

PERSPECTIVES ON SENTENCING

I. Welcome and Introduction

1 A very good morning to all of you.

2 I was invited to speak at this conference in April this year, while I was still the Attorney-General and the Public Prosecutor. The two years I spent in that office were among the most challenging and fulfilling of my career, and I returned to the Bench in July with a fuller and better appreciation of the complexity of the role in our legal system.

3 Today, I would like to share some thoughts on the sentencing process seen through the eyes of my experience as the Public Prosecutor. I will speak on three specific facets of the sentencing process from the prosecutorial perspective. First, in relation to the gatekeeping function of the Public Prosecutor in bringing criminal cases before the court. Second, the duty and responsibility of the Public Prosecutor to submit on sentence. Third, the Public Prosecutor's duty in bringing timely and appropriate appeals. I will end with a brief word on the handling of juvenile offenders in the criminal justice system, a topic which the learned Chief Justice alluded to briefly in his keynote address yesterday.

II. The Public Prosecutor as the Gatekeeper

4 First, the Public Prosecutor as a gatekeeper.

5 It is the Public Prosecutor who puts a case into the system. He has the discretion to commence, or discontinue, any criminal proceeding. Lord Simon famously said in 1925 that "there is no greater nonsense talked about the Attorney-General's duty than the suggestion that in all cases the Attorney-General ought to decide to prosecute merely because he thinks there is what the lawyers call a case."¹ In addition to assessing evidential sufficiency, it is the role of the Prosecutor to

¹ Quoted by Lord Hope, quoting Viscount Dilhorne's observations in *Smedleys Ltd v Breed* [1974] AC 839, in *R (Purdy) v Director of Public Prosecutions* [2010] 1 AC 345 at [44].

assess what the public interest requires.² The public interest will not always be in favour of prosecution, even if the evidential hurdle is crossed, and it is the responsibility of the Public Prosecutor to sieve out such cases from the Court system and indeed, during my term in office, I had occasion to do so.

6 Assessing the public interest in a prosecution should be done on a consistent basis. Like cases must be treated alike, and conversely, unlike cases must not be treated alike. But the charging decision, like the sentencing decision, is not a mathematical exercise. Deciding what factors are relevant to each case, and then weighing them up depends, to an extent, on personal convictions about what justice requires from the perspective of the larger society, the victim, and also the person accused of an offence. This is part and parcel of the decision making process.

7 As the Public Prosecutor, I believed, and I continue to believe, that charging decisions would be better informed by internal prosecutorial guidelines for serious and prevalent offences highlighting to prosecutors the key factors which should be taken into account. One of those factors was the outcome to be sought if a conviction was obtained. Having been a Judge prior to my appointment as the AG and Public Prosecutor, I obviously appreciated that in Singapore, the sentencing function is purely a judicial one, constitutionally and in practice. However, I took the view that it would be unrealistic, and wrong, for prosecutors to exercise their discretion without regard to the outcome of the case if a conviction were obtained. Notions about what sentences are appropriate for particular offences, are therefore an integral part of the exercise of prosecutorial discretion. Sentencing considerations are not downstream issues which only come into play after a conviction is obtained – they must be addressed upstream. While in the office of the Public Prosecutor, I pushed for the development of more comprehensive internal prosecutorial guidelines, which examined cases holistically, including sentencing issues.

8 How the process plays out in practice, however, is a complex and iterative “sentencing loop”, which to my mind, has not been adequately examined. The loop is iterative in part because the information available to the prosecutor is limited at the time the decision is made, and typically becomes more substantive as the case

² *Ramalingam Ravinthran v AG* [2012] 2 SLR 49 at [53]

unfolds. The prosecutor must always be ready to change his views, based on representations made by the defence, or as a result of fresh evidence or developments that unfold in the course of court proceedings. The loop is also iterative from another, broader, perspective. For the prosecutor, sentencing considerations are parasitic, or perhaps “symbiotic” is a better word, on the development of judicial sentencing guidelines, and also the evolution of the sentencing options put in place by the Legislature, and available to judges. A prosecutor obviously cannot ignore judicial sentencing guidelines (although the extent to which he is bound by them is an interesting conceptual question). Neither can he ignore the range of available sentences – in some cases, the range may be restrictive or none at all for mandatory sentences, in other cases, very wide. There is therefore a broader iterative process at play, which involves not only prosecutors, defence lawyers and judges, but also policy makers who decide what sentences ought to be applicable for each offence.

9 As I said earlier, I think the “sentencing loop”, as I have called it, is an area which would benefit from more research and study. For today, I would make 2 observations. First, sentencing philosophy, policy and practice, is an extremely important and critical part of the criminal justice process – it is by sentencing outcomes that the public at large judge the entire criminal justice system. Few laypersons have the time or aptitude to read court judgments or academic books, and even so, may have difficulty understanding the technicalities involved. The sentence a person is given is the end product of the system – it represents the collective wisdom and values of the prosecutor, defence and the judge. All stakeholders therefore have a duty to make the process more refined, and better tailored for the goals of justice.

10 My second observation is that in this area, we must always be conscious of developments in other jurisdictions, but at the same time, bear in mind the unique circumstances of Singapore. Singapore faces some unique threats to law and order, which are constantly evolving. We must be prepared to take decisive steps to deal with them. We are a small country – with little room for disruption. We must never let serious crime take a foothold, as was the case in the early years of our nationhood.

11 One small, but significant example of how prosecutors can work with the judiciary to calibrate sentences to respond to specific threats is the spate of “Theft on Board Aircraft” or “TOBA” offences, which started a few years ago. This was a trend which I identified when I took office as A-G in 2012. From 2011 to 2012, the number of reported cases of thefts committed on board Singapore-registered aircrafts³ rose from 1 case to 43 cases. This further rose to 57 cases in 2013. In response to this crime trend, the Prosecution decided in 2012 to initiate prosecution even in cases where the value of the items was negligible, in order to send a deterrent message to potential offenders that, when detected, the likelihood of being convicted and punished is high. The prosecutions as a percentage of the total number of reported cases rose from 47% in 2012 to 83% in 2013.

12 Having noticed the trend, I gave specific instructions for the Prosecution to seek stiffer sentences. This led the then Senior District Judge See Kee Oon to issue written grounds of decision in the case of *PP v Yue Liangfu*.⁴ He agreed with the Prosecution that the starting point for such offences should be 9 months’ imprisonment. Previously the sentences ranged from 3 to 10 weeks. He was of the view that a clear message needed to be sent that such offences will be punished with substantial imprisonment terms and that there was a need to emphasise both specific and general deterrence given the increasing prevalence of such offences which were easy to commit but difficult to detect.⁵ This set a new benchmark for such cases.

13 Some of you may be asking whether this move was actually effective. As part of the Prosecution’s review of its position, AGC recently conducted a study based on data and investigations of resolved cases from the Singapore Police Force in the period 2011 to 2014, in order to ascertain the impact of the increase in prosecutions and sentence on the incidence of such thefts. What we found was a large percentage decrease in the number of TOBA offences. 2014 saw a reversal of the

³ Under article 1(2) of the Convention on Offences and Certain Other Acts Committed On Board Aircraft, the Convention only applies in respect of offences committed or acts done by a person on board any aircraft registered in a Contracting State, while that aircraft is in flight or on the surface of the high seas or of any other area outside the territory of any State.

⁴ Brief grounds in MAC 4821/2013.

⁵ Paragraph 12 of the GD.

upward trend of thefts on board aircrafts. At its peak, there were 57 cases in 2013. By 2014, this number had dropped to 16, a 72% decrease. I should add that I also took steps to curtail this trend by informing my counterpart in China. The offenders predominantly came from Henan Province and those who have been recruited to commit thefts on board aircrafts may well be unaware of the strict enforcement and stiff sentence for such offences in Singapore.

III. The Public Prosecutor's duty and responsibility to submit on sentence

14 It has been the practice in our courts that a prosecutor can submit on sentence where necessary and appropriate. Over time, the practice has evolved, partly in tandem with developments in other jurisdictions, and partly in response to the needs of our own criminal justice system. This was not always the case. As a Judge, I had observed on some occasions that some prosecutors' submission on sentence was simply to leave it to the discretion of the sentencing judge. While I can understand that this stance was typically the result of some understanding with the defence counsel, I did not think it was particularly helpful to the sentencing judge. It would require the judge to do his own getting up which may well result in inconsistency in sentencing if the relevant precedents were not brought to his attention. Some judges also do seem to look to the prosecutor for assistance in identifying sentencing precedents, and possible relevant factors. Under my watch, prosecutors were required to address the courts on sentence. Even in cases where no specific sentence is being sought, I would expect the prosecutors to assist the sentencing judge with the range of sentences from similar cases.

15 What, then, should be the appropriate range or content of submissions which the Public Prosecutor should make? This is a difficult question, which other jurisdictions are still grappling with. The answer depends principally on how we understand the role of the Public Prosecutor *vis-à-vis* the Judge. The fact that the criminal justice system is adversarial may wrongly suggest that the Public Prosecutor's role is primarily as a counter-weight to the defence, pushing for a higher sentence to "balance out" the mitigated sentence put forward by the defence. On this

view, the Judge's role is to settle on some quantum "in between", which will satisfy all parties and accordingly, immunise the decision from appeal.

16 Obviously, this is not the right approach to take. Unlike in civil cases, the prosecutor considers the public interest in deciding on what the appropriate sentence is, which requires the prosecutor to consider things from the perspective of the offender himself, the victim, and the wider community. These may not be mutually exclusive interests. An example is in the area of restoration and rehabilitation after sentence is passed, a topic which received illuminating treatment from the three speakers at yesterday afternoon's session. The rehabilitation and subsequent re-integration of an offender into society is not merely a question of rehabilitating the offender for his own good. Receiving the offender back as a contributing member of society has a wider community dimension. A real example exists right across from the State Courts with the 'Breakthrough café', set up to allow ex-offenders to contribute to their immediate community. The consideration of whether a sentence is unduly crushing takes into account whether the length of sentence is appropriate to allow later re-integration of the offender into society. This is part of the public interest and it is accordingly an important consideration which the prosecutor must take into account when deciding what submission on sentence to make.

17 Having said that, one aim of punishment is retribution for the wrong, and it is therefore important also to factor this into sentencing. Being dispassionate does not mean ignoring the nature of the wrong done, and the impact on the victim and others affected by the crime. It is not the duty of the Public Prosecutor to represent the victim's interests, but the victim's interests are special indicia of the harm that has resulted from the offence.

18 The meting out of a sentence which is too lenient may also have knock-on effects on future offences of a similar nature. Future victims may be less inclined to report a similar offence in future, thinking that the process of making a report and going through the trauma of a trial may not, in the end, make any appreciable difference.

19 At the same time, the circumstances of the offence and the offender may reflect a lower level of culpability than is proportionate to the subjective harm that the victim feels that he or she has suffered. There will be circumstances after the offence which can affect sentence but which do not diminish the suffering of the victim. The courts in Singapore recognise as mitigating factors the remorse of the offender, his willingness to plead guilty at the earliest opportunity and, in the specific case of a long term of imprisonment, the age of the offender.⁶ A failure to consider these mitigating factors in deciding on an appropriate sentence is also a failure to consider the public interest in according a certain value to remorse, repentance and rehabilitation.

20 The Public Prosecutor's duty in sentencing is accordingly unique. It does not stand in opposition to the defence, but is similar to the exercise of prosecutorial discretion in charging. The need to provide a properly balanced submission on sentence was recently the subject of comment in the case of *Ghazali bin Mohamed Rasul v Public Prosecutor*.⁷ In that case, Judicial Commissioner See Kee Oon observed that the prosecutor for the Council of Estate Agencies had unjustifiably pressed for a deterrent custodial sentence. He commented that "the Prosecution, no less than defence counsel, stand as officers of the court, and have an obligation to make submission that are fair, measured and in the public interest, but always with due regard to the circumstances of the case."⁸ I entirely agree.

21 The need to consider the public interest presents certain challenges in deciding the submission on sentence. Where does the Public Prosecutor's duty end and the judicial function begin? This issue was considered by Justice of Appeal Buchanan of the Supreme Court of Victoria in the case of *R v MacNeil-Brown*.⁹ The issue there was how a sentencing judge's discretion may be guided by prosecution submissions. Buchanan JA observed that to expect the prosecution to give an opinion on the exact range of appropriate sentences would be to "enlist counsel as a surrogate judge".¹⁰ This was quoted with approval in the case of *Barbaro v the*

⁶ *PP v UI* [2008] 4 SLR(R) 500 at [78], recently quoted in *Yap Ah Lai v PP* at [86].

⁷ [2014] SGHC 150.

⁸ At paragraph 77.

⁹ [2008] VSCA 190.

¹⁰ At paragraph 128.

Queen, where the High Court of Australia held that the prosecution would form a view reflecting the interests it is bound to advance, and that view “is not, and cannot be, dispassionate.”¹¹ We do not subscribe to this position in Singapore. The difference in approach may well be cultural rather than jurisprudential. As Public Prosecutor, my duty was to uphold the public interest. The Public Prosecutor has no dog in the race, so to speak. It is not such a dissimilar exercise when it comes to sentencing. The obligation to provide, as See Kee Oon JC so aptly put it, “submissions that are fair, measured and in the public interest” requires dispassion and the Prosecution is able to make such dispassionate assessments.

22 I do not think that prosecutors making detailed submissions on sentence is a usurpation of the judicial function. Prosecutors make submissions on sentence as officers of the court, in order to assist the court. It is the court’s responsibility to consider the full range of submissions of the prosecution and the defence, and pass what it considers to be an appropriate sentence. Where appropriate, the court can and should reject submissions from the Public Prosecutor. I am confident that the local judiciary is robust enough not to merely substitute the opinion of the Public Prosecutor for its own. I speak from personal experience both as the Public Prosecutor and a Judge.

23 However, the High Court’s view expressed in *Barbaro* has given me food for thought. I think certainly this is an area which again would benefit from further study, reflection, and dialogue between the various stakeholders.

24 At a broader level, the Public Prosecutor is uniquely placed to have a big picture view of public interest considerations which apply to a particular offence. Whereas the sentencing judge only deals with the specific case before him, the Public Prosecutor is able to make a wider submission on the value to the community of a sentence which is higher or lower than the norm in offences of that nature. The wider value to the community of a specific sentence was considered by the learned Chief Justice in *Edwin s/o Suse Nathen v Public Prosecutor*. In paying more

¹¹ [2014] HCA 2 at paragraph 32.

attention to the more recent sentencing precedents submitted by the Prosecution, he said:

The gravity of an offence under s 67(1) should be assessed in the light of the presently prevailing traffic environment and driving habits of the public. This is entirely appropriate because sentencing is a tool by which the imperatives of the criminal justice system can be achieved in a manner that is sensitive and responsive to the realities affecting society.¹²

25 Indeed, the Public Prosecutor's duty, in my view, is to assess the realities affecting society, and if necessary, bring them to the attention of the court. The Public Prosecutor is at once independent, and yet works closely with law enforcement agencies, and therefore has an understanding of operational issues and concerns in a way which is often not possible for the courts.

26 One of the key issues for me, in terms of sentencing, was when to ask for deterrent sentences. As with all my predecessors, I recognised the gravity of asking for a higher benchmark for the general purpose of deterring crime, and the consequent impact on the individual offender before the court, and others who would come after. The demands of deterrence also mean different things in different contexts. For road traffic offences, for example, deterrence may better be achieved by a period of disqualification rather than a nominal custodial term, even though the latter may be considered the "stiffer" sentence. In the same vein, the former Chief Justice Chan Sek Keong opined, in *Yang Suan Piau Steven v Public Prosecutor*,¹³ that a heavy fine may sufficiently deter economic offences which are not of a serious nature, and that general deterrence will not, in every case, result in a custodial term.

27 In general, I took the view that deterrent sentences, used in the strict sense, should only be sought where there was sufficient data on offending trends to justify this (as in the TOBA cases), and only after careful consideration. Further, deterrent sentences cannot be excessive, and must be what is necessary to send the right signal, no more. I intend to continue to hold true to these principles as a judge.

¹² [2013] 4 SLR 1139, at paragraph 21.

¹³ [2013] 1 SLR 809 at [33] and [34].

IV. The Public Prosecutor's duty in bringing appeals

28 The responsibility of the Public Prosecutor does not end when the sentence is passed. The third area I would like to explore today is the Public Prosecutor's duty in bringing appeals.

29 The decision to appeal must not be an emotional nor instinctive exercise. The principles upon which appeals against sentence should be allowed by the courts are set out in the Criminal Procedure Code [Section 394] – in short where they are manifestly inadequate or excessive. From the prosecution perspective, a manifestly inadequate sentence has repercussions on other cases. This is particularly so where it is unclear what the reasons are behind a sentence which departs from the usual precedents or which is unusually low. An inadequate (and inappropriate) sentence which goes uncorrected on appeal produces inequality for those who have been appropriately sentenced. This may be seen as unjust. In the case of *Public Prosecutor v Tan Cheng Yew*,¹⁴ the Public Prosecutor cross-appealed against a sentence of 9 years' for cheating offences, a sentence which was not very much more than other cases involving much smaller sums. This was not only unjust to other offenders who had been appropriately sentenced, but also waters down the deterrent effect of those previous sentences. The appellate judge agreed with the Prosecution that the trial judge "failed to give sufficient weight to the aggravating factors and the need for general deterrence in the public interest... [and that] the overall sentence did not reflect the overall gravity of [the offender's] fraudulent conduct."¹⁵ He accordingly enhanced the sentence to 12 years' imprisonment.

30 Bringing such appeals boosts public confidence in the authority of the courts and administration of justice by ensuring consistency of sentences and ensuring that low sentences which may outrage public feelings are adjusted to reflect the culpability of the offender and the seriousness of the offence.

31 For the wider public, the Public Prosecutor's failure to appeal against an inadequate sentence may also result in the premature release of an offender who is

¹⁴ [2013] 1 SLR 1095.

¹⁵ At paragraph 184.

a menace to society. Cases of preventive detention are prime examples of this. The Public Prosecutor, in *Public Prosecutor v Roslin bin Yassin*,¹⁶ brought an appeal against a sentence of 12 years' preventive detention for an offender who was convicted of eight charges, including cheating, criminal breach of trust and culpable homicide. One of the grounds was manifest inadequacy, particularly in light of the fact that the principle underlying preventive detention was the protection of the public. The second ground was that the trial judge had erred in taking into account the offender's period of remand in deciding to impose a lower sentence of preventive detention.

32 This appeal was thus important not only to ensure protection of the public, but also to seek guidance from the court on the right principles to consider when passing a sentence of preventive detention. Both of these purposes were achieved in bringing this appeal. In relation to the second ground of appeal, the Court of Appeal clarified that in serious cases featuring habitual offenders (which are the norm in cases of preventive detention), the court should not consider taking into account the time the offender has spent in remand. In relation to the first ground, the Court of Appeal enhanced the sentence of 12 years to the maximum 20 years' preventive detention, having considered that there was a high possibility of re-offending and that the offender had refused to take personal responsibility for the fact that his dishonesty offences had escalated into the taking of a human life.

33 In bringing this appeal, the Public Prosecutor was able to raise for consideration the interests of the community and potential future victims of the offender. In so doing, guidance was also obtained for the prosecution and the lower courts.

34 The Public Prosecutor has a duty to consider whether an appeal would be of assistance to the lower courts and the prosecution. So, in the well known case of *Public Prosecutor v Ng Boon Gay*,¹⁷ a decision was taken not to appeal against the acquittal. When the judgment came out, it was clear that the determining factors for the acquittal were entirely factual. The prosecution's principal witness had also been

¹⁶ [2013] 2 SLR 831.
¹⁷ [2013] SGDC 132.

seriously discredited. There were no factual grounds for an appeal. There would also be little practical assistance to the prosecution or lower courts for similar cases given the fact intensive nature of that case. It may have been an appropriate emotional response to lodge an appeal, but that is not the role of the Public Prosecutor in appeals. The Public Prosecutor must dispassionately consider what the utility and purpose of any possible appeal is. In the case of *Ng Boon Gay*, this led to a decision not to appeal.

35 Where the accused person has brought the appeal, the Public Prosecutor must also perform a similar balancing exercise in deciding how that appeal should be dealt with. There will be occasions when the Public Prosecutor can take the view that the public interest will be served by a lower sentence than that originally meted out by a lower court. One recent example is the case of *Hii Ung Hung v Public Prosecutor*.¹⁸ This was an appeal against a sentence of three months' imprisonment imposed on a 29-year-old Malaysian man for evasion of excise duty and Goods and Services Tax on duty unpaid cigarettes of assorted brands. The appellant sought to have the sentence of imprisonment substituted with a commensurate fine on the ground that at the time of his plea of guilt, he did not inform his family members of his predicament nor did he seek their assistance. However, now that they had been apprised of the case, the appellant's family indicated that they were willing to assist the appellant in paying the appropriate fines. The Prosecution, instead of strenuously defending the three-month imprisonment term, highlighted the appropriate ranges for fines to be imposed and the situations in which such fines were imposed. A staunch defence of the sentence imposed may not always be the most helpful submission for the Prosecution to make and that is something that the Public Prosecutor takes into account when deciding what position to take on appeal.

36 Where appropriate, the Public Prosecutor also has a duty to bring to the Court of Appeal specific issues of law which will have an impact on prosecution and court practice. For cases originating in State Courts, this is usually done via a criminal reference.

¹⁸ MA 9009 of 2014

37 One case that comes to mind is the recent decision of the Court of Appeal in *PP v Henry Teo Chu Ha* involving the former director of Seagate Technology. A Criminal Reference was filed following the reversal of his conviction by the High Court. The Court of Appeal clarified that contrary to the decision of the High Court, the prosecution has no burden to prove that the payment by the accused for the shares in a company through which the kickbacks were channelled was a sham. As a consequence his original sentence of 6 months imprisonment was restored. This was an important decision as it has wide implication on sophisticated acts of corruption.

38 Another such case is the case of *PP v Jali bin Mohd Yunos*.¹⁹ This was a criminal reference before the Court of Appeal, which is still pending judgment. For that reason, I am not able to comment substantively on it, but will outline the key issue at stake – namely, the difference between the meaning of “rash” and “negligent” in relation to road traffic offences. Broadly speaking, current case law advocates the subjective approach to “rashness”, which is in line with past local and Indian authorities: *ie*, if the offender did not know or perceive of the risk at the time, he cannot be said to have been “rash”. This means that in most cases, although not all, the benchmark sentence of a fine for “negligent” driving would be applied where the prosecution could not prove a subjective appreciation of risk. This is despite the fact that, from the point of view of safety of the general public, a failure to appreciate risk on the roads may sometimes have more serious consequences than advertent risk-taking. From a prosecutorial perspective, this was not a satisfactory position, and the DPP who argued the case asked the court to reconsider the established law. This was an argument on a matter of principle, to address a broader issue, not with only the specific case in mind.

39 During my term as PP, I also appealed against sentence in a case of negligent driving - *PP v Hue An Li*,²⁰ to address a broader sentencing issue. This was a case under s 304A(b) of the Penal Code, and related to drivers who fall asleep at the wheel. This case concerned an accused person who had worked a gruelling

¹⁹ CR 4 of 2013 – Note: This was a reference brought by the Defence relating to the facts of the case, but the CA substantially changed the question to relate to “rash” and “negligent” acts in the context of driving offences.

²⁰ [2014] SGHC 171.

12 hour shift and had, just after 7 in the morning, gotten behind the wheel of her car. She failed to exercise proper control of her car while trying to overtake a lorry, and her car veered to the left, hitting the rear of the lorry and putting it into a tailspin. The lorry then flipped over onto its right side, and all nine passengers seated in the rear cabin were thrown out of the vehicle. One of the passengers was pronounced dead at the scene of the accident. Another passenger was paralysed from the waist down. And still another was hospitalised for four weeks. The driver admitted in mitigation that she must have dozed off while driving, and was sentenced to a fine of \$10,000 and 5 years' disqualification from driving.

40 The Prosecution appealed to the High Court²¹ against the sentence on the ground that the appropriate sentence should be a custodial term, and not a fine, highlighting the dangers of drivers who took the wheel when sleep deprived. After hearing the arguments, the Court allowed the appeal and increased the sentence of a fine to 4 weeks' imprisonment. The Grounds of Decision was released very recently. It is significant in many respects, the most material being the court's ruling that the starting point for sentencing in a s 304A(b) traffic death case is a brief period of incarceration for up to four weeks. The court was however quick to add that it does not follow that a sentence of imprisonment will be imposed in every s 304A(b) traffic death case. The court must examine all the circumstances of each individual case, in particular the aggravating and/or mitigating factors to determine the gravity of the particular offender's conduct before deciding on the appropriate sentence. The decision is also significant in that it jettisoned any doubt for sleepy driver cases that the prosecution is required to prove that the accused person in all likelihood knew that he would fall asleep while driving. Quite apart from the immense difficulty to discharge such a burden, if it could be discharged in extremely rare situations, speaking for myself, I would have charged that person with a far more serious offence than s 304A(b).

²¹ This was the first Magistrate's Appeal heard by a 3-judge coram.

V. A brief word on young offenders

41 I would like to end with a brief word on the treatment of young offenders. The choice of a sentence in the case of young offenders is driven predominantly by rehabilitation objectives. Some of these concerns are addressed at the charging stage – through the use of diversionary programmes such as the Guidance Programme which ensure that cases are dealt with appropriately outside the court system. Within the court system, it is not uncommon for judges to consider primarily probation or reformatory training, if the offence is not too serious and there is a prospect of rehabilitation. There is an additional set of parties involved in this process – the probation and RTC officers, who make recommendations, and follow them through. The focus of the parties that produce the probation and RTC report is invariably on the individual offender and his circumstances. Much less attention by these important stakeholders, and naturally so, to other public policy concerns related to the commission of that offence, including considerations relating to the criminal justice system as a whole.

42 It is the responsibility of the Public Prosecutor to raise public policy concerns in order to avoid the impression that the sentencing process for young offenders is exempt from wider justice considerations. Youth alone is not a reason for ignoring the perspectives of the victim or potential victims, or the community at large.

43 The Public Prosecutor may take the position that reformatory training is a more appropriate sentence than that of probation. This position is not always accepted by the court and the Public Prosecutor has a duty to appeal to put forward the alternative sentencing principles which may not be served by a sentence of probation.

44 The difficulty with such appeals is that the Prosecution must apply for a stay in order to prevent any prejudice to the appeal. Whether or not a stay is granted depends on the judge. Inconsistency in the decision of whether or not to grant a stay has an inevitable knock-on effect on consistency of sentence. In the case of *Public*

Prosecutor v Adith s/o Sarvotham,²² the offender was a 17-year-old convicted of three serious charges under the Misuse of Drugs Act: the cultivation of cannabis plants, the consumption of cannabinol derivatives and the trafficking of heroin, with four further drug charges taken into consideration. Two of the three proceeded charges carried a heavy minimum sentence – 3 years for the cultivation offence and 5 years for the trafficking offence. The Prosecution submitted for a sentence of reformatory training. The offender was instead sentenced to probation.

45 The Public Prosecutor brought an appeal against the decision of the District Judge on the ground that the sentence of probation was wrong in principle and that, given the serious nature of the offences, a sentence of reformatory training should have been imposed instead. In order to preserve the prosecution's interest in the appeal, the DPP applied for a stay of execution, but the stay was not granted. The appeal came up for hearing 6 months later.

46 The learned Chief Justice agreed with the Prosecution that the District Judge had erred in imposing a sentence of probation as probation and reformatory training functioned "equally well to advance the dominant principle of rehabilitation" and would "undoubtedly represent a better balance between the need for rehabilitation and deterrence."²³

47 However, he declined to allow the appeal as the offender had served a period of almost six months on probation, with moderate to good progress and had already fulfilled his obligations under the 240-hour community service order. To have reversed the District Judge's decision would prejudice the offender by effectively punishing him twice for the same offence. Similar appeal outcomes were reached whenever stay of sentence was not granted. I was aware that the practice of the State Courts on stay of sentence pending appeal was not entirely consistent. If left unchecked, it would mean that the fate of the prosecution's appeal against such sentences would effectively depend on whether stay is granted by the State Courts. This was plainly unsatisfactory. I recognised that as the PP, I have a role to play in bringing such inconsistency to the attention of the court and in seeking the

²² [2014] SGHC 103.

²³ At paragraph 21.

publication of written grounds. Accordingly at my suggestion, the prosecution wrote in to request the Chief Justice to issue written grounds to provide useful guidance to both the lower courts and the Bar. The Chief Justice helpfully laid down guiding principles in situations where the Prosecution's appeal is not against acquittal but against sentence that entails some loss of liberty, and where the Prosecution was seeking a stay of execution to prevent the convicted person from commencing to serve his sentence before the appeal hearing. I can do no better than to quote from his judgment:

In such circumstances, the court hearing a stay application should primarily be concerned with ensuring that the Prosecution's appeal is not prejudiced while weighing this against the comparative prejudice, if any, that is suffered by the convicted person in having to await the outcome of the appeal before commencing his sentence. Prejudice in the latter context will not readily be apparent but I do not mean to shut the door to matters that might conceivably be raised. Any legitimate concern the offender might have should be weighed against *the legitimate interest of the Prosecution in having the sentence reviewed and finally settled by the appellate court.* [emphasis added]

48 Indeed, the Public Prosecutor does not only have a legitimate interest in the review of inappropriate sentences, it has a duty throughout the sentencing process to consider the full range of factors demanded by the public interest and to maintain its position throughout the sentencing process and through to appeal. This will include considering the impact of any potential stays of execution.

49 The Public Prosecutor's duties do not change depending on the age of the offender or on the type of sentences that are available. It is intimately tied to a responsible exercise of Prosecutorial discretion and starts from the moment the Public Prosecutor decides to put the case into the system.

VI. Conclusion

50 The relationship between the different stakeholders in the sentencing process is a constantly evolving one. It would benefit from a clearer elucidation of the roles of the different parties and in particular, of the role of the Public Prosecutor. I commend the efforts made in this conference to encourage and facilitate a better understanding of the role that each stakeholder plays, and I hope that such efforts will continue, and I would be happy to contribute in any way I can.

51 On that note, I wish all of you a productive second day at this conference.

Thank you.

Steven Chong
Judge
Supreme Court
10 October 2014

Speech delivered by Justice Steven Chong²⁴ at the State Courts Sentencing Conference 2014

²⁴ I would like to record my appreciation to DPP Ailene Chou for her assistance in the preparation of this address.