IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 46

Magistrate's Appeal No 9039 of 2017

Between

Public Prosecutor

… *Appellant*

And

Lim Chee Yin Jordon

… *Respondent*

GROUNDS OF DECISION

[Criminal Procedure and Sentencing] — [Sentencing] — [Appeals]

[Criminal Procedure and Sentencing] — [Sentencing] — [Forms of punishment]

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Public Prosecutor
v
Lim Chee Yin Jordon

[2018] SGHC 46

High Court — Magistrate's Appeal No 9039 of 2017
See Kee Oon J
13 June; 8 August; 30 November 2017; 11 January 2018

1 March 2018

See Kee Oon J:

1 Magistrate's Appeal No 9039 of 2017 was the Prosecution's appeal against a probation order imposed on the respondent, Jordon Lim Chee Yin (the "Respondent"). The Respondent pleaded guilty to three proceeded charges arising from his reckless actions on 19 April 2016, when he stole and crashed a lorry while allegedly in a state of voluntary intoxication. On 11 January 2018, I allowed the appeal and sentenced the Respondent to an aggregate term of four months and two weeks' imprisonment. I also disqualified him from driving all classes of vehicles for a period of two years from his release from imprisonment. These are the detailed grounds for my decision.

Facts

2 The statement of facts, which the Respondent admitted without qualification, intimated that the Respondent was walking along Killiney Road

at about 6.10am on 19 April 2016. He had been drinking heavily, was unable to even walk straight, and was on his way home from a club. The Respondent saw an unattended lorry parked along the road with its engine left running. He decided to commandeer the lorry and drive it to the nearest MRT station so that he could take a bus home.

3 The lorry was in the possession of one Choo Chee Wee ("Choo") and one Loh Kai Leong ("Loh"). Choo and Loh were delivering bread to a supermarket outlet located along Killiney Road. They had parked the lorry and had alighted to deliver the bread to the supermarket outlet. The lorry was valued at about $40,000.

4 Loh subsequently discovered that the lorry had been moved when he returned to retrieve more bread. The lorry was in a stationary position about 15m from its original position. Loh then rushed back to the supermarket outlet to inform Choo and the two of them then ran towards the lorry, with Loh shouting at the Respondent as he approached. Upon seeing Loh, the Respondent drove off, beating the red light signal at the traffic junction.

5 Choo and Loh then gave chase and a member of the public offered to give them a ride in his car to pursue the Respondent. They then pursued the Respondent for some distance before losing sight of the lorry. At about 6.20am, Choo and Loh found the lorry at Unity Street off Mohamed Sultan Road, toppled on its left side. By then, the Respondent had already fled after having driven the lorry for an estimated distance of 1.4km.

6 The cost of repair for the lorry amounted to $3,563.10. The Respondent was subsequently arrested on 29 April 2016. He was 23 years and four-plus months old at the time of these events. Prior to this, he was untraced.

7 The first proceeded charge (*ie*, DAC 916916/2016) was under s 379A of the Penal Code (Cap 224, 2008 Rev Ed) (the "PC") for theft of a motor vehicle. As the Respondent was not a holder of any driving licence when he was driving the lorry, he faced a second proceeded charge (*ie*, MAC 903863/2016) under s 35(1) read with s 35(3) and punishable under s 131(2)(*a*) of the Road Traffic Act (Cap 276, 2004 Rev Ed) (the "RTA") for driving without a licence. Moreover, the lorry had toppled onto its left side because the Respondent had abruptly swerved the lorry in order to turn into Unity Street. The lorry had also skidded a short distance before coming to a complete stop after toppling. Accordingly, the third proceeded charge (*ie*, MAC 905998/2016) was for rash driving under s 279 of the PC.

Proceedings and decision below

8 On 28 October 2016, the Respondent pleaded guilty to the three proceeded charges before a district judge (the "District Judge") and was convicted accordingly. In addition, two additional charges were taken into consideration for the purpose of sentencing. The first was under s 3(1) and punishable under s 3(2) and 3(3) of the Motor Vehicles (Third-Party Risks and Compensation) Act (Cap 189, 2000 Rev Ed) for driving without insurance. The second was under s 84(2) read with s 84(7) and punishable under s 131(2)(*a*) of the RTA for failing to report the accident. The Prosecution urged the District Judge to impose a sentence of four months' imprisonment and 18 months' disqualification in respect of the charge under s 379A of the PC and a sentence of four to eight weeks' imprisonment and two years' disqualification in respect of the charge under s 279 of the PC. The sentence for the charge under s 35(1) read with s 35(3) and punishable under s 131(2)(*a*) of the RTA was left to the court, as was the global sentence. The Respondent, on the other hand, asked for a probation order. In this regard, the Respondent relied on a specialist

psychiatric report dated 10 August 2016 (the "First Report") which was prepared by Dr Ong Seh Hong ("Dr Ong"), a Senior Consultant at the Department of Psychological Medicine at Khoo Teck Puat Hospital. The matter was then adjourned for parties to make further submissions.

9 The matter was next heard on 25 November 2016. This hearing ended with the District Judge calling for a probation report. Directions were also given for the Respondent to obtain a further report on whether his conditions were causally linked to his behaviour at the time of the offences. The Prosecution was also to file further submissions.

10 The probation report found the Respondent suitable for probation. Notwithstanding, when the matter next came up for hearing on 3 February 2017, the Prosecution maintained its objection to a probation order. On his part, the Respondent stated that he was not given a further report, but submitted that the First Report and the probation report were sufficient for the District Judge to impose a probation order. The District Judge imposed a sentence of 24 months' supervised probation with various conditions. At the end of this hearing, the Prosecution asked for a one-week stay of execution to consider whether to file an appeal. This request was granted by the District Judge.

11 One week later, on 9 February 2017, the Prosecution informed the District Judge that it had filed its notice of appeal. The District Judge granted a stay of execution and bail pending appeal.

12 The District Judge subsequently issued the full grounds for his decision on 21 February 2017 (see *Public Prosecutor v Jordan Lim Chee Yin* [2017] SGDC 44 (the "GD")).

13 The District Judge was conscious that the offence under s 379A of the PC for theft of a motor vehicle was a serious offence, and that both general and specific deterrence would be the usual relevant considerations for the court. However, the offences were not premeditated (see the GD at [7] and [8]).

14 Notably, the District Judge found that the Respondent was diagnosed with major depressive disorder and alcohol abuse (see the GD at [10]). He placed considerable emphasis on Dr Ong's diagnosis, accepting that the First Report was relevant for sentencing purposes as it confirmed that the Respondent was labouring under various mental conditions (see the GD at [9] and [16]). He also pointed to the Respondent's "possible relevant medical history", which apparently relates to the Respondent's "past history of acute psychosis" and "positive family history of likely schizophrenia" (see the GD at [9] and [11]).

15 The District Judge also considered other features of the factual matrix, including the Respondent's lack of antecedents, his relatively young age, his employment history and his National Service record (see the GD at [11], [15] and [18]).

16 The District Judge thought that "less emphasis could be placed on the principle of deterrence when the offender was facing a serious mental or psychiatric disorder at the time of commission of the offence" (see the GD at [19]). He thought that the impact of a sentence on the medical treatment and rehabilitation of an offender was also a relevant consideration. In this regard, he held (at [19] of the GD) that:

> On the balance, the presence of co-occurring medical, psychiatric and psychological conditions that need to be treated by mental health professionals and the good prospects of rehabilitation are *exceptional factors that swing the sentencing consideration towards rehabilitation instead of deterrence.* [emphasis added]

17 The District Judge next considered the various aggravating factors highlighted by the Prosecution. These included the manner of the Respondent's driving, the type of vehicle involved, the Respondent's intoxication and the cost of damage (see the GD at [20] and [21]). However, he concluded that "these ordinarily aggravating factors were not severe enough … to swing the sentencing consideration back to deterrence" (see the GD at [21]). Finally, the District Judge opined that a "key consideration" in this case was the comprehensive programme planned by the probation officer for the Respondent's specific needs, which also included curbs on the Respondent's liberty (see the GD at [22]). In any case, the District Judge was of the view that the probation order had a deterrent effect even though it was not as severe as that of imprisonment (see the GD at [23]).

Proceedings and submissions on appeal

Clarifications on the Respondent's mental condition

18 At the heart of the parties' contentions on appeal was the District Judge's reliance on the First Report. In the First Report, Dr Ong opined that the Respondent suffered from "depression, poor anger management and alcohol abuse". Dr Ong further noted the Respondent's "past history of acute psychosis" dating from 2011 and "positive family history of likely schizophrenia". However, the First Report did not make clear the degree to which the Respondent was suffering from depression and, additionally, did not specify if the Respondent's depression amounted to a causal link or contributory factor leading to the commission of the offences.

19 When the appeal was first heard on 13 June 2017, I sought clarification from the Prosecution in respect of these points. Dr Ong subsequently furnished a specialist medical report dated 27 June 2017 (the "Second Report"). In the

Second Report, Dr Ong provided a brief update of the Respondent's progress since August 2016. More importantly, Dr Ong clarified that the Respondent's depression was of "at least moderate severity" and had "interfered with his functioning and leading to his alcohol abuse". Dr Ong further stated his opinion that the Respondent's untreated depression was a contributory factor towards the offences he committed.

20 Upon receipt of the Second Report, the Prosecution took the view that an independent assessment of the Respondent's mental condition from the Institute of Mental Health (the "IMH") would be appropriate. Thus, when the matter was next heard on 8 August 2017, the Prosecution applied for a further adjournment in order for the Respondent to be referred to the IMH (on the Prosecution's expense) for this purpose. The Respondent objected and maintained that Dr Ong's assessment was adequate and that he could be called to further clarify if necessary. I was of the view that it would be helpful to have the benefit of an IMH report on the Respondent given that the First and Second Reports appeared to have been prepared by Dr Ong to reflect his assessment regarding the need for treatment rather than as forensic reports. Moreover, Dr Ong did not categorically state whether the Respondent had indeed suffered from a major depressive disorder (as defined in the *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Association, 5th Ed, 2013) (the "DSM-5")) of any particular severity in either the First or Second Reports. Accordingly, I allowed the Prosecution's application for a further adjournment and directed that the Respondent be referred to the IMH for assessment.

21 In due course, an IMH report dated 18 September 2017 (the "IMH Report") which was prepared by Dr Jaydip Sarkar ("Dr Sarkar"), a Consultant at the Department of General and Forensic Psychiatry at the IMH, was furnished. In the IMH Report, Dr Sarkar opined that the Respondent was not

mentally disordered currently and did not suffer from any mental disorder at the material time. The Respondent may have suffered from an adjustment disorder with depressed mood or a mild depressive disorder in the weeks *following* his arrest and subsequent legal proceedings. However, at no point immediately *prior* to the commission of the offences was the Respondent's disorder of a moderate level of severity. The Respondent knew what he was doing then was wrong and he was able to reason, could control his actions and displayed appropriate judgment. Dr Sarkar found no substantial contributory link between the Respondent's voluntarily-consumed alcohol and his ability to reason, control his actions and use appropriate judgment. The Respondent was not clinically depressed at the material time and his actions did not appear to be related to this. When interviewed by Dr Sarkar, the Respondent in fact denied feeling depressed, upset or in any way distressed in the period leading up to the offences.

22 Both Dr Ong and Dr Sarkar were cross-examined on their respective reports when the matter was next heard on 30 November 2017. Dr Ong clarified that he did not conduct a forensic assessment in relation to the Respondent's mental state. He explained that his focus vis-à-vis the Respondent was therapeutic, *ie*, to ensure that the Respondent was given appropriate treatment. He stood by his assessment that the Respondent did suffer from moderately severe depression when the Respondent presented himself on 4 July 2016. He did not assess the Respondent's mental state relating to the offences, and he did not ask the Respondent specifically about his mental state at the time of the commission of the offences. However, he formed the view that the Respondent's depression and other conditions had contributed to the Respondent's misjudgment and the way the Respondent handled stress. Dr Ong

also stated that his diagnosis of depression also took into account the Respondent's higher risk factors, including genetic loading on account of his late mother's history of likely schizophrenia. Based on the Global Assessment of Functioning test, the Respondent's score was 55 on a scale of one (most severe) to 100 (perfectly normal). Dr Ong accepted that there was no direct causal link between the Respondent's depression and his offending conduct. However, he maintained (*per* the Second Report) that the Respondent's depression was a contributory factor to the offences.

23 Dr Sarkar emphasised that from his interview with the Respondent for the purpose of preparing the IMH Report, his conclusion was that the Respondent's depression only commenced after the Respondent was arrested and legal proceedings had begun, and the Respondent could not find employment thereafter. The Respondent was otherwise able to socialise and enjoy himself drinking and chatting with his friends, listening to live music and doing things that he found pleasurable around the time the offences were committed. Thus, his conduct then was not consistent with that of someone who was clinically depressed.

The substantive appeal

24 The substantive appeal was heard following the clarifications on the Respondent's mental condition provided by Dr Ong and Dr Sarkar.

25 The Prosecution sought for the probation order to be set aside, and for the imposition of a global sentence of five to six months' imprisonment and two years' disqualification. The following points were made in the Prosecution's written submissions. First, the District Judge failed to appreciate that deterrence (and not rehabilitation) was the foremost sentencing principle in this case.

Second, the District Judge failed to give weight to the following aggravating factors: (a) the manner and distance of driving; (b) the fact that a heavy vehicle was involved; (c) the blatant disregard for the victims; (d) the cost of damage; and (e) the Respondent's voluntary intoxication. Third, the District Judge failed to treat the Respondent's voluntary intoxication as an aggravating factor. Fourth, the District Judge overstated and placed excessive weight on the Respondent's mental condition, and ignored the fact that there was no evidence linking the Respondent's mental condition to his offending conduct. Fifth, the District Judge failed to consider the entirety of the probation report and placed undue weight on the probation report's recommendation. Sixth, the District Judge wrongly disregarded the relevant sentencing precedents.

26 In oral submissions, the Prosecution stressed that the Respondent should be treated as an adult offender. The seriousness of the offences was also emphasised. In addition, the Prosecution submitted that there were no compelling reasons to support a probation order.

27 The Respondent, on the other hand, asked for the probation order to be upheld. He made the following points in his written submissions. First, he urged the court to lean in favour of his rehabilitation and place less weight on the need for deterrence. Several arguments were raised in support of this. The Respondent said that the potential harm that presented itself could not be held against him. He had pleaded guilty at the first instance and his mental condition operated to reduce his culpability. Moreover, he was untraced and had since found gainful employment as a part-time warehouse assistant. Unlike before, he now had strong familial support. Second, the Respondent submitted that his mental condition caused him to make sub-optimal choices and caused him to be unable to think rationally. Third, the Respondent's offending behaviour was one-off and not premeditated.

28 In oral submissions, the Respondent contended that this was not a typical case, given the combination of issues the Respondent faced, including his past history of acute psychosis in 2011 and Dr Ong's opinion of genetic loading being a likely risk factor based on the Respondent's late mother's history of likely schizophrenia. It was also suggested that Dr Sarkar's assessment in September 2017 might be less reliable as he had only seen the Respondent twice and there was a lapse of time since April 2016 when the offences were committed. Furthermore, the Respondent's condition had improved under Dr Ong's care and treatment, and he had taken steps to curb his drinking habit.

Applicable principles

29 The four classical principles of sentencing – retribution, deterrence, prevention and rehabilitation – are well established in our criminal jurisprudence. It is also trite that a probation order accords primacy to the principle of rehabilitation. Indeed, it has been observed that probation is primarily reformative and that the main legislative intent behind the Probation of Offenders Act (Cap 252, 1985 Rev Ed) (the "POA") is to promote the rehabilitation of young first-time offenders (see *Public Prosecutor v Mohammad Al-Ansari bin Basri* [2008] 1 SLR(R) 449 ("*Al-Ansari*") at [41]–[42]). Elsewhere, it has been said that probation places rehabilitation at the "front and centre" of the court's deliberation (see *Public Prosecutor v Koh Wen Jie Boaz* [2016] 1 SLR 334 ("*Boaz Koh*") at [35]). Accordingly, rehabilitation must be shown to be the dominant sentencing principle in order for a probation order to be justified. In this regard, a number of principles were relevant to the present appeal, and it is to these that I now turn.

30 First, rehabilitation as a sentencing principle generally takes precedence where young offenders are involved. In *Public Prosecutor v Mok Ping Wuen Maurice* [1998] 3 SLR(R) 439, the High Court held (at [21]) that:

> Rehabilitation is the dominant consideration where the offender is 21 years and below. Young offenders are in their formative years and chances of reforming them into law-abiding adults are better. The corrupt influence of a prison environment and the bad effects of labelling and stigmatisation may not be desirable for young offenders. Compassion is often shown to young offenders on the assumption that the young "don't know any better" and they may not have had enough experience to realise the full consequences of their actions on themselves and on others. Teens may also be slightly less responsible than older offenders, being more impressionable, more easily led and less controlled in their behaviour. However, there is no doubt that some young people can be calculating in their offences. Hence the court will need to assess the facts in every case.

31 Similarly, and more recently, the High Court in *Public Prosecutor v Lim Cheng Ji Alvin* [2017] 5 SLR 671 held (at [6]–[7]) that the law takes a presumptive view that with young offenders, the primary sentencing consideration is rehabilitation, but that this is not presumptively the case with an older offender. The upshot of these pronouncements is that a probation order might therefore be deemed a more viable option where the offender is young.

32 Notwithstanding, what is also clear is that this does not mean that adult offenders who are above 21 years old can never be sentenced to probation. Still less does it mean that the age of 21 operates as some sort of a bright line beyond which probation can never be granted. Indeed, s 5(1) of the POA imposes no such *general* prohibition:

> **5.**—(1) Where a court by or before which a person is convicted of an offence (not being an offence the sentence for which is fixed by law) is of the opinion that having regard to the circumstances, including the nature of the offence and the character of the offender, it is expedient to do so, the court may, instead of sentencing him, make a probation order, that is to say, an order requiring him to be under the supervision of a

> probation officer or a volunteer probation officer for a period to be specified in the order of not less than 6 months nor more than 3 years:
>
> Provided that where a person is convicted of an offence for which a specified minimum sentence or mandatory minimum sentence of imprisonment or fine or caning is prescribed by law, the court may make a probation order if the person —
>
> (*a*) has attained the age of 16 years but has not attained the age of 21 years at the time of his conviction; and
>
> (*b*) has not been previously convicted of any such offence referred to in this proviso, and for this purpose section 11(1) shall not apply to any such previous conviction.

33 Thus, in appropriate cases, adult offenders who are above 21 years old *can* be sentenced to probation. In *Goh Lee Yin v Public Prosecutor* [2006] 1 SLR(R) 530, the High Court held (at [28]) as follows:

> Evidently, the age of an offender is often indicative of the effectiveness of probation in bringing about rehabilitation. However, *this does not lead to the inexorable conclusion that rehabilitation can never be the operative concern in the case of an offender above the age of 21,* ***particularly if he or she demonstrates an extremely strong propensity for reform and/or there are exceptional circumstances warranting the grant of probation***. The offender's age, therefore, is by no means absolutely determinative of the appropriate sentence as the court must still examine the facts in the individual case. … [emphasis added in italics and bold italics]

34 At the same time, it is evident from this passage that it is the exception rather than the norm for adult offenders to be sentenced to be probation. Indeed, it has been noted that whilst the court may exceptionally be persuaded to allow probation in cases involving older offenders, the archetype of the appropriate candidate for probation remains the young "amateur" offender (see *Lim Li Ling v Public Prosecutor* [2007] 1 SLR(R) 165 at [87]).

35 Second, even where rehabilitation is relevant as a sentencing principle, it is likely to be trumped by the need for deterrence in cases where the offence concerned is serious. In *Boaz Koh*, the High Court held (at [30]) that the focus on rehabilitation can be diminished or even eclipsed by such considerations as deterrence or retribution where the circumstances warrant, and that, broadly speaking, this happens in cases where: (a) the offence is serious; (b) the harm caused is severe; (c) the offender is hardened and recalcitrant; or (d) the conditions do not exist to make rehabilitative sentencing options viable. Thus, the imposition of probation is unlikely to be appropriate where there are serious charges even where rehabilitation is an important consideration; in such cases, the principle of deterrence requires that a strong deterrent message be sent to others (see *Al-Ansari* at [72]). Generally, therefore, probation would not be considered where the offence is a serious one.

36 At this juncture, it is also appropriate to briefly address the District Judge's view that the probation order had a deterrent effect (see [17] above). In my view, courts should be careful to not overstate the deterrent effect of a probation order. Indeed, it has been noted that while probation orders do exert some form of deterrence, such deterrence, generally speaking, must be regarded as being relatively modest in nature (see *Al-Ansari* at [56]).

37 Third, the existence of a mental condition that is causally linked to the commission of the offence may displace the need for deterrence and bring rehabilitation to the fore. In *Public Prosecutor v Lee Han Fong Lyon* [2014] SGHC 89, the High Court affirmed (at [7]) the lower court's view that less emphasis could be placed on the principle of deterrence when the offender was facing a serious mental or psychiatric disorder at the time of the commission of the offence. In so far as *general* deterrence is concerned, the High Court in *Ng So Kuen Connie v Public Prosecutor* [2003] 3 SLR(R) 178 held (at [58]) that:

> … However, I found that … *the element of general deterrence can and should be given considerably less weight if the offender was suffering from a mental disorder at the time of the commission of the offence. This is particularly so if there is a causal link between the mental disorder and the commission of the offence.* In addition to the need for a causal link, other factors such as the seriousness of the mental condition, the likelihood of the appellant repeating the offence and the severity of the crime, are factors which have to be taken into account by the sentencing judge. In my view, *general deterrence will not be enhanced by meting out an imprisonment term to a patient suffering from a serious mental disorder which led to the commission of the offence.* [emphasis added]

38 In *Lim Ghim Peow v Public Prosecutor* [2014] 4 SLR 1287 ("*Lim Ghim Peow*"), the Court of Appeal clarified (at [28]) that the element of general deterrence may still be accorded full weight in some circumstances, such as where *the mental disorder is not serious or is not causally related to the commission of the offence, and the offence is a serious one*. The court went on to state (at [35]) that:

> … the existence of a mental disorder on the part of the offender does not automatically reduce the importance of the principle of general deterrence in sentencing. Much depends on the circumstances of each individual case. If the nature of the mental disorder is such that it does not affect the offender's capacity to appreciate the gravity and significance of his criminal conduct, the application of the sentencing principle of general deterrence may not be greatly affected.

39 Similarly, *specific* deterrence may be of limited application in cases involving mentally-disordered offenders (see *Lim Ghim Peow* at [36]). In *Lim Ghim Peow*, the court explained (at [36]) that where the offender's mental disorder has seriously inhibited his ability to make proper choices or appreciate the nature and quality of his actions, it is unlikely that specific deterrence will fulfil its aim of instilling in him the fear of re-offending. Conversely, specific deterrence may remain relevant in instances where the offence is premeditated or where there is a conscious choice to commit the offence.

40 Thus, the existence of a mental condition that is causally linked to the commission of the offence may mean that rehabilitation (as opposed to deterrence) assumes centre stage in the sentencing analysis. In *Lim Ghim Peow*, the court noted (at [37]) that rehabilitation may take precedence where deterrence is rendered less effective by virtue of a serious psychiatric condition or mental disorder on the part of the offender. However, the court was also quick to caution (at [38]) that it should not be assumed that rehabilitation necessarily dictates that a lighter sentence be imposed on a mentally-disordered offender.

My decision

Analytical framework

41 It was clear that there were two principal factors which pointed against the appropriateness of a probation order. First, the Respondent was 23 years and four-plus months old at the time of the offences. While this did not preclude the imposition of a probation order, it would require the Respondent to demonstrate an "extremely strong propensity for reform" or show "exceptional circumstances" in order to justify the same (see [30]–[34] above). Second, there was no doubt that the offences in the present case were serious and that, therefore, deterrence would ordinarily be the dominant sentencing consideration (see [35] above). Indeed, the Respondent (and, for that matter, the District Judge (see [13] above)) accepted as much in relation to the offence of theft of a motor vehicle under s 379A of the PC, which was the most serious of the three proceeded charges.

42 Accordingly, the focus in the present appeal was squarely on whether the present case was an *exceptional* one such that, notwithstanding these two factors, rehabilitation remained the dominant sentencing consideration and a probation order should still be made. The District Judge clearly thought so (see

[16]–[17] above). However, although the District Judge did advert to the relevant sentencing considerations, I was, with respect, of the view that he had erred in two main aspects: first, in his assessment of the Respondent's mental condition and, second, in his broader evaluation of the factual context. In my judgment, neither the Respondent's mental condition nor the factual context rendered the present case an exceptional one.

The Respondent's mental condition

43 I have set out the District Judge's findings with respect to the Respondent's mental condition at [14] and [16] above. The District Judge's findings in this regard were made *solely* on the basis of the First Report. However, the First Report was inadequate in many respects. As I have already noted at [18] above, the First Report did not make clear the degree to which the Respondent was suffering from depression and, additionally, did not specify if the Respondent's depression amounted to a causal link or contributory factor leading to the commission of the offences.

44 In my view, the District Judge erred in assessing the Respondent's mental condition based on the First Report. The District Judge in fact seemed cognisant of this possibility of error as he acknowledged that "[a] further medical report could have helped clarify the sentencing position to adopt" (see the GD at [16]). Yet, he chose to accept that there were no more reports forthcoming from Dr Ong. Having had sight of the Second Report, the IMH Report and hearing the clarifications of both Dr Ong and Dr Sarkar under cross-examination, I was of the view that the basis on which the District Judge formed his opinion of the Respondent's mental condition was questionable at best, if not seriously flawed.

45 In light of what has been said at [37]–[40] above, it is clear that it is not simply the *existence* of a mental condition that displaces the need for deterrence and brings rehabilitation to the fore. Rather, the search is for the existence of a mental condition that is *causally linked* to the commission of the offence. Ordinarily (although not invariably), this would involve evidence from the realm of forensic psychiatry. In this connection, what became evident in the course of cross-examination was that Dr Ong did not conduct a forensic assessment in relation to the Respondent's mental state. Rather, Dr Ong's focus vis-à-vis the Respondent was therapeutic (see [22] above). Perhaps unsurprisingly, therefore, Dr Ong did not assess the Respondent's mental state *relating to the offences* or ask specifically about the Respondent's mental state *at the time of the commission of the offences*.

46 In these circumstances, the relevance and weight of Dr Ong's diagnosis of the Respondent's depression (assuming that this was even a reference to major depressive disorder as defined in the DSM-5) had to be carefully examined. As already noted, Dr Ong's position was not so much that the Respondent's depression was causally linked to the offences, but that the former was a contributory factor to the latter (see [22] above). As against this, Dr Sarkar opined that the Respondent was not clinically depressed at the material time (see [21] above) and that his conduct around the time the offences were committed was not consistent with that of someone who was clinically depressed (see [23] above). In my view, Dr Sarkar's assessment was more persuasive. Indeed, it is pertinent to note that the Respondent had *himself* informed Dr Sarkar that *he did not feel depressed, upset or in any way distressed in the period leading up to the offences* (see [21] above). This crucial point was not seriously challenged by the Respondent when Dr Sarkar was cross-examined. All things considered,

I was not persuaded that the Respondent suffered from a major depressive disorder of at least moderate severity at the time of offending. I was even less convinced that any such major depressive disorder amounted to a causal link or contributory factor (substantial or otherwise) leading to the commission of the offences.

47 As for Dr Ong's diagnosis of the Respondent's "alcohol abuse", this would, at its highest, explain the Respondent's disinhibition at the time of the offences. In this respect, I agreed with Dr Sarkar's view as set out at [21] above. The Respondent had voluntarily consumed alcohol as a pleasurable activity and was able to exercise judgment and adequate control over his actions before deciding to steal the lorry and drive it away. He was even able to flee from the lorry after it crashed and make his way home on a bus.

48 I accepted that the Respondent required treatment and appeared to have benefitted from seeing Dr Ong more regularly for follow-up treatment. However, given the tenuous link between his mental condition and the commission of the offences, I was unable to agree that this was a factor that weighed in favour of rehabilitation.

The factual context

49 As regards the factual context, I was of the view that the District Judge erred in his evaluation of the same.

50 First, the District Judge took into account the Respondent's National Service record and employment history as factors that operated in his favour. In doing so, the District Judge had glossed over certain background facts that tended to portray the Respondent in a less favourable light. When these

background facts were considered, it became doubtful that the Respondent's potential for rehabilitation was demonstrably strong.

51 In respect of the Respondent's National Service record, the District Judge noted that this was "satisfactory" (see the GD at [18]). This appears to have been based on a bare statement in the Respondent's Certificate of Service. Admittedly, the Respondent was also reported as having completed his tasks on time and with commitment, and as having been diligent and helpful. But the rest of his National Service record painted quite a different picture. The Respondent underwent 40 days' detention in September 2011 for using insubordinate language to a person superior in rank. Subsequently, he was put under seven days' stoppage of leave in December 2011 for a similar infraction. As recently as March 2016, he was fined $50 for failing to complete his remedial training. The District Judge made no mention of this poor disciplinary record. Taking all these matters into account, I found it perplexing that the District Judge was prepared to give weight to the Respondent's "satisfactory" National Service record.

52 As for the Respondent's employment history, the District Judge noted that the Respondent had kept himself gainfully employed since November 2016. The District Judge thought that this engagement would help the Respondent to steer clear of risky behaviours and that the Respondent needed a regular job to pay for his daily expenses and medication. The District Judge further held that a period of incarceration would severely compromise the Respondent's ability to continue working with his current company, and would also affect his future employability (see the GD at [18]). While there may have been some truth in all of this, I noted that the Respondent's employment history was patchy for the most part, at least up till December 2016 when he seemed more settled after taking on a new job as a warehouse assistant in a transport and shipping

company. One could also be sceptical and question if this was in some part motivated by the proceedings that were pending by this time. Either way, I found the Respondent's employment history to be a neutral factor.

53 Second, the District Judge had placed inadequate weight on a number of factors which aggravated the seriousness of the offences. In this regard, it is helpful to bear in mind that the seriousness of an offence is a function of: (a) the harm caused by the offence; (b) the offender's culpability; and (c) other aggravating and mitigating factors which do not relate to the commission of the offence *per se* (see *Public Prosecutor v Koh Thiam Huat* [2017] 4 SLR 1099 ("*Koh Thiam Huat*") at [41]).

54 To begin with, the District Judge, when dealing with the Respondent's manner of driving, did note that the offences affected public safety and public facilities and "would ordinarily be an aggravating factor". However, he then went on to state that it was "fortuitous" that the Respondent had only driven the lorry for a short distance before causing it to topple without injuring anyone or damaging anything else, and that "[t]he extent of harm would be one of the factors in determining the appropriate sentence" (see the GD at [20]). It is not entirely clear whether the District Judge had considered the Respondent's manner of driving aggravating. I was prepared to assume that the District Judge had in fact done so but thought that the extent of aggravation was to a lesser degree than a situation involving personal injury or more serious property damage. However, an offender's manner of driving is generally a factor that goes towards *culpability* rather than *harm* (see *Koh Thiam Huat* at [41]; *Stansilas Fabian Kester v Public Prosecutor* [2017] 5 SLR 755 at [74]). Thus, the fact that no harm was caused apart from damage to the lorry did not lower the Respondent's culpability in any way. Accordingly, the weight to be

attributed to the Respondent's manner of driving should still be considerable and it would appear that the District Judge had not given adequate consideration to this factor.

55 The District Judge also held, with respect to the type of vehicle involved, that the lorry was stolen impulsively and it was therefore not particularly aggravating that a heavy vehicle was stolen. Specifically, he found that while this "would ordinarily be an aggravating factor", the Respondent "had not set out looking to steal a heavy vehicle which could cause more harm" (see the GD at [20]). This seems related to the District Judge's earlier and apparent finding that the lack of premeditation was a mitigating factor (see the GD at [8] and [11]). However, the lack of premeditation is not a mitigating factor but is a neutral factor at best. More importantly, the fact that the Respondent acted impulsively did not detract from the fact that a heavy vehicle was stolen and driven away. While it was true that the offences were committed between 6.10am and 6.20am when there were conceivably fewer pedestrians and vehicles on the road, there remained a very real risk that the Respondent, a drunk and unlicensed driver who was driving a stolen lorry which he would be unfamiliar with operating, could have easily caused much more harm, whether by way of substantial personal injury (including the possibility of a fatality) or serious property damage. This is significant because, as I held in *Koh Thiam Huat* (at [41]), the *potential* harm that might have resulted is an important consideration in assessing the harm caused by an offence, which in turn affects the overall seriousness of the same.

56 Finally, the District Judge appears to have thought that the Respondent's intoxicated and inebriated state was not aggravating. He held that "ordinarily intoxication would be an aggravating consideration" but that "in this factual matrix, the [Respondent] had uncharacteristically tried to drive a vehicle when

he [could not] drive" (see the GD at [21]). As noted at [47] above, the Respondent was able to exercise judgment and adequate control over his actions before deciding to steal the lorry and drive it away, and was even able to flee from the lorry after it crashed and make his way home on a bus. It was by no means clear why the Respondent's "uncharacteristic" actions rendered his voluntary intoxication any less aggravating. Indeed, the fact that the Respondent had acted "uncharacteristically" was precisely a manifestation of what intoxication can lead to – possibly uncharacteristic and disinhibited conduct in an alcohol-induced "high". It was no different from rowdy, disorderly or loutish behaviour exhibited in a state of intoxication.

57 In short, I was not persuaded that the District Judge had correctly distinguished what he had accepted to be "ordinarily" aggravating factors, or that he was correct in considering that they were aggravating but only to a lesser degree. When these factors were properly taken into account, they weighed clearly in favour of deterrence.

Probation not appropriate

58 Returning to the analytical framework set out at [41]–[42] above, and bearing in mind what has been said at [43]–[57] above, I did not think that the present case was an exceptional one where rehabilitation remained the dominant sentencing consideration and a probation order should be made. The Respondent's mental condition was not a factor that weighed in favour of rehabilitation (see [43]–[48] above). Nor did his National Service record and employment history point towards a demonstrably strong potential for rehabilitation (see [50]–[52] above). Furthermore, there were aggravating factors which weighed clearly in favour of deterrence (see [53]–[57] above). In all the circumstances, probation was not an appropriate sentence.

The appropriate sentence

59 Having found that probation was not an appropriate sentence, I next had to decide what the appropriate sentence was. At the outset, it bears noting that the Respondent's position in this appeal was simply that a probation order was appropriate. As such, he made no submissions regarding the appropriate sentence in the event that this position was rejected.

DAC 916916/2016: theft of a motor vehicle under s 379A of the PC

60 DAC 916916/2016 was the charge for theft of a motor vehicle under s 379A of the PC. The Prosecution submitted for a sentence of four months' imprisonment and 18 months' disqualification for this charge. The following precedents were relied on:

(a) In *Public Prosecutor v Mohammad Hafisy bin Kamaruddin* (District Arrest Case No 26970 of 2012 and others) ("*Hafisy*"), the offender stole a lorry with his accomplices. They drove the lorry around a housing estate and then abandoned it. The offender was sentenced to four months and two weeks' imprisonment and disqualified from holding or obtaining all classes of driving licenses for 18 months.

(b) In *Public Prosecutor v Mohamed Rezal bin Abdul Rahim* (District Arrest Case No 904716 of 2014 and others) ("*Rezal*"), the offender and his accomplice stole lorries for joyrides on two occasions. For each charge, he was sentenced to three months' imprisonment and disqualified from holding or obtaining all classes of driving licenses for 12 months.

(c) In *Public Prosecutor v Muhammad Taufiq bin Jasmi* (District Arrest Case No 922848 of 2015 and others) ("*Taufiq*"), the offender

stole a lorry with his two accomplices, drove it, and then abandoned it. He was sentenced to four months' imprisonment and disqualified from holding or obtaining all classes of driving licenses for 18 months.

61 The District Judge distinguished *Hafisy* and *Rezal* on the basis that the offenders in those cases had acted with premeditation (see the GD at [7]). While this might have been true, it also completely overlooked the other aggravating factors that presented themselves in the present case (see [53]–[57] above). As for *Taufiq*, the District Judge noted that the offender had stolen a lorry while he was under disqualification and that he had also stolen a cash card (which was in the in-vehicle unit of the lorry) (see the GD at [7]). With respect, I did not think that either of these substantially distinguished *Taufiq* from the present case.

62 All things considered, I was in broad agreement with the Prosecution's submissions. In relation to DAC 916916/2016, I imposed a sentence of four months' imprisonment and disqualified the Respondent from driving all classes of vehicles for a period of two years.

MAC 903863/2016: driving without a license

63 MAC 903863/2016 was the charge for driving without a license under s 35(1) read with s 35(3) and punishable under s 131(2)(*a*) of the RTA. The Prosecution submitted for a sentence of at least one month's imprisonment for this charge. The following precedents were relied on:

(a) In *Public Prosecutor v Mohammad Nor Haslan bin Mustaffa Kamar* (District Arrest Case No 32961 of 2011 and others) ("*Haslan*"), the offender drove a van without a valid driving licence and was sentenced to a fine of $800. In *Public Prosecutor v Wilson Ong Jie Rong* (District Arrest Case No 59028 of 2010 and others) ("*Wilson Ong*"), the

offender drove a motorcycle without a valid driving licence and was sentenced to a fine of $800. The Prosecution submitted, however, that the present case was more aggravated than these cases as a heavy vehicle was involved and the Respondent was intoxicated.

(b) In *Public Prosecutor v Muhammad Rizman bin Rahman* (District Arrest Case No 23760 of 2009 and others) ("*Rizman*"), the offender drove a lorry without a valid driving licence and caused the death of a motorcyclist. In respect of the charge for driving without licence, he was sentenced to one month's imprisonment and four months' disqualification. In *Public Prosecutor v Ho Eng Leong* (District Arrest Case No 45550 of 2013 and others) ("*Ho Eng Leong*"), the offender drove a vehicle without a valid driving licence and collided into a motorcyclist. In respect of the charge for driving without licence, he was sentenced to one month's imprisonment.

64 I agreed that the present case was more aggravated than *Haslan* and *Wilson Ong*. However, I did not think that it was as serious as *Rizman* and *Ho Eng Leong*. Accordingly, in relation to MAC 903863/2016, I imposed a sentence of two weeks' imprisonment.

MAC 905998/2016: rash driving

65 MAC 905998/2016 was the charge for rash driving under s 279 of the PC. The Prosecution submitted for a sentence of four to eight weeks' imprisonment and two years' disqualification for this charge. The following precedents were relied on:

(a) In *Lim Yong Guan v Public Prosecutor* (Magistrate's Appeal No 217 of 1995), the offender drove a car at high speed when negotiating a

right bend and made an abrupt right turn before losing control of the vehicle, mounting a foot path, and crashing into a tree. He then negotiated another right turn at high speed and almost hit a kerb. He was sentenced to two months' imprisonment and five years' disqualification, and his appeal against sentence was dismissed.

(b) In *Lim Thian Sang v Public Prosecutor* (Magistrate's Appeal No 154 of 1997), the offender reversed his prime mover without assistance and crashed into a carpark signboard. He then continued reversing further until his vehicle crashed into an electronic arm barrier mechanism and a parking kiosk. On appeal, he was sentenced to four weeks' imprisonment and one year's disqualification.

(c) In *Soh Beng Yong v Public Prosecutor* (Magistrate's Appeal No 142 of 2003), the offender performed various "hell-riding" manoeuvres on his motorcycle and almost lost control on a few occasions. He also made U-turns by cutting across the centre divider. On appeal, he was sentenced to four weeks' imprisonment, a $1,000 fine and four years' disqualification.

66 None of these precedents was on all fours with the present case. All of them were also rather dated. Notwithstanding, they did provide a broad sense of what the appropriate sentence should be. Accordingly, in relation to MAC 905998/2016, I imposed a sentence of one month's imprisonment and disqualified the Respondent from driving all classes of vehicles for a period of two years.

Conclusion

67 For the above reasons, I allowed the appeal and set aside the probation order made by the District Judge. I ordered the imprisonment terms in DAC 916916/2016 and MAC 903863/2016 to run consecutively. The total imprisonment term was four months and two weeks' imprisonment. The two-year disqualification term was to commence upon the Respondent's release from imprisonment. The Respondent applied for a deferment of sentence to 19 February 2018, and I allowed the request with a concomitant increase in bail.

See Kee Oon
Judge

April Phang, Lu Yiwei and Sia Jiazheng (Attorney-General's Chambers) for the appellant;
Tan Teck Hian Wilson (WNLEX LLC) for the respondent.
