IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 129

Magistrate's Appeal No 9192 of 2016

Between

Public Prosecutor

… *Appellant*

And

Kong Hoo (Private) Limited

… *Respondent*

Magistrate's Appeal No 9193 of 2016

Between

Public Prosecutor

… *Appellant*

And

Wong Wee Keong

… *Respondent*

GROUNDS OF DECISION (SENTENCE)

[Criminal Law] — [Statutory Offences] — [Endangered Species Act]

[Criminal Procedure and Sentencing] — [Sentencing]

TABLE OF CONTENTS

Public Prosecutor
v
Kong Hoo (Pte) Ltd and another appeal

[2017] SGHC 129

High Court — Magistrates' Appeals Nos 9192 and 9193 of 2016
See Kee Oon J
9 December 2016; 1, 30 March; 28 April 2017

26 May 2017

See Kee Oon J:

Introduction

1 These are my reasons for the sentences which I imposed on the Respondents pursuant to my decision on 30 March 2017 to allow the Prosecution's appeals against their acquittals and convict them for offences under s 4(1) of the Endangered Species (Import and Export) Act (Cap 92A, 2008 Rev Ed) ("the ESA"). I do not propose to recite the material facts as they have already been set out in my two previous judgments in this matter, namely, (a) *Public Prosecutor v Kong Hoo (Pte) Ltd and another appeal* [2017] SGHC 65 ("*Conviction Judgment*"), which was my decision in respect of the Prosecution's appeals against the acquittals granted to the Respondents at the close of trial and (b) *Public Prosecutor v Wong Wee Keong and another appeal* [2016] 3 SLR 965 ("*No Case GD (HC)*"), which was my decision on the Prosecution's appeals against the District Judge's decision that the

Respondents had no case to answer. The same abbreviations used in these earlier judgments will also be used in these grounds.

Prosecution's submissions on sentence

2 I shall first summarise the Prosecution's submissions on sentence. Mr Kwek Mean Luck SC ("Mr Kwek") asked for deterrent sentences of at least 18 months' imprisonment in respect of Mr Wong and the maximum fine of $500,000 in respect of Kong Hoo. Mr Kwek began his submissions by pointing to what he termed the "sheer, unmatched scale" of the seizure – 3,235 tonnes of the Rosewood comprising 29,434 logs. This, he said, was "reported to be the "largest-ever seizure of rosewood made in the world", and it alone represented "more than half of the global seizures of rosewood in the last decade". The estimated commercial value of the Rosewood was "phenomenal" and ranged from $15-20m (based on a report prepared for the AVA by Double Helix Tracking Technologies Pte Ltd) to $135m (based on an estimate from the United Nations Office of Drugs and Crimes). While the value of the Rosewood could not be determined with precision, Mr Kwek submitted that even if the most conservative figure was used, it was clear that the present case (and the international trade in wildlife in general) was "very lucrative…spans continents and probably [involved] several middlemen."

3 Mr Kwek sought to characterise this as "an instance of transnational organised wildlife crime, not unlike transnational drug trafficking or arms trafficking" on the ground that it was an organised criminal act involving the "cross-border movement of large quantities of endangered timber, for huge amounts of profit". If allowed to continue, such trade would threaten the survival of the species which the ESA (and CITES, which the ESA had been passed to give effect to) sought to protect. Further compounding the problem

was the fact that such offences are not easy to detect as Singapore is a major trading port and it would be impossible for enforcement agencies to conduct on-site inspections of the tens of thousands of vessels which enter our ports each year. In the premises, he submitted that it was imperative that a "clear signal" be sent that those who would use Singapore as a "conduit for smuggling" would be dealt with severely.

4 Mr Kwek focused on two factors, which he submitted were particularly aggravating. First, he contended that there were "conscious and calculated efforts" to evade detection of the true nature of the cargo. He pointed to, among other things, the fact that the Rosewood had been "hidden from view" in the hold of the Vessel and to the fact that the cargo manifests (P6 and P7) merely described the cargo as "logs, sawdust, wood charcoal", without giving any indication of the Rosewood's protected status. Second, he submitted that the manner in which the Respondents had conducted their case evinced their lack of remorse. He argued that their refusal to testify despite clear indications that there was "evidence which called out for an explanation" constituted "stubborn reticence [and] signals an utter lack of remorse". He also submitted that their decision to put up an "untenable defence" to what was "ultimately, a straightforward regulatory defence" was an aggravating factor. In support of this submission, he cited the decision of the Singapore High Court in *Lee Foo Choong Kelvin v Public Prosecutor* [1999] 3 SLR(R) 292 ("*Kelvin Lee*").

5 In closing, Mr Kwek argued that because this was one of the worst imaginable cases of illegal import, the maximum fine was warranted for Kong Hoo. Turning to the sentence to be imposed on Mr Wong, Mr Kwek relied chiefly on a series of unreported cases (all of which involved scheduled species with estimated commercial values of about $100,000), sentences of between 15 and 16 months' imprisonment had been imposed. Considering the

far greater value of the Rosewood, the fact that Mr Wong had claimed trial (which meant that he was not entitled to a discount on account of a timeous plea of guilt), and his "lack of remorse", Mr Kwek submitted that a slight uplift was warranted and called for a term of 18 months' imprisonment to be imposed.

Mitigation

6 In his oral mitigation plea, Mr Muralidharan Pillai ("Mr Pillai") began by outlining Mr Wong's personal circumstances. Mr Wong was 56 years old, married with two children, and had no antecedents. He had been in the trading and manufacturing business for about 40 years, was active in community service in Whampoa, where he had been serving for the past 7 years, and was among the first Singaporean businessmen who ventured into Africa in the early 1990s.

7 Turning to the offence proper, Mr Pillai stressed that the facts were exceptional and quite different from those in the precedents cited. First, he submitted that the evidence did not support the Prosecution's contention that this was a case of transnational organised wildlife crime. He pointed to the fact that genuine shipping documents were involved (that is, the documents in D5) and submitted that the Respondents had acted throughout with a genuine belief in the legality of their actions. Furthermore, despite doubts over their legitimacy, there was also a statement from the Madagascan government affirming that the Madagascan export documents the Respondents had relied on (also in D5) were genuine (see *Conviction Judgment* at [28] and *No Case GD (HC)* at [22]), thus showing that there was nothing to suggest that the transaction was illegal – at least insofar as the movement of the Rosewood out of Madagascar was concerned. Secondly, he submitted that any lapses here

arose as a result of the Respondents' mistaken reliance on Jaguar Express, which had been engaged to deal with all necessary regulatory requirements. Thirdly, he argued that any lapses here would have been quickly remedied as Singapore Customs would have been alerted to the presence of the Rosewood eventually given that Mr Tan of Jaguar Express testified that he would have declared the nature of the cargo to Singapore Customs before the containers left Jurong FTZ for PSA Port (see the *Conviction Judgment* at [69]). Fourthly, the species in question were pre-convention stock (that is to say, the trees were felled in 2010, which was before Rosewood was listed as a protected species in the Annex to CITES in March 2013). Lastly, he noted that the Rosewood – which he said had been legitimately acquired as part of a barter trade – would have to be forfeited flowing from the conviction and that in itself would be a serious punishment.

8 Mr Pillai also argued that that the only reported precedent cited – the decision of the District Court in *Public Prosecutor v Sustrisno Alkaf* [2006] SGDC 182 ("*Sustrisno Alkaf*") – in fact supported the Respondents' case. There, the accused had produced a fake CITES export permit and clearly evinced an intention to smuggle the items into Singapore. In the present case, by contrast, there was no evidence that the Rosewood was meant for use within Singapore. Instead, the evidence suggested that the Respondents had intended for the Rosewood to leave Singapore for Hong Kong (where there was – at the material time – no prohibition against the import of Rosewood).

9 Mr Pillai also sought to refute the points raised by Mr Kwek. First, he argued that there had not been any deliberate attempt at concealment. While the cargo manifests did not identify the cargo as Rosewood, this information was clearly stated in D5. Also, he argued that the fact that the Rosewood was stored in the hold was neither here nor there because it was open bulk cargo

and that was where it had to be placed. Indeed, he argued that the evidence supported the opposite conclusion: namely, the Rosewood had been openly transported at all times and the Respondents had not acted surreptitiously. The fact that the Rosewood had been offloaded openly while it was being containerized, he submitted, lent credence to his claim that Mr Wong had always thought he was engaged in a "*bona fide* transaction". Secondly, Mr Pillai vigorously disputed the submission that the respondents lacked remorse because they had put up an untenable defence. Mr Pillai argued that there were genuine issues of law in this case (chiefly, the nature of the "sole purpose" and "control" conditions) and that there was therefore nothing defiant about the Respondents' decision to claim trial to ventilate these issues, which – he stressed – was a decision they took after receiving legal advice. It was, he argued, an "overstatement" to say that claiming trial and electing to remain silent were aggravating factors.

10 For the foregoing reasons, Mr Pillai argued that a non-custodial sentence for Mr Wong would suffice. As for Kong Hoo, he submitted that the maximum permissible fine in this case was only $50,000 and not $500,000, as the Prosecution had submitted, since there was only one "species" involved. I will come to the details of this submission shortly but it suffices to say for now that he did not appear to dispute that the imposition of the maximum fine (on the assumption that it was $50,000) would be appropriate.

"Per species" or "per specimen" – interpretation of s 4(1) of the ESA

11 Before I turn to the sentencing considerations, I will first address the principal legal issue which divided the parties, namely, whether the maximum fine which could be imposed here was $50,000 or $500,000. This dispute turned on the construction of s 4(1) of the ESA, which reads as follows:

> **Restriction on import, export, etc., of scheduled species**
>
> 4.—(1) Any person who imports, exports, re-exports or introduces from the sea **any scheduled species** without a permit shall be guilty of an offence and *shall be liable on conviction to a fine not exceeding $50,000* ***for each such scheduled species*** *(but not to exceed in the aggregate $500,000)* or to imprisonment for a term not exceeding 2 years or to both.
>
> [emphasis added in italics and bold italics]

12 The critical phrase is that which has been rendered in bold italics – "for each such scheduled species". In this case, the Respondents have been convicted of importing 29,434 Rosewood logs without a permit. The question before me was whether *each log* was to be considered a distinct "scheduled species", as contended by the Prosecution, or whether the 29,434 logs are collectively to be considered *a single scheduled species*, as the Respondents argued.

(a) The first approach construes the expression "scheduled species" as a reference to a *single specimen* (that is to say, any individual animal or plant or recognisable part or derivative thereof) of a species listed in the Schedule to the ESA. On this reading, the Respondents would be liable to be fined up to $50,000 *per log* and a maximum of $500,000 for the whole lot. The Prosecution referred to this as the "per plant/animal" interpretation but I shall refer to this as the "per specimen" reading.

(b) The second approach construes the expression "scheduled species" as a reference to a *type or group of organisms*. On this reading, the Respondents would only be liable to a maximum fine of $50,000 because all of the logs belonged to *the same species* specified

in the Schedule to the ESA. I will refer to this as the "per species" reading.

13 The "per species" reading is perhaps the more natural of the two as it tracks the grammatical meaning of the expression "species". The word "species" is defined as a "group or class of animals or plants … having common and permanent characteristics which clearly distinguish it from other groups" (see *The Oxford English Dictionary* vol 16 (Clarendon Press, 2nd Ed, 1989) ("*OED*") at p 156). This is also the scientific meaning of the word, where a "species" is a taxonomic rank in the prevailing system of biological classification currently used (ranking after domains, kingdoms, phyla, classes, orders, families, and genera): see *The New Shorter Oxford English Dictionary* Vol 2 (Clarendon Press, 1993) at p 2972. Where there is a need to refer to a single organism, the expression "specimen", which is defined as "[a]n animal, plant, or mineral, a part or portion of some substance or organism, etc. serving as an example of the thing in question for the purposes of investigation or scientific study" is usually used instead (see *OED* at p 160).

14 However, statutory interpretation is not a matter of dictionaries or encyclopaedias. The task of the Court is to identify the *legal meaning* of an enactment, having due regard to, among other things, the rules, principles, presumptions, and canons that inform this legal exercise (see Oliver Jones, *Bennion on Statutory Interpretation* (LexisNexis, 6th Ed, 2012) at p 4). Chief among these is the requirement, contained in s 9A of the Interpretation Act (Cap 1, 2002 Rev Ed) ("IA"), that the court must prefer an interpretation that advances the objects or purposes of the statute in question over one which does not. In *Attorney-General v Ting Choon Meng and another appeal)* [2017] 1 SLR 373 ("*Ting*") Sundaresh Menon CJ held that this required the court to proceed in three broad steps (I note that even though Menon CJ dissented on

the ultimate result, the majority did not disagree on his analysis of s 9A of the IA):

> (a) Ascertain the possible interpretations of the *text* as it has been enacted having regard to the context within which it is situated in the written law as a whole *without* reliance on extraneous materials – *ie*, the ordinary meaning(s) of the text in context (at [59(a)] and [66]).
>
> (b) Ascertain the legislative purpose or object of the statute by reference to the language of the enactment and, where permitted by s 9A(2) of the IA, by reference to extraneous material (at [59(b)]).
>
> (c) Compare the range of possible interpretations of the text against the purposes or objects of the statute, referring to extraneous materials only to (i) confirm that the ordinary meaning of the text in context is the correct and intended meaning; (ii) to ascertain the meaning of the text when it is, on its face, ambiguous or obscure; or (iii) to ascertain the meaning of the text where the ordinary meaning of the text in context is – having regard to the purpose or object of the statute – one that is absurd or unreasonable (at [59(c)] and [65]).

The ordinary meaning of the text in context

15 I begin with the task of ascertaining the ordinary meaning of the text in context. Section 2(1) of the ESA defines the expressions "animal", "plant", "readily recognisable part or derivative of a plant", "readily recognisable part of derivative of an animal", and "scheduled species" as follows:

> "**animal**" means any member of the Animal Kingdom, and includes —
>
> (a) any mammal (other than man), bird, reptile, amphibian, fish, mollusc, arthropod, or other

> vertebrate or invertebrate, whether alive or dead, and the egg, young or immature form thereof; and
>
> (b) any readily recognisable part or derivative of an animal;
>
> "**plant**" means any member of the Plant Kingdom, whether live or dead, and any readily recognisable part or derivative of a plant;
>
> "**readily recognisable part or derivative of a plant**" means any substantially complete or part or derivative of a plant, in natural form, preserved, dried or otherwise treated or prepared which may or may not be contained in preparations, and includes —
>
> (a) seed, stem, leaf, bark, root, log, flower, fruit or pod; and
>
> (b) any thing which is claimed by any person, or which appears from an accompanying document, the packaging, a label or mark or from any other circumstances, to contain a part or derivative of a plant;
>
> "**readily recognisable part or derivative of an animal**" means any substantially complete or part or derivative of an animal, in natural form, stuffed, chilled, preserved, dried or otherwise treated or prepared which may or may not be contained in preparations, and includes —
>
> (a) meat, bones, hide, skin, leather, tusk, horn, antler, gland, feathers, hair, teeth, claws, shell, scales and eggs; and
>
> (b) any thing which is claimed by any person, or which appears from an accompanying document, the packaging, a label or mark or from any other circumstances, to contain a part or derivative of an animal;
>
> "**scheduled species** means any animal or plant (including any readily recognisable part or derivative thereof) specified in the Schedule.
>
> [emphasis added]

16 Under the ESA, a "scheduled species" is "any animal or plant" which, in turn, is defined as "any member" of the animal or plant kingdoms respectively (including "any recognisable part or derivative thereof"). It is

clear, therefore, that the expression "scheduled species" is used generally to refer to a single *specimen* of a species that is specified in the Schedule to the ESA. This general meaning is that which prevails throughout the ESA. To give one example: s 11(4) of the ESA states that "any animal or plant is liable to seizure if an authorised officer has reason to suspect that it is *a* scheduled species" [emphasis added]. This provision would only make grammatical sense if the expression "scheduled species" is understood to refer to *individual specimens* of a species that is specified in the Schedule to the ESA. Otherwise, it would have read, "any animal or plant is liable to seizure if an authorised officer has reason to suspect that it is a [*member/specimen of*] a scheduled species" instead. While an expression may bear different meanings at different parts of a statute (see *Ting* at [75], citing the decision of the House of Lords in *Madras Electric Supply Corporation Ld v Boarland (Inspector of Taxes)* [1955] AC 667), there is a presumption that expressions are used in the same sense throughout and there is nothing in s 4(1) of the ESA to displace this presumption.

17 On this basis alone, I would have found in favour of the Prosecution that the "per specimen" interpretation is the correct one. This is because when the text of the provision is viewed in context, the "per species" interpretation, while grammatically more natural, runs against the specific definitions ascribed to the expression "scheduled species" in the ESA and is therefore legally untenable.

The purposes or objects of the provision

18 The object of the ESA is succinctly captured in the long title. The ESA was passed to give effect to CITES "by controlling the importation, exportation, re-exportation and introduction from the sea of certain animals

and plants, and parts and derivatives of such animals and plants". The object of CITES, as I explained at [6] of the *No Case GD (HC)*, is to "regulate the international trade in wildlife to ensure that the trade does not threaten their survival in the wild." It does so by creating a "broad framework for the regulation of the trade through a system of permits and certificates", the implementation of which is left to each member state (*ibid*). Viewed in this light, s 4 is the lynchpin of the ESA, for it contains the core prohibition against the import/export/re-export/introduction from the sea of any scheduled species without a permit. It is also clear from s 4(1) that Parliament had contemplated that the magnitude of the infringement would increase in direct proportion to the number of scheduled species brought in, as is clear from the fact that a maximum fine of $50,000 would be levied in respect of each scheduled species brought in.

The extraneous material

19 Viewing the two possible interpretations against the purposes of the statute, I considered that the "per specimen" reading is to be preferred. An interpretation that allows a fine to be imposed in respect of each specimen illegally imported should be preferred as this better achieves the objective of deterring the illegal trade of wildlife than one which only permits a maximum fine of $50,000 to be imposed, irrespective of the actual number of items trafficked. The present appeal is a case in point. Even though only one scheduled species is involved, the actual *gravity of the infringement*, as disclosed by the weight of the Rosewood, is staggering. In my judgment, the extraneous material relevant to the issue serves a *confirmatory* function and serves to further bolster the conclusion that the "per specimen" interpretation is to be preferred.

20 In 2006, the ESA was repealed and re-enacted. In moving the Endangered Species (Import and Export) Bill (No 43 of 2005) ("the ESA Bill"), Mr Heng Chee How, the then-Minister of State for National Development, said that one of the three "key features" of the Bill was the raising of "the maximum level of penalties to ensure an effective deterrence against the illegal trafficking and trade of CITES-protected species" (see *Singapore Parliamentary Debates, Official Report* (17 January 2006) vol 80 at col 2185 ("the ESA Debates"). He explained that since "the value of smuggled endangered wildlife can be very high, the current fine of $5,000 [under the Endangered Species Act (Cap 92A, 2000 Rev Ed) ("Old ESA")] is not an effective deterrent" and would be increased to a maximum of $50,000 which would be "applicable to each CITES-protected animal or plant, or part thereof, involved in the offence, up to an aggregate maximum of $500,000" (at col 2187). This makes it clear that a fine of $50,000 is to be levied in respect of each specimen.

21 If there was any doubt in this regard, it would be put to rest by the following exchange which took place in the course of the ESA Debates. Immediately after Mr Heng delivered the second reading speech, Dr Amy Khor Lean Suan, Member of Parliament for Hong Kah asked (at col 2189):

> … given that the sums involved in illegal wildlife trading can run into tens of millions of dollars, as the Minister of State has just noted, *I would like to ask the Minister of State why the penalty imposed is not computed on a per animal basis, but on a per species basis. This is despite the fact that there have been calls from various quarters, including the Animal Concern Research Education Society (ACRES), who* ***have asked for the penalty imposed to be based on the number of animals traded, or in the case of animal parts, on a quantifiable unit, instead of a per species basis, which does not reflect the true market value of what is illegally traded****.*
>
> *Logically, the higher the number of animals being illegally traded, the higher would be the value.* Hence, the heftier the

> fine ought to do. This would then be an even stronger deterrent against illegal wildlife trading.
>
> [emphasis added in italics and bold italics]

In response, Mr Heng said (at col 2195):

> Dr Amy Khor asked whether or not it would be on a per animal basis. ***It is actually on a per animal basis because, according to the interpretation, the word "species" would also relate to per animal.***
>
> On her question on penalties, she is right. We have increased the minimum fine ten-fold. In fact *the* ***maximum fine of $500,000*** *is a hundred-fold of the old arrangement.*
>
> [emphasis added in italics and bold italics]

22 The legislative history of the provisions provides further support for this position. Section 4 of the Old ESA read as follows:

> **Restriction on import, export, re-export or introduction from sea of scheduled species**
>
> 4.–(1) No person shall import, export, re-export or introduce from the sea any scheduled species without a permit.
>
> (2) No person shall have in his possession, under his control, sell, offer or expose for sale, or display to the public any scheduled species which has been imported or introduced from the sea in contravention of subsection (1).
>
> (3) Any person who contravenes subsection (1) or (2) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding one year or to both and, in the case of a second or subsequent conviction, to a fine not exceeding $10,000 or to imprisonment for a term not exceeding one year or to both.

23 When the ESA was repealed and re-enacted in 2006, the phrase "each such scheduled species" was added after the prescribed maximum fine (which had been raised from $5,000 to $50,000 –a hundred-fold increase for a first-time offender, as the Minister rightly noted): see [21] above. The addition of these words was no accident – Parliament does not legislate in vain (see the

decision of the Singapore Court of Appeal in *Shell Eastern Petroleum Pte Ltd v Chief Assessor* [1998] 3 SLR(R) 874 at [12]) – and it is clear that this amendment was intended to underscore the point made by Mr Heng in the ESA Debates, namely, that a fine would be levied in respect of each specimen that formed the subject matter of the offence. I note that this was also the analysis of the District Court in *Sustrisno Alkaf*, where DJ Danielle Yeow Ping Lin held, after referring to the ESA Debates and the history of s 4(1) of the ESA, that "the fine quantum is now determined on a per animal basis instead" (at [27]). In the premises, I agreed with the Prosecution that the "per specimen" reading was to be adopted and that the Respondents were therefore liable to be fined up to $500,000 each.

My decision on sentence

24 Next, I deal with the question of the appropriate sentence. After careful consideration of all the facts and circumstances, I sentenced Mr Wong to three months' imprisonment and a fine of $500,000 (in default of payment of which he will serve an additional 12 months' imprisonment). I sentenced Kong Hoo to a fine of $500,000. I propose to give my reasons in three parts, as follows:

(a) first, I will consider the proper characterisation of the present offence;

(b) second, I will discuss the relevance of the forfeiture provisions to the sentence to be meted out; and

(c) last, I will consider the sentencing precedents that the Prosecution cited.

The characterisation of the present offence

25 The central plank of Mr Kwek's submissions was that this was a case of "transnational organised wildlife crime". He did not place any finer point on this, but the suggestion (as reinforced by his use of the examples of drug and arms trafficking) was that he viewed this as an instance of illegal activity that had been perpetrated in a structured and disciplined manner by an international criminal enterprise for profit. With respect, I could not agree with this characterisation. The Rosewood had certainly been brought into Singapore in contravention of local laws – without the necessary import permit having first been obtained – but there was no evidence that this was deliberate, or that some more nefarious motive underlay the breaches. I agreed with Mr Pillai's submission that it was important to bear in mind that it had *not been proven* that the export permission granted to Mr Zakaria Solihi (and, by extension, the Respondents) was a forgery nor that the Rosewood had been illegally sourced and smuggled out of Madagascar. In this connection, it will be recalled that there was a belated attempt by the Prosecution to try, by way of a criminal motion filed *after* the first hearing of the appeal (but before the *Conviction Judgment* had been handed down), to establish that many of the documents in D5 (including the aforementioned export permission granted to Mr Zakaria) were forgeries. However, this motion was dismissed: see *Conviction Judgment* at [21]–[29]. Insofar as the record shows, therefore, the Rosewood had been legally exported from Madagascar and it was undisputed that Hong Kong did not have any prohibition against the import of Rosewood at the time (see the version of the Protection of Endangered Species of Animals and Plants Ordinance (Cap 586) – Hong Kong's equivalent of the ESA – then in force). Rosewood was only added to the list of protected species in Hong Kong on 28 November 2014 when the Protection of Endangered Species of Animals and

Plants Ordinance (Amendment of Schedules 1 and 3) Order 2014 (L.N. 98 of 2014) came into force.

26 Further, I disagreed with Mr Kwek's submission that there was evidence of deliberate concealment. I agreed with Mr Pillai that there was nothing untoward about the fact that the Rosewood was stored in the cargo hold of the Vessel – the cargo hold is, after all, where one might reasonably expect cargo to be stored. I also note that the logs had been openly moved for the purpose of containerisation, and there was no suggestion that there was anything surreptitious about the way it was done. While I agreed that the disclosures in the cargo manifests (P5 and P6) were inadequate, the undisputed evidence of Mr Tan was that it was BSK Stevedoring Pte Ltd ("BSK") – the stevedores engaged by Jaguar Express – and not the Respondents, which had filled in the manifestos. There was no evidence before me to suggest that the Respondents had deliberately instigated BSK to give inadequate disclosure of the contents of the Vessel nor could this fact be inferred.

27 That being said, I could not completely accept Mr Pillai's suggestion that the Respondents' fault lay only in their having been too trusting of Jaguar Express or that the Respondents had acted at all times with a genuine belief in the legitimacy of their actions. It was not entirely clear if the Respondents' breach had arisen solely from their misunderstanding of the law or technical non-compliance or whether there were other underlying and undisclosed reasons. In this regard, it must be borne in mind that the Respondents had elected to remain silent and offered no testimony in support of their defence. They declined to furnish any evidence of any buyers to whom the Rosewood would be on-sold, whether in Singapore, Hong Kong or elsewhere and were content to rest their entire defence on the basis that – on their interpretation of the law – they had not acted in contravention of the ESA. I hasten to add that I

did not see any basis for treating their decision to remain silent as an aggravating factor *per se* but their decision compelled me to revisit the adverse inference I drew against them: namely, that there were no confirmed buyers and the Rosewood had been brought into Singapore "in the hope that it might be shipped to Hong Kong if a suitable Hong Kong buyer could be found but with the intention that until and unless this came to pass, the Rosewood was to remain within Singapore" (see the *Conviction Judgment* at [56] and the *No Case GD (HC)* at [63]). As I explained in my previous judgment, if there were in fact confirmed buyers, there would have been no reason for Mr Wong to refuse to disclose the details under investigation, and even less reason to withhold any such information when the defence was called (see *Conviction Judgment* at [54]).

28 The only other logical inference that could have been drawn from the respondents' election to remain silent (apart from the fact that they did not have any confirmed buyers) was that they were parties to questionable transaction(s) in respect of which they did not wish to disclose further details or risk being cross-examined on. If the underlying transaction (assuming it did exist) was wholly above board and untainted, one would reasonably expect that Mr Wong would have been eager to protest his innocence and to demonstrate his *bona fides* rather than retreat into reticence and shy away from testifying. That being said, I did not need to go so far as to make this inference. As the High Court held in *K Saravanan Kuppusamy v Public Prosecutor* [2016] 5 SLR 88 at [27], where a material fact that either aggravates or mitigates the offence is put forward at the sentencing stage, it is incumbent upon the party relying on it to prove that that fact exists (approved of by the Court of Appeal in its recent decision in *Chang Kar Meng v Public Prosecutor* [2017] SGCA 22 at [40]–[42]). For present purposes, it sufficed

for me to conclude, on the totality of the evidence, that it had not been proved that the commission of the present offences was merely the result of an oversight or that Mr Wong had genuinely believed all along that he was engaged in a *bona fide* transaction.

29 For these reasons, I was drawn to conclude that this case cannot be characterised as an instance of "smuggling" in the usual sense which the expression is generally used and understood – that is to say, as an attempt to move goods across borders in deliberate contravention of applicable laws and regulations – nor could it be said that this was a case of transnational organised wildlife crime. Such a portrayal of the facts cannot fairly be put forth based on the evidence. This case has none of the usual features of transnational organised wildlife smuggling, such as deliberate concealment and bogus documentation, let alone any direct evidence of illicit dealings or profiteering to be made on the black market. However, I also rejected Mr Pillai's characterisation of this as mere regulatory slip-up. My finding that the Respondents had brought the Rosewood into Singapore with the intention that it was to remain here until and unless a foreign buyer could be found militated against such a conclusion.

The impact of forfeiture

30 I turn to the next factor, which concerns the issue of forfeiture. Under s 15(1) of the ESA, forfeiture of the seized items is mandatory upon conviction. Pursuant to s 15(7) of the ESA, any expenses incurred in relation to the "detention, confiscation, storage, maintenance, housing, repatriation, transport and disposal" of the scheduled species "shall be charged against the owner, importer, exporter or re-exporter, as the case may be, of the scheduled species". Because of the length of time that had elapsed between seizure and

the final disposal of this matter (from April 2014 to 31 March 2017), the detention and storage charges alone amounted to about $3.5m. This excludes the value of the Rosewood which, as I have already noted at [3] above, is extremely substantial. This raises the following question: What is the relevance, if any, of the consequences of a prospective forfeiture order to a court's decision on sentence?

31 Mr Pillai's submission was that it ought to be taken into account. However, he did not elaborate on how this was to be done. The Prosecution, perhaps because of constraints of time, did not have the opportunity to address me on this point. In the circumstances, I preface my observations with the caveat that I did not have the opportunity to receive full submissions on this point.

32 Forfeiture can serve at least four distinct though inter-related purposes. First, it can be a form of punishment, serving as an "additional penalty" to the accused (see the decision of the Singapore High Court in *Magnum Finance Bhd v Public Prosecutor* [1996] 2 SLR(R) 159 ("*Magnum Finance*") at [12]). Second, it can serve as a deterrent against the commission of future offences, dissuading would-be offenders on pain of suffering the loss of their property. It has been held that forfeiture performs this deterrent function most meaningfully when it is directed against the offender or to someone "tainted with complicity", rather than when it is directed against an "innocent" third party (see *Magnum Finance* at [33] and [34]). Third, it can prevent crime by removing from circulation the instrumentalities of the crime which could be used in the commission of future offences (see Kow Keng Siong, *Sentencing Principles in Singapore* (Academy Publishing, 2009) at para 32.114). Last, it can be a mechanism for the disgorgement of ill-gotten profits to prevent unjust enrichment. The principle is that the property sought to be forfeited is the

fruits of crime to which the offender can lay no legitimate claim and therefore should be divested of (see the decision of the Supreme Court of Western Australia in *Macri v Western Australia* [2006] WASCA 63 at [15]).

33 Of the four objects of sentencing listed above, three of them – punishment, deterrence, prevention – are familiar to us as being part of the four classical principles of sentencing (see the decision of the English Court of Appeal in *R v James Henry Sargeant* (1974) 60 Cr App R 74 at 77, cited with approval by our Court of Appeal in *Public Prosecutor v Kwong Kok Hing* [2008] 2 SLR(R) 684 at [17]). Insofar as forfeiture contributes to the attainment of one of these objectives, it might lessen the need for a more severe sentence. To this extent, I consider that a sentencing court can and should properly have regard to the effect of any forfeiture order in deciding on an appropriate sentence. In his dissenting judgment in *R v Craig* [2009] 1 SCR 762 (a decision of the Supreme Court of Canada) Fish J (with whom Lebel J agreed) put the point in the following terms (at [93]):

> The third question is whether the decision to allow forfeiture can be considered by the sentencing judge in crafting a fit sentence. Justice Abella says *no*; with respect, I say *yes*. More precisely, my colleague says *never* and I say *sometimes*. In my view, forfeiture may be taken into account by the sentencing judge where the order of forfeiture constitutes punishment of the offender for having committed the offence. Conceptually, forfeiture may have other purposes. But it is unmistakeably punitive in effect when the property forfeited was acquired by the offender legally and honestly – for example, by gift, inheritance or with funds lawfully earned or obtained. In these circumstances, **forfeiture is a relevant consideration in determining the appropriate sentence, since it is the *global punishment* that must fit the crime**. [emphasis in original in italics; emphasis added in bold italics]

34 In this passage, Fish J specifically referred to the principle of *retributive* proportionality, but his broader point was that the court should strive to arrive at a sentence which fits the crime and the effect of any

forfeiture order was a relevant consideration in the sentencing inquiry. The specific issue before the court in that case was how the forfeiture provisions in ss 16 and 19 of the Controlled Drugs and Substances Act (c 19) (Can) should be applied. The rest of the judges confined their analysis to the specific provisions under consideration and held, after an examination of the purpose and statutory language of the forfeiture scheme set out therein, that Parliament had intended that forfeiture orders be treated discretely and distinctly from the sentencing decision. They did not lay down any general rule that forfeiture would *never* be relevant to sentence. In New Zealand, the approach is also to focus on the particular statute under which forfeiture is being ordered. In *R v Brough* [1995] 1 NZLR 419, the New Zealand Court of Appeal held that because confiscation orders under the Proceeds of Crime Act 1991 (NZ) were not punitive in nature, they were generally not relevant to sentence save where (a) the sentence has a disproportionate effect on the offender, and (b) the deterrent effect of the forfeiture order lessens the need for a deterrent sentence (at 424).

35 In short, everything turns on the facts and the statutory context. It matters precisely *what* is sought to be forfeited and for *what purpose*. Forfeiture can be ordered in different situations and in respect of different kinds of property: the instrumentalities of the crime, the proceeds of crime, the subject matter of the offence etc. Each of these should be treated differently. For instance, s 5 of the Sentencing Act 1991 (No 49 of 1991) (Vic) draws a clear distinction between forfeiture of the proceeds of crime and forfeiture of other forms of property: the former *must* be disregarded in the sentencing process; the latter *may* be taken into account in deciding on an appropriate punishment. As the Victorian Court of Appeal explained in *R v McLeod* [2007] 16 VR 682 at [19], this distinction had been drawn because the State

Parliament recognised that where forfeiture was directed at the proceeds of crime, the dominant purpose of the order was the reversal of unjust enrichment. To the extent that forfeiture was directed at this goal, it should be considered separately and had no bearing on the sentencing decision. However, the picture was different where the subject matter of the forfeiture relates to the instrumentalities of the crime or where the effect of the forfeiture order goes further than mere disgorgement. Where this was the case, the effect of a forfeiture order was properly taken it into account in the sentencing calculus.

36 That being said, the fact that the effect of a forfeiture order *can* be taken into account does not settle the issue of the *weight* to be accorded it. At the end of the day, the task for the court – as it always is in the sentencing process – is to properly balance the four classical principles of sentencing (retribution, deterrence, prevention, and rehabilitation) and decide, first, on the appropriate weight to be given to each principle in the context of the particular offence; second, the purposes(s) of the forfeiture provisions in the statute in question; and, third, on the proper weight to be accorded to the effect of any forfeiture order in the light of the analysis (see generally *Public Prosecutor v Goh Lee Yin and another appeal* [2008] 1 SLR 824 at [59]). In some cases, the principle of deterrence might be so imperative that it might eclipse the other sentencing principles such that little to no weight ought to be given to the fact that a forfeiture order would constitute a substantial additional punishment and would ordinarily result in a downward calibration of the sentence. This is probably the case for forfeiture orders issued under s 28(2) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"), where the court is enjoined to forfeit, upon the application of the Public Prosecutor, to the Government any vehicle which has been proved to have been used in connection with an

offence under the MDA. The object of such an order is partly punitive – to signal society's abhorrence for drug offences – but it is predominantly used to serve as a general deterrent against future offending. Given the clear focus on deterrence in the MDA, the punitive consequences of a forfeiture order might not result in any significant reduction in an offender's sentence (if at all).

37 I turn now to consider the forfeiture provisions in the ESA. As I have noted here and in my previous judgments in this matter, the object of the ESA is the protection of endangered wildlife. Section 15 of the ESA, which governs forfeiture, advances this purpose by promoting the preservation and repatriation of scheduled species to the habitats where they belong. Under s 15(1) of the ESA, forfeiture is *mandatory* upon the conviction of any person for an offence under ss 4 and 5 of the ESA. In my judgment, this is a clear indication that the forfeiture is intended to serve an additional punitive purpose by punishing offenders who are found to have breached the applicable legislation and to deter would-be offenders. The dominant purpose of a forfeiture order is not the reversal of unjust enrichment. This is underscored by the fact that forfeiture is *not* conditional upon proof that the scheduled species had been illegally removed from the source country although in cases of illegal removal, forfeiture serves an additional restitutionary purpose: it reverses the unjust enrichment of the offender and restores the loss suffered by the source country.

38 As for the storage and detention charges, it is important to have regard not only to s 15(7) of the ESA (which provides that the aforementioned expenses are chargeable against the offender), but also to the provisions which follow:

(a) Section 15(8) of the ESA provides that if any scheduled species enters Singapore by a conveyance in contravention of the Act, the owner *and* the importer shall be jointly and severally liable for all expenses incurred by the Director-General in dealing with the species.

(b) Section 15(9) provides that if the sum levied under ss 15(7) and 15(8) are not paid within 14 days, it may be recovered in the same manner as if it were a fine imposed by the courts.

(c) Section 15(10) provides that where a decision to repatriate a species has been made, the owner of the conveyance on which it was brought here shall be legally obliged to provide free passage for the return of the species if required to by the Director-General.

39 These provisions complement the primary forfeiture provisions by making offenders wholly responsible for the preservation and repatriation of the scheduled species. The policy behind making the aforementioned provisions is two-fold. First, it is intended to punish contraventions of the ESA by making offenders liable for all expenses incurred in the preservation and repatriation of the species. That it has this punitive character is underscored by the fact that the expenses may be recovered as a fine imposed by the court. Secondly, it is intended to deter not only offenders from flouting the applicable laws but also others (such as the owners – if they are not the offenders) from assisting or otherwise facilitating contraventions of the ESA on the pain that they might be liable for the expenses which arise from (or are incidental to) the seizure, detention, and repatriation of the scheduled species.

40 In the present case, while the Rosewood had been illegally brought into Singapore, the evidence did not go so far as to show that it had been illegally sourced. As far as the documentary record was concerned, the Rosewood had

been legitimately exported from Madagascar. Nevertheless, it was common ground that forfeiture should be ordered and also that it would constitute a substantial punishment. While not strictly a mitigating factor, I considered that there was a compelling case for taking the punitive consequences of the forfeiture into account in determining the totality of the punishment. This was another reason that militated against the heavy-handed imposition of a crushing custodial sentence in respect of Mr Wong.

The sentencing precedents

41 Finally, I turn to the sentencing precedents. In support of his submission that a substantial custodial term should be imposed, Mr Kwek referred me to the following four unreported cases heard in the District Court in respect of which no written grounds of decision had been issued:

(a) *Public Prosecutor v Pham Anh Tu* (DAC 1503/2014, unreported): The offender learnt that there was a thriving black market in illegal wildlife in Mozambique. He travelled from his native Vietnam to Mozambique where he viewed various samples of illegal ivory and horns. He elected to purchase eight black rhinoceros horns weighing 21.5kg (which he paid US$15,000 for) as they were easier to conceal. He was *en route* back to Vietnam when he was arrested at Changi Airport. He pleaded guilty to a single charge of contravening s 5(1) of the ESA and was sentenced to 15 months' imprisonment.

(b) *Public Prosecutor v Hoang Xuan Quang* (DACs 2044 and 2045 of 2014, unreported): The two offenders were Vietnamese nationals who worked in Angola. While at a market in Luanda (the capital of Angola), the first offender was approached by an unknown Vietnamese male, who offered him US$1,000 to smuggle a luggage bag of

scheduled species from Luanda to Laos. The first offender agreed and involved the second offender in the plan. They were handed two luggage bags containing a total of 45.7kg of ivory (comprising tusks, bangles, and cubes) with an estimated market value of US$65,000 and boarded a flight for Laos. They were arrested while in transit in Singapore and pleaded guilty to charges of having (with common intention) contravened s 5(1) of the ESA. They were each sentenced to 16 months' imprisonment.

(c) *Public Prosecutor v Jaiswal Arun Harish Chandra* (DAC 902791 of 2015 and MAC 900579 of 2015) ("*Jaiswal Arun*"): The offender was a businessman. An acquaintance offered to pay him US$325 for transporting three luggage bags containing live turtles from Bangladesh to Indonesia. The offender was aware that the luggage was too small to house the turtles and that they would not have enough air, but he agreed anyway. All travelling arrangements and expenses were borne by the acquaintance. On the appointed day, the offender boarded a flight from Bangladesh to Indonesia *via* Singapore. He was arrested while in transit in Singapore and the 190 turtles (with an estimated commercial value of about $95,000) in the luggage bags were seized. 47 turtles had died due to dehydration while the remaining 143 had to be euthanized. The offender pleaded guilty to one charge of contravening s 5(1) of the ESA and one charge of animal cruelty under s 42(1)(*e*) of the Animals and Birds Act (Cap 7, 2002 Rev Ed) ("ABA"). He was sentenced to 16 months' imprisonment for the offence under the ESA.

(d) *Public Prosecutor v Pavlychek Maksim & another* (DAC 927181 of 2015 and another, unreported) ("*Pavlychek Maksim*"): The

> two offenders were Russian nationals who lived and worked in Moscow. An acquaintance offered to pay the second offender US$2,000 to smuggle wildlife from Bangladesh to Indonesia. As was the case in the *Jaiswal Arun*, all travelling arrangements and expenses were borne by the acquaintance. The offenders travelled from Moscow to Bangladesh. Upon their arrival in Bangladesh, they were handed several luggage bags filled with black pond turtles. That night, they boarded a flight from Bangladesh to Indonesia. They were arrested while in transit in Singapore and the 206 turtles in their bags were seized. 36 of the turtles soon died as a consequence of the cramped, airless, and dry conditions in which they were kept. They each pleaded guilty to one charge under s 4(1) of the ESA and another charge of animal cruelty under s 41C(2), punishable under s 41C(3)(*b*)(i) of the ABA. They were each sentenced to 16 months' imprisonment for the charge under the ESA.

42 I agreed with Mr Pillai that the present case differs significantly from the precedents cited by the Prosecution. First, the present case cannot be described as an instance of "smuggling" in the usual sense (see [25] above). This stands in contrast with the precedents, which were plain and obvious cases of smuggling. Secondly, there was no evidence of transnational syndication. In all the precedent cases cited, details were given of a third party in a foreign jurisdiction who directed and controlled the actions of the offenders, who acted merely as couriers. By contrast, the only named foreign actor here is Mr Zakaria Solihi who, as far as the record shows, is the legitimate holder of export permits issued by the Madagascan Government (see the *Conviction Judgment* at [11] and the *No Case GD (HC)* at [21]). Thirdly, there is no evidence of deliberate concealment. In the precedent cases,

the accused had hidden the scheduled species (live animals) in their suitcases. Contrary to the submissions put forward by the Prosecution, I am unable to agree that there is any evidence of deliberate concealment here (see [26] above). Fourthly, there is no evidence of cruelty to any living animals. In *Jaiswal Arun* and *Pavlychev Maksim* the turtles had callously been stuffed into suitcases which were manifestly unsuitable for the transport of live animals and many of the turtles perished on the journey. This was clearly an aggravating factor.

43 In my judgment, a lengthy custodial term of 18 months as sought by the Prosecution could not be justified purely on the basis that the existing precedents all seem to point towards imprisonment as the norm. Quite apart from the fact that they were unreported cases in respect of which the usual circumspection should be applied (see *Luong Thi Trang Hoang Kathleen v Public Prosecutor* [2010] 1 SLR 707 at [21]), there were a number of fundamental distinctions that set this case apart and I was not persuaded that the Prosecution's sentencing precedents provided a suitable frame of reference.

44 In the absence of comparable precedents, I turned to first principles to decide what was fair and just in the circumstances. The primary offence-specific sentencing consideration here is the vast quantity of Rosewood imported (and the huge value which it carried). Thus, any sentence which is meted out must appropriately reflect the deterrent objectives of the ESA. The sentence must thus make it palpably not worth the risk for one to take when weighed against the potential gains. While the maximum fine is $500,000, it pales alongside the enormous potential gains in the present case. I was therefore of the view that a custodial sentence was warranted for Mr Wong. The imprisonment term must be carefully calibrated to his culpability – which

is not, in my judgment, as high as that in the precedent cases. That said, it should be more than merely nominal so that the grave consequences of the breach are fully appreciated.

45 I did not consider the Respondents' decision to claim trial and then to remain silent as aggravating factors. As the Court of Appeal reiterated recently, every accused has a constitutional right to plead not guilty and to claim trial to a charge (see *Ng Kean Meng Terence v Public Prosecutor* [2017] SGCA 37 at [40]). The facts of *Kelvin Lee*, which Mr Kwek relied on, were quite different. In that case, the accused had been charged under s 420 of the Penal Code (Cap 224, 1985 Rev Ed) for cheating. He had contrived to persuade the victim to hand over US$300,000 in advance payments for a loan from a foreign lender, fraudulently misrepresenting that these fees would be repayable without exception when they were in fact not – only 65% would be refundable if the loan applications failed, and only if the borrower was found not to have been at fault. In order to create a situation of default, the accused deliberately omitted to tell the victim of a "Basic Checklist" of documents the production of which was a condition precedent to the loan until shortly before this checklist were due even though some of these documents were expensive and onerous to obtain. The victim ended up defaulting and the accused neither returned the victim the money (which had been deposited into his own account) nor remitted any of it to the foreign lender. When questioned on his failure to return the money to the victim, he replied that he was a person of means but had refused to repay the sum because he "refused to bow to the pressure" exerted by the victim, whom he accused of having filed "false" charges against him (at [31]). In deciding to enhance the sentence, the High Court observed that the evidence against the accused was "overwhelming" but he nevertheless remained defiant and did not display any contrition (at [36]).

46 In this case, the Respondents were no doubt not fully cooperative during investigations, as exemplified by Mr Wong's refusal to disclose details of their purported Hong Kong buyers. For this reason, they should not be entitled to claim any credit in mitigation as they could not be said to have cooperated fully in the investigations nor to have demonstrated any genuine remorse. But this was not a case where they had elected to contest the charges in the face of overwhelming evidence and, in this regard, I agreed with Mr Pillai that the Prosecution's reliance on *Kelvin Lee* was misplaced. The Respondents could not be said to have defiantly mounted a patently untenable defence at trial – they did after all succeed (twice) in putting forth their defence at first instance.

Conclusion

47 After consideration of the relevant circumstances, I sentenced Mr Wong to three months' imprisonment and the maximum fine of $500,000. Had there been further evidence of aggravating features associated with transnational organised wildlife smuggling, I would not have hesitated to consider a far lengthier custodial sentence, possibly within the range sought by the Prosecution. As I have explained above, these aggravating features were absent. As it was, three months' imprisonment is still substantial and adequately registers the scale and seriousness of the offence. I also ordered that if Mr Wong does not pay the fine, he is to serve a default imprisonment term of 12 months. I also sentenced Kong Hoo to a fine of $500,000. In my judgment, the combined effect of an appropriately-calibrated imprisonment

term, heavy fines and forfeiture were adequate to drive home the message that the offences are serious.

48 Consequential upon the convictions, I ordered that the Rosewood be forfeited to the Director-General of the AVA pursuant to s 15(1) of the ESA. I also ordered that the Respondents pay for all expenses incurred by the Director-General or the AVA in relation to the detention, confiscation, storage, maintenance, housing, repatriation, transport, and disposal of the Rosewood pursuant to s 15(7) of the ESA.

See Kee Oon
Judge

Kwek Mean Luck SC, Tan Wen Hsien, Sarah Shi, and Zhuo Wenzhao (Attorney-General's Chambers) for the appellant;
K Muralidharan Pillai, Paul Tan, and Jonathan Lai (Rajah & Tann Singapore LLP) (instructed), Choo Zheng Xi (Peter Low LLC) for the defendants.
