IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 99

Magistrate's Appeal No 9149 of 2019/01

Between

Mao Xuezhong

… *Appellant*

And

Public Prosecutor

… *Respondent*

Magistrate's Appeal No 9149 of 2019/02

Between

Public Prosecutor

… *Appellant*

And

Mao Xuezhong

… *Respondent*

JUDGMENT

[Criminal Procedure and Sentencing] — [Sentencing] — [Benchmark sentences]

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Mao Xuezhong
v
Public Prosecutor and another appeal

[2020] SGHC 99

High Court — Magistrate's Appeal No 9149 of 2019
Sundaresh Menon CJ, Tay Yong Kwang JA, Vincent Hoong J
10 March 2020

20 May 2020 Judgment reserved.

Tay Yong Kwang JA (delivering the judgment of the court):

1 The accused, Mao Xuezhong, is a 49 year old citizen of the People's Republic of China. He was tried in the District Court on the following charge:[1]

> That you, on 20 January 2014, being a formwork supervisor of Hong Khim Construction Pte Ltd (UEN: 200709452N) of 118 Yunnan Crescent Singapore 638327, at a construction worksite located at 201 Henderson Road, Apex @ Henderson, Singapore 159545, which was a workplace within the meaning of the Workplace Safety and Health Act (Chapter 354A), without reasonable cause, performed a negligent act which endangered the safety of others; to wit, you,
>
> > (a) instructed two workers under your charge, Md Mastagir Rana (Sohal) Md Aminur Rahman (FIN …) and Khan Alam (FIN…), to descend onto a soffit top of an Aluma formwork when it was unsafe to do so; and

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[1] ROP 5.

> (b) failed to ensure that the said Md Mastagir Rana (Sohal) Md Aminur Rahman (FIN…) had anchored his safety harness before descending onto the soffit top,
>
> resulting in the death of the said Md Mastagir Rana (Sohal) Md Aminur Rahman (FIN…), and you have thereby committed an offence under section 15(3A) of the Workplace Safety and Health Act (Chapter 354A), punishable under the same section of the same Act.

2 Section 15(3A) of the Workplace Safety and Health Act (Cap 354A, 2009 Rev Ed) ("WSHA") provides as follows:

> **Duties of persons at work**
>
> **15.**— …
>
> (3A) Any person at work who, without reasonable cause, does any negligent act which endangers the safety or health of himself or others shall be guilty of an offence and shall be liable upon conviction to a fine not exceeding $30,000 or to imprisonment for a term not exceeding 2 years or to both.

3 The District Judge ("DJ") convicted the accused and sentenced him to 24 weeks' imprisonment. The accused appealed against his conviction and sentence while the Prosecution appealed against sentence. For the purposes of this judgment, the accused shall be referred to as "the appellant".

4 The Prosecution's appeal against sentence involved submissions calling for a reconsideration of the WSHA sentencing framework for offences under s 15(3A) of the set out in the High Court decision of *Nurun Novi Saydur Rahman v Public Prosecutor and another appeal* [2019] 3 SLR 413 ("*Nurun Novi*").[2] A three-Judge High Court was therefore convened to hear the appeals and a Young *Amicus Curiae* ("the *amicus*") was appointed to assist the court on this issue. The appellant contended that the sentence of 24 weeks' imprisonment

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[2] Prosecution's Bundle of Authorities ("PBOA") at Tab 10.

for an accident involving the death of one person was "disproportionate even following *Nurun's* standards" because *Nurun Novi* was sentenced to 25 weeks' imprisonment on appeal to the High Court and that case involved the deaths of two persons. The Prosecution argued for a sentence of at least 12 months' imprisonment.

Factual background

5 Most of the facts were not in dispute and were set out in a Statement of Agreed Facts dated 2 May 2018. The worksite in question was a construction site where a 9-storey industrial building was being built at Henderson Road. The construction company named in the charge was contracted to supply labour and tools for the reinforced concrete structure work which included the construction of formwork, the fixing of reinforcement and concrete casting. The labour supplied would report to and receive instructions from the main contractor of the building project. The main contractor used traditional formworks and also rented a modular formwork system from a formwork supplier.

6 The appellant was employed by the said construction company for about one and a half years before the incident. He was deployed as a formwork supervisor at the worksite for about three months before the incident. His duties included the deployment of workers and the assignment of work to them at the worksite.

7 On 20 January 2014 at about 2pm, the appellant was supervising the lifting of Aluma formworks (which we shall refer to as "table forms") from the fourth to the fifth floor of the building under construction. The photograph in Annex 1 of this judgment shows what such a table form looked like. Md Mastagir Rana (Sohal) Md Aminur Rahman, a 25 year old Bangladeshi national

("the deceased"), Khan Alam ("Khan") and their co-workers in the construction company were involved in this endeavour.

8 The table form was approximately 1,170kg in weight and measured approximately 6m in length, 3.6m in width and 4.8m in height. Before it was lifted from the fourth floor to the fifth floor, it would be positioned such that it protruded partially from the edge of the fourth floor. The photograph in Annex 2 of this judgment shows how a table form would be positioned prior to lifting. This was meant to facilitate the lowering of lifting gears through the openings on the top of the table form to secure it. This top portion of the table form is a platform known as a "soffit top" but for simplicity, we refer to the whole structure as a table form. The lifting gears would be lowered using a tower crane and they would be threaded through the openings. The table form rested on rollers (or wheels) to facilitate its movement. Each table form should be secured with two guide ropes and there would ordinarily be workers holding onto the table form to further secure it.

9 At the material time, the deceased and Khan were working on the fifth floor while their co-workers were working on the fourth floor. The role of the deceased and Khan was to facilitate the threading of the lifting gears through the openings, by descending onto the top of the table form to guide the lifting gears through the openings. The workers on the fourth floor would then secure the lifting gears to the table form. Following this, the table form would be lifted up to the fifth floor.

10 The workers started at about 7am on 20 January 2014. The workers had lifted seven or eight table forms in this manner before they stopped for lunch at noon. At about 1pm, they resumed the lifting works. After lifting another two or three table forms, the lifting work was paused as the tower crane had to be

deployed for other operations. During this pause, the table form was secured with a guide rope.

11 At about 2pm, when the tower crane became available again, the lifting work resumed. The deceased and Khan climbed out beyond the horizontal guard rails at the edge of the fifth floor and descended onto the top of the protruding table form. While both the deceased and Khan wore body safety harnesses, only Khan secured his safety harness to the guardrail before the descent. The deceased did not secure his safety harness to an anchorage point despite being reminded to do so by Khan.

12 The deceased, who was in front of Khan, walked towards the openings near the top edge of the table form. As he did so, the table form suddenly started to tilt downwards, causing the deceased to slide off the table form and fall to the third floor vehicle ramp. The deceased was brought to a hospital where he succumbed to his injuries four days later.

13 It was undisputed that previously and on several occasions, the appellant had instructed his workers to descend onto the top of similar table forms to perform the same task during lifting operations.

Proceedings in the District Court

The parties' cases in the District Court

14 The Prosecution's case was that the appellant had, without reasonable excuse, performed a negligent act which endangered the safety of others, by (a) instructing the deceased and Khan to descend onto the table form when it was unsafe to do so; and (b) failing to ensure that the deceased had anchored his

safety harness before he descended onto the table form, thus causing the deceased to fall and resulting in his death.

15 The Prosecution called Khan as its witness. Khan testified that:

(a) The appellant had instructed him and the deceased to descend onto the top of the table form. The appellant was with them on the fifth floor when he gave those instructions, about one and a half arm's length away from him.[3] There were also two others present – a construction worker, Al-Amin, and the signalman, Lyton. Lyton's duty was to signal to the crane operator on when to lift up the table form.[4] Lyton and Al-Amin were not called as witnesses at the trial.

(b) Khan asked the appellant for a lifeline but the appellant did not say anything. He did not dare to ask the appellant a second time because he was afraid that the appellant would be angry. There was a previous occasion when Khan asked the appellant for something a second time and the appellant got angry.[5] On his own initiative, Khan anchored his safety harness to the guard rail (which Khan referred to as a "GI pipe" in his oral evidence[6]) at the edge of the fifth floor before he descended.[7] Khan advised the deceased to do the same but the deceased did not listen

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3 NE, 2 May 18, page 32 lines 3-18.

4 NE, 2 May 18, page 28 line 16 to page 29 line 32.

5 NE, 2 May 18, page 34 line 6 to page 35 line 7.

6 NE, 2 May 2018, pages 36 – 37.

7 NE, 2 May 18, page 36 line 27 to page 38 line 11.

to him.[8] When Khan and the deceased descended onto the top of the table form, the formwork suddenly tilted and the deceased fell off.

16 Khan testified that before the accident, he had made two similar descents. On those occasions, he and the other workers involved acted under the appellant's instructions.[9] On both those occasions, Khan was provided with a lifeline and had secured his safety harness to the lifeline, which was in turn secured around a column on the fifth floor.[10]

17 The Prosecution also called one Liow Kim Chong ("Liow"), the Formwork Technology Supervisor of the manufacturer of the table forms and who was the manufacturer's representative responsible for training the appellant and his workers on the safe use of the table forms. Liow testified that he had given specific instructions that workers should not climb onto the top of table forms because of the risk of falling and that workers standing at the edge would need a lifeline. Liow also said that he confirmed with the appellant that he understood the instructions.[11]

18 Applying *Nurun Novi*, the Prosecution submitted that the culpability of the appellant and the harm in the offence both fell within the "high" category. Accordingly, the sentence to be imposed should not be less than 25 weeks' imprisonment. The Prosecution also submitted that *Nurun Novi* should be treated with caution and proposed an alternative sentencing framework.[12]

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8 NE, 2 May 18, page 35 lines 12-14.

9 NE, 2 May 18, page 40 lines 14-19.

10 NE, 2 May 18, page 41 lines 17-24.

11 NE, 5 November 2018, 14:19–27, 16:8–22 (ROP 229, 231).

12 PBOA at Tab 13.

19 The appellant gave evidence in his own defence. The defence's case was that the appellant did not give instructions to the deceased and Khan to descend onto the table form. He was unaware that the works were re-starting after the pause and was therefore working on the other side of the fifth floor when the deceased and Khan descended onto the table form and the accident happened. The appellant claimed that Khan did not ask him for a lifeline. The appellant also claimed that it was not possible that there was no lifeline, given that the lifting work had been going on since morning that day and lifelines were available then. Further, the appellant argued that descending onto the top of the table form was in line with the established work procedure, as instructed by the appellant's superiors. He therefore had every reason to believe that the work procedure was safe. On sentence, it was submitted in mitigation that the appellant was a first offender, that he had cooperated with the investigations and that a fine was the appropriate sentence in this case.

Decision of the District Court

20 The DJ preferred Khan's account over the appellant's. The DJ accepted that the appellant, who was the only supervisor on the fifth floor of the building at the material time, instructed the deceased and Khan to descend onto the table form. The DJ found that the appellant ignored Khan's request for a lifeline.

21 The DJ was of the view that the appellant was negligent as it was clear that a reasonable man in those circumstances would be aware of the likelihood of death or injury to others when instructing workers to descend onto the top of the table form when it was protruding halfway out of the building. The DJ held that the risk of death or serious injury from falling from height in that situation was patently obvious. The appellant had also admitted that climbing onto the top of the table form to secure the lifting cables was unsafe. A reasonable man

in those circumstances would know that it was dangerous to instruct the workers to descend without ensuring that they had their safety harnesses secured.

22 The DJ also found that there was no reasonable cause for the appellant's actions. The appellant had pleaded reasonable cause on the basis that he was merely following the existing lifting methodology when lifting the table forms. As the methodology was approved by his superiors, who had higher levels of safety training and technical expertise than the appellant, he had no reason to believe that it was unsafe. He was also not in the position to criticise or to make changes even if the methodology was unsafe. Further, the appellant argued, he was bogged down by many responsibilities and could not be everywhere at the same time. Following *Nurun Novi*, the DJ held that the WSHA and the Parliamentary debates suggested that Parliament did not intend for orders from superiors to amount to reasonable cause. The DJ referred to s 10(b) and (c) of the WSHA which declare respectively that "this Act may at any one time impose the same duty or liability on 2 or more persons, whether in the same capacity or in different capacities" and "a duty or liability imposed by this Act on any person is not diminished or affected by the fact that it is imposed on one or more other persons, whether in the same capacity or in different capacities".

23 At the sentencing stage, the DJ held that he was bound by the High Court decision in *Nurun Novi* and its sentencing framework. He therefore declined to apply the Prosecution's suggestion of an alternative sentencing framework based on another High Court decision in *Public Prosecutor v GS Engineering & Construction Corp* [2016] SGHC 276 ("*GS Engineering*"). Applying the *Nurun Novi* sentencing framework, the DJ held that this case fell within the sentencing range of 11.5 weeks' to 20.8 weeks' imprisonment. He took the view that the facts placed the starting point at 16 weeks' imprisonment and on account

of the aggravating factors, he sentenced the appellant to 24 weeks' imprisonment.

Appeal against conviction

24 We begin by reiterating the high threshold required for appellate intervention. The appellate court is not to reassess the evidence in the same way that the trial judge assessed it but is restricted to considering: (a) whether the trial judge's assessment of witness credibility is plainly wrong or against the weight of evidence; (b) whether the trial judge's verdict is wrong in law and therefore unreasonable; and (c) whether the trial judge's decision is inconsistent with the material objective evidence on record, bearing in mind that an appellate court is in as good a position to assess the internal and external consistency of the witnesses' evidence and to draw the necessary inferences of fact from the circumstances of the case: *Pram Nair v Public Prosecutor* [2017] 2 SLR 1015 at [55].

Whether the appellant committed the acts alleged

25 The DJ accepted Khan's evidence that the appellant had instructed the deceased and Khan to descend onto the table form without ensuring that their safety harnesses were first anchored to a lifeline or something secure. The DJ was of the view that Khan's evidence exhibited internal and external consistency.[13]

26 The appellant's case on appeal reiterates his account of events at the trial – that he was not at the scene when the accident happened,[14] which meant that

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13 GD at [25].

14 Accused's skeletal submissions at paras 39–53.

he did not instruct the deceased's descent onto the table form and could not be expected to ensure that the deceased was safely anchored.[15] The appellant presented three main arguments in his attempt to undermine Khan's account of the accident.

27 First, the appellant contends that despite Khan's own admission that he did not see the appellant when he was descending as he was looking away at the time because he was holding the ladder, the DJ made the finding that the appellant was present.[16] However, we think that Khan was clear in his evidence-in-chief that the appellant was about one and a half arm's length away from him when he (the appellant) gave the instruction to descend onto the table form.[17] Khan also stated, during cross-examination, that "[w]e were all standing there" when the appellant gave the instruction to descend and when Khan asked for a lifeline.[18] Khan did turn his back on the appellant shortly after, when the deceased began descending onto the table form by using a ladder and Khan had to hold onto the ladder for him.[19] Khan was neither unsure nor inconsistent in his evidence about the appellant being nearby and that the appellant gave the instruction to descend.

28 Second, the appellant argues that the DJ was wrong in finding that Khan was consistent in asking for a lifeline because Khan had used a lifeline earlier in the morning when he descended onto the top of the table form twice. The

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15 Accused's skeletal submissions at para 56.

16 Accused's skeletal submissions at para 42.

17 NE, 2 May 2018 at 31:29–32:18 (ROP 65).

18 NE, 2 May 2018 at 61:14–23 (ROP 94).

19 NE, 2 May 2018, 61:11-23.

appellant points out that the record of the proceedings showed that Khan actually testified that there was no lifeline on the day of the accident.[20]

29 In Khan's examination-in-chief, the following was said:[21]

> Q How often Mao give you such an instruction which is to step onto the table top?
>
> A A total 3 times. I have---I went down.
>
> Q And among these 3 times, how often have you secured yourself to the GI pipe?
>
> A Only on that---only on the day of the accident because there was no lifeline.
>
> …
>
> Q Mr. Khan, how many times have you performed these works, when I say "these works" I'm referring to the passing of the chain sling through the openings?
>
> A 2 times before the accident.
>
> Q And during these 2 times, how did you perform this work?
>
> A I have secured my lifeline to the column and then---and then secured my harness to the lifeline. …

In Khan's cross-examination, he stated as follows:[22]

> Q … Why did you ask for a lifeline?
>
> A Because the day before, I have worked with the lifeline.
>
> Q You told us earlier that you---the barricade is safe, correct, because it is bolted to the floor?
>
> A Yes.
>
> Q So you didn't need a lifeline, did you?

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20 Accused's skeletal submissions at para 46.

21 NE, 2 May 2018, 40:14–20; 41:17–24.

22 NE, 2 May 2018, 62: 17–63:32(ROP p 95).

> A The day before the accident, I have worked with 'Sohil' and Mao gave lifeline, but on the day of the accident, there was no lifeline, that's why I asked for the lifeline.

30 The DJ understood Khan as having testified that before the accident, he had made two similar descents earlier that morning and on both those occasions, it was the appellant who instructed Khan and his fellow workers to do so. The DJ also held that on both of those occasions, Khan had secured his safety harness to a lifeline which was secured around a concrete column on the fifth floor (GD at [23]). The DJ went on to state that he was satisfied that Khan was telling the truth because his testimony exhibited internal and external consistencies as he had candidly testified that earlier that morning, he had descended onto the top of the table form twice and on both those occasions, had used a lifeline. The DJ was of the view that Khan's act of insisting on securing himself before descending was consistent with his concern that it was unsafe to descend onto the top of the table form. Therefore, the DJ reasoned, if there was a lifeline available, Khan would have used it as he had done twice earlier that morning and would not have needed to ask the appellant for one. The DJ went on to state that Khan asked for a lifeline because there was none at that point in time and surmised that it was possible that the lifeline had been removed during the pause in the lifting work. He was also of the view that the fact that Khan had secured his safety harness to the guard rail underscored the point that there was no lifeline and that this was wholly consistent behaviour given Khan's concern for his safety (GD at [25]).

31 In so far as the criticism is against the DJ's conclusion that Khan had made two descents earlier in the morning of the accident on 20 January 2014, we think the criticism is justified. This is because Khan's evidence shows that he was actually referring to two descents made the day before the accident. The DJ may have been mistaken on Khan's evidence about when the two earlier

incidents took place but what is clear is that Khan had descended onto the top of a table form on two recent previous occasions and on those occasions, he was provided with a lifeline and he did use it to secure himself before making the descent. On the day of the accident, Khan was therefore concerned about his safety and asked the appellant for a lifeline but was ignored or rebuffed by him. Khan had also explained that he was afraid of asking the appellant a second time because he was known to become angry when people did that. Had Khan been provided with a lifeline on the day of the accident, he would certainly have used it as he did twice before, consistent with his concern for his safety. Khan was therefore consistent in his evidence before the court.

32 The appellant further argues that his statement of 17 April 2014, Exhibit P11 (which was taken by an officer from the Ministry of Manpower in the course of the investigations into the accident here), in fact corroborates his account that he was away from the scene of the accident at the material time as he had gone to get an electrical wire cable which was needed to operate the chain block during the lifting operation.[23] At question 10 of P11, which asked "What happened on the day of accident?", the appellant stated as follows:

> … We lifted about 2-3 pieces of tableform and was informed that the tower crane had to lift rebars at other location. I called Wang via my mobile to inform him about it and told him to do some housekeeping at level 4. We were also doing some housekeeping work at level 5. At about 2pm, the signalman from my company stationed at level 5 informed me that the tower crane is ready for us to use. I informed Deceased, the signalman and another bangla[d]eshi worker to go over to prepare for the lifting of the tableform. I then went to fetch an electrical wire cable for the chain block with another bangla[d]eshi worker. When I return to the area, I saw the tableform had titled (*sic*) and the Deceased at level 3 ramp. I then ran down to attend to the Deceased. The Deceased was then conveyed to the hospital.

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23 Accused's skeletal submissions at para 48, ROP 760.

33 In contrast to the above statement where the appellant admitted that he was informed that the tower crane was ready for use, the appellant maintained in his evidence in the District Court that he was unaware that the tower crane was again available for the lifting operation to re-commence:[24]

> Q Mr. Mao, when the crane came, did anyone tell you that the crane had come back?
>
> A I didn't know.
>
> Q You normally rely on somebody to tell you that the crane is coming back?
>
> Court: Sorry. Hold on. Did---hold on---hold on. The question was, did anyone tell you, right, did anyone tell you that the crane had come back? Your answer was, "I did not know". What---what do you mean? Because did anyone tell you or not?
>
> Witness: Nobody---nobody told me.

34 The appellant's statement in Exhibit P11 is also inconsistent with his testimony in court where he denied knowing why Khan and the deceased descended onto the table form:[25]

> Q Mr. Mao, can you tell this Court then why did the deceased and Khan descend on to the table top if the crane was not ready?
>
> A I found out only subsequently the situation. Maybe, the signal [inaudible] had told the deceased. He must---he must have said that it was going to be ready soon. He must have told the deceased. Because before the crane could turn over, the tableform had already tilted. The signalman left about 4 or 5 days later, maybe he was scared or something. I do not know what the signalman had told the deceased Bangladeshi. …

35 When confronted with these material inconsistencies in court, the appellant claimed initially that he was "unable to remember 100%" due to the

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24 NE, 8 November 2018, 35:1 – 10 (ROP 342).

25 NE, 12 November 2018, 4:20–29.

lapse of time.[26] The DJ noted that his attempt at explaining the incongruity between P11 and his testimony in court was weak.[27] The DJ also noted from P11 that despite knowing that the lifting work was recommencing, the appellant went to collect some electrical cable instead of staying at the scene to supervise the lifting. The appellant also did not mention any electrical cable in his evidence in court. In any case, the appellant eventually accepted that the contents of his statement in Exhibit P11 were accurate and that his evidence about the signalman not informing him that the crane was ready for use was incorrect.[28] The appellant also stated earlier in court that when he instructed his workers to lift the table forms, he knew that they were going to step onto the top of the table form and that "they already know the procedure".[29]

36 In response to question 13 of P11 which asked whether he instructed the workers to go on top of the table form on the day of the accident, the appellant replied that "I did not instruct the worker to go onto the top of the table form. They had gone onto the top of the table form by climbing over the barricade by themselves". When asked at question 14 of P11 why the workers would do that if the appellant did not instruct them to do so, he replied that "[t]his is the usual practice and they will have to go down to the table form to put the web sling through the holes on the table form". The appellant went on to explain in response to question 16 of P11, which asked what the method for lifting table forms was prior to the accident, that there was only one method of lifting that they had been using prior to 20 January 2014 and it included workers climbing

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26 NE, 12 November 2018, 82:7-24.

27 GD at [27].

28 NE, 12 November 2018, 82:16–21.

29 NE, 12 November 2018, 65:15 - 66:1 (ROP 507 and 508).

onto the protruding table form. He then said at question 17 of P11 that he did not know who had suggested the method and that he had been using the same method since he joined the worksite. In our opinion, these answers suggested that it was a standing instruction anyway for the workers to descend onto the top of the table form and the appellant was aware of it and had in fact been following that method. He therefore knew that the deceased and Khan would do the same once he "informed Deceased, the signalman and another Bangladeshi worker to go over to prepare for the lifting of the table form", as he said at question 10 above.

37 Looking at the evidence in totality, we saw no reason to disagree with the DJ's finding of fact that the appellant was present at the material time just before the accident and had instructed the deceased and Khan to descend onto the top of the table form.

Whether the appellant was negligent

38 We also agree that the appellant was negligent in giving the instructions to descend without ensuring that the workers had anchored their safety harness. He admitted at the trial that it was "definitely" dangerous to instruct the deceased and Khan to descend onto the top of the table form.[30] He argued on appeal that he was not negligent because the accident was caused by the interruption in continuity of work when the lifting crane was called away and if there had not been any interruption, there would be workers on the fourth floor securing the table form.[31] It may be true that if the interruption in the lifting work had not occurred, there would be workers on the fourth floor securing the table

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30 NE, at 83:27-30 (ROP 525)

31 Accused's skeletal submissions at paras 36 – 37.

form, so that despite the appellant's negligence, the accident could be averted. However, this does not detract in any way from the appellant's negligence in ordering the descent without ensuring that their safety harnesses were anchored. In any event, the onus was on the appellant, as the formwork supervisor, to ensure that the table form was secured properly on the fourth floor before he gave the instructions for the workers on the fifth floor to descend onto the table form.

Whether there was any reasonable cause

39 The appellant submitted that he had reasonable cause to act as he did and was therefore not guilty of the charge. He claimed that he was merely following the established "system of work" or "practice" of the company in doing so. It was submitted that it was an agreed fact that the *de facto* safety team at least acquiesced to, if not approved of, the practice of stepping out onto the table form for threading of the belts.[32]

40 As noted in *Nurun Novi* at [56]–[67], while the WSHA does not define what amounts to "reasonable cause" under s 15(3) and (3A), it can be inferred from the provisions of the WSHA and the relevant Parliamentary debates that Parliament did not intend for a superior's orders to amount to such reasonable cause. The scope of liability was intended to be a broad one, imposing a duty on multiple "persons at work" involved in a workplace to ensure the safety or health of themselves or others. Even if there was the alleged practice of the company in this case, it would be inconsistent with parliamentary intention to find that a supervisor like the appellant could be exonerated from liability under s 15(3A) of the WSHA merely because he was following a practice of the

[32] Accused's POA at para 17 (ROP 22).

company which he knew to be dangerous. In any case, on the facts here, there can be no dispute that asking someone to descend onto the top of a movable platform which had no safety barricades and at that height without securing him to a lifeline was inherently dangerous and that the consequences of an accidental fall would in all likelihood be loss of life or severe injuries. Nevertheless, the appellant instructed the deceased and Khan to do precisely this inherently dangerous act while ignoring Khan's request for a lifeline.

Delay in prosecution

41 The final issue on liability raised by the appellant was that the delay in prosecuting this case had affected his ability to get witnesses to corroborate his defence. The appellant argued that if this case had proceeded in a more timely manner, he would have been able to call other workers who were in the vicinity at the material time (such as Lyton and Al-Amin, see [15] above) to give evidence in support of his account that he was not present and did not give the instruction to descend onto the table form. Due to the delay, he had lost contact with those persons by the time he received the notice of prosecution more than three years later. Lyton had apparently left Singapore. The delay also caused him difficulties in recalling what he had said in his statement (*ie*, P11). Further, the appellant pointed out that he had raised in mitigation at the trial that photographs on the day of the accident were taken by many people. However, due to the lapse of time before he knew about his charge, all these were lost.

42 In the present case, the accident happened on 20 January 2014 but the appellant was charged only on 6 September 2017. At the hearing of this appeal, the Prosecution was unable to offer any explanation for the delay.

43 The record of proceedings does not indicate whether Lyton and Al-Amin gave statements during the investigations into the accident. On the issue of non-availability of witnesses, the appellant did not explain why Lyton or Al-Amin would have corroborated his defence instead of Khan's evidence. On impairment of memory, it was clear that the DJ did not convict the appellant merely because of contradictions between his evidence in court and in his statements in P11. The photographs taken by others after the accident had occurred could not possibly support his evidence that he was not at the scene just before the accident and during those moments when the accident happened. There is accordingly no reason for the delay in prosecution to have any impact on the decision on conviction and we are satisfied that the appellant did not suffer prejudice at the trial. We dismiss the appeal against conviction accordingly.

44 All prosecuting agencies should note of course that delay in investigations and in prosecution must be avoided and potential accused persons should be notified as soon as is practicable of charges against them. Delay in prosecution may also be taken into account by the court at the sentencing stage in appropriate cases.

Appeal against sentence

45 We have set out s 15(3A) of the WSHA at [2] above. We now reproduce s 15(3) of the WSHA which is relevant in our consideration of the proper sentencing framework because of *Nurun Novi*. Section 15(3) was enacted together with the rest of the WSHA in March 2006 and it criminalises wilful and reckless acts which endanger safety or health:

> (3) Any person at work who, without reasonable cause, wilfully or recklessly does any act which endangers the safety or health of himself or others shall be guilty of an offence.

Offences under s 15(3) are punished under the general punishment provision in s 50 of the WSHA:

> **General penalties**
>
> **50.** Any person guilty of an offence under this Act (but not including the regulations) for which no penalty is expressly provided by this Act shall be liable on conviction −
>
> (a) in the case of a natural person, to a fine not exceeding $200,000 or to imprisonment for a term not exceeding 2 years or to both; and
>
> (b) in the case of a body corporate, to a fine not exceeding $500,000, …

46 Originally, s 15 of the WSHA did not contain a provision covering negligent acts which endanger safety or health. This changed in 2011 with the passing of the Workplace Safety and Health (Amendment) Act which introduced s 15(3A). Section 15(3A) is both an offence-creating and punishment provision in that negligent acts which endanger safety or health are punishable with a fine not exceeding $30,000 or with imprisonment not exceeding two years or both.

47 The legislative intent of the WSHA, as recognised in both *Nurun Novi* at [73(a)] and *GS Engineering* at [51], was to improve workplace safety by effecting a "cultural change" for employers and other stakeholders to take proactive measures to prevent accidents. This is to be achieved in part through ensuring that the penalties for non-compliance are sufficiently high to deter risk-taking behaviour. The implication is that Parliament's intention was for the courts to impose higher penalties where appropriate to achieve the necessary deterrent effect. The penalty regime under the WSHA applies beyond situations where actual harm resulted. It provides for meaningful penalties where there are severe lapses, even if no accidents happened: *Nurun Novi* at [73(b)]. It was expressly recognised in Parliament that the penalty to be applied in any given

case will take into account the culpability of the offender, the potential harm that could have been caused and the harm actually done: *Nurun Novi* at [73(c)].

The Nurun Novi sentencing framework

48 The Prosecution, the appellant and the *amicus* have similar reservations about the sentencing framework set out in *Nurun Novi* at [92] for s 15(3A) WSHA offences. We are in general agreement with them.

49 In *Nurun Novi* (at [91]), a case involving an offence under s 15(3A), the High Court Judge noted that both ss 15(3) and 15(3A) provide for the same maximum imprisonment term of 2 years for the exact same act of endangerment of the safety or health of others. However, he noted that s 15(3) criminalises the far more culpable *mens rea* of wilful or reckless behaviour. He then considered the issue of how to ensure proportionality in sentencing between offenders who commit the same acts but with very different *mens rea*. After careful consideration, the Judge crafted a table of sentencing ranges for s 15(3A) cases (at [92]) and a preliminary table each for reckless endangerment and for wilful endangerment for s 15(3) cases (in Annexes A-1 and A-2 of *Nurun Novi*).

50 The Judge in *Nurun Novi* stated (at [96]) that the sentencing ranges in brackets in the tables were listed in terms of weeks of imprisonment. He then explained that the sentences of fine and of imprisonment were "interchangeable with a notional conversion rate of one week's imprisonment being convertible to a fine of $5,000". He derived this notional conversion rate in the following manner. Under s 319(*d*)(i) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed), the maximum term of imprisonment in default of a fine cannot exceed one half of the maximum term of imprisonment for the offence. Therefore, if the maximum fine of $200,000 were imposed for a s 15(3) offence, the maximum

term of default imprisonment would be one year (since the maximum imprisonment term in s 15(3) is two years). One year is approximately 52 weeks. Every failure to pay $5,000 in a maximum fine situation would result in a maximum of 1.3 weeks' imprisonment in default. The Judge chose a notional conversion rate which is slightly lower than this to reflect the fact that in default imprisonment terms are distinct from imprisonment terms. He also explained (at [96(d)]) that:

> I have decided to use the figure for s 15(3) instead of s 15(3A) to ensure consistency between the two offences which have the same maximum imprisonment term and criminalise the same act, albeit with different mental elements. Additionally, I regard the equivalent figure derived from the maximum fine of s 15(3A) as too low to form a useful notional conversion rate.

51 At [97], the Judge in *Nurun Novi* said that the custodial threshold would generally be crossed for offences under s 15(3A) when the appropriate sentence crosses the threshold of a maximum fine of $30,000, which is notionally convertible to six weeks' imprisonment. He derived this point for s 15(3A) based on the maximum fine for that section. The same custodial threshold is applied under s 15(3) as well. This was to ensure consistency between the two offences and to avoid an unjust situation where the same level of potential harm and culpability with a more culpable *mens rea* for the same unsafe act would be given a more lenient custodial threshold. At [98], the Judge opined that greater weight had to be given for potential for harm as opposed to culpability.

52 For the different *mens rea*, the Judge applied "notional upper limits" in the ratio of 10:5:2 for wilful (or intentional) acts, reckless acts and negligent acts respectively, a concept which he had used in *Abdul Ghani bin Tahir v Public Prosecutor* [2017] 4 SLR 1153 ("*Abdul Ghani*") (discussed at [56] to [58] below). Following from this, the "notional upper limit for the starting

point" for the different *mens rea* for offences under s 15(3) and s 15(3A) of the WSHA would be (at [100]):

Offence	Notional upper limit
Wilful acts under s 15(3) WSHA	The maximum 104 weeks' or two years' imprisonment
Reckless acts under s 15(3) WSHA	52 weeks' or one year's imprisonment
Negligent acts under s 15(3A) WSHA	20.8 weeks' or about 5 months' imprisonment

53 The notional upper limit was used to calibrate the highest point of the nine-box matrix of indicative sentences in the *Nurun Novi* framework, where the vertical axis measures potential for harm and the horizontal axis measures the offender's culpability. The Judge in *Nurun Novi* (at [95]) explained that the table of sentencing ranges was only to assist in determining the starting point for the sentence based on the appropriate levels of potential for harm (and not actual harm caused) and culpability at the first stage. The final sentence would be calibrated based on adjusting the starting point reached with appropriate weight given to the various aggravating and mitigating factors at the second stage. In the table, the impact of actual harm such as death and serious injuries would not be taken into account yet. Actual harm would only be taken into account as an aggravating factor at the second stage together with mitigating factors such as an early plea of guilt. For this reason, the table was meant to reflect only a situation where the offender claimed trial.

54 The Judge in *Nurun Novi* stated (at [105]) that while sentencing is often said to be an art and not a science, sentences should be seen to increase in tandem and in a logical and coherent fashion with the severity of the criminal

conduct in question. He opined that there should be no sudden unexplainable jumps or gaps in either the sentence or the sentence range when the severity of the criminal conduct increased only slightly. He also noted that the full sentencing range provided by law should be used and that the table he proposed was merely a tool to assist the sentencing judge who is not deprived of his full discretion in deciding what the appropriate sentence ought to be.

55 We agree with the submissions of the Prosecution, the appellant and the *amicus* that the *Nurun Novi* treatment of fines and imprisonment as interchangeable and "convertible" is difficult to justify in principle. Fines and imprisonment are different qualitatively, with imprisonment regarded generally as a more severe punishment than fine. Even if they are "convertible", why should the "conversion rate" be computed using the punishments for s 15(3) and then be applied to both s 15(3) and s 15(3A) offences? The choice of the maximum fine for s 15(3) offences over that provided in s 15(3A) merely because the maximum fine of $30,000 for s 15(3A) is "too low to form a useful notional conversion rate" makes the reasoning even more difficult to follow. Whether or not $30,000 is too low for the purposes of conversion, it is the maximum fine mandated by the WSHA for s 15(3A).

56 Where the 10:5:2 ratio is concerned, that found its origin in *Abdul Ghani* which concerned offences under s 59 of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) ("CDSA") and under s 157 of the Companies Act (Cap 50, 2006 Rev Ed). The Judge in *Abdul Ghani* (at [99]) considered that s 59(1) of the CDSA contemplated three distinct *mens rea* – consent, connivance and neglect – on the part of an officer of a body corporate in relation to an offence committed by the body corporate. The Judge there contemplated the possibility of a fourth *mens rea* of recklessness being encompassed within the rubric of "neglect" (at [102]).

However, he noted (at [103]) that the same punishments provided in s 47(6) CDSA (a fine of up to $500,000 or imprisonment not exceeding ten years or both) apply to all four types of *mens rea*, even though the relevant culpability could vary greatly. Accordingly, with the aim of offering some guidance for future sentencing decisions, the Judge decided to "determine the so-called invisible or notional upper limits as an aid in determining the appropriate sentence when faced with the different degrees of culpability". The Judge expressed the view (at [104]) that where consent or connivance was involved, the maximum of ten years' imprisonment should apply. Where recklessness was involved, "the notional maximum may be treated as approximately four years' imprisonment". For "negligence *simpliciter*", he held that "the notional maximum may be treated as approximately two years' imprisonment".

57 The Judge explained (at [105] to [111]) that the most culpable *mens rea* of consent or connivance would naturally be pegged to the maximum term of imprisonment provided by law. As for recklessness and negligence *simpliciter*, he said that he determined their notional maximums based on a comparison of other criminal legislation in Singapore which expressly indicated the respective maximum imprisonment terms that may be awarded for the different *mens rea* of intention/knowledge, recklessness and negligence. Those statutes guided him in stratifying and calibrating the notional maximums since the CDSA does not stipulate the stratification. The statutes that the Judge referred to were ss 304, 304A, 323, 325, 337 and 338 of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code"), ss 64 to 66 of the Road Traffic Act (Cap 276, 2004 Rev Ed), s 57 of the Immigration Act (Cap 133, 2008 Rev Ed), s 83 of the Electricity Act (Cap 89A, 2002 Rev Ed) ("Electricity Act") and s 37A of the Civil Defence Act (Cap 42, 2001 Rev Ed) ("Civil Defence Act"). These were listed in an Annex to the judgment in that case.

58 The Judge stated at [106] of *Abdul Ghani* that his analysis of these provisions led him to conclude that there was often a 50–60% reduction in the maximum sentence when the offences involved recklessness as opposed to those committed with intention or knowledge. There was a further 50–60% reduction when the offences involved negligence as opposed to recklessness. He cautioned that his analysis did not reveal absolute consistency but only a broad consistency. He also acknowledged (*Abdul Ghani* at [111]) that there were some anomalies where the Electricity Act was concerned and in the case of the Civil Defence Act, there was "a more extreme anomaly". He opined however that the anomalies could presumably be explained on the basis that both electricity and civil defence concerned "public goods" (in their context, this means public property) such that Parliament may not have been willing to give the usual discount rate with the aim of exceptionally deterring those offences. He concluded that the anomalies did not justify departure from the general norm that he had found.

59 We question the utility and indeed the logic of comparing vastly different statutes dealing with different objectives and mischiefs to try to decipher Parliament's intention in dealing with different types of *mens rea* in offences. The rationale for the CDSA is vastly different from the objective of legislation regulating violent or negligent acts against a person or of a statute dealing with immigration issues, electrical installations or service property of the Civil Defence Force. If statutes dealing with "public goods" were exceptions to the perceived intention of Parliament, then why should the rationale for legislation concerning violent or negligent acts against persons in the Penal Code apply to the CDSA which concerns essentially financial crimes? Further, s 304 and s 325 of the Penal Code also provide for the possibility of caning as

an additional or an alternative punishment. That surely should not be overlooked in trying to understand Parliament's intention.

60 Finally, s 47(6) of the CDSA provides the same punishments for the different types of *mens rea*. However, the offences in s 15(3) and s 15(3A) of the WSHA have significantly different maximum fines for different *mens rea* even though they have the same maximum imprisonment term of two years. The punishments for the offences under the WSHA therefore cannot be calibrated in the same way as the offence in the CDSA.

61 As a result of the objections in principle set out above against the *Nurun Novi* sentencing framework, we do not endorse it. We will now consider a more appropriate sentencing framework for s 15(3A) of the WSHA offences.

The appropriate sentencing framework

62 We first reiterate the observations of the Court of Appeal in *Mohd Akebal s/o Ghulam Jilani v Public Prosecutor and another appeal* [2020] 1 SLR 266 at [20] regarding the approach that should be taken to sentencing guidelines:

> (a) First, guidelines are a means to an end and the relevant end is the derivation of sentences that are just and are broadly consistent in cases that are broadly similar.
>
> (b) Second, sentencing guidelines are not meant to yield a mathematically perfect graph that identifies a precise point for the sentencing court to arrive at in each case. Rather, they are meant to guide the court towards the appropriate sentence in each case using a methodology that is broadly consistent.
>
> (c) Third, sentencing guidelines are meant to be applied as a matter of common sense in the light of the foregoing observations.

63 In the context of this case, we think a sentencing framework broadly akin to the one considered in the High Court decision in *GS Engineering* at [70]

would be more appropriate and workable for offences under s 15(3A) of the WSHA. *GS Engineering* concerned a company charged under s 12(1), read with s 20 of the WSHA, for breaching its duty as an employer to take necessary measures to ensure the safety and health of its employees at work. The offence was punishable under s 50(*b*) of the WSHA, which provides for a maximum fine of $500,000 for a body corporate. *GS Engineering* involved the same accident that occurred in *Nurun Novi* in which two workers fell to their deaths from the seventh floor of a tower at a worksite at Fusionopolis Way.

64 In our opinion, for a first-time offender who claims trial to a charge under s 15(3A) of the WSHA, the following sentencing framework should guide the court:

(a) The first step would be to establish the level of harm and the level of culpability in order to derive the indicative starting point according to the matrix set out below.

(i) Harm includes a consideration of the degree of both potential harm and actual harm caused, *ie*, the actual harm with a causal or contributory link to the risk created by the accused person's negligent act. We accept the non-exhaustive factors affecting the degree of potential harm as enumerated in *Nurun Novi* at [86]: the seriousness of the harm risked, the likelihood of that harm arising and the number of people likely to be exposed to the risk of that harm. Where the harm was likely to be death or serious injury (such as paralysis or loss of a limb), the harm could be considered to be high even though it did not materialise. If death or serious injury did occur, the harm would be graded near the top end of the high range.

(ii) We also accept, as held in *Nurun Novi* at [87], that culpability includes a consideration of the nature of the unsafe act, the number of unsafe acts committed by the offender and the level of deviation from established procedure involved in the unsafe act. Other relevant factors would include whether the unsafe acts were motivated by the offender's desire to save on costs.

(iii) The proposed matrix is as follows:

Harm	**High**	Up to 6 months' imprisonment	More than 6 months', up to 12 months' imprisonment	More than 12 months', up to 24 months' imprisonment
	Moderate	Fine of more than $15,000, up to $30,000	Up to 6 months' imprisonment	More than 6 months', up to 12 months' imprisonment
	Low	Fine of up to $15,000	Fine of more than $15,000, up to $30,000	Up to 6 months' imprisonment
		Low	**Moderate**	**High**
		Culpability		

Accordingly, an imprisonment term will be appropriate where there is (a) high harm with low culpability; (b) moderate or high harm with moderate culpability; or (c) high culpability.

(b) The second step would be to adjust the starting point according to offender-specific aggravating and mitigating factors that have not yet been factored into the analysis.

65 The Judge in *Nurun Novi* (at [90]) held the view that potential for harm should be given greater weight as opposed to equal weight for culpability and harm. The Prosecution argues likewise in this appeal. It submits that potential for harm should be emphasised in the sentencing framework because the WSHA was enacted to deter risk-taking behaviour and goes beyond situations where actual harm took place. Accordingly, the Prosecution argues, one of the primary sentencing parameters should be potential for harm rather than actual harm and potential for harm should be given more weight as against the offender's culpability.

66 The *amicus* submits that the primary sentencing consideration should be the offender's culpability rather than the risk of harm.[33] This is because the mischief sought to be addressed by the WSHA is the culpable creation of risk of harm rather than the non-culpable existence of risk itself. Further, the *amicus* submits, s 15(3A) offences are not "outcome-based" offences.

67 In our view, both harm (which includes the risk of or potential for harm) and culpability are equally important considerations in s 15(3A) offences. The Parliamentary debates do not support choosing one factor over the other and, in fact, stressed the importance of both factors. For example, *Singapore Parliamentary Debates, Official Report* (17 January 2006), vol 80 at col 2206 (Dr Ng Eng Hen, Minister for Manpower) states as follows:

> … [T]his Bill will … institute penalties which reflect the true economic and social cost of risks and accidents. Penalties should be sufficient to deter risk-taking behaviour and ensure that companies are proactive in preventing incidents. Appropriately, companies and persons that show poor safety management should be penalised even if no accident has occurred.

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33 *Amicus*' skeletal submissions at paras 22(2), 92 – 94.

Although the above relates to the passing of the Workplace Safety and Health Act 2006 (No 7 of 2006), which did not yet include s 15(3A), the above quote speaks of the objectives of the WSHA as a whole and there is no indication that the principles are any different in relation to the current version of the WSHA.

68 We agree that sentences at or close to the prescribed maximum imprisonment term should be reserved for the types of disasters that involve significant loss of life or great loss to the economy and severe inconvenience to the public. As the Judge in *GS Engineering* opined at [55], "the maximum sentence for a case is reserved for the worst type of cases falling within the prohibition and … in the case of the present offence, this would be something close to the scale of the Nicoll Highway collapse".

Applying the sentencing framework to the facts

69 Applying the sentencing framework above, we think that there was a high degree of harm involved for the following reasons:

(a) The risk of harm was very high. Two workers were instructed to descend onto the table form from the fifth floor. From the photographs of the scene, it was apparent that each of the five floors had high ceilings. For the particular incident in the charge, the deceased and Khan were not provided with important safety equipment, *ie*, a lifeline, which meant that if they slipped off the table form at that height, death or severe injury would invariably be the result.

(b) Due to the precarious position that the deceased and Khan were in, the likelihood of harm was high. The top of the table form did not have safety barricades at its sides for the workers to hold on to. It was on rollers and protruded partially from the building structure. Even if it

was secured properly, it was a heavy object of approximately 1,170 kg and there was always the danger that it could shift.

(c) There was significant actual harm caused. The deceased fell and died from his injuries a few days later. Khan would probably have suffered the same fate if he had not taken the initiative to anchor himself to the guard rail of the building structure after his request for a lifeline was ignored.

70 The appellant's culpability was high. He put his workers' lives at risk by instructing them to perform the works in a dangerous manner. He knew that it was a dangerous act for the workers and it was therefore baffling that he could even ignore Khan's request for a lifeline before the descent. One does not need to be in the construction industry to realise that asking someone who is not anchored to a safety line to descend at that kind of height onto a protruding platform with no barricades would be asking him to undertake a highly risky task. Further, the appellant had known, since around 2006, of a safer procedure of lifting table forms which he had seen being used at another worksite.[34] The safer method did not involve workers descending onto the table form. Instead, it involved workers throwing ropes through the openings at the top of the table form. However, the appellant continued with the practice of instructing his workers to descend onto the top of table forms and had done so on several previous occasions before the accident. The negligent act was therefore not an isolated incident but a sustained practice although Khan's evidence showed that on at least two previous occasions, a lifeline was provided before the workers made their descent. We also note the appellant's evidence that it was an existing

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[34] NE, 9 November 2018, 45:6 – 31 (ROP 413); 59:1– 61:13; 64:13 – 65:26 (ROP 427-429, 432-433).

practice that he continued, not started. However, the appellant was in a position of seniority as the formwork supervisor in charge of the lifting operation and could have spoken to his management about the dangerous practice instead of simply continuing with it.

71 The appellant's case would therefore fall within the high harm and high culpability sector in the sentencing matrix set out earlier. The indicative sentence would be above 12 months' imprisonment up to the maximum of 24 months' imprisonment.

72 As for the offender-specific factors in this case, we note that the appellant showed little to no remorse during the trial. The DJ found that he was an evasive witness on numerous occasions in that he avoided answering questions directly and often gave irrelevant answers. The DJ noted that there was even a totally unmeritorious suggestion that the deceased had taken his own life (GD at [43] and [59]).

73 As mentioned earlier, there was an unexplained delay of more than three and a half years before the appellant was informed that he would be charged (see [42] above). In his type-written note in the Chinese language presented to the court at the hearing of this appeal, the appellant informed us that he had been working hard to earn a living in Singapore in order to support his parents, his wife and his children. He pleaded that the case had been "pressing on me like a stone in my heart" and that he had lost his personal freedom since 2017 because of the accident. He also claimed that his mother-in-law passed away in 2019 and his father-in-law passed away in 2020 and it has become his "lifelong regret" that he could not attend their funerals.

74 Having considered all the circumstances and bearing in mind the principles set out at [68] above, we think that the appropriate sentence for the appellant would fall at the lower end of 12 to 24 months' imprisonment. In our view, a sentence of 12 months' imprisonment is appropriate and we allow the Prosecution's appeal against sentence accordingly.

Conclusion

75 We dismiss the appellant's appeals against conviction and sentence. We allow the Prosecution's appeal against sentence and substitute the 24 weeks' imprisonment imposed by the DJ with a sentence of 12 months' imprisonment. As the appellant is presently on bail, the 12 months' imprisonment is to commence from today unless there is an application to defer the commencement of sentence.

76 We thank the *amicus* for giving of his time and effort in this case and we also thank the parties for their submissions on the proper sentencing framework for s 15(3A) of the WSHA.

Sundaresh Menon Chief Justice	Tay Yong Kwang Judge of Appeal	Vincent Hoong Judge

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Reuben Gavin Peter (Allen & Gledhill LLP) as *amicus curiae*.

Annex 1 (see [7] of judgment)

Annex 2 (see [8] of judgment)