IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 40

Criminal Appeal No 34 of 2017

Between

Adri Anton Kalangie

… *Appellant*

And

Public Prosecutor

… *Respondent*

GROUNDS OF DECISION

[Criminal law] — [Statutory offences] — [Misuse of Drugs Act]
[Criminal Procedure and Sentencing] — [Sentencing] — [Prospective overruling]

Adri Anton Kalangie
v
Public Prosecutor

[2018] SGCA 40

Court of Appeal — Criminal Appeal No 34 of 2017
Sundaresh Menon CJ, Andrew Phang Boon Leong JA and Judith Prakash JA
23 March 2018

16 July 2018

Sundaresh Menon CJ (delivering the grounds of decision of the court):

Introduction

1 The accused in the present case was arrested at Changi Airport in March 2016 and found to be in possession of methamphetamine which he had brought into Singapore from Guangzhou, China. He was charged with one count of importation of not less than 249.99g of methamphetamine under s 7 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"). Subsequently, in April 2017, we released our decision in *Suventher Shanmugam v Public Prosecutor* [2017] 2 SLR 115 ("*Suventher*"), in which we laid down a sentencing framework for the offence of importation of cannabis in any quantity between 330g and 500g under s 7 of the MDA. In July 2017, the accused pleaded guilty and was then sentenced on the basis of a sentencing framework which was

adapted from *Suventher* for use in the context of the importation of methamphetamine.

2 The accused appealed against the sentence that was imposed. One of issues presented in the appeal was whether the doctrine of prospective overruling applied such that the pre-*Suventher* sentencing benchmark and precedents should have been applied instead. In our judgment, the answer was "no" – the doctrine did not apply in the present case and the basis on which the accused was sentenced, namely, by reference to an analytical framework extrapolated from *Suventher*, was unimpeachable. In the circumstances, we dismissed the appeal. We now provide the grounds of our decision and take the opportunity to clarify the operation of the doctrine of prospective overruling, particularly in relation to judgments establishing or clarifying sentencing frameworks and guidelines. For ease of reference, we will refer to such judgments as "sentencing guideline judgments".

The admitted facts

Background

3 The accused, Adri Anton Kalangie ("the Accused"), was a 41-year-old male Indonesian citizen at the time of the offence in March 2016.

4 In 2008, the Accused was introduced to a Nigerian man known to him as "Frank". The Accused was told that Frank could help him find a job, but nothing came out of their meetings at that time.

5 Some years later in 2013, Frank called the Accused and offered him a job at a trading company in China. The Accused flew to Guangzhou on a fully-paid flight and then learnt that Frank was in fact a drug syndicate leader

in the business of transporting drugs between China and Indonesia. Frank invited the Accused to work for him and promised a remuneration of IDR$10m (around S$1,000) per delivery of drugs from China to Indonesia. Enticed by this offer of generous remuneration, the Accused agreed.

6 Thereafter, up to February 2016, the Accused performed six successful deliveries of methamphetamine from Guangzhou to Jakarta, four involving direct flights from Guangzhou to Jakarta and two involving flights that transited through Singapore. Before each trip, the Accused would ingest or insert into his body around 40 pellets of methamphetamine. After reaching Jakarta, he would then retrieve and deliver the pellets to the intended recipients.

Facts leading to the present offence

7 On 20 February 2016, the Accused left Singapore for Guangzhou in preparation for a drug delivery.

8 About a month later, on 17 March 2016, the Accused received 43 pellets of methamphetamine at his hotel room in Guangzhou.

9 On 20 March 2016, the Accused swallowed 29 of the pellets and inserted another ten pellets into his body. He also concealed one pellet in his shoe and three pellets in the pocket of his pants, over which he wore a pair of jeans.

10 On 21 March 2016, the Accused departed Guangzhou for Singapore, intending to transit in Singapore *en route* to Jakarta. However, the Accused missed his connecting flight from Singapore to Jakarta and decided to remain in the transit hall at Changi Airport in Singapore.

11 On 23 March 2016, at about 5.30am, a customer service officer ("the CSO") approached the Accused in the transit hall. When he was asked whether he was drunk, the Accused claimed that a child had purchased alcohol for him. The CSO informed him that a child would not be allowed to do so under Singapore law. Upon hearing that, the Accused cried and apologised repeatedly, saying in Bahasa Indonesia, "I know I'm wrong", "I am afraid to be beaten", and "don't beat me up".

12 The CSO inquired into the circumstances of the Accused and then escorted him first to the transit counter where he was issued a new departure ticket for Jakarta, and thereafter to the relevant departure gate for the flight. On the way to the gate, the Accused repeated the above-mentioned utterances in louder tones and continued crying. Just as they reached the gate, the Accused pulled the CSO to one side and admitted that he was in the wrong. On questioning, the Accused admitted that he was in possession of drugs and pointed to his shoe and stomach when asked where the drugs were. The CSO called for assistance and the Accused was arrested and sent to a nearby hospital for a medical examination.

13 It appeared that the Accused had acted in this strange manner because he thought that there had been some leakage of the pellets in his body, although a urine test that was administered turned out negative for controlled drugs. An X-ray taken at the hospital also showed no obvious leakage or rupture of the pellets.

14 Subsequently, a search was conducted on the Accused. Three pellets were recovered from the pocket of his pants and one pellet from his left shoe. Between 23 March 2016 and 4 April 2016, the Accused excreted a total of 39 pellets, which were seized by officers of the Central Narcotics Bureau

("CNB"). In total, 43 pellets were recovered from the Accused. These were sent to the Health Sciences Authority ("HSA") for examination and found to contain not less than 275.44g of methamphetamine. The street price for the 43 pellets of methamphetamine was estimated to be around S$62,495.

15 According to the Accused, his objective was to bring the drugs from Guangzhou to Jakarta. He was promised IDR$16m (around S$1,648) for this delivery. He admitted that he knew the pellets contained methamphetamine. He also admitted to having knowingly imported methamphetamine into Singapore, which he was not authorised under the MDA or the regulations thereunder to do.

The proceedings below

16 The Accused was represented by counsel in the proceedings below. On 17 July 2017, the Accused pleaded guilty to one count of importation of 43 pellets containing not less than 249.99g of methamphetamine under s 7 of the MDA, punishable under s 33(1) of the same Act. Sentencing submissions were heard on the same day.

The Prosecution's submissions on sentence

17 The Prosecution sought a sentence of at least 27 years' imprisonment and 15 strokes of the cane, relying on the following arguments:

(a) *Suventher* had laid down the sentencing framework for the offence of importation of cannabis in quantities ranging from 330g to 500g of cannabis. This framework should be extrapolated to derive a similar table of indicative starting sentences for the offence of

importation of methamphetamine in quantities ranging from 167g to 250g as follows:

Sentencing band	**Quantity of cannabis (based on *Suventher*)**	**Quantity of methamphetamine (proposed)**	**Imprisonment (years)**	**Caning**
1	330–380g	167.00–192.99g	20–22	15 strokes
2	381–430g	193.00–216.99g	23–25	
3	431–500g	217.00–250.00g	26–29	

(b) Based on the table and the quantity of methamphetamine that the Accused had been charged with importing, namely, 249.99g, the appropriate starting custodial sentence was between 26 and 29 years' imprisonment, in addition to 15 strokes of the cane.

(c) The Prosecution also highlighted several aggravating factors:

(i) the drugs delivered were worth more than S$60,000;

(ii) given his conduct in the transit hall and the relatively large payments that he accepted for the deliveries, the Accused was clearly aware of the risk he was taking in making the deliveries;

(iii) the Accused had taken active steps to evade detection.

The submissions of the Defence

18 The Defence submitted that a sentence of no more than 20 to 23 years' imprisonment and 15 strokes of the cane was appropriate on the basis of the following submissions:

(a) A number of mitigating factors were in play:

(i) The Accused had stumbled upon the drug syndicate while looking for a proper job. He was not someone who had set out to be involved with drug deliveries.

(ii) The drugs concerned were not meant to be delivered to persons in Singapore and therefore its social harm would not be felt in Singapore. It was fortuitous that the Accused happened to be in Singapore on the occasion of his arrest.

(iii) The Accused was made use of by the syndicate as a drug mule. This explained the "very cruel" fact that he was made to ingest and insert drug pellets into his body.

(iv) The Accused had rendered the fullest assistance to the authorities from the outset by providing the contact details of Frank and other critical information.

(v) While the Accused had made six previous deliveries, insofar as the present charge was concerned, it was the sole offence that he was being sentenced for and he should be considered a first time offender.

(b) Given that the present offence was committed prior to the release of the decision in *Suventher*, the sentence should be calibrated downwards from that which would have been derived from the sentencing framework laid down in *Suventher*. In any event, in *Suventher*, the Court of Appeal did not disturb the sentence imposed by the trial judge of 23 years' imprisonment and 15 strokes of the cane, even though the quantum of drugs involved was at the very top end of

the range (that is, 499.9g of cannabis) and would by the *Suventher* framework have warranted between 26 and 29 years' imprisonment.

(c) The precedents cited by the Prosecution could be factually distinguished.

The decision below

19 On 17 July 2017, the learned High Court Judge ("the Judge") sentenced the Accused to 25 years' imprisonment, backdated to 23 March 2016, that being the date of initial remand, and 15 strokes of the cane. His written grounds were subsequently released on 30 August 2017 in *Public Prosecutor v Adri Anton Kalangie* [2017] SGHC 217 ("GD").

20 In brief, the Judge's reasons were these:

(a) Only the court making a judicial pronouncement may restrict the retroactive effect of that pronouncement. Since the court in *Suventher* had not stated that its decision should apply only prospectively, it was not open for the Judge to so decide (GD at [29]–[30]).

(b) In any event, based on the approach set out in *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 ("*Hue An Li*"), the doctrine of prospective overruling did not apply to *Suventher* because, among other things, the decision of the High Court in *Vasentha d/o Joseph v Public Prosecutor* [2015] 5 SLR 122 ("*Vasentha*"), which was issued two years prior to *Suventher*, had already held that the quantity of drugs should be the reference point for deriving the applicable range of sentences for a drug-related offence (GD at [31]).

(c) Applying a sentencing framework extrapolated from *Suventher*, the indicative sentencing range in the present case was 26 to 29 years' imprisonment. Based on the following factors, a "slight downward adjustment from the lower end of the indicative range" was thought to be appropriate (GD at [37]):

(i) The high market value of the drugs should *not* be taken as aggravating as that would double count the quantity of the drugs involved (GD at [34]).

(ii) The involvement of a drug syndicate was *not* a significant aggravating factor as nothing suggested that the Accused had occupied a high position in the supply chain (GD at [35]).

(iii) Active concealment and motivation by financial gain were aggravating factors (GD at [36]).

(iv) "[S]ignificant weight" was given to the fact that the Accused had pleaded guilty and rendered fullest cooperation to the authorities (GD at [37]).

(d) The Judge further reasoned that a 25-year custodial term was consistent with the precedents (GD at [38]).

The arguments on appeal

The submissions of the Accused

21 The Accused made the following main submissions on appeal:

(a) The Accused was brought before a Magistrate more than 48 hours after his arrest. Even if the CNB had been waiting for him to

discharge the rest of the pellets, this delay was unreasonable because they had already recovered a few pellets from his clothes.

(b) At the pre-trial stage, the Defence had requested that the Prosecution reduce the charge to one of importing not less than 167g and not more than 250g of methamphetamine. The parties eventually agreed that the Prosecution would reduce the charge to importation of not less than 249.99g of methamphetamine on account of the Accused agreeing to plead guilty at the pre-trial stage. According to the Accused, if the charge had in fact been reduced to one for not less than 167g of methamphetamine, he would have received between 20 and 22 years' imprisonment under the sentencing framework extrapolated from *Suventher*.

(c) The Accused was not shown photographs of the pellets during the CNB interviews. He considered this to be important because he did not wrap those pellets himself but had merely received them from his boss.

(d) The Prosecution had informed the Judge that the Accused's urine test for controlled drugs turned out negative. But a medical report in fact showed that the Accused was an intravenous drug abuser and had consumed an unknown drug. This was important because it explained why the Accused was "hallucinating" and "experienc[ing] such a frightened situation" in the transit hall.

(e) The Accused also relied on several drug-related precedents. He stressed that in comparison he had low culpability and was in fact a victim of the drug syndicate. The fact that the drugs were not intended for the Singapore market should also be a relevant mitigating factor.

The Prosecution's submissions

22 The Prosecution, on the other hand, sought to uphold the Judge's decision and made the following main submissions:

(a) The sentencing framework established in *Suventher* was applicable and the doctrine of prospective overruling did not apply.

(b) The sentencing framework in *Suventher* had appropriately been extrapolated and applied, and the sentence was correctly calibrated based on the Accused's culpability and the relevant sentencing factors.

(c) The sentence imposed was in line with post-*Suventher* precedents.

The issues

23 Most of the arguments raised by the Accused were self-evidently ill-conceived and we need not say more about them. But the appeal raised two main issues which we deal with:

(a) whether the doctrine of prospective overruling applied to *Suventher* such as to foreclose the extrapolation and application of the sentencing framework developed that decision to the present case; and

(b) given the answer in (a), whether the sentence imposed by the Judge warranted appellate intervention.

24 Before turning to these issues, we should make one preliminary observation. At the hearing of the appeal on 23 March 2018, the Accused raised some arguments which appeared to go towards the propriety of the conviction. For instance, he suggested, at least initially, that he had not seen the pellets that

he was found to be carrying, and that he did not know their exact ingredients. He also submitted that in every drug case, the offender had to be present to witness the weighing of the drugs by the authorities in order for the conviction to be sustained. Apparently, he was not afforded this opportunity.

25 The Accused subsequently clarified that he was not appealing against or challenging his conviction. We should add that, in any event, we saw no merit in his arguments. First, in the Statement of Facts, the Accused stated that he "knew that the forty-three (43) pellets [found on him] … contained methamphetamine. He also knowingly imported methamphetamine into Singapore." Before the Judge, the Accused admitted to the Statement of Facts without qualification and was advised by counsel at that time. Second, the objective facts, including the fact that he had agreed to ingest the pellets and to have them inserted into parts of his body, that he had to discharge the pellets from his body and deliver them onwards to the recipients, and that he was paid relatively large sums for the deliveries, contradicted any claim that he did not know he was carrying illicit drugs. Third, there was no authority for the proposition that a drug-related conviction could only be sustained if the offender personally witnessed the weighing of the relevant drugs. The HSA certificates clearly stated the gross weight of each of the 43 pellets and the net weight of the methamphetamine found within each pellet. It was open to the Accused to challenge these certificates, but he did not do so. In the circumstances, we saw no reason to question the propriety of the conviction.

Whether prospective overruling applied to *Suventher*

26 Turning to the propriety of the sentence imposed, the first question was whether the doctrine of prospective overruling applied to *Suventher*, and if so, how this affected the applicability of the sentencing framework in *Suventher* to

the present case. While this issue was not the focus of the Accused's arguments on appeal, we considered it an important preliminary question to be addressed. First, this was an argument that the Accused's counsel below had focused on and which the Judge had considered necessary to discuss in some detail (see GD at [25]–[33]). Second, the application of the doctrine of prospective overruling to sentencing guideline judgments is an issue of significance given the greater willingness of appellate courts in recent years to issue such judgments. The temporal scope of these judgments may frequently be challenged if the approach to be taken in determining their prospectivity is not clarified. It is with these considerations in mind that we take the opportunity here to clarify the application of the doctrine.

Overview of the doctrine

27 Traditionally, a judgment pronouncing on a legal issue is taken to be unbounded by time and to have both retroactive and prospective effect (*Hue An Li* at [100]). This accords with the declaratory theory of law, which posits that judges do not create law but rather declare what the law has been and will continue to be, and is also a consequence fostered by the doctrine of precedents (see *Hue An Li* at [101]–[104]; Johannes Chan, *Disturbing the Past and Jeopardising the Future: Retrospective and Prospective Overruling*, The 2014 Administrative Law Fall Conference (16–17 October 2014) at p 1). Whether one conceives of a retroactive judicial pronouncement as having been operative since a time in the past, or as operating prospectively but also in respect of past events, the effect of such a pronouncement is to attach new consequences to events that occurred prior to the pronouncement of the new law (see E A Dreiger, *Statutes: Retroactive Retrospective Reflections* (1978) 56 Canadian Bar Review 264 at pp 268–269).

28 Quite apart from the declaratory theory, several other considerations have been advanced in support of the retroactivity of judicial pronouncements. One of these is that it falls outside the judicial function and trespasses into the domain of Parliament for courts to pronounce new law only prospectively. Another is that if all judicial pronouncements are prospective in effect, the winning litigants would not stand to benefit from any change in legal position decided in their respective cases, and this would distort the incentive system fundamental to the mechanism of justice (see *Hue An Li* at [106]). Moreover, limiting the retroactivity of a decision draws an arbitrary line between similarly-situated litigants and, in that regard, raises questions of fairness and equality.

29 The justifications raised in support of retroactivity are, however, not incontrovertible. Judges and academic commentators alike have challenged the declaratory theory as a fiction in which courts should not indulge (see, for example, *Review Publishing Co Ltd and another v Lee Hsien Loong and another* [2010] 1 SLR 52 at [241]–[243] (*per* Chan Sek Keong CJ)). The doctrine of separation of powers, arguably, can also impose no blanket prohibition on prospectivity on the premise that "the modern state [is one] where the Executive and the Judiciary are also involved in the making of law" (see, for example, Zhuang WenXiong, "Prospective Judicial Pronouncements and Limits to Judicial Law-Making" (2016) 28 SAcLJ 611 ("*Zhuang on Prospectivity*") at p 616; Seng Kiat Boon Daniel, "Of Retrospective Criminal Laws and Prospective Overruling: Revisiting *Public Prosecutor v Tan Meng Khin & 24 Ors*" (1996) 8 SAcLJ 1 ("*Seng on Retrospective Criminal Laws*") at p 32). Further, it may be argued that retroactive and prospective judicial pronouncements are equally arbitrary to the extent that the former, just like the latter, would not apply to all similarly-situated litigants in light of the operation

of various doctrines such as time bar and *res judicata* (see *Zhuang on Prospectivity* at pp 612–613).

30 A further concern weighing heavily against an absolute rule of retroactivity is the serious injustice that may arise from retroactive changes in the law. As we have in the past recognised, "because people conduct their affairs on the basis of what they understand the law to be, a retrospective change in the law can frustrate legitimate expectations" (*Hue An Li* at [109]; see also *Abdul Nasir bin Amer Hamsah v Public Prosecutor* [1997] 2 SLR(R) 842 at [51]). Indeed, prospectivity in judicial pronouncements can be said to advance the rule of law insofar as it enables one to arrange his affairs on the basis of the law then prevailing without fear that his rights or obligations would be affected by subsequent judicial pronouncements to the contrary. This same concern for the law's guiding force applies, albeit with different nuances, to all areas of law whether criminal, civil, or constitutional, and to all actors functioning within the rule of law whether private or governmental.

31 It is amidst this "patchwork of competing considerations" that the doctrine of prospective overruling has developed (see *Hue An Li* at [111]). While the term "prospective overruling" is imprecise and may take on different nuances in different contexts, its central precept is the court's power to limit the temporal effect of its judicial pronouncement, usually by declaring that it would come into effect only prospectively from a particular date of reference (see *HKSAR v Hung Chan Wa and another* [2006] HKCFA 85 ("*Hung Chan Wa*") at [5]).

Prospectivity of sentencing guideline judgments

Current position

32 In the criminal law context, the doctrine of prospective overruling was recently considered in *Hue An Li*, where a three-judge bench of the High Court laid down a new sentencing guideline in relation to offences under s 304A(*b*) of the Penal Code (Cap 224, 2008 Rev Ed) ("PC") for causing death by a negligent act in the context of road traffic accidents. The previous sentencing tariff for this offence, which had prevailed for more than 20 years, was a fine. In *Hue An Li*, the court held that the starting point should instead be a brief period of incarceration of up to four weeks (at [61]). It was in that context that the prospectivity of the new sentencing guideline had to be considered. The court, after discussing the doctrinal tensions and foreign jurisprudence, held as follows (at [124]):

> … The tension between retroactivity and prospectivity, in our judgment, is best resolved by a framework in which judicial pronouncements are, by default, fully retroactive in nature. Our appellate courts (that is, our High Court sitting in its appellate capacity and our Court of Appeal) nevertheless have the discretion, in exceptional circumstances, to restrict the retroactive effect of their pronouncements. … [emphasis omitted]

33 The court also laid down four factors to guide the exercise of such discretion: (a) the extent to which the law or legal principle concerned is entrenched, (b) the extent of the change to the law, (c) the extent to which the change to the law is foreseeable, and (d) the extent of reliance on the law or legal principle concerned (at [124]). No one factor is preponderant over any other, and no one factor must necessarily be established before prospective overruling can be invoked in a particular case (at [125]).

34 Subsequent cases have applied the *Hue An Li* factors in determining whether the doctrine of prospective overruling should apply. In the context of sentencing guideline judgments, *Poh Boon Kiat v Public Prosecutor* [2014] 4 SLR 892 ("*Poh Boon Kiat*") is one example where the doctrine was in fact invoked. In that case, the High Court hearing a Magistrate's Appeal laid down new sentencing frameworks in relation to first time offenders convicted of separate categories of vice offences under the Women's Charter (Cap 353, 2009 Rev Ed) ("WC"). These new frameworks prescribed *custodial* starting sentences ranging from around one day to three years and six months, depending on the extent of harm caused and the level of culpability of the offender (at [77]–[78]). In this regard, *Poh Boon Kiat* departed from the precedents which had entrenched the proposition that the starting sentences for first time offenders of these offences without any aggravating factors should be a fine (at [113]). In deciding whether the new sentencing frameworks should apply only prospectively, the court noted the following factors and gave an affirmative answer (at [113]):

> (a) The previous sentencing position was entrenched in sentencing precedents. Indeed, it was the Prosecution's starting position until the court invited further submissions on the issue.
>
> (b) The change in the starting point for sentences was fundamental and unforeseeable from the offender's perspective.
>
> (c) The shift was influenced by the need for a coherent framework for sentencing in relation to vice offences.

35 On the other hand, there have been at least two cases post-*Hue An Li* in which the doctrine was held *not* to apply even though a new sentencing framework was laid down.

36 First, in *Ding Si Yang v Public Prosecutor and another appeal* [2015] 2 SLR 229 ("*Ding Si Yang*"), Chan Seng Onn J sitting in the High Court in a Magistrate's Appeal laid down new sentencing guidelines for match-fixing offences under s 5(*b*)(i) of the Prevention of Corruption Act (Cap 241, 1993 Rev Ed), under which the guideline sentence for an offender who fixed football matches at the FIFA World Cup level was (if certain assumptions held true) three and a half years' imprisonment, whereas those who did so at the S League level faced (if the same assumptions held true) a guideline sentence of one year's imprisonment (see [58]–[59], Annex A). Although the court did not explicate what the pre-existing sentencing guideline was, it appeared to accept the Prosecution's submission that prior to *Ding Si Yang*, the *highest* sentence imposed for an individual charge on a match-fixer (disregarding offences with aggravating factors unique to that particular offender) had been 18 months' imprisonment (at [56]). On the issue of prospective overruling, Chan J held that no exceptional circumstances justified the invocation of the doctrine (at [103]). In his judgment, the adjustment of benchmarks "cannot be said to be a revolutionary one" as imprisonment had always been on the cards (at [103]). Chan J further considered that little weight should be accorded to the expectations of one who deliberately flouted the law because the expected rewards of the offence outweighed its expected costs. Further, specific and general deterrence were of especial importance in that case to check against the rise of the scourge of match-fixing and to repair the reputational damage that had been caused to Singapore (at [103]).

37 To the same end, in *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449, we laid down a new sentencing framework for rape offences under s 375 of the PC but declined to apply the framework only prospectively on the bases that (a) the new framework did not effect a radical change in the

sentencing benchmarks but merely sought to rationalise existing judicial practice, and (b) applying the new framework would not give rise to any higher punishment to be imposed on the offender in that case (at [74]).

38 These cases illustrate how the doctrine of prospective overruling has been applied to sentencing guideline judgments. We find it apposite, however, to stress certain points both generally and in relation to such sentencing guideline judgments in particular.

Four points generally regarding the doctrine

39 We begin with four points which concern the doctrine generally. First, we reiterate that it is only in an *exceptional* case that the court may exercise its discretion to invoke the doctrine of prospective overruling. This is a function of the restrictive approach to prospective overruling which represents, in our judgment, the appropriate balance of the tension between retroactivity and prospectivity in this jurisdiction (see *Hue An Li* at [124]). Indeed, most other Commonwealth jurisdictions that recognise the existence of the doctrine have preferred to limit its operation to extraordinary or exceptional circumstances (see, for example, the UK in *In re Spectrum Plus Ltd (in liquidation)* [2005] 2 AC 680 ("*Spectrum*") at [40]; Malaysia in *Public Prosecutor v Dato Yap Peng* [1987] 2 MLJ 311 ("*Dato Yap Peng*") at 320–321; and Hong Kong in *Hung Chan Wa* at [33]). Such exceptionality is likely to be even more prominent in the context of civil cases, where this Court has observed that "in contrast to criminal cases, civil cases presenting exceptional circumstances that justify invoking the doctrine of prospective overruling are likely to be few and far between" (*L Capital Jones Ltd and another v Maniach Pte Ltd* [2017] 1 SLR 312 at [71]).

40 Second and relatedly, it follows from the exceptionality of the doctrine that it should only be invoked in circumstances where a departure from the ordinary retroactivity of a judgment is necessary to avoid serious and demonstrable injustice to the parties or to the administration of justice. Such a high threshold of necessity, and the need for serious and demonstrable injustice, are consistent threads across much of the Commonwealth jurisprudence on the doctrine. For instance, in *Re Manitoba Language Rights* [1985] 1 SCR 721, the Canadian Supreme Court granted a declaration of temporary validity in respect of its decision that all existing provincial legislation were unconstitutional for failing to be enacted and published in both official languages, French and English. Such a declaration abridging the ordinary retroactivity of its decision was, in the court's view, "necessary to preserve the rule of law" and to avoid the legal chaos that might result from an immediate invalidation of all provincial statutes (at [90]). Similarly, in the UK, the majority of the House of Lords in *Spectrum* accepted the existence of the doctrine but contemplated that it should only be invoked where it was necessary for the fair administration of justice or to avoid the gravely unfair and disruptive consequences of a judgment (at [40]):

> Instances where this power has been used in courts elsewhere suggest there could be circumstances in this country where prospective overruling *would be necessary to serve the underlying objective of the courts of this country: to administer justice fairly and in accordance with the law*. There could be cases where a decision on an issue of law, whether common law or statute law, was unavoidable but *the decision would have such gravely unfair and disruptive consequences for past transactions or happenings that this House would be compelled to depart from the normal principles relating to the retrospective and prospective effect of court decisions*. [emphasis added]

41 In the same vein, the Supreme Court of Malaysia (presently known as the Federal Court) held in *Dato Yap Peng* that the doctrine should be applied "in accordance with the justice of the cause or matter before it – to be adhibited

however with circumspection and as an exceptional measure in light of the circumstances under consideration" (at 320). On the facts, recognising that the prevailing state of law had been relied on for some 11 years, the court applied the doctrine to its decision to constitutionally invalidate a provision entitling the Public Prosecutor to require a case to be transferred from a lower court to the High Court. In New Zealand, while a majority of the Court of Appeal left open the issue of the existence of the doctrine in *Chamberlains v Sun Poi Lai* [2007] 2 NZLR 7 ("*Chamberlains*"), Tipping J preferred to recognise a narrow scope for the doctrine, to be invoked only where the prevailing law had been relied upon to such an extent that it would cause serious injustice to individuals, or would clearly not be in the interests of society as a whole, for the law to be altered retrospectively (at [144]).

42 These cases decided in other jurisdictions show that even though the factual instances of injustice might vary significantly, the central concern in determining when the doctrine should be resorted to remains whether it is necessary to avoid serious and demonstrable injustice, either to the parties at hand or otherwise for the proper administration of justice. This, in our judgment, is also the normative yardstick against which the factors identified in *Hue An Li* (see [33] above) should be considered.

43 The third point, as we alluded to in *Hue An Li* at [124], is that judicial pronouncements are *by default* retroactive in nature (see [32] above). Thus, as a general rule, until and unless the appropriate appellate court *explicitly* states that a judicial pronouncement is to take effect only prospectively, that pronouncement should *presumptively* be taken as being unbounded by time.

44 Fourthly, we agree with Tipping J's view in *Chamberlains* at [154] that the onus of establishing that there are grounds to limit the retroactive effect of a decision should ordinarily be on whoever seeks to do so.

Two points specific to sentencing guideline judgments

45 We turn now to two further points concerning specifically the invocation of the doctrine in relation to sentencing guideline judgments.

46 The first point relates to the *effect* of prospectivity in relation to such judgments. In our view, when a new sentencing framework in a sentencing guideline judgment is said to apply "prospectively", it should ordinarily apply to all offenders who are *sentenced* after the delivery of the decision in question, regardless of when they had *committed* the offence. As a corollary, the previous sentencing framework would apply to offenders who had already been sentenced by the time of that decision and also to the offender in the very case that is being dealt with in that judgment. In other words, the prospective application of a sentencing guideline judgment "exempts" only the offender at hand from the new framework, but not any offender sentenced at a later time even if the offence might have been committed prior to the delivery of the relevant decision. This is at least the case in relation to sentencing guideline judgments laying down new sentencing frameworks which, if applied to the instant case, would result in a *more severe* sentence for the offender.

47 In our judgment, the restrictive effect of the doctrine as described above is principled and accords with the nature of the injustice which prospectivity in this context seeks to avoid, which is injustice to the offender at hand if he were made to immediately bear the consequences of an adverse change in the law, when it was by chance that his case happened to afford the occasion for the

calibration of the new sentencing framework. In this regard, we find apposite the observations of Widgery LJ in *R v Newsome and another* [1970] 2 QB 711 ("*Newsome*"), where a five-member Court of Appeal unanimously overruled two earlier decisions of the same court regarding the exercise of sentencing discretion, but declined to apply the new approach to the offenders at hand as that would have resulted in more severe sentences for them (at 718G–719A):

> But at the end of the day it is of particular importance where the court is not following an earlier decision to see that *the individual appellant who is the subject of the present appeal suffers no injustice as a result, and we are highly conscious of the fact that these two men* [*ie*, the offenders in the instant appeal] *should not be allowed to be prejudiced in the result merely because these lawyers' battles have taken place over the cases in which they were concerned*. We think that, having regard to what has followed the trial and all the circumstances which now stand before us, the only fair thing is to suspend the sentences which they received and we shall do that for that reason alone, not, as I stress, because there is substance in the appeal, but because there is no other way in which justice can be done to the appellants in the circumstances now prevailing. [emphasis added]

48 Although the language of prospective overruling was not specifically referenced, the decision in *Newsome* effectively amounted to prospective overruling since the law was "corrected for the future without affecting the particular appellants" (G Zellick, "Precedent in the Court of Appeal, Criminal Division" [1974] Crim LR 222 at p 237; *Seng on Retrospective Criminal Laws* at footnote 48).

49 The approach we have taken focuses on the *date of sentencing* (as opposed to the date of commission of the offence or the date of conviction) as the general date of reference to determine the applicability of the new sentencing framework, and this is supported by authority. In *R v Taueki* [2005] 3 NZLR 372 ("*Taueki*"), the New Zealand Court of Appeal laid down new sentencing guidelines for offences involving serious violence, replacing earlier

guidance given in *R v Hereora* [1986] 2 NZLR 164. These new guidelines were not applied to the offenders at hand, but were held to apply to all offenders who were to be *sentenced* after the delivery of the decision (at [60] and [62]):

> [60] This judgment is intended to supersede [*R v Hereora*]. The approach set out in this judgment should now be adopted in sentencing offenders for [serious violence] offences instead of recourse to the approach outlined in [*R v Hereora*]. …
>
> …
>
> [62] We propose to adopt the same approach as that adopted by this Court in [*R v Mako* [2000] 2 NZLR 170], where the Court set out guidelines for sentencing for aggravated burglary. In that case the Court dealt with the appeal before it on the basis of the law as it stood at the time, and then set out guidelines for aggravated robbery sentences in the future. The Court said at para [21] that it did this because:
>
> > "[21] It might give the appearance of unfairness to the respondent [Mako] to formulate revised guidelines for sentencing in aggravated robbery cases and then to apply them in his case."

50 Subsequently in *R v AM* [2010] 2 NZLR 750 ("*AM*"), new sentencing guidelines for the offence of rape were laid down in place of earlier guidance in *R v A* [1994] 2 NZLR 129. The New Zealand Court of Appeal stated the following about the temporal applicability of the new guidelines (at [125]–[127]):

> *Starting date for application of the guidelines*
>
> [125] The content of this guideline does not differ significantly from what many sentencing judges have been doing in reliance on more recent appellate authority. The new guideline should be applied to all sentencing taking place after 31 March 2010. That was the approach this Court took in *Taueki* and in [*Hessell v R* [2010] 2 NZLR 298]. To assist trial judges and counsel, a copy of this judgment is being emailed to all trial judges, Crown Solicitors, the New Zealand Law Society, and the Criminal Bar Association today.
>
> [126] In those cases where sentencing indications have been given and relied on by defendants, sentencing judges should adhere to those indications rather than follow the guideline,

> unless the guideline yields a more favourable result than the indication.
>
> [127] With respect to appeals filed relating to sentences imposed up to today's date, we shall continue to apply the law as set out in previous appellate authorities.

51 Notably, 31 March 2010 which was referred to at [125] of *AM* was the date of delivery of the decision in *AM*. Therefore, the effect of *AM* was to adopt the *date of sentencing* as the general date of reference to determine the applicability of the new sentencing framework. The new framework would apply to all offenders whose sentencing date post-dated the date of release of the decision, even if the offence had been committed prior to that date. This would effectively exclude only the offender at hand (as well as offenders who had already been sentenced by that date) from the operation of the new framework. On the other hand, even if the appeal against sentence was filed after the pronouncement of the new framework, the previous state of law would apply so long as the original sentencing date pre-dated the new framework.

52 Two further points should be noted in relation to the New Zealand authorities. First, while there was no explicit reference in *Taueki* or *AM* to the doctrine of prospective overruling, the court in *Michael Marino v Chief Executive of the Department of Corrections and others* [2016] NZHC 3074 recognised, in the context of a discussion of the doctrine, that the two decisions were cases which "rule[d] that, contrary to the declaratory theory, the effect of its judgment is limited to the future" (at [9]). Second, the New Zealand courts recognised one exception to the general rule in favour of the sentencing date as the date of reference, which arises where the offender had been given and had relied on certain "sentencing indications". In such cases, the "more favourable" sentencing approach, presumably seen from the perspective of the offender, would be applicable (see *AM* at [126]). The appropriateness of such an

exception did not arise for consideration in the present appeal and we make no comment, save to note that there may be other options in such a situation including to allow the offender to retract his plea.

53 We appreciate that the local jurisprudence to date on the prospectivity of sentencing guideline judgments may not have been entirely consistent. On the one hand, in *Chan Lye Huat v Public Prosecutor* (HC/MA 251/2006), VK Rajah JA sitting in the High Court rejected an argument that a sentencing benchmark should not apply to the offender because it was only established *after* the date of commission of the offence. In his oral grounds for dismissing the offender's appeal against sentence, VK Rajah JA was reported to have stated that "I do appreciate why there's a sense of grievance *but I can only deal with the facts as I see it today*, whether the sentence is manifestly excessive" [emphasis added] (see Kow Keng Siong, *Sentencing Principles in Singapore* (Academy Publishing, 2009) at para 13.088). Such reasoning would appear consistent with our approach which posits as a general rule that, whether or not the doctrine of prospective overruling applied, an offender whose sentencing date post-dates the delivery of a sentencing guideline judgment should be sentenced according to the new framework.

54 On the other hand, in *Madhavan Peter v Public Prosecutor and other appeals* [2012] 4 SLR 613 ("*Madhavan*"), Chan Sek Keong CJ sitting in the High Court appeared to prefer the contrary view that a new sentencing framework *should not* be applied to offences committed before the relevant sentencing guideline judgment was delivered. This case raised several novel issues under the Securities and Futures Act (Cap 289, 2002 Rev Ed) ("SFA"), but we are presently concerned only with the appeal against sentence by one of the offenders in respect of insider trading offences under s 218(2)(*a*) of the SFA. The offender committed these offences on September 2005 and was sentenced

by the district judge in March 2011. One issue on appeal was whether the offender should have been sentenced under the more severe sentencing norm established in the context of a different SFA offence in *Public Prosecutor v Wang Ziyi Able* [2008] 2 SLR(R) 1082 ("*Able Wang*"), which was released only in March 2008. Chan CJ held in the negative. One reason was that a justification was required for *Able Wang* to be applied retrospectively to the present offences, and none was shown on the facts (at [175]). Chan CJ added that there was a "serious objection, in terms of fairness and the principle of just deserts, to the retrospective application of sentencing norms to offences committed before those norms are established" (at [175]). Having examined a few foreign cases, he then concluded (at [181]):

> In my view, there is no inflexible rule that current sentencing guidelines or principles cannot be applied to "old" offences in any circumstances. Nevertheless, the general principle ought to be that an offender should not be punished more severely than other offenders who committed the same offence (or an offence falling within the same category of offences) before the implementation of new guidelines providing for heavier sentences for that offence (or that category of offences). This principle is fair and just, and gives equal protection of the law to offenders of equal or similar culpability. If the sentencing norm for an offence is to be departed from to the detriment of the offender (*eg*, from a fine to imprisonment and/or caning), it should only be done in circumstances where specific or general deterrence is needed to check the rise of particular types of offences. Even then, there is no reason why the courts should not, whenever possible, forewarn would-be offenders of the new sentencing guidelines or even benchmarks. …

55 At the outset, we respectfully note that it may be appropriate to characterise Chan CJ's views about the temporal applicability of *Able Wang* as *obiter dicta*. This is because, arguably, the *primary* basis of his decision that *Able Wang* should not apply appears to be his finding that nothing in that case suggested that "the then sentencing norm [referring to the time of delivery of *Able Wang*] for securities market-related offences was no longer appropriate for

every such offence" [emphasis in original] (at [174]). Thus, by reading *Able Wang* narrowly, it was not strictly necessary for the court to have considered the temporal effects of that decision.

56 In any event, with the greatest respect, we were not persuaded by Chan CJ's view that a new sentencing framework should not generally apply to offences committed before the relevant sentencing guideline judgment was delivered. One of the primary justifications advanced in support of this view was that it would afford "equal protection of the law to offenders of equal or similar culpability" (see *Madhavan* at [181]). Presumably, he had in mind that two offenders who committed the same offence prior to the delivery of a sentencing guideline judgment should not be sentenced under different frameworks simply because one offender's sentencing *pre-dated* that judgment while the other offender's sentencing *post-dated* the same. However, while we appreciate the concern that arbitrariness might arise if the reference point is taken as the sentencing date, such arbitrariness would appear to exist in any event, even under the approach outlined in *Madhavan*, since there is no principled reason to distinguish between an offender who commits an offence one day *prior to* the delivery of a sentencing guideline judgment, and one who does the same thing a day *after* the release of the same judgment. Arbitrariness and "inequality" (in a loose sense of the term), in this sense, are criticisms of prospectivity in general (and perhaps even of retroactivity, in light of the doctrines of time bar and *res judicata*) and not of any particular construct of prospectivity (see [28] and [29] above).

57 The other primary justification advanced was "fairness" to the offender. This appears to be grounded in the view that an offender has, at the time of commission of the offence, some "legitimate expectation" as to the sentencing framework that would be applicable to him, and should thus be "forewarned"

of any change in that framework. It is not apparent why this should be the case. Indeed, it is not entirely clear if an individual can even, *at the time of commission of the offence*, be said to have a legitimate expectation as to the sentence that he will receive in the event that he is subsequently successfully prosecuted for the offence, save that the sentence should be within the relevant statutorily-prescribed range. Instead, as the High Court noted in *Ding Si Yang*, little weight should be given to the expectations of one who deliberately flouted the law and later found the expected costs or consequences were worse than anticipated (see [36] above). We broadly agree with this.

58 In our judgment, the invocation of the doctrine of prospective overruling in relation to sentencing guideline judgments should not be viewed as protecting a would-be offender's legitimate expectation in the eventual sentence to be imposed. Rather, it is a *concession* extended only in exceptional cases in order to avoid serious and demonstrable injustice to the offender at hand, whose case was arbitrarily selected for the calibration of the new sentencing framework, and who faces unique pressures in the criminal justice process such as we have recognised in a somewhat different context in *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [60]: "an accused person defending criminal charges experiences a strain and anxiety that is difficult for those who have not endured a similar ordeal to imagine".

59 There are two decisions post-dating *Hue An Li*, however, that warrant some explanation.

60 The first is *Public Prosecutor v Quek Chin Choon* [2015] 1 SLR 1169 ("*Quek Chin Choon*"). Here, the Prosecution appealed against the sentence imposed in respect of offences under s 146(1) of the WC for living on the earnings of prostitution. The appeal was heard before a High Court judge

between October and December 2014, which was after the release of *Poh Boon Kiat* on 25 September 2014. The date of commission of the offences in *Quek Chin Choon* is not clear from the grounds of decision. In any event, at the start of the analysis on the appropriate sentence to be imposed, the judge noted the new sentencing framework in *Poh Boon Kiat* and stated that "[b]ut since Menon CJ decided at [113] of the judgment that he would invoke the doctrine of prospective overruling, his observations do not apply to the present case. It is to the Prosecution's credit that it pointed this out even though that judgment would have lent much support to its appeal" (at [36]).

61 With respect, the premise of this reasoning – that *Poh Boon Kiat* did not apply to the offender in *Quek Chin Choon* because, presumably, he had committed the offences before the release of *Poh Boon Kiat* – should be corrected. As explained above (at [46]), the consequence of holding that the new sentencing framework in *Poh Boon Kiat* applied only prospectively meant only that the offender at hand, namely, Poh Boon Kiat (and those offenders who had already been sentenced by the date of the decision in *Poh Boon Kiat*), should be sentenced under the previous framework. Any offender *sentenced* after the release of *Poh Boon Kiat* – which would include Quek Chin Choon – should be subject to the new sentencing framework regardless of whether the offence was *committed* prior to the release of *Poh Boon Kiat*.

62 The second case is *Public Prosecutor v Soh Choon Seng* [2015] SGDC 106 ("*Soh Choon Seng*"), where the offender pleaded guilty to one count of negligent driving causing death under s 304A(*b*) of the PC. The district judge reasoned that the new sentencing framework established in *Hue An Li* applied prospectively and was thus not relevant to the instant case because "if due to administrative efficiency … the accused was prosecuted right after the commission of the offence in April 2014, and he pleaded guilty before the

decision of the High Court in *Hue An Li* that was delivered on 2 September 2014, the starting default position of a fine would have been applicable" (at [34]). In the judge's view, it would be arbitrary and prejudicial for the sentencing outcome to depend on the efficiency of the criminal justice system (at [35]). Thus, the pre-*Hue An Li* sentencing benchmark was applied instead.

63 We appreciate the district judge's concern that arbitrariness might arise if the reference point is taken as the sentencing date rather than the date of commission of the offence. However, as we have explained above in relation to *Madhavan* (at [56]), this concern is not unique to any particular construct of prospectivity. We therefore respectfully disagree with the construction of *Hue An Li* that the district judge adopted in *Soh Choon Seng*.

64 We hasten to add that none of the offenders in *Quek Chin Choon* and *Soh Choon Seng* were prejudiced. In fact, they each avoided harsher sentences under the new sentencing frameworks which would have been applicable on a proper understanding of the doctrine of prospective overruling. These cases, however, serve as apposite reminders to appellate courts to clarify the precise purport of any decision to invoke the doctrine of prospective overruling. As we mentioned above (see [31]), the term "prospective overruling" is imprecise and may be prone to confuse.

65 The second point to be made relates to the question of which is the appropriate court to pronounce on the prospectivity of a sentencing guideline judgment. In our view, this would ordinarily only be the court that is establishing or clarifying the new sentencing framework or guideline. This follows from our previous point, which is that the effect of applying the doctrine to a sentencing guideline judgment is that only the offender at hand is "exempted" from the new sentencing framework but not the other offenders

whose sentencing date post-date the delivery of the decision, even if they had committed the offence prior to the delivery of the same (see [46] above). In this context, it would make no sense for a later court to decide that an offender who had already been sentenced in a previous case should have been subject to a different sentencing regime.

66 We note that in some foreign jurisdictions, subsequent courts have considered the prospectivity of earlier judgments (see, for instance, *Ramdeen v State of Trinidad and Tobago* [2014] UKPC 7 (at [65], [90] and [91]) on the prospectivity of *Matthew v State of Trinidad and Tobago* [2005] 1 AC 433; and *Clarence Chan v Commissioner of Police* [2010] HKCFA 49 on the prospectivity of *Lam Siu Po v Commissioner of Police* [2009] HKCFA 113). However, we consider those to be exceptional cases where the failure of the subsequent court to do so would have, in itself, resulted in serious and demonstrable injustice. In any event, those cases were not concerned with sentencing guideline judgments.

67 Relatedly, since the court establishing a new sentencing framework will likely be an appellate court, the doctrine of prospective overruling will likewise most likely arise for consideration by an appellate court. This is consistent with the exceptionality of the doctrine and our decision in *Hue An Li* at [124] that the discretion to prospectively overrule lies with "[o]ur appellate courts (that is, our High Court sitting in its appellate capacity and our Court of Appeal)" [emphasis omitted] (see [32] above). It would probably be a rare case where a first instance court, whether the High Court sitting in its original criminal jurisdiction or a State Court, has to calibrate a sentencing framework for the first time and must therefore consider the prospectivity of the framework laid down. Such a situation should generally be avoided.

68 We make one further clarification. In some jurisdictions, the doctrine of prospective overruling has been confined for consideration only by the *highest court of the land* (see, for instance, India in *I C Golaknath v State of Punjab* [1967] 2 SCR 762 at 814; and Malaysia in *Dato Yap Peng* at 320). We do not consider this appropriate at least insofar as the criminal context is concerned. This is because in our system, the High Court will most often sit as the final appellate court in criminal matters in the context of determining Magistrate's Appeals, even if it may not technically be the highest court of the land. Indeed, in select cases involving important questions of public interest such as *Hue An Li* itself, the High Court may convene a three-judge bench in which case the court sits in a position that is closely akin to that of the Court of Appeal (see *Public Prosecutor v Lam Leng Hung and others* [2018] 1 SLR 659 at [56]).

69 In the premises, it would generally be improper for a subsequent court, and in particular a court of first instance, to pronounce on the prospectivity of an earlier sentencing guideline judgment issued by an appellate court (see, for instance, *Public Prosecutor v Tan Huai En Jonathan* [2017] SGDC 17 which considered the prospectivity of an earlier High Court decision in *Public Prosecutor v Chow Chian Yow Joseph Brian* [2016] 2 SLR 335 which had established a new sentencing framework for National Service defaulter offences under the Enlistment Act (Cap 93, 2001 Rev Ed)). We do not think that such cases would continue to arise given the clarifications that we have made in this decision.

Summary

70 In summary, the following principles are generally relevant in determining the applicability of the doctrine of prospective overruling:

(a) The appellate courts (namely, the Court of Appeal and the High Court sitting in an appellate capacity) have the discretion to invoke the doctrine of prospective overruling in exceptional cases.

(b) In determining whether the doctrine should be invoked, the central inquiry is whether a departure from the ordinary retroactivity of the judgment is necessary to avoid serious and demonstrable injustice to the parties at hand or to the administration of justice. In this regard, the following four factors identified in *Hue An Li* are relevant:

(i) the extent to which the pre-existing legal principle or position was entrenched;

(ii) the extent of the change to the legal principle;

(iii) the extent to which the change in the legal principle was foreseeable; and

(iv) the extent of reliance on the legal principle.

No one factor is preponderant over any other, and no one factor is necessary before the doctrine can be invoked in a particular case.

(c) The onus of establishing that there are grounds to exercise such discretion and limit the retroactive effect of a judgment is ordinarily on whoever seeks the court's exercise of that discretion.

(d) If the doctrine of prospective overruling is invoked, this should be explicitly stated and the precise effect of the doctrine should, if appropriate, be explained. As a general rule, judicial pronouncements are presumed to be retroactive in effect until and unless expressly stated or plainly indicated otherwise.

71 If the judgment concerned is one establishing or clarifying a new sentencing framework or guideline, the following principles apply in addition:

(a) The prospectivity of a sentencing guideline judgment should, as a general rule, only be considered and pronounced by the court that is establishing or clarifying the new sentencing framework. The doctrine of prospective overruling will generally not need to be considered by a court of first instance (namely, the High Court sitting in its original criminal jurisdiction and the State Courts).

(b) When a new sentencing framework is said to apply "prospectively", it should ordinarily apply to all offenders who are sentenced after the delivery of the relevant decision, regardless of when they had committed the offence. The previous sentencing framework would apply to the other offenders, that is to say, the offenders who have already been sentenced and the offender in the instant case giving rise to the decision in question.

72 We acknowledge that the application of these principles may have to be modified to suit the diverse range of factual situations in which the issue of prospective overruling may arise.

***Prospectivity of* Suventher**

73 Turning to the issue of whether the doctrine of prospective overruling applied to *Suventher*, we were of the view that this could not be the case. At the outset, two points were notable. First, this was not the appropriate court to consider the prospectivity of *Suventher*, and even if the issue needed to be raised, that should have been done in *Suventher* itself. Second, even if the doctrine of prospective overruling applied to *Suventher*, that did not mean that

the previous sentencing benchmark would apply to the Accused. Rather, all that it meant was that the offender in *Suventher* should have been sentenced under the previous benchmark. Whether or not that should have been or was in fact the case, it did not concern the Accused.

74 Even if we were to put aside for the moment these threshold objections, it was clear that the doctrine should not apply to *Suventher*. In our judgment, the central proposition in *Suventher* was that "[w]here the offence concerns the trafficking or importation of drugs, the gravity of the offence is measured by the quantity of drugs involved", which should in turn be indicative of the range of possible sentences (at [21]). The subsequent analysis in that case, including the proposition that the relevant weight of the drugs for the purpose of sentencing should be that stated in the charge and not the actual weight (at [32]), and the sentencing guidelines established in relation to the unauthorised importation or trafficking in quantities of cannabis between 330g and 500g (at [29]), was a derivative of that central proposition. Yet, that central proposition had been part of Singapore's jurisprudence at least since the High Court decision in *Vasentha*, about two years earlier.

75 Indeed, after *Vasentha* laid down the sentencing framework in relation to the offence of trafficking in diamorphine in quantities of up to 10g, and before we delivered our decision in *Suventher*, there had been several local decisions extrapolating from that framework in relation to other drugs and developing other sentencing ranges under the MDA, including these:

(a) In *Loo Pei Xiang Alan v Public Prosecutor* [2015] 5 SLR 500, the High Court held, based on parity between the statutory sentencing ranges, that 1g of diamorphine was equivalent to 16.7g of methamphetamine. It then applied this rate of conversion to the

framework in *Vasentha* to extrapolate the indicative starting sentences for the offence of trafficking in quantities of methamphetamine ranging from 167g to 250g.

(b) In *K Saravanan Kuppusamy v Public Prosecutor* [2016] 5 SLR 88, the framework in *Vasentha* which related to the *trafficking* of diamorphine was extended to the *importation* of diamorphine.

(c) Lower courts have also relied on the *Vasentha* framework to extrapolate sentencing decisions in relation to cannabis mixture (see, for instance, *Public Prosecutor v Chandrasekran s/o Elamkopan* [2016] SGDC 20; *Public Prosecutor v Sivasangaran s/o Sivaperumal* [2016] SGDC 214).

76 Therefore, although *Suventher* was the first Court of Appeal decision affirming the central proposition established in *Vasentha*, it could not be said to have introduced a significant or unforeseeable change in the law.

77 A further point was of particular significance in the present case. The facts showed that the Accused had in fact imported a quantity of drugs, 275.44g of methamphetamine, which would have warranted the imposition of capital punishment (see [14] above), even though he was eventually charged by the Prosecution with a reduced quantity, 249.99g of methamphetamine, which fell below the capital threshold. In this context, it could not be said that *Suventher* brought about a change in the law on which the Accused had relied at the time he committed the offence. Even taking the Accused's case at the highest, his reliance on the pre-*Suventher* state of law was contingent on an exercise of discretion by the Public Prosecutor, which was wholly beyond his control.

78 In the circumstances, even if the question was appropriate for determination in the present case, we did not consider it necessary for the avoidance of serious and demonstrable injustice that *Suventher* be held to operate with only prospective effect or that the sentencing position prior to *Suventher* be applied to the Accused.

Whether the sentence imposed below warranted appellate intervention

79 The threshold for appellate intervention in sentencing is well established. Appellate intervention would only be warranted if the Judge had made the wrong decision as to the proper factual matrix for sentencing, or had erred in appreciating the material before him, or had erred in principle in arriving at the sentence, or had imposed a manifestly excessive or inadequate sentence. In this regard, a sentence is only "manifestly excessive" if there is a need for a substantial alteration, rather than an insignificant correction, to the sentence to remedy the injustice: *Public Prosecutor v UI* [2008] 4 SLR(R) 500 at [12].

80 Under s 33 of the MDA read with the Second Schedule, the statutory sentencing range for the importation of 167g to 250g of methamphetamine is between 20 and 30 years' imprisonment and a fixed 15 strokes of the cane. Extrapolating an analogous framework for the trafficking or importation of 167g to 250g of methamphetamine from the *Suventher* framework, the indicative starting sentences should be as follows (see also *Pham Duyen Quyen v Public Prosecutor* [2017] 2 SLR 571 at [55]):

Sentencing band	**Quantity of methamphetamine trafficked or imported**	**Imprisonment (years)**	**Caning**
1	167.00–192.99g	20–22	15

2	193.00–216.99g	23–25	strokes
3	217.00–250.00g	26–29	

81 As mentioned, the central proposition underlying this sentencing framework is that insofar as the trafficking and importation of drugs are concerned, the gravity of the offence is to be chiefly measured by the quantity of the drugs involved. Indicative starting sentences should thus be broadly proportional to the quantity of the drugs trafficked or imported. In this case, the charge against the Accused was framed for the importation of not less than 249.99g of methamphetamine. Thus, under Band 3 of the sentencing framework, the appropriate indicative starting sentence should be between 26 and 29 years' imprisonment, or more specifically, at the higher end of this range.

82 Turning then to the aggravating and mitigating factors in this case, we broadly agreed with the Judge's analysis. In terms of aggravating factors, we considered it an aggravating factor that the Accused had taken active and sophisticated steps to avoid detection of the offence by ingesting the drug pellets and inserting them into his body. As the Prosecution noted, a routine airport screening would not have been able to detect the offence. We also agreed with the Judge, largely for the reasons he had given (see [20(c)] above), that the high market value of the drugs, and the involvement of a drug syndicate, were *not* aggravating factors on the facts of this case. However, we respectfully did not agree with the Judge that the fact that the Accused was motivated by financial gain in making the drug deliveries could, without more, be considered aggravating. It appeared to us that most drugs traffickers or importers would be motivated by some form of financial or material gain, and that the presence of such motivation did not render the offence materially more serious, or the

offender more culpable, than any other case of drug trafficking or importation. It might be otherwise if there was something exceptional about the circumstances of the case, such as the role of the offender or the amount of the gain but nothing of that kind was proven in the present case.

83 As for the mitigation, we considered that there were three operative factors: (a) the Accused had voluntarily confessed to his crime – a factor which we regarded as highly significant, (b) he had cooperated with the authorities, and (c) he had pleaded guilty at an early stage. However, we did not accept the submission that the Accused had only agreed to perform the deliveries because he was in dire financial straits. There was no evidence that this was the case at the time of the present offence in 2016. Further, while we were not unsympathetic to the Accused's condition when he was in the transit hall, which was caused apparently by his fear that the pellets had "leaked", that did not affect his culpability or the seriousness of the offence, and therefore it could not be given mitigating weight.

84 On appeal, the Accused placed great weight on the fact that the pellets he carried were not intended for the Singapore market. In our judgment, this could not constitute a mitigating factor. In *Public Prosecutor v Adnan bin Kadir* [2013] 3 SLR 1052, we held that the word "import" in the MDA "does not require that the object must be brought into Singapore for any particular purpose before it would qualify as an act of importation" (at [6]). Specifically, after surveying the case law and Parliamentary debates, it was clarified that the MDA "does *not* require the Prosecution to prove that the accused imported the controlled drugs for the purpose of trafficking in order to secure a conviction under that section" [emphasis in original] (at [70]). Therefore, the baseline offence of importation contemplated merely the bringing of drugs into Singapore, whether or not this was a mere transit stop, and wherever the final

destination of the drugs may be. In that context, even if the drugs were not intended for sale in Singapore or to persons in the country, that could not justify any credit to be given to the offender. Indeed, no authority was cited to us for a contrary position. Further, we agreed with the Prosecution that the Accused's argument faced an insurmountable practical difficulty: in the context of the international syndicated drug trade, it would be difficult to ascertain the final incidence of the harm caused by the drugs. It could not be said that just because the Accused's intended destination of delivery was Indonesia, there would be no impact on Singapore's interests. In the circumstances, the fact that the drugs were not intended by the Accused for the Singapore market could not be considered a mitigating factor.

85 Accordingly, taking the indicative starting sentence and the operative sentencing factors into account, the sentence of 25 years' imprisonment and 15 strokes of the cane imposed by the Judge was unimpeachable and was not manifestly excessive.

86 Furthermore, the sentence imposed was consistent with the three precedents which the Accused had himself cited in support of his appeal. Two of those cases are pending appeal and we should not say more about them. As to the third, in *Public Prosecutor v Muhamad Nor Rakis Bin Husin* [2017] SGDC 174, several drug-related charges were brought against the offender. One of the charges was for the importation of not less than 247.04g of methamphetamine. The offender was convicted after trial and sentenced to 27 years' imprisonment and 15 strokes of the cane in relation to this charge. According to the LawNet Editorial Note, the appeal against this decision in MA 9162/2017/01 as to both conviction and sentence was dismissed by the High Court on 6 October 2017. It was not clear why the Accused cited this case when the sentence imposed there was in fact higher than that which he had

received. In any event, the higher sentence imposed in that case could be explained on the basis that, unlike the Accused, the offender there had drug-related antecedents and did not plead guilty.

87 Finally, we should add for the avoidance of all doubt that the doctrine of prospective overruling did not apply to the present case.

Conclusion

88 For the foregoing reasons, we dismissed the appeal.

Sundaresh Menon Chief Justice	Andrew Phang Boon Leong Judge of Appeal	Judith Prakash Judge of Appeal

Appellant in person;
April Phang, Chan Yi Cheng and Lim Shin Hui
(Attorney-General's Chambers) for the respondent.