IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 174

Magistrate's Appeal No 9128 of 2015

Between

Sim Wen Yi Ernest

… *Appellant*

And

Public Prosecutor

… *Respondent*

GROUNDS OF DECISION

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

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Introduction

1 In December 2013, the appellant, Sim Wen Yi, Ernest, bought two types of airsoft arms (an airsoft pistol and an airsoft gun) in Thailand and brought them back to Singapore. He was 25 years old then. He first started using these arms to shoot at trees and inanimate objects. This escalated when he began shooting people from his second floor residential unit, taking aim at them as they walked along public areas below. In January 2015 alone, he shot at three unsuspecting persons on four occasions. The hard, non-compressible plastic pellets discharged from these arms even hit one of the victims on her temple, near her eye.

2 Eight charges under the Arms and Explosives Act (Cap 13, 2003 Rev Ed) ("the AEA") and the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code")

were preferred against the appellant. He pleaded guilty to and was convicted of three charges for the following offences:

(a) Importation of the airsoft pistol under s 13(1)(*b*) read with s 13(2)(*a*) of the AEA for which he was sentenced to a fine of $8,000 ("the Importation Charge").

(b) Possession of the airsoft gun under s 13(1)(*a*) read with s 13(4) of the AEA for which he was sentenced to a fine of $4,000 ("the Possession Charge").

(c) Voluntarily causing hurt using an airsoft gun, an instrument for shooting under s 324 of the Penal Code for which he was sentenced to seven weeks' imprisonment ("the s 324 charge").

The s 324 charge

3 The arguments on appeal largely concerned the custodial sentence imposed for the s 324 charge. In the proceedings below, the prosecution submitted that an eight-week imprisonment term would be appropriate given that (a) the appellant had targeted and shot at the victim; (b) the offence was premeditated; (c) the offence was committed out of mischief and boredom; (d) the offence could have resulted in serious injury to the victim and (e) the appellant had shot at two other victims as reflected in the three other related charges which were taken into consideration for the purpose of sentencing.

4 In their written submissions filed for the purposes of the appeal, the prosecution maintained that a custodial sentence would still be warranted for the s 324 charge. However the prosecution changed their position on the appropriate length of the custodial sentence, and submitted instead that a one-week imprisonment term would be sufficient. They highlighted a recent

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development, namely a test conducted post-sentence by the Health Sciences Authority ("HSA") that was inconclusive as to the degree of dangerousness posed by the airsoft arms in question[1].

5 The appellant accepted that the prosecution's submission was extremely fair but nevertheless implored the court to consider the possibility of a probation order.[2] The appellant also urged the court to consider exercising its powers under s 390(4) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC") to alter the charge from s 324 of the Penal Code to s 337 or s 352 of the same.[3] The principal reason for this was that the prosecution had not clearly established that any serious hurt was caused to the victim.

6 I did not think that probation was appropriate. However I was persuaded that it would be fair and just to alter the s 324 charge to a lesser charge under s 337 of the Penal Code and I accordingly gave the necessary order. The appellant was thus eligible to be considered for a Community-Based Sentence ("CBS") or a suitable combination of CBSs. As the appellant was found suitable to perform community service, I concluded that a combination of a Short Detention Order ("SDO") and a Community Service Order ("CSO") would be the most appropriate order on the facts.

7 In allowing the appeal, I delivered a brief oral judgment. I now set out the full grounds of my decision. These grounds will focus primarily on why I altered the s 324 charge and imposed a combination of CBSs (as opposed to probation or some other sentence). I will also make several observations on

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1 Respondent's Written Submissions at [65] and [88].

2 Appellant's Written Submissions at [62].

3 Appellant's Written Submissions at [128] to [134].

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the correctness of the sentences imposed in relation to the Importation Charge and Possession Charge. This concerned the issue of whether a fine *and* an imprisonment term were both mandated by law.

Whether the High Court has the power to alter the s 324 charge

8 Section 390(4) of the CPC permits the appellate court to frame an altered charge (whether or not it attracts a higher punishment), if the court is satisfied that, based on the records before it, there is sufficient evidence to constitute a case which the accused has to answer. A reading of s 390(3) of the CPC confirms that this is a power that applies even where an accused has pleaded guilty and has been convicted on such plea.

9 This interpretation was not disputed by the prosecution in the course of the hearing of the appeal. It is supported by a recent decision of Sundaresh Menon CJ in *Koh Bak Kiang v Public Prosecutor* [2016] 2 SLR 574 ("*Koh Bak Kiang*"). The facts of *Koh Bak Kiang* are as follows. On 29 November 2007, the accused pleaded guilty to two charges for trafficking in diamorphine and one for the possession of ketamine. He asserted in mitigation through his counsel that he did not know the precise nature of the drug he was trafficking. He had been led to believe that it was a drug other than diamorphine. He nonetheless maintained that he was not qualifying his plea.

10 Some six and a half years after the accused pleaded guilty, he filed a criminal motion seeking an extension of time to appeal against his convictions. Since his main complaint was that his convictions were unsafe because he had qualified his plea, the matter was remitted to the District Court for it to record evidence on the specific point of whether the accused had knowledge of the nature of the drug he was trafficking in. Subsequently, both the accused and the prosecution were in agreement that the most appropriate course was for the

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court to substitute, in the place of the earlier convictions, convictions on *amended* charges. The question that arose was whether the court had the power to substitute the convictions on the disputed charges with convictions on amended charges. The provision that was in issue was s 256(*b*) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("CPC 1985"), the predecessor of s 390(4) of the CPC, which provided that the court may:

> in an appeal from a conviction —
>
> > (i) reverse the finding and sentence and acquit or discharge the accused or order him to be retried by a court of competent jurisdiction or committed for trial;
> >
> > (ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or enhance the sentence; or
> >
> > (iii) with or without the reduction or enhancement and with or without altering the finding, alter the nature of the sentence[.]

11 CJ Menon referred to the decision of *Garmaz s/o Pakhar and another v Public Prosecutor* [1996] 1 SLR(R) 95 ("*Garmaz*") in which the Court of Appeal confirmed that s 256(*b*) of the CPC 1985 empowers the High Court, when hearing an appeal from a *conviction made after a trial* to amend a charge and convict the accused person on the amended charge, subject to the safeguard that the amendment did not cause prejudice to the accused. In *Koh Bak Kiang*, the prosecution and the appellant agreed that the charge should be amended. CJ Menon drew support from cases in which the power to amend the charge on appeal had been previously exercised where the accused had pleaded guilty in the court below (*eg*, *Public Prosecutor v Henry John William* [2002] 1 SLR(R) 274) and held that the High Court's power to amend the charge in its appellate capacity under s 256(*b*) of the CPC 1985 extended to situations where the accused had pleaded guilty in the court below (at [55]). It was in this context that CJ Menon observed that any want of clarity in the

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CPC 1985 has been resolved by s 390 of the present CPC which sets out the powers of an appellate court in hearing an appeal against a sentence imposed following a plea of guilt (at [55]).

Whether the court should exercise its powers to alter the s 324 charge

12 On the premise that the High Court has the power to amend a charge and convict an accused person on the amended charge in cases where the accused had pleaded guilty in the court below, the next question that arises is whether this power should be exercised. It has been held that the power must be exercised sparingly, subject to careful observance of the safeguards against prejudice to the defence: *Public Prosecutor v Koon Seng Construction Pte Ltd* [1996] 1 SLR(R) 112 at [21]. Therefore, to avoid injustice and prejudice to the accused, the court must be satisfied that the proceedings below would have taken the same course, and that the evidence recorded would have been the same.

13 If there is no reason to impugn the correctness of the charge, there would correspondingly be no reason to alter it. Thus, in determining whether the s 324 charge should be altered in the present case, the first question to ask was whether the conviction under s 324 was correct. In my assessment, this question had to be addressed as there were material uncertainties in the prosecution's case which caused concern: first, whether the airsoft gun was indeed as dangerous as suggested by the prosecution through the literature tendered, in spite of the inconclusiveness of recent HSA tests; and second, whether hurt was in fact caused to the victim (which is a distinct enquiry from whether hurt could potentially have been caused) and the extent of hurt involved.

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14 The airsoft gun was accepted to be a dangerous weapon by definition only because s 324, which creates the offence of causing hurt with a dangerous weapon, defines such a weapon to include "any instrument for shooting". But on a purely literal reading, without further reference to the requirement that hurt has to be caused in order to satisfy the requirements of s 324, even a "Nerf" gun (*ie* a toy gun which fires soft foam darts), a "Laser Tag" gun (which does not discharge any projectile whatsoever) or a toddler's water pistol is a "dangerous weapon". Such a wide reading would be entirely absurd. In my view, an "instrument for shooting" cannot be said to be dangerous at all in the context of a s 324 charge unless there is clear evidence that hurt (*ie* as defined in s 319 of the Penal Code as "bodily pain, disease or infirmity") was caused. Unfortunately the Statement of Facts ("SOF") did not mention whether any hurt was in fact caused, let alone how extensive it was. It is not enough that hurt could potentially be caused if there is no evidence of actual hurt caused. And if there was only very minimal discomfort (or "no significant hurt"[4]) thus suggesting it might have been *de minimis*, would the facts truly warrant a s 324 charge?

15 In examining whether hurt was caused to the victim, I found nothing in the SOF to suggest that the victim had suffered any "bodily pain" or bodily injury. To that extent, it could be said that the SOF did not adequately support the s 324 charge even though the appellant was prepared to accept the charge that was preferred and to plead guilty to it. There was at least some lingering doubt whether hurt was in fact caused or whether the victim was merely annoyed or irritated by the fact that she became the unfortunate subject of the accused's target practice.

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4 Respondent's Written Submissions at [67] – [68], [134].

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16 The learned DPP, Mr Prem Raj Prabakaran ("Mr Prem Raj"), suggested that since a police report was lodged, this could permit a reasonable inference (by deduction) that the victim did suffer hurt and was sufficiently aggrieved to warrant her taking action to lodge a report. With respect, I could not agree. The mere fact that a police report was lodged does not give rise to the inexorable inference that the victim had suffered bodily pain. Police reports have been lodged over far lesser infractions or perceived slights.

17 In view of the prosecution's concession that the level of danger posed by the airsoft gun could not be conclusively stated, the court was left to speculate on this material aspect. There was literature tendered by the prosecution to show that such guns *can* potentially be dangerous but they concerned tests which had been conducted on other airsoft guns which are not generic. Counsel was nevertheless prepared to concede that the airsoft gun in question can potentially be dangerous if the pellets struck vulnerable areas such as a person's eyes. Much depends on the specifications of the gun in question, *eg* the nature of the gun firing mechanism (spring or gas *etc*), the range of the weapon and the type of pellets used. Other factors such as wind conditions as well as the shooter's skill would likely influence the level of danger posed by the gun. Even if one accepts that the airsoft gun can be dangerous, there was no reliable evidence that it was in fact as dangerous as suggested by the prosecution, especially in light of the literature tendered.

18 I was therefore minded to consider either of two options which I raised with the DPP and counsel for the appellant on 5 July 2016. The first option would be for the court to exercise its revisionary power to set aside the conviction since there were doubts whether a fundamental ingredient of the s 324 charge, namely hurt (*ie*, 'bodily pain'), was established. In addition, the entire basis on which the prosecution had sought the custodial sentence of

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eight weeks before the District Judge was flawed if it cannot be said with any certainty how dangerous the airsoft gun was. Should this course of action be adopted, the prosecution could then review the appropriateness of the charge and if the appellant still wished to plead guilty, the plea could be taken afresh, perhaps on an amended charge if necessary.

19 Should any charge involving hurt as an ingredient still be tendered, then the SOF ought to contain a clear statement of the relevant pain and/or injury suffered (if any). The absence of any such statement in these circumstances lends itself to the strong inference that any pain or injury was either non-existent or minimal at most. The undesirability of this approach (*ie* revision and re-taking the plea), however, was that it would protract the matter and effectively allow the prosecution the full benefit of a "second bite" to get it right when they ought to have done so in the court below. I was less inclined to adopt this course, and counsel and the DPP were of a similar view.

20 The second option, in line with what was suggested by Mr Shashi Nathan ("Mr Nathan"), counsel for the appellant, was for the court to alter the charge under s 390(4) and substitute a conviction on a lesser charge (*eg*, s 337 or s 352). This was the parties' preferred course and mine as well. It would not operate to the prejudice of the appellant. The court would then also be permitted a wider range of sentencing options, including CBS or a combination of CBSs. A combination of a SDO and a CSO might be a more appropriate option as the offence involves antisocial behaviour and disturbance and possible danger to the community.

21 Mr Prem Raj's disclosure of the recent HSA test results, despite their adversity to the prosecution's case, was highly commendable as a demonstration of candour and even-handedness. The prosecution has an

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overriding duty to act fairly to advance the public interest and assist the court. Ideally, of course, this duty ought to have been performed at first instance. The HSA tests were said to have been a "recent development" but the airsoft arms ought to have been tested before the plea was taken, particularly since the prosecution intended to seek a significant custodial sentence. Those tests could and indeed should have been conducted before the prosecution proceeded with a s 324 charge at the plead-guilty mention and submitted for a lengthy custodial sentence of at least 8 weeks' imprisonment.[5]

22 The prosecution might well have decided not to proceed with the s 324 charge had the results of the HSA tests been available before the plea of guilt was taken. With the benefit of hindsight and an opportunity to take a fresh look at the matter, I was of the view that it would be fairer to afford the appellant the benefit of doubt by replacing the original charge with a lesser charge. I formed this view after having regard to the crucial issue of whether the SOF adequately supported the ingredient of hurt under s 324.

23 In directing that the charge be altered, I was fully conscious that the exercise of prosecutorial discretion should not be lightly interfered with. The Public Prosecutor has an extensive discretion to decide on both the nature of the charges and the number of charges: *Kalaiarasi d/o Marimuthu Innasimuthu v Public Prosecutor* [2012] 2 SLR 774 ("*Kalaiarasi*") at [4]. The court should be slow to substitute its opinion for what the prosecution considers to be the most appropriate charge in the circumstances. Otherwise, the court would risk usurping the discretion that has been constitutionally vested in the Public Prosecutor.

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5 Respondent's Written Submissions at [64].

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24 I was heartened to note Mr Prem Raj's indication that an alteration of the charge would not meet with any objections from the prosecution. I had in fact requested Mr Prem Raj to propose what a more appropriate lesser charge ought to be. There was clearly no prejudice to the defence if the charge at hand was amended to a lesser one. Mr Nathan recognised that an alteration of this nature could only operate to his client's benefit and thus had also concurred with this approach. I permitted a brief adjournment to 8 July and on that date, the parties informed me that they had reached agreement that a reduced charge under s 337(*a*) of the Penal Code, *ie* of doing a rash act endangering personal safety, was appropriate. Accordingly, an amended SOF was tendered in support of the altered charge.

25 The prosecution clarified in the amended SOF that while the victim did suffer hurt, the hurt caused was apparently not severe. It was common ground that the victim felt a "sharp pain" causing her to exclaim as she was hit just above her chest by the hard pellet fired by the appellant from his airsoft gun (see the amended SOF at [5]). No medical report was tendered as the victim did not seek medical attention. Nothing in the SOF indicated that the victim suffered any severe injury or trauma.

26 In the premises, I was satisfied that the alteration of the charge to the offence under s 337(*a*) of the Penal Code was fair and appropriate. Having confirmed that the appellant accepted the amended SOF, I proceeded to record a conviction on the altered charge.

Whether probation would be appropriate

27 In view of the alteration of the charge to a lesser one, it might then be contended that there is at least an arguably stronger case for probation to be considered. In *Lim Li Ling v Public Prosecutor* [2007] 1 SLR(R) 165, it was

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observed that while the archetype of the appropriate candidate for probation remains the young "amateur" offender, the court may exceptionally be persuaded to allow probation in cases involving older offenders (at [87]). The age of the offender is usually deemed relevant because the chances of effective rehabilitation in the case of young offenders are greater than in the case of adults and this generally makes probation more relevant where young offenders are concerned.

28 Having said that, I was also conscious that older offenders may in fact be more receptive to probation as they are generally more mature and better able to understand their responsibilities, the consequences of breaching probation, and the significance of being afforded a chance for reform. In the present case, the chances of effective rehabilitation for the 27-year-old appellant are no doubt still present but the nature of the offences is serious and deserving of strong disapprobation. A measure of general deterrence was also necessary. While the appellant's age was not strictly a barrier to granting probation, I was also mindful that at his age, he really ought to have known better than to put members of the public at risk of injury by his conduct. As there were significant aggravating features as well, I did not think probation was a suitable option.

Aggravating factors

29 A number of aggravating features were clearly present. The acts were not one-off but deliberate and persistent. I did not think it was correct to characterise them as momentary lapses or as sudden, impulsive and immature acts. This was particularly so when there were four separate incidents in one month involving three victims who became hapless subjects of target practice for the appellant. One of them had the misfortune of being targeted twice and

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shot at on consecutive days. He shot at them as they walked along public areas below his second floor residential flat. The hard pellet even hit one of them at her temple, near her eye. Public safety and public disquiet was caused and the offences were difficult to detect.

30 The broader harm in terms of the risk of potential danger and serious injury could not be ignored. These were not mere toy guns. Though usually made of plastic, they were realistic, full-scale replicas of actual firearms. It was common ground that the hard pellets fired from the airsoft guns were capable of causing serious injuries, for example if they struck a person's eye at close range. Therefore the appellant's level of culpability remained high. He was very fortunate that no serious injuries were caused.

Mitigating factors

31 I noted that there were also relevant mitigating factors: the appellant had pleaded guilty, was remorseful, and had compensated the victims. He had no previous convictions. His parents remained supportive. Some other factors raised on his behalf – the lack of any significant hurt, the suggestion that these were "less dangerous" weapons – were not truly mitigating but merely neutral. His reasons for committing the offence, *ie* that he acted on "impulse" or out of "boredom" or "mischief", were certainly not mitigating in the circumstances. For the avoidance of doubt, neither do I consider them to be aggravating factors.

32 The appellant was hardly a youthful or immature offender – he was over 26 years of age in January 2015 and was (until recently) gainfully employed as a bank officer. Although I did not consider probation to be suitable in the circumstances, a calibrated mix of deterrence and rehabilitation was in my view a necessary element of the appropriate sentence. The offences

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harmed the community by causing disquiet among persons in his neighbourhood. I was of the view that his likelihood of reoffending was low and hence a combination of CBSs was suitable.

Whether CBS would be appropriate

33 The crux of the issue was whether the appellant, who was over 26 years old at the time of offending, was a suitable candidate for a combination of CBSs. It is helpful to begin by identifying the legislative intent underlying the CBS framework. CBSs were introduced to allow greater flexibility in balancing the various sentencing principles in individual cases. CBS targets offences and offenders traditionally viewed by the courts to be on the rehabilitation end of the spectrum: *ie* regulatory offences, offences involving younger accused persons and persons with specific and minor mental conditions (*Singapore Parliamentary Debates*, *Official Report* (18 May 2010) vol 87 at col 422 (K Shanmugam, Minister for Law and Second Minister for Home Affairs)).

34 I will now turn to consider some precedents where SDOs were ordered. I begin with a recent decision of the High Court in *Public Prosecutor v Daryl Lim Jun Liang* Magistrate's Appeal No 9047 of 2014 (16 July 2015) ("*Daryl Lim*"). The facts of the case are set out in the District Court's decision which is reported as *Public Prosecutor v Daryl Lim Jun Liang* [2015] SGDC 144. The offender, who was 17 years old at the relevant time, met up with his three accomplices and set out to look for foreign workers to assault. A foreign national worker was punched multiple times on the face and mouth by two of the offender's accomplices. There was nothing to indicate that the offender had himself participated actively or assaulted the victim. It was accepted,

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however, that the two others had acted in furtherance of the common intention of the group of four and hence the offender was criminally liable.

35 The District Judge took the view that the need for a tough deterrent message could be outweighed by other considerations such as the offender's rehabilitative capacity or the absence of any need for extended incarceration, or the principle of proportionality. He further observed that CBSs could serve as a midpoint of sorts for youthful offenders where the offence is relatively minor in nature and is not ruled out by the strictly exclusionary criteria. Having regard to all the circumstances of the case, the District Judge passed the following combination of three CBSs on the offender: (a) ten days' detention in prison under an SDO; (b) 150 hours of community service to be completed within 12 months; and (c) a 12-month day reporting order with daily time restriction from 10pm to 6am and electronic monitoring.

36 On appeal to the High Court, Sundaresh Menon CJ observed that the real question in dealing with a youthful offender was whether the general emphasis on rehabilitation had been displaced. Given the specific circumstances of the case which included the offender's role in the incident, as well as his favourable probation report and suitability report for day reporting, CJ Menon agreed that CBS was appropriate but adjusted the District Judge's orders by directing that his parents should be bonded in a suitable sum to ensure his good behaviour.

37 In *Public Prosecutor v Joachim Gabriel Lai Zhen* (Magistrate's Appeal No 20 of 2015) (24 November 2015) ("*Joachim Gabriel*"), the offender was charged with and convicted of voluntarily causing hurt to a public transport worker. The offender was 21 years old at the time of offending. He had been drinking heavily at Clarke Quay before he boarded the

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victim's taxi at about 3.30 am. He assaulted the victim after refusing to pay the taxi fare despite having been sent to his intended destination. After he was charged in 2013, the offender claimed trial. The District Judge imposed a 14-day SDO on the offender, chiefly because of his relatively young age at the time of the offence, and also due to his remorse and his capacity for reform and reintegration into the community.

38 On appeal by the prosecution, the issue before me was whether this was such an exceptional case that warranted a departure from the benchmark sentence of four weeks' imprisonment for offences involving violence against public transport workers as set out in the case of *Wong Hoi Len v Public Prosecutor* [2009] 1 SLR(R) 115. In my oral judgment, I explained why I took the view that such a departure was not warranted on the facts. There was nothing to suggest that the offender's capacity for rehabilitation was so demonstrably high that a CBS would suffice. His acceptance of responsibility through his belated plea of guilt and compensation made to the victim were apparent afterthoughts. Further, his intoxication and impulsiveness were aggravating factors in the context of such offences. Therefore, I allowed the prosecution's appeal and substituted the 14-day SDO with a four-week imprisonment term.

39 In contrast, in *Public Prosecutor v Gan Boon Kheng* [2016] SGDC 162, a 25-year-old offender who had also committed the offence of voluntarily causing hurt was assessed to be suitable for a combination of an SDO and a CSO. There, the offender punched the victim during an altercation which arose out of a basketball game. In sentencing the offender to a combination of an SDO and a CSO, the District Judge expressly rejected the prosecution's submission that CBSs are meant only for young offenders and minor offences of a regulatory nature or for persons with mental disorders. He reasoned that

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CBSs also seek to offer offenders the opportunity to move on from their first mistake of committing a crime, one that is not so serious as to preclude rehabilitation (at [18]). Further, in his view, the SDO caters to the situation where the court finds that the threshold for imposing a custodial sentence has been crossed due to the nature of the offence, but that at the same time, the offender possesses the necessary characteristics and support for immediate re-integration into society (at [22]). The prosecution's appeal against sentence was discontinued.

40 The important point that emerges from the above authorities is that the suitability of the various types of CBS orders depends on the type of offender and the type of offence. This calls for an open-textured assessment that is highly contextualised and the court must have regard to all the facts of the case. Some types of CBS may have greater relevance in the cases which involve youthful offenders since such offenders are often seen to have greater rehabilitative capacity. Nevertheless, I did not think that offenders over the age of 21 should *ipso facto* be denied the opportunity to be considered for CBS. The rehabilitative aim does not automatically recede into the background once the offender reaches 21 years of age. In every case, the particular circumstances of the offence and the offender in question must be carefully scrutinised and evaluated to determine whether rehabilitation should be given prominence notwithstanding any countervailing need for deterrence, retribution or prevention: *Kalaiarasi* at [39]. Thus, the appropriateness of CBS is a question which turns on *all* the relevant circumstances of each case, including the offence and offender in question.

41 This approach is consistent with ss 346 and 348 of the CPC which provide that persons above 16 years of age can be considered for CSOs and SDOs respectively; the provisions do not restrict the imposition of such orders

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to offenders below the age of 21. It is also in line with the broad policy objective that undergirds the CBS framework, that is, to enable offenders of less serious crimes to be dealt with in ways other than by imposing fines or imprisonment to enhance their chances of rehabilitation without diluting the deterrent objective of our penal regime or jeopardising the public's sense of safety (*Sentencing Practice in the Subordinate Courts Volume 1* (LexisNexis, 3rd Ed, 2013) ("*Sentencing Practice in the Subordinate Courts*") at p 77).

42 Returning to the present case, while probation was not appropriate, this was a case in which a rehabilitative approach should not be wholly disregarded. While the appellant had committed the same offence on four distinct occasions, he had not reoffended since the offences were detected. He had no prior convictions apart from traffic-related antecedents. In my view, he is unlikely to re-offend. While general deterrence remained relevant, it could be achieved with a carefully calibrated mix of CBS options. In any case, a short custodial sentence in the form of a SDO would likely be sufficient to keep him away from crime in the future.

43 The appellant's conduct was clearly anti-social and harmful to the community. It was relevant however to note that the hurt caused in this case, while not *de minimis*, was transient at best. The appellant is not beyond redemption but appears to be someone who has a good future and who can benefit from a second chance to put his life right. Looking at all these factors in totality, this was a sufficiently compelling case for CBS. A combination of CBSs in the form of an SDO and a CSO was therefore the outcome that would best reflect the interplay of sentencing objectives in this case.

44 An SDO carries a punitive and deterrent element and this would suitably address the issue of his culpability. The authors of *Sentencing*

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Practice in the Subordinate Courts observe that through the principle of the 'clanging of prison doors', the SDO acts as a warning for the offender of a more severe experience of imprisonment if he were to reoffend (at p 90). I digress briefly to note that the "clang of the prison gates" principle originated prior to the introduction of CBS and in a slightly different context. The usual basis for the application of the "clang of the prison gates" principle is that the shame of going to prison is sufficient punishment for a person of eminence (*Tan Sai Tiang v Public Prosecutor* [2000] 1 SLR(R) 33 at [39]–[40]). Given the limited scope that has been ascribed to the principle, it is arguable that it is not conceptually correct to apply the principle in the context of SDOs. I would, however, observe *provisionally* that the ambit of this principle could potentially be expanded to include SDOs having regard to the wider range of sentencing options currently at the court's disposal. That said, this issue is best left to be decided on a future occasion since it did not arise in this case and the parties did not address me on it.

45 At the same time, I took the view that the appellant deserved an opportunity for a fresh start after he serves his sentence. Under s 7DA of the Registration of Criminals Act (Cap 268, 1985 Rev Ed), his criminal record will be spent on the date he completes the CBSs. I was gratified to note that the prosecution had indicated that they would support such a sentencing approach as well.

46 Having regard to the CSO suitability report, in my view the appropriate sentence was for him to serve a one-week SDO and perform 150 hours of CSO. I had confirmed that the appellant was agreeable to perform community service if the court so ordered. Although the CSO suitability report recommended 240 hours of community service, I was of the view that this

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duration should be shorter as the appellant would also be ordered to serve a non-nominal SDO.

The AEA offences

Whether the AEA offences required both fines and imprisonment to be imposed

47 It bears recalling that the appellant was sentenced to fines of $8,000 and $4,000 for the Importation Charge and Possession Charge respectively. It was pointed out by Mr Prem Raj that the sentences imposed by the District Judge in respect of the Importation Charge and the Possession Charge were erroneous, as only fines were imposed. He submitted that properly interpreted, the relevant AEA provisions required both fines *and* imprisonment to be imposed. This was not disputed by Mr Nathan. For completeness, although the outcome of the appeal did not turn on these issues, I shall briefly state my observations in relation to these submissions.

48 The District Judge in the present case proceeded on the assumption that the starting point for the Importation Charge and the Possession Charge was a fine. This assumption, according to Mr Prem Raj, appears to have been based on the table of three unreported precedents tendered by the prosecution which indicated that:

(a) Sentences for importation of "arms", under s 13(2)(*a*) of the AEA, have ranged from a fine of $8,000 to two weeks' imprisonment; and

(b) Fines of $5,000 have been imposed for the possession of "arms" under s 13(4) of the AEA.

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49 The District Judge's assumption (in respect of s 13(4) of the AEA) finds support in the decision of *Public Prosecutor v Zulkifli bin Mohamed* [2007] SGDC 139 ("*Zulkifli bin Mohamed*"). In that case, 75 distress flares were found in the offender's possession. The court considered s 13(4) of the AEA and held that the word "and" in s 13(4) should be taken to be used disjunctively:

> 41. I should note that in relation to the charge concerning the flares, my reading of s 13(4) Arms and Explosives Act is that since it provides that an offender ' shall be liable … to a fine not exceeding $5,000 and to imprisonment for a term which may extend to 3 years'. While most similar provisions would use the disjunctive 'or', rather than 'and' which usually means conjunction, I am of the view that here 'and' should also be taken to be used disjunctively. This is in particular because the phrase 'shall be liable' indicates that the offender is exposed to a potential sentence, rather than mandating that a specific sentence or type of sentence should follow invariably from conviction. This appears to be the approach taken in Hong Kong SAR where this particular phrasing is common: see for example *Chung Yat and Ors v The Queen* CACC 160 of 1978; and more recently in *HKSAR v Cheng Hong Keung* HCMA 78 of 2004. The cases cited by Counsel, namely *PP v Lee Soon Lee Vincent* [1998] 3 SLR 552 and *Abu Seman v PP* [1982] 2 MLJ 338 could also be used to support this interpretation, though neither dealt with the matter directly.

50 I agreed with the prosecution's submission that the relevant AEA provisions required both fines and imprisonment to be imposed, and I now set out the reasons for my view. I begin with the relevant punishment provisions which are summarised in the table below:

Offence	**Punishment provision**	**Punishment Prescribed**
Importation Charge	Section 13(2)(*a*) of the AEA	"*shall be liable* on conviction to a fine not exceeding $10,000 **and** to imprisonment for a term not

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		exceeding 3 years" [emphasis added in italics and in bold]
Possession Charge	Section 13(4) of the AEA	"*shall be liable* on conviction to a fine not exceeding $5,000 **and** to imprisonment for a term which may extend to 3 years" [emphasis added in italics and in bold]

51 The wording of ss 13(2)(*a*) and 13(4) may be contrasted with six other provisions in the AEA which prescribe that the offender "*shall be liable* on conviction… to a fine… **or** to imprisonment… **or** to both" [emphasis added in italics and in bold].[6] Such punishment provisions apply to other offences including those which involve resisting any person in the execution of power vested under the AEA (see s 25 of the AEA) and obstructing inspection of stock-in-trade (see s 26 of the AEA).

52 As a starting point, while I accept that the words "shall be liable" do not have any *prima facie* obligation or mandatory connotation (*Public Prosecutor v Lee Soon Lee Vincent* [1998] 3 SLR(R) 84) and have been generally viewed as conferring a discretion (*Poh Boon Kiat v Public Prosecutor* [2014] 4 SLR 892 at [36]), the interpretive exercise must be guided by the textual and legislative context of the provision in question. I also accept that the word "and" may be used in a disjunctive sense (*Kori Construction (S) Pte Ltd v Nam Hong Construction & Engineering Pte Ltd*

6 Prosecution's submissions at [94].

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[2015] 2 SLR 616 at [24]) whereas the application of the word "or" may not always produce a disjunctive result (*Public Prosecutor v Low Kok Heng* [2007] 4 SLR(R) 183 at [69]).

53 As pointed out by the learned DPP, there are three distinct types of punishment provisions under the AEA: (a) those providing for imprisonment *and* fines ("the AND Phrasing"); (b) those providing for imprisonment *or* fines *or* both ("the OR Phrasing); and (c) those providing for fines only. Given that the OR Phrasing is used elsewhere in the AEA, it is implausible that the legislative intention behind the AND Phrasing was to confer on courts the discretion to impose sentences of fines and imprisonment terms as alternatives. Further, the natural and ordinary meanings of the words "and" and "or" are clear and I see no compelling reason to depart from them. Therefore, it seems to me that the plain meaning of the word "and" as well as the variation in language of the punishment provisions under the AEA are powerful factors that militate against the disjunctive reading of the provisions that was preferred in *Zulkifli bin Mohamed*.

54 My understanding of the provisions is reinforced by s 13(5) which makes it clear that imprisonment is mandatory under s 13(4). Section 13(5) provides:

> (5) Upon the conviction of any person of an offence under subsection (4), if it is proved to the satisfaction of the court before which the conviction is had that the offender had possession or control of the arms, explosives, poisonous or noxious gas or noxious substance for the purpose of committing an offence punishable under the Penal Code (Cap. 224), ***the offender shall, in addition to the imprisonment prescribed by that subsection***, be liable to caning.
>
> [emphasis in bold italics]

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I agreed with the prosecution that the reference to "in addition to the imprisonment prescribed by [s 13(4)]" provides some support for the view that an imprisonment term is mandatory for an offence under s 13(4).

55 In view of the above, I concluded that the word "and" in both ss 13(2)(*a*) and s 13(4) should be read conjunctively, and this mandates the imposition of *both* fines and imprisonment terms on offenders convicted of offences under those provisions as well as other provisions under the AEA that adopt the AND Phrasing. I also note that the defence concurred with the prosecution's submissions in this regard. Having said that, I agreed with the parties that the doctrine of prospective overruling should apply such that the conjunctive reading of the word "and" in ss 13(2)(*a*) and 13(4) should not apply in the instant case, and therefore had no bearing on the outcome of the appeal.

Whether the doctrine of prospective overruling applied

56 The doctrine of prospective overruling was discussed extensively in *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 ("*Hue An Li*"). There, a 3-Judge panel of the High Court held that judicial pronouncements are, by default, fully retroactive in nature save in cases where the appellate court exercises its discretion, in exceptional circumstances, to restrict the retroactive effect of its pronouncements. The exercise of this discretion is guided by factors such as the extent to which the law or legal principle concerned is entrenched, the extent of the change to the law, the extent to which the change is foreseeable and the extent of reliance on the law or legal principle concerned (at [124]). The court also stressed that in applying the framework, no one factor is preponderant over any other, and no one factor is necessary before prospective overruling can be adopted.

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57 I was persuaded by the learned DPP's submission that this was an appropriate case in which the court should exercise its discretion to limit the application of its pronouncement to future cases since the conjunctive interpretation is a significant and unforeseeable change in the law. Hitherto, a fine and imprisonment have never been imposed together for offences that are punishable under s 13(2)(*a*), and the sentencing structure under s 13(2)(*a*) has not been the subject of judicial attention. In respect of the s 13(4) offence, the only case that has dealt with the sentencing structure under this provision had held that the sentences of a fine and imprisonment were alternatives. In these circumstances, it was only fair to limit the application of the present decision to future cases. To borrow the words of the court in *Hue An Li*, "it would have been grossly unfair if the rug had been pulled from under [the appellant's] feet, especially as this concerned [the appellant's] physical liberty" (at [125]).

Conclusion

58 For the above reasons, the appeal was allowed in the terms that follow. First, the appellant stood convicted for DAC 910467/2015 on the reduced charge under s 337(*a*) of the Penal Code. Second, in lieu of the imprisonment term of seven weeks originally imposed, he was sentenced to serve an SDO of one week and to perform 150 hours of community service, to be completed within six months. The fines paid in respect of the other two charges and the compensation paid were ordered to stand.

See Kee Oon
Judicial Commissioner

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