the statements of accounts of these affected accounts before transmitting them to the Melbourne office so as to conceal the unauthorised transfers. However, losses continued to be incurred. They only disclosed the actual state of affairs in April 1984 when the company's clients decided to terminate their engagement with the company and sought to withdraw their balances. The court considered that the duo were committed to conceal the unauthorised transfers of clients' money, and that their acts had resulted in huge losses amounting to $2,741,757.45. Although they did not commit the offences to enrich themselves, it was equally true that their offences caused significant losses of monies belonging to the company's clients. The offender was sentenced to a global sentence of three years' imprisonment. His appeal was dismissed and no written reasons were furnished by the High Court.

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46 Whilst not irrelevant as a point of comparison, it was apparent that the respondent's culpability was not as high as the offender in *Sabastian Anthony Samy*. As pointed out by the DJ, the offender had actively falsified documents so as to cover up losses of over $2.7 million which were a result of unauthorised transfers made by him. He worked with an accomplice, and his actions displayed clear premeditation. The offender also faced 142 charges, and he had committed the offences over a longer period of twelve months (GD at [33]).

47 The appellant submitted that the offences in the present case were similarly highly premeditated and involved "sophisticated execution and concealment". However, I did not accept that these assertions were supported by the facts. Quite apart from covering up the burgeoning losses in the LET accounts, the offender in *Sabastian Anthony Samy* had falsified documents so as to conceal unauthorised transfers of money belonging to the company's clients. These transfers were effected to fund his continued attempts at further trading to recoup the losses in the LET accounts. By systematically making and concealing these unauthorised transfers, the offender depleted the clients' moneys in the local stock portfolio accounts before further drawing on monies in the International Portfolio accounts. Despite the accumulating losses, the offender continued to effect these transfers over 142 occasions, incurring an increasingly large quantum of loss with every transfer. In contrast, the respondent recorded false mark-to-market updates in the system in order to conceal losses caused by trades which he failed to contemporaneously hedge. The respondent's actions were certainly also premeditated, but the level of sophistication of his plans was not in any way comparable to the elaborate scheme that was planned by the offender in *Sabastian Anthony Samy*.

48 Further, while the offender in *Sabastian Anthony Samy* did not commit

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the offences primarily for direct pecuniary benefit, the court had found that he did commit these offences to protect his personal interests. He was concerned about his international reputation and recognition as an expert in the gold trading market, and the impact of the losses on his career. The respondent, on the other hand, was merely a junior trader in Lukoil. In terms of the level of trust reposed and the amount of personal benefit each stood to gain, the offender in *Sabastian Anthony Samy* was significantly more culpable. Therefore, on the whole, I did not think that the facts supported the appellant's assertion that *Sabastian Anthony Samy* was factually similar to the present case and should have been the most appropriate reference point. The DJ had carefully considered *Sabastian Anthony* Samy, compared it to the present case, and had given the precedent its due weight.

Jansen Lim

49 On the other hand, the respondent relied primarily on *Jansen Lim* and argued that it was factually similar to the present case. However, I was of the view that *Jansen Lim* remains a highly exceptional case on its facts.

50 In *Jansen Lim*, the offender was convicted before me in a District Court in 2001 of four charges under s 477A of the Penal Code, and 21 similar charges were taken into consideration for sentencing. The offender was a senior manager of a bank, and he had instructed his subordinates to suppress or delay data entry relating to credit lines, in order to allow credit in excess of limits to be granted to a client. The client had been introduced by the offender to the bank. For the four proceeded charges, US$1.8 million additional credit was extended as a result; and for the 25 charges, the aggregate loss caused by the offender's conduct was in excess of US$5 million. The offender was sentenced to 12 weeks' imprisonment, taking into account the two months which he had

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spent in remand. In reaching this sentence, I had noted that the offender had given instructions to his subordinates openly, and there was no evidence of surreptitiousness. This was in contrast to cases such as *Sabastian Anthony Samy*, where the offender engaged in falsification of documents to recoup significant losses already incurred, and had abused the trust reposed in him to make unauthorised fund transfers. I had also held in *Jansen Lim* that an important distinguishing factor was that the offences were only indirectly connected with the offender's own interests, and there was no evidence that he stood to obtain any pecuniary gain from the offences.

51 To my mind, the facts in the present case were clearly more aggravated than those in *Jansen Lim*. As noted by the DJ, the High Court in *Tan Puay Boon* had also commented at [48] that the offences in *Jansen Lim* were "unsophisticated and unsurreptitious, with the main intention of conferring benefit on a bank customer". In contrast, the offences in the present case involved some level of surreptitiousness in the respondent's continued attempts to cover up the losses caused by the irregular trades. Whilst the respondent did not obtain any direct pecuniary benefit from his offences, it could be said that the ways in which his interests might be furthered by the offences, such as an increased likelihood of obtaining a bonus or of not losing his job, were more evident than any benefit which the offender in *Jansen Lim* stood to gain.

52 The appellant argued that the DJ had erred by relying on *Jansen Lim* as a reference point. I did not think that this argument was sustainable. The DJ explicitly stated at [47] of the GD that "in so far as the case of *Jansen Lim* could serve as a reference point, it was to show that the global sentence that should be imposed in the present case should be more than even the six months' imprisonment sentence that may otherwise have been imposed in *Jansen Lim*",

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had the offender in *Jansen Lim* not already spent time in remand. The DJ had taken care to distinguish *Jansen Lim* as a precedent and had explained why he found at [44] that the facts in that case were "clearly more benign" and the mitigating factors therein "undoubtedly more compelling". He then calibrated the global sentence in the present case upwards accordingly. I found no error in the DJ's approach, and no reason to fault his reference to *Jansen Lim*.

Relevance of other sentencing precedents

53 The appellant also sought to rely on *Public Prosecutor v Alex Ng Soon Heng* [2010] SGDC 242 ("*Alex Ng*") and *Public Prosecutor v Tan Liang Chye* [2006] SGDC 109 ("*Tan Liang Chye*") and submitted that the DJ failed to take these precedents into consideration. According to the appellant, these cases showed that substantial imprisonment terms were imposed even in cases where direct financial benefits were not gained by the offenders. However, these cases are clearly dissimilar on their facts.

54 In *Alex Ng*, the offender was convicted of seven charges of entering into a conspiracy to falsify accounts under s 477A read with s 109 of the Penal Code and one charge under the Securities and Futures Act (Cap 289, Rev Ed 2006) ("SFA"). 61 similar charges under s 477A and one charge under the SFA were taken into consideration for sentencing. The offender was the Group Financial Controller of the company. Under instructions from his superiors, he instructed his staff to inflate and fabricate invoices to raise the financial standing of the company to make it an attractive investment for investors. The company's actual profit was $1.61 million, which was inflated to $8.033 million in its unaudited full-year financial statement released via SGXNET. The offender was sentenced to two to four months' imprisonment for each charge under s 477A of the Penal Code, and six months' imprisonment for the charge under the SFA.

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He was sentenced to a global sentence of ten months' imprisonment, with sentences for one charge under s 477A of the Penal Code and one charge under the SFA running consecutively. The sentences were upheld on appeal.

55 Even though the offender was sentenced to a global sentence of ten months' imprisonment, I note that the lengthiest sentence was imposed for the offence under the SFA. The considerations of the court in determining the appropriate sentences for the offence under the SFA, as well as for the offences under s 477A of the Penal Code, were also specific to the facts of that case. In respect of the offence under the SFA, the court noted the importance of truthful disclosure of information under the regime regulated by the Singapore Exchange, and the impact that false disclosure could have on investor confidence. In respect of the s 477A offences, the court considered that the false accounts would deceive investors and expose them to financial risk. In contrast, there was no evidence that the falsehoods made by the respondent in the present case had any impact on the general public or on third parties. Different sentencing considerations would therefore apply in these two cases with vastly different facts, and comparisons between them would have limited value.

56 In *Tan Liang Chye*, the offender was convicted of seven charges of entering into a conspiracy to falsify accounts under s 477A read with s 109 of the Penal Code, and consented to 46 other similar offences under s 477A read with s 109 and two other offences to be taken into consideration for sentencing. Pursuant to a conspiracy, the offender had either created or caused others to create fictitious sale invoices and delivery orders in order to trigger false sales entries in the sales accounts of three companies. The court considered that the offender was part of a "syndicate that managed an extensive and elaborate scam" and was an essential part of a "sophisticated scheme involving the use of false documents between several companies to perpetrate fraud". In respect of

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the proceeded charges, the quantum involved in the falsified invoices and delivery orders was about $22 million; and the figure was about $42 million for the charges taken into consideration. Although the offender did not himself benefit from his offences, the court noted that this factor had little mitigating weight as "it was not in dispute that [his] criminal acts did cause harm and loss to others and to the [company] and enable[d] his accomplices to reap benefits of their nefarious trade on a large scale" (at [12]). He was sentenced to a global sentence of 45 months' imprisonment.

57 Again, the facts in *Tan Liang Chye* differ vastly from the facts in the present case. The appellant sought to argue that a substantial imprisonment term was imposed on the offender in *Tan Liang Chye* despite the fact that he did not personally obtain financial benefit from his offences. However, it is clear that the offender was an important player in a scheme to perpetrate fraud. His actions caused loss to the company and third parties, and also benefited his accomplices. The aggravating factors present in that case were egregious and justified the long imprisonment term. Those factors are not present in this case.

58 For completeness, I should add that in the proceedings below, apart from *Sabastian Anthony Samy*, the appellant had relied on *Tan Puay Boon*, *Chew Soo Chun v Public Prosecutor* [2016] 2 SLR 78 and *Public Prosecutor v Gene Chong Soon Hui* [2018] SGDC 117 as sentencing precedents in support of the 18-month imprisonment term it sought. It was not contended on appeal that the DJ had erred in distinguishing these three cases on various grounds, primarily because they involved much more aggravated facts and many more charges.

59 Overall, in my assessment, the DJ had not erred in not taking reference from the sentencing precedents with dissimilar facts. He had correctly addressed his mind to the specific aggravating and mitigating factors and accorded them

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appropriate weight. He was also conscious of the need for deterrence; as he explained at [57] of his GD, he sought to achieve a rational balance of the sentencing considerations having regard to the respondent's culpability.

Conclusion

60 I was of the view that the main arguments raised on appeal had been duly addressed by the DJ. He was cognisant of the applicable sentencing considerations and had reviewed the relevant sentencing precedents before calibrating the sentences.

61 I dismissed the appeal as I was not persuaded that there were compelling reasons to differ from the DJ's considered assessment of the appropriate sentence. The aggregate sentence of 36 weeks' imprisonment is not manifestly inadequate. It is fair and commensurate with the gravity of the offences and the respondent's culpability.

See Kee Oon
Judge

Sanjiv Vaswani, Eric Hu and Sarah Thaker (Attorney-General's Chambers) for the appellant;
Vergis S Abraham and Loo Yinglin Bestlyn (Providence Law Asia LLC) for the respondent.

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