IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 41

Magistrate's Appeal No 9088 of 2019

Between

Lee Shing Chan

… *Appellant*

And

Public Prosecutor

… *Respondent*

Magistrate's Appeal No 9089 of 2019

Between

Tan Ah Lai

… *Appellant*

And

Public Prosecutor

… *Respondent*

GROUNDS OF DECISION

[Criminal Law] — [Statutory Offences] — [Protection from Harassment Act]

TABLE OF CONTENTS

Lee Shing Chan
v
Public Prosecutor and another appeal

[2020] SGHC 41

High Court — Magistrate's Appeal Nos 9088 and 9089 of 2019
Sundaresh Menon CJ, Tay Yong Kwang JA and Aedit Abdullah J

7 February 2020

28 February 2020

Tay Yong Kwang JA (delivering the grounds of decision of the court):

1 The appellants, Mr Lee Shing Chan ("Lee") and Mr Tan Ah Lai ("Tan"), were each charged with one count of using abusive words towards a public servant in relation to the execution of his duty as such public servant, an offence under s 6 of the Protection from Harassment Act (Cap 256A, 2015 Rev Ed) ("POHA"). They were also each charged with one count of unlawful stalking with the common intention to cause alarm, an offence under s 7 of POHA read with s 34 of the Penal Code (Cap 224, 2008 Rev Ed).

2 The s 6 POHA charges involved the appellants shouting vulgarities in the Hokkien dialect at a National Environment Agency ("NEA") officer while the s 7 POHA charges alleged that the appellants, together with one Mr Chow Yong Heng ("Chow"), in furtherance of the common intention of all of them,

followed in a lorry two NEA officers, who were travelling in a van (with two other men) to various places for over three hours. Lee pleaded guilty to the s 6 charge and claimed trial in respect of the s 7 charge. Tan claimed trial for both his charges. The appellants were tried jointly and conducted their own defences. Chow had pleaded guilty in earlier proceedings to his s 7 charge and was sentenced to undergo three months' imprisonment. At the time of the hearing before us, Chow had already served his sentence.

3 In the State Courts, the Magistrate ("the Magistrate") convicted the appellants on all the charges against them. Lee was sentenced to one week's imprisonment for the s 6 charge and four months' imprisonment for the s 7 charge. Tan was sentenced to nine days' imprisonment and four months' imprisonment for the corresponding charges. The Magistrate ordered the sentences for each appellant to run consecutively. Lee and Tan appealed against their convictions and sentences in respect of the s 7 charges.

4 After hearing the parties, we dismissed the appeals against conviction but allowed the appeals against sentence. We set aside the sentences of four months' imprisonment that the Magistrate imposed for the s 7 charges and substituted them with two weeks' imprisonment. We further ordered the sentences for the s 6 and s 7 charges to run concurrently. The result was that each appellant would serve an aggregate sentence of two weeks' imprisonment.

Facts

5 Lee and Tan were unlicensed fruit hawkers. On 6 June 2016 at about 6.45pm, they were spotted selling fruits illegally near Yew Tee MRT station by two NEA officers, Mr Mohamed Shammir s/o Thirunauc Karasu ("Shammir") and Mr Siow Chee Tseng ("Siow"). At that time, Lee and Chow were arranging

boxes of fruits near Lee's silver Nissan lorry ("the Lorry"). Tan was issued a summons for being an unlicensed hawker. The fruits and two wooden planks that formed part of a makeshift display table were seized. After issuing the summons, the NEA team – comprising Shammir, Siow, Mr Nagalingam Chilvarajo ("Nagalingam") who was the driver and Mr Yasothaaran Thessaruva ("Yasothaaran") who was a CISCO auxiliary police officer ("APO") – left in a van ("the NEA Van").

6 The appellants and Chow then got into the Lorry and followed the NEA Van to various destinations over the span of about three hours:

(a) From Yew Tee MRT to Lakeside MRT where the NEA team went to collect other seized items. Along the way, Shammir observed that the Lorry appeared to be following them and instructed Nagalingam to drive into a dead-end slip road to see if the Lorry would follow. The Lorry did.

(b) From Lakeside MRT to a carpark near Pioneer MRT where the NEA team went to collect more seized items. Siow and Shammir decided to test again if the Lorry was deliberately following them by relocating to a different car park. The Lorry followed.

(c) From the carpark, the Lorry followed the NEA Van to a petrol station when the NEA team went there for a toilet break.

(d) From the petrol station, the Lorry followed the NEA Van to the NEA North East Regional Office ("NEA office") where the NEA Van went to dispose of all the seized items. Lee, Tan and Chow looked at the NEA team as they unloaded the seized items.

(e) From the NEA office to a McDonald's restaurant where the NEA Van was driven to for the purpose of testing again whether the Lorry was following it around. The Lorry stopped along the main road when the NEA Van entered the drive-through at the McDonald's restaurant.

(f) From the McDonald's restaurant to an open carpark near Seah Im food centre ("Seah Im carpark") where the Lorry parked about two lots away from the NEA Van. Siow alighted from the NEA Van to take photographs of the Lorry. Lee, Tan and Chow then alighted from the Lorry and Lee demanded to see Siow's warrant card. When Siow refused to produce his warrant card, Lee and Tan hurled vulgarities in the Hokkien dialect at Siow. These formed the subject matter of the s 6 charges against Lee and Tan. Shammir and Yasothaaran alighted from the NEA Van and when they and Siow tried to get back into the NEA Van, Lee stood in front of it and held onto its doors. Chow did not take part in this confrontation and hence did not face a s 6 charge.

(g) From the Seah Im carpark back to the NEA office.

7 On his manager's advice, Shammir made a police report at 10.06pm. The first information report stated:

> I AM CALLING FROM NEA. EARLIER AT 7PM I HAD BOOKED OFFENDER AT YEW TEE MRT STATION. NOW A CAR IS FOLLOWING MY VEHICLE. I AM ON THE WAY BACK TO MY OFFICE AND WILL ARRIVE IN 10 MINUTES TIME

8 The manager also advised the NEA team not to enter the office premises but to park at the car park at Sin Ming Drive. The NEA team complied. The Lorry parked along the main road just outside the car park. A police car arrived soon thereafter and the police interviewed Lee, Tan and Chow. Later, the police

went into the NEA office to interview Shammir. Lee, Tan and Chow left in the Lorry.

Arguments and decision in the Magistrate's Court

Conviction under s 7 of the POHA

9 The Prosecution submitted that Lee and Tan were unhappy that enforcement action had been taken against their illegal hawking. They intended to cause alarm to the NEA officers, as seen from the way they followed the NEA officers from place to place. They did not conceal their presence but followed the NEA Van closely to ensure that the NEA officers knew they were being followed. Any reasonable person would have thought the appellants' conduct would cause alarm to the NEA officers and alarm was indeed caused. Siow and Shammir testified that they were alarmed and worried for their safety, including being concerned about being followed to their homes. This caused them to inform their manager and to call the police. Finally, the appellants' course of conduct was unreasonable. They knew they would not have been allowed to retrieve the items. They claimed that Shammir had waved at them to follow but Shammir denied doing that. The Prosecution argued that it was nonsensical for the appellants to say they were following the NEA Van in order to ask the NEA officers to call the police.

10 The appellants admitted that they decided to follow the NEA officers. However, there was nothing sinister in their motive and they took no steps to conceal themselves. Their actions were unlikely to cause harassment, alarm or distress because there was an APO in the NEA Van who could act against the appellants if necessary. The appellants' actions were also reasonable as they only wanted to retrieve their goods. In any case there was no course of conduct as the appellants' actions on that single occasion were not protracted.

11 The Magistrate held that the offence of unlawful stalking was made out. It was undisputed that the appellants' conduct of following the NEA officers was an act associated with stalking. The Magistrate held that there was a course of conduct because the stalking took place over a few hours and that the appellants intended to cause alarm to the NEA officers. She rejected their explanations for their conduct:

(a) The appellants claimed that they followed the NEA Van to retrieve the seized items but this was inconsistent with their testimony that they would not be allowed to retrieve the items and their conduct of alerting the NEA officers of their presence would have been self-defeating. Lee agreed that he was following in such a manner that the NEA officers would be able to see and know that they were being followed.

(b) The appellants claimed that after the NEA Van arrived at the NEA office on the first occasion to off-load the seized items, Shammir waved at the Lorry to indicate that the Lorry should follow the NEA Van. However, the appellants gave no reason why Shammir would do that and they did not ask Shammir why he waved despite having had the chance to do so. In any case Shammir denied waving at them.

(c) The appellants alleged that they followed the NEA Van because they wanted to stop the NEA officers to ask them to call the police. The Magistrate rejected this as an illogical response.

12 The Magistrate held that the appellants' conduct had the effect of alarming the NEA officers as seen from Siow's and Shammir's testimony and their conduct of informing their manager and calling the police. The allegation that Siow and Shammir could not have been alarmed because an APO was

present was an afterthought as that was not put to the witnesses at trial. In any event, it could even be said that the appellants' boldness in following the NEA Van despite the presence of an APO would give cause for alarm.

Sentence

13 Before the Magistrate, the Prosecution sought a sentence of at least four months' imprisonment. An outcome of four months would be reached applying Chan Seng Onn J's framework in *Lim Teck Kim v Public Prosecutor* [2019] 5 SLR 279 ("*Lim Teck Kim*"). Two additional considerations were parity of sentences and the need for deterrence. Chow, who was in the Lorry with Lee and Tan, was sentenced to three months' imprisonment on 26 July 2018 on his s 7 POHA charge. Chow played a lesser role in the offence and pleaded guilty. There was also a need to deter unlawful stalking of law enforcement officers carrying out their duties.

14 In mitigation, both appellants submitted they had been candid, forthright and remorseful.

15 Central to the Magistrate's decision was the principle of parity of sentences. The offence-specific factors were similar as all three persons were in the Lorry, travelled to the same places and were present for the same duration. A common aggravating factor was that the stalking was carried out against NEA officers while they were executing their official duties. To avoid double counting, the Magistrate decided to disregard the appellants' conduct at the Seah Im carpark which formed the basis of the s 6 charges. The offender-specific factors differed as Chow had pleaded guilty. Considering that a guilty plea could warrant a 25% discount, the Magistrate decided that a sentence of 4 months'

imprisonment each was appropriate for Lee and Tan in contrast to Chow's sentence of three months' imprisonment.

Issues on appeal

16 The issues on appeal were:

(a) whether the elements of unlawful stalking were proved beyond a reasonable doubt, in particular, whether there was a "course of conduct" although the appellants followed the NEA Van on only one occasion; and

(b) whether the sentences should stand in the light of what this Court determines to be the applicable sentencing framework.

17 To assist in the determination of the legal issues raised, a Young *Amicus Curiae,* Ms Leong Yi-ming ("the YAC"), was appointed to address these questions:

(a) When will a single occasion of offending conduct constitute protracted conduct under s 7(10)(*a*)(i) of the POHA so as to qualify as a "course of conduct" under s 7(2)?

(b) Whether, and in what way, the victims' identities as law enforcement officers or APOs affect the conviction and/or sentence under s 7 of the POHA?

(c) What is the appropriate sentencing framework for an offence under s 7 of the POHA, considering in particular *Lim Teck Kim* and *Sim Kang Wei v Public Prosecutor* [2019] 5 SLR 405 ("*Sim Kang Wei*")?

Appeals against conviction

When is conduct on a single occasion "protracted" so as to qualify as a course of conduct under s 7(2) of the POHA?

18 In considering this question, it is useful to set out the entire s 7 of the POHA for context as "course of conduct" appears in several sub-sections there. Section 7 of the POHA reads:

> **Unlawful stalking**
>
> **7.**—(1) An individual or entity must not unlawfully stalk another person.
>
> (2) Subject to subsection (7), an individual or entity (called in this section the accused) unlawfully stalks another person (referred to for the purposes of this section as the victim) if the accused engages in a course of conduct which —
>
> (*a*) involves acts or omissions associated with stalking;
>
> (*b*) causes harassment, alarm or distress to the victim; and
>
> (*c*) the accused —
>
> (i) intends to cause harassment, alarm or distress to the victim; or
>
> (ii) knows or ought reasonably to know is likely to cause harassment, alarm or distress to the victim.
>
> (3) The following are examples of acts or omissions which, in particular circumstances, are ones associated with stalking:
>
> (*a*) following the victim or a related person;
>
> (*b*) making any communication, or attempting to make any communication, by any means —
>
> (i) to the victim or a related person;
>
> (ii) relating or purporting to relate to the victim or a related person; or
>
> (iii) purporting to originate from the victim or a related person;

(*c*) entering or loitering in any place (whether public or private) outside or near the victim's or a related person's place of residence or place of business or any other place frequented by the victim or the related person;

(*d*) interfering with property in the possession of the victim or a related person (whether or not the accused has an interest in the property);

(*e*) giving or sending material to the victim or a related person, or leaving it where it will be found by, given to or brought to the attention of, the victim or a related person;

(*f*) keeping the victim or a related person under surveillance.

Illustrations

These acts are acts associated with stalking of X by Y:

(*a*) Y repeatedly sends emails to Y's subordinate (X) with suggestive comments about X's body.

(*b*) Y sends flowers to X daily even though X has asked Y to stop doing so.

(*c*) Y repeatedly circulates revealing photographs of a classmate (X) to other classmates.

(4) For the purposes of subsection (2)(*c*), the accused ought reasonably to know that the accused's course of conduct is likely to cause harassment, alarm or distress to the victim if a reasonable person in possession of the same information would think that the course of conduct is likely to have that effect.

(5) In considering whether a course of conduct is likely to cause harassment, alarm or distress, the court may have regard to the following factors:

(*a*) the number of occasions on which the acts or omissions associated with stalking were carried out;

(*b*) the frequency and the duration of the acts or omissions associated with stalking that were carried out;

(*c*) the manner in which the acts or omissions associated with stalking were carried out;

(*d*) the circumstances in which the acts or omissions associated with stalking were carried out;

(*e*) the particular combination of acts or omissions associated with stalking comprised in the course of conduct;

(*f*) the likely effects of the course of conduct on the victim's safety, health, reputation, economic position, or his freedom to do any act which he is legally entitled to do or not to do any act which he is not legally bound to do; and

(*g*) the circumstances of the victim including his physical or mental health and personality.

(6) Any individual or entity that contravenes subsection (1) shall be guilty of an offence and, subject to section 8, shall be liable on conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding 12 months or to both.

(7) In any proceedings for an offence under subsection (6), it is a defence for the accused to prove —

(*a*) that the course of conduct was reasonable in all the circumstances;

(*b*) that the course of conduct was pursued under any written law or rule of law or to comply with any condition or requirement imposed by any person under any written law;

(*c*) that the course of conduct was lawfully done under a duty or power under any written law for the purpose of preventing or detecting crime; or

(*d*) that the course of conduct was done on behalf of the Government and was necessary for the purposes of national security, national defence or the conduct of international relations.

(8) If any dispute arises as to whether any act falls within paragraph (*d*) of subsection (7), a certificate issued under the hand of the Minister responsible for national security, or for national defence or for the conduct of international relations, as the case may be, stating that in his opinion any act done by a specified individual or specified entity on a specified occasion falls within that paragraph shall be conclusive evidence that the act falls within that paragraph.

> (9) A document purporting to be a certificate issued pursuant to subsection (8) and to be issued under the hand of the Minister shall be received in evidence and, unless the contrary is proved, be treated as being such a certificate.
>
> (10) In this section —
>
> "course of conduct" means conduct —
>
> (*a*) on one occasion, if —
>
> (i) the conduct is protracted; or
>
> (ii) the accused has a previous conviction under this section in respect of the same victim; or
>
> (*b*) on 2 or more occasions in any other case;
>
> [*Deleted by Act 17 of 2019 wef 01/01/2020*]
>
> *Illustration*
>
> Y surreptitiously plants a camera in X's apartment. Unknown to X, the camera continuously transmits live videos of X in X's apartment and Y watches the videos continually over several days. Y's conduct is protracted.

19 The YAC submitted that where there was a single occasion of offending conduct, there must be some continuity in time and it must be sustained over a period of time although this did not require complete continuity. What would be regarded as protracted depended on the facts. The course of conduct had to evince the nature and gravity of the offence of unlawful stalking.

20 The Prosecution submitted that the enquiry called first for a consideration of when an act or a series of acts constituted conduct on a single occasion as opposed to conduct on multiple occasions. This was to be done by assessing whether there was a "sufficient break in time and space" between the acts that constituted the conduct. The extent of and the reasons for the break would help to show whether the stalker "consciously disengaged". Next, what would be regarded as an appropriate length of time for the conduct to be

regarded as being protracted was not a question of numbers but depended on the nature of the conduct, in particular, its intensity and the degree of intrusiveness.

21 In our judgment, whether conduct on one occasion is "protracted" so as to amount to a course of conduct under ss 7(2) and 7(10) of the POHA is a fact-sensitive assessment that must be made as a matter of common sense. The court must look at all the circumstances, including the type, intensity and intrusiveness of the conduct. To be protracted, conduct does not have to be continuous or uninterrupted. For instance, conduct can still be protracted even if a physical stalker pauses for lunch or for a toilet break. Similarly, where the remote surveillance stalker has to pause because he needs to re-charge the battery in his electronic device. It is invariably a matter of degree as to when seemingly innocuous behaviour turns into a course of conduct of acts or omissions associated with stalking. Generally, if the conduct on a single occasion is engaged in for longer than would reasonably be considered sensible in the circumstances, that would be a pointer towards it fulfilling the meaning of protracted conduct under s 7(10) of POHA.

22 The assessment of whether conduct is "protracted" under s 7(10)(*a*)(i) is essentially a qualitative rather than a purely quantitative exercise. As shown in the illustration at the end of s 7, watching the videos in question continually over several days would obviously qualify as being protracted conduct. In some cases, doing such an act or similar acts over several hours instead of days might also qualify. The court must be satisfied that there is a certain degree of persistence or continuity of purpose which is unreasonable in the particular circumstances.

23 Finally, too much emphasis ought not to be placed on whether conduct is better classified as happening on one or multiple occasions. As has been

pointed out, "whether a conduct is protracted or whether it can actually be split up into, and considered as, separate actions on separate occasions constituting a course of conduct may be mere semantics" (Warren Chik, "Harassment through the Digital Medium A Cross-Jurisdictional Comparative Analysis on the Law on Cyberstalking" (2008) 3 JICLT 13 at fn 165). The way that s 7(10) of the POHA is worded allows the court to avoid being drawn into such semantic debates by accepting that conduct on one or two or more occasions will suffice. This contrasts with the Protection from Harassment Act 1997 (c 40) (UK) which requires conduct to have occurred on at least two occasions if it pertains to a single person. The English courts have responded by characterising conduct that might be regarded more naturally as occurring on one occasion as conduct over two or more occasions. For instance, in *Wass v Director of Public Prosecutions* (11 May 2000, Queen's Bench Division (Office Crown List)) (England and Wales), the accused had followed the complainant continuously over the course of a day. The requirement that there be two incidents was fulfilled by separating the following of the complainant into that which happened before the complainant entered a shop and that which happened after the complainant left the shop. In the present case, it could similarly be said that the appellants followed the NEA Van on two or more occasions if the first time the NEA Van returned to the NEA office or the incident at Seah Im carpark was used as the break between "occasions". One might even argue that following the NEA Van to each location that night constituted one occasion and that there were therefore multiple occasions of following in this case. However, such distinctions are unreal and do not accord with common sense as the entire episode that night was obviously one occasion of stalking taking place over several hours with inconsequential breaks in between. Such artificiality in approach should be avoided altogether.

24 Returning to the present appeals, the appellants' conduct was protracted because they had followed the NEA Van to numerous destinations over a three-hour period. They persisted in doing so even after the NEA Van returned to the NEA office the first time and the seized goods had been unloaded. This may be contrasted with *Nadarajamoorthy v Moreton* [2003] VSC 283, which dealt with the offence of stalking under s 21A of the Crimes Act 1958 (Vic). That provision also requires conduct to have been engaged in on more than one occasion or conduct that is protracted. Bongiorno J found that the appellant's conduct of tail-gating a vehicle and driving parallel to that vehicle for three or four minutes was not protracted conduct. This shows that stalking by following a victim is highly fact-dependent and so are the other forms of stalking where the perpetrator may not be even physically present or near the victim or within sight of the victim (as with cyber-stalking and electronic surveillance).

Other elements under s 7 of the POHA

25 As was their case below, the appellants did not deny having followed the NEA Van. They maintained that they followed the NEA Van openly and that there was nothing sinister in this. They claimed that they only wished to see where the seized items would be discarded so they could be retrieved. Further, the NEA officers were not alarmed because: (a) if they were, they would not have confronted the appellants at the Seah Im carpark; and (b) there was no reason for them to feel alarmed when an APO was present to escort them.

26 These contentions are essentially an appeal against the Magistrate's findings of fact, given that the Magistrate rejected all the professed reasons for following the NEA Van. We were not satisfied that the Magistrate erred in her detailed assessment of the evidence. While the appellants insisted that they followed the NEA Van without any ill intention, the fundamental point is that

the NEA officers here would not know what the stalkers' intention was. Further, the appellants' conduct showed clearly that they intended to cause alarm to the NEA officers. As we pointed out at the hearing, alarm does not need to be fear of immediate consequences but could also be apprehension as to what could potentially follow. Alarm can also be fear of the unknown where the stalker makes his presence felt but does not communicate or hint at his intention. The incident in question took place over some three hours from 7pm to 10pm and the NEA officers were likely to be returning home after their duties. The officers had no way of knowing what the appellants would do after the Lorry followed the NEA Van persistently for three hours and after the appellants, particularly Lee, engaged in the brief show of aggression at the Seah Im carpark incident. The altercation at the carpark put it beyond doubt that the appellants' intentions were anything but innocuous or benign. As the evidence at the trial showed, the NEA officers were alarmed by the appellants' persistent conduct in following them in the Lorry.

27 It was an exaggeration to claim that the NEA officers were the ones who confronted the appellants when all that the NEA officers did was to take photographs of the Lorry's identification marks. It would also be an over-statement to say that the NEA officers could not have been alarmed when they knew that an APO was with them. As mentioned earlier, alarm could also be apprehension as to what could happen subsequently and it was clear that when the NEA officers completed their duties later and made their way home, the APO would not be escorting them. It could also be said that the appellants' conduct caused alarm or perhaps greater alarm because they persisted in brazenly tailing the NEA Van despite knowing that an APO was on board the NEA Van.

28 The appellants also argued in their written submissions that the Prosecution should have called the APO who was present throughout the incident. However, the APO was one of two witnesses offered by the Prosecution to the appellants during the trial. Having declined to cross-examine the APO, the appellants could not complain on appeal about the absence of the APO's evidence or ask the Court to draw adverse inferences against the Prosecution.

29 In our opinion, the fact that alleged victims of unlawful stalking are law enforcement officers, whether on duty or off duty, does not prevent a conviction under s 7 of POHA if all the elements of the offence specified in s 7(2) are established. Even an armed law enforcement officer on duty could feel harassed or be alarmed or distressed if a person or, worse, several persons, insist on tailing him or keeping him under surveillance. Here again, we emphasise that decisions on unlawful stalking have to be commonsensical and are highly fact-dependent. We shall have more to say about victims being law enforcement officers when considering the appropriate sentence to impose for unlawful stalking.

30 For the reasons that we have set out above, we agreed with the Magistrate that the s 7 POHA charges against Lee and Tan were proved beyond reasonable doubt. We therefore dismissed their appeals against conviction on these charges.

Appeals against sentence

Applicable sentencing framework

31 On the issue of whether the victims' identity as law enforcement officers should affect sentence, the YAC submitted that it should be an aggravating

factor if the unlawful stalking occurred in relation to the execution of such a victim's execution of his or her duty as a public servant or public service worker (as defined under s 6(5) of POHA for the purposes of s 6). She submitted that the starting position should be a short custodial sentence to reflect society's opprobrium towards anti-social behaviour occurring while the public servant or the public service worker is trying to perform his or her duties and the need to deter the public from such anti-social behaviour. The Prosecution agreed with the YAC on this point.

32 As for the sentencing framework and guidelines for s 7 POHA offences, the YAC submitted that the methodology used in the High Court decision of *Lim Teck Kim* should not be followed, particularly in the light of the criticisms against such an approach set out in another High Court decision in *Sim Kang Wei.* Instead, the YAC proposed a two-step framework adapted from that in *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 ("*Terence Ng*"). This considered first, the offence-specific factors (based roughly on the considerations listed in s 7(5) of the POHA) and second, the offender-specific factors. In contrast, the Prosecution submitted that the sentencing framework should be modelled after that in *Logachev Vladislav v Public Prosecutor* [2018] 4 SLR 609 ("*Logachev*") because this was in line with the courts' preference in recent years to adopt a harm-culpability analysis. Its structured approach was also suitable for an offence like unlawful stalking which could involve very varied factual situations.

33 In *Lim Teck Kim*, Chan Seng Onn J formulated a sentencing framework for unlawful stalking offences that refined the two-step methodology in *Terence Ng* by introducing a points system to identify the appropriate sentencing band. In Chan J's view, a key advantage of the *Lim Teck Kim* framework was that it allowed for calibration among offence-specific factors and within each factor

(at [42]). The more nuanced analysis helped to avoid the problem of congregation of sentences around three to six months' imprisonment. However, in *Sim Kang Wei*, Chua Lee Ming J declined to follow the *Lim Teck Kim* framework. Chua J disagreed with the view taken in *Lim Teck Kim* of the Court of Appeal's decision in *Terence Ng*. He pointed out that the points system correlated rigidly the highest aggravating weight of any given factor to the other factors and constrained the sentencing judge unduly. The points system also raised problems in relation to the imposition of the maximum sentence (*Sim Kang Wei* at [37]–[40]). In *Public Prosecutor v Ng Wei Long* [2019] SGMC 78, Magistrate Chua Wei Yuan did a comparison of the two High Court decisions and gave a detailed analysis on why he was not fully persuaded by either of the approaches in *Lim Teck Kim* or *Sim Kang Wei*.

34 In our judgment, merely analogising from precedents is unsatisfactory as the lack of structure and guidance is not conducive to building consistency across cases. On the other hand, we think that the mathematical approach in *Lim Teck Kim* should not be adopted. A points system in sentencing may constrain the sentencing judge unduly and raises the spectre of appeals on the allocation of points (for instance, whether a trial court ought to have allocated a higher or a lower number of points to a particular factor). We prefer a more holistic approach since sentencing is not a scientific exercise and does not demand mathematical precision, which is quite impractical in any case when dealing with human beings and the multifarious situations in the cases. We repeat the Court of Appeal's words in the recent decision of *Mohd Akebal s/o Ghulam Jilani v Public Prosecutor and another appeal* [2019] SGCA 81 at [20(b)]:

> … [S]entencing guidelines are not meant to yield a mathematically perfect graph that identifies a precise point for the sentencing court to arrive at in each case. Rather, they are meant to guide the court towards the appropriate sentence in each case using a methodology that is broadly consistent.

35 Therefore, for unlawful stalking cases under s 7 of the POHA, we think it is appropriate to have a sentencing framework based on the five-step approach in *Logachev*. As mentioned above and as is evident from s 7 itself, unlawful stalking can take many varied forms and each case must necessarily be decided on its particular facts. In each case, the court should:

(a) Identify the level of harm caused by the offence (slight, moderate or severe) and level of culpability (low, medium or high), having regard to the offence-specific factors (see the non-exhaustive list of factors at [36] below).

(b) Identify the applicable indicative sentencing range by reference to the following matrix.

Harm / **Culpability**	**Slight**	**Moderate**	**Severe**
Low	Fine / short custodial sentence of up to 2 months	2+ to 4 months' imprisonment	4+ to 6 months' imprisonment
Medium	2+ to 4 months' imprisonment	4+ to 6 months' imprisonment	6+ to 9 months' imprisonment
High	4+ to 6 months' imprisonment	6+ to 9 months' imprisonment	9+ to 12 months' imprisonment

(c) Identify the appropriate starting point within that range, having regard again to the offence-specific factors (see the non-exhaustive list of factors at [36] below)

(d) Adjust the starting point based on offender-specific aggravating and mitigating factors (see [37] below).

(e) Where an offender has been convicted of multiple charges, consider whether further adjustments are necessary to take into account the totality principle.

36 We set out below a non-exhaustive list of offence-specific factors, some of which mirror the factors set out in s 7(5), which the court may have regard to in considering whether a course of conduct is likely to cause harassment, alarm or distress:

Offence-specific factors	
Factors going towards harm	Factors going towards culpability

(a) Type and extent of harm to the victim (including harm to safety, health, reputation, economic position or freedom to do any act he or she is legally entitled to do or not to do any act he or she is not legally bound to do) (b) Type and extent of harm to third parties (c) The victim's age, physical and mental health and personality	(a) Offender's *mens rea* (whether the offender intended to cause harassment, alarm or distress, knew his or her conduct was likely to so cause, or ought reasonably to have known this) (b) Offender's motive (c) Offender's age, difference in age between victim and offender (d) Whether the offender is of low IQ or suffering from a mental condition, which causally affected the commission of the offence and substantially affected the offender's mental responsibility (e) Degree of premeditation, planning or sophistication (f) Particular combination or nature of acts that make up the course of conduct (*eg*, public dissemination of sensitive information, the making of threats, exceptional duration or frequency of stalking) (g) Targeting of vulnerable victim (but not a situation covered by s 8A of the POHA) (h) Victim belonging to a class that warrants special protection, including public servants or public service workers (but not a situation covered by s 8A of the POHA)

	(i) Abuse of position, breach of trust (but not a situation covered by s 8B of the POHA)

37 In the same vein, we provide a non-exhaustive list of offender-specific factors below:

Offender-specific factors	
Aggravating factors	Mitigating factors
(a) Offences taken into consideration for sentencing purposes (b) Relevant antecedents (c) Evident lack of remorse	(a) Guilty plea (b) Cooperation with the authorities (c) Voluntary apology or actions taken to minimise further harm to victim

38 We highlight s 8A and s 8B POHA at [36] above as these two sections came into operation recently on 1 January 2020. They provide for doubling of the maximum punishment that the court could impose for a s 7 offence (as well as offences under other sections of POHA) where the victim is a "vulnerable person" or where the victim was or is in an intimate relationship with the perpetrator respectively. This serves to remind the sentencing court not to double count these factors in sentencing. We also note that s 8 of POHA provides for enhanced punishments for a subsequent offence under s 7 (as well as offences under other sections of POHA), again by doubling the maximum punishments for that offence.

39 In relation to factor (h) in the list of offence-specific factors that go towards culpability (see [36] above), we agreed with the YAC and the Prosecution that the fact that the victim is a public servant or public service worker (including a law enforcement officer) is an aggravating factor. However,

this would only be the case if the offender knows that the victim is a public servant or public service worker who is in the course of discharging his or her duty or the unlawful stalking is precipitated by what the victim said or did while in the course of discharging his or her duty. However, we disagreed with the YAC and the Prosecution that the default starting point should be a short custodial sentence whenever this aggravating factor is present. As the YAC acknowledged, there were no statistics to show an increase in offences against this category of victims or a disproportionate number of unlawful stalking offences committed against them so as to justify a default custodial sentence for the purpose of deterrence.

Lee's and Tan's sentences

40 The maximum punishments provided under s 7(6) of POHA are a fine not exceeding $5,000 or imprisonment for a term not exceeding 12 months or both. The Prosecution submitted that the present case was one which occasioned slight harm and low culpability, considering the minimal harm caused to the victims, the unsophisticated manner of tailing the victims, the appellants' motive and the fact that the appellants knew that the victims were public officers in the course of discharging their duties. The indicative sentencing range was thus a fine or short custodial sentence of up to two months.

41 As noted by the Magistrate, Lee had an antecedent for committing affray in 2009 while Tan had an antecedent of voluntarily causing hurt to deter a public servant from his duty way back in 1986. For completeness, Chow (the third man in the Lorry who pleaded guilty to his s 7 POHA charge) had an antecedent of voluntarily causing grievous hurt by dangerous weapons or means in 1993.

42 In our view, this case occasioned slight harm and low culpability (or perhaps the low end of medium culpability). We considered that the appropriate starting point was an imprisonment term. The custodial threshold was crossed having regard to the specific aggravating factor that the appellants knew that the victims were public officers going about their duties that night and were apparently undeterred by the presence of the APO. We also note that there was a lack of remorse as evidenced in the stance they persisted in taking even before us when it was clear that some of their attempts to justify or explain their conduct were simply not tenable. We further note that at the appeal before us, the Prosecution moderated the suggested length of sentence downwards to not less than five weeks' imprisonment. Four months' imprisonment in these circumstances would be manifestly excessive. In all the circumstances, we held that a sentence of two weeks' imprisonment for each appellant would be appropriate. As the s 6 charges (which were not the subject of any appeal) took place as an offshoot of the s 7 charges and were essentially part of the train of events that night, we think the imprisonment terms for both offences ought to run concurrently. The result was that Lee and Tan would each serve an aggregate sentence of two weeks' imprisonment which we considered was a just punishment on the facts of this case.

43 We were aware that Chow was sentenced to three months' imprisonment and had served his sentence already. In our opinion, it would have been more than arguable that Chow's sentence was also manifestly excessive despite his antecedent which was more than two decades old at the material time. However, Chow did not appeal against his sentence and the Magistrate rightly took into consideration the parity principle when she considered Lee and Tan's sentences. Nevertheless, we think that the parity principle cannot justify sustaining a

subsequent manifestly excessive sentence on a co-accused if the first sentence was also manifestly excessive but not appealed against.

Conclusion

44 We therefore dismissed the appellants' appeals against conviction but allowed their appeals against sentence to the extent explained above. Tan indicated that he was prepared to begin serving his sentence immediately after the appeal while Lee asked for a deferment of two weeks to take care of his new shop. We granted the deferment and ordered Lee to surrender himself at the State Courts on 21 February 2020 to commence serving his sentence.

45 We thank the YAC, Ms Leong Yi-Ming, for her time and effort in preparing the written submissions and in attending the hearing to assist the Court with her views on the legal issues. This was especially important here because both Lee and Tan were not represented by counsel at the trial and on appeal.

Sundaresh Menon Chief Justice	Tay Yong Kwang Judge of Appeal	Aedit Abdullah Judge

The appellants in MA 9088/2019 and MA 9089/2019 in person;
Wong Woon Kwong, Jason Chua, Norine Tan and Daphne Lim
(Attorney-General's Chambers) for the respondent in MA 9088/2019
and MA 9089/2019;
Leong Yi-Ming (Allen & Gledhill LLP) as Young A*micus Curiae*.