IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 16

Civil Appeal No 99 of 2019

Between

Wham Kwok Han Jolovan

… *Appellant*

And

The Attorney-General

… *Respondent*

Civil Appeal No 108 of 2019

Between

Tan Liang Joo John

… *Appellant*

And

The Attorney-General

… *Respondent*

Civil Appeal No 109 of 2019

Between

The Attorney-General

… *Appellant*

And

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Wham Kwok Han Jolovan

… *Respondent*

Civil Appeal No 110 of 2019

Between

The Attorney-General

… *Appellant*

And

Tan Liang Joo John

… *Respondent*

In the matter of Originating Summons No 510 of 2018

Between

The Attorney-General

And

Wham Kwok Han Jolovan

In the matter of Originating Summons No 537 of 2018

Between

The Attorney-General

And

Tan Liang Joo John

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JUDGMENT

[Contempt of Court] — [Scandalising the court]

[Contempt of Court] — [Sentencing]

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Wham Kwok Han Jolovan
v
Attorney-General and other appeals

[2020] SGCA 16

Court of Appeal — Civil Appeals Nos 99, 108, 109 and 110 of 2019
Sundaresh Menon CJ, Andrew Phang Boon Leong JA, Judith Prakash JA, Tay Yong Kwang JA and Steven Chong JA
22 January 2020

16 March 2020 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 These appeals arise out of HC/OS 510/2018 ("OS 510") and HC/OS 537/2018 ("OS 537"), which were initiated by the Attorney-General ("the AG") to punish Mr Wham Kwok Han Jolovan ("Wham") and Mr Tan Liang Joo John ("Tan") respectively for contempt by scandalising the court ("scandalising contempt") under s 3(1)(*a*) of the Administration of Justice (Protection) Act 2016 (Act 19 of 2016) ("the AJPA"). The conduct alleged to constitute scandalising contempt pertained to Wham's and Tan's posts on their respective Facebook profiles.

2 The matter first came before a High Court judge ("the Judge"), who dismissed Wham's and Tan's challenge to the constitutionality of s 3(1)(*a*) of the AJPA. Wham and Tan do not appeal against this aspect of the Judge's

decision. The Judge convicted Wham and Tan of scandalising contempt, and sentenced each of them to a fine of $5,000, with one week's imprisonment in default. The Judge declined to grant the AG's application for either: (a) an order that Wham and Tan each publish an apology under s 12(3) of the AJPA (an "apology order"); or (b) an injunction requiring Wham and Tan to cease further publication of their posts pursuant to the court's inherent power read with s 9(*d*) of the AJPA (a "cease-publication injunction") (collectively, "the Remedies"). Wham and Tan were also each ordered to pay the AG costs fixed at $5,000, as well as disbursements of $2,297.82 and $1,966.39 respectively. The Judge's decisions on liability and sentence may be found in *Attorney-General v Wham Kwok Han Jolovan and another matter* [2018] SGHC 222 (the "Liability Judgment") and *Attorney-General v Wham Kwok Han Jolovan and another matter* [2019] SGHC 111 (the "Sentencing Judgment") respectively.

3 CA/CA 99/2019 ("CA 99") is Wham's appeal against the Judge's decision on conviction, sentence and costs. CA/CA 108/2019 ("CA 108") is Tan's appeal in respect of the same matters in so far as they concern him. CA/CA 109/2019 ("CA 109") is the AG's appeal against the Judge's refusal to grant the Remedies in respect of Wham, and CA/CA 110/2019 ("CA 110") is the AG's appeal regarding the same in respect of Tan.

4 We reserved judgment after the hearing on 22 January 2020, and now deliver the same dismissing Wham's and Tan's appeals in CA 99 and CA 108, dismissing the AG's appeal in CA 110, and allowing in part the AG's appeal in CA 109.

5 As Wham and Tan are the first persons to be prosecuted under s 3(1)*(a)* of the AJPA, we take the opportunity in this judgment to address a number of points pertaining to how certain aspects of the AJPA are to be understood and

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applied. Before turning to that, we begin with the facts.

The facts

6 On 27 April 2018 at around 6.30pm, Wham published a post on his Facebook profile ("Wham's post") containing the following statement:

> Malaysia's judges are more independent than Singapore's for cases with political implications. Will be interesting to see what happens to this challenge.

Wham's post also included a link to an online article titled "Malaysiakini mounts constitutional challenge against Anti-Fake News Act". Wham published his post under the "Public" setting of Facebook's audience selector. According to information on Facebook's online Help Centre, sharing a post under this setting means that "anyone including people off of Facebook can see it".

7 On 30 April 2018, the AG filed OS 510 seeking leave to apply for an order of committal against Wham for scandalising contempt under s 3(1)(*a*) of the AJPA.

8 On 6 May 2018 at around 11.05am, Tan published a post on his Facebook profile ("Tan's post") containing the following statement:

> By charging Jolovan for scandalising the judiciary, the AGC only confirms what he said was true. [underlining in original]

Tan's reference to "what [Wham] said" was a reference to what Wham had said in his post. Tan's post also contained a link to Wham's Facebook profile. Like Wham, Tan published his post under the "Public" setting of Facebook's audience selector.

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9 On 7 May 2018, the AG filed OS 537 seeking leave to apply for an order of committal against Tan for scandalising contempt under s 3(1)(*a*) of the AJPA.

10 On 9 May 2018, the Judge granted both applications for leave. On 10 May 2018, Wham published the following post on his Facebook profile (Wham's "10 May 2018 post"):

> I received a letter today from the Attorney General's Chambers confirming that leave has been granted by the High Court to prosecute me for making the following remarks on Facebook:
>
> "Malaysia's judges are more independent than Singapore's for cases with political implications. It will be interesting to see what happens to this challenge."
>
> The AGC said I had "scandalised the court"[.]
>
> My comment was made in response to the news that Malaysiakini had filed a constitutional challenge to declare that Malaysia's fake news law was a violation of the right to freedom of expression.
>
> I said it based on several Malaysian cases I had read in which the courts upheld basic rights to freedom of expression and assembly and overturned several government decisions. It was also based on my reading of Francis Seow's book: Beyond Suspicion? The Singapore Judiciary, published by Yale University's Council on Southeast Asian Studies. Seow was not prosecuted by the government for publishing it.
>
> …

11 On 11 May 2018, the AG filed HC/SUM 2196/2018 (in OS 510) and HC/SUM 2192/2018 (in OS 537) for Wham and Tan respectively to be punished for scandalising contempt. The Judge heard these summonses on 17 July 2018.

12 On 8 October 2018, Wham published the following post on his Facebook profile (Wham's "8 October 2018 post"):

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> Update: Justice Woo Bih Lih [*sic*] will deliver his judgment tomorrow at 10am in High Court Room 5C. I will be there with my lawyers …
>
> In May this year, I was accused of 'scandalising the judiciary' for making the following statement: 'Malaysian judges are more independent than Singapore's for cases with political implications. Will be interesting to see what happens to this challenge'. The case I was referring to was Malaysiakini's high court challenge to declare Malaysia:s [*sic*] new fake news law unconstitutional.
>
> I said this based on several cases I had read in the media and in journal articles in which the Malaysian courts had upheld the constitutional rights of its citizens in relation to their civil and political liberties, whereas similar challenges in Singapore failed. My views were also formed by the late Francis Seow's indictment of the judiciary in his book "Beyond Suspicion? The Singapore Judiciary"[.]
>
> …

13 Wham and Tan were convicted of scandalising contempt on 9 October 2018. On the same day, Wham published the following post on his Facebook profile (Wham's "9 October 2018 post"):

> Justice Woo Bih Lih [*sic*] has found me and **John L. Tan** guilty of scandalising the judiciary. Separate hearing for sentencing will be scheduled. The offending statement I made was 'Malaysian judges are more independent that Singapore's for cases with political implications. Will be interesting to see what happens to this challenge'. [emphasis in bold in original]

14 The Judge heard the parties on sentencing and costs on 20 March 2019. At that hearing, Tan indicated that he would not be apologising for his post but would remove it. He took down his post on 21 March 2019. In contrast, Wham did not take down his post (see [17] below). Wham and Tan were sentenced by the Judge on 29 April 2019. The parties then filed their respective appeals.

15 On 8 January 2020, Wham published the following post on his Facebook profile (Wham's "8 January 2020 post"):

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> A 5 judge panel at the Court of Appeal will preside over my offence of 'scandalising the judiciary' on 22 January Wednesday, 10am on the 9th floor of the Supreme Court. This is the final appeal.
>
> In April last year, I had said 'Malaysian judges are more independent than Singapore's for cases with political implications. Will be interesting to see the outcome of this case'. The 'case' I was referring to was Malaysiakini's announcement that it would be filing a court challenge against a proposed 'anti fake news law' enacted under the BN [Barisan Nasional] government.
>
> Singapore Democratic Party's John Tan was similarly convicted for posting on Facebook that the AGC's decision to charge me proved that what I said was true.
>
> In the lead up to the hearing at the end of the month, I will be sharing a little on the history of the law I've been convicted under, the legal arguments that have been put forth, and why this law is unconstitutional. Watch this space! #contemptOfCourt #FreedomOfExpression

16 On 20 January 2020, two days before the hearing of the present appeals, Wham published a further post on his Facebook profile (Wham's "20 January 2020 post") as follows:

> Court hearing on 22 January, Wednesday 10am at Supreme Court, level 9.
>
> Scandalising the judiciary:
>
> In a 2018 interview, PM Lee said that Singaporeans were "free to say or publish whatever they wanted, subject to the laws of sedition, libel and contempt."
>
> But the way these laws are applied violate not only our constitutional rights but international free speech standards.
>
> …
>
> What I have been hauled up to court for was … a two sentence [Facebook] post which asserted that Malaysian judges are more independent than the ones in Singapore for cases with political implications.
>
> … My criticisms were temperate and moderate; I did not allege that our judges were corrupt, incompetent, or lacked independence.

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> …
>
> International case law sets the standards of free speech as that which does not incite violence, discrimination, and hate. Other jurisdictions which still have contempt of court convict those who make harsh and insulting attacks
>
> My post can hardly be said to have breached those standards. It attracted fewer than 20 likes and was shared by only one person. What kind of damage to the name and reputation of the judiciary did it cause?
>
> …
>
> … What I'm guilty of is making a comparison about the independence of the judiciary of 2 countries. In fact, the World Bank makes such assessments all the time. In 2016, [Singapore] was ranked 15 on the independence scale and Norway was 1st. So is the [W]orld [B]ank in contempt of court?
>
> What is worse, Singapore Democratic Party's Vice Chairman John L. Tan, shared my post without repeating its contents and he has been convicted of contempt of court too. He merely said that the government's decision to prosecute me only confirms that what I said is true.
>
> I lost my case in the High Court and have been fined $5000. The AGC has insisted that I also issue a public apology. I refuse. To do so would be to succumb to the culture of fear, and to be humiliated into submission. We need to resist it #activism #freedomofexpression

17 All of Wham's posts referred to above remain online to date.

18 For completeness, we note that on 16 July 2019, after his conviction and sentencing in OS 537, Tan applied by way of HC/OS 911/2019 for a declaration under O 15 r 16 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) that he was eligible to stand for election as a Member of Parliament pursuant to Art 44(1) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution") notwithstanding his conviction for scandalising contempt and his sentence of a $5,000 fine (with one week's imprisonment in default). Aedit Abdullah J declined to grant the declaration on the basis that scandalising contempt was a form of criminal contempt, and quasi-criminal offences such as

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criminal contempt fell within the meaning of "offence" in the disqualification provision set out in Art 45(1)(*e*) of the Constitution: see *Tan Liang Joo John v Attorney-General* [2019] SGHC 263.

The decision below

Liability for scandalising contempt

19 It was not disputed before the Judge that for scandalising contempt under s 3(1)(*a*) of the AJPA to be made out, it had to be proved beyond a reasonable doubt that the alleged contemnor had the *mens rea* (meaning that he had intended to publish the contemptuous matter or do the contemptuous act), had committed the *actus reus* and could not invoke fair criticism.

20 The Judge found that Wham had committed scandalising contempt. The *mens rea* requirement was satisfied as it was undisputed that Wham had intentionally published his post on his Facebook profile (Liability Judgment at [80]). The *actus reus* requirement was also satisfied. Wham's post impugned the integrity and impartiality of Singapore's judges and, thus, its courts. The Judge rejected Wham's submission that what his post meant was that Singapore's judges were independent when adjudicating cases with political implications, just that Malaysia's judges were *more* independent (Liability Judgment at [86]–[89]). The Judge also found that there was a risk that public confidence in the administration of justice would be undermined by Wham's post. The average reasonable person would interpret the post to mean that Singapore's judges lacked complete independence when adjudicating cases with political implications and were thus not impartial. The post was published at a time when Wham had nearly 7,200 Facebook followers, some of whom were living in Singapore and might see updates from his Facebook profile in their news feeds. Moreover, since the post was published under the "Public"

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setting of Facebook's audience selector, its audience was the public at large. It was immaterial that only 33 people had responded to the post because the number of responses (meaning "likes") did not reveal anything about how many people had in fact read the post. What had to be shown was a *risk* of undermining public confidence in the administration of justice, and not that public confidence in this regard had *in fact* been undermined (Liability Judgment at [90]–[95]). Finally, Wham's post was not published in good faith and did not constitute fair criticism (Liability Judgment at [96]–[104]).

21 The Judge found that Tan too had committed scandalising contempt. It was undisputed that Tan had intentionally published his post on his Facebook profile. Tan's post impugned the integrity and impartiality of the Singapore courts as it was "intertwined with and repeat[ed] what Wham said in Wham's post", and the latter impugned the integrity and impartiality of the Singapore courts (Liability Judgment at [115]). Tan's criticism of the AG for commencing proceedings against Wham was an *additional* attack over and above the attack on the Singapore courts. The average reasonable person would interpret Tan's post to mean, first, that the allegation in Wham's post that Singapore's judges were not impartial when adjudicating cases with political implications was true, and, second, that the AG's action against Wham in OS 510 confirmed this. The audience for Tan's post was likewise the public at large since it was published under the "Public" setting of Facebook's audience selector. There was therefore a risk that public confidence in the administration of justice would be undermined by Tan's post regardless of how many people had in fact responded to it (Liability Judgment at [123]–[126]). Tan's post was also not published in good faith and did not constitute fair criticism.

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Sentence

22 Both Wham and the AG submitted that *Au Wai Pang v Attorney-General* [2016] 1 SLR 992 ("*Au Wai Pang*") provided a useful reference point for sentencing as that case likewise concerned publication on the Internet. In *Au Wai Pang*, the contemnor was fined $8,000 for publishing a 16-paragraph article on his blog that attacked certain members of the Judiciary.

23 The AG submitted that the appropriate sentence for Wham was a fine ranging from $10,000 to $15,000, with two to three weeks' imprisonment in default. In contrast, Wham submitted that the appropriate sentence was a fine ranging from $4,000 to $6,000, with one week's imprisonment in default.

24 The Judge sentenced Wham to a fine of $5,000, with one week's imprisonment in default. He found Wham's conduct to be less egregious than that of the contemnor in *Au Wai Pang*. He also took into account: (a) the fact that Wham had submitted that he was a social activist, and that it was not Wham's case that he had little influence through his Facebook profile; (b) Wham's lack of remorse; and (c) Wham's lack of antecedents. The Judge disagreed with the AG that the extent of dissemination of Wham's post was further amplified by his 8 and 9 October 2018 posts (Sentencing Judgment at [30]–[39]).

25 As for Tan, the AG submitted that the appropriate sentence was a term of imprisonment of not less than 15 days, that being the sentence imposed on Tan for a previous instance of scandalising contempt committed in May 2008 (see *Attorney-General v Tan Liang Joo John and others* [2009] 2 SLR(R) 1132). Tan sought a sentence of seven days' imprisonment instead. He accepted that his sentence should be similar to that of Wham, who had sought a fine of $4,000

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to $6,000, with one week's imprisonment in default. On this basis, Tan contended that his imprisonment term, if imposed, should not be for longer than one week. Tan further explained that he was seeking a short custodial sentence instead of a fine primarily because being sentenced to a fine of $2,000 or more would disqualify him from running for election as a Member of Parliament. As Tan was seeking to persuade the court to impose a custodial sentence instead of a fine, he removed his post from his Facebook profile before the Judge delivered his decision on sentence (see [14] above). Tan's counsel made it clear that this change in position had been driven by the consideration that it might put Tan in a "better position to ask the Court for some compassion", and was not conditional upon the court acceding to his request for a custodial sentence instead of a fine. Tan did not dispute in his written submissions that he and Wham were comparably culpable, although he submitted at the sentencing and costs hearing that he was in fact less culpable than Wham.

26 The Judge sentenced Tan too to a fine of $5,000, with one week's imprisonment in default (Sentencing Judgment at [88]–[116]). He considered that the custodial threshold had not been crossed, and that Tan's sentence should be similar to Wham's. While he thought that Tan was less culpable than Wham in this instance because his attack on the Singapore courts was less direct, he was also mindful of the fact that this was not Tan's first conviction for scandalising contempt, although Tan's prior conviction had been for a more egregious instance of scandalising contempt. Further, like Wham, Tan had not evinced any remorse. Finally, the Judge pointed out that while the AG and Tan had both sought a custodial sentence, the court was not bound to impose a custodial sentence simply because both sides submitted that this was appropriate (citing *Stansilas Fabian Kester v Public Prosecutor* [2017] 5 SLR 755 ("*Stansilas*")).

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The Remedies

27 The Judge declined to make an apology order in respect of Wham. He disagreed with the AG that the general approach should be to order a contemnor to publish an apology to purge his contempt if the contemnor was not willing to do so voluntarily. He also considered it premature to lay down, *as a general rule*, the circumstances under which an apology order should be made under s 12(3) of the AJPA because this was the first case involving scandalising contempt under s 3(1)(*a*) of the same. On the facts, the Judge held that it was unnecessary to order Wham to issue an apology, given that Wham's refusal to apologise had already been taken into account in determining the appropriate sentence (Sentencing Judgment at [40]–[51]).

28 The Judge also declined to order a cease-publication injunction against Wham requiring him to remove his post. He rejected the AG's argument that the court should, *as a general rule*, order a contemnor to remove his contemptuous publication to purge his contempt if he failed to do so voluntarily. Again, the Judge considered it premature to rule on the circumstances under which such an injunction should *generally* be issued. On the facts, he was satisfied that such an injunction was unnecessary. This was because Wham's refusal to take down his post had already been considered in determining the appropriate sentence. Moreover, since Wham's post had been published around a year before the date of his sentencing, it would have receded into the background on his Facebook profile (Sentencing Judgment at [52]–[60]).

29 As for Tan, the Judge held that it was unnecessary to issue an apology order against him, and that the question of ordering him to remove his post was moot because he had already done so (Sentencing Judgment at [117]–[118]).

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The issues on appeal

30 CA 99 and CA 108 raise two questions: whether it has been established beyond a reasonable doubt that Wham and Tan are liable for scandalising contempt, and if so, what the appropriate sentences are for each of them. CA 109 and CA 110 raise the question of whether one or both of the Remedies should have been granted by the Judge.

Wham's and Tan's appeals in CA 99 and CA 108

Liability for scandalising contempt

31 Section 3(1)(*a*) of the AJPA provides:

> **Contempt by scandalising court, interfering with administration of justice, etc.**
>
> **3.**—(1) Any person who —
>
> (*a*) scandalises the court by intentionally publishing any matter or doing any act that —
>
> (i) imputes improper motives to or impugns the integrity, propriety or impartiality of any court; and
>
> (ii) poses a risk that public confidence in the administration of justice would be undermined;
>
> …
>
> commits a contempt of court.
>
> *Explanation* 1.—Fair criticism of a court is not contempt by scandalising the court within the meaning of subsection (1)(*a*).
>
> …

The Judge referred to s 3(1)(*a*)(i) as the "first limb" and s 3(1)(*a*)(ii) as the "second limb" of this provision. We will adopt the same terminology in the analysis below.

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The first limb

32 At the hearing before us, counsel for Wham and Tan, Mr Eugene Thuraisingam ("Mr Thuraisingam"), eventually conceded, rightly in our judgment, that the first limb was satisfied in respect of Wham's post. Mr Thuraisingam accepted that Wham's post was contemptuous because its objective interpretation was that the prospects of success in the Malaysian constitutional challenge referred to in the post were better in Malaysia than if the case were heard in Singapore *because Malaysian judges were more likely, in cases with political implications, to decide on the basis of the merits of the case*. In other words, Singapore judges would decide on the basis of something *other than* the merits of the case, and were therefore not independent. In our judgment, there is no other reasonable way to interpret or understand Wham's post, and Mr Thuraisingam was not, in the circumstances, able to advance any viable alternative interpretation.

33 In Mr Thuraisingam's written submissions, in line with the stance anticipated in Wham's 20 January 2020 post, there was an argument that Wham's post was doing no more than making a bare comparison of the independence of the two Judiciaries in question, without casting any aspersions on the independence of the Singapore Judiciary. In other words, an assertion that one Judiciary was less independent than another did not necessarily mean that the former was not objectively independent. Mr Thuraisingam wisely did not advance this contention in his oral arguments because it was patently untenable. Wham's post was a commentary on how he thought *a particular case* would likely be decided *differently* in Malaysia compared to in Singapore *because* it was a case with political implications, and the irresistible conclusion to be drawn is that Wham was saying that the Singapore Judiciary would decide such a case on the basis of something other than its merits. As we have noted,

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Mr Thuraisingam did accept this when it was put to him. An assertion that a Judiciary would decide matters otherwise than in accordance with the merits is self-evidently among the most serious attacks that one can make against courts and the administration of justice. It goes to the very heart and essence of the judicial mission and oath.

34 Given that Wham's post is contemptuous, it is impossible to come to a different view on Tan's post, which obviously affirms the allegation made in Wham's post about the Singapore Judiciary's lack of independence. It matters not that Tan's post might have resulted from an outburst of anger or emotion at the time, or that it *additionally* attacked the AG on top of the Singapore Judiciary (as opposed to attacking the Singapore courts exclusively). None of that changes the analysis, which leads to the inescapable conclusion that Tan's post too is contemptuous.

The second limb

35 Turning to the second limb, co-counsel for Wham, Mr Choo Zheng Xi ("Mr Choo"), submitted that the "risk" test embodied in this limb could not encompass a "remote" or "fanciful" risk. The latter formulation is taken from this court's elucidation of the common law "real risk" test in *Shadrake Alan v Attorney-General* [2011] 3 SLR 778 ("*Shadrake Alan (CA)*") (at [36]). Mr Choo also emphasised that the platform of publication should make all the difference, given that Wham's and Tan's posts had been published on their respective personal Facebook pages, which contained a "mix" of content of varying degrees of levity and gravity.

36 In our judgment, Parliament's intention in replacing the common law "real risk" test with the "risk" test in the second limb was to introduce a test that

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could be applied more expediently and pragmatically. Parliament intended to *pre-empt hair-splitting or fine distinctions* as to the level of risk that had to be established in order to satisfy the test. This was part of a considered policy choice to come out strongly in favour of upholding and protecting the integrity and standing of the Judiciary.

37 The foregoing intention of Parliament may be gleaned from the Minister for Law's speech at the second reading of the Bill that was later enacted as the AJPA. There, the rationale for moving away from the common law "real risk" formulation was explained as follows (see *Singapore Parliamentary Debates, Official Report* (15 August 2016) vol 94 (K Shanmugam, Minister for Law)):

> Weighing the importance of maintaining the sanctity and reputation of the Judiciary, we have decided that it should be contempt if one imputes improper motives, impugns the integrity, propriety or impartiality of a court; and that poses a risk of undermining public confidence in the Judiciary.
>
> ***If one calls a judge a biased swine, then let us not have arguments as to whether he only risked undermining the sanctity of the Judiciary, as opposed to whether he really risked undermining the sanctity of the Judiciary.*** *Our Judiciary is of fundamental importance – I have laid out for you the different factors, and this is a policy call if we want to go this way. It is for us to decide which is the right approach.*
>
> …
>
> Members may say, yes, but why not the current layer of protection as in the common law, which is "real risk"? I have explained why. I want to make sure that the integrity of the Judiciary is pristine. This will give us a strong anchoring in the rule of law which, in itself, is of basic fundamental importance for our people.
>
> [emphasis added in italics and bold italics]

38 Considering Parliament's intention in formulating the second limb as it did, we do not think the proliferation of labels such as "remote", "fanciful", "illusory" or "imaginary" is ultimately helpful. It is clear to us that Parliament

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would not have legislated against risks that, in substance, are non-existent. However one might describe it, a risk may be seen as either objectively existent or objectively non-existent. A risk may be seen as objectively (as opposed to purely theoretically) existent if reasonable people would consider that it bears guarding against; conversely, a risk may be seen as objectively non-existent if reasonable people would not think it needs to be guarded against. We therefore consider that the application of the "risk" test under the second limb should simply be guided by this central question: *Is the risk one that* ***the reasonable person coming across the contemptuous statement would think needs guarding against*** *so as to avoid undermining public confidence in the administration of justice?* In answering this question, both the *content* and the *context* of the alleged contemptuous statement may be relevant. When we put this to counsel in the course of their arguments, Mr Choo and Mr Thuraisingam did not contend that this test was unsuitable, while Mr Mohamed Faizal SC, who appeared for the AG, accepted this as a correct formulation.

39 Turning then to Wham's post, the reasonable person reading it would, in our judgment, conclude that it *does* pose a risk of undermining public confidence in the administration of justice. The content of this post objectively and plainly entails a direct attack on the independence and integrity of Singapore's Judiciary. The question is whether a reasonable person coming across this post in these circumstances would conclude that there is a need to guard against the risk that public confidence in the administration of justice would be undermined as a result. This can only be answered affirmatively. The post was published on Wham's Facebook page under the "Public" setting and was thus accessible to the world at large (not to mention directly to Wham's 7,000-odd followers on Facebook). Wham also held himself out as a commentator of sorts on social affairs and someone who is knowledgeable on

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such matters. While Wham denied this in his affidavit dated 14 June 2018 ("Wham's affidavit"), he in fact intimated in his 8 January 2020 post that he would be "sharing a little on the history of the law [he had] been convicted under, the legal arguments that have been put forth, and why this law is unconstitutional" (see [15] above). This belies his claim that he did not regard or present himself as being knowledgeable in this respect. Mr Choo also accepted at the hearing of these appeals that Wham's post was *not* intended to be "tongue in cheek". In sum, Wham was using his personal Facebook page as a platform from which to broadcast his view – namely, that Singapore judges are not independent when hearing cases with political implications – and having regard to his conduct and his manner of posting, it is clear that he intended his post to be taken seriously. This analysis is not in the least bit affected by the fact that the assertion made in that post is false. There is also no basis at all for thinking that just because the post was published on a Facebook page, that fact made it so fanciful or self-evidently unreliable that no risk of undermining public confidence in the administration of justice arose. Wham himself did not contend that his post was never intended to be taken seriously, or that he had put it on his Facebook page so that it would not be taken seriously.

40 Likewise, the reasonable person reading Tan's post, which essentially affirmed Wham's post even though it also contained additional allegations against the AG, would conclude that it poses a risk of undermining public confidence in the administration of justice. What we have said about Wham's post would largely apply to Tan's post as well. Further, Tan's post could be seen in the news feeds of his 352 Facebook followers and 2,597 Facebook friends (these being the numbers as at 7 May 2018, the date on which OS 537 was filed against Tan), and was similarly published on his Facebook page under the "Public" setting and, hence, accessible to the world at large.

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Fair criticism

41 We agree with the Judge that fair criticism is not made out in respect of either Wham's post or Tan's post since there is no objective or rational basis for both these posts.

42 Wham claimed that his post was informed by his "knowledge of at least three specific case examples where the Malaysian judiciary had adopted a less conservative approach (against the government) than their counterparts in Singapore". These cases ("the Case Pairs") are: (a) the Malaysian Court of Appeal's decision in *Nik Nazmi bin Nik Ahmad v Public Prosecutor* [2014] 4 MLJ 157 ("*Nik Nazmi*") and the Singapore High Court's decision in *Chee Siok Chin and others v Minister for Home Affairs and another* [2006] 1 SLR(R) 582 ("*Chee Siok Chin*"); (b) the Malaysian Court of Appeal's decision in *YB Teresa Kok Suh Sim v Menteri Dalam Negeri, Malaysia, YB Dato' Seri Syed Hamid bin Syed Jaafar Albar & Ors* [2016] 6 MLJ 352 ("*YB Teresa*") and this court's decision in *Chng Suan Tze v Minister for Home Affairs and others and other appeals* [1988] 2 SLR(R) 525 ("*Chng Suan Tze*"); and (c) the Federal Court of Malaysia's decision in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 ("*Semenyih*") and the Singapore High Court's decision in *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 ("*Nagaenthran*").

43 Preliminarily, it is unclear if Wham maintains this argument, which is directed at his *conviction*, as part of his arguments on fair criticism (it has not been suggested to us that Tan is relying on the Case Pairs to argue that his post constituted fair criticism). Nonetheless, it is convenient to deal briefly with this point here since Wham does raise it subsequently in any event in relation to his *sentence*. Wham contends that the Judge did not consider the "highly

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mitigating" factor that his post was "largely based on [his] misunderstanding of … the comparability of three pairs of Malaysia and Singapore cases".

44 We note, first, that it is by no means evident that Wham in fact had the Case Pairs in mind when he prepared his post. The post does not refer to any of the facts or materials that he later cited (including the Case Pairs), which suggests that he belatedly referred to those materials as an afterthought in an effort to bolster his case. Moreover, as the AG pointed out, Wham equivocated between whether he had actually read the Case Pairs or whether he had only read *about* them, and even on which case(s) he was relying on. Wham initially relied on *Nagaenthran*. But when the AG argued at the committal hearing before the Judge that this was impossible because that decision was only delivered a week *after* Wham's post was published, Wham's counsel then pointed to another judgment, *Prabagaran a/l Srivijayan v Public Prosecutor and other matters* [2017] 1 SLR 173, even though that case did not match the description in Wham's affidavit of the case that he had supposedly relied on.

45 Even assuming that Wham had indeed based his view on the Case Pairs, in our judgment, his post would not constitute fair criticism (and, *a fortiori*, would not be a mitigating factor in sentencing). We observe that in so far as Wham asserts that the Case Pairs are comparable, it is incumbent on him to explain *how exactly* that is the case. He failed to do so in his affidavit, and instead simply stated the following:

(a) In relation to *Nik Nazmi* and *Chee Siok Chin*:

> … In my mind, I contrasted [*Nik Nazmi*] with … *Chee Siok Chin* … which in my view was a case in which the Singapore judiciary did not uphold the right to freedom of assembly in our Constitution in as robust a manner.

(b) In relation to *YB Teresa* and *Chng Suan Tze*:

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> … I contrast this judicial approach [in *YB Teresa*] with what I felt was a more conservative judicial approach in *Chng Suan Tze* … where the Court of Appeal held that the detention orders of the Applicants in that case were illegal on a technicality.

(c) In relation to *Semenyih* and a Singapore High Court case which was not identified in his affidavit:

> … The Malaysian judges have, in [*Semenyih*], held that there had been a breach of the separation of powers. In contrast, the Singapore High Court recently held that [the] Misuse of Drugs Act which gives the prosecution sole discretion to decide whether or not to issue a Certificate of Substantive Assistance to a particular accused person, which decision cannot be challenged in court on grounds short of bad faith, did not breach the doctrine of separation of powers. This in my mind, indicates that the Singapore judiciary may be more conservative in deciding whether the other branches of state have breached the Constitution. …

Such bare and *conclusory* assertions do nothing to advance Wham's case on fair criticism.

46 Further, we concur with the Judge's analysis at [100]–[102] of the Liability Judgment as to why the Case Pairs are not comparable. For convenience, we reproduce below that part of his analysis:

> 100 … I find that there is no rational basis for comparing those three Malaysian cases with those three Singapore cases, as Wham submitted, to allege that the courts tend to rule against the government more often in Malaysia than in Singapore. Wham sought to contrast the Malaysian case of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 ("*Semenyih Jaya*") with the Singapore case of *Prabagaran a/l Srivijayan v Public Prosecutor and other matters* [2017] 1 SLR 173 ("*Prabagaran*"). *Semenyih Jaya* was discussing, *inter alia*, the constitutionality of s 40D of the Land Acquisition Act 1960 (Act 486) (M'sia) which empowers assessors sitting with the judge to make the final determination on the amount of compensation for the acquisition of land under the Land Acquisition Act 1960. *Prabagaran* was discussing, *inter alia*, the constitutionality of

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> ss 33B(2)(*b*) and 33B(4) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) which relate to the certification by the Public Prosecutor that an accused person has substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities, and the discretion of the court not to impose the death penalty in certain circumstances. It may be that both cases discussed, amongst other issues, the judicial power of the courts, but they dealt with wholly different subject matters and entirely different legislation.
>
> 101 Wham also sought to contrast the Malaysian case of *YB Teresa Kok Suh Sim v Menteri Dalam Negeri, Malaysia, YB Dato' Seri Syed Hamid bin Syed Jaafar Albar & Ors* [2016] 6 MLJ 352 ("*Teresa Kok*") with the Singapore case of *Chng Suan Tze v Minister for Home Affairs and others and other appeals* [1988] 2 SLR(R) 525 ("*Chng Suan Tze*"). *Teresa Kok* was considering the validity of an arrest and detention made by the police under s 73(1) of the Internal Security Act 1960 (Act 82) (M'sia) (which has since been repealed). *Chng Suan Tze* was considering the legality of detention orders made by the Minister of Home Affairs under s 8(1) of the Internal Security Act (Cap 143, 1985 Rev Ed), and not of arrests and detentions made by the police under the Internal Security Act. These two cases were comparing legal provisions for different facts. … Further, the Singapore Court of Appeal in *Chng Suan Tze* in fact discharged the appellants from custody on a technical ground when finding that the Minister of Home Affairs failed to prove the validity of the detention orders (see *Chng Suan Tze* at [39], [41]). This result does not demonstrate that the courts tend to rule in favour of the government more often in Singapore than in Malaysia.
>
> 102 The third comparison that Wham made was between the Malaysian case of *Nik Nazmi bin Nik Ahmad v Public Prosecutor* [2014] 4 MLJ 157 ("*Nik Nazmi*") and the Singapore case of *Chee Siok Chin* … *Nik Nazmi* concerned an organiser who failed to notify the relevant authority of an assembly within the time required under the Peaceful Assembly Act 2012 (Act 736) (M'sia), while *Chee Siok Chin* concerned applicants who had been holding what they described as a "peaceful protest" when they were, *inter alia*, ordered by the police to disperse because of such conduct. Both cases may have generally discussed the constitutional right of assembly, but they considered vastly different factual matrices and legislative provisions.

47 The point that emerges from this analysis is that there is in fact nothing in the Case Pairs that could reasonably lead one to come to the conclusion that

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Singapore judges, unlike their Malaysian counterparts, are prone to deciding cases with political implications otherwise than in accordance with their merits. That, after all, is the essence of what Wham said about the Singapore Judiciary in his post. In order to show that this comment constituted fair criticism, Wham must, at the minimum, prove that there was at least an objective basis upon which it was reasonably put forward. When one considers the basis put forward by Wham, as the Judge did, it wholly fails to meet this threshold.

48 Accordingly, we affirm Wham's and Tan's convictions for scandalising contempt under s 3(1)(*a*) of the AJPA.

Sentence for scandalising contempt

49 We turn now to the issue of sentence. Under s 12(1)(*a*) of the AJPA, contemnors liable for contempt of court under (amongst other provisions) s 3(1)(*a*) of the AJPA may be punished with a fine of up to $100,000, or with a term of imprisonment of up to three years, or with both. The factors that the court may consider in deciding on the sentence for scandalising contempt at common law (see *Shadrake Alan (CA)* ([35] *supra*) at [147]) remain relevant under s 12(1)(*a*) of the AJPA.

Wham's sentence

50 Mr Thuraisingam, in his written submissions, argued that Wham's sentence of a $5,000 fine, with one week's imprisonment in default, was manifestly excessive, and that the Judge failed to consider several "highly mitigating" factors. First, the AG had not applied to cross-examine Wham on his affidavit evidence that he had never intended to do anything amounting to scandalising contempt. Second, on the day Wham received notice that leave had been granted for an order of committal to be made against him (that is, on

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10 May 2018), Wham published his 10 May 2018 post (see [10] above) explaining what he had been trying to convey in his post of 27 April 2018. Therefore, even if the latter post were contemptuous, Wham had "expeditiously and publicly qualified or corrected it", and this "achieve[d] the same effect as a retraction". Third, it was emphasised that Wham was "a layperson with no legal education or background". His falling afoul of contempt laws arose from his "misunderstanding of court judgments dealing with complex issues of administrative and constitutional law".

51 We do not accept these contentions, and instead affirm Wham's sentence of a $5,000 fine, with one week's imprisonment in default. Wham's assertion that he subjectively did not intend to scandalise the court is ultimately irrelevant. His post was a statement that the Singapore Judiciary is not independent; or, at least, that it is less independent than another country's Judiciary in dealing with cases with political implications, and is prone to deciding such cases otherwise than in accordance with their merits. In this light, his contention that he never *subjectively intended* to denigrate the Singapore Judiciary is belied by the fact that his counsel, when asked directly whether his post meant anything other than what we have set out here, accepted that it did not (see [32] above). As we have already explained, the statement made in Wham's post is among the most serious aspersions that one can cast upon a Judiciary. Wham plainly intended to make that statement and to have it taken seriously. He stood by it, repeated it on several occasions and declined to retract or apologise for it. Moreover, he tried to defend that statement by purportedly comparing some cases which, as we have explained above at [47], were neither legally nor factually comparable. Further, Wham's 10 May 2018 post has no mitigating value for the following reasons. It was not a retraction of Wham's post, but a purported *explanation* that the view expressed in that post was based on several Malaysian cases and a

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book. Thus, its real effect was not to withdraw, retract or even qualify the original attack in Wham's post, but to attempt to justify it. It also repeated, unnecessarily in our view, the contents of Wham's post. In this regard, we also find it relevant that the tenor and contents of Wham's subsequent posts, particular those published on 8 and 20 January 2020, were all of the same ilk. Finally, the fact that Wham is not legally trained is not a mitigating factor. If Wham did indeed truly misunderstand the comparability of the Case Pairs because of his lack of *legal* training, then the highest at which his case can be put is that he made a bald and outrageous assertion without reference to any supporting *facts*. But even this is implausible, given his refusal to apologise even after taking legal advice. Further, his counsel in these appeals has admitted that his post was contemptuous. There is nothing to suggest that any other competent counsel advising Wham at the time would have taken or did take a different view on this point.

Tan's sentence

52 Mr Thuraisingam also submitted that Tan's sentence was manifestly excessive. He contended that the Judge failed to consider the significance of the fact that the AG likewise had not applied to cross-examine Tan on his affidavit evidence. This was allegedly significant because the court would not be in a position to assess, based on Tan's affidavit evidence alone, his state of mind or the relevance of the fact that he had taken down his post after the sentencing and costs hearing on 20 March 2019. At the hearing before us, Mr Thuraisingam emphasised that anyone reading Tan's post would come to the view that Tan had simply been lashing out in anger, and, in particular, that Tan had been upset *with the AG* for taking Wham to court, rather than that Tan had been acting with the primary intention of undermining the Judiciary. Mr Thuraisingam also pointed out that a fine of $2,000 or more would disqualify Tan from contesting

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the upcoming General Election. Tan was hence willing to accept an objectively harsher sentence of several days' imprisonment rather than bear a fine, since disqualification would set in only for imprisonment terms of at least one year and Tan's imprisonment term would not cross that threshold.

53 We do not accept these arguments and instead likewise affirm Tan's sentence of a $5,000 fine, with one week's imprisonment in default. Tan's removal of his post before the Judge delivered his decision on sentence is not a mitigating factor because it does not demonstrate remorse. Tan admitted that he removed his post to put his counsel in a "better position to ask the Court for some compassion" (Sentencing Judgment at [76]; see also [25] above). Further, the post was removed only after the hearing on sentencing and costs on 20 March 2019 – more than five months after Tan's conviction on 9 October 2018. Tan's lack of remorse is further demonstrated by his position that he would not apologise for his post, evidently because he had no intention of scandalising the court. As to this, we reiterate all that we have said at [51] above in relation to the similar argument made by Wham as to his subjective intention. In that light, Mr Thuraisingam's submission that Tan had been reacting in anger when he published his post does not assist Tan's case, because even with the benefit of time, reflection, explanation and access to legal advice, Tan persists in maintaining his position and refuses to apologise.

54 We turn then to deal with the relevance of Tan's potential disqualification from standing in the next General Election if a fine of $2,000 or more were to be imposed on him. Article 45 of the Constitution provides:

> **Disqualifications for membership of Parliament**
>
> **45.**—(1) Subject to this Article, a person shall not be qualified to be a Member of Parliament who —
>
> …

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> (*e*) has been convicted of an offence by a court of law in Singapore or Malaysia and sentenced to imprisonment for a term of not less than one year or to *a fine of not less than $2,000* and has not received a free pardon:
>
> Provided that where the conviction is by a court of law in Malaysia, the person shall not be so disqualified unless the offence is also one which, had it been committed in Singapore, would have been punishable by a court of law in Singapore;
>
> …
>
> (2) The disqualification of a person under clause (1)(*d*) or (*e*) may be removed by the President and shall, if not so removed, cease at the end of 5 years beginning from the date on which the return mentioned in clause (1)(*d*) was required to be lodged or, as the case may be, the date on which the person convicted as mentioned in clause (1)(*e*) was released from custody or the date on which the fine mentioned in clause (1)(*e*) was imposed on such person; and a person shall not be disqualified under clause (1)(*f*) by reason only of anything done by him before he became a citizen of Singapore.
>
> …
>
> [emphasis added]

55 We were not pointed to any precedents where the nature of the sentence was changed from a fine to imprisonment after taking into account the offender's desire to run for electoral office (and the relevance of his potential disqualification from doing so if a particular type of sentence were to be imposed). In considering whether any weight should be given to this factor, we must therefore turn to first principles.

56 The starting point is that the court's task in sentencing is to mete out the *appropriate* punishment, having regard to the gravity of the offence, the culpability of the offender and the offender-specific aggravating and mitigating factors. Against this background, Tan's argument runs contrary to principle in two respects.

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57 First, Tan is seeking a *harsher* sentence than what would be regarded as *appropriate*. Imprisonment is generally regarded as a more severe punishment than payment of a fine, as is manifest from the fact that the custodial threshold is crossed only for more egregious instances of an offence (see, for instance, *Public Prosecutor v Koh Thiam Huat* [2017] 4 SLR 1099 at [63] in relation to the offence of dangerous driving under s 64(1) of the Road Traffic Act (Cap 276, 2004 Rev Ed), and *Public Prosecutor v Lim Yee Hua and another appeal* [2018] 3 SLR 1106 in relation to the offence of road rage violence under s 323 of the Penal Code (Cap 224, 2008 Rev Ed)). There is some precedent for a court imposing a term of imprisonment where a fine would otherwise be appropriate. That is where it is unambiguously clear that the offender is not able to pay a fine and would end up facing a default term of imprisonment (which may be even longer than a specific and intended sentence of imprisonment). In such circumstances, the court should recognise the reality that the offender will inevitably be imprisoned and calibrate the appropriate term of imprisonment from that perspective, instead of from the perspective of an imprisonment term being a penalty for defaulting on payment of a fine. As the High Court stated in *Low Meng Chay v Public Prosecutor* [1993] 1 SLR(R) 46 ("*Low Meng Chay*") at [13]:

> … Default terms of imprisonment are intended to prevent evasion of the payment of fines imposed, not to punish those who are genuinely unable to pay. ***When it is unambiguously clear that a defendant cannot pay a fine, realistic and reasonable though it may be, the fine should not be imposed even though the court would have preferred to impose a fine rather than a short term of imprisonment***. I am aware that it is frequently a difficult matter for the court to decide whether or not a defendant will in truth be unable to come up with the money to pay a fine. In these cases, although the court is not entitled to assume that he will be able to do so, a default sentence may nonetheless be proper. [emphasis added in bold italics]

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58 The considerations in *Low Meng Chay* simply do not apply in Tan's case. *Low Meng Chay* involved a situation where the offender was *demonstrably unable* to pay a fine, such that he would incur a default imprisonment term in any event. There is no suggestion before us that Tan is *unable* to pay a fine – instead, it is simply that he would prefer not to be visited with a fine (to be more precise, with a fine of $2,000 or more) because that could interfere with his aspirations to stand for election as a Member of Parliament.

59 Once that is grasped, the reasoning in *Stansilas* ([26] *supra*) at [110]–[111], where the offender sought – unsuccessfully – to argue for a sentence of a fine instead of imprisonment for the offence of drink driving, becomes apposite:

> 110 The second argument is that an offender should not receive punishment of a certain type or above a certain degree because he will lose his job or face disciplinary proceedings otherwise. The argument is that the imposition of a certain type or degree of punishment will lead to hardship or compromise the offender's future in some way and that this additional hardship may and indeed should be taken into account by the sentencing court. However, this will not often bring the offender very far. Prof Ashworth accounts for the general lack of persuasiveness of such arguments in the following lucid fashion (*Sentencing and Criminal Justice* [(Cambridge University Press, 6th Ed, 2015)] at p 194):
>
> > Is there any merit in this source of mitigation [*ie*, the effect of the crime on the offender's career]? *Once courts begin to adjust sentences for collateral consequences, is this not a step towards the idea of wider social accounting which was rejected above?* In many cases one can argue that these collateral consequences are a concomitant of the professional responsibility which the offender undertook, and therefore that they should not lead to a reduction in sentence because the offender surely knew the implications. *Moreover, there is a discrimination argument here too. If collateral consequences were accepted as a regular mitigating factor, this would operate in favour of members of the professional classes and against 'common thieves' who would either be unemployed or working in jobs where a criminal record is no barrier. It would surely be wrong to*

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> *support a principle which institutionalized discrimination between employed and unemployed offenders.*
>
> 111 Whichever way one looks at it, I do not regard it as relevant to sentencing. ***A person who breaches the criminal law can expect to face the consequences that follow under the criminal law. Whether or not such an offender has already [suffered] or may as a result suffer other professional or contractual consequences should not be relevant to the sentencing court.***
>
> [emphasis added in italics and bold italics]

60 Although *Stansilas* was concerned with *professional or contractual* consequences whereas Tan professes to wish to run for *public* office, we do not consider this to be a relevant distinction. In short, we do not think that different standards apply to offenders engaged in private employment as opposed to those in or seeking public office. As a matter of principle, it cannot be the case that the law would treat, say, a military officer who faces dismissal for being sentenced to a term of imprisonment (as was the case in *Stansilas*) differently from and less favourably than an actual or aspiring Member of Parliament who might face disqualification for being sentenced to a fine of $2,000 or more rather than to a term of imprisonment of less than one year.

61 It is also apposite to note that although the AG's position in the proceedings below was that a custodial sentence should be imposed on Tan (see [25] above), at the hearing before us, the AG clarified that in so far as a fine of $2,000 or more might be alleged to have political implications or repercussions for Tan, the AG was indifferent to whether a fine or an imprisonment term was imposed. What the AG objected to was Tan's submission that he be sentenced to an imprisonment term rather than to a fine in order to suit his own purposes. This objection was not directed at the *substantive outcome* (that is, the sentencing outcome of imprisonment in lieu of a fine), but was instead founded on the *principle* that an offender should not be allowed to choose a particular

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sentence on account of his political aspirations. This objection is well-founded. In *Public Prosecutor v Koh Wen Jie Boaz* [2016] 1 SLR 334, it was observed, in the context of sentencing a youthful offender, that the offender should not be "place[d] in the position where he is able to simply pick and choose the terms on which he would like to be rehabilitated" (at [64]). While CA 108 (Tan's appeal) does not involve a youthful offender or the relevant statutory regime governing the sentencing of such offenders, the same principle applies – Tan should not be allowed to pick and choose the sentence that best suits his own purposes (here, to fulfil his political aspirations).

62 Second, Tan's potential inability to run for electoral office if he were sentenced to a fine of $2,000 or more would be relevant (if at all) as an *overriding public interest consideration* rather than as a mitigating factor *per se*. As the High Court explained in *Public Prosecutor v Tan Fook Sum* [1999] 1 SLR(R) 1022 at [21] in the context of discussing the applicable principles for determining which of several available sentencing options was the appropriate punishment and whether any of those options should be combined (citing Tan Yock Lin, *Criminal Procedure* (Butterworths Asia, 1997) ch VXIII at para 852), the type of sentence to be imposed in a given case is to be determined by the public interest to be protected:

> [W]hat will facilitate more rational and informed sentencing is recognition that there is a dichotomy between public interest and aggravating or mitigating factors. *Generally speaking,* ***only the public interest should affect the type of sentence to be imposed*** *while only aggravating or mitigating circumstances affect the duration or severity of the sentence imposed.* [emphasis added in italics and bold italics]

On this basis, Tan might argue here that it would be in the public interest to promote the democratic process by avoiding a sentence that could result in his being barred from running for public office. For convenient reference, we term

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this the "Democratic Process Argument". Put another way, the Democratic Process Argument rests on the proposition that there would be negative repercussions for the public and the State if there were fewer candidates eligible to run for public office.

63 In our judgment, the Democratic Process Argument does not advance Tan's case very far because what constitutes the public good or public interest is an amorphous concept. Parliament has separately legislated for the conditions that would disqualify a candidate from standing for election as a Member of Parliament, and on this basis, the starting point is that the public interest is served when candidates are allowed to stand for election *only if* they are *not* disqualified under Art 45 of the Constitution. This is because the qualifying conditions set out in Art 44 and the accompanying disqualifications enumerated in Art 45 serve the purpose of sieving out candidates who were deemed by the drafters of the Constitution to be unsuitable to be Members of Parliament. There is also a public interest in ensuring that the law is applied fairly and equally without regard to whether or not an offender has political aspirations.

64 In the final analysis, Tan's argument, which is that he is, in effect, volunteering to take on an apparently harsher sentence in order to avoid being disqualified from standing for election as a Member of Parliament, is flawed for two reasons. First, Parliament has enacted a series of disqualifying conditions for aspiring Members of Parliament, and it would bring the Judiciary and the administration of justice into disrepute if we were to impose sentences with an eye towards the political process. After all, a court that chooses to impose an inappropriate sentence in order to avoid disqualifying a candidate from standing for election as a Member of Parliament could just as easily do the same thing to achieve the opposite end. In truth, both outcomes are equally abhorrent and impermissible. This leads to our second point, which is that the only guide for

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a sentencing court is that it must strive to impose a condign sentence. Ironically, it seems that Tan is inviting us to do the very thing that he and Wham have improperly accused the Judiciary of, namely, to decide his appeal in CA 108 otherwise than in accordance with its merits. We do not condone and will not do that.

65 For these reasons, we hold that Tan's potential disqualification from standing in the next General Election, for five years from the date on which the fine meted out by the Judge was imposed unless he obtains a presidential pardon (see Art 45(2) of the Constitution), is not a relevant factor in sentencing. We therefore affirm the Judge's imposition of a fine of $5,000, with one week's imprisonment in default.

Costs

66 Wham and Tan also appealed against the Judge's order of costs against them. It was submitted on their behalf that no costs should have been ordered against them even if they did not succeed in their defence because they were exercising their "legal right to defend themselves against a committal order carrying penal consequences". Alternatively, it was contended that costs should have been fixed at no more than $2,000 including disbursements, taking into consideration the following:

(a) Wham and Tan had not disputed the *mens rea* of the offence;

(b) the three affidavits filed in the course of the proceedings below were relatively short; and

(c) some of the work done for Wham's and Tan's respective cases overlapped.

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67 The AG, on the other hand, contended that it was appropriate to order costs against Wham and Tan. The AG argued that since committal proceedings were brought by way of civil proceedings under s 26(1) of the AJPA, the general principle that costs follow the event should stand. Wham's and Tan's argument that costs should not be ordered against them since they were exercising their legal right to defend themselves against a committal order bearing penal consequences misunderstood and conflated the different statutory regimes provided for in the Criminal Procedure Code (Cap 68, 2012 Rev Ed) and the AJPA.

68 We are not persuaded by the AG's line of argument regarding the civil nature of committal proceedings, given that such proceedings are very much criminal in nature. In keeping with this, in *Li Shengwu v The Attorney-General* [2019] SGCA 20, this court held that the modern law of contempt does not purport to attach such weight to the classification of civil and criminal contempt as would justify their different juridical treatment (at [82]). The differences between the two categories of contempt have considerably narrowed to the point that they are virtually indistinguishable in three material aspects: (a) the process by which committal proceedings for both categories of contempt are initiated; (b) the applicable standard of proof in both civil and criminal contempt; and (c) the penal consequences that apply to both civil and criminal contempt (at [59]–[61]).

69 Instead, we turn to the statutory language and case law for guidance. Section 26(3) of the AJPA provides for the court's exercise of discretion in awarding costs as it thinks fit in contempt proceedings. It is part of settled jurisprudence that the Singapore courts have consistently ordered costs in favour of the successful party in cases of scandalising contempt: see *Au Wai Pang* ([22] *supra*) at [55] and *Shadrake Alan (CA)* ([35] *supra*) at [157]. No

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cause for deviating from the general rule was provided by Wham and Tan. In our judgment, the Judge correctly ordered them to each pay costs of $5,000 and disbursements to the AG. The arguments which they furnished failed to demonstrate that the quantum of costs and disbursements ordered by the Judge was excessive.

70 We therefore find Wham's and Tan's appeals to be without merit as well where the issue of costs is concerned, and accordingly dismiss CA 99 and CA 108 in their entirety.

The AG's appeals in CA 109 and CA 110

The apology order

71 We turn to the AG's appeals in CA 109 and CA 110. The AG sought an apology order, submitting that this would address the risk posed to public confidence in the Judiciary and the rule of law by: (a) securing an acknowledgement of wrongdoing from the contemnor; (b) signalling to the public that a wrong had been committed and that the contemnor had to change his behaviour (which would help to deter future contemnors); and (c) counteracting the effect of the contemptuous conduct in the public sphere. It was said that an apology order would serve the corrective and educative purposes that advanced the aims of prohibiting scandalising contempt. Indeed, the AG submitted, because the purpose of an apology order was to signal that a wrong had been committed, the starting point in scandalising contempt cases should be to order the contemnor to apologise if he refused to do so voluntarily ("the Presumptive Approach").

72 The AG further submitted that the Judge erred in relying on the reasons that he gave for refusing to make an apology order against Wham. Just because

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the lack of an apology had already been taken into account in sentencing, this did not, in and of itself, render an apology order redundant. The relevance of a voluntary apology in the context of sentencing was to assess whether the offender was remorseful. The relevance of a mandated apology, on the other hand, was to signal the contemnor's wrongdoing. Moreover, contrary to the Judge's view, it would not be meaningless to compel an unwilling contemnor to apologise. Compulsion was only made necessary by the offender's intransigence, but if the contemnor's unwillingness to apologise would preclude an apology from being ordered, then logically, there would never be a case for *ordering* one. Yet, the AG contended, Parliament surely did not legislate in vain, and it had provided the courts with the power to make an apology order.

73 It was argued on behalf of Wham and Tan, on the other hand, that the Judge correctly exercised his discretion not to order them to publish an apology. In support of this argument, Wham and Tan essentially relied on the reasons that the Judge gave.

74 Apologies have been granted as remedies in various contexts, including in defamation cases and anti-discrimination litigation (regarding the latter, see Gijs van Dijck, "The Ordered Apology" (2014) 37 Oxford Journal of Legal Studies 562 ("van Dijck") at 563). Apologies may serve some or all of these purposes:

> (a) Signalling, educative or corrective: An apology may signal a wrong or reprehensibility to the public, which is informed about the fact that the wrongdoer had to change his behaviour. In some cases, this may lead to the affirmation or redefinition of social norms (van Dijck at 574).

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(b) Rehabilitative: "Compelled apologies could create opportunities for the sort of moral reflection that triggers personal transformation – or at least a kind of behavior modification – and thereby reduces recidivism" (Nick Smith, "Against Court-Ordered Apologies" (2013) 16 New Criminal Law Review 1 ("Smith") at 27).

(c) Retributive: This refers to "the inherent value of humiliation as a counterweight on the scales of justice … [offenders] deserve to suffer the negative emotions associated with [apology] rituals" [emphasis in original omitted] (Smith at 9).

(d) Deterrence: An ordered apology may serve both specific and general deterrence, presumably because of the unpleasant experience of having to apologise and increased public consciousness of this (Smith at 37; van Dijck at 574).

75 We agree with the AG that an apology order under the AJPA may primarily serve signalling, educative and corrective functions, although we accept that retribution and deterrence may also be relevant depending on the circumstances of the case and whether the sentence is seen from the viewpoint only of the contemnor or also of the wider public (see further [76] below). However, we disagree that the Presumptive Approach is the correct one. The importance of the signalling function of an apology order does not justify adopting this approach simply because it is *not* in every case that a signal *needs* to be sent to the public. Indeed, in our judgment, the inflexibility of this approach would unnecessarily restrict the court's discretion to choose from the range of available remedies. Moreover, an insincere apology made under compulsion can have the opposite effect of diminishing the standing of the Judiciary.

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76 In our judgment, a mandated apology should only be considered in *exceptional circumstances*, where the content of the contempt and the conduct of the contemnor are so egregious that the imposition of the ordinary punishments (meaning a fine and/or imprisonment) does not suffice. In such cases, even the insincerity underlying a court-ordered apology might be eclipsed by the sentencing considerations of retribution and deterrence (see above at [74(c)] and [74(d)]). Wham's and Tan's cases do not fall within this category, and we consider that the sentences meted out by the Judge on them are sufficient, leaving aside the question of whether a cease-publication injunction should be granted. The latter engages concerns different from those listed at [74] above, which we turn now to address.

The cease-publication injunction

77 The AG submitted that in addition to an apology order, a cease-publication injunction under s 9(*d*) of the AJPA should be ordered in any case, and that the Judge erred in holding that this was unnecessary because Wham's post had been online for about a year by the time he was sentenced on 29 April 2019 and would have receded into the background with the passage of time. On the contrary, the AG contended, online posts had an enduring quality that made them prone to being republished or circulated. Unless Wham's post was deleted or removed from his Facebook profile, it would continue to be disseminated (which would be the case whenever it was "liked", "shared" or commented upon on Facebook), and would therefore constitute *continuing* publication. Further, considering the continuing harm to the public interest so long as a contemptuous publication remained accessible, contemnors such as Wham should generally be ordered to cease further publication unless there were exceptional circumstances or unless doing so might result in significant hardship. The AG also argued that Wham had evinced a tendency to repeat his contemptuous

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conduct by publishing several further posts that republished the contemptuous content of his post of 27 April 2018, which substantially amplified the extent of dissemination. In respect of Tan, the AG argued that even though Tan had removed his post after the hearing on sentencing and costs, sufficient grounds existed at the time of argument in the proceedings below to restrain Tan from further publication, and a cease-publication injunction should likewise be issued against him as a matter of principle.

78 At the hearing before us, Mr Thuraisingam accepted that there was no reason not to grant an order that Wham was not to *repeat* the contemptuous statement contained in his post. But, he submitted, that was different from a takedown order, which would be an attempt to "erase history". This was unnecessary given that old Facebook posts would "fade away", as the Judge observed. Further, the fact that the AG did not seek to take down Wham's post earlier amounted to a concession that there was no imminent harm.

79 Although the AG framed the relief sought as a simple cease-publication injunction, we observe that depending on whether or not the publication in question is a continuing one, a cease-publication injunction may operate differently. If the publication is not a continuing one, a cease-publication injunction would simply require the contemnor to *desist* from future publication and this would suffice. Conversely, if the publication is a continuing or ongoing one, a cease-publication injunction may also entail a directive to *take down* the offending publication.

80 Having regard to the nature of Facebook posts, we are satisfied that Wham's post is a continuing publication. Material continues to be published for the entire time that it remains available on the Internet. As long as a Facebook post is not taken down, it can be continually disseminated (such as when any

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person "likes", "shares" or comments on it) *in the sense of* ***actively resurfacing*** *in the news feed of another individual.* This is because the algorithm that produces an individual's news feed is sensitive to the activity of his Facebook friends and his "followed" persons or pages. As explained in a printout from Facebook exhibited in Wham's affidavit:

> What kinds of post will I see in News Feed?
>
> Posts that you see in your News Feed are meant to keep you connected to the people, places and things that you care about, starting with your friends and family.
>
> Posts that you see first are influenced by your connections and activity on Facebook. The number of comments, likes and reactions a post receives and what kind of story it is (example: photo, video, status update) can also make it more likely to appear higher up in your News Feed.
>
> Posts that you might see first include:
>
> - A friend or family member commenting on or liking another friend's photo or status update.
> - A person reacting to a post from a publisher that a friend has shared.
> - Multiple people replying to each other's comments on a video they watched or an article they read in News Feed.
>
> …

We note that Wham's 8 October 2018 post garnered 170 reactions, 22 comments and 62 "shares" on Facebook in five days, and his 9 October 2018 post, 227 reactions, 32 comments and 72 "shares" in four days. The 9 October 2018 post also "tagged" Tan in the post, meaning that it would appear again on Tan's Facebook page as well. Wham's 8 January 2020 post garnered 135 reactions, 22 comments and 15 "shares" on Facebook in nine days, and his 20 January 2020 post, 82 reactions, 9 comments and 14 "shares" in two days.

81 In our judgment, there is generally no justification for permitting the continued existence or posting of a statement that has already been found to be

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contemptuous. Accordingly, the issue in each case is *whether there are good reasons to favour the status quo and leave the contemptuous statement in existence*. The court should consider all the relevant circumstances in this regard, including, for instance:

(a) the technical feasibility of removing the contemptuous statement; and

(b) whether the contemptuous statement has already faded from the public consciousness, such that the issuance of a cease-publication injunction would only breathe new life into a falsehood that has in truth died a natural death.

82 In this case, we are satisfied that there are no good reasons for leaving Wham's post online on Facebook. There is no suggestion that taking down the post would be disproportionately costly or technically difficult. Nor has the contemptuous statement contained in that post faded from the public consciousness; on the contrary, it was repeatedly referred to by Wham in his 8 and 20 January 2020 posts, and would have appeared in the news feeds of his Facebook followers and members of the public who accessed his Facebook page. Accordingly, we allow CA 109 in part by granting a cease-publication injunction in respect of Wham to require him both to *desist* from future publication of his post of 27 April 2018 and to *take down* that post (see [79] above).

83 We dismiss CA 110 and hold that a cease-publication injunction is not necessary in respect of Tan. Tan's post was removed after the hearing on sentencing and costs, and the AG has not sufficiently demonstrated Tan's propensity to repeat his offending conduct.

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Conclusion

84 For the foregoing reasons, we dismiss Wham's and Tan's appeals in CA 99 and CA 108, dismiss the AG's appeal in CA 110, and allow in part the AG's appeal in CA 109 in so far as we grant a cease-publication injunction in respect of Wham.

85 Unless the parties are able to come to an agreement on costs, they are to furnish written submissions, limited to five pages each and to be filed within 14 days of the date of this judgment, on the appropriate costs orders that they each contend we should make.

Sundaresh Menon Chief Justice	Andrew Phang Boon Leong Judge of Appeal	Judith Prakash Judge of Appeal

Tay Yong Kwang Judge of Appeal	Steven Chong Judge of Appeal

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