IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 207

Magistrate's Appeal 9187 of 2018/01

Between

Public Prosecutor

And

Tan Kok Ming, Michael

Magistrate's Appeal No 9187 of 2018/02

Between

Tan Kok Ming, Michael

And

Public Prosecutor

Magistrate's Appeal 9200 of 2018/01

Between

Gursharan Kaur Sharon Rachael

And

Public Prosecutor

Magistrate's Appeal No 9200 of 2018/02

Between

Public Prosecutor

And

Gursharan Kaur Sharon Rachael

JUDGMENT

[Criminal Procedure and Sentencing] — [Sentencing] — [Appeals]
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v
Tan Kok Ming Michael and other appeals

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Hoo Sheau Peng J
22 February 2019

6 September 2019 Judgment reserved.

Hoo Sheau Peng J:

Introduction

1 These are cross-appeals against the sentences imposed on Tan Kok Ming, Michael ("Tan") and Gursharan Kaur Sharon Rachael ("Kaur") in two separate cases. In the first case, Tan pleaded guilty to and was convicted of one charge under s 5(*b*)(i) of the Prevention of Corruption Act (Cap 241, 1993 Rev Ed) ("PCA"). In the second case, Kaur pleaded guilty to and was convicted of three charges under s 6(*a*) of the PCA and one charge under s 47(1)(*c*) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) ("CDSA").

2 The appeals were heard at the same time because of two common issues. The first issue is whether a sentencing principle known as the public service rationale is applicable in a corruption case where the recipient or intended

recipient of a bribe is a foreign public official, and if not, whether the public service rationale should be extended to cover such a scenario. As explained in detail at [62] below, the public service rationale (interchangeably referred to as the public sector rationale) was developed by case law as an aggravating factor in sentencing. The second issue is whether a sentencing framework should be formulated for *all* corruption offences under ss 5 and 6 of the PCA, and if so, whether the sentencing framework proposed by the Prosecution should be adopted. A young *amicus curiae* ("the *amicus*") was appointed to assist the court on the former issue.

3 In addition to these common issues, on various grounds, the parties argued that the sentence of four months' imprisonment imposed on Tan and that of 33 months' imprisonment imposed on Kaur warrant appellate intervention.

4 Having had the benefit of submissions of parties and the *amicus*, this is my decision.

Facts

5 The facts are as set out in the respective Statement of Facts ("SOF") admitted to by Tan and Kaur. The contents of Tan's SOF are reproduced at [4]–[14] of the District Judge's grounds of decision in *Public Prosecutor v Tan Kok Ming, Michael* [2018] SGDC 213 ("*Tan Michael*"), while those in Kaur's SOF are substantially set out at [3]–[23] of *Public Prosecutor v Gursharan Kaur Sharon Rachael* [2018] SGDC 217 ("*Gursharan Kaur*"). I summarise them here.

Tan

6 Tan pleaded guilty to a charge under s 5(*b*)(i) of the PCA, for giving one Owyong Thian Lai ("Owyong") a sum of S$10,000 for the benefit of officers of the Malaysian Maritime Enforcement Agency (known as "APMM") to detain a vessel belonging to his competitor, Continental Platform Pte Ltd ("CP"). Two further charges under s 5(*b*)(i) of the PCA were taken into consideration for the purposes of sentencing.

Background

7 Tan was the sole owner and director of Dynamix Marine Petroleum & Trading Pte Ltd ("Dynamix"), an oil trading company which owned vessels for its business. Tan was acquainted with Owyong since 2014, and knew that Owyong had a reputation for being a "fixer" in the oil market, *ie*, Owyong was able to help vessel owners resolve or prevent problems with Malaysian and Indonesian authorities through bribes. One such authority was the APMM, an enforcement authority which preserved the security of the Malaysian Maritime Zone.

8 In 2015, prior to the events of the charge, Owyong became aware that APMM had detained one of Tan's vessels, the *Vitology*. He told Tan that he could pay APMM officers a sum of RM100,000 to secure the release of the *Vitology*. Tan refused, as the matter had already reached the Malaysian courts.[1]

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1 Tan's SOF, at para 4.

The charge

9 Sometime in late June 2016, Tan and Owyong had a discussion to sabotage two of Tan's competitors in Singapore, Kian Guan Industries Pte Ltd ("KGI") and CP. Tan wanted Owyong to get APMM officers to detain the *AquaTera07*, a vessel owned by CP, and spread the news that KGI sabotaged CP. In this manner, CP and KGI would get into a conflict, leaving Dynamix to "conquer the market".

10 Owyong asked for S$10,000 for the APMM officers, which included S$1,500 for their fuel costs. Tan agreed. Pursuant to this, Tan later handed over S$10,000 in cash to Owyong for the benefit of the APMM officers. In doing so, Tan intended the money to be an inducement for the APMM officers to detain CP's vessel. This is the subject matter of the charge under section 5(*b*)(i) of the PCA (DAC-940630-2017).

11 Eventually, Owyong did not follow through with the agreement. He returned S$8,500 out of the sum of S$10,000 to Tan sometime in July 2016, stating that the remaining S$1,500 had been passed to APMM officers for the purchase of fuel.

Charges taken into consideration

12 I summarise the facts relating to the two charges taken into consideration:

(a) DAC-940629-2017 ("Tan's 1st TIC charge"): In May 2016 (prior to the events of the proceeded charge), two of Tan's vessels, the *Advance Ocean* and the *An Phu 16* were detained by APMM. Tan knew that Owyong was able to resolve the problem with APMM by giving money to APMM officers. He gave Owyong a sum of S$10,000 for the

benefit of the APMM officers to induce them to release the vessels. He also gave a commission of S$2,000 to Owyong. Thereafter, APMM released the two vessels.[2]

(b) DAC-940631-2017 ("Tan's 2nd TIC charge"): On 7 July 2016, Tan promised to give Owyong an additional S$10,000 for the benefit of APMM officers if he saw proof of the detention of the *AquaTera07* in the form of a newspaper report. This sum was intended to reward the APMM officers for the detention of CP's vessel. Owyong did not agree to this request.[3]

Kaur

13 Turning to Kaur, she was an employee of the US government. She pleaded guilty to three charges under s 6(*a*) of the PCA, for accepting bribes from one Leonard Glenn Francis ("Leonard"), the chief executive officer of Singapore-incorporated Glenn Defense Marine (Asia) Pte Ltd ("GDMA"), to provide non-public information on the US Navy to him. She also pleaded guilty to one charge under s 47(1)(*c*) of the CDSA, for using the benefits of her criminal conduct to acquire property. Five other charges were taken into consideration for the purposes of sentencing.

Background

14 At the material time, Kaur was a Lead Contract Specialist of the US Navy based at its Supply Systems Command Fleet Logistics Centre in

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2 Tan's SOF at para 5.

3 Tan's SOF at para 9.

Singapore ("NAVSUP FLC Singapore").[4] She performed duties of a senior contract specialist, and led a team of contract specialists. She was authorised to enter into multi-million dollar contracts on behalf of the US federal government. She therefore stood in a position that required substantial trust, responsibility and accountability to the US government.[5]

15 In the main, her role as a Lead Contract Specialist included managing complex ship-husbanding contracts. This required her to draft and develop contract requirements, strategise procurements, engage in sensitive foreign country coordination and discussions at senior management levels, conduct pre-award market surveys, solicit, negotiate and evaluate bids, evaluate quotes, and assess performance after the services were provided.[6]

16 Kaur was subject to federal regulations which prohibited, *inter alia*: (a) the disclosure of non-public information of the US Navy to external parties; and (b) the acceptance of any bribe, gratuity and/or any form of benefits in the course of employment.[7]

17 Kaur's SOF also included the following information. In 2012, Leonard was discovered to be bribing US Navy personnel with millions of dollars' worth of gifts[8] in order to, *inter alia*, divert US Navy vessels to ports in the Pacific and South East Asia where GDMA had a presence, and supply classified and other non-public information. This enabled GDMA to secure lucrative ship-

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4 Kaur's SOF at para 2.

5 Kaur's SOF at para 15.

6 Kaur's SOF at para 16.

7 Kaur's SOF at para 17.

8 Kaur's SOF at para 7.

husbanding contracts to supply US Navy vessels at ports located in the region. GDMA also overcharged for goods and services supplied at these ports, defrauding the US Navy of about US$35 million.[9] The investigations uncovered that the decade-long bribery and fraud conspiracy extended to numerous countries, was the largest in the US Navy's history, and involved numerous US Navy personnel (including senior personnel).[10]

18 Kaur first became acquainted with Leonard sometime in 1999 to 2005[11] when she held a more junior rank. She had more significant interactions with him after she was promoted to Lead Contract Specialist.

19 On numerous occasions from 2006 to 2013, Kaur initiated disclosure of non-public information of the US Navy to Leonard. Such information included *inter alia*, procurement-sensitive information, strategic information on new ship-husbanding contracts, pricing strategy, price information of GDMA's competitors, the names of personnel on the contracts review board, and even the questions posed by the review board to GDMA's competitors.[12]

20 In return for the inside information, Kaur and Leonard had a shared understanding that Kaur would be duly rewarded for providing non-public information about the US Navy on an ongoing basis, with a view to ensuring GDMA retained an advantage.[13] As a result, Leonard could ensure that GDMA's

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9 Kaur's SOF at para 5.

10 Kaur's SOF at para 4.

11 Kaur's SOF at para 13, 14, 19.

12 Kaur's SOF at para 20.

13 Kaur's SOF at para 22.

bids were competitive, so that GDMA continued to secure lucrative ship-husbanding contracts with the US Navy.[14]

21 Kaur took great efforts to conceal her illicit disclosure of information to Leonard.[15] I elaborate on this below at [153]. Furthermore, Kaur understood that, as GDMA's "insider" within NAVSUP FLC Singapore, she was expected to further GDMA's interests as far as possible and whenever the opportunity arose. On numerous occasions, Kaur sought Leonard's input on submissions she made to her superiors, and written replies that she sent on behalf of the US Navy to GDMA's competitors in connection with potential or ongoing contracts with the US Navy.[16]

22 In all, the inside information leaked by Kaur was linked to 16 US Navy contracts. Of these 16, GDMA bid for 14, and was awarded 11 contracts worth a total of about US$48 million.

4th charge

23 In December 2008, Leonard arranged for the delivery of a hamper containing food, alcohol, and a red packet with S$50,000 in cash to Kaur. When Kaur asked what the red packet was about, Leonard told her it was her "Christmas bonus". Kaur understood that the S$50,000 was a reward for the non-public US Navy information she had supplied, and accepted it. This is the subject of DAC-942782-2015, under s 6(*a*) of the PCA ("the 4th charge").

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14 Kaur's SOF at para 21.

15 Kaur's SOF at para 23.

16 Kaur's SOF at para 24.

6th and 7th charges

24 In 2009, Kaur wished to purchase a condominium unit worth more than S$1 million, but could not pay the option fee. She thus telephoned Leonard to ask for S$50,000 cash, knowing he would agree. Leonard acceded, and arranged for S$50,000 cash to be delivered to Kaur, which she accepted. This is the subject of DAC-942784-2015, under s 6(*a*) of the PCA ("the 6th charge").

25 Kaur then applied the cash towards the option fee. She subsequently resold the unit at a profit of S$267,000. This is the subject of DAC-942785-2015, pursuant to s 47(1)(*c*) punishable under s 47(6) of the CDSA ("the 7th charge").

9th charge

26 Sometime in July 2011, Kaur booked a resort stay in Bali, before subsequently mentioning this resort stay to Leonard with the intention of prompting Leonard to pay for it. She knew Leonard would offer to pay given their corrupt agreement, and also because he had acceded to prior similar requests. As expected, Leonard asked Kaur to forward the online reservation details to him for him to settle payment, and she did so.

27 Thereafter, Kaur telephoned Leonard as the holiday was approaching but she had not heard from him. Leonard assured her that he was looking into payment arrangements. That same night, to prompt Leonard to make payment, Kaur emailed Leonard a set of US Navy documents, which included:

(a) internal email correspondence between Kaur's superiors about GDMA's services for port visits to Hong Kong and Singapore under a regional ship-husbanding contract for Southeast Asia; and

(b) a draft letter by Kaur's superior to GDMA expressing concerns on the unsatisfactory service provided by GDMA.

Kaur did this to give Leonard an insight into her superiors' concerns regarding GDMA's services in Hong Kong and Singapore, enabling him to prepare a detailed response ahead of GDMA receiving the final letter from her superior. That same day, Leonard made arrangements for Kaur's resort stay to be charged to his credit card.[17]

28 Kaur proceeded with the resort stay, charging various expenses to her room. The total bill of S$14,977.74 was paid for by Leonard. This is the subject of DAC-942787-2015, under section 6(*a*) of the PCA ("the 9th charge").

Charges taken into consideration

29 Five further charges were taken into consideration as set out below. All but one, *ie*, Kaur's 4th TIC charge, are s 6(*a*) PCA offences, for gratification corruptly obtained from Leonard as a reward for providing non-public US Navy information to Leonard:[18]

Charge	**Offence**	**Time of offence**	**Gratification**
Kaur's 1st TIC charge (DAC-942779-2015):	s 6(*a*) PCA	November 2006	Hotel stay priced at S$3,801.74

17 Kaur's SOF paras 41–46.

18 Kaur's ROP, at pp 23–27.

Kaur's 2nd TIC charge (DAC-942780-2015):	s 6(*a*) PCA	December 2007	Hotel stay priced at S$7,061.41
Kaur's 3rd TIC charge (DAC-942781-2015):	s 6(*a*) PCA	December 2007	Hotel stay priced at S$2,600.93
Kaur's 4th TIC charge (DAC-942783-2015):	s 47(1)(*b*) p/u s 47(6) CDSA	February 2009	Cash of S$50,000, being gratification corruptly accepted, applied to payment of an insurance policy
Kaur's 5th TIC charge (DAC-942786-2015):	s 6(*a*) PCA	February 2011	Hotel stay priced at S$1,836.42
Total gratification amount involved in the s 6(*a*) TIC charges (excluding the sum involved in the 4th TIC charge):			**S$15,300.50**

Newton hearing on Kaur's medical condition

30 In mitigation, Kaur raised the issue of her medical condition, and the impact imprisonment would have on her. In this connection, a Newton hearing was conducted to determine the precise nature of her medical condition. I discuss the details below as they arise.

Voluntary disgorgement

31 For completeness, I should add that Kaur voluntarily disgorged S$130,278.24, being the total sum of gratification received for all the charges.

The decisions below

32 I turn to the respective sentencing decisions made in the courts below. On the common issues, while the District Judge in Tan's case rejected the Prosecution's proposed sentencing framework, the District Judge in Kaur's case adopted it. However, both rejected the suggestion that any public sector consideration was at play.

Tan's sentence

33 The District Judge held that Tan's case was one of private sector corruption (*Tan Michael* at [18]). The District Judge relied on the sentencing approaches in *Public Prosecutor v Ang Seng Thor* [2011] 4 SLR 217 ("*Ang Seng Thor*") and *Public Prosecutor v Syed Mostofa Romel* [2015] 3 SLR 1166 ("*Romel*"), which I consider in more detail below.

34 Based on the sentencing considerations in *Ang Seng Thor*, the District Judge held that she "[did] not agree with the defence that [Tan's] culpability [was] on the low side". In view of certain factors, she opined that the custodial threshold had been crossed (*Tan Michael* at [23]–[26]).

35 In deciding on the appropriate length of the custodial sentence, the court considered several offence-specific factors (*Tan Michael* at [31]–[36]). First, the bribe amount was considered. The court initially stated that, taking into account the TIC charges, Tan had "actually given bribes totalling S$20,000 and promised another S$10,000". Subsequently, the court stated that "considering

that Owyong [had] returned S$8,500, what [had] been paid out [was] actually $1,500 and this by itself is not a large sum". Hence, together with Tan's 1st TIC charge, "[Tan] has in effect paid a bribe amounting to $11,500".

36 Second, the District Judge considered that Tan's bribe to the APMM officers was in relation to their duties, such that their enforcement functions will be compromised. However, the District Judge took the view that Tan's offences did not have the potential to damage Singapore's international reputation or public administration, or to undermine confidence in Singapore's port or maritime industry. This was because Tan did not hold any important position in the relevant industries, and the bribery was between individuals in their private capacity (*Tan Michael* at [32]). The fact that the *Aquatera07* was also eventually not detained by APMM further underscored that confidence in the industry was not undermined (*Tan Michael* at [33]).

37 Third, the District Judge stated that "[w]hile it can be interpreted [from Tan's SOF] … that [Tan] did initiate the transaction, the amount of $10,000 was fixed by … Owyong". However, the District Judge held that the offence was not committed in the spur of the moment, because Tan had initiated the prior discussion on how to carry out his competitors' sabotage. Instead, the District Judge stated that "there was some degree of malice involved", which was aggravating (*Tan Michael* at [34]).

38 Fourth, the District Judge held that it would be a "stretch of the imagination" to describe the number of offences as "sustained and persistent offending" or "numerous and multiple in nature". This was because, there were only three offences occurring in the course of a year. Further, "[t]he fact that the offences occurred some 2 years after he knew that Owyong was a fixer … could possibly imply that [Tan] was able to restrain himself for at least 2 years". Tan's

criminal conduct "cannot be viewed as extremely reprehensible" (*Tan Michael* at [35]). Nevertheless, I note that earlier in her judgment, the District Judge had described Tan as being "rather persistent in wanting the vessel of CP to be detained" by APMM (*Tan Michael* at [24]).

39 Fifth, the District Judge considered that Tan had pleaded guilty at the first available opportunity, thus showing his remorse. Tan was also a first offender, and had been cooperative with the authorities – it was undisputed that the offences only came to light due to Tan's voluntary admissions in unrelated investigations (*Tan Michael* at [37]).

40 The District Judge then turned to consider and distinguish the sentencing precedents cited by the Prosecution (*Tan Michael* at [39]). Having considered these factors, the District Judge sentenced Tan to four months' imprisonment. The District Judge rejected the Prosecution's argument that a fine of S$8,500 should be imposed in addition to the custodial term, to disgorge Tan of the "windfall" sum that was returned to him by Owyong. The District Judge held that this was Tan's own money, and was not benefit of any criminal conduct; an additional fine was therefore not necessary (*Tan Michael* at [22]).

Kaur's sentence

41 Turning to Kaur's case, the District Judge adopted in full the Prosecution's proposed sentencing framework. This assumed the form of sentencing bands which I set out at [106] below. The District Judge opined that even if the adoption of a sentencing band approach would lead to a "quantum leap" in sentences, it would be acceptable as previous sentences did not reflect use of the full spectrum of punishment (*Gursharan Kaur* at [48]).

42 Applying the sentencing bands, the District Judge held (at [75]–[80]) that there were four offence-specific factors applicable to all the proceeded charges: abuse of trust and authority, premeditation and taking steps to avoid detection, sustained offending, and a transnational character to the offences. There was also an additional offence-specific factor applicable to the 4th and 6th charges – the high amount of gratification received (*Gursharan Kaur* at [82]).

43 As Kaur had no criminal antecedents, the indicative starting points were as follows:

(a) 4th charge: 18 months' imprisonment;

(b) 6th charge: 22 months' imprisonment, higher than that of the 4th charge due to Kaur actively seeking out the gratification;

(c) 9th charge: 16 months' imprisonment, as although Kaur had actively sought out gratification, the amount involved was significantly lower than that in the 6th charge.

44 These sentences were calibrated downwards to account for Kaur's guilty plea and voluntary disgorgement of the value of the bribes, and Kaur was sentenced to a global imprisonment term of 33 months as follows (*Gursharan Kaur* at [85], [94]–[95]):

(a) 4th charge: 12 months' imprisonment, to run consecutively;

(b) 6th charge: 16 months' imprisonment, to run consecutively;

(c) 9th charge: 10 months' imprisonment, to run concurrently; and

(d) 7th charge under the CDSA: 5 months' imprisonment, to run consecutively.

45 In coming to this conclusion, the District Judge held that Kaur's medical condition did not warrant the exercise of judicial mercy. Her condition was not terminal, and imprisonment would not endanger her life. Neither did it constitute a mitigating factor, as Kaur "would not face more than the usual hardships" that accompany a custodial sentence. She would be provided equivalent medical care, whether inside or outside prison (*Gursharan Kaur* at [39]–[40]).

The parties' cases

46 On appeal, these are the parties' cases in brief.

Tan

47 The Prosecution's case was that the sentencing approach was incorrect in principle. This was *not* a case of private sector corruption, and the public service rationale had in fact been triggered. As it had done before the District Judge, the Prosecution put forth the proposed sentencing framework for all corruption offences under ss 5 and 6 of the PCA. Based on the application of this framework, the Prosecution sought for Tan's custodial sentence to be enhanced to 20 months' imprisonment, arguing also that various factors had been incorrectly weighed by the District Judge. The Prosecution also submitted that a fine of S$8,500 should be imposed in addition to the term of custody to disgorge the bribe money of the same amount that was returned to Tan.

48 Tan argued that the sentence was manifestly excessive, and should instead be reduced to a fine of no more than S$20,000.[19] Besides submitting that the District Judge had erred in several factual findings, and that the District Judge had erred in weighing the various factors, Tan also submitted that the District Judge erred in considering the facts relating to the 1st TIC charge.

Kaur

49 In relation to Kaur, the Prosecution's case was that that the District Judge erred in finding that the public service rationale had not been triggered, and in the calibration of the indicative starting point sentences based on the sentencing framework. It sought an enhancement of the sentences to the 4th, 6th and 9th charge to 18 months', 20 months' and 16 months' imprisonment respectively, producing a global custodial term of 43 months.

50 Kaur argued that the District Judge had erred in adopting the Prosecution's sentencing band approach, and even if the bands were adopted, the doctrine of prospective overruling should apply to prevent injustice to Kaur. Kaur further argued that the sentence was based on a "mischaracterisation" of her offending behaviour, and that her medical condition warranted the exercise of judicial mercy or the conferring of mitigating weight.

The submissions of the *amicus*

51 In sum, the *amicus* submitted that the public service rationale is not engaged where the recipient or intended recipient of a bribe is a foreign public official, because the legislative intent of the PCA and the common law objective of the public service rationale only sought to protect the interests of Singapore's

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19 Tan's Written Submissions, at para 119.

public sector, and not the interests of foreign governments. It would also be inappropriate to extend the scope of the public service rationale to cover bribery of foreign public officials. That said, the bribery of a foreign public official can be recognised as a distinct aggravating factor.

Corruption offences within the PCA

52 Before addressing the specific issues put forth by the parties, it is useful to make a few general observations about corruption offences within the PCA. The PCA does not specifically provide for bribery of foreign public officials. Such bribery falls within the ambit of ss 5 and 6, which are the key provisions within the PCA. Here, Tan and Kaur have pleaded guilty to different offences punishable under s 5(*b*)(i) and s 6(*a*) of the PCA respectively.

53 For convenience, the relevant provisions are set out in full as follows:

> **Punishment for corruption**
>
> **5.** Any person who shall by himself or by or in conjunction with any other person —
>
> (*a*) corruptly solicit or receive, or agree to receive for himself, or for any other person; or
>
> (*b*) corruptly give, promise or offer to any person whether for the benefit of that person or of another person,
>
> any gratification as an inducement to or reward for, or otherwise on account of —
>
> (i) any person doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed; or
>
> (ii) any member, officer or servant of a public body doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such public body is concerned,
>
> shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $100,000 or to imprisonment for a term not exceeding 5 years or to both.

> **Punishment for corrupt transactions with agents**
>
> **6.** If —
>
> (*a*) any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business;
>
> (*b*) any person corruptly gives or agrees to give or offers any gratification to any agent as an inducement or reward for doing or forbearing to do, or for having done or forborne to do any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or
>
> (c) any person knowingly gives to an agent, or if an agent knowingly uses with intent to deceive his principal, any receipt, account or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal,
>
> he shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $100,000 or to imprisonment for a term not exceeding 5 years or to both.

54 Reading ss 5 and 6 together, there is a substantial degree of overlap between the two offences. In *Song Meng Choon Andrew v Public Prosecutor* [2015] 4 SLR 1090 ("*Andrew Song*") at [32], the High Court stated that considering that both provisions prescribe the same punishment range, an argument may be made "that ss 6(*a*) and 6(*b*) are actually otiose as they may both be subsumed under s 5". The court explained that this phenomenon is in fact a product of the PCA's historical origins. While s 6 "was first to find footing in the corpus of the criminal law of Singapore", s 5 was later introduced as a means of providing wider powers to combat corruption (at [34]). Hence, "[a]

court *should not be overly concerned with whether a charge is brought under s 5 or s 6*" [emphasis added] (at [37]).

55 I agree with this observation. While s 6 relates to an agent's corruption in relation to his principal's affairs, and s 5 relates to the bribery of "any person" with regard to "any matter or transaction", s 5 is wide enough to capture an agent's corruption as well. Indeed, notwithstanding the existence of specific offences under ss 11 and 12 PCA for the bribery of Members of Parliament or members of public bodies in relation to certain transactions, the corruption of agents from the private sector, the local public sector and foreign public sector may be prosecuted alike under ss 5 and 6 PCA. The same prescribed maximum punishment would apply to them under ss 5 and 6. Hence, in sentencing, the correct approach must be to *focus on the specific facts giving rise to the corrupt act.* If two cases consisting of the same facts are brought under ss 5 and 6 PCA respectively, then they should be viewed with equal severity.

56 This consistency in treatment extends to the sub-provisions within s 5, being Limb (i) (comprising ss 5(*a*)(i) and 5(*b*)(i)) and Limb (ii) (comprising ss 5(*a*)(ii) and 5(*b*)(ii)). Limb (ii) refers to the situation where a "member, officer or servant of a *public body*" [emphasis added] is involved as the agent being influenced, while Limb (i) is phrased more broadly as relating to "any person". At first blush, this might seem that offences committed under Limb (ii) are more serious than those under Limb (i). In fact, Tan's submissions allude to this. Specifically, Tan argued that the Prosecution could have brought Tan's charge under s 5(*b*)(ii). As the Prosecution chose to proceed under s 5(*b*)(i), further consideration of any public sector element is unnecessary.[20]

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[20] Tan's Written Submissions at para 79.

57 In this connection, my view is that the correct approach is that adopted in *Andrew Song* at [35], where the court stated that "s 5(*b*)(ii) is in essence a sub-set of s 5(*b*)(i)", and the Prosecution may prefer charges under the more general s 5(*b*)(i), even though it could otherwise have brought them under s 5(*b*)(ii). This does not preclude the public sector element from being considered at the sentencing stage. Furthermore, the prescribed range of punishment is the same whether charges are brought under Limb (i) or (ii). Once again, the focus must be on the specific facts of the corrupt act, and not on the precise provision within ss 5 and 6 which the charges are brought under.

58 I digress to deal with Tan's argument that the charge against him could have been brought under s 5(*b*)(ii), which involves corruption of "any member, officer or servant of a *public body*" [emphasis added]. "Public body" is defined under s 2 of the PCA as being any body:

> which has power to act under and for the purposes of *any written law* relating to public health or to undertakings or public utility or otherwise to administer money levied or raised by rates or charges in pursuance of *any written law*; … [emphasis added]

In turn, s 2(1) of the Interpretation Act (Cap 1, 2002 Rev Ed) ("Interpretation Act") provides that where the expression "written law" appears in a statute, it means the Constitution of the Republic of Singapore, and the statutes and subsidiary legislation "for the time being in force in Singapore". Therefore, the APMM does not fall within the definition of a public body, and s 5(*b*)(ii) is not applicable to Tan.

59 I should add that Section 7 of the PCA does place on statutory footing *enhanced punishment* for certain offences, increasing the maximum custodial sentence to seven years "where the matter or transaction in relation to which the offence was committed was a *contract or a proposal* for a contract with *the*

Government or any department thereof or with *any public body* …". The definition of "the Government" is not contained in the PCA, but it is defined in the Interpretation Act as the Government of Singapore. I have set out the definition of "public body" above. Rounding off, in my view, it is against this legislative context that the common law has developed the public service rationale.

Whether the public service rationale applies to corruption involving foreign public officials

60 This brings me neatly to the first of the two common issues, *ie*, whether the public service rationale applies to corruption involving foreign public officials. The Prosecution argued that the District Judges had erred in failing to find that the public service rationale was triggered. There is no distinction in the culpability of a giver who bribes a local public official to obtain a benefit and one who bribes a foreign public official to obtain the exact same benefit. Neither is there any distinction in the culpability of the recipient who is the local public official or the foreign public official. The Prosecution said that both sets of circumstances involve the giver seeking to undermine the legitimate operations of a government for his own benefit, and involve a public official breaching trust placed in him by his government. As the scope of the public service rationale has not been exhaustively determined, the court can, and should extend the scope of the public service rationale to such situations.

61 In response, Tan argues that an examination of local cases reveals that the public service rationale only applies where an offence could lead to a loss of confidence in Singapore's public administration, and it does not cover a situation where the recipient or intended recipient of a bribe is a foreign public

official. In addition, its scope should not be extended.[21] Kaur's argument, sharing the same thrust, is that a "foreign public servant" is "a creature that does not exist in Singapore law".[22]

The scope of the public service rationale

62 I now set out the scope of the public service rationale, which is an *aggravating factor* to be considered for sentencing developed by common law. To trace its origins, I turn to the case of *Lim Teck Chye v Public Prosecutor* [2004] 2 SLR(R) 525 ("*Lim Teck Chye*") at [57], where the term "public service rationale" was first used to refer to cases of corruption "where the *integrity of public service and the administration of justice would be jeopardised* by the act of corruption involved" [emphasis added]. The court in *Lim Teck Chye* went on to cite its judgment in *Chua Tiong Tiong v Public Prosecutor* [2001] 2 SLR(R) 515 ("*Chua Tiong Tiong*") for an elaboration on the rationale. I cite the passage at [17]–[19] more fully as follows:

> 17 I accepted the grave issue of public interest at stake in the present case. Eradicating corruption in our society is of primary concern, and has been so for many years. This concern becomes all the more urgent where public servants are involved, whose very core duties are to ensure the smooth administration and functioning of this country. ***Dependent as we are upon the confidence in those running the administration, any loss of such confidence through corruption becomes dangerous to its existence and inevitably leads to the corrosion of those forces***, in the present case the police force, which sustain democratic institutions. I highlighted this in *Meeran bin Mydin v PP* [[1998] 1 SLR(R) 522], approving the words of the trial judge in that case (at [18]):
>
> > … Acts of corruption must be effectively and decisively dealt with. Otherwise the very foundation of our country will be seriously undermined. …

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21 Tan's Written Submissions, at para 69–84.

22 Kaur's Written Submissions, at para 65.

> 18 In 1960, this very same position was emphasised by the then Minister for Home Affairs when the PCA was presented before Parliament for its second reading:
>
> > The Prevention of Corruption Bill is in keeping with the new Government determination to ***stamp out bribery and corruption in the country, especially in the public service***. *The Government is deeply conscious that a Government cannot survive, no matter how good its aims and intentions are, if corruption exists within its ranks and its public service on which it depends to provide the efficient and effective administrative machinery to translate its policies into action. …*
>
> 19 Over the years, whilst we have had considerable success in keeping mainstream corruption in check, there are still instances of corruption which seep through our system. On my part, I have sought to deter corruption through harsher punishment for lawbreakers in this area, but success has not been total, and the Judiciary still hears a steady stream of such cases. In many instances, the cases involve reprehensible public servants, contrary to their responsibility of acting as instruments preserving the efficiency, peace and stability of this nation. This ***not only erodes the confidence of the general public in their duty of service, but also reflects poorly on those public servants who stick by the law***. Specifically for police officers, their role as guardians of our streets, our crime-fighters, to police our society becomes a ridicule.
>
> [emphasis in original in italics; emphasis added in bold italics]

63 The Second Reading of the Prevention of Corruption Bill (*Singapore Parliamentary Debates, Official Report* (13 February 1960) vol 12), as cited in *Chua Tiong Tiong* above, makes it clear that the impetus for its passage through Parliament was the eradication of corruption within the public service in the country. In moving the Bill, it was further stated clearly at col 377 (Ong Pang Boon, Minister for Home Affairs):

> … Corruption on the part … of some *must not be allowed to smirch the good name of the present Government and the large majority of its civil servants*. Therefore, this Government is determined to take all possible steps to see that all necessary legislative and administrative measures are taken to … deter and punish severely those who are susceptible to it and engage in it shamelessly.

> Therefore, in this Bill, the government is asking for new and wider powers to fight bribery and corruption. … The Bill, *while directed mainly at corruption in the public services*, is applicable also to corruption by private agents …
>
> [emphasis added]

64 As a result of the application of the public service rationale to cases of public sector corruption, the sentencing outcome is that custodial sentences are "typically attract[ed]" (*Romel* at [15]). In contrast, the court in *Romel* has stated at [20] that where private sector agents are concerned, offences involving a lower level of culpability – generally being those where the amount of gratification is below S$30,000 and where there is no real detriment to the interests of the principal – "*can* be dealt with by the imposition of fines" [emphasis in original]. However, the courts have also taken pains to stress that there is no presumption in favour of non-custodial sentences whenever private sector corruption is involved (*Romel* at [20], *Ang Seng Thor* at [39], *Lim Teck Chye* at [65]). Ultimately, what matters is the "*specific nature* of corruption" [emphasis in original] presented by the facts of the case (*Romel* at [20]).

65 The courts have also extended the public service rationale to particular kinds of private sector corruption cases. In this regard, some examination of the existing jurisprudence is warranted. The court in *Ang Seng Thor* at [33] distilled the holding in *Lim Teck Chye* to the following propositions:

> (a) The public service rationale ***refers to the public interest in preventing a loss of confidence in Singapore's public administration*** (see *Chua Tiong Tiong* at [17]–[19]).
>
> (b) Where there is a risk of this harm occurring, a custodial sentence is normally justified …
>
> (c) The [public service rationale] is presumed to apply where the offender is a government servant or an officer of a public body, but it may also apply to private sector offenders where the ***subject matter of the offence involves a public contract or a public service***. This includes private sector

> offences that concern ***regulatory or oversight roles*** such as marine surveying (see *Lim Teck Chye* … at [66]–[68]).
>
> [emphasis added in bold italics]

66 Having summarised *Lim Teck Chye*, the court in *Ang Seng Thor* then stated that the correct view should be that the public service rationale did *not* extend to private sector corruption cases that merely result in loss of confidence in strategic industries (at [34]):

> … [A]lthough Yong CJ suggested in *Lim Teck Chye* at [68] that the public service rationale included cases occasioning a loss of confidence in a strategic industry such as the bunkering and maritime industry, subsequent cases such as *Wong Teck Long v PP* [2005] 3 SLR(R) 488 … and *Zhao Zhipeng* have clarified that such facts form a ***separate aggravating factor*** justifying general deterrence (see *Wong Teck Long* at [36] in reference to the banking and finance industry). … To bring this factor under the definition of the public service rationale ***strikes me as making the latter too wide***.
>
> [emphasis added in bold italics]

67 Most recently, the court in *Romel* reaffirmed recognition of the extension of the public service rationale to private sector corruption, and mentioned cases where private agents *handle public money* as an example of private sector activity implicating the public service rationale (at [24]). More important is the application of preceding case law to the facts of *Romel*. The offender in *Romel* was an employee of a private company, tasked with conducting inspections of vessels seeking to enter an oil terminal. He faced two proceeded charges under s 6(*a*) PCA, which related to his overlooking of vessel defects in exchange for bribes. In holding that the public service rationale should *not* apply in *Romel*, the court stated at [37]:

> … While it is true that the present case involved a strategic industry, my view was that it ***did not involve any regulatory or oversight considerations that warranted the extension of the public service rationale***. The arrangement that had been put in place by the oil terminal was a *purely commercial*

> one which the terminal operator had chosen to establish. This was not imposed on the terminal by virtue of any government regulation or subsidiary legislation. Nor was it evident why the terminal in this case had implemented such a system. It was undoubtedly entitled to do so, but its motivation could have been purely private in nature. In that light, I was unable to see how the public service rationale could be extended. It is true that ***potentially damaging economic and physical harm could have resulted*** from the Respondent's actions in this case. But that goes to a ***separate aggravating consideration***.
>
> [emphasis in original in italics; emphasis added in bold italics]

68 *Romel* and *Ang Seng Thor* are notable as they contain judicial pronouncements of when the public service rationale should *not* apply. In *Romel*, the facts did not involve the private agent offender performing a regulatory or oversight role. The mere fact that *Romel* involved a strategic industry was insufficient, which echoes the explicit pronouncement to the same effect in *Ang Seng Thor*, albeit *obiter*. From such decisions, it is apparent that protection of the public administration undergirds and explains why the courts have chosen to extend the public service rationale to *some* cases of private sector corruption (involving public contracts, management of public money, or provision of public services), but *not* others (such as in *Romel*). This brings me to the issue at hand, which is *whose* public administration the public service rationale is concerned with.

Whether the public service rationale is applicable, or should be extended to apply, to the corruption of foreign public officials

69 It is clear that the cases have not specifically ruled on whether the public service rationale applies to the corruption of foreign public officials. In my judgment, the corruption of foreign public officials does not, and should not, fall within the ambit of the public service rationale. I am guided by the legislative intent underlying the PCA, from which the common law principle of the public service rationale has evolved.

70 The extracts from the Parliamentary debates (cited at [62]–[63] above) reveal that the *main* legislative objective behind the enactment of the PCA was to prevent corruption of *Singapore's public administration*. The aim was to eradicate corruption, especially in the public service, "in the country", and repeated reference was made to our Government's recognition that *our* public administration will lack efficacy if corruption existed within its ranks. Against this backdrop, the provision for enhanced punishment within ss 7, 11 and 12 for certain types of public sector corruption (see above at [59]) makes it clear that Parliament intended for corruption of *Singapore's* public administration to be dealt with by the imposition of enhanced penalties.

71 In *Chua Tiong Tiong*, specific reference was made to the Parliamentary records of the Second Reading of the Prevention of Corruption Bill, and the cases on public service rationale have made multiple allusions to the *Singapore* public administration being harmed by the various acts of corruption. I cite a few examples. In *Chua Tiong Tiong* at [17], the "grave issue of public interest" identified was that a public servant, whose duty was to ensure the administration of "this country", was corrupt, thus threatening the administration "we" are dependent on. In *Ang Seng Thor* at [33(c)], the court even stated in no uncertain terms that "[t]he public service rationale refers to the public interest in preventing a loss of confidence in *Singapore's* public administration" [emphasis added]. These are unmistakable references to the direct stake that Singaporeans have in the public administration of our country, the very public interest that was being threatened. Therefore, while certain acts of corruption may have fallen outside of the application of ss 7, 11 and 12, through the public service rationale, the courts have recognised that these offences go towards undermining confidence in *Singapore's* public administration, and thus fall within the same species of social ills deserving of more severe treatment.

72 Viewing the cases in their totality, I am of the view that the public service rationale was developed with the protection of *Singapore's* public service in mind. That is the public interest at stake. It does not apply to foreign public sector corruption. To extend its scope so as to fit cases involving foreign public sector corruption would dilute the true purpose and meaning of the principle. In this connection, I share the *amicus*'s observation[23] that the public interest and the public service rationale are distinct. The public interest is inextricably interwoven with the conventional sentencing principles of retribution, deterrence, rehabilitation and prevention (*Angliss Singapore Pte Ltd v Public Prosecutor* [2006] 4 SLR(R) 653 at [21]–[22]). The public service rationale is one manifestation of how the public interest – that of protection of Singapore's public service – has informed the sentencing court. It would be wrong in principle to stretch it to apply to foreign public sector corruption.

Whether the corruption of foreign public officials should be a distinct aggravating factor

73 That being said, I note the Prosecution's arguments on why the public service rationale should be extended to cover foreign public sector corruption. The Prosecution argued that, first, given the changing landscape of commerce in Singapore, there is an increased presence of foreign public officials within Singapore's borders, and increased interactions between such officials and private sector agents, resulting in increased prevalence of transnational corruption. Second, maintaining a high standard of conduct for all public officials, local or foreign, is important to maintain Singapore's international reputation for a having a clean and incorrupt system. Third, drawing a

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23 YAC's submissions, at para 28.

distinction and setting a double standard would be inconsistent with Singapore's international commitment against transnational bribery and corruption.

74 In this regard, I am of the view that the Prosecution's arguments are made with a particular dilemma in mind – either the public service rationale is extended to apply to cases of foreign public sector corruption such that these concerns can be dealt with, or it does not, leaving these concerns unaddressed. However, there is another more principled option so as to give due regard to these concerns. Indeed, as the *amicus* helpfully pointed out, the bribery of foreign public officials does implicate Singapore's public interest, and that it cannot be said to be akin to "merely commercial" cases of corruption; it is "*clearly an aggravating factor* that a foreign public official has been suborned" [emphasis added].[24]

75 I agree with the *amicus*. My view is that the appropriate course is to recognise the corruption of foreign public officials as an aggravating factor *distinct* from the public service rationale. Recognition of the corruption of foreign public officials as a separate aggravating factor is grounded in the public interest. However, this public interest is distinct from that underlying the public service rationale. In this connection, I draw from the factors raised by the *amicus* and the Prosecution.[25]

76 The first factor is that the corruption of a foreign agent within Singapore's borders is a significant threat to Singapore's international reputation for incorruptibility. This was recognised in *Ding Si Yang v Public Prosecutor and another appeal* [2015] 2 SLR 229 ("*Ding Si Yang*"), a case

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24 YAC's submissions, at para 50.

25 YAC's submissions, at paras 31–42; Prosecution's Submissions (Tan), at paras 54–59.

bearing some significance as it dealt with how the bribery of foreign (private) officials should be dealt with under the PCA. *Ding Si Yang* concerned the giving of gratification to foreign football match officials in Singapore for the purposes of match-fixing under s 5(*b*)(i) of the PCA. Having recognised that Singapore had recently acquired "an insalubrious reputation as a haven for match-fixers", (at [42]), the court proceeded to state at [60] that:

> … The very fact that Ding had attempted to corrupt a number of foreign match officials who officiate international matches would *no doubt reinforce the unfortunate global perception of Singapore as a haven for match-fixing*. As the Prosecution argues, *the harm to Singapore's reputation is increased "when a Singaporean offender is seen to export corruption in sport beyond our shores"*. The trial judge was right to take the damage to Singapore's reputation and image into consideration as *the nation's international reputation and standing must be jealously safeguarded at all times*.
>
> [emphasis added]

77 While the above holding in *Ding Si Yang* was in respect of corruption of a foreign agent in the private sector, it is broadly applicable to the corruption of foreign public officials. Corruption of foreign public officials would fall under the PCA in two circumstances, where a Singaporean bribes a foreign public official anywhere in the world (by virtue of the PCA's extraterritorial reach as provided for in s 37(1) PCA), and where a foreign public official is bribed in Singapore. Just as how concerns to preserve Singapore's reputation as a prime international sporting venue applied in *Ding Si Yang* whether the match fixed was within or outside Singapore (at [35]), there are similar concerns of Singapore's international reputation being marred in the above two circumstances. In the former circumstance, it may appear to the international community that corruption in the public sector is being "export[ed] beyond our shores", while in the latter circumstance, the impression may be created that Singapore is a "haven" for the corruption of foreign public officials. The threat

to Singapore's international reputation is thus a harm to Singapore that has to be accounted for.

78 The second factor is that of Singapore's international obligations to combat transnational corruption, which undermines public institutions and values. This is relevant in my determination of the issue, as I accept the Prosecution's reliance on *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489, which states at [59] that "domestic law … should, as far as possible, be interpreted consistently with Singapore's legal obligations".

79 I pause to note that the *amicus* has raised the 1997 Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention"). However, I consider this to be of little direct relevance to the present purposes of discovering any of Singapore's legal obligations, as Singapore is not a party to it.

80 Instead, what is of direct relevance is the United Nations Convention Against Corruption ("UNCAC"), which Singapore has signed and ratified,[26] thus endorsing its goals and accepting its obligations. The UNCAC is the first international and legally binding instrument in the fight against corruption,[27] and entered into force for Singapore on 6 December 2009.[28] Its objectives include

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26 Prosecution's Submissions (Tan's case), at para 55.

27 *Technical Guide to the United Nations Convention Against Corruption* (United Nations, 2009) at p xvii.

28 "Country Review Report of Singapore", Conference of the States Parties to the United Nations Convention against Corruption (2015) at para 7.

promoting, facilitating, and supporting international cooperation and technical assistance in the prevention of and the fight against corruption.[29]

81 Turning to the provisions of the UNCAC, the preamble states that States Parties share the concern that "corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international co-operation to prevent and control it essential". States Parties further recognise that corruption "undermin[es] the institutions and values of democracy".

82 Indeed, quite apart from the threat to Singapore's reputation as a corruption-free country (as discussed above at [77]), the corruption of foreign public officials causes a distinct mischief recognised by the UNCAC – the undermining of a foreign country's public administration, and prejudicing transnational efforts to fight corruption. The Canadian case of *R v Griffiths Energy International* [2013] AJ No 412, a sentencing judgment for an offence of bribing a foreign public official under s 3(1) of the Canadian Corruption of Foreign Public Officials Act, SC 1998, c 34 (Can), recognised these considerations, phrasing it as follows at [8]–[9]:

> The bribing of a foreign official by a Canadian company is a serious matter ... such bribes, besides being an embarrassment to all Canadians, *prejudice Canada's efforts to foster and promote effective governmental and commercial relations with other countries*; and where, as here, the bribe is to an official of a developing nation, it *undermines the bureaucratic or governmental infrastructure for which the bribed official works*.
>
> Accordingly, the penalty imposed must be sufficient to show the Court's denunciation of such conduct as well as provide deterrence to other potential offenders.

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29 United Nations Office on Drugs and Crime, 'Signature and Ratification Status' <https://www.unodc.org/unodc/en/corruption/ratification-status.html> (accessed 1 June 2019).

> [emphasis added]

83 Another facet of policy is provided by the Hong Kong Final Court of Appeal decision of *B v The Commissioner of the Independent Commission Against Corruption* [2010] HKCFA 4 at [21]:

> Unsurprisingly the legislative history shows that the legislature's principal concern was public sector corruption in Hong Kong. That is only be expected. But it does not suggest that criminalising and prosecuting the bribery here of foreign officials is a course that the legislature has set its face against. Such a course makes a *positive and important contribution to the worldwide struggle against corruption*, an endeavour inherently and highly dependent on cross-border cooperation. Acting cooperatively, *each jurisdiction properly protects itself and other jurisdictions* from the scourge of corruption and other serious criminal activity. For Hong Kong in particular, *criminalising and prosecuting the bribery here of foreign officials deters corruption here and helps to avoid the growth here of a culture of corruption.* [emphasis added]

84 I acknowledge that Canada, unlike Singapore, is a signatory to the OECD Convention, Article 3(1) of which provides for punishing the bribery of foreign officials with a "range" of penalties "comparable" to that applicable to the bribery of the respective country's own public officials. Further, the Hong Kong decision above was made in the context of finding that it was an offence for a bribe to be offered in Hong Kong to a foreign public official outside Hong Kong in relation to his public duties in that foreign country, and not in relation to sentencing. Nevertheless, the reasoning in these cases applies to explain why offences of corruption of foreign officials are distinguishable from merely commercial corruption offences.

85 To summarise, these are the non-exhaustive aspects of the public interest in cases of corruption involving foreign public officials:

(a) Corruption of a foreign public official within Singapore's borders threatens Singapore's international reputation for incorruptibility, by creating an impression that Singapore is a "haven" for the corruption of foreign public officials.

(b) Corruption of a foreign public official outside of Singapore by a Singaporean threatens Singapore's international reputation for incorruptibility, by creating the appearance that corruption in the public sector is being exported beyond our shores.

(c) Corruption of a foreign public official undermines a foreign country's public administration, which run contrary to Singapore's obligations and efforts to combat transnational corruption.

(d) Corruption of a foreign public official, whether by a Singaporean or within Singapore's borders, risks fostering a culture of corruption in Singapore.

86 At this juncture, I deal with Tan's submissions relating to the UNCAC, which broadly object to the recognition of corruption of a foreign public official as *any sort* of aggravating factor. Tan argued that the UNCAC only requires that a "specific criminal offence" of corruption of foreign public officials be established, and not as an aggravating factor at sentencing. To treat the corruption of a foreign public official as an aggravating factor, instead of "as an offence in itself", would give undue weight to its severity. It may be beyond the court's proper powers for it to decide on "how Singapore ought to rightly incorporate its international legal obligations domestically".[30]

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30 Tan's Written Submissions, at paras 76–78.

87 In my view, the objection is unmeritorious. First, it is pertinent to note that the UNCAC does *not* require that a specific criminal offence be created for the corruption of foreign public officials. What is required under Article 16(1) of the UNCAC is that each State Party ensures that the corruption of foreign public officials is a criminal offence. This is clearly achieved by ss 5 and 6 of the PCA being broad enough to capture such corruption. There is therefore no issue of the court, in giving the involvement of a foreign public official aggravating weight, making any determination of how Singapore fulfils Article 16(1) of the UNCAC.

88 Second, I take notice of Articles 26(4) and 30(1) of the UNCAC, which state as follows:

> *Article 26. Liability of legal persons*
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> …
>
> 4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to ***effective, proportionate and dissuasive*** criminal or non-criminal sanctions, including monetary sanctions.
>
> …
>
> *Article 30. Prosecution, adjudication and sanctions*
>
> 1. Each State Party shall make the commission of an offence established in accordance with this Convention ***liable to sanctions that take into account the gravity of that offence***.
>
> [emphasis added in bold italics]

89 By these provisions, the UNCAC *requires* that the gravity of the offence be taken into account in sentencing. As explained in the *Technical Guide to the United Nations Convention Against Corruption* (United Nations, 2009) at p 83, the UNCAC does not specify the severity of sanctions, whether criminal or civil, as it acknowledges that penalties for similar crimes diverge across jurisdictions, reflecting diverging national traditions and policies. Nonetheless, the UNCAC

emphasises that appropriate measures "shall" be put in place to ensure that, "whether through fines, imprisonment or other penalties, the punishment reflects the [gravity] of the offence". In coming to its decision, the sentencing court is thus not precluded from considering the corruption of foreign public officials as aggravating.

90 Another objection Tan raised against treating the corruption of a foreign public official as an aggravating factor is that the sentencing courts would be placed in an untenable position of having to examine the legality of the offending act under the laws of the foreign public official's home country. This is because it is only if the offending act is also illegal in the foreign country that the court can treat it as an aggravating factor.[31] One example Tan provided was that "facilitation payments" may not be criminalised in the home country of the foreign public official, although they are criminalised under the PCA. The treatment of the offence as aggravated may thus be inconsistent, depending on where the foreign public official is from.

91 I am not convinced by such an argument. First, it is an incorrect assumption that the corruption of foreign public officials can only be aggravating if the offending act is also illegal in the other country. In all cases prosecuted in Singapore, criminal jurisdiction would have been established in one of two circumstances, where a Singaporean bribes a foreign public official anywhere in the world and where a foreign public official is corrupted in Singapore (see above at [77]). In both instances, the public interests of Singapore are implicated, as (a) we have an interest in preventing Singaporeans from engaging in acts of corrupting any foreign public official; and (b) we have

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[31] Tan's Written Submissions, at para 69(ii).

an interest in preventing Singapore from becoming a haven for corruption of foreign public officials. Second, the non-criminal nature of "facilitation payments" under the relevant foreign law is not determinative of the court's assessment of harm done. The role of the sentencing court will be to assess the extent of harm to the foreign public administration, criminal liability having been established under Singapore laws. Should the particular circumstances of the relevant foreign country be germane in determining such harm, then such facts will be considered accordingly.

92 To sum up, I am of the view that the fact that a foreign public official is the recipient or intended recipient of a bribe is an aggravating factor, due to the policy considerations such offences implicate. This does not entail an extension of the public service rationale, and the sentencing jurisprudence developed in relation to the public service rationale will not directly apply. I also acknowledge that such corruption cases involving foreign public officials form a distinct category of cases. Certainly, such cases are not *purely* commercial in nature, and do not fall within the category of private sector corruption. They also do not neatly fall within the category of public sector corruption cases which has been limited to the local context. Nonetheless, what can be said is that both local public sector corruption and corruption involving foreign public officials should share the same starting point of a custodial sentence. Beyond that, whether cases involving the public service rationale are suitable precedents for corruption cases involving foreign public officials will be entirely fact-dependent.

93 For completeness, I should stress that for now, this aggravating factor arises in the scenario where a *foreign public official is the recipient or the intended recipient* of the bribe. Whether, like the public service rationale, there should be any extension of this to private sector agents in the circumstances as

set out at [65] above remains to be considered. Furthermore, as far as possible, and for consistency, I have used the term "foreign public official" to refer to the recipient or intended recipient throughout this judgment, rather than "foreign public servant" or "foreign public officer". This is because the UNCAC has a definition of "foreign public official" which includes "any person exercising a public function for a foreign country, including for a public agency or public enterprise". To my mind, "foreign public official" would include any employee of a foreign government. More is said of this at [149] below. No doubt, the precise bounds of the scope of this group of recipients or intended recipients will be developed and delineated in subsequent cases based on their precise facts.

Whether to formulate a sentencing framework for all corruption offences

94 I turn to the issue of whether a sentencing framework should be established for corruption offences under ss 5 and 6 of the PCA, and if so, what form that should take.

95 Given the discussion immediately above that there should be consistent treatment towards sentencing for offences under ss 5 and 6 of the PCA at [54]–[57] above, *prima facie,* it seems that it may be appropriate to do so. In this regard, the Prosecution provided two key reasons for proposing a sentencing framework – (a) the courts in past corruption cases have failed to engage the full spectrum of punishment; and (b) there are no guideline sentencing judgments for corruption cases. The Prosecution argued that the complex and diverse nature of corruption offences do not militate against the development of a sentencing framework.[32] Tan and Kaur disagree.

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32 Prosecution's Written Submissions (Tan), para 23.

96 Having considered the parties' arguments and the precedent cases, I conclude that it is not appropriate to formulate a general sentencing framework for ss 5 and 6 PCA offences.

97 Turning to reason (a) offered by the Prosecution, I am not convinced that the courts have not been using the full range of sentences as prescribed. The Prosecution had cited several cases in which "the full spectrum of punishment" had not been engaged. However, first, these are but a handful in the sea of available precedents. Without the opportunity to examine the case law holistically, I hesitate to make the same claim the Prosecution makes. In addition, I am in agreement with the District Judge in Tan's case that the Prosecution's argument seems to be premised on their view that there are several egregious cases where the sentences were insufficient. This is despite the fact that these sentences had either been passed without appeal from the Public Prosecutor, or had been upheld on appeal. There is insufficient analysis to show that the full spectrum of punishment had not been considered by the sentencing courts.

98 In respect of the reason (b) offered by the Prosecution, as the Prosecution acknowledged, corruption offences are diverse and complex in nature. The different circumstances range from corruption of local public officials, foreign public officials, private sector officials performing a public function or using public funds, and private sector officials performing "purely commercial" functions. This is further illustrated by the fact that, even within the classification of "private sector" corruption, there are three non-exhaustive categories of offences as recognised in *Romel* where the public service rationale is applicable (discussed below at [100]). The purpose of the bribes may vary widely, such as for match-fixing, for awards of contracts, for business authorisations or licenses, for expedition of delays, for leniency with regulatory

checks or for protection from investigation or prosecution. Indeed, the words of the court in *Romel* are apposite, that "sentencing, especially in the context of corruption, is an intensely factual exercise" (at [31]).

99 Despite the fact-specific exercise involved, a rich body of sentencing precedents provides much-needed guidance in setting out factors and categories to guide a sentencing court's decision. The main overarching sentencing considerations in corruption cases are deterrence and retribution (*Ang Seng Thor* at [33]). The courts have recognised numerous offence-specific factors relevant to sentencing, which I non-exhaustively summarise as follows:

(a) The value of the gratification:

(i) This is linked to both the culpability of the offender, and the harm caused by the offence. In terms of harm, the greater the value of the gratification, the greater the corrupt influence exerted on the receiver, and larger bribes tend to lead receivers to commit greater transgressions (*Ang Seng Thor* at [46]). In terms of culpability, the value of the gratification *usually* reflects the degree of illegitimate advantage the giver wishes to secure through the bribe. The value of gratification demanded or accepted also reflects the greed of the receiver for monetary gain, and hence his culpability. However, the link between the size of the gratification and culpability must be established on the facts (*Ang Seng Thor* at [47]).

(ii) As cautioned by the court in *Ding Si Yang* (at [13] of Annex A), the value of gratification must be considered in context – as the rational giver of a bribe will give the minimum amount necessary to compromise the recipient, the gratification

sum may only be indicative of the appetite of the recipient, and not necessarily the giver's culpability. Further, given the *evidential value* of the gratification sum in determining the harm and culpability involved, where there is clear evidence relating to the giver's motives, expected gains and likely resulting harm, the sentencing judge must be careful that his weighing of the bribe amount does not lead to *double counting* (*Ding Si Yang* at [14] of Annex A).

(iii) In *Romel*, the court stated (at [20]) that in cases of private sector corruption, offences which register a lower level of culpability are "*generally* those where [*inter alia*] the amount of gratification is below $30,000" [emphasis in original].

(iv) While *Romel* does not create a rule that cases involving bribes less than S$30,000 should only attract a fine, the amount of gratification is *not* "just one of the factors" to be considered. It is an *important* factor, carrying extra-ordinary weight as it "correlates with the harm caused by the bribe and the need to deter the creation of a corrupt business culture at the highest level of commerce" (*Heng Tze Yong* [2017] 5 SLR 976 ("*Heng Tze Yong*") at [24]–[25]).

(b) Consequences of the corruption:

(i) Where there are broader consequences of the corruption, the policy considerations implicated are relevant factors (*Ang Seng Thor* at [33(d)]). One of the most significant policy considerations – the public sector rationale – is triggered depending on whether the offence was one of public sector or private sector corruption, which I have previously discussed in

detail (see [64] above in particular). Beyond the general undermining of the integrity and trust in Singapore's public administration, other more specific policy considerations might be implicated, such as where corrupt acts have the effect or risk of "perverting the course of justice or affecting public health and safety" (*Public Prosecutor v Marzuki bin Ahmad and another appeal* [2014] 4 SLR 623 ("*Marzuki*") at [28(c)], [31]), or a loss of confidence in a strategic industry (*Ang Seng Thor* at [34]). *Wong Teck Long v Public Prosecutor* [2005] 3 SLR(R) 488 at [36] (cited with approval in *Romel* at [51]) found that "[f]reedom from corruption is undoubtedly a magnet that attracts and assures" clients in Singapore's fast-growing banking and financial industry, and hence safeguarding the public confidence in the industry's integrity required deterrent punishment. This factor is also discussed above at [66]. Where the gratification is given to enforcement officials to avoid detection and punishment for certain criminal activities, the broader impact is the adverse impact on law and order in the country (*Marzuki* at [33]).

(ii) Where the corruption directly implicates the interest of a principal (of the recipient), whether there is real detriment to the interests of that principal is a relevant consideration (*Romel* at [20]). One example is *Heng Tze Yong*, where the offender paid bribes to a private company's manager to secure awards of supply contracts. The court held that while the principal company was deprived of the opportunity to consider quotations from other competitors, there was no real loss suffered by the principal, as it was still generally satisfied with the products and services provided under the contract awarded. The absence of

real detriment to the principal is one factor indicating that the case falls short of the custodial threshold (*Romel* at [20], *Heng Tze Yong* at [29]). Where the offender's actions potentially result in damaging economic and physical harm, this is an aggravating consideration (*Romel* at [37]). Such was the case in *Romel*, where defective vessels were allowed entry to an oil terminal, placing lives and property at risk (*Romel* at [44]).

(c) Motivation of the offender: where the offender is the giver of the gratification, it is relevant to his culpability to consider the nature of his motivations. It is aggravating where the motivation was to facilitate and conceal criminal acts (*Public Prosecutor v Tay Sheo Tang Elvilin* [2011] 4 SLR 206 ("*Tay Sheo Tang Elvilin*") at [22]).

(d) The web of corruption or broader syndicate operations: the number of people drawn into the "web of corruption" is a relevant factor (*Ang Seng Thor* at [33(d)]). In the case of *Tay Sheo Tang Elvilin*, it was aggravating that the offender, a police officer, had drawn several fellow officers into a "web of corruption". This has also been treated as an aggravating factor (*Ding Si Yang* at [73]), where the offender (charged for his match-fixing in Singapore) was found to be a member of a match-fixing syndicate.

(e) The extent of premeditation and sophistication: Premeditation of the offence is a relevant sentencing factor in terms of culpability, and the degree of sophistication in avoiding detection reflects the degree of premeditation involved (*Ding Si Yang* at [71]). As elaborated in *Logachev Vladislav v Public Prosecutor* [2018] 4 SLR 609 ("*Logachev*") at [56], the presence of planning and premeditation "evinces a considered commitment towards law-breaking and therefore

reflects greater criminality". Sophistication which makes an offence more difficult to detect is also deserving of a deterrent sentence (*Logachev* at [58]).

(f) Duration of offending: where the offences are committed over a long period of time, even where the total amount of gratification is relatively low, custodial sentences have been meted out (as in *Public Prosecutor v Chang Kar Yang* [2006] SGDC 85 involving six charges and a total gratification of S$18,000, cited in *Ang Seng Thor* at [63]).

(g) Role of the offender:

(i) The starting point is that the giver and receiver of the gratification ought to receive similar sentences, except where one party is more culpable than the other (*Chua Tiong Tiong* at [21]; *Ding Si Yang* at [79]) and where the circumstances of each offender are different (*Marzuki* at [45]).

(ii) The corrupt recipient's seniority and position within the principal organisation, and the nature of the duty owed to that organisation, which duty was compromised by the offender's corrupt act, are relevant (*Marzuki* at [28(d)]).

(iii) The level of control enjoyed by the recipient over whether any action would be taken or forborne to be taken as a result of his corrupt act, are relevant (*Marzuki* at [28(e)]).

(iv) Whether the corrupt transaction was initiated by the offender: In *Heng Tze Yong*, the court stated that "there must be some difference in … culpability between a giver who initiated the corrupt transaction and a giver who merely succumbed to the solicitation and pressure of the recipient" (at [34]). One reason

why *Romel*'s third category (see below at [100]–[101]) would largely deserve a custodial sentence is a recognition that that receiving parties who solicit gratification are more culpable. That being said, it bears reiteration that the court must pay ultimate heed to the context in which the solicitation takes place. Despite the payer usually initiating the transaction in *Romel*'s first category, there is no presumption that the custodial threshold is crossed (Menon CJ in *Thor Chi Tiong v Public Prosecutor* Magistrate's Appeal No 9123 of 2016 (7 November 2016), referred to in *Heng Tze Yong* at [33]).

(h) Transnational nature of the offence: This element was recognised in *Ding Si Yang* as aggravating (at [53]), as it was recognised that the transnational nature of an offence results in additional hurdles to the prosecution of those offenders (*eg*, additional difficulty securing witnesses to cooperate and testify). Furthermore, I note another aspect in *Public Prosecutor v Law Aik Meng* [2007] 2 SLR(R) 814 ("*Law Aik Meng*") at [42], where the court stated that where the offender was "part of a *foreign syndicate* which had systematically targeted … *Singapore* to carry out its criminal activities" [emphasis in original], and it was the *audacity and daring* of such a cross-border scheme that was aggravating and deserved denunciation.

(i) Whether the corrupt conduct was endemic (*Ang Seng Thor* at [33(d)]; *Ding Si Yang* at [54]).

100 The court in *Romel* (at [26]) further contributed to this existing jurisprudence three broad and non-exhaustive categories of private sector corruption cases, which I cite:

> (a) First, where the receiving party is paid to confer on the paying party a benefit that is within the receiving party's power to confer, without regard to whether the paying party ought properly to have received that benefit. This is typically done at the payer's behest.
>
> (b) Second, where the receiving party is paid to forbear from performing what he is duty bound to do, thereby conferring a benefit on the paying party. … This also is typically done at the payer's behest.
>
> (c) Third, where a receiving party is paid so that he will forbear from inflicting harm on the paying party, even though there may be no lawful basis for the infliction of such harm. This is typically done at the *receiving party's* behest.
>
> [emphasis in original]

101 Cases in the third category will generally result in a custodial sentence for the receiving party, as the corruption is characterised by the receiving party's heightened culpability – in seeking out payment of a bribe, and his threat to illegitimately inflict harm on the paying party if the bribe is not paid – and the resulting interference with the paying party's legitimate rights unless he pays the bribe (*Romel* at [29]–[30]). Cases in the second category will frequently attract custodial sentences for the receiving party, reflecting the receiving party's compromise of his duty or betrayal of trust (*Romel* at [23], [28]). As for cases in the first category, whether they cross the custodial threshold for the receiving party will depend on the facts (*Romel* at [27]). These categories also show that it is the *interplay* of factors which determines whether a custodial sentence is warranted, affirming the fact-specific sentencing of corruption offences as discussed above.

102 It is critical to note that although there have been many sentencing precedents, there has only been *one* endeavour to set out a sentencing framework in *Ding Si Yang*. The sentencing framework was formulated with *narrow* application to cases of football match-fixers convicted under s 5 of the

PCA. It is important to understand how specific and fact-sensitive this framework is. In devising the framework, the court had to cater for the football competition or league that the match-fixer was trying to fix, using the Singapore Premier League and the FIFA World Cup as two ends of the spectrum of popularity/level of the game, but leaving future sentencing judges to consider where other types of football competitions fall along the spectrum. Furthermore, the guideline sentences were designed based on numerous assumptions which had to be made, while other several factors were not accounted for within the framework (set out at [5]–[15] of Annex A of *Ding Si Yang*). Apart from this, no precedent case, including those as recent as *Romel* and *Heng Tze Yong*, has attempted to set forth a sentencing framework for corruption offences *generally*.

103 In this connection, it is useful for me to refer to another context, where the High Court considered what sentencing guidance to provide for offences under s 182 of the Penal Code (Cap 224, 1985 Rev Ed) which criminalises the giving of false information to public servants. In *Koh Yong Chiah v Public Prosecutor* [2017] 3 SLR 447 ("*Koh Yong Chiah*"), the High Court, comprising three judges, refrained from setting out a framework because of the broad nature of the offence, and found it appropriate to stop at giving broad guidance as to the type of cases that generally would attract a custodial sentence as a starting point. The court elaborated as follows:

> 34 … [I]t can be seen that s 182 would encompass a wide range of misconduct in different circumstances. While certain fact patterns stand out, and while the sentences imposed in cases bearing similar fact patterns may be rationalised, it is doubtful if a *single* sentencing framework would ever be adequate to cater to the full range of different factual scenarios.
>
> …
>
> 48 In our judgment, it is difficult to categorise s 182 offences based on a set of "principal factual elements". The way in which the offence may be committed, the offender's motivation and the outcome of a s 182 offence can take a wide

> variety of shapes and forms. *In particular*, we find it difficult to define in the abstract a uniform set of factors that allows us to categorise an *offender's degree of culpability* for s 182 offences and in turn the appropriate punishment. For example, the significance of the fact that a lie was repeatedly told, or that the offender may have had an intention to reap personal benefit, must be assessed *in context* before the extent to which these factors aggravate the offence can be assessed. [For instance], a public servant may have repeatedly lied to his superiors about not being the one who did not turn off the printer or the lights in the office. This is however unlikely to be treated by the courts as a serious criminal offence. …
>
> [emphasis in original]

104 Likewise, having considered the matter in the round, I decline to devise a general sentencing framework for *all* corruption offences under ss 5 and 6. The wide variety of acts caught by ss 5 and 6 PCA would make crafting of a *single* sentencing framework applicable to *all* such offences an extremely challenging task. In the words of the High Court in *Koh Yong Chiah*, I am highly doubtful that "a *single* sentencing framework would ever be adequate to cater to the full range of different factual scenarios." The context in which the corruption occurs will affect how other aggravating factors present are to be weighed. Factors such as the size of gratification offered or the duration of offending may vary in severity depending on the public/private nature of the offence, or the motivation of the giver of the gratification.

105 In line with the many sentencing precedents, I would adopt the approach of articulating, developing and clarifying the categories and factors for consideration by sentencing courts. In the present cases, as stated at [92], I find that corruption involving a foreign public official is aggravating, and that where such an aggravating factor is present, the starting point would be a custodial sentence. Within this category of offences, the factors I have identified at [99] apply as well. I add that, as the Prosecution pointed out, while the factor at [99(h)] *ie,* the transnational nature of the offence, does not overlap entirely with

the corruption of foreign public officials, care must be taken that there should not be any double-counting.[33]

The Prosecution's proposed sentencing framework

106 That said, I briefly discuss the Prosecution's proposed framework, as it illustrates the difficulties of formulating such a framework for corruption offences. Essentially, the Prosecution has adapted[34] the sentencing bands and corresponding indicative sentences used in the case of *GBR v Public Prosecutor and another appeal* [2018] 3 SLR 1048 (at [31]), involving aggravated outrage of modesty under s 354(2) of the Penal Code (Cap 224, 2008 Rev Ed) – an offence which has the same prescribed maximum imprisonment term as the ss 5 and 6 corruption offences. It broadly comprises four steps:[35]

(a) Step 1: Identify the significant offence-specific factors which are relevant in the case.

(b) Step 2: Classify the offence into one of four sentencing bands based on the number of offence-specific factors present. Each band corresponds to an indicative starting point sentence. The proposed bands are as follows:

Band	**Offence-specific factors**	**Starting Point Sentence**
1	Less than two	Fine
2	Two or more	Imprisonment of up to one year

33 Prosecution's Written Submissions (Kaur) at para 40(d).

34 Prosecution's Written Submissions (Tan), at footnote 108.

35 Prosecution's Written Submissions (Tan), at para 34 and Annex A.

3	Four or more	Imprisonment of one to three years
4	Six or more	Imprisonment of three to five years

In exceptional cases, the court may decide on an indicative starting point which falls outside the band, although cogent reasons should be given in such a case.

(c) Step 3: Adjust the indicative starting point sentence to account for offender-specific factors, such as remorse or criminal antecedents.

(d) Step 4: Further adjust the sentence to take into the account the totality principle where an offender faces multiple charges, to ensure that the global sentence is not crushing.

Drawing upon the cases which I have summarised at [99] above, 11 offence-specific factors were put forth by the Prosecution.

107 One fundamental premise of the proposed approach is that each offence-specific factor listed above carries somewhat similar (if not equal) weight. The emphasis is more on the number of factors present, and less on the quality of each of the factors present. However, in the unique context of corruption offences which encompass a wide range of misconduct, the premise simply does not hold true. The variation in each factor's importance is wide, and is also dependent on the context and the interplay of the factors. I will illustrate with one example. As discussed above, in cases involving public sector corruption, custodial sentences are the norm. Therefore, one factor put forth by the Prosecution, the triggering of the public service rationale, is a single but weighty consideration. However, the proposed framework treats the public service

rationale as just another offence-specific aggravating factor to add to the count, instead of recognising the wholly different complexion public sector corruption cases have. Even if there are no other factors to add up to "two or more", concluding that the starting point sentence should be a fine would be too hasty. Viewed in light of precedent cases which establish the norm of custodial sentences in cases of public sector corruption, the problem becomes clear.

108 In sum, it seems to me that the Prosecution's proposed sentencing band approach, with its emphasis on the number of offence-specific factors, disregards the weight and quality of such factors which are particularly important in corruption offences. This concern is not adequately addressed by the caveat that in exceptional cases, the court may depart from the indicative starting point. Even if I had considered it appropriate to adopt a general sentencing framework, *this* framework would not be appropriate. It may well be that an appropriate approach would be to formulate specific sentencing frameworks applicable to the various contexts in which corruption occurs, in line with and in furtherance of the effort in *Ding Si Yang*. In the present cases before me, the overarching context is that of corruption involving foreign public officials. However, given the scarcity of corruption cases involving foreign public officials, it may be premature to craft a framework for this specific context.

The appropriate sentences

109 Having set out the approach to sentencing of corruption offences under ss 5 and 6 of the PCA, I now apply it to the facts of the two cases before me, and address the contentions by the parties.

Tan

110 At the outset, following from the discussion above regarding the corruption of foreign public officials, Tan's case should not be classified as one of private sector corruption. Tan, in giving gratification to Owyong *for the benefit of APMM officers*, has triggered the relevant policy considerations as discussed above at [85(b)]–[85(d)]. Contrary to Tan's submission that a fine is the appropriate punishment for him, I agree with the District Judge (albeit on a different basis) that a custodial sentence is appropriate. I now turn to the arguments in relation to the other specific findings by the District Judge.

Tan's knowledge of Owyong's connection with APMM

111 Tan's SOF, which Tan had admitted to without qualification, states at paragraph 3, "[t]hrough [Tan's] dealings with Owyong, he knew that Owyong was able to pass monies to APMM officers so that they do not detain or find problems with ... vessels". However, in written submissions, Tan argued that he lacked "personal knowledge about Owyong's alleged connections with the [APMM]", and his knowledge of Owyong's reputation as a "fixer" was entirely based on hearsay.[36] This submission flew in the face of the unequivocal statement in Tan's SOF to the contrary. Indeed, when this was put to Tan's counsel on appeal, he confirmed that Tan was not intending to qualify his SOF, and rightly did not pursue the point.

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36 Tan's Written Submissions, at para 7.

Facts relating to the 1st TIC charge

112 Tan argued on appeal[37] that the facts set out in paragraph 5 of his SOF were inaccurate, and that he had offered a differing version of those facts in his mitigation plea before the District Judge.[38] In the main, this version included the claim that the two vessels being the subject matter of the 1st TIC charge were never detained, which came to light by way of letter from the Marine Department of Malaysia,[39] and that one Mr Luc had instructed Tan to hand S$5,000 (not S$10,000 as was in the charge) to Owyong.

113 Once again, it bears repeating that Tan's SOF was admitted to without qualification by Tan. In the SOF, it states incontrovertibly that Tan was worried about these vessels being detained, he knew that Owyong could resolve the problem, and he therefore gave Owyong the S$10,000 for the APMM's officers' benefit as inducement. I note that the 1st TIC charge sheet stated that these vessels were owned by Viet Hai Shipping and Real Properties Corporation,[40] but Tan's SOF[41] states that they were Tan's vessels (and this is reproduced as such in *Tan Michael* at [8]). However, the inconsistency fades in relevance in the face of Tan's admission in his SOF that he wanted to secure the release of the vessels in any event. The fact of S$10,000 being the gratification sum as inducement for the vessels' release also formed the subject matter of the 1st TIC charge which Tan had admitted to and consented to be taken into consideration for the purposes of sentencing. Furthermore, even if the vessels were not in fact

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37 Tan's Written Submissions, at para 6.

38 Record of Proceedings in Tan's case ("Tan's ROP") pp 1068–1070, paras 21–27.

39 Tan's ROP p 1070, para 26; pp 1176–1177.

40 Tan's ROP, p 9.

41 Tan's SOF, at para 5.

detained, it remained the *purpose* of Tan's payment to bribe APMM officials for their release.

Effect of the 1st TIC charge at sentencing

114 Related to this was another of Tan's submissions that the District Judge was incorrect in law and fact to rely on the facts of the 1st TIC charge.[42] In reliance on the doctrine in *Chua Siew Peng v Public Prosecutor* [2017] 4 SLR 1247 (at [84]) ("*Chua Siew Peng*"), the legal challenge was that uncharged offences cannot be considered in sentencing unless they bore a sufficient nexus to the proceeded charge. This submission is mistaken. It is trite that the effect of taking into consideration outstanding offences is to enhance the sentence that would otherwise be awarded (*Public Prosecutor v Mok Ping Wuen Maurice* [1998] 3 SLR(R) 439 at [19]), and this is especially where they show persistence and recalcitrance in offending (see, *eg*, *Public Prosecutor v N* [1999] 3 SLR(R) 499 at [19]). This was clearly the case here, where there were similar *modi operandi* in the 1st TIC charge and the proceeded charge reflecting an escalation of offending behaviour.

115 There was also a factual challenge, that the District Judge was incorrect to state that Tan had "every confidence" that Owyong could secure the detention of the *Aquatera07* (*Tan Michael* at [26]), because Tan's belief in Owyong's abilities was mistaken. The two vessels in the 1st TIC charge were never detained, and hence Owyong had no role in their "release". In my judgment, such a contention does not detract from the fact that Tan *did* believe, at that time, that Owyong had been successful in the incident giving rise to the 1st TIC charge, and that subsequently giving gratification to the APMM officers through

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42 Tan's Written Submissions, para 24–31.

Owyong would in all likelihood induce the APMM's detention of the *Aquatera07*. The fact that Tan realised he had been mistaken, after the fact, carries little weight.

Tan's motivations

116 Tan alleged that the District Judge erred in finding (at [24]) that he "wanted to create a non-level playing field for himself, an unfair advantage so to speak … when his competitors would be in conflict", when there were no facts adduced to explain what the "unfair advantage" was, or how Tan could create the "non-level playing field".[43] Tan argued that there were no facts to support Tan being in any position to benefit or conquer the market, because Dynamix was a small industry player.[44]

117 In my judgment, it is important to appreciate that the District Judge's inferences were in relation to Tan's *motivations*, and not the *actual* advantages he reaped from his corrupt transaction. This is clear from the finding at [24] of *Michael Tan* that Tan "*wanted* to" [emphasis added] gain an unfair advantage by creating conflict between his competitors, leading to the conclusion that "[Tan] was motivated not just for his self-interest but also by malice". Hence, even if I accept that Dynamix's small market share or other circumstances rendered it unable to benefit or "conquer the market", it would not undermine the finding as to Tan's motivations, which can be inferred from paragraph 6 of Tan's SOF. I am therefore of the opinion that the District Judge did not err in this regard.

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43 Tan's Written Submissions, para 21–22.

44 Tan's Written Submissions, para 23.

Quantum of gratification involved

118 In terms of quantum of gratification involved, Tan had argued that only a gratification sum of S$1,500 could be taken into account, being the sum involved in the proceeded charge less the amount that Owyong returned to Tan. I am unable to agree with such a view. Tan is charged for corruptly giving a gratification of the full S$10,000 to Owyong for the benefit of APMM officers, and it was this amount which he fully intended to transmit to those officers. Although the District Judge was not entirely clear about this, it seems to me that she recognised that this full sum should be taken into account (at [31] and [36] of *Michael Tan*). I am also of the view that the amounts involved in the TIC charges (S$20,000 including the promised sum) can be considered in the sentencing court's exercise of its discretion to accord the TIC charges due weight.

Initiation of the transaction and Owyong specifying the gratification quantum

119 The Prosecution asserted that the District Judge gave insufficient weight to Tan initiating the transaction because she "gave [Tan] credit" for not having suggested the gratification amount of S$10,000.[45] I do not think the District Judge erred in this regard. *Tan Michael* at [34] merely recognised the fact that, as reflected at paragraph 6–7 of Tan's SOF, there was a prior discussion between Tan and Owyong, Tan then "broached the subject of sabotaging his competitors" and in response Owyong asked for S$10,000 (as opposed to Tan suggesting the sum). Due recognition was given to the fact that "[Tan] did initiate the transaction", but the District Judge also rightly appreciated how the

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45 Prosecution's Written Submissions (Tan) at para 79–80.

discussion developed between Tan and Owyong, as per the unique facts of the present case borne out in Tan's SOF.

Whether confidence in a strategic industry was undermined

120 The Prosecution argued[46] that the District Judge had erred in declining to find that Tan's actions undermined confidence in Singapore's strategic industries – the port and maritime industry – because the *Aquatera07* was never detained by APMM (see [36] above). The Prosecution relied on the observations in *Heng Tze Yong* that this aggravating factor targeted "any corrupt act which would occasion a loss of confidence in a strategic industry" (at [39]), and *Romel* (at [51]) that "the potential loss of confidence in the maritime industry" in that case was an aggravating factor. The Prosecution submitted that it would be "fortuitous" if an accused person whose actions seek to undermine a strategic industry, but ultimately fails, is treated more leniently than another who succeeds.[47]

121 In my view, it is important not to confuse the considerations of harm and culpability. Where the offender seeks to undermine a strategic industry, or knows that such a result will in all likelihood result if he is successful but proceeds nevertheless, that goes to his culpability in offending. Where actual or potential harm results, that is taken into account as well. In the present case, Tan wanted to induce the APMM officers to exercise their powers of detention, notwithstanding that such an exercise would be illegitimate. That goes to his culpability, and is a factor which the District Judge recognised at [23] of *Tan Michael*.

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46 Prosecution's Written Submissions (Tan), at para 67–68.

47 Prosecution's Written Submissions (Tan), at para 67.

122 As for the aspect of harm, the question is whether potential harm to the port or maritime industry could be said to have been caused. The offender in *Romel*, an employee responsible for inspection of vessels seeking to enter an oil terminal, had not only accepted gratification from the ship-master in exchange for omitting the vessel's defects in his report, he had also then omitted to report those defects. This was what gave rise to the potential loss of confidence in the maritime industry in that case. However, in the present case, not only was the *Aquatera07* not detained, but Tan's SOF does not conclusively establish that the APMM officers were eventually in receipt of any gratification. It is not clear whose pocket the unreturned S$1,500 eventually reached, for it was merely Owyong's word that it was used for fuel costs of the APMM officers.[48] Given the extent of the admitted facts, I am in agreement that the District Judge was correct in recognising that there was no potential undermining of Singapore's port and maritime industry.

Whether offending was persistent or sustained

123 The duration of offending is a generally relevant sentencing consideration, as reflective of how determined the offender is, and is tied to the recalcitrance of the offender and the need for specific deterrence (*Logachev* at [59]). Repeatedly committing a pattern of offences without any sign of contrition is indicative of a hardened offender (*Public Prosecutor v Fernando Payagala Waduge Malitha Kumar* [2007] 2 SLR(R) 334 at [43], cited in *Logachev* at [59]).

124 The District Judge was of the opinion that there was no sustained and persistent offending (see above at [38]). In this regard, I agree with the

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48 Tan's SOF at para 10.

Prosecution that it was wrong to infer that Tan, in committing the offences two years after learning of Owyong being a "fixer", showed any "restrain[t]". The fact that he had not offended during those two years, and even initially refused Owyong's offer to pay APMM officers RM100,000 to secure the release of the *Vitology* in 2015, does not reveal "restraint". To say so is speculative, and more importantly, fails to recognise that such a fact is merely neutral.

125 As for whether the offending was "persistent" or "sustained", such an assessment is one of *degree*. It was not wrong for the District Judge to state that three offences were "not numerous", and that his conduct could not be characterised as "extremely reprehensible", because such evaluations are ultimately relative.

Whether the length of the sentence appropriate

126 I now turn to the length of the sentence. Two related District Court cases involving the bribery of foreign public servants were brought to my attention by Tan. These are *Public Prosecutor v Chew Hoe Soon* District Arrest Case No 916888 of 2017 & Ors (24 August 2018) and *Public Prosecutor v Tok Teck Hoe* District Arrest Case No 916950 of 2017 & Ors (24 August 2018). In both cases, the offenders had pleaded guilty.

127 The facts were as follows. Chew was the owner of an oil trading business which chartered ships, barges and boats for its business. Tok was his employee. Sometime in 2011, Chew was informed by a crew member of one of his vessels that one Mohamad Sulhan Bin Zainon ("Sulhan"), a Maritime Commander of the APMM, wanted to investigate that vessel. Sulhan asked Chew to meet him in Malaysia, and at the meeting, requested Chew to give him S$2,000 per month in order for the APMM to refrain from conducting checks on Chew's vessels for the offences of operating without the required permits and licenses. On 40

occasions over more than 3½ years, Chew gave Sulhan a total of S$86,000. Tok helped Chew by making the arrangements for the payments.

128 Further, sometime in December 2012, one "Bakar" called Chew to arrange for a meeting. "Bakar" was an officer of the Royal Malaysia Customs Department, whose duties included investigating into customs offences such as the purchase and smuggling of subsidised oil. In fact, Chew's oil trading business had engaged in purchasing subsidised oil from suppliers in Malaysia. At the meeting, "Bakar" asked Chew for monthly payments, in exchange for "Bakar" refraining from conducting customs checks on Chew's vessels engaged in customs offences. They negotiated on the amount and agreed on S$1,200 per month. On five occasions for over a year, Chew paid "Bakar" a total sum of S$6,000.

129 There were 45 charges under s 6(*b*) PCA against Chew, with nine charges proceeded with while the remaining 36 were taken into consideration for the purpose of sentencing. In addition, there was one proceeded charge under s 177 read with s 109 of the Penal Code (Cap 224, 2008 Rev Ed). The total amount of gratification involved was S$92,000. Chew's sentences for his s 6(*b*) PCA charges ranged from six weeks to 20 weeks of imprisonment. In total, Chew's aggregate sentence was 38 weeks' imprisonment (which included a consecutive two-week custodial sentence for the Penal Code charge).

130 As for Tok, there were 38 charges under s 6(*b*) read with s 29(*a*) of the PCA against him, with 8 charges proceeded with and 30 being taken into consideration for the purpose of sentence. He was involved in dealing with S$80,000 of the bribe amounts. Tok was sentenced to 24 weeks' imprisonment, with the individual sentences ranging from six weeks to 12 weeks' imprisonment.

131 I note that in its submissions on sentence, the Prosecution pressed for individual sentences of three to four months' imprisonment for Chew, with a global sentence of nine to 12 months' imprisonment. As for Tok, the Prosecution submitted that the sentences should range from two to three months, with a total sentence of six to eight months' imprisonment. In doing so, the Prosecution relied on factors which included the corruption of foreign public servants, abuse of authority, difficulty in detecting the offences, sustained and persistent offending, high amount of gratification and the high degree of premeditation in the commission of the offences.

132 As I understand, there is no appeal by the Prosecution against the decisions. Having regard to the sentences in these cases, and the Prosecution's sentencing positions in them, I find the Prosecution's contention that the sentence against Tan should be 20 months' imprisonment unsupportable. In particular, taking a holistic view of the facts in Tan's case compared to the cases involving Chew and Tok, Tan's culpability is lower, and the resulting consequences (both harm and benefit) are of a lower degree. As such, I am of the view that an appropriate sentence for Tan should be lower than those imposed on Chew and Tok of 36 weeks and 24 weeks' imprisonment. That said, unlike Chew and Tok, Tan initiated the offences, and his motivations included both self-interest and malice. Therefore, any further reduction of the sentence of four months' imprisonment would not be appropriate. Based on the facts and circumstances of Tan's case, I do not find the sentence either manifestly excessive or inadequate.

Whether an additional fine should be imposed on Tan

133 Next, I deal with the issue of whether a fine of S$8,500 should be imposed on Tan, in addition to the term of custody, to disgorge the bribe money

that was returned to him. The District Judge had deemed such a fine unnecessary, as the returned sum was Tan's own money, and was not the benefit from any criminal conduct. On appeal, relying on the authority of *Public Prosecutor v Goh Chan Chong* [2016] SGDC 210 ("*Goh Chan Chong (DC)*"), upheld on appeal in *Goh Chan Chong v Public Prosecutor* Magistrate's Appeal No 9115 of 2016 (17 April 2017) ("*Goh Chan Chong (HC)*"), the Prosecution argued that the fine should be imposed, as the fortuitous return of the bribe money to Tan did not strip it of its tainted character.[49]

134 In Singapore, the courts have recognised that one purpose of imposing a fine in addition to an imprisonment term is to "disgorge the offender's substantial benefit from his offending" (*Ding Si Yang* at [109]), or to "disgorge any profits which the offender may have made from his illegal behaviour" (*Poh Boon Kiat v Public Prosecutor* [2014] 4 SLR 892 at [77], citing *Public Prosecutor v Lim Teck Chye* [2004] SGDC 14 at [376]). It is clear that the purpose of disgorging such benefits is to deter offenders.

135 However, on the facts of *Ding Si Yang*, the court observed that there was no evidence that any match was fixed or that the offender benefited financially as a result of his offences. This had been one of the reasons given by the lower court in its refusal to award an additional fine, the other reason being that the imprisonment term was a sufficient deterrent (*Ding Si Yang* at [26]). The appellate court also added that if the Prosecution could show that the offender derived any benefits from his criminal conduct, the Prosecution could proceed under the CDSA, as s 5 of the PCA is listed under the Second Schedule of the CSDA as a serious offence for which confiscation is a possible recourse (*Ding*

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[49] Prosecution's Written Submissions (Tan) at paras 83–84.

Si Yang at [110]). The court concluded that the trial judge did not err in law by failing to impose additional fines on the offender, and added at [111] as follows:

> … [T]his should not be taken to mean that fines should never be imposed on match-fixers in appropriate circumstances even where no match is actually fixed and there is no evidence of direct or indirect financial gain on the part of an accused arising from the offences he is convicted of …

136 Next, it is necessary to go into some detail regarding the facts in *Goh Chan Chong (DC)*, which the Prosecution relied on as precedent for imposing a fine to disgorge returned bribe moneys. In that case, the offender wanted to invest in one property development developed by United Engineers Developments Pte Ltd ("UED"). As there was great interest in the development, and as units would be sold at progressively higher prices, the offender was aware of the need to get to the development launch early to select good units at a good price. However, UED had a policy of sending invitation cards to a select group of people. These invitation cards allowed their holders to gain priority entry into the launch without queueing, so they may choose their desired units. The offender thus repeatedly telephoned one Suhaimi of UED to insist on being invited. As a result, Suhaimi eventually provided invitation cards to the offender and his associates. On the day of the launch, the accused and his associates did gain such priority entry by virtue of their invitation cards, and purchased eight units in total. All units were purchased at the lowest price available at the launch, meaning the offender and his associates were among the first buyers to enter the launch. The offender thereafter gave Suhaimi two sums of S$50,000 each, as gratification for the invitation cards. Suhaimi, feeling uneasy with receipt of the money, later unilaterally returned the combined sum of S$100,000 to the offender (at [33]).

137 Of the eight units purchased, six were sub-sold, while the remaining two units were retained by the offender (with one being occupied by his family) (at [182]). While there was some uncertainty as to the precise amount of direct or indirect profit to the offender from the six units' sub-sales, it was at least S$1.1 million, and may have been up to an estimated S$1.69 million (at [181], [184]).

138 The Prosecution in *Goh Chan Chong* had submitted for a total fine of S$100,000 in addition to the global custodial term of 12 weeks imposed, to disgorge the offender of his "unexpected windfall" when his bribes were refunded to him. The District Judge accepted the Prosecution's submission and imposed the fine, for the following reasons:

(a) While the offender clearly benefitted from the bribe moneys being returned to him after the offence was committed, it was unclear whether this money could be the proper subject matter of any CDSA proceedings to be confiscated, as "benefits *derived from* criminal conduct" [emphasis in original] within the meaning of the Act (at [246(a)]);

(b) Even though the bribe money may not constitute direct benefit of his offences, their return effectively increased the offender's net gain, by reducing his "outlay" by S$100,000 (at [246(b)]); and

(c) There was no issue of double-counting in sentencing, because the returned sum was only considered in the context of imposing the fine, and not in the court's decision on the appropriate custodial term (at [247(b)]).

The decision was upheld on appeal in *Goh Chan Chong (HC)*, with no written grounds for its decision being released by the appellate court.

139 Having considered the matter, I see no compelling reason to disturb the District Judge's decision on this issue. The facts of *Goh Chan Chong (DC)* differed in one crucial aspect – Goh *did* make a direct profit from his corrupt acts, in the form of profits from the sub-sales and the value of the two remaining units he retained. It is unclear why the Prosecution in that case chose to submit for a fine based on disgorgement of the returned bribe amount (as opposed to an amount tied to the profits made through the acquisition of the relevant units), and the reasons for appellate court's decision are not clear given the lack of a written judgment.

140 The Prosecution additionally argued that, had the money not been returned from Owyong to Tan, it could have been disgorged from Owyong as a penalty under s 13 of the PCA anyway. However, this does not justify the Prosecution's proposed "workaround" of imposing a fine on Tan. Bribe moneys are confiscated from recipients under s 13 PCA because they would be an illegitimate gain otherwise. The factual scenario is entirely different where the moneys are returned. In any event, and most importantly, I am of the view that a custodial sentence imposed on Tan, without any additional fine, is sufficient punishment, and the additional fine pursued by the Prosecution is unnecessary to achieve the appropriate deterrent effect.

Kaur

141 I now turn to the issues raised on appeal by the parties specifically in relation to Kaur's case.

Judicial mercy and the mitigating effect of Kaur's illness

142 As previously alluded to, Kaur suffered from epithelial ovarian cancer ("EOC"). Dr Tay Eng Hseon ("Dr Tay"), Kaur's oncologist from Thomson Women Cancer Centre, had described her condition in several medical reports as a rare form of EOC which was usually highly fatal. While her EOC was currently in remission, if the cancer should relapse, it would usually be highly fatal.[50] Kaur was assessed to have a low chance of relapse, in the region of 10% to 15%.

143 Before the District Judge, Kaur's counsel relied on various pieces of medical literature to submit that imprisonment would exacerbate her medical condition, as chronic stress played a prominent role in cancer growth and metastasis. As the Prosecution disputed these claims, a Newton hearing was convened. Dr Tay and Dr Yeo Kuang Ling ("Dr Yeo") of the Singapore Prisons Service ("SPS") were called to give evidence on the matter, and key aspects of their evidence are set out in full at [33]–[34] of *Gursharan Kaur*. I summarise them as follows:

(a) Dr Tay stated that it was impossible to conclude if the stress of imprisonment would exacerbate Kaur's cancer, or increase risk of remission, due to research limitations.

(b) Dr Tay disagreed with Kaur's assertion that cancer would be more likely to recur if she were to be imprisoned.

(c) Dr Tay stated that the key would be to ensure that Kaur would be provided with strict medical follow-ups, investigations and expertise

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50 Record of Proceedings for Kaur's case ("ROP Kaur"), at pp 1222–1226.

during imprisonment. This was so that she would have the same chance of detecting a salvageable recurrent cancer as that of a similar patient with her condition outside of prison.

(d) In this regard, Dr Yeo confirmed that everything necessary would be done to ensure an acceptable standard of medical care and treatment would be accorded to Kaur during her incarceration with the SPS. Further, SPS would work closely with Dr Tay to obtain her medical history, and determine her required follow-up care and treatment. In particular, she would be sent to the National Cancer Centre, where oncologists have the necessary expertise to handle her condition, if and when required. Such expertise would not be inferior to that available in the private sector. The full measures SPS will take were detailed in a letter, Exhibit P1.

144 The District Judge concluded at the close of the Newton hearing that the conditions to invoke judicial mercy were not met. Based on the above evidence, Kaur's cancer was in remission, and so her condition was not terminal. Incarceration would not lead to an endangerment of her life, and she would not be deprived of the care needed to enhance prospects of her recovery (*Gursharan Kaur* at [39]). The District Judge was also of the view that Kaur's medical condition provided no basis for a sentencing discount, as the evidence showed that she would not face more than the usual hardships accompanying a prison sentence (*Gursharan Kaur* at [40]).

145 Kaur submitted on appeal that the District Judge had erred in holding that her illness did not warrant the exercise of judicial mercy or mitigating

weight being assigned.[51] The thrust of her argument was that the lower court had failed to appreciate the risk of the cancer's relapse in prison, given the stressful conditions in prison.

146 To reiterate, it is trite that judicial mercy is an exceptional jurisdiction, only to be exercised "in cases where the offender is suffering from a terminal illness or when a custodial term would endanger the offender's life" (*Chua Siew Peng* at [101], citing *Chew Soo Chun v Public Prosecutor and another appeal* [2016] 2 SLR 78 at [22]).

147 With this test in mind, I am satisfied that the District Judge was correct in declining to apply the doctrine of judicial mercy in this case. I accept that while Kaur's condition is in remission, there is still a risk of relapse. I also accept Kaur's point on appeal that the medical uncertainty with regard to the stress in prison and the risk of her cancer's recurrence does not necessarily mean that there is no risk posed by being in prison.[52] That being said, the sentencing court must be satisfied that relevant conditions are met before the exception is made and judicial mercy exercised. With the evidence that is before me, there is nothing to show that imprisonment will risk exacerbation or recurrence of Kaur's medical condition. There *is* evidence, however, that Kaur will be given at least as good a chance of detecting any salvageable recurrent cancer in prison as compared to outside of prison. The SPS has confirmed having the appropriate and necessary measures in place to provide medical care and treatment to Kaur as required. The high threshold for the invocation of judicial mercy is not surmounted.

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51 Kaur's Written Submissions at paras 5–18.

52 Kaur's Written Submissions at para 15.

148 For similar reasons, I reject Kaur's argument that her medical condition warranted a sentencing discount. Given the evidence set out above, it is apparent that a jail term would not present "a risk of significant deterioration in health or a significant exacerbation of pain and suffering" to Kaur: *Chua Siew Peng* at [102].

Whether Kaur was a foreign public official

149 Kaur argued that she was merely a civilian employee of the US Navy, and thus not a public official, public officer or a public servant of the US Navy. While Kaur might be a civilian employee, and not one in the uniformed service of the US Navy, this was no reason to exclude a finding that the aggravating factor of corruption of a foreign public official is triggered. As I mentioned above, the definition of "foreign public official" within the UNCAC includes a person exercising a public function for a foreign country. I have no doubt Kaur was in such a role. Further, in s 2 of the PCA, an agent is defined merely to include "a person serving the Government", while s 8 of the PCA provides for a presumption of corruption where "a person in the employment of the Government or any department thereof" is involved. While the Government within the PCA refers to the Government of Singapore, my main point is that the nub of the foreign public sector corruption should be the involvement of a person in the employment of a foreign government. It does not matter if the person is a civilian employee as opposed to one in the uniformed service. Therefore, Kaur's case falls within the category involving corruption of foreign public officials, which is an aggravating feature.

Transnational element

150 The District Judge had found a "transnational character" in Kaur's offences, on the basis that "[Kaur's] offences were juxtaposed within a wider

conspiracy involving GDMA and officials in the US Navy" (*Gursharan Kaur* at [80]). The facts pertaining to this wider conspiracy were included in Kaur's SOF, and summarised in this judgment above at [17]. The Prosecution, on appeal, argued along similar lines – that Kaur's offence was "situated within" the wider conspiracy involving GDMA and other officials in the US Navy.[53] Kaur argued on appeal that her offences did not involve any transnational element, as there were no facts to support the assertion that she had acted in concert with parties in other jurisdictions for the purpose of perpetrating offences in Singapore.[54]

151 I am inclined to agree with Kaur on the specific point that Kaur cannot be said to have offended as part of the wider conspiracy involving the other officials of the US Navy. The present case is unlike the situation in *Law Aik Meng* (see [99(h)] above). There is no basis to say that Kaur participated in some cross-border scheme that was so daring as to have targeted Singapore. The facts admitted do not disclose that she had any awareness of the corruption of the other US Navy officers forming Leonard's bigger scheme. It would hence not be correct to ascribe higher culpability to her by reason of this.

152 Insofar as the present offences concern the US Navy, the aggravating factor of the corruption of a foreign public official is applicable (see [149] above), and takes into account this transnational connection. The fact that Kaur's corruption implicated a foreign government would already be fully factored in (as opposed to an additional element, *eg*, of her participation in an international syndicate or any hurdles in the prosecution of such offences).

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53 Prosecution's Written Submissions (Kaur) at para 40(d).

54 Kaur's Written Submissions at paras 74–81.

Further recognition of the transnational element may amount to double-counting.

Degree of premeditation

153 The District Judge had found that Kaur had exhibited a high level of premeditation, in reliance on Kaur's efforts to conceal her illicit disclosure of non-public US Navy information to Leonard. These efforts included:[55]

(a) transmitting the information to Leonard via compact disks;

(b) scanning documents and thereafter forwarding them to him, using her personal address under her married name; and

(c) passing photocopies of US Navy documents to Leonard's driver at an agreed location.

154 While the District Judge accepted that they were unsophisticated acts, they were sufficiently effective such that her misdeeds were not discovered for a long period of time (*Gursharan Kaur* at [78]). On appeal, Kaur insists that she did not engage in any elaborate scheme, unlike that at play in *Logachev*.

155 Having examined the case law in relation to this factor (see [99(e)] above), I do not think the District Judge erred. Of course, the degree of sophistication here is not at the high end of the spectrum. That does not detract from the fact that she had taken careful steps to conceal her illicit disclosure to Leonard, as enumerated above. These steps effectively sought to eliminate any paper trail or electronic footprint of her correspondence to Leonard, which, in

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55 Kaur's SOF at para 23.

the context of offences involving such illicit disclosure, were important steps to avoid detection. It also revealed that the offences were premeditated.

Abuse of trust and authority, quantum of gratification and degree of initiation

156 Although these were not points canvassed before me on appeal, I discuss these factors as well to arrive at a holistic view on the appropriate sentence.

157 In respect of Kaur's abuse of trust and authority, the District Judge had held that Kaur, as a Lead Contract Specialist, stood in a "position of substantial trust, responsibility and accountability in relation to … the US Government", and her offences displayed a "flagrant abuse of trust" (at [76]). I am in agreement with the District Judge on these points. The facts at [14] above reflected the extent of trust vested in her. Kaur had access to confidential information regarding ship-husbanding contracts by virtue of her senior position as Lead Contract Specialist, and she breached such confidence when she disclosed such information to Leonard in exchange for gratification. Going further, she behaved as GDMA's "insider" within NAVSUP FLC Singapore, furthering its business interests as far as possible. This included covertly permitting Leonard to have a say in matters where GDMA's interests may be implicated. This was a serious breach of trust on Kaur's part.

158 Regarding the quantum of the gratification involved, the District Judge held that the 4th and 6th charges involved a high amount of gratification – S$50,000 (at [82]). I agree, and further recognise two points:

(a) In respect of the 6th charge, the gratification enabled Kaur to purchase the unit, which she subsequently sold for a profit of S$267,000.

(b) In respect of the 9th charge, I make an observation that *Romel* does not create a rule that bribes less than S$30,000 are low amounts, and in any event *Romel* was a case of private sector corruption (see the discussion at [99(a)(iii)]–[99(a)(iv)] above). The bribe amount must be viewed in context. Leonard agreed to pay for Kaur's room tab by arranging for her stay to be charged to his credit card. Kaur thereafter charged "luxury spa treatments and resort dining" to her room, which were eventually paid for by Leonard. Considered in this context, the total bill of S$14,977.74 reflected a sizeable gratification to Kaur as it started as a blank cheque to her to spend as she wished.

159 I turn to the degree of initiation of the corrupt transactions, which appears not to have been addressed by the District Judge or by the Prosecution on appeal. It is unclear who initiated the arrangement between the parties – while Kaur's SOF stated that on numerous occasions from 2006 to 2013, "[Kaur] initiated disclosure of non-public information of the US Navy to Leonard" (see above at [19]), this is possibly pursuant to the pre-existing agreement between the parties. However, it is clear that Kaur prompted Leonard into giving her gratification in relation to the 6th and 9th charges (see [24] and [26]–[27] above). In relation to the 9th charge, it bears repeating the extent of her prompting. Kaur made the reservation booking first, then made her first request to Leonard for payment, knowing he would agree to foot the bill. Subsequently, Kaur even contacted Leonard a second time, essentially to remind him to handle payment. After the call, to prompt Leonard to make payment, Kaur made further disclosure of non-public US Navy information to Leonard to confer him the benefit of preparing a response to her superior's concerns in advance. This is clearly aggravating.

Whether the length of sentence is appropriate

160 Having considered the factors at play, I again refer to the sentencing cases of Chew and Tok. On all counts, Kaur was far more culpable than Chew and Tok. While Chew and Tok were givers of the bribes *solicited from them*, Kaur was the foreign public official who entered into an arrangement which lasted from 2006 to 2013 to provide non-public information to Leonard for reward, and who actively solicited the bribes in the 6th and 9th charges. As stated at [22] above, Kaur gave information in relation to 16 contracts, out of which GDMA bid for 14, and was awarded 11 contracts worth a total of about US$48 million.

161 Based on all the facts and circumstances, especially the specific aggravating features discussed in [149]–[159] above, the individual sentences, as well as the global sentence of 33 months' imprisonment, imposed on Kaur cannot be said to be manifestly excessive. On the contrary, I am of the view that the sentences are manifestly inadequate warranting appellate intervention. While I acknowledge that Kaur had voluntarily disgorged the gratification and had pleaded guilty to the charges, the sentences do not reflect the severity of the offences.

162 Accordingly, I allow the Prosecution's appeal. I impose 16 months' imprisonment for the 4th charge (gratification of S$50,000 which was received in the context of the arrangement between the parties), 19 months' imprisonment for the 6th charge (gratification of S$50,000 which was actively sought by Kaur to be used to buy a property), and 14 months' imprisonment for the 9th charge (gratification of S$14,977.74 which Kaur actively sought, and even provided information to Leonard to prompt him to agree to pay the gratification). The five-month imprisonment term for the 7th charge remains.

The global sentence, comprising the sentences for the 4th, 6th and 7th charges which are to run consecutively, is 40 months of imprisonment.

Conclusion

163 By the above, I dismiss the appeals in Tan's case, as well as Kaur's appeal. I allow the Prosecution's appeal against Kaur's sentences (and impose the sentences set out at [162] above). Finally, it leaves me to thank the *amicus* for his assistance, and all parties for their detailed submissions.

Hoo Sheau Peng
Judge

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Suresh s/o Damodara, Clement Ong and Sukhmit Singh (Damodara Hazra LLP) for the second accused;
Chew Xiang (Rajah & Tann Singapore LLP) as young *amicus curiae*.