Mohamad Fairuuz bin Saleh *v* Public Prosecutor
[2014] SGHC 264

Case Number	: Magistrate's Appeal No 113 of 2014
Decision Date	: 22 December 2014
Tribunal/Court	: High Court
Coram	: Sundaresh Menon CJ; Chao Hick Tin JA; See Kee Oon JC
Counsel Name(s)	: S K Kumar and Joseph Fernandez (S K Kumar Law Practice LLP) for the Appellant; Nicholas Tan and Norman Yew (Attorney-General's Chambers) for the Respondent; and Darius Chan (Norton Rose Fulbright Asia LLP) as Amicus Curiae.
Parties	: Mohamad Fairuuz bin Saleh — Public Prosecutor

Criminal procedure and sentencing – Sentencing – Forms of punishment

22 December 2014

Sundaresh Menon CJ:

Introduction

1 This was an appeal brought by Mohamad Fairuuz Bin Saleh ("the Appellant") against the decision of the district judge ("the DJ") in *Public Prosecutor v Mohamad Fairuuz Bin Saleh* [2014] SGDC 203 ("the GD"). The Appellant pleaded guilty to one charge of assisting an unlicensed moneylender by performing multiple fund transfers through his bank account, an offence under s 5(1) read with ss 14(1)(*b*)(i) and 14(1A)(*a*) of the Moneylenders Act (Cap 188, 2010 Rev Ed) ("the MLA"). A similar charge involving a separate bank account was taken into consideration for the purposes of sentencing.

2 Before the DJ, counsel for the Appellant, Mr S K Kumar ("Mr Kumar") submitted that a sentence of probation should be imposed. This was rejected by the DJ who instead sentenced the Appellant to three months' imprisonment and a fine of $30,000 (in default to a term of imprisonment of one month).

3 The Appellant appealed against the sentence, submitting that the DJ had erred in holding that he was not eligible for probation. The appeal came before us on 6 November 2014 and we delivered our brief oral grounds after the hearing. We allowed the appeal insofar as we reduced the term of imprisonment from three months to six weeks, but we agreed with the DJ that the Appellant was ineligible for probation. We now give our detailed reasons for our decision.

The facts

4 Sometime in 2011, the Appellant borrowed from unlicensed moneylenders. The amount was initially small but eventually it ballooned to a total of approximately $23,000. He was unable to repay the loan and in a misguided endeavour to ameliorate his situation, the Appellant agreed to assist an unlicensed moneylender known as Tango whom he had borrowed money from. He did this by setting up various accounts, and procuring a total of 977 deposits and 592 withdrawals involving a sum of $236,873 over a period of almost seven months from early January 2012 to 27 July 2012. He was arrested on 15 August 2012.

The decision below

5 As alluded to above, the DJ held that probation was not available as a sentencing option. In his view and on an application of the reasoning in *Lim Li Ling v Public Prosecutor* [2007] 1 SLR(R) 165 ("*Lim Li Ling*"), the sentence for an offence under s 14(1)(*b*)(i) of the MLA is "fixed by law". The term "fixed by law" is found in s 5(1) of the Probation of Offenders Act (Cap 252, 1985 Rev Ed) ("the POA") which essentially provides that an accused person is *not* eligible for probation where the sentence for the offence is "fixed by law".

6 The DJ also noted that a similar conclusion was reached in *Public Prosecutor v Ng Teng Yi Melvin* [2013] SGDC 207, a case which likewise involved an offence under s 5 of the MLA punishable by s 14(1)(*b*)(i) of the MLA. The District Court as well as the High Court (when the matter went on appeal) both held that the sentence under s 14(1)(*b*)(i) is fixed by law (see *Ng Teng Yi v Public Prosecutor* [2014] 1 SLR 1165 at [21]). Consequently, the DJ considered himself bound to arrive at the same result.

7 As for the sentence imposed, the DJ observed that such offences were fairly common and that the sentencing precedents were well-established. He considered that the Appellant was a first time offender, had pleaded guilty (albeit at trial), and was a graduate who was gainfully employed. The DJ also noted the circumstances in which the offence was committed. The Appellant only turned to unlicensed moneylenders after he had run out of credit lines from authorised lenders, and started working for the unlicensed moneylender when he found himself unable to service the repayments in order to avoid harassment and repay his debt. The DJ found that many others had committed similar acts under similar circumstances for similar reasons, and that the precedents established that a term of imprisonment of between three and four months together with the prescribed fine would be appropriate. Taking into consideration the fact that there were several hundred separate transactions carried out over the relevant period and that the total amount transacted was not small, the DJ sentenced the Appellant to a term of imprisonment of three months together with the mandated minimum fine of $30,000 and in default to a term of imprisonment of one month.

The relevant legislative provisions

8 It is apposite to briefly set out s 5(1) of the POA, which is the relevant legislative provision governing the availability of probation as a sentencing option. The section reads:

> **Probation**
>
> **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. [emphasis added]

Section 5(1) is followed by a proviso ("the Proviso") which reads:

> 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.

[emphasis added]

9 In summary, pursuant to the opening paragraph of s 5(1) of the POA (which we shall refer to as the principal part of s 5(1)), where an accused person is convicted of an offence which is punishable by a sentence that is fixed by law, probation is generally not available as a sentencing option for the court. However, pursuant to the Proviso, where a person is convicted of an offence for which *a specified minimum sentence or mandatory minimum sentence* is prescribed, probation may be ordered if the two conditions in the Proviso as encapsulated in subsection (*a*) and (*b*) are satisfied.

10 This is also a convenient juncture to set out s 14(1)(*b*)(i) of the MLA which contains the punishment for the commission of an offence under s 5 of the MLA:

Unlicensed moneylending

14.—(1) Subject to subsection (1A), any person who contravenes, or who assists in the contravention of, section 5(1) shall be guilty of an offence and —

…

(*b*) in any other case —

(i) shall on conviction be punished with a fine of not less than $30,000 and not more than $300,000 and with imprisonment for a term not exceeding 4 years; and

…

The parties' arguments

11 In this appeal, Mr Kumar submitted that the sentence for an offence under s 14(1)(*b*)(i) of the MLA is not one fixed by law ("the MLA Sentence"). Hence, the Appellant could be considered for probation. It was further argued that the MLA Sentence is neither a "specified minimum sentence" nor a "mandatory minimum sentence". As a result, there was no need for the two conditions to the Proviso to be satisfied before the court could grant probation.

12 In the alternative, Mr Kumar submitted that the sentence imposed was manifestly excessive in the circumstances of the case. He also relied on two medical reports that stated that the Appellant was unfit for prison. These reports were before the DJ and had not been challenged by the Prosecution, but did not seem to have been considered by the DJ.

13 The Prosecution, on the other hand, maintained that the DJ was right in holding that the MLA Sentence was one that was fixed by law, and further submitted that because the Proviso applied and the Appellant did not meet the requirement under subsection (*a*), in that he was above 21 years of age, probation was not a sentencing option that was open to the court.

Issues before this court

14 The first issue we considered was whether the Appellant was eligible for probation. This involved determining whether the MLA Sentence was "fixed by law", and/or whether it was a "specified minimum sentence" or a "mandatory minimum sentence". The second issue we considered was whether the sentence imposed in this case was appropriate.

Our decision

Overview

15 The first issue required us to consider what Parliament meant by the terms "fixed by law", "mandatory minimum sentence", and "specified minimum sentence", and how, if at all, they related to one another. To assist us, we appointed an Amicus Curiae under the Young Amicus Curiae Scheme, Mr Darius Chan ("Mr Chan"), to make submissions on the following issues:

(a) the proper interpretation of the terms, "sentence fixed by law", "mandatory minimum sentence" and "specified minimum sentence" as they appear in s 5(1) of the POA, the Proviso and s 337(1)(*a*) and (*b*) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC"); and

(b) whether and in what circumstances, probation is a sentencing option available under s 14(1)(*b*)(i) of the MLA.

16 Mr Chan presented us with a careful analysis and made very helpful submissions for which we were very grateful. The Prosecution and the Appellant were invited to make further submissions to address what Mr Chan had said.

17 Having carefully considered the various arguments in the round, we concluded that the terms "sentence fixed by law", "mandatory minimum sentence" and "specified minimum sentence" carry the following meanings:

(a) A "mandatory minimum sentence" means a sentence where a minimum quantum for a particular type of sentence is prescribed, and the imposition of that type of sentence is mandatory.

(b) A "specified minimum sentence" means a sentence where a minimum quantum for a particular type of sentence is prescribed, but the imposition of that type of sentence is not mandatory.

(c) A sentence "fixed by law" is one where the court has absolutely no discretion as to the type of sentence (which is mandatory) and the quantum of the prescribed punishment.

18 On the basis of the foregoing, the MLA Sentence is a mandatory minimum sentence, and therefore, probation would only have been available if the Appellant was able to fulfil the two conditions to the Proviso.

19 For clarity, we would observe that our decision affirms the definitions of the terms "mandatory minimum sentence" and "specified minimum sentence" as set out by the High Court in *Lim Li Ling*. However, we respectfully disagree with the definition of the term "fixed by law" that was adopted in that case. There, it was held that a sentence "fixed by law" encompasses three different types of sentences: a sentence where the court has no discretion as to either the type or the quantum of punishment; a mandatory minimum sentence; and a specified minimum sentence. In our judgment the latter two types of sentences are not sentences that are "fixed by law".

20 We now elaborate on these points.

The legislative history of the POA

21 We begin by analysing the legislative history of the POA. The High Court in *Lim Li Ling* had undertaken a similar exercise (see *Lim Li Ling* at [20] to [30]), and we find it necessary to set out and restate a substantial portion of this as it was critical to our decision. The expressions "fixed by law", "specified minimum sentence" and "mandatory minimum sentence" as found in s 5(1) of the POA are not defined in the POA or in other legislation, and thus it is necessary to understand the context and background in which these terms were introduced in the POA.

The earlier iterations of these provisions

22 The main body of s 5(1) of the POA was first enacted as s 5(1) of the Probation of Offenders Ordinance (Ordinance 27 of 1951) ("the 1951 Ordinance"). As was observed in the legislative debate leading to the introduction of the Ordinance (see *Proceedings of the Second Legislative Council*: *Colony of Singapore*, First Session (1951) at pp B126-127), a high percentage of offenders were being sent to prison in Singapore for short terms of imprisonment and this was "generally recognised" to be of little use as a reformative measure. It was thought that probation would be suitable and indeed preferable where neither the nature of the offence nor the interests of the community demanded imprisonment. Probation would also serve to reduce the prison population, as well as give offenders an opportunity to reform by offering them a "second chance" in limited circumstances.

23 The regime proposed to be adopted was similar to that which was then in operation in the UK, where it had been implemented with some success. Thus, the 1951 Ordinance was modelled after the UK Criminal Justice Act 1948 (11 & 12 Geo 6, c 58) ("the UK Act"). Aside from the duration of probation that was prescribed, s 5(1) of the 1951 Ordinance was *in pari materia* with s 3(1) of the UK Act – probation was not a sentencing option if the offence of which the accused was convicted prescribed a sentence that was fixed by law. There was one difference however – the 1951 Ordinance did not define the term "fixed by law", whereas under s 80(1) of the UK Act, the term "fixed by law" was defined as one where "the court is required to sentence the offender to death or imprisonment for life or to detention during His Majesty's pleasure".

Development of local case law

24 The first opportunity to adopt the definition in the UK Act arose in *Regina v Goh Boon Kwan* [1955] MLJ 120 ("*Goh Boon Kwan*"). There, Murray-Aynsley CJ had to decide whether an offence under s 420 of the Penal Code (Cap 119, 1955 Rev Ed) which, at that time, provided that an offender "shall be punished with imprisonment for a term which may extend to 7 years" (and that the offender shall also be liable to fine) was an offence the sentence for which was fixed by law. Murray-Aynsley CJ declined to apply s 80(1) of the UK Act and instead chose to accept the interpretation that had been applied to an equivalent phrase in the UK Criminal Appeal Act 1907 and the local Court of Criminal Appeal Ordinance (Cap 11). As a result, he held that a sentence "fixed by law" referred to a sentence "fixed both in quantum and kind".

25 This holding in *Goh Boon Kwan* stood as the law for a good 38 years until it was departed from in *Juma'at bin Samad v Public Prosecutor* [1993] 2 SLR(R) 327 ("*Juma'at*"). In *Juma'at*, then Chief Justice Yong Pung How had to decide whether probation was an option for an offence of housebreaking in order to commit theft (under s 454 read with s 34 of the Penal Code (Cap 224, 1985 Rev Ed) ("the Penal Code"), which prescribed a penalty of imprisonment which "shall be for a term of not less than 18 months and not more than 10 years".

26 Yong CJ held (at [42]) that this was a sentence which was "fixed by law to be a minimum of 18 months", and that there was a "clear statutory prohibition on the court from giving sentences of imprisonment of less than the minimum period expressly stated." In effect he construed it as a mandatory minimum sentence and regarded it as part of a wider category of offences the sentences for which he deemed were "fixed by law".

27 Yong CJ accordingly held that the court had no power under s 5(1) of the POA to grant probation for offences which carried a mandatory minimum sentence. He observed thus (at [43]):

> … the phrase "an offence the sentence for which is fixed by law" clearly indicates that the court's discretion to make a probation order is subordinated to the power of the legislature to provide that certain offenders be made to suffer certain forms of punishment. The provision of a mandatory minimum sentence is a clear instance of the exercise of this power by the legislature and the court ought not to usurp this power by an unjustifiably wide reading of an unambiguous provision. Therefore the expression "an offence (not being an offence the sentence for which is fixed by law)" *cannot and should not be given the excessively broad meaning of any offence other than one which attracts a single inflexible sentence for which the exact quantum and kind of punishment are expressly provided in the statutory provision concerned.* … [emphasis added]

28 This was considerately more restrictive than the position taken in *Goh Boon Kwan*, as the court could no longer grant probation for offences which carried "mandatory minimum sentences" in addition to those which were "fixed both in quantum and kind". While this may not have been expressly stated, the effect of the decision in *Juma'at* was to expand the definition of a sentence "fixed by law" to include "mandatory minimum sentences" and so to bring these within the main body of s 5(1) of the POA. Consequently, the court's power to grant probation for offences was further limited.

29 The restrictive position taken in *Juma'at* was particularly striking because the Penal Code had been amended some years prior to that decision in 1984, to impose mandatory minimum sentences for numerous offences including robbery, housebreaking and theft, rapes and outraging of modesty (see *Singapore Parliamentary Debates*, *Official Report* (26 July 1984) vol 44 at cols 1867–1870). The decision of the High Court in *Juma'at* meant that the courts could no longer grant probation for all those offences.

Introduction of the Proviso

30 Shortly after the High Court's decision in *Juma'at*, Parliament introduced amendments to the POA by way of the Probation of Offenders (Amendment) Act 1993 (Act 37 of 1993) ("the POA Amendment Act"). The POA Amendment Act introduced the Proviso. The amendment also introduced the term "specified minimum sentence", which the courts had hitherto not used.

31 The Explanatory Statement to the Probation of Offenders (Amendment) Bill (Bill No 25 of 1993) ("the POA Bill") which preceded the POA Amendment Act, as well as the speech of then Minister of Community Development, Mr Yeo Cheow Tong ("Minister Yeo") introducing the POA Bill were critical to our analysis, and we refer to the relevant portions in detail below (see [40], [48] and [59]). Suffice to say for the present that no explanation was given as to whether, and if so how, the terms "fixed by law", "mandatory minimum sentence" and "specified minimum sentence" related to each other. This was an issue which the High Court in *Lim Li Ling* had to deal with.

The decision in Lim Li Ling

32 In *Lim Li Ling*, the appellant was convicted of a charge of assisting in the carrying out of a

public lottery under section 5(*a*) of the Common Gaming Houses Act (Cap 49, 1985 Rev Ed) ("the CGHA"), which carried the following punishment:

> **Assisting in carrying on a public lottery, etc**
>
> …
>
> … a fine of not less than $20,000 and not more than $200,000 and shall also be punished with imprisonment for a term not exceeding 5 years.

33 In her appeal in the High Court, the appellant submitted that she should have been given probation instead of the imprisonment sentence that had been imposed by the court below. The High Court there was therefore faced with the identical issue as was presented in this appeal, which is whether the court had the power to grant probation pursuant to s 5(1) of the POA. This is turn, depended on whether the sentence prescribed by s 5(*a*) of the CGHA was a sentence "fixed by law".

34 The High Court reviewed the legislative history of s 5(1) of the POA, including the Proviso that was introduced in the aftermath of *Juma'at*, and held that it did not have the power to grant probation, In doing so, it held that:

> (a) A "mandatory minimum sentence" meant a sentence where a minimum quantum for a particular type of sentence is prescribed, and the imposition of that type of sentence is mandatory.
>
> (b) A "specified minimum sentence" meant a sentence where a minimum quantum for a particular type of sentence is prescribed, but the imposition of that type of sentence is not mandatory.
>
> (c) A sentence "fixed by law" encompassed three different types of sentences: offences that called for fixed punishment where the court has no discretion either as to the type or the quantum (as decided in *Goh Boon Kwan*); offences that carried mandatory minimum sentences; and offences with specified minimum sentences.

35 The High Court reasoned that the Proviso had been introduced to reinstate the power to grant probation in certain circumstances where that power had been lost as a consequence of *Juma'at*. On this basis, the court reasoned that the types of sentences that were specifically mentioned in the Proviso must have been part of the wider group of sentences comprehended by the words "fixed by law".

3 6 *Lim Li Ling* therefore went further than *Juma'at* in holding that offences which prescribe a specified minimum sentence, in addition to those which prescribe "mandatory minimum sentences", were part of a group of offences for which the sentences were "fixed by law" and the court could not, in general, order probation for any of these offences. However, for offences carrying the former two types of sentences, the court could grant probation if the two conditions to the Proviso were satisfied.

37 We now set out our understanding of mandatory and specified minimum sentences.

Mandatory and specified minimum sentences

38 As is evident from the summary of our conclusions at [17] above, we were in agreement with

the definitions of the terms "mandatory minimum sentence" and "specified minimum sentence" that were adopted in *Lim Li Ling*. A few observations are nonetheless apposite.

Mandatory minimum sentence

39 The concept of a "mandatory minimum sentence" was not new when it was interpreted in *Lim Li Ling*. Pursuant to the amendments to the Penal Code in 1984, mandatory minimum sentences were introduced for a variety of offences. Then Minister for Home Affairs Mr Chua Sian Chin explained that minimum sentences were necessary to combat the increasing crime rate at that time (see *Singapore Parliamentary Debates, Official Report* (26 July 1984) vol 44 at cols 1861–1866) ("the 1984 Penal Code Amendments Parliamentary Debates"). Following these amendments, Prof Stanley Yeo in an article discussed the use of mandatory minimum sentences in Singapore (see Stanley Yeo Meng Heong, "Mandatory Minimum Sentences: A Tying of Judicial Hands" [1985] 2 MLJ clxxxvi). He observed (at p clxxxvii) that a mandatory minimum sentence is a type of sentence:

> … where the sentencing judge has no discretion to vary the length of the minimum or to avoid the minimum once an offender has been convicted of a particular offence. The past twelve years has seen an increasing use of mandatory minimum sentences in our jurisdiction. It began with the Misuse of Drugs Act, 1973 which provided minimum sentences for all types of drug trafficking offences and for repeat offenders convicted of unauthorised possession of drugs. More recently, minimum prison sentences have been prescribed for a host of offences under the Penal Code such as snatch theft, motor vehicle theft, extortion, housebreaking, robbery, outraging modesty and rape. Another recent example is to be found in the amendments to the Arms Offences Act, 1975 which provide minimum prison sentences for the unlawful possession of firearms and ammunition.

40 When the expression "mandatory minimum sentence" was introduced into the POA in 1993, the Explanatory Statement to the POA Bill mentioned s 384 of the Penal Code (in force at that time) as an example of an offence with a "mandatory minimum sentence". Section 384 of the Penal Code provides:

> **Punishment for extortion**
>
> 384. Whoever commits extortion shall be punished with imprisonment for a term of not less than 2 years and not more than 7 years and with caning.

41 Thus, it is evident that Parliament intended to use the term "mandatory minimum sentence" as it was then understood by Yong CJ in *Juma'at*. Taking the example of s 384 of the Penal Code, the prescribed punishment of imprisonment is mandatory (as evidenced by use of the words "shall be punished"), as well as having a minimum quantum (as evidenced by the use of the words "imprisonment for a term of not less than 2 years"). Hence, a "mandatory minimum sentence" under s 5(1) of the POA is one where a minimum quantum for a particular type of sentence is prescribed, and the imposition of that type of sentence is mandatory.

42 Before moving on to discuss the meaning of a "specified minimum sentence", we digress briefly to clarify two important points.

43 First, although we have, for the purposes of brevity, somewhat simplistically proceeded on the basis that the sentence prescribed under s 384 of the Penal Code is mandatory because of the use of the phrase "shall be punished", we would emphasise that whether or not a punishment prescribed is mandatory is dependent on the textual and legislative context of the provision. In *Poh Boon Kiat v Public Prosecutor* [2014] SGHC 186 ("*Poh Boon Kiat*"), one of the issues raised was whether the

sentences prescribed under ss 140(1) and 146 of the Women's Charter (Cap 353, 2009 Rev Ed) were mandatory.

44 Under s 140(1) of the Women's Charter, an accused convicted:

> … shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding 5 years and shall also be liable to a fine not exceeding $10,000.

Section 146 of the Women's Charter provides:

> **Persons living on or trading in prostitution**
>
> **146.**—(1) Any person who knowingly lives wholly or in part on the earnings of the prostitution of another person shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding 5 years and shall also be liable to a fine not exceeding $10,000.
>
> (2) Any male person who is convicted of a second or subsequent offence under this section shall, in addition to any term of imprisonment imposed in respect of such offence, be liable to caning.

45 Both offence provisions use the phrase "shall be liable" as opposed to "shall be punished". As regards that, it was noted at [36] of *Poh Boon Kiat* that case law suggested a tendency to view provisions which employed the phrase "shall be liable" to a punishment as conferring a discretion on the courts to impose that punishment. However, after examining the legislative history and properly setting out the context in which the provisions had been enacted, the court held (at [59]) that the imposition of an imprisonment term for offences under ss 140(1) and 146 of the Women's Charter was *not* discretionary but mandatory.

46 The simple point for present purposes is that a sentence prescribed for an offence could well be a mandatory minimum sentence for the purposes of s 5(1) of the POA even though the words "shall be punished" are not used, and we reiterate the point that although this may be a safe starting point in the analysis, the conclusion that the words "shall be liable" in fact connotes a discretionary punishment should only be drawn after considering the textual and legislative context of the provision.

47 Second, we would observe for completeness that a sentence which prescribes a mandatory type of punishment without a minimum quantum is not a "mandatory minimum sentence". As observed in the 1984 Penal Code Amendments Parliamentary Debates, minimum sentences were introduced to address what were thought to be unduly lenient sentences for particular offences (see at [39] above). A minimum sentence is therefore one that reflects the legislature's calibration of the minimum quantum for a particular type of punishment that ought to be imposed on a convicted person. A sentence that *only* stipulates a mandatory type of punishment *without* a minimum quantum therefore cannot be considered a minimum sentence. This was also the view taken in *Lim Li Ling* (at [74]–[75]).

Specified minimum sentence

48 As was observed in *Lim Li Ling* (at [80]), the term "specified minimum sentence" was used in contradistinction to the term "mandatory minimum sentence" when it was first introduced in the POA following the amendments in 1993. The Explanatory Statement to the POA Bill cited s 4 of the Betting Act (Cap 21, 1985 Rev Ed) as an example of an offence which prescribed a "specified minimum sentence". Any person convicted of an offence under s 4:

> … shall be liable on conviction to a fine of not less than $10,000 and not more than $100,000 and

shall also be punished with imprisonment for a term not exceeding 5 years.

49 It can be seen that s 4 of the Betting Act carries with it two types of punishment – a fine, which is subject to a minimum amount, *and* imprisonment. The Prosecution submitted that because s 4 of the Betting Act was cited as an example of an offence with a "specified minimum sentence" the architecture of that section defined what "specified minimum sentence" entails. In particular, the Prosecution submitted that an offence would carry a specified minimum sentence only if the punishment provision had two elements: (a) a sentence which is at the discretion of the court to impose but which if it is imposed carries with it a stipulated minimum quantum; *and* (b) an independent mandatory sentence. (We note in passing that the Prosecution proceeded on the basis that the fine component of this punishment provision was not mandatory and for present purposes we do likewise.)

50 In our judgment this construction is incorrect. The term "specified minimum sentence" refers to the *sentence* that is imposed rather than the range of *punishment options* that are prescribed. Thus, the only part of the punishment provision in s 4 of the Betting Act that can possibly be read as containing a *specified minimum sentence* is the fine. The minimum sentence is specified in that while the court has the discretion to choose whether or not to impose the fine (see [43] of *Lim Li Ling*), if it so chooses to do, the court *will have to* impose a fine of at least $10,000.

51 The conclusion that flows from the example of s 4 of the Betting Act is that, in contrast to a "mandatory minimum sentence", a "specified minimum sentence" is one where the court has discretion over the *type* of punishment, but not over the *minimum quantum*, should it decide to impose that type of punishment. In this regard, we are also at one with the view taken in *Lim Li Ling*.

Sentence fixed by law

52 As noted above, we respectfully disagree with the definition of the term "fixed by law" that was adopted in *Lim Li Ling*, where the court concluded that it included not only sentences which were fixed in quantum and in type (the position taken in *Goh Boon Kwan*), but also mandatory minimum sentences (the position taken in *Juma'at*) as well as specified minimum sentences. In our judgment, a sentence which is fixed by law refers *only* to sentences which are fixed in quantum and in type, in the sense that the court has no discretion as to the type of sentence (including its imposition) or the quantum to be imposed.

53 In this regard we affirm *Goh Boon Kwan* and decline to follow *Juma'at* (which, as should be apparent was, in our judgment, wrongly decided) and *Lim Li Ling* on this point. This conclusion emerges from a consideration of the legislative history and the parliamentary debates pertaining to the relationship between the Proviso and the principal part of s 5(1) of the POA. We should mention that our following analysis benefitted considerably from Mr Chan's submissions.

54 In *Lim Li Ling*, the High Court observed as follows (at [18]):

> From a plain reading, it is not immediately obvious *how* the proviso to s 5(1) qualifies the preceding part of the section. It could do so in one of two ways – either by *adding to*, or by *circumscribing* the category of offences already excluded from the court's jurisdiction by the main body of s 5(1). This ambiguity stems from the fact that both parts of s 5(1) employ differing terminology. Whilst the main body of s 5(1) adopts the criterion of whether the offence in question has a sentence "*fixed by law*", the proviso to the section refers to offences with "*specified minimum … or mandatory minimum*" sentences. It follows from this that the legal effect of the proviso would depend on the relationship between the respective scopes of these

differing terms. If "specified minimum" and "mandatory minimum" sentences merely constitute *subsets* of a broader category of sentences "fixed by law", the proviso would *expand the court's jurisdiction* by allowing it to grant probation in circumstances that the main body of s 5(1) would otherwise prohibit. Conversely, if "specified minimum" and "mandatory minimum" sentences form categories *distinct* from sentences "fixed by law", the proviso would *create a further exception to the court's jurisdiction* by limiting the availability of probation for offences with "specified minimum" and "mandatory minimum" sentences to situations where conditions (a) and (b) therein are satisfied. [emphasis in original]

55 This passage prefaces the analysis that is contained in the subsequent paragraphs of the judgment in that case, which was to understand the nature and purpose of the Proviso. If the Proviso was meant to *extend* the court's powers to grant probation, then a sentence fixed by law would include mandatory minimum and specified minimum sentences; if the Proviso was meant to *circumscribe* the court's powers to grant probation, then a sentence fixed by law would not include mandatory minimum and specified minimum sentences.

56 After considering the legislative history of the POA, the High Court in *Lim Li Ling* concluded that the Proviso was meant to *extend* the court's powers to grant probation. After all, the Proviso was added in response to the decision in *Juma'at*. Pertinently, Parliament seemed to have approved of Yong CJ's holding that a sentence fixed by law included mandatory minimum sentences. According to Minister Yeo (see *Singapore Parliamentary Debates, Official Report* (10 November 1993) vol 61 at col 931 ("the POA Parliamentary Debates")):

> The Chief Justice had ruled [on 30 June 1993] that … the words "fixed by law" appearing in s 5(1) of the Probation of Offenders Act apply to mandatory minimum sentences.
>
> *Sir, the Chief Justice's decision is correct*. In granting probation to an adult offender in cases where the law specifies a mandatory minimum sentence, a Court would be defeating the intention of Parliament when it enacted mandatory minimum penalties for such offences.
>
> [emphasis added]

57 The High Court reasoned that while Parliament recognised the correctness of this interpretation in *Juma'at*, it also recognised the need to qualify its excessive consequences. Hence, the Proviso was inserted to enable the court to grant probation in specific situations that would otherwise have been caught by the inability to order probation, but only when the two conditions to the Proviso were met. This view was reinforced by the introductory paragraph of the Minister's speech in the POA Parliamentary Debates, where he said:

> The Bill seeks to amend the Probation of Offenders Act (Chapter 252) *to provide the Courts with the power to grant probation* … for young offenders who have attained the age of 16 years but have not attained the age of 21 years at the time of their convictions for their offences, notwithstanding that the offences concerned are punishable with specified minimum or mandatory minimum sentences. [emphasis added]

As a result, the High Court concluded that the Proviso was meant to *extend* the powers of the court to grant probation. This suggested that but for the Proviso, the court would have had no power to grant probation for mandatory minimum and specified minimum sentences, and so they must have been considered sentences "fixed by law".

58 The foregoing analysis appears attractive at first blush. However, in our judgment the Proviso

was in fact meant to be circumscriptive in nature, in the sense that it was meant to further restrict the court's power to grant probation in cases *other than* those where the type and quantum of sentence are both fixed by Parliament. We arrived at this conclusion for several reasons.

59 First, although the language used by Minister Yeo in explaining the POA Bill seems to suggest that the Proviso was to extend the court's power to grant probation, the Explanatory Statement to the POA Bill in fact opens as follows:

> This Bill seeks to amend the Probation of Offenders Act (Cap. 252) to *preclude* a court from making a probation order or an order for absolute or conditional discharge where a person is convicted of an offence for which there is a specified minimum sentence (e.g. section 4 of the Betting Act (Cap. 21)) or mandatory minimum sentence (e.g. section 384 of the Penal Code (Cap. 224)) of imprisonment or fine or caning prescribed by law unless the person is a first offender and is between the age of 16 and 21 years at the time of his conviction. [emphasis added]

The use of the word "preclude" suggests that the amendments were meant to take away some of the court's powers to grant probation.

60 Second, and more significantly, we note that the Proviso as it appears now is not the form in which it was initially proposed. When the Proviso was first proposed, it was worded as follows:

> 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 *shall not* make a probation order *unless* the person … [emphasis added]

The Proviso, in its original form, is much clearer in signifying the intent to circumscribe the powers of the court and it becomes evident that absent the Proviso, the court would have had the power to grant probation even when the sentence prescribed is a specified minimum sentence or a mandatory minimum sentence. However, the Proviso curtails this power by allowing probation to be ordered in relation to such offences only when the two conditions to the Proviso are fulfilled.

61 This interpretation of the Proviso is more consistent with the manner in which other Provisos in the POA are used, in the main these being to circumscribe or to impose conditions on the exercise of certain powers granted by the main body of the provision to which the proviso is appended. For instance, s 6(2) of the POA and its proviso provides:

> **Discharge, amendment and review of probation orders**
>
> (2) A court may, upon application made by the probation officer or volunteer probation officer or by the probationer, by order amend a probation order by cancelling any of the requirements thereof or by inserting therein (either in addition to or in substitution for any such requirement) any requirement which could be included in the order if it were then being made by that court in accordance with section 5:
>
> *Provided that —*
>
> (*a*) the court *shall not* amend a probation order by reducing the probation period, or by extending that period beyond the end of 3 years from the date of the original order; and
>
> (*b*) the court *shall not* so amend a probation order that the probationer is thereby required to reside in an approved institution, for any period exceeding 12 months in all.

[emphasis added]

62 Why then was the Proviso worded in its current form when it would have been much clearer in its original form? It would appear the Proviso was re-worded purely for linguistic reasons. It emerges from the POA Parliamentary Debates that shortly before the Bill was passed, Minister Yeo moved an amendment to replace the words "shall not" with "may" and the word "unless" with "if". For convenience we set out the original form of the Proviso with the changes tracked:

> 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 ~~shall not~~ [may] make a probation order ~~unless~~ [if] the person…
>
> [Original form in strikethrough; Amended form in square brackets]

63 Minister Yeo explained that this was "to make the section easier to read by avoiding the use of the double negatives" (the double negatives being "shall not" and "unless"). Hence, there was no deliberate intent to alter the substantive meaning of the Proviso when its form was changed as aforesaid.

64 We turn to the excerpts of the POA Parliamentary Debates cited by the High Court in *Lim Li Ling*. On the whole, the POA Parliamentary Debates did not shed much light on how the term "fixed by law" is to be understood.

65 It is true that Minister Yeo expressed his view that Yong CJ's decision in *Juma'at* was correct (see [56] above). However, his statement is neither directly relevant to nor a *considered* declaration of the appropriate understanding of the expression "fixed by law", particularly in relation to the insertion of the Proviso into the POA. Rather, all that Minister Yeo suggested, in our view, was that Yong CJ was correct in saying that the court would be defeating the intention of Parliament in ordering probation if Parliament had already enacted mandatory minimum sentences in relation to those offences. In our judgment, he was saying nothing about whether Yong CJ was correct, *in the first place*, in subsuming mandatory minimum sentences under the umbrella of the term "fixed by law".

66 On a holistic reading of the POA Parliamentary Debates, we did not think that Minister Yeo had represented that Parliament was endorsing the position adopted by Yong CJ.

67 The nature of the Proviso as being circumscriptive is not inconsistent with Minister Yeo's statement that the amendments were meant "to provide the [c]ourts with the power to grant probation". The key to understanding this aspect of Minister Yeo's statement is the context in which the amendments to the POA took place. The amendments came shortly after the decision in *Juma'at*, which had completely restricted the court's powers to grant probation in every situation where the offence prescribed a mandatory minimum sentence. By adding the Proviso, there would no longer be a blanket restriction, because where the two conditions to the Proviso were fulfilled, the court would now have the option to grant probation. Viewed from this perspective, the Minister was right in every sense to say that the amendments would "provide" the courts with the power to grant probation. Nevertheless, this says little about how the words "fixed by law" should be construed, except to buttress our assessment that Parliament was not endorsing Yong CJ's approach.

68 It is clear to us therefore that the term "fixed by law" was intended by Parliament to be read narrowly in that it did not cover mandatory minimum or specified minimum sentences. The court therefore has the power, pursuant to the principal part of s 5(1) of the POA, to grant probation in a wide variety of cases. In our judgment, to the extent this power was curtailed by *Juma'at*, that case

was wrongly decided. Rather, the term "fixed by law" was correctly interpreted in *Goh Boon Kwan*, that is, "fixed by law" referred to a mandatory sentence fixed both in type and quantum (see [24] above).

69 In the premises, without the Proviso, the court would have had the power to grant probation for offences which prescribe mandatory minimum as well as specified minimum sentences. The Proviso was introduced to circumscribe this power in relation to mandatory minimum and specified minimum sentences by adding two conditions that must be fulfilled before probation can be granted. Although the interpretation we have placed on the words "fixed by law" may make little, if any, practical difference to the application of s 5(1) of the POA (as a result of the applicability of the Proviso), in our judgement, it coheres better with the legislative materials.

Section 337(1) of the CPC

70 We are reinforced in this view by s 337(1)(*a*) and (*b*) of the CPC, which provides:

> **Community orders**
>
> **337.**—(1) Subject to subsections (2) and (3), a court shall not exercise any of its powers under this Part to make any community order in respect of —
>
> (*a*) an offence for which the sentence is fixed by law;
>
> (*b*) an offence for which a specified minimum sentence or mandatory minimum sentence of imprisonment or fine or caning is prescribed by law;
>
> …

71 Section 337 of the CPC was enacted in 2010 to introduce community orders as part of the array of sentencing options available to the court. The rationale for these new sentencing options was explained in the introductory speech of the Minister for Law and Second Minister for Home Affairs, Mr K Shanmugam, at the Second Reading of the Criminal Procedure Code Bill (Bill 11 of 2010) (see *Singapore Parliamentary Debates*, *Official Report* (18 May 2010) vol 87 at col 422):

> *CBS [ie, community-based sentencing] gives more flexibility to the Courts.* Not every offender should be put in prison. *CBS targets offences and offenders traditionally viewed by the Courts to be on the rehabilitation end of the spectrum: regulatory offences, offences involving younger accused persons and persons with specific and minor mental conditions.* For such cases, it is *appropriate to harness the resources of the community. The offender remains gainfully employed and his family benefits from the focused treatment*.

72 Section 337(1) of the CPC lists the exclusions where the court would not have the power to grant community orders. The fact that these exclusions separate offences for which the sentences are "fixed by law" from those with "mandatory minimum" or "specified minimum" sentences suggests that these are distinct categories and that the latter are not subsumed within the former. Were this not the case, s 337(1)(b) of the CPC would be otiose. We recognise this arises in a different statute but we see no reason to think that the identical terminology applied in closely related contexts should not bear the same meaning.

The MLA sentence and whether the Appellant is eligible for probation

73 The foregoing analysis would mean that the MLA sentence, which provides that an accused "shall on conviction be punished with a fine of not less than $30,000 and not more than $300,000 and with imprisonment for a term not exceeding 4 years" is a mandatory minimum sentence. Upon conviction, the court *must* impose a punishment of a fine, and the quantum *must not* be less than $30,000. As a result of this, in order for the Appellant to be eligible for probation, the two conditions to the Proviso must be fulfilled. Given that the Appellant was past the age of 21 at the date of conviction, s 5(1)(*a*) is not fulfilled and therefore the Appellant is ineligible for probation.

74 Before moving on to the second issue, that is, whether the sentence imposed was appropriate, we would like to make some observations in relation to what might appear to be anomalous in some respects as to the circumstances in which probation might or might not be available as a sentencing option. Specifically, the concern is that probation would not be a sentencing option for adult offenders (as a result of para (*a*) of the Proviso) and repeat youth offenders (as a result of para (*b*) of the Proviso) for what might appear to be relatively *less* serious offences, whereas it might well be a sentencing option for adult offenders and repeat youth offenders who have committed what are seemingly more serious offences just because Parliament has not thought it fit to impose either a mandatory or specified minimum sentence in the latter instances. An illustration will bring the point into focus.

75 A first time offender convicted of an offence for the possession, exhibition or distribution of uncensored films under s 21 of the Films Act (Cap 107, 1998 Rev Ed) shall be liable to "a fine of not less than $100 for each such film that he had in his possession (but not to exceed in the aggregate $20,000"). As a fine is the only prescribed sentence for this offence, the sentence would ordinarily be in the nature of a mandatory minimum sentence and consequently, the Proviso would apply to preclude the granting of probation to both adult offenders and repeat youth offenders. However, probation would seem to be available to the same adult offender or repeat youth offender for what may be considered to be more serious offences but where the prescribed sentence is not a mandatory or specified minimum sentence, and therefore does not engage the Proviso. For instance, following *Poh Boon Kiat*, the sentence under s 140(1) of the Women's Charter (Cap 353, 2009 Rev Ed) for keeping, managing or assisting in the management of a brothel is a mandatory imprisonment term "not exceeding 5 years" and a discretionary fine "not exceeding $10,000". This sentence for an offence under s 140(1) of the Women's Charter is neither a mandatory nor a specified minimum sentence (even though a period of imprisonment is mandatory). Accordingly, the Proviso would not apply. As a result, the principal part of s 5(1) of the POA would govern and the consequence is that probation would *prima facie* be available to both adult offenders and repeat youth offenders. As noted above, this might appear to be anomalous.

76 We accept, of course, that it is a matter for Parliament rather than for the courts to decide on the relative gravity of offences. It chose to contain the excessive reach of the decision in *Juma'at* by the enactment of the Proviso. But the policy considerations that underlie a legislative choice to impose a mandatory or specified minimum sentence may not necessarily be identical or relevant to the consideration of whether or not probation should be available in a given case. We offer these observations as something Parliament may wish to consider.

The sentence imposed

77 During the appeal, Mr Kumar raised a number of points seeking to persuade us that the sentence imposed was manifestly excessive. On the other hand, the Prosecution argued that the sentence should not be disturbed, submitting that the sentence of three months' imprisonment and fine of $30,000 (in default to one month imprisonment) was completely in line with the relevant sentencing precedents and that there was nothing out of the ordinary in this case which warranted a

departure from the established precedents.

78 In fairness to the DJ, a review of the relevant sentencing precedents shows that the sentence, when viewed in isolation as a matter of its quantum, is not manifestly excessive. Furthermore, the fine of $30,000 was simply the mandatory minimum sum which the DJ was obliged to impose. However, in our judgment while there was no occasion to alter or adjust the benchmarks for this offence, there were a number of facts unique to this appeal that merited the reduction of the term of imprisonment from three months to six weeks.

79 First, as briefly mentioned above, the Appellant in the proceedings below had submitted two medical reports that opined he was unfit for prison. These were not disputed by the Prosecution, and unfortunately did not seem to have been considered by the DJ at all as they were not mentioned in the GD. The Prosecution during the appeal raised doubts as to the authenticity and reliability of these reports, but if the Prosecution had been minded to raise this, it should have done so in the proceedings below, if necessary by seeking a Newton hearing. This was not done and we therefore saw no reason not to consider the reports at this point. While there is a mandatory requirement for a term of imprisonment for an offence of this nature, there is no mandated term and the sentence imposed may be shortened to avoid undue hardship that may be suffered by the offender on account of medical factors.

80 Second, we note that the Appellant had stopped his illegal activities sometime before he was apprehended. The Appellant said he had managed to get out of the vicious cycle he had been in and stopped his activities sometime in July 2012. He was only arrested about three weeks later in August 2012. This was not disputed by the Prosecution and we considered this a mitigating factor.

81 Third, we also note the Appellant had testified that he had sought help from the police when his problems in dealing with the moneylenders had arisen, but to no avail. Again, this was not challenged by the Prosecution below, though they sought unsuccessfully, to discredit this before us.

82 Last but not least, the Appellant is a post graduate degree holder who holds a relatively senior position working as a physiotherapist in a respectable hospital. He has no related antecedents. While none of this excuses the fact that the Appellant had engaged in illegal activities, he claimed that he had borrowed the money in order to settle his father's debt and also that he had borrowed only $1,000 to begin with, but this had spiralled out of control because of the punitive terms of such loans. His assertion that he had started with a small sum of $1,000 was likewise not challenged by the Prosecution in the proceedings below.

83 Deterrence remains of vital interest in offences of this sort. However, on the whole, we could not ignore the Appellant's excellent prospects of rehabilitation. We say that bearing in mind that the purpose of rehabilitation assumes both public as well as individual dimensions (see *Public Prosecutor v Goh Lee Yin and another appeal* [2008] 1 SLR(R) 824 at [98]). The Appellant had been and could continue to be a useful and contributing member of society in his occupation. Taking that into consideration and the various factors noted above, we were satisfied that the term of imprisonment in this case should be reduced from three months to six weeks. We did not disturb the fine.

Conclusion

84 For these reasons we allowed the appeal and reduced the term of imprisonment from three months to six weeks.

85 We close by once again recording our appreciation to Mr Darius Chan for his excellent and

invaluable contribution to the analysis of the legal issues in this case.