IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 94

Magistrate's Appeal No 9040 of 2015

Between

NICKSON GUAY SENG TIONG

… *Appellant*

And

PUBLIC PROSECUTOR

… *Respondent*

JUDGMENT

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

Guay Seng Tiong Nickson
v
Public Prosecutor

[2016] SGHC 94

High Court — Magistrate's Appeal No 9040 of 2015
Sundaresh Menon CJ
18 February 2016

13 May 2016 Judgment reserved.

Sundaresh Menon CJ:

Introduction

1 This is an appeal against sentence brought by the accused, Nickson Guay Seng Tiong ("the appellant"). The appellant was involved in a tragic road accident that claimed the life of a two-month old infant ("the deceased"). The appellant failed to keep a proper lookout whilst making a right turn at a traffic-light controlled junction and encroached into the path of another car which was travelling in the opposite direction and had the right of way. The other car collided with the side of the appellant's car. The deceased was in the rear passenger seat of the other car and passed away as a result of the injuries sustained during the accident. The Public Prosecutor ("the Prosecution") preferred a charge against the appellant for causing death by a negligent act under s 304A(*b*) of the Penal Code (Cap 224, 2008 Rev Ed). The appellant pleaded guilty and was sentenced by the district judge ("the DJ") to a term of

four weeks' imprisonment as well as a five-year disqualification order. On appeal, the appellant contends that the imprisonment sentence is manifestly excessive and submits that he should be sentenced to a fine instead. He does not contest the disqualification order.

2 The appellant's principal contention is that the death of the deceased was caused at least in part by the "contributory negligence" of the deceased's father, who was the driver of the other vehicle ("the father"). The father failed to ensure that the deceased was secured by an approved child restraint. The appellant contends that the deceased would not have passed on if he had been properly restrained; and that this was a factor he had no control over. He therefore submits that his sentence should be reduced to reflect the fact that he was not the sole cause of the death of the deceased. I preface my consideration of the arguments with a brief recitation of the facts.

The Facts

3 At about 7.54pm on 20 October 2014, the appellant, who was 21 years old at the time, made a right turn at the cross-junction of Ayer Rajah Avenue and North Buona Vista Road. Prior to making the turn, the appellant had been travelling along North Buona Vista Road in the direction of Holland Road. The appellant had obtained his driving licence not long before the accident and a probation plate was displayed on his car. Investigations revealed that the appellant had only driven this car for about five or six days before the accident.

4 Travelling on the same road, but in the opposite direction (towards South Buona Vista Road), was another car driven by the father. There were two passengers in the car. The first was the mother of the deceased ("the

mother"). She was seated in the left rear seat and was cradling the deceased, the second passenger, in her arms. The deceased was being breastfed at the material time.

5 As the father approached the cross-junction, the light was in his favour, the road ahead was clear, and there were no vehicles in front of him. There were also no oncoming vehicles making a right turn into his path. He maintained a speed of about 50 – 60km per hour as he drove into the cross-junction.

6 As the appellant turned right, his car cut across the path of the father's car as it was proceeding through the cross-junction. The father could not stop his car in time and collided into the side of the appellant's car. Both cars surged forward and stopped at opposite ends of the cross-junction. At the time of the collision, the weather was fine, the road was dry, visibility was clear, and traffic was light.

7 After the collision, the mother engaged the assistance of a stranger, who conveyed the deceased and the mother to the National University Hospital ("NUH"). Doctors at the Children's Emergency Unit at NUH ("CEU") attended to the deceased. The deceased was noted to be conscious when he arrived at the hospital. Tests revealed that he had a blood clot on the left side of his brain and emergency surgery was organised to remove it. Tragically, however, the deceased suffered a cardiac arrest during the operation and succumbed to his injuries at 2.55am on 21 October 2014.

8 The autopsy report confirmed that the cause of death was the head injury and that this injury, as well as most of the other internal and external injuries, was consistent with those sustained in a road traffic accident.

9 The front bumper of the car driven by the father was crumpled and had been ripped off. The car driven by the appellant was more badly damaged. The front bumper was ripped off, the front windscreen smashed, and the left side of the body of the vehicle was crumpled and dented.

10 Video footage revealed that the appellant made the turn and drove into the cross-junction without stopping. When the appellant entered the cross-junction, the traffic light was green and in favour of vehicles travelling in the same direction as the father (towards South Buona Vista Road). At the point of impact, the lights had turned amber but the arrow light signal had yet to come on in favour of vehicles turning right. The father therefore had the right of way throughout the entire episode. This much is not disputed.

11 The appellant was charged under s 304A(*b*) of the Penal Code for causing death by a negligent act not amounting to culpable homicide. The negligent act described in the charge was the "failing to keep a proper lookout whilst making a right turn". He pleaded guilty to the charge and the only issue before the DJ was the sentence to be imposed.

The DJ's decision

12 The Prosecution sought a term of imprisonment of at least four weeks and a five-year disqualification order. Counsel for the appellant argued that a custodial term was not warranted and a fine should instead be imposed. The appellant took no issue with the disqualification order. Before the DJ, both sides agreed that the leading authority was the decision of the specially constituted 3-judge bench of this court in *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 ("*Hue An Li*"), but they differed on how the principles enunciated in that case were to be applied.

13 In his decision, which was reported as *Public Prosecutor v Nickson Guay Seng Tiong* [2015] SGDC 99 ("the GD"), the DJ first began by considering the following aggravating factors raised by the Prosecution:

(a) The place of the collision and how the collision occurred: The DJ noted that drivers traversing a cross-junction had to be especially vigilant because it was to be expected that there would be oncoming vehicles. However, the appellant had failed to exercise due care. The fact that the road surface was dry, visibility was clear and traffic flow was light coupled with the fact that the father was not driving in an improper manner suggested that the collision was mainly, if not solely, due to the default of the appellant (at [37]–[38]).

(b) The manner in which the appellant drove through the cross-junction: The appellant did not take the "most basic" precaution of stopping at the cross-junction to wait for the arrow light signal. Instead, he drove into the junction and made a turn without stopping. His act could be likened to that of a driver who speeds across a junction, since the appellant was not supposed to have been traversing the junction either at the speed or in the manner that he did (at [39]–[41]).

(c) The fact that the appellant was a new driver who was driving a new car: The appellant should have taken greater care because he was a new driver who was driving an unfamiliar vehicle. Proper care was called for especially because driving is an inherently dangerous activity (at [43]–[47]).

(d) The extensive harm caused: The DJ considered the severe head and brain injuries suffered by the deceased and the "very extensive

damage" caused to the two vehicles as aggravating factors (at [48]–[52]).

14 The DJ then considered the following mitigating factors advanced by the defence:

(a) The appellant was an inexperienced driver and was handling an unfamiliar vehicle: The DJ did not consider this to be a mitigating consideration. If anything, this called for more care on the part of the appellant (at [54]–[55]).

(b) The appellant's plea of guilt and genuine remorse: The DJ gave the appellant the benefit of the doubt that he had displayed genuine remorse in apologising to the parents of the deceased, and in expressing sorrow and regret. His plea of guilt also spared the parents the agony of testifying in court and having to relive the trauma. Some consideration should be accorded to this (at [56]–[58]).

(c) The appellant's personal circumstances and his clean record: Counsel for the appellant pointed out that he was an entrepreneur and a university undergraduate who held a scholarship. All this heralded a bright future for the appellant, which would be in jeopardy if he was to receive a custodial sentence. The DJ did not find these factors to be mitigating. Nevertheless, the DJ took the fact that the appellant was a first offender into account (at [59]–[62]).

15 Taking into account all the circumstances, the DJ sentenced the appellant to four weeks' imprisonment and a five-year disqualification order (at [63]–[65]).

The arguments on appeal

Appellant's arguments

16 On appeal, counsel for the appellant, Mr Abraham Vergis ("Mr Vergis"), argues that the imprisonment sentence is manifestly excessive and that a fine should be imposed instead. The appellant was not represented by Mr Vergis in the court below. Before me, Mr Vergis raised some new arguments that were not put before the DJ.

17 In particular, Mr Vergis submits that the DJ failed to take account of the fact that the deceased was not properly secured by an approved child restraint as required under r 11 of Road Traffic (Motor Vehicles, Wearing of Seat Belts) Rules (Cap 276) ("Rule 11"). Rule 11 reads as follows:

> **11.**—(1) Where a seat belt is available for the use of a child below 8 years of age who is the rear seat passenger of a motor vehicle to which these Rules apply, no person shall use the motor vehicle unless the child is properly secured by an approved child restraint appropriate for a child of that height and weight.
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> …
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> (3) This rule shall not apply to taxis or buses.

I note that Rule 11 has been superseded by r 8 of the Road Traffic (Motor Vehicles, Wearing of Seat Belts) Rules 2011 (S 688/2011). While a number of changes were introduced, none of them are relevant for present purposes and it does not affect the substance of Mr Vergis's argument. I will therefore continue referring to Rule 11 since it was the provision that was cited and referred to by both parties in argument.

18 At the material time, the deceased was being breastfed by the mother in the left rear seat. Mr Vergis says this constituted a breach of Rule 11. I

pause to observe, parenthetically, that although Mr Vergis used the term "contributory negligence" in argument (he refers, specifically, to "the [father and mother's] *contributory negligence* in failing to ensure that [the deceased] was appropriately secured" [emphasis in original]), I do not think he meant it as a term of act since the doctrine of contributory negligence only applies where a *plaintiff/victim* has, by his own negligence, contributed to the harm he suffers. However, I cannot see how the *deceased* can be said to have been negligent in all this. What Mr Vergis must mean is that there was another negligent act, besides that of the appellant, which contributed to the death of the deceased.

19 Mr Vergis argues that even if the appellant's negligence was the significant cause of the car accident, the parents' breach of Rule 11 was *a cause* of, or *a significant contributing factor* to the serious head injuries that led to the death of the deceased. As a consequence of the failure to properly restrain the deceased, the deceased sustained fatal injuries while his parents, who were wearing seat belts at the time, emerged largely unscathed. Were the deceased properly restrained, Mr Vergis submits, he might well have survived. Mr Vergis submits that every road user has a duty to do his part in abiding by the law to prevent harm from coming to others, whether directly (as a result of their own negligent acts) or indirectly (through their failure to exercise precautions to minimise harm from coming to others in the event of an accident). In conclusion, he submits that the father's failure to ensure that the deceased was in an approved child restraint should be seen as an "extenuating circumstance" that "directly impacts the gravity of [the appellant's] negligence and the level of his personal culpability" and calls for a reduction in the sentence. The DJ's failure to take this into account led him to impose a sentence which was manifestly excessive.

20 Next, Mr Vergis submits that the DJ erred in considering the severity of the injuries of the deceased as an aggravating factor. Mr Vergis accepts that the injuries were serious, but he points out that death is an essential element of the charge. Therefore, treating the severity of the same injuries that led to the death as an aggravating factor would amount to double counting. Mr Vergis also contends that the DJ fell into error when he took into account the extensive damage to the father's car. He argues that something substantially more than "run-of-the-mill vehicular damage that normally accompanies any traffic collision" must be shown in order for the damage caused to the car to be considered an aggravating factor.

21 Lastly, Mr Vergis contends that the DJ placed excessive weight on the fact that the appellant made an immediate right turn without stopping. He argues that the DJ failed to consider that the appellant, as a new driver, had made an honest mistake in assuming that he had the right of way (on the basis that the green light was illuminated in his favour, even though the arrow light signal was not). Mr Vergis accepts that the appellant was clearly negligent, but submits that this was a mistake made by a new driver and should be seen in that light. Furthermore, the appellant was not under any obligation to stop at the cross-junction and wait for the arrow light signal. By law, the appellant was entitled to proceed to make the turn, provided he did so cautiously and with due regard to oncoming vehicles which might have the right of way. Mr Vergis therefore submits that the appellant's negligence should be seen as a failure to keep a proper lookout, as specified in the charge, and not the breach of an absolute prohibition, as the DJ erroneously seemed to suggest in his GD.

The Prosecution's arguments

22 The Prosecution argue that that the DJ did not err in sentencing the appellant to four weeks' imprisonment. They contend that the fact that the deceased was not properly secured is irrelevant to the question of what sentence should be imposed. In addition, they argue that there is no objective evidence before the court that the failure to restrain the deceased contributed in any way to the injuries sustained, and that the appellant, having failed to adduce evidence to this effect, was now advancing a purely speculative argument.

23 The Prosecution further contend that the DJ also correctly took into account the extent of harm caused by the appellant. They also submit that there was no double counting involved because he did no more than impose the starting point of four weeks' imprisonment that was set out in *Hue An Li*. This, they say, shows that the DJ did not enhance the sentence on account of the severity of injuries suffered by the deceased. They also argue that the DJ was also entitled to take into account the damage to the father's car as it served to illustrate the impact caused by the appellant's negligence.

24 Finally, the Prosecution say that the appellant's mistaken belief that he had the right of way is irrelevant. First, there is no evidence of such a mistaken belief. Second, it is not an answer for a driver to say, in response to a charge of negligence, he was mistaken as to his legal duties. The test is simply whether the appellant's conduct fell below the standard of a reasonably competent driver and not whether he was subjectively mistaken as to his right of way.

The issue on appeal

25 The sole issue before me is whether the DJ erred in sentencing the appellant to a term of four weeks' imprisonment. Having regard to the arguments on appeal, I approach the issue by first considering three separate sub-issues:

(a) whether the fact that the deceased was not properly restrained is relevant as a mitigating factor in sentencing ("Issue 1");

(b) whether the DJ erred in taking into account as aggravating factors the serious injuries of the deceased and the damage to the vehicles ("Issue 2"); and

(c) whether the DJ erred in taking into account the fact that the appellant drove into the cross-junction without stopping and by failing to consider the appellant's mistaken subjective belief that he had the right of way ("Issue 3").

After considering these three sub-issues, I will consider whether the DJ had imposed a term of imprisonment which, on the whole, is manifestly excessive.

My Decision

Issue 1: the failure to properly restrain the deceased

Preliminary observations

26 I begin with some preliminary observations. Mr Vergis accepts that the reason the DJ did not consider this argument was because it was not raised in the proceedings below. Because it is a new argument advanced only on appeal, there is very little, if any, evidence before me on whether the failure to restrain

the deceased had a material effect on the eventual injuries sustained by the deceased. Mr Vergis accepts this but he seeks to rely on statistics obtained in an article published on the website of the Automobile Association of Singapore where it is stated that a "properly fitted child restraint system can reduce fatal injuries by up to 75 per cent and serious injuries by 67 per cent" (see Automobile Association of Singapore, "Belt Up for Safety" < http://www.aas.com.sg/?show=content&showview=12&val=268> (accessed 6 May 2016)). He also relies on a newspaper article where Dr Andrea Yeo, a consultant from the CEU, was reported to have said that children might sustain fatal injuries if not properly restrained while travelling in a motor vehicle (see Shaffiq Alkhatib, "His Baby Dies After He Crashes Car", *The New Paper* (4 June 2015).

27 While I accept, as a matter of common sense, that children and infants are better protected when they are in an approved restraint as compared to when they are not (as is the case with adults who use seat belts) the fact remains that there is a lack of evidence on the precise effect of the failure to secure the deceased in a child restraint *in this particular case*. It could well have been that the failure to secure the deceased would not have made any material difference and he would, in any event, have succumbed to his injuries even if he had been in an approved restraint. Mr Vergis submits, in response to this, that this is unlikely because the parents did not suffer any serious injuries and he suggests that the deceased would likewise have survived had he been properly restrained.

28 In my judgment, this is impermissibly speculative. The observed effects of a major car collision on adults restrained in seat belts does not tell me, without the benefit of expert evidence, what the effect would have been on a two-month old infant had he been in an approved restraint. One may have

an intuitive sense on this, but that alone cannot be the basis on which I make an important finding of fact. Hence, if I were to allow Mr Vergis to canvass this point further, I would also have to consider whether to allow further evidence to be taken in order that this question may be determined. But before one comes to the question of further evidence, there is an anterior question, which is this: assuming that if the deceased had been properly restrained, this could have saved his life, can this assumed fact, *as a matter of principle*, operate as a mitigating factor?

29 Undergirding this question is a more fundamental inquiry. In broad terms, the question is this: In the context of criminal negligence under s 304A(*b*) of the Penal Code, can the negligent acts of the victim or of third parties which contributes to the death of the victim have a mitigating effect on the sentence to be imposed an offender? On this question, both the appellant and Prosecution struggled to find any relevant local authority. Mr Vergis points me to various district court decisions which appeared to take into account the negligence of the victim as a mitigating factor in the context of road traffic accidents (see, *eg*, *Public Prosecutor v Lim Yong Han, Gabriel* [2010] SGDC 467, *Public Prosecutor v Tan Yan Yee* [2014] SGDC 35, and *Public Prosecutor v Thein Zaw* [2012] SGDC 59). I do not consider these cases to be of assistance since this particular issue was not thoroughly examined in any of them. The Prosecution, on the other hand, argue that this matter had been decided by this court in *Hue An Li*. While many of the principles discussed in *Hue An Li* will feature in my analysis, I do not consider *Hue An Li* to have decided this specific point. In the light of this, I turn to outline the applicable general principles before considering how the courts in the UK, Canada and Australia have approached this issue. I then examine what our position should be.

The principles at play

(1) Causation

30 Causation is an essential requirement of an offence under s 304A(*b*) of the Penal Code. The negligent act of the offender must have *caused* the death of the victim.

31 Generally, causation consists of causation in fact and causation in law. As explained by the Court of Appeal in *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR(R) 782 ("*Sunny Metal*") at [52] (*albeit* in the context of the tort of negligence), causation in fact "is concerned with the question of whether the relation between the defendant's breach of duty and the claimant's damage is one of cause and effect in accordance with scientific or objective notions of physical sequence." The test is often framed as a counterfactual and the question to be asked is this: but for a particular event (A), would the result (B) have occurred? This is referred to as the "but for test". However, to take the but for test as the sole *indicia* of causation can lead one to draw absurd conclusions. The example provided in *Sunny Metal* (taken from Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 17th Ed, 2003) at para 6-008)) is that of a mother who gives birth to a son who commits murder when he grows up. Applying the but for test, the mother may be said to be a cause of the murder because if she had not had that child, the murder would not have happened.

32 To avoid such absurdities, for the purposes of establishing legal liability, the requirement of causation in law must also be satisfied. In *Sunny Metal*, the Court of Appeal put the point in the following terms (at [54]):

> … There is usually no dispute as to what in fact happened to cause the claimant's damage; *rather the question is which*

> *event will be treated as the cause for the purpose of attributing legal responsibility.* The court therefore has to decide whether the defendant's wrongful conduct constituted the "legal cause" of the damage. *This recognises that causes assume significance to the extent that they assist the court in deciding how best to attribute responsibility for the claimant's damage*: see *M'Lean v Bell* (1932) 48 TLR 467 at 469. In effect, as Andrews J quite candidly put it in *Palsgraf v The Long Island Railroad Company* 248 NY 339 (1928) at 352:
>
> > [B]ecause of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics.
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> [emphasis in original removed; emphasis added in italics]

33 It has thus often been said that the common law approaches the question of causation on a common-sense basis (see *McGhee v National Coal Board* [1973] 1 WLR 1 at 5B *per* Lord Reid and *Alexander v Cambridge Credit Corp Ltd* (1987) 12 ACLR 202 at 244 *per* McHugh JA). The underlying inquiry is always whether there is a sufficient nexus between the negligent conduct and the damage to justify the attribution of responsibility to the actor. If the nexus is not sufficient, liability will not attach to the negligent actor in respect of that damage. Actions of third parties or the victim *may* serve to so weaken the nexus between the actor's conduct and the eventual damage that he cannot be said to be a *legal cause* of the damage even if, on a scientific and objective analysis, his act was a *factual cause* of the damage.

34 In the context of the offence of causing death by a rash or negligent act under s 304A of the Penal Code, it has been held that in order for liability to attach, the act must not only be the cause without which the death would not have occurred, but it must also be the *causa causans*, or the proximate and efficient cause of the death (see *Lee Kim Leng v Regina* [1964] MLJ 285 at 286C-286D). In *Ng Keng Yong v Public Prosecutor and another appeal* [2004] 4 SLR(R) 89 ("*Ng Keng Yong*"), the appellants were two officers who

served on a Republic of Singapore Navy Ship ("the Navy Ship") who were charged under s 304A of the Penal Code. It was established that certain negligent actions they took in the course of navigation resulted in a collision between the Navy Ship and a merchant vessel ("ANL"). Four crewmembers of the Navy Ship lost their lives as a result of the collision. The appellants were convicted by the district judge and appealed only against their conviction. On the facts, it was established that ANL, too, had been negligent in making a series of small alterations to its course to avoid collision, instead of making a large alteration, as was required by the International Regulations for Preventing Collisions at Sea 1972 ("Collision Regulations").

35 Yong Pung How CJ accepted the appellants' submission that the vessels would not have collided if ANL had not also been negligent in the way they altered their course. However, he rejected the argument that the appellants were therefore not the cause of the accident at law. He held that the chain of causation was not necessarily broken just because a third party's negligence supervenes. On the facts, he concluded that while the ANL's negligent act was a contributing cause of the accident, it did not break the chain of causation. He explained his decision as follows (at [64] and [66]):

> 64 … [T]he question before me was whether the appellants' negligent alteration to port in breach of r 14(a) of the Collision Regulations constituted the proximate and efficient cause of the collision, or whether the *ANL*'s undisputed contributory negligence intervened to break the chain of causation.
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> …
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> 66 … Proceeding on both principle and logic, it is evident that criminal liability under s 304A should attach to the person(s) whose negligence contributed substantially, and not merely peripherally, to the result. When Chua J observed that the accused's act should be the proximate and efficient cause of the result without the intervention of another's negligence, he was merely emphasising the point that the accused's

> negligence, and not the negligence of any other person, should have contributed significantly to the result. If he meant to suggest that the chain of causation was necessarily broken by the very fact of a third party's intervening negligence, then, with the greatest respect, I cannot agree. *The particulars of the factual matrix, and the extent to which the third party's negligence contributed to the deaths, have to be assessed as well. The court must ultimately direct its mind to whether the negligence of the accused contributed significantly or substantially to the result.*
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> [emphasis in original removed; emphasis in italics added]

On the facts before him, Yong CJ held that the appellants' negligence was clearly a substantial cause of the collision and, despite the negligence of ANL, the appellants were criminally liable under s 304A of the Penal Code.

36 *Ng Keng Yong* demonstrates that the mere presence of multiple causes that all contribute to occasion the death may not be sufficient to relieve a negligent actor of criminal liability even if one of those other contributing causes was the negligent act of the victim or of a third party. For the purposes of a charge under s 304A, the court does not look to ascertain which of the contributing causes can be said to be *the most* substantial cause. Instead, its concern is whether the act of the accused was *a* substantial cause of the death such that it can be said to be a proximate and efficient cause of the injury.

37 In *Regina v Cheshire* [1991] 1 WLR 844 ("*R v Cheshire*") at 852B, the English Court of Appeal explained that "[i]t is not the function of the jury to evaluate competing causes or to choose which is dominant provided they are satisfied that the accused's acts can fairly be said to have made a significant contribution to the victim's death" (see also the decision of the Ontario Court of Appeal in *R v KL* [2009] ONCA 141 at [19]).

38 Hence, in order to escape *liability*, it is not sufficient for the accused to point to the fact that there are other contributing causes. All the prosecution

has to show is that the accused is a substantial cause of the injury even if there were other contributing causes. I should add that I use the term "substantial cause" because it was the expression used in *Ng Keng Yong* at [71]. The test for causation has been variously articulated in other parts of the Commonwealth, with expressions such as "not insignificant", "more than *de minimis*", or "significant contribution" having been used to convey the same notion that an accused's act must be a significant cause of death in order for liability to attach (see *R v Nette* [2011] 3 SCR 488 at [4]; *R v Smithers* [1978] 1 SCR 506; *Royall v The Queen* [1991] 100 ALR 669; *R v Pagett* (1983) 76 Cr App R 279 at 288 *per* Robert Goff LJ; *R v Cato and others* [1976] 1 All ER 260 at 266d *per* Lord Widgery CJ; *R v Cheshire* at 852A). I also note that there are some who consider that these are not merely semantic differences (see Stanley Yeo, "Causation in Criminal and Civil Negligence", (2007) 25 Sing L Rev 108 and see also the observations of Lord Sumner in *British Columbia Electric Railway Company, Limited v Loach* [1916] 1 AC 719 at 727–728) but as none of this is in issue before me, I say no more on this.

39 All of the foregoing pertains to establishing *liability* for the offence. To put this in its proper perspective, the appellant has pleaded guilty to causing the death of the accused by a negligent act. This means he has accepted, without qualification, that his negligent failure to keep a proper lookout was the *causa causans* of the death of the deceased, notwithstanding the fact that the deceased was not properly secured in an approved restraint. He now falls to be sentenced for his negligent act. Mr Vergis submits that the fact that the negligent act of another contributed to the death of the deceased should be taken into account in the sentencing of the appellant, even if it might not have been relevant to the question of his liability. Accordingly, he argues that the appellant's sentence should be reduced. It is noteworthy that he does not say

that *all* contributing causes should be taken into account in the appellant's favour. If he had, I would have had no hesitation in rejecting such an argument because it would mean that the father's decision to drive that fateful day or the fact that the medical team was unable to save the infant (which might all have contributed in one way or another to the death) can somehow mitigate the sentence. Mr Vergis only focuses on conduct of a third party which is itself negligent and which is a contributing cause of the death. Thus, Mr Vergis conceded in oral argument that if the appellant had collided with a taxi, he would not be able to run his argument because Rule 11 does not apply to taxis (see [17] above).

40 With Mr Vergis' argument properly understood in the light of the appellant's plea of guilt and the principles of causation in relation to criminal liability, I turn to another fundamental sentencing principle – proportionality.

(2) Proportionality

41 Writing for the court in *Hue An Li*, I explained that two fundamental principles underlie the cardinal principle of proportionality – the control principle and the outcome materiality principle (at [68]). The control principle encapsulates the notion that no man should be held criminally accountable for that which is beyond his control; while the outcome materiality principle is the brute principle that moral (and indeed legal) assessments often depend on factors that are beyond an actor's control.

42 Proportionality "emphasises the moral requirement of maintaining a proper proportion between offence and punishment" (see Martin Wasik, *Emmins on Sentencing* (Oxford University Press, 4th Ed, 2001) ("*Emmins on Sentencing*") at p 48). Generally speaking, the punishment imposed should be

that which is deserved for the offence, "having regard to the seriousness of the harm caused or risked by the offender and the degree of the offender's culpability" (*Emmins on Sentencing*, likewise at p 48; see also *Muhammad Saiful bin Ismail v Public Prosecutor* [2014] 2 SLR 1028 at [22]; *Public Prosecutor v Saiful Rizam bin Assim and other appeals* [2014] 2 SLR 495 at [29]). It has also been pointed out that in the context of driving offences, sentencing is particularly difficult because "[t]he death – the most serious of harms – was not intended and so the calculation of culpability is relatively low in relation to the total of harm caused" (see Susan Easton and Christine Piper, *Sentencing and* Punishment (Oxford University Press, 3rd Ed, 2012) at p 88).

43 However, Parliament has decided that the principle of outcome materiality should continue to hold sway, even in the context of criminal negligence. As was explained in *Hue An Li*, this can be seen by the increase in prescribed maximum punishments under the Penal Code as the gravity of the resultant harm increases (at [71]). I discussed the philosophical aspects of this issue in *Hue An Li* and do not propose to revisit them here.

44 In the final analysis, Parliament has decided that outcomes matter and the court must exercise its sentencing discretion accordingly. In *R v Scholes* [1999] 1 VR 337 ("*Scholes*"), the Court of Appeal of the Supreme Court of Victoria commented that the introduction of the offence of causing death by culpable driving reflected "a recognition of a social necessity to seek to deter, by criminal sanction, unnecessary and unavoidable killings by motor vehicle drivers" (at [16]). As to the argument that negligence cannot be deterred because it is not actuated by *conscious wrongdoing*, it was been pointed out that most negligence is due to insufficient care being taken and that the degree of care that actors bring to bear in these situations can be increased by means of the penal law (likewise at [16]).

45 For these reasons, amongst others, we decided in *Hue An Li* that the outcome materiality principle trumps the control principle in the context of criminal negligence such that the full extent of harm caused may be taken into account in sentencing (at [67]–[75]). However, the extent of harm is not determinative. It is but one factor that must be taken into account in determining the appropriate sentence to be meted out. The extent of the offender's negligence and the presence of aggravating and mitigating factors are also matters that also feature heavily in the sentencing calculus.

46 With these principles in mind, I turn to consider the approach taken to the present issue in the UK, Canada and Australia before considering what the proper approach in Singapore ought to be.

The approach in other jurisdictions

(1) The UK

47 On 18 August 2008, the United Kingdom Sentencing Guidelines Council ("the Council") issued a set of sentencing guidelines for offenders who have caused death by driving (see *Causing Death by Driving: Definitive Guideline* <https://www.sentencingcouncil.org.uk/wpcontent/uploads/web_causing_death_by_driving_definitive_guideline.pdf> (accessed 9 May 2016) ("the Guideline"). The Guideline covers the following four offences under the Road Traffic Act 1988 (c 52) (UK):

(a) causing death by dangerous driving (s 1);

(b) causing death by careless or inconsiderate driving (s 2B);

(c) causing death by careless driving when under the influence of alcohol or drugs (s 3A); and

(d) causing death by driving when one is an unlicensed, disqualified, or uninsured driver (s 3ZB).

48 The Guideline is based on the advice prepared by the Sentencing Advisory Panel ("the Panel") following a public consultation: see United Kingdom, Sentencing Advisory Panel, *Advice to the Sentencing Guidelines Council: Driving Offences – Causing death by Driving* (2008) (Chairman: Professor Andrew Ashworth) ("the Advice"). Paragraph 24 of the Guideline states:

> Where the actions of the victim or a third party contributed to the commission of an offence, this should be acknowledged and taken into account as a mitigating factor.

In the Advice, the Panel explained that this particular issue was not discussed in the consultation paper it released but it was raised both by those who responded to the public consultation as well as those who contributed to the research process. After consideration, the Panel agreed that where the actions of the victim or a third party contributed to the commission of the offence, it should be acknowledged and taken into account as a mitigating factor (see the Advice at paras 89 and 90). This suggestion was subsequently adopted by the Council and it found its way into the Guideline as para 24. However, it appears that the courts have not applied para 24 of the Guideline as broadly as it seems to be worded.

49 In *R v Ben Hywel David Powell* [2011] 2 Cr App R (S) 41 ("*R v Powell*"), the appellant went out drinking with the deceased. Subsequently, they got into the same car and the appellant drove. The appellant had his

seatbelt on but the deceased did not. The appellant lost control of the car and in the ensuing accident, the deceased was thrown from the car and killed instantly. The appellant contended that two factors – first, the fact he was driving in difficult conditions with a boisterous passenger and, second, that the deceased was not wearing a seatbelt – should be taken into account as mitigating factors. The English Court of Appeal rejected this submission and held that these factors were not mitigating. The court went even further and held that, if anything, these factors necessitated that the appellant take greater caution than what might normally be required and it was an aggravating factor that he did not display the requisite level of caution.

50 In *R v Smith* [2011] EWCA Crim 2844, the appellant driver collided with a 74-year-old man who sustained fatal injuries as a result of the collision. The road on which the collision happened was a rural road subject to a speed limit of 60 miles per hour. There was no ambient lighting. There was also no footpath. The deceased was struck when he was approximately 1.1m out from the kerb. He was wearing a black jacket, dark trousers, and brown shoes. The Court also noted that the road surface was dark, thus offering no contrast in shape and colour to the deceased. The appellant pleaded guilty to an offence of dangerous driving and to an offence of causing death by careless driving while over the prescribed limit. The Court of Appeal, in reducing the total sentence from four years' imprisonment to 30 months' imprisonment, observed (at [9]):

> … There is an important mitigating feature of this case identified in the guidelines, namely that *the actions of the victim contributed significantly to the likelihood of collision occurring and of death resulting.* We have already described the circumstances in which the deceased came to be struck, and sadly he must be held to have contributed significantly to the collision and to his demise.
>
> [emphasis added]

51 Although it was not explicitly spelt out, it seems to me that the court considered that the deceased had significantly increased the likelihood of an accident occurring by wearing dark clothing and by walking some distance away from the kerb even though the road was unlit. These were factors which had the effect of reducing the culpability of the appellant in that case.

52 In this connection, the decision of the High Court of Justiciary (the highest criminal court in Scotland), sitting in its appellate capacity as the Court of Criminal Appeal, in *HM Advocate v McCourt* [2014] JC 94 is instructive. The facts are analogous to our own. There, the respondent was convicted after trial for causing death by driving a motorcar without due care and attention. He was driving a motorcar and collided into the deceased's bicycle at low speed and modest impact. The deceased lost her balance, fell, and struck her head on the roadway. She died a few days later as a result of the head injury she sustained. The sheriff in the proceedings below had taken into account as mitigating the fact that the deceased was not wearing a bicycle helmet. On appeal, the court observed that it had doubts as to whether the fact that the cyclist did not wear a helmet was in fact a mitigating factor within the terms of para 24 of the Guideline. It observed at [39]:

> … It is at least arguable that [the Guideline] is directed towards the culpability of the accused's driving (eg where the victim contributed to the occurrence of a collision to some extent by his/her bad driving), rather than with an element of causation of death. There may be some force in the analogy drawn by the Solicitor General with cases in which the deceased failed to wear a seatbelt. …

53 The court then referred to *R v Powell* and its own decision in *Wright v HM Advocate* [2007] JC 119 that had been issued before the Guideline in which it had disregarded in sentencing the fact that the deceased persons in those cases were not wearing seatbelts. Ultimately, the court held that it did

not have to decide the issue because it found that the sheriff had fallen into error in holding that it was a matter within judicial knowledge that in low impact, low speed collisions between vehicles and cyclists, the wearing of a safety helmet would likely be effective in preventing serious or fatal injuries. The court agreed with the Crown that this was a matter on which expert opinions differed and was therefore not properly one which may be treated as a matter of judicial knowledge. On this basis, the court concluded that the sheriff had erred in treating the failure of the deceased to wear a helmet as a mitigating factor.

54 In summary, the position in the UK appears to be that the actions of a victim or a third party can, in principle, be taken into account as a mitigating factor. However, the courts are careful to distinguish between contributory acts which can properly be taken into account because they reduce the culpability of the offender for the collision (see, *eg*, *R v Smith*) and those which do not (see, *eg*, *R v Powell*).

(2) Canada

55 I turn to the position in Canada. In *R v Mitchell* (1981) 29 Nfld & PEIR 125 ("*R v Mitchell*"), the Prince Edward Island Court of Appeal was split on the question of whether an accused who was charged with causing death through negligent driving may be treated more leniently if the deceased was himself negligent in failing to leave the vehicle when he knew that the accused was not in a fit state to drive. MacDonald J was of the view that it ought to matter in sentencing, analogising it to an "assumption of risk" (at [5]) while MJ McQuaid J expressly disagreed and opined that "[c]ontributory negligence by a deceased is not a defence to a charge of criminal negligence causing death and therefore… should not be a factor influencing the severity of the

punishment imposed" (at [30]). CR McQuaid J, who dissented, agreed with MJ McQuaid J that the voluntary act of the victim in placing himself in harm's way was irrelevant in mitigation (at [37]).

56 In *R v Duncan* (1994) 116 Nfld & PEIR 170, the accused was charged with criminal negligence causing death after he failed to stop at an intersection which was marked with a stop sign and consequently collided with a van which was travelling in the opposite direction. The driver of the van, who was not wearing a seatbelt, was killed by the impact. The Appeal Division of the Prince Edward Island Supreme Court unanimously followed its previous decision in *R v Mitchell* and held that a victim's failure to wear a seatbelt was not relevant in sentencing. The court preferred the views of MJ McQuiad and CR McQuaid JJ. It reasoned that while death was an essential element of the offence, it was ultimately incidental to the criminal negligence rather than a matter of the accused person's choosing or preference. Thus, the victim's contributory negligence as regards the result of the act should not affect sentence. It was thought that the essential question in sentencing remained how serious was the act of criminal negligence committed by the accused and to this, the victim's contributory negligence was irrelevant.

57 In *R v McCarthy* (1997) 157 Nfld & PEIR 222, the accused, who was in control of a motor vehicle while intoxicated, struck and killed a pedestrian who was walking on the highway at night. The pedestrian was wearing dark clothing and was also intoxicated at the material time. The Court of Appeal of the Newfoundland Supreme Court, citing both *R v Mitchell* and *R v Duncan*, was unanimous in holding that the fact that the victim might himself have been negligent was not a mitigating factor which warranted a reduction of the appellant's sentence (at [13]).

58 By contrast, in *R v Cluney* [2013] NLCA 46, another decision of the Court of Appeal of the Newfoundland and Labrador Supreme Court, it was accepted that the victim's conduct could be used as a mitigating factor. The victim was the passenger in a car driven by the accused. While the vehicle was in motion, the victim grabbed the steering wheel, causing the car to fishtail. The accused, who was intoxicated and speeding at the time, overcompensated in trying to regain control, causing the car to crash. The accused was charged with the offence of impaired driving causing death. The court distinguished *R v Mitchell*, *R v Duncan*, and *R v McCarthy* on the ground that the victim's decision to grab the steering wheel here was an "intentional as opposed to a merely negligent act" whereas the victims in those three precedent cases were merely negligent (at [14]). The court held that a distinction should be drawn between a positive act and an omission. It held that where the act which contributed significantly to the collision was a deliberate act of the victim, proportionality would require a reduction in sentence to reflect the fact that the victim's conduct diminished the accused's moral blameworthiness (at [17]).

59 In my judgment, the effect of these cases can be summarised as follows: the victim's own act in contributing to his death will be irrelevant in sentencing unless the victim's act has the effect of diminishing the accused person's moral culpability for the offence. It is arguable that this principle only applies to *intentional* acts of the victim, and not to negligent acts.

(3) Australia

60 A survey of position in the various Australian states does not reveal an entirely uniform approach. In *Huriwai v R* (1994) 20 MVR 166 the appellant's vehicle collided with another vehicle and a passenger in the back seat of the second vehicle lost his life. The evidence was that the appellant had taken his

eyes off the road for a few seconds in order to get a cigarette when the accident happened. He had also been drinking and smoking cannabis before that. The appellant was charged with causing death by dangerous driving. In mitigation, it was pointed out that the passengers in the other vehicle, including the deceased, were not wearing seatbelts and that the deceased ought to have given way to the appellant, who had the right of way. The trial judge held that these were irrelevant considerations. The Supreme Court of South Australia, disagreeing with the trial judge, held that the failure of the deceased to wear a seatbelt and the fact that the other vehicle had failed to give way even though the appellant had right of way could be taken into account in the appellant's favour as factors that pointed to leniency (*per* Milhouse J at 167 and *per* Perry J at 170). For this, among other reasons, they allowed the appeal and reduced the sentence.

61 The Court of Appeal of the Supreme Court of Victoria has also had the opportunity of considering if the conduct of the victim should affect the sentence imposed on an offender for a road traffic offence. In *R v Howarth* [2000] VSCA 94, the Brooking JA, delivering the principal judgment, drew a distinction between (a) the conduct of the victim which bore upon how bad the offender's driving was or as possibly mitigating the conduct of the offender in choosing to drive and (b) a victim's recklessness to his own safety (at [45]). The court held that the latter was not mitigating as it ultimately rested on the notion that it was worse to kill a worthy or careful person than an unworthy or careless one who was consequently less deserving of the law's protection. The court emphatically rejected such a notion and therefore held that the failure of the victim to wear a seatbelt or a crash-helmet could not be regarded as a mitigating factor.

62 In *R v Tran* [2002] 4 VR 457, a differently constituted bench of the Victorian Court of Appeal declined to follow *R v Howarth* insofar as it suggested that the complicity of the victim in the accident could not be used as a factor to reduce the sentence. The court explained that the innocence of the victim was usually treated as an aggravating factor that justified an increase in the sentence (at [29]). Thus, where the victim was complicit in the offence (*eg*, where he had urged the offender to speed to evade being caught by the police, as was the case in *R v Tran*), this aggravating factor – the innocence of the victim – would be absent. To that limited extent, the court could consider the complicity of the victim in the sentencing calculus if it could be said to constitute the "absence of a circumstance of aggravation" and could justifiably rely on it to reduce the sentence (at [34]). Ultimately, however, it was thought that not too much attention should be paid to labels and it was a matter for the judge, within the limits of sound discretion, to decide what weight to attribute to the victim's complicity (likewise at [34]).

63 In *The Queen v Cowden* [2006] VSCA 220 ("*R v Cowden*"), a yet differently constituted bench of the Court of Appeal did not choose between these two approaches. The Court however considered that even on the *R v Tran* approach, it was ultimately a matter of discretion whether or not to regard the complicity of the victim as a mitigating factor. In that case, the conduct of the victims, who were passengers in the appellant's car, in encouraging the appellant to drift was thought not to be sufficiently complicit to warrant any significant mitigating weight. It was held that the judge was correct to decide that the appellant was responsible for his passengers' safety and bore principal responsibility for his actions (see also *Director of Public Prosecutions v Johnstone* [2006] VSCA 281, where the Victorian Court of Appeal took a similar approach).

64 In *R v Janceski* (2005) 44 MVR 328, the New South Wales Court of Appeal held that it would be incorrect to take the culpability of the victim into account in mitigation (at [28]). In that case, there was a car chase and the appellant's car collided into the car he was chasing, causing the driver of the chased car to lose control. The chased car collided with a power pole, and both the driver and his passenger were killed. Hunt AJA, with whom Spiegelman CJ and Howie J agreed, observed that, the culpability of the victim, while not a mitigating factor *per se*, will "usually be relevant to the assessment of the seriousness of the offender's conduct, and therefore to the offender's culpability" (at [29]).

The applicable approach in Singapore

65 My brief survey of the position in these three jurisdictions suggests that while the position in Australia is not entirely settled, in Canada and to some degree in the UK, the conduct of a victim or a third party *may* be a relevant factor in sentencing and *may at times* be accorded weight in mitigation. In my judgment, where the conduct of the victim or a third party has a direct bearing on the culpability of the offender, it should, in keeping with the principle of proportionality, be taken into account when determining the sentence to be meted out. Proportionality requires that the sentence be commensurate to the gravity of the offence, which is measured by, among other things, the moral culpability of the offender. In the context of a traffic death case, the moral culpability of the offender is usually linked to the extent of the offender's negligence and it can, in some circumstances, be affected by the behaviour of a third party or of the victim.

66 I regard the pronouncements in Canada and Australia in *R v Duncan*, *R v Cluney*, *R v Janceski*, and *R v Howarth* as expressing similar views. I also

consider that the approach taken in *R v Cowden* and *R v Tran* was in line with this view. When a victim is held to be complicit in the offence such that it can be seen as an "absence of a circumstance of aggravation" (see *R v Tran* at [34]), what the court is really concerned with is whether the conduct of the victim has a bearing upon the conduct of the offender who now falls to be punished. It appears that this is also the approach taken in Scotland (see *HM Advocate v McCourt* at [39]; discussed at [52] above), notwithstanding para 24 of the Guideline. The conduct of the victim was taken into account in *R v Smith* because the conduct of the victim in that case was relevant to the negligence of the offender and could be said to have diminished his culpability (at [51] above).

67 Save in such circumstances as I have outlined at [65] above, in my judgment it would be improper to have regard to the fact that there exists another contributing cause to the death as a factor relevant in sentencing.

68 I am therefore unable to accept Mr Vergis' submission that the fact that the negligence of the victim or a third party was a contributory cause of the death should, without more, be taken into account as a mitigating factor. It seems to me that this submission rests on the erroneous assumption that the law needs to "apportion" responsibility between all persons whose actions might have contributed to the result which forms the subject matter of the offence. This is the approach taken in the civil law of negligence where damages are apportioned between multiple tortfeasors for a single indivisible injury so as to prevent *double recovery* on the part of the claimant. However, that is not the position taken in the criminal law.

69 The criminal law, unlike the civil law, is not concerned with recovery of loss on the part of the victim. Instead, it is concerned with punishment of

the offender for *his* criminal conduct. In this regard, as Martin Wasik points out, it is mistaken to conceive of there being "a certain total amount of 'responsibility' to be allocated for each crime, and that such responsibility may be placed wholly upon the offender, or distributed in varying proportions between the offender and the victim" (see Martin Wasik, "Crime Seriousness and the Offender-Victim Relationship in Sentencing" in *Fundamentals of Sentencing Theory* (Clarendon Press, 1998) (Andrew Ashworth & Martin Wasik eds) at p 118). Take the example of two drivers of a motor vehicle who drive negligently, thereby causing a collision in which a pedestrian is injured. There is no rule in our criminal law that requires the sentence meted out on both drivers to be half that which would be imposed if there were only one driver who caused death.

70 Where the conduct of the victim or third parties, whether negligent or otherwise, has materially contributed to the outcome for which the offender is being charged, but has no bearing on the *culpability* of the offender, it should not affect the sentence to be imposed. In my judgment, this is so for two reasons. First, as was explained in *Hue An Li*, the outcome materiality principle trumps the control principle in the context of criminal negligence. Parliament has decided that outcomes matter and the role of the court is to exercise its sentencing discretion within the framework established by Parliament (see, generally, *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 94 at [43]–[45]). The fact of the matter is that the appellant had, through his negligent conduct, caused a collision to take place which resulted in the death of a person. If what he is saying is that his sentence should be reduced to reflect the fact that he was "unfortunate" to have collided with a vehicle in which there was an unrestrained child as opposed to one without, I would reject this submission. There can be no principled basis on which the

Court should mitigate the sentence on account of an offender's "moral (bad) luck". In keeping with this, we said as follows in *Hue An Li* (at [74]):

> … Take, for instance, two drivers who briefly fall asleep while driving straight at the same speed along the same stretch of road. One driver wakes up before any harm is caused. The other driver collides into and kills a *jaywalking* pedestrian. It could be said that as a matter of moral assessment, both drivers are equally culpable. However, as a matter of practical fact, the former will not suffer any legal repercussions because no detectable harm has occurred. Putative offenders take the benefit of legal luck operating in their favour if adverse consequences do not eventuate; it is only fair that an offender should not be heard to raise the control principle as a shield when a harmful outcome does eventuate.
>
> [emphasis added]

71 Second, and more fundamentally, a putative offender either is or is not legally responsible for the death of the victim; there are no degrees of legal responsibility. In convicting an offender, the court has determined as a matter of criminal law that the offender is *legally responsible* for the death (see [34]–[36] and [39] above). It would therefore be inconsistent to then punish him on the basis that he is somehow less responsible for the harm that was occasioned by his negligent conduct. The sentence meted out should in my judgment be proportionate to his moral culpability and all the resulting harm that he is *legally responsible for*.

The applicable approach on the present facts

72 In my judgment, the failure to properly secure the deceased in an approved restraint is not a relevant consideration in sentencing since it can have no bearing on the negligence of the appellant. The fact of the matter remains that the appellant drove into a cross-junction without keeping a proper lookout. That the deceased was not in an approved restraint is neither here nor there. It does not in any way impact the assessment of whether the appellant

was more or less negligent in failing to meet the standard of care which is expected of all drivers. It is therefore irrelevant to his moral culpability. This case is a world away from that of *R v Smith*, where the victim was walking along an unlit road dressed in dark clothing, or *R v Cluney*, where the victim grabbed the offender's steering wheel suddenly and without warning, causing the offender to lose control of the vehicle.

73 In the light of this, it is not necessary for further evidence to be taken on whether the failure to properly secure the deceased contributed to the death of the deceased.

Issue 2: serious injuries to the deceased and damage to the vehicles

74 I turn to the second sub-issue. I agree with Mr Vergis that the DJ erred in considering both the injuries to the deceased and the damage to the vehicles as aggravating factors.

75 The DJ referred to *Hue An Li* for the proposition that the harm caused should also be taken into account for the purposes of sentencing. The Prosecution concede that if the DJ had taken into account the injuries of the deceased to enhance the sentence, it would amount to double counting since the harm caused in this case, death, is already an essential element of the charge. However, the Prosecution argue that the DJ had not in fact enhanced the sentence on the basis of the injuries sustained by the deceased because he only imposed the benchmark sentence of four weeks' imprisonment set out in *Hue An Li*.

76 With respect, I do not agree with the Prosecution's submissions. First, it seems clear to me from [51] of the GD that the DJ did have regard to the "considerable injuries suffered by the deceased" in determining the

appropriate sentence to be imposed. He explained that this factor and the fact that extensive damage was caused to the vehicles were both relevant sentencing considerations. Second, the starting point for sentencing in a s 304A(*b*) traffic death case is a brief period of incarceration "*for up to* four weeks" (see *Hue An Li* at [61]) [emphasis added]. It is therefore incorrect for the Prosecution to submit that the DJ imposed no more than the starting point. In my judgment, the DJ did take into account the injuries suffered by the deceased in determining sentence.

77 I am also satisfied that the DJ erred in considering the serious injuries suffered by the victim as an aggravating factor on the authority of *Hue An Li* (see [13(d)] above). The issue in *Hue An Li* was whether the full extent of the harm caused by the offender's actions could be taken into account. The court held that it could and accordingly had regard to the fact that the offender's negligence resulted in injuries to ten other people besides the deceased, seven of whom suffered grievous hurt and one of whom was paralysed from the waist down. This was harm that went entirely beyond the injuries of the victim, in respect of whose death the charge had been brought.

78 Similarly, the DJ erred in placing significant weight on the damage caused to the vehicles. The Prosecution submit that the DJ did not err because the extent of the damage is strongly indicative of the fact that the appellant had approached the junction at an excessive speed, which is an aggravating factor. I have difficulty accepting this because the DJ had ample evidence as to the manner in which the appellant approached the junction and had already taken this into account in assessing the degree of the appellant's negligence (see the GD at [40]–[42]). To take the speed of his approach into account again as an aggravating factor under the guise of considering the damage to the vehicles as a separate consideration would amount to double counting.

Issue 3: the appellant's mistaken belief and his failure to stop and wait for the green "right turn" arrow

79 I turn to the third sub-issue. Even assuming the appellant had a mistaken belief as to his right of way, I do not consider this to be a mitigating factor. First, a mistaken belief as to the effects of road signs or traffic lights cannot possibly be advanced as a mitigating factor in the context of criminal negligence that causes a road death. I agree with the DJ that, if anything, such ignorance would itself be indicative of the offender's unsuitability to be allowed to drive at all, given the potential dangers that this can give rise to. Secondly, negligence is found where an accused is adjudged to have fallen below the *objective* standard of the reasonable person (see *Hue An Li* at [43]). Advertence to the risk of harm is *not* a constitutive element of the offence (at [45]) but proof that an offender *knowingly* ran a risk is an aggravating factor which may be taken into account in sentencing (at [94]). In this case, Mr Vergis seeks to characterise the appellant's lack of advertence to the risk of harm as a mitigating factor. In my judgment, this discloses an error of principle: the absence of an aggravating factor does not, in and of itself, constitute a mitigating factor (see *Public Prosecutor v AOM* [2011] 2 SLR 1057 at [37]). The DJ therefore did not err in not taking this into account in sentencing.

80 In my judgment, there is also no merit in Mr Vergis' submission that the DJ placed excessive weight on the fact that the appellant did not stop at the cross-junction to wait for the arrow light signal to appear (see [13(b)] above). In my judgment, while it might not have been legally obligatory for the appellant to stop to wait for the arrow light signal, he was obliged to slow down with a view to checking for oncoming traffic before navigating the turn and, if necessary, stop to avoid a collision. He completely failed to do

anything of this nature and this resulted in the accident. In my judgment, the DJ was entitled to take the appellant's wanton disregard for other road users into account. However, I do not see this as an aggravating factor *per se* but rather a factor to be considered in appreciating the extent of the appellant's negligence. On the whole, I do not consider that the DJ erred in his evaluation of the extent of the appellant's negligence.

The appropriate sentence

81 In my judgment, even though the DJ erred in considering the injuries of the deceased and the damage to the vehicles as aggravating factors, a custodial sentence was plainly called for. As the DJ noted, there were certain aggravating circumstances here, one of which was the fact that the appellant was a new driver who was not used to or familiar with a new car and ought to have taken greater care but did not (see *Hue An Li* at [95(*d*)). Adding to this, the cross-junction the appellant drove into was a major intersection and in order to complete the right turn he would have had to cut across five lanes of oncoming traffic. The circumstances demanded a greater degree of care and the appellant fell woefully short of this when he made the turn immediately upon reaching the cross-junction without keeping a proper lookout and without slowing down to check for oncoming vehicles. In these circumstances, a sentence in excess of four weeks would not have been out of place.

82 That said, there are some mitigating circumstances here. These include the remorse expressed by the appellant and his timeous plea of guilt. As for the fact that he was a first time offender, I do not regard this to be of much significance in this case, because as far as offences related to driving are concerned, he had just obtained his licence and was not really in a position to have committed other similar offences prior to this.

83 But in the final analysis, and considering all the factors in the round, I do not think the sentence imposed was manifestly excessive and I am satisfied that there is no ground for appellate intervention. This was a case of quite serious negligence which has resulted in tragic consequences.

Conclusion

84 In the premises, the appeal is dismissed.

Sundaresh Menon
Chief Justice

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