IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC 191

Magistrate's Appeal No 9140 of 2022

Between

Public Prosecutor

… *Appellant*

And

Yeduvaka Mali Naidu

… *Respondent*

EX TEMPORE JUDGMENT

[Criminal Procedure and Sentencing — Sentencing]
[Criminal Law — Statutory offences — Workplace Safety and Health Act]

Public Prosecutor
v
Yeduvaka Mali Naidu

[2022] SGHC 191

General Division of the High Court — Magistrate's Appeal No 9140 of 2022
Vincent Hoong J
10 August 2022

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Vincent Hoong J (delivering the judgment of the court *ex tempore*):

1 The respondent pleaded guilty to one charge under s 15(3), punishable under s 50(*a*) of the Workplace Safety and Health Act (Cap 354A, 2009 Rev Ed) ("WSHA") for recklessly doing an act which endangered the safety or health of himself or others by allowing an untrained forklift operator, one Shanmugam Sivarasu ("Shanmugam") to operate a forklift which had faulty brakes ("the K Forklift"). This endangered the safety of persons working at the work site and resulted in the death of a co-worker.

2 Shanmugam was similarly charged with and pleaded guilty to an offence under s 15(3), punishable under s 50(*a*) of the WSHA for operating the K Forklift without attaining the relevant training to do so and with knowledge that the brakes of the K Forklift were faulty.

3 The District Judge ("the DJ") sentenced Shanmugam to 11 months' imprisonment and the respondent to an imprisonment term of 7 months.

Background facts

4 The detailed facts surrounding the respondent's offence can be found in the DJ's grounds of decision at *Public Prosecutor v Yeduvaka Mali Naidu* [2022] SGDC 173. For present purposes, it suffices to note the following.

5 The respondent was employed by Chye Joo Marine Pte Ltd since 6 May 2013 to perform grit blasting and painting works at a shipyard ("the Shipyard"). In this connection, he operated forklifts and supervised the work of other workers.

6 On 26 May 2019, six employees – including the respondent, Shanmugam and the deceased – were assigned to work at the Shipyard. The team began spray painting a vessel at about 9.00am. At about 3.00pm, the respondent sought permission from one Velu Prakashraj ("Velu"), employee of Asia-Pacific Shipyard Pte Ltd (the operator of the Shipyard) ("APS") to use a forklift (which was distinct from the K Forklift) ("the M Forklift"). Velu allowed the respondent to use the M Forklift as he knew the respondent was a certified forklift operator but cautioned the respondent that the brakes of the M Forklift were not effective.

7 Separately, at about 5.00pm, the respondent wanted to seek permission to use the K Forklift (which similarly had faulty brakes). However, as none of the APS employees were present at the Shipyard and the respondent knew that he could start the engine to the K Forklift without an ignition key, he used his locker key to ignite and operate the K Forklift.

8 The respondent and Shanmugam subsequently used the K Forklift to transfer spray painting equipment. Sometime after 5.40pm, Shanmugam attempted to transport a blasting pot using the K Forklift. In his attempt to elevate the height of the forks of the K Forklift to lift the blasting pot, Shanmugam erroneously stepped on the accelerator of the K Forklift (while the K Forklift was in forward, rather than neutral gear).

9 This caused the K Forklift to crash through the guardrail along the edge of a slipway and fall onto the slipway, resulting in minor injuries to one Subramaniam and the death of a co-worker.

10 Investigations subsequently revealed that (a) Shanmugam was not certified, trained and competent to operate a forklift; (b) the respondent had allowed Shanmugam to operate forklifts on multiple occasions knowing that Shanmugam lacked the qualifications to do so; and (c) the respondent knew that the brakes of the K Forklift were faulty.

The decision below

11 The DJ considered that the two-stage sentencing framework set out in *Mao Xuezhong v Public Prosecutor and another appeal* [2020] 5 SLR 580 ("***Mao***") pertaining to offences under s 15(3A) of the WSHA (involving negligent acts) could be modified to deal with wilful or reckless acts under s 15(3) of the WSHA and that the factors relevant to harm and culpability set out at [64(a)] of *Mao* were equally relevant to cases involving s 15(3) of the WSHA.[1]

[1] Grounds of Decision ("GD") at [74]–[76].

12 She found that the level of harm (both actual and potential) disclosed in the present case (as well as in the case involving Shanmugam) was high as it resulted in the death of a worker and minor injuries to Subramaniam and involved an untrained individual operating moving and heavy machinery in a confined workplace.[2]

13 Whilst the DJ placed Shanmugam's culpability at the upper end of moderate, she assessed the respondent's culpability to be at the lower end of moderate.[3] In particular, she found that the respondent was less culpable than Shanmugam given that (a) Shanmugam had committed an additional unsafe and reckless act, namely in operating the K Forklift in a manner which resulted in the fatal accident; (b) the respondent's reckless act of permitting Shanmugam to operate the forklift was distinct from the accident caused by Shanmugam; (c) the accident arose because Shanmugam mistakenly stepped on the acceleration pedal (which had nothing to do with the faulty brakes and which could have still occurred if a trained individual operated the K Forklift); (d) the respondent did not instruct Shanmugam to operate the K Forklift in a reckless manner or deviate from the usual safety procedure; and (e) it was too onerous to expect the respondent to have refused to comply with instructions to perform the works using forklifts with faulty brakes.[4]

14 For completeness, the DJ considered that unlike *Mao* where "the entire unsafe system of works was permitted by the supervisor and this unsafe system

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2 GD at [80]–[82].

3 GD at [97]–[99].

4 GD at [100]–[121].

of works had directly caused the death of or harm to a worker", the accident in the present case can be directly traced to the acts of Shanmugam.[5]

15 Following from the above, the DJ assessed the indicative starting sentence for the respondent to be ten months' imprisonment and, after considering the respondent's plea of guilt and co-operation with the authorities, arrived at a final sentence of seven months' imprisonment.[6] As noted earlier, she sentenced Shanmugam to 11 months' imprisonment.

The parties' submissions

The appellant's submissions

16 The appellant submits that the respondent's sentence of 7 months' imprisonment is both wrong in principle and manifestly inadequate and should be enhanced to at least 11 months' imprisonment.

17 The central plank to the appellant's submissions is that the DJ failed to appreciate that – in instructing Shanmugam to operate the K Forklift knowing that the K Forklift had faulty brakes and Shanmugam was not competent to operate the forklift – the respondent's culpability should be at least on par with Shanmugam's culpability. In so far as the respondent's act of permitting Shanmugam to operate the forklift cannot be artificially divorced from Shanmugam's subsequent mishandling of the forklift, the DJ accorded too much weight to the fact that the respondent was not the proximate cause of the incident.[7]

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5 GD at [122]–[124].

6 GD at [133]–[134].

7 Appellant's Submissions dated 5 August 2022 ("AS") at [33]–[50].

18 In this connection, the DJ's finding cuts against parliamentary intent animating the WSHA, *viz*, that supervisors have a crucial role to play and need to lead by example and ensure the safety of their workers as well as the High Court's observations in *Mao* and *Nurun Novi Saydur Rahman v Public Prosecutor and another appeal* [2019] 3 SLR 413 ("*Nurun*") that a supervisor is expected to be responsible for the safety of the workers under him and may be found to be of greater culpability when he commits breaches of the WSHA.[8] The appellant submits that the DJ's decision may lead to rank-and-file workers suffering heavier penalties than their supervisors because they are held to have directly caused workplace accidents.[9]

19 Additionally, the appellant contends that the DJ accorded inadequate weight to the fact that the respondent made a conscious and active decision to instruct a supervisee to work unsafely, had previously done so on multiple occasions and had been involved in the development of Risk Assessments which cautioned against the very breach of safety he committed.[10]

20 In conjunction with the fact that the DJ placed insufficient emphasis on the potential harm of the appellant's actions and failed to consider that even if the faulty brakes did not contribute to the accident, it reflected a greater disregard for safety on the respondent's part,[11] the appellant submits that appellate intervention is warranted.

The respondent's submissions

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8 AS at [36]–[41].

9 AS at [51].

10 AS at [44]–[45], [57(b)].

11 AS at [44]–[52], [58]–[65].

21 On the other hand, the respondent submits that the DJ correctly assessed the respondent to be less culpable than Shanmugam. The respondent was charged with allowing Shanmugam, an untrained forklift operator, to operate the K Forklift. This was at least a step removed from the deceased's death. Moreover, the respondent did not actively encourage Shanmugam to act in a dangerous manner and could not have reasonably foreseen or prevented Shanmugam from stepping on the accelerator when the K Forklift was not in neutral gear.[12]

22 Next, the respondent was not in charge of maintaining the forklifts at the work site. In any event, the faulty brakes had nothing to do with the accident (it was undisputed that Shanmugam had mistakenly depressed the accelerator pedal of the K Forklift and did not apply the brakes when the forklift surged forward) and at best went towards assessing potential *harm* (which the DJ had already pegged as high).[13]

23 Finally, the sentence of seven months' imprisonment accords with *Mao* and *Public Prosecutor v Chong Chee Boon Kenneth and other appeals* [2021] 5 SLR 1434 ("*Kenneth Chong*"). In the latter regard, the respondent contends that *Kenneth Chong* is instructive in demonstrating that the culpability of a supervisor can be lower than that of a primary offender, particularly when the supervisor is "more removed" from the harm that eventuated.[14]

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12 Respondent's Submissions dated 5 August 2022 ("RS") at [15]–[26].

13 RS at [46]–[49].

14 RS at [69]–[98].

My decision

24 Preliminarily, both the appellant and the respondent do not take issue with the sentencing framework set out by the DJ. As I alluded to earlier, the DJ had adapted the sentencing framework set out in *Mao* to deal with offences under s 15(3) of the WSHA. I note that this accords with the High Court's provisional view in *Public Prosecutor v Manta Equipment (S) Pte Ltd* [2022] SGHC 157 ("*Manta*") that the two-stage sentencing approach set out in *Manta* (which is consistent with the approach adopted in *Mao*) "should in principle apply to *all* Part 4 offences punishable under s 50 of the [WSHA]" (at [39]).

25 As parties have not made submissions on the propriety of the appellant's proposed sentencing ranges for the various sectors in the sentencing matrix governing offences under s 15(3) of the WSHA (which the DJ relied on), I make no finding on this. It suffices to note that Shanmugam's sentence of 11 months' imprisonment is not the subject of the present appeal and the key question for present purposes is whether the DJ correctly assessed the culpability of the respondent and particularly vis-à-vis Shanmugam's.

26 Before leaving the issue of the appellant's proposed sentencing matrix for offences under s 15(3) of the WSHA, I make one observation. I caution against any notion that "the sentence ranges for high level of culpability should generally be reserved for wilful acts".[15] Wilfulness and recklessness are dichotomous legal concepts but no bright line distinction can be drawn between the two *mentes reae* in assessing the culpability of an offender *at the sentencing stage*. Each case turns on its own facts (see also *Jali bin Mohd Yunos v Public Prosecutor* [2014] 4 SLR 1059 at [36]).

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15 GD at [78].

27 Set against this backdrop, I find that the DJ erred in assessing the respondent's culpability to be lower than Shanmugam's. Though Shanmugam was the individual who negligently stepped on the accelerator of the K Forklift, this cannot be neatly divorced from the fact that the respondent – as Shanmugam's supervisor – allowed Shanmugam to operate the K Forklift knowing that the latter was not trained or competent to operate the forklift and that the forklift had faulty brakes. To draw a water-tight distinction between the respondent permitting Shanmugam to use the forklift and Shanmugam's subsequent act (in the manner that the DJ had done) accords insufficient weight to first, the working relationship between the respondent and Shanmugam and second, the fact that it is reasonably foreseeable that an untrained and uncertified operator may make mistakes and cause accidents while operating a forklift.[16] In the former regard, it is undisputed that Shanmugam worked under the supervision of the respondent. In this connection, the DJ implicitly recognised the influence that the respondent had over Shanmugam's reckless act; she observed that Shanmugam "was authorised and instructed by [the respondent]" and did not operate the K Forklift "on a frolic of his own".[17]

28 The DJ's assessment of the acts of the respondent and Shanmugam also unjustifiably attenuates a supervisor's culpability for facilitating a supervisee's reckless act. It is pertinent to note that (a) the legislative intent of the WSHA was to improve workplace safety by effecting a cultural change for employers and other stakeholders to take proactive measures to prevent accidents; and (b) the scope of liability under s 15(3) of the WSHA was intended to be a broad one, imposing a duty on multiple persons at work to ensure the safety or health of themselves and others (*Mao* at [40] and [47]). Thus, during the Second

16 Appellant's Supplemental Submissions dated 8 August 2022 at [7].

17 Record of Proceedings ("ROP") at p 28.

Reading of the Workplace Safety and Health Bill (Bill No 36/2005) – through which Parliament promulgated s 15(3) of the Workplace Safety and Health Act 2006 ("WSHA 2006") (which is *in pari materia* to s 15(3) of the WSHA) – then Minister for Manpower, Dr Ng Eng Hen observed that under the liability regime introduced by the WSHA 2006, "responsibility for the safety and health of others will lie not only with employers, but also with employees, whether they be supervisors or rank-and-file workers" (*Nurun* at [57]). I find that the DJ's evaluation of the relative culpabilities of the respondent and Shanmugam cuts against the public interest in ensuring that persons who hold positions of authority under the WSHA (and who, for this reason, are likely to have greater influence over workplace practices) act in a manner that respects the safety of their supervisees.

29 For the avoidance of doubt, my holding in this regard should not be (mis)construed as a pronouncement that supervisors will invariably be equally or more culpable than supervisees where the latter acts in a reckless manner. Again, each case turns on its own facts. In the present case, the constellation of factors, including the working relationship between the respondent and Shanmugam and the fact that the respondent permitted Shanmugam to operate a faulty forklift on multiple occasions knowing that Shanmugam lacked the training to do so, militates in favour of a finding that the respondent's culpability was, minimally, on par with Shanmugam's.

30 Next, I also find that the DJ placed undue weight on the fact that the faulty brakes did not materially contribute to the accident.[18] I note that there is some uncertainty as to whether the Statement of Facts the respondent admitted to stated that Shanmugam did not utilise the brakes to the K Forklift "as he knew

[18] GD at [111]–[112].

the brakes were faulty".[19] I am prepared to find, in the respondent's favour, that the Statement of Facts merely stated that Shanmugam did not step on the brakes of the K Forklift given that the Prosecution accepted that the faulty brakes "did not directly result in the accident itself" during oral submissions.[20] That said, even if the proximate cause of the accident was Shanmugam mistakenly stepping on the accelerator, one must be alive to the reality that the risk of an untrained individual erroneously operating a forklift with malfunctioning brakes is significantly higher than the commensurate risk of this individual operating a functioning forklift. Whilst the respondent's counsel submits that the issue of the faulty brakes is relevant only to an assessment of potential harm and which the DJ had already pegged as high,[21] I find to the contrary. That the respondent knew that the forklift had malfunctioning brakes and still permitted Shanmugam, an untrained individual, to operate it, heightens his culpability as a supervisor. This is inasmuch as culpability includes a consideration of the nature of the unsafe act (*Mao* at [64(a)(ii)]).

31 Finally, in my view, the decision in *Kenneth Chong* is of limited assistance to the respondent. First, *Kenneth Chong* is not a decision involving workplace safety. Rather, Chong and Nazhan, who had sanctioned the continuance of ragging through their inaction (in contradistinction to Fatwa and Farid who actively encouraged ragging and made sure that the servicemen of Tuas View Fire Station submerged the victim in the pump well), were convicted of offences under s 338(*a*) of the Penal Code (Cap 224, 2008 Rev Ed). The legislative intent animating the WSHA, in particular to ensure that all stakeholders would be held responsible for workplace safety (*Nurun* at [57]), is

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19 GD at [109].

20 ROP at p 24.

21 RS at [30]–[31], [42]–[49].

a consideration that was not germane on the facts of *Kenneth Chong*. Second, while Chong, Nazhan and the respondent were each one step removed from the act(s) that eventually resulted in the death of the victims, the respondent, unlike Chong and Nazhan, had directly contributed to the initial unsafe state of affairs by permitting Shanmugam to operate the K Forklift.

32 For completeness, I briefly deal with *Public Prosecutor v Wong Kiew Hai and others* (DSC 900150/2018 & Ors) ("*Wong Kiew Hai*"), a decision which was accompanied by the District Judge's brief oral remarks. Before me, the respondent's counsel submitted that the fact that the natural persons subject of *Wong Kiew Hai*, namely Wong and Yee, received sentences of eight and ten months' imprisonment respectively even though they committed reckless acts under s 15(3) of the WSHA which contributed to the death of one worker and injuries to ten others suggested that the respondent's sentence of seven months' imprisonment was fair and just. I am unable to accept this submission. It must be remembered that the District Judge had reduced Wong and Yee's respective sentences by three months to account for the fact that a more culpable co-accused person, one Robert Tjandra, had earlier been sentenced to approximately 12 months' imprisonment on the authority of *Nurun* (which was subsequently disapproved by *Mao*).[22]

[22] Appellant's Bundle of Documents and Authorities dated 5 August 2022 at pp 197–198.

33 For the above reasons, the sentence of seven months' imprisonment imposed by the DJ on the respondent is manifestly inadequate. I enhance the sentence to 11 months' imprisonment.

Vincent Hoong
Judge of the High Court

Isaac Tan and Norine Tan (Attorney-General's Chambers) for the appellant;
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