IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2024] SGCA 45

Court of Appeal / Criminal Reference No 1 of 2023

Between

Public Prosecutor

… *Applicant*

And

Xu Yuanchen

… *Respondent*

JUDGMENT

[Criminal Procedure and Sentencing — Criminal references]
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Public Prosecutor
v
Xu Yuanchen

[2024] SGCA 45

Court of Appeal — Criminal Reference No 1 of 2023
Sundaresh Menon CJ, Tay Yong Kwang JCA and Andrew Phang Boon Leong SJ
27 June 2024

29 October 2024 Judgment reserved.

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

1 CA/CRF 1/2023 ("CRF 1") is the Public Prosecutor's application pursuant to s 397(2) of the Criminal Procedure Code 2010 (2020 Rev Ed) (the "CPC") to refer the following question of law of public interest (the "Question") to the Court of Appeal:

> Where an offender convicted of an offence is sentenced to imprisonment, and elects to serve such imprisonment term and not apply for a stay of execution of the sentence pending appeal, and the sentence is subsequently varied on appeal to a fine, can the imprisonment term imposed in default of the payment of the fine be satisfied by the imprisonment term that was earlier served?

2 The Question arose from the decision of the High Court in *Xu Yuanchen v Public Prosecutor and another appeal* [2023] 5 SLR 1210 ("Judgment 1") and its subsequent follow-up decision in *Xu Yuanchen v Public Prosecutor* [2023] SGHC 217 ("Judgment 2"). We elaborate below on these two judgments.

3 CRF 1 was heard in open court. The respondent was given prior permission to be absent from the hearing as he was residing outside Singapore. The respondent was also given the option of attending the proceedings remotely by Zoom if he wished but he chose not to do so. We reserved judgment at the conclusion of the hearing and now answer the Question in the negative for the reasons discussed below.

The factual background

The offence and charge

4 The respondent and one Daniel De Costa Augustin (the "co-accused") were charged and tried jointly on one court of criminal defamation under ss 499 and 500 of the Penal Code (Cap 224, 2008 Rev Ed) (the "Penal Code")

5 The respondent is the director of The Online Citizen Pte Ltd ("TOC"), a company which runs the socio-political website "www.theonlinecitizen.com" (the "TOC website") (Judgment 1 at [3]). On 4 September 2018, he approved the publication of an article (the "Article"), which was in the form of a letter purportedly authored by one "Willy Sum" titled "The Take Away From Seah Kian Ping's Facebook Post" but which was actually written and sent by email to TOC by the co-accused. The relevant portion of the Article read (Judgment 1 at [6]):

> …
>
> The present PAP leadership severely lacks innovation, vision and the drive to take us into the next lap. We have seen multiple policy and foreign screw-ups, tampering of the Constitution, corruption at the highest echelons and apparent lack of respect from foreign powers ever since the demise of founding father Lee Kuan Yew. The dishonorable son was also publicly denounced by his whole family, with none but the PAP MPs on his side as highlighted by Mr Low Thia Khiang! The other side

> is already saying that we have no history, origins, culture and even a sound legal system to begin with.
>
> …

6 The following charge was brought against the respondent (Judgment 1 at [30]):

> You … are charged that you, on or about 4 September 2018, in Singapore, had defamed members of the Cabinet of Singapore by publishing an imputation concerning members of the Cabinet of Singapore by words intended to be read, to wit, by approving the publication on the website www.theonlinecitizen.com of a letter from 'Willy Sum' titled 'The Take Away From Seah Kian Ping's Facebook Post' which stated that there was 'corruption at the highest echelons', knowing that such imputation would harm the reputation of members of the Cabinet of Singapore, and you have thereby committed an offence punishable under s 500 of the Penal Code (Cap 224, 2008 Rev Ed).

7 A similar charge was brought against the co-accused who also faced one charge of accessing an e-mail account without authority for the purpose of sending an e-mail, an offence under s 3(1) of the Computer Misuse Act (Cap 50A, 2007 Rev Ed) (the "CMA"). As the co-accused is not a party in the present matter and the charges and proceedings against him are not relevant here, the discussion which follows will focus on only the respondent's case.

The trial

8 At first instance, the trial judge (the "DJ") interpreted the Article as alleging that members of the Cabinet had engaged in illegal, fraudulent or dishonest conduct (*Public Prosecutor v Daniel De Costa Augustin and another* [2022] SGMC 22 ("*Daniel De Costa*") at [80]–[82]). The DJ held that the other elements of criminal defamation were made out and rejected the respondent's challenge to the constitutionality of the ss 499 and 500 of the Penal Code. Accordingly, the DJ convicted the respondent on the criminal defamation

charge (*Daniel De Costa* at [92]). The DJ sentenced the respondent to three weeks imprisonment, taking the view that the defamatory allegation was "serious and grave in nature" (*Daniel De Costa* at [111], [125]).

9 The respondent's sentence was pronounced by the DJ on 21 April 2022. The respondent chose to serve his sentence immediately. As the DJ observed, this was despite the fact that the respondent filed a notice of appeal against both conviction and sentence and despite having been advised by his defence counsel that a variation of his sentence on appeal may end up prejudicing him if he started serving his sentence before the appeal was heard by the General Division of the High Court ("GDHC") (see *Daniel De Costa* at [135]). Before us, counsel for the respondent explained that the respondent took this course of action because he had relocated to Taiwan and wanted to "serve and get his sentence over with". Therefore, by the time the appeal was heard by the GDHC on 28 October 2022, the respondent had served the sentence of three weeks' imprisonment imposed by the DJ.

The appeal before the High Court

10 On appeal, while the High Court Judge (the "Judge") agreed that the Article was directed at the Cabinet, he interpreted it as alleging that its members were responsible for the emergence of serious and substantial corruption in Singapore by virtue of their incompetence, omission or failure to act, rather than that they were corrupt (Judgment 1 at [40]–[41]). Such an allegation, while still defamatory, was "less serious than the allegation that members of the Cabinet were themselves corrupt, since it [imputed] only incompetence to the members of the Cabinet instead of corruption" (Judgment 1 at [121]). As a result, while the Judge upheld the respondent's conviction, he held that the custodial threshold was not crossed for sentencing purposes. Accordingly, he set aside the

respondent's sentence of three weeks' imprisonment and substituted it with a fine of $8,000 (in default two weeks imprisonment) (Judgment 1 at [124]–[125]).

11 As mentioned above, by the time of the appeal before the Judge, the respondent had completed serving the three weeks' imprisonment imposed by the DJ. The question therefore arose as to how this matter ought to be dealt with. The Judge heard further submissions on this issue and gave his decision in Judgment 2.

12 In the Judge's view, the absence of any explicit mechanism in the CPC for the backdating of a default term in such a situation resulted in "unfairness" and a "real, substantial gap" as it would mean that any reduction of the sentence by the court would in effect make the respondent's punishment more severe. This was because the respondent would have to pay a fine or undergo two weeks' imprisonment in default of such payment although he had already served three weeks' imprisonment. The respondent would have been better off had he failed in his appeal against sentence (Judgment 2 at [3]–[4], [8]). The fact that the respondent chose to serve the sentence imposed by the DJ instead of applying for bail would, in the Judge's view, not suffice to ameliorate any injustice (Judgment 2 at [9]).

13 Therefore, the Judge treated the previously served sentence of three weeks' imprisonment "as going towards the default sentence imposed on the appellant" and held that "nothing remains to be served or paid under the sentence" that the Judge pronounced in the appeal (Judgment 2 at [10]). In so deciding, the Judge relied on s 6 of the CPC which provides as follows:

> **Where no procedure is provided**
>
> **6.** As regards matters of criminal procedure for which no special provision has been made by this Code or by any other law for the time being in force, such procedure as the justice of the case may require, and which is not inconsistent with this Code or such other law, may be adopted.

14 Following from Judgment 2, the Public Prosecutor filed CRF 1 which is the present application seeking to refer the Question (set out in [1] above) to the Court of Appeal for decision.

The Public Prosecutor's arguments

15 The Prosecution took the position that the Question ought to be answered in the negative. The Prosecution pointed out that s 319 of the CPC, the general provision in the CPC governing fines, applies "where any fine is imposed and there is no express provision in the law relating to the fine". It followed from this that the list of orders which the court may made before a fine is paid in full as set out in s 319(*b*) must be regarded as exhaustive. Since the power to backdate a sentence of imprisonment in default of paying a fine is not in the list, the court does not have the power to do so. In this connection, the Prosecution referred to ss 319(1)(*b*)(v), 319(1)(*f*), and 319(1)(*g*) in support of the proposition that a default term of imprisonment "necessarily only takes effect upon the offender's failure to pay the fine imposed".

16 The Prosecution also referred to s 318 of the CPC which provides for the power to backdate terms of imprisonment generally. It submitted that the phrase "sentence of imprisonment" in ss 318(1) and 318(3) should not be interpreted as including default terms of imprisonment and that the power to backdate therefore would not apply to default terms. This conclusion found support in the express mention of corrective training and preventive detention

in s 318 of the CPC, in contrast to the omission of any mention of default terms of imprisonment in that section.

17 The Prosecution drew support for its reading of ss 318 and 319 from what it submitted was the purpose of default terms of imprisonment, which was to prevent evasion of payment of fines. All the orders available to the court before the fine is paid in full are directed at preventing evasion of the fine. The High Court has recognised that default terms of imprisonment are not meant to punish the offender but to prevent evasion of payment of the fine. Backdating default imprisonment would therefore be inconsistent with its prospective nature.

18 The Prosecution acknowledged the potential for unfairness if the respondent, having served the three weeks' imprisonment imposed by the DJ, had to pay the fine or serve an additional two weeks' imprisonment in default of payment. However, it pointed to other ways in which time already served could have been accounted for, such as to impose an imprisonment term outright and then backdate it or to reduce the quantum of the fine. These methods would allow the court to ensure fairness to an accused person, while being legally permissible and consistent with caselaw. In the present case, the Public Prosecutor submitted that it was open to us to set aside the fine imposed by the Judge, substitute it with a nominal or short imprisonment term and backdate it to commence on 21 April 2022, which was the date the respondent began serving the three weeks' imprisonment imposed by the DJ.

19 The Prosecution submitted further that it followed from the above arguments that the three requirements for recourse to s 6 of the CPC were not satisfied in this case. As the orders which a court may make in connection with a fine set out in s 319 of the CPC were exhaustive, the CPC did in fact make

provision for this issue, notwithstanding the lack of an express provision either permitting or prohibiting backdating of a default imprisonment term. Backdating of a default sentence would be inconsistent with the CPC and Parliamentary intention regarding default imprisonment terms. Finally, in view of the other options available to the court, the justice of the case did not require the backdating of the default imprisonment term imposed by the Judge.

The respondent's arguments

20 The respondent submitted that the Question ought to be answered in the affirmative. He argued that the plain and ordinary meaning of the term "imprisonment" in ss 318(1) and (3) includes default terms of imprisonment, consistent with the qualification of the word "imprisonment" with the phrase "in default of a fine" in the various subsections of s 319 of the CPC as well as ss 303A(5)(*a*) and 320 of the CPC. It followed that where a fine was "transmuted" into an imprisonment term, that term would fall within the meaning of "imprisonment" in s 318.

21 The respondent argued that, in addition to preventing the evasion of fines, default terms of imprisonment also serve the additional purpose of punishing an offender for the original offence for which the fine was imposed. This is implied in s 319(1)(*g*) of the CPC which provides that a default term of imprisonment must end when a proportion of the fine is paid or levied such that the default term of imprisonment already suffered is at least equivalent to the part of the fine which remains unpaid. It is also implicit in s 319(1)(*d*) of the CPC which sets out the maximum default terms of imprisonment which may be imposed expressed as fractions of the maximum terms of imprisonment fixed for the original offence.

22 A default term of imprisonment punishes the offender for both the failure to pay the fine and the original offence. This may be inferred from the fact that a default term of imprisonment punishes an offender more severely compared with a fine or a sentence of imprisonment for the original offence. This is because s 319(1)(*b*)(v) mandates that a default sentence must run consecutively with any other imprisonment term.

23 The respondent emphasised that he was not contending that he was unable to pay the fine. Instead, he had been punished already for the offence after he served the original sentence of imprisonment imposed by the DJ.

24 The respondent pointed out that in *Sim Yeow Kee v Public Prosecutor and another appeal* [2016] 5 SLR 936, a three-judge High Court held that the court had the power to backdate a sentence of corrective training. This was done even though the version of s 318 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) then in force did not empower the court explicitly to backdate a sentence of corrective training. In coming to this conclusion, the court observed that there was no longer any qualitative difference between corrective training and regular imprisonment and the respondent argued that the same could also be said of regular imprisonment and default terms of imprisonment.

25 The respondent also addressed several arguments raised by the Prosecution at the appeal before the Judge. First, the respondent argued that the phrase "in default of payment of the fine, the offender must suffer imprisonment" in s 319(1)(*b*)(v) of the CPC has no bearing on when a default term of imprisonment can take effect. The fact that such a term must be consecutive with other terms of imprisonment, including other default terms, also has no bearing on whether it can be backdated. The respondent sought to distinguish the Malaysian case of *Irwan bin Abdullah & Others v Public*

Prosecutor [2002] 2 MLJ 577 ("*Irwan*") on the basis that the issue in *Irwan* was whether the Malaysian equivalent of s 319(1)(*b*)(v) of the CPC prohibited the court from directing that a default sentence take effect from the date of arrest. The issue in that case was irrelevant to the Question here because the offender in *Irwan* had merely been arrested whereas the respondent had served his original sentence of imprisonment already.

26 Section 319(1)(*f*) of the CPC which provides that the default term of imprisonment shall end when the fine is paid or levied by process of law also does not support the Prosecution's position that the sole purpose of default terms is to secure payment of fines. Otherwise, any period of service of the default term should not be capable of reducing the quantum of fine payable by the offender.

27 Finally, the respondent argued that the interpretation advanced by the Prosecution may result in offenders sentenced to fines being punished more severely than those sentenced to terms of imprisonment. The court would also be precluded from ordering that a default term commence from the date of arrest if an offender was held in remand prior to conviction and sentencing. In the present case, the respondent would be better off if he had lost his appeal against sentence. Given that imprisonment is generally regarded as a more severe punishment than a fine, these outcomes could not possibly have been intended by Parliament. The respondent therefore submitted that the Question should be answered in the affirmative and that this court order that the default imprisonment of two weeks take effect from the date that the respondent started serving the original three weeks' imprisonment on 21 April 2022.

Our decision

28 The statutory provisions relevant to the Question are ss 318 and 319 of the CPC. They provide as follows:

> **Date that sentence begins**
>
> **318**.—(1) Subject to this Code and any other written law, a sentence of imprisonment, corrective training or preventive detention takes effect beginning on the date it was passed, unless the court passing the sentence or, when there has been an appeal, the appellate court, otherwise directs.
>
> …
>
> (3) To avoid doubt, a court may under subsection (1) direct that a sentence of imprisonment, corrective training or preventive detention is to take effect on a date earlier than the date the sentence is passed.
>
> **Provisions as to sentence of fine**
>
> **319**.—(1) Where any fine is imposed and there is no express provision in the law relating to the fine, the following provisions apply:
>
> …
>
> (*b*) the court which imposed the fine may choose to do all or any of the following things at any time before the fine is paid in full:
>
> …
>
> (i) allow and extend time for its payment;
>
> (ii) direct that the fine be paid by instalments;
>
> (iii) order the attachment of any property, movable or immovable, belonging to the offender —
>
> (A) by seizure of such property which may be sold and the proceeds applied towards the payment of the fine; or

> (B) by appointing a receiver who is to be at liberty to take possession of and sell such property and apply the proceeds towards the payment of the fine;
>
> (iv) direct any person who owes money to the offender to pay the court the amount of that debt due or accruing or the amount that is sufficient to pay off the fine;
>
> (v) direct that in default of payment of the fine, the offender must suffer imprisonment for a certain term which must be consecutive with any other imprisonment to which the offender may be sentenced, including any other imprisonment term or terms imposed on the offender under this section in default of payment of fine, or to which the offender may be liable under a commutation of a sentence;
>
> (vi) direct that the person be searched, and that any money found on the person when so searched or which, in the event of his or her being committed to prison, may be found on him or her when taken to prison, is to be applied towards the payment of the fine, and the surplus (if any) being returned to him or her; provided that the money must not be so applied if the court is satisfied that the money does not belong to the person on whom it was found;

…

> (*d*) the term for which the court directs the offender to be imprisoned in default of payment of a fine is to be as follows:
>
> (i) if the offence is punishable with imprisonment for a term of 24 months or more, it must not exceed one half of the maximum term of imprisonment fixed for the offence;
>
> (ii) if the offence is punishable with imprisonment for a term of less than 24 months, it must not exceed one third of the maximum term of imprisonment fixed for the offence;
>
> (iii) if the offence is not punishable with imprisonment, it must be 6 months or less;

…

> (*e*) the imprisonment imposed in default of payment of a fine may be additional to the sentence of imprisonment for the maximum term which the court may impose under s 303 provided that the total punishment of imprisonment passed on an offender at one trial does not exceed the limits prescribed by s 306;
>
> (*f*) the imprisonment imposed in default of payment of a fine ends when that fine is paid or levied by process of law;
>
> (*g*) if, before the end of the period of imprisonment imposed in default of payment of a fine, such a proportion of the fine is paid or levied that the term of imprisonment already suffered in default of payment is at least equivalent to the part of the fine still unpaid, then the imprisonment must end;

…

29 We first make some observations on the general purposes of default terms of imprisonment. In our view, the architecture of s 319 of the CPC suggests that the imposition of a default term of imprisonment serves several purposes. The most obvious of these is to deter evasion of the fine imposed as punishment for the offence, as well as to punish such evasion if it does occur. As observed in *Chia Kah Boon v Public Prosecutor* [1999] 2 SLR(R) 1163 at [17], the purpose of a default term of imprisonment is both to deter evasion of a fine and to punish the offender for such evasion in the event he defaults in payment. Similarly, the High Court again recognised in *Yap Ah Lai v Public Prosecutor* [2014] 3 SLR 180 ("*Yap Ah Lai*") at [57(a)] that the purpose of a default term of imprisonment is both to deter evasion of a fine and to punish the offender for such evasion in the event he defaults. These two purposes find expression in ss 319(*f*) and (*g*) of the CPC, whose combined effect is to provide that once the fine, or a part thereof corresponding to the default term which the

offender has yet to serve, is paid, the default term of imprisonment must come to an end.

30 However, as we suggested at the hearing before us, a default term of imprisonment undoubtedly takes effect as a different form of punishment for the offence for which a fine was originally imposed. This is so as a matter of fact and it also seems implicit in s 319(1)(*d*) of the CPC which limits the maximum default term of imprisonment to a fraction of the maximum punishment fixed for the offence, with the fraction proportional to the severity of the offence measured by the maximum imprisonment term.

31 We acknowledge that the court in *Yap Ah Lai* observed at [22] that a default sentence of imprisonment is not meant to be a substitute punishment for the offence. There, the court was dealing with sentencing under the Customs Act (Cap 70, 2004 Rev Ed) (the "Customs Act"), which prescribes very high fines which would probably be beyond the means of many offenders to pay. The court was of the view that in such situations, the better course would be to impose a term of imprisonment instead of a fine (*Yap Ah Lai* at [17]). The question then arose as to how to calibrate a sentence of imprisonment which is imposed as a primary punishment for the offence rather than as a default penalty for non-payment of a fine. The court held that it would be incorrect in principle to calibrate the primary sentence of imprisonment with reference to the level of fines or the schedule of default imprisonment terms prescribed by the Customs Act. In imposing a fine rather than a term of imprisonment, the court would have come to the view that the custodial threshold was not crossed in the first place. It would be inappropriate therefore to then determine the default term of imprisonment with reference to the term of imprisonment that might have been imposed as a primary punishment. The court's observation that a default sentence of imprisonment was not meant to be a substitute punishment for the

primary offence was made in the context of explaining this holding (*Yap Ah Lai* at [18], [22]). This does not detract from our view that a default term of imprisonment nonetheless will also take effect as a different form of punishment for the offence for which a fine was originally imposed.

32 We now consider the specific issue of whether a default term of imprisonment can be backdated. The plain wording in ss 318 and 319 of the CPC does not answer this question explicitly. There are sections in the CPC such as ss 303A(5)(*a*) and 337(1)(*d*) which exclude default terms of imprisonment from the meaning of imprisonment in their specific contexts. This suggests that "imprisonment" ordinarily includes such default terms. However, other provisions in the CPC, such as s 249(10)(*a*) and s 319(1)(*b*)(v), include default terms of imprisonment within the meaning of imprisonment, suggesting therefore that "imprisonment" would not ordinarily include such default terms. The plain wording of these CPC provisions therefore does not point clearly to what the answer ought to be for the question whether the term "imprisonment" includes default terms of imprisonment.

33 However, to read s 318 of the CPC as permitting backdating of default terms of imprisonment would appear to be against the logic and mechanics of such default terms. Section 318(1) provides that a sentence of imprisonment "takes effect beginning on the date it was passed, unless the court passing the sentence or, when there has been an appeal, the appellate court, otherwise directs". This implies that the date of commencement of the sentence of imprisonment must be identifiable at the point at which it is passed. While this is true for regular terms of imprisonment, as well as for corrective training and preventive detention, the same cannot be said of a default term of imprisonment. A default term of imprisonment operates prospectively in that it is triggered by a future event, the default in payment of the fine imposed. In this sense, it is like

a conditional sentence where the fulfilment of the condition of payment lies in the hands of the offender. If this condition is not fulfilled within the time given for payment, the default term of imprisonment then comes into effect.

34 Further, s 318 permits terms of imprisonment imposed as the primary punishment for the offence in question to be backdated to the commencement of a period of remand, which is conceptually distinct from regular imprisonment terms. While the respondent in the present case was not held in remand prior to trial or delivery of sentence, had he been so remanded, the DJ would in all likelihood have backdated his original sentence of three weeks' imprisonment to take such a period of remand into account. If a default term of imprisonment could be backdated to the date on which an offender began serving a sentence of imprisonment which is later set aside on appeal, it would follow that there is no reason why a default term of imprisonment could not also be backdated to the date of remand as well. This is the position that the respondent argued for. However, this position would lead to situations where an accused person who pleads guilty, is fined and given a default imprisonment term, seeks to have the fine deemed paid in full or in part by virtue of the period he had already spent in remand. There would be no need or incentive to pay the fine imposed, whether in full or in part, depending on the comparative lengths of the remand and the default imprisonment term. We do not think that s 318 meant to permit such a situation.

35 For these reasons, we answer the Question posed by the Prosecution in the negative. In the situation that exists in the present case, the default imprisonment term imposed for the fine on appeal cannot be satisfied by the respondent having served the original imprisonment term that was imposed by the DJ.

36 It was argued that there would be injustice in the present situation because the respondent was worse off although he succeeded in his appeal against sentence. The respondent would have been punished by having served the three weeks' imprisonment imposed by the DJ and yet have to pay the fine substituted for the imprisonment on appeal or face another two weeks' imprisonment in default of payment of the fine. The Judge was of the view that the fact that it was the respondent's choice to serve his original sentence of three weeks' imprisonment while it was still under appeal did not undo the perceived injustice. He stated that "there could be various reasons for choosing to do so, but which should still not lead to an injustice" (Judgment 2 at [9]). As a result, the Judge ruled that the previously served imprisonment should be treated as going towards the default imprisonment term that he imposed on appeal. He held therefore that nothing remained to be served or paid under the sentence pronounced by him at the appeal (Judgment 2 at [10]).

37 We do not share the Judge's view that there was injustice in the present situation. Our courts have emphasised the importance of seeking a stay of execution of sentence pending appeal so as to ensure that the discretion of the appellate court is not curtailed or affected by the offender having served their original sentence by the time of the appeal hearing (*Public Prosecutor v Saiful Rizam bin Assim and other appeals* [2014] 2 SLR 495 ("*Saiful Rizam*") at [44]; *Public Prosecutor v Adith s/o Sarvotham* [2014] 3 SLR 649 ("*Adith s/o Sarvotham*") at [29]–[30]). Where such a stay is not obtained, the party who bears responsibility for that situation will be visited with the prejudice that results from it.

38 Where the Prosecution seeks a more onerous sentence on appeal but is either unsuccessful in obtaining a stay of execution of sentence or fails to apply for one at all, the appellate court may decline to enhance the sentence on the

basis that the offender has already served part of the sentence. This is so even if the appellate court agrees that enhancement would have been warranted (see *Saiful Rizam* at [46]; *Adith s/o Sarvotham* at [35]).

39 Conversely, where the offender elects to begin serving his sentence immediately despite an appeal by the Prosecution, then it is the offender who is made to bear the consequences arising from his choice. This was the case in *Public Prosecutor v Chong Chee Boon Kenneth and other appeals* [2021] 5 SLR 1434 ("*Kenneth Chong*") where the Prosecution appealed against the offender's acquittal on the more serious charge and applied for a stay of execution of the sentence of imprisonment imposed in respect of the lesser charge. However, the offender elected to serve the sentence of imprisonment immediately and finished serving it by the time the appeal was heard. On appeal, See Kee Oon J (as he was then) overturned the acquittal on the more serious charge and found that a sentence of 11 months of imprisonment was appropriate (*Kenneth Chong* at [117]). While acknowledging that it was generally undesirable for an offender to be made to serve two separate imprisonment terms in relation to the same offence and that there were precedents in which discounts were given for time already served in respect of sentences enhanced on appeal, See J "saw no principled basis to consider any sentencing discount on account of him having already served ten weeks' imprisonment". This was because the offender had elected to serve the original term of imprisonment despite the Prosecution's application for a stay of execution pending appeal (*Kenneth Chong* at [109]–[113]).

40 In the present case, the respondent appealed against both conviction and sentence the day after sentence was pronounced by the DJ, sought an entirely different type of sentence from that imposed and yet decided not to seek a stay of execution of the sentence of imprisonment pending appeal. On appeal,

although he failed to set aside the conviction, he succeeded in his appeal against sentence and was given the sentence which he sought. The respondent's co-accused was in fact granted bail pending appeal (*Daniel De Costa* at [136]).

41 If the respondent was unable to afford the bail offered or to fulfil the conditions imposed, he could have applied for a reduction in the bail or a variation of its terms. Alternatively, he could have asked for an early date for his appeal to be heard. However, this was not his case. On his own volition, he chose to serve his sentence immediately so as to facilitate his relocation to Taiwan. The choice was entirely his and he has to accept the consequences of his choice.

42 The Prosecution accepts that, in the circumstances of this case, there is no need for the respondent to be subject to any further penalty. The Prosecution suggests that we could impose a shorter term of imprisonment or a short detention order to reflect the Judge's findings that the gravity of the allegations made in the Article were of a lesser degree of severity and then backdate that shorter term to 21 April 2022, the date on which the respondent began serving his original term of imprisonment imposed by the DJ.

43 We do not agree with this suggestion. The Judge held that the facts of the present case as found by him did not cross the custodial threshold (Judgment 1 at [124]). This holding is not under appeal before us as the present proceedings concern only the Question of law posed by the Prosecution. In view of this holding, it would not be right for us nevertheless to impose a custodial term, even if it is shorter than three weeks and backdated in order to achieve the outcome reached by the Judge.

44 In the unique circumstances of the present case, we are of the view that the proper course for the Judge would have been to find that the custodial threshold was not crossed, that a fine would have been the appropriate sentence but decline to interfere with the sentence imposed by the DJ on the basis that the respondent had elected to serve the imprisonment term although he had appealed against conviction and sentence. There was no "real, substantial gap" in the law and therefore no need to resort to s 6 of the CPC to fill the perceived gap (see Judgment 2 at [7] and [8]).

45 Such a course of action is not new. In *Saiful Rizam*, the respondents were sentenced to terms of imprisonment and began serving them soon after (at [27]). The Prosecution appealed, seeking suitability reports for reformative training (*Saiful Rizam* at [11]). However, by the time the appeal was heard, the respondents had already served a considerable portion of their imprisonment terms. Chao Hick Tin JA was of the view that reformative training would have been appropriate but, because reformative training could not be backdated, he declined to substitute reformative training in place of the terms of imprisonment as that would have amounted to "double punishment" (*Saiful Rizam* at [43]).

46 Similarly, in *Adith s/o Sarvotham*, the offender had already served part of the probation term ordered by the time of the appeal. Sundaresh Menon CJ was of the view that reformative training would have been more appropriate but he declined to replace the probation with reformative training in the circumstances (at [26]–[27]).

47 In our view, the course of action adopted in these two cases should have been taken by the Judge in the present case in order to address the perceived injustice. The imprisonment term ordered by the DJ should not have been set aside and substituted with a fine. Instead, the Judge ought to have declined to interfere with the sentence imposed by the DJ and dismissed the appeal against sentence, in addition to his dismissal of the appeal against conviction.

Conclusion

48 We answer the Question posed by the Prosecution in the negative. Where an offender convicted of an offence is sentenced to imprisonment and elects to serve such imprisonment term and not apply for a stay of execution of the sentence pending appeal and the sentence is subsequently varied on appeal to a fine, the imprisonment term imposed in default of the payment of the fine cannot be satisfied by the imprisonment term that was earlier served. Instead, the appellate court should decline to interfere with the sentence imposed on the basis that the original sentence has already been served, even if the appellate court holds the view that a different sentence would have been appropriate.

49 Pursuant to s 397(5) of the CPC, when hearing any question of law referred to it, the Court of Appeal may make such orders as the General Division of the High Court might have made as the Court of Appeal considers just for the disposal of the case. Accordingly, for the reasons set out above, we set aside the fine of $8,000 (in default two weeks imprisonment) imposed by the Judge and order that the respondent's appeal against sentence in the GDHC be dismissed.

50 For the avoidance of doubt, the Judge's dismissal of the respondent's appeal against his conviction on the criminal defamation charge and his dismissal of the co-accused's appeal against conviction and sentence for both the criminal defamation and CMA charges are to stand.

Sundaresh Menon
Chief Justice

Tay Yong Kwang
Justice of the Court of Appeal

Andrew Phang Boon Leong
Senior Judge

Deputy Attorney-General Ang Cheng Hock SC, Norine Tan and Niranjan Ranjakunalan (Attorney-General's Chambers) for the applicant;
Choo Zheng Xi and Chua Shi Jie (RCL Chambers Law Corporation) for the respondent.