Changes to Sentencing Guidelines for Workplace Negligence[*]

Mao Xuezhong v Public Prosecutor [2020] SGHC 99

I. Introduction

1 In recent years, the higher courts have been issuing more sentencing guidelines to ensure the consistency of sentences being meted out to offenders.[1] In *Mao Xuezhong v Public Prosecutor ("**Mao Xuezhong**"*), a three-Judge coram of the High Court issued a new sentencing guideline for offences under s 15(3A) of the Workplace Safety and Health Act ("**WSHA**"):[2]

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

2 This case is significant as the High Court departed from the previous sentencing guideline for s 15(3A) of the WSHA as set out by Chan Seng Onn J in *Nurun Novi Saydur Rahman v Public Prosecutor* ("***Nurun Novi***") just one and a half years earlier.[3]

3 Briefly, the *Nurun Novi* framework consists of two stages. First, the court determines the starting point for sentencing based on the offender's culpability and the potential of harm resulting from the offender's act.[4] Second, the sentence is adjusted in accordance with the relevant aggravating and mitigating factors.[5] This framework was represented in the form of a table:[6]

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[1] Benny Tan Zhi Peng, "Assessing the Effectiveness of Sentencing Guideline Judgments in Singapore issued post-march 2013 and a Guide to Constructing Frameworks" (2018) 30 SAcLJ 1004 at [1] and [17]; See also Selina Lum, "Increase in sentencing guidelines set recently", *The Straits Times* (14 September 2017) <https://www.straitstimes.com/singapore/increase-in-sentencing-guidelines-set-recently> (accessed 10 June 2020).

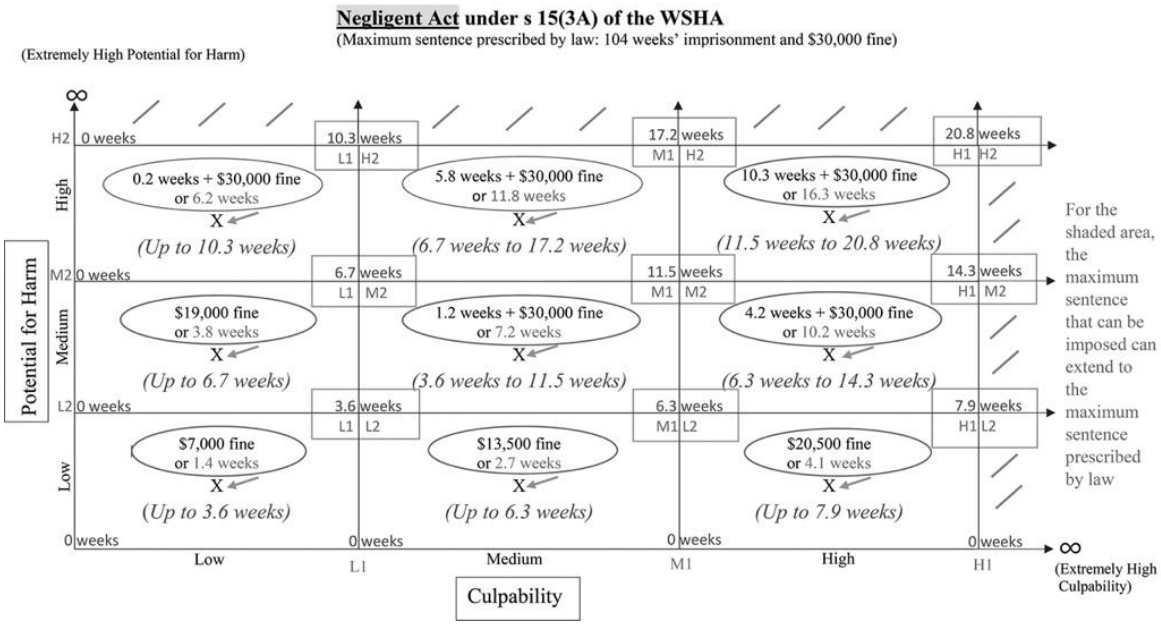
[2] Workplace Safety and Health Act (Cap 354A, 2009 Rev Ed) ("WSHA").

[3] *Nurun Novi Saydur Rahman v Public Prosecutor* [2019] 3 SLR 413 ("*Nurun Novi*"). See Victoria Ang, "Sentencing Approach for Workplace Safety Breaches: Nurun Novi Saydur Rahman v Public Prosecutor [2019] 3 SLR 413", *SMU Lexicon* (25 June 2019) <https://smulexicon.com/tag/workplace-safety/> (accessed 30 August 2020).

[4] *Nurun Novi* at [76]

[5] *Nurun Novi* at [76].

[6] *Nurun Novi* at [92].



4 This table is subdivided into three broad bands of low, medium and high potential for harm and culpability which leads to a breakdown of nine boxes. This categorization was similarly utilized in the new sentencing guidelines set out in *Mao Xuezhong* as shown below:[7]

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

5 The most important difference between the two sets of guidelines lies in the prescribed length of sentences and the quantum of fines. Under this new sentencing framework, the length of sentences recommended under each band is higher than that stipulated under the *Nurun Novi* framework.

7 *Mao Xuezhong* at [64].

6 For instance, the maximum term of imprisonment for an offence that has both high potential for harm and culpability would see an increase from approximately 5 months (20.8 weeks) to 24 months under the new guideline. This is an increase of almost 20 months from the sentence under *Nurun Novi*.

7 This difference in sentences and fines has some important implications. In this paper, we first discuss the issues that arose on appeal. We then examine, in detail, criticisms that the High Court had concerning the *Nurun Novi* framework and the newly proposed sentencing guideline that was laid down in response. This paper concludes with some observations in respect of the significance and bearing that *Mao Xuezhong* may have on future cases concerning the sentencing for offences under both s 15(3A) as well as s 15(3) of the WSHA which deals with reckless acts.

II. Facts

8 The Appellant, Mao Xuezhong (**"**Mao"), was the formwork supervisor of a construction site and was responsible for deploying workers and assigning them work.[8] On 20 January 2014, under Mao's supervision of the lifting of Aluma formworks ("table forms"), Md Mastagir Aminur ("the deceased") fell from a table form and succumbed to his injuries four days later.[9]

9 At trial, it was found that as part of lifting works, the deceased and his co-worker, Khan Alam ("Khan"), had to descend atop a table form that was situated at the edge of the fourth floor and which protruded halfway out of the building.[10] Mao had instructed the workers to adopt this method in previous lifting operations as well.[11] The table form in question weighed approximately 1,170kg and rested on rollers.[12]

10 At the material time, the deceased's safety harness was not secured to an anchorage point despite Khan's reminders.[13] Consequently, when the table form abruptly tilted downwards, the deceased slid off and fell one storey below onto a vehicle ramp where he sustained the fatal injuries.[14]

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8 *Mao Xuezhong* at [6].
9 *Mao Xuezhong* at [7] and [12].
10 *Mao Xuezhong* at [8] and [9].
11 *Mao Xuezhong* at [13].
12 *Mao Xuezhong* at [8].
13 *Mao Xuezhong* at [11].
14 *Mao Xuezhong* at [12].

III. District Court's Judgment

11 Mao was tried in the District Court for performing a negligent act which endangered the safety of others. He was charged under s 15(3A) of the WSHA for:[15]

> (a) Instructing Khan and the deceased to descend onto the top of the table form when it was unsafe to do so; and
>
> (b) Failing to ensure that the deceased had anchored his safety harness before he descended onto the top of the table form.

For such an offence, the maximum punishment prescribed is a fine not exceeding $30,000, or imprisonment for a term not exceeding 2 years, or both.[16]

12 The trial judge, finding himself bound by the sentencing framework elucidated by the High Court in *Nurun Nov*i, sentenced Mao to 24 weeks' imprisonment.[17]

13 Both Mao and the Prosecution appealed against the sentence, with Mao also appealing against his conviction. The Prosecution further argued for a reconsideration of the WSHA sentencing framework for offences under s 15(3A).[18] Significantly, all parties in this appeal, *viz* the prosecution, appellant and the *amicus curiae*, expressed similar reservations about adopting the *Norun Novi* sentencing guidelines.[19]

IV. High Court's Judgment

14 The High Court dismissed Mao's appeal against his conviction.

15 First, Mao attempted to dispute the fact that he was present when the accident occurred.[20] However, the High Court found "material inconsistencies"[21] in his statements. Instead, it found Khan to be a credible witness. Khan's testimony showed that Mao had been present at the material time just before the accident occurred, and that Mao had instructed the deceased and Khan to descend atop the table form.[22]

16 Second, Mao also disputed that he was negligent, arguing that the accident would not have occurred if not for an interruption that occurred during the lifting works (when the lifting crane was called away), which led to the absence of workers on the fourth floor

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15 *Mao Xuezhong* at [1].
16 WSHA s 15(3A).
17 *Mao Xuezhong* at [3].
18 *Mao Xuezhong* at [3]-[4].
19 *Mao Xuezhong* at [48].
20 *Mao Xuezhong* at [26].
21 *Mao Xuezhong* at [35].
22 *Mao Xuezhong* at [37].

to secure the table form.[23] However, the High Court disagreed, holding that this did not excuse Mao's negligence in ordering the deceased's descent without first ensuring that his harness had been anchored. Mao was responsible for doing so as the supervisor.[24]

17 Third, Mao argued that his actions were not "without reasonable cause" within the meaning of s 15(3A) of the WSHA, as it was purportedly the company's practice for workers to descend atop table forms while doing lifting works. The High Court disagreed, noting that in *Nurun Novi*, Chan J concluded from the available materials that Parliament could not have intended that a superior's order could amount to reasonable cause under s 15(3A) of the WSHA, as this would have the effect of reducing the scope of persons responsible for workplace safety.[25]

18 Lastly, Mao contended that the delay of more than three years[26] in prosecution had prejudiced his case since he was unable to get witnesses or rely on the now missing photographs that were taken on the day of the accident to support his claims that he had not been present at the scene of the accident at the material time (and hence had not given the instruction to descend onto the table form). [27] However, the High Court also rejected this argument, since there was nothing to suggest that the witnesses in question would have testified in favour of Mao had they been able to do so.[28] Further, the photographs that were taken after the accident had occurred could not support Mao's claim that he had not been at the scene before or during the accident.[29]

19 Mao's appeal against conviction was accordingly dismissed.[30]

V. Declining to follow the previous sentencing guideline in *Nurun Novi*

20 Two concepts were used by the *Nurun Novi* court to establish its sentencing guidelines. First, it established a notional conversion rate which converted imprisonment terms to fines. Second, it established a 10:5:2 ratio, representing the sentences to be meted out for intentional, reckless and negligent acts, respectively, for a particular offence.[31] To illustrate: an accused who intentionally caused hurt in the workplace would receive five times the punishment as another who merely caused hurt negligently. However, the High Court in *Mao Xuezhong* found both concepts to be problematic.

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23 *Mao Xuezhong* at [38].
24 *Mao Xuezhong* at [38].
25 *Nurun Novi* at [58].
26 *Mao Xuezhong* at [42].
27 *Mao Xuezhong* at [41].
28 *Mao Xuezhong* at [43].
29 *Mao Xuezhong* at [43].
30 *Mao Xuezhong* at [43].
31 *Nurun Novi* at [100].

A. Notional conversion rate

21 Under the *Nurun Novi* framework, the sentences of fines and imprisonment were set to be interchangeable, with a notional conversion rate of one week's imprisonment being convertible to a fine of $5,000. However, in *Mao Xuezhong*, the High Court found this to be "difficult to justify in principle,"[32] since fines and imprisonment are qualitatively different, with imprisonment being generally regarded as a more severe punishment than a fine.[33]

B. Sentencing norms under the Penal Code are inapplicable to the WSHA

22 In *Nurun Novi*, Chan J relied on the 10:5:2 ratio and ascertained the notional upper limit for negligent acts under s 15(3A) of the WSHA to be 20.8 weeks' imprisonment.[34] This ratio could be traced to Chan J's earlier judgement in *Abdul Ghani v Public Prosecutor ("**Abdul Ghani**")*. There, Chan J surveyed the length of imprisonment terms provided by several statutes such as the CSDA[35] and the Penal Code.[36] He then observed that there was a general trend of a 50%-60% reduction in the maximum sentence for a reckless offence as compared with an intentional offence, and a further 50%-60% reduction for a negligent act as compared with a reckless offence.[37] Accordingly, he derived the 10:5:2 ratio.

23 However, the High Court in *Mao Xuezhong* saw little, if any, purpose or logic in applying the general sentencing norms for a CSDA offence to a WSHA offence given that they were "vastly different statutes".[38] Further, the court also opined that it was inappropriate to compare the WSHA to the Penal Code as the latter provided caning as a form of punishment but not the former.[39] To the High Court, it was simply futile to draw comparisons in an attempt to decipher Parliament's intention in dealing with different types of *mens rea* for the various offences under each act, as they would all serve different objectives.

24 Given the above, the High Court declined to endorse the *Nurun Novi* sentencing guidelines insofar as s 15(3A) of the WSHA was concerned.[40]

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32 *Mao Xuezhong* at [55].
33 *Mao Xuezhong* at [55].
34 *Nurun Novi* at [100].
35 Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) ("CDSA") s 59.
36 Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code") s 304A.
37 *Abdul Ghani* at [106].
38 *Mao Xuezhong* at [59].
39 *Mao Xuezhong* at [59].
40 *Mao Xuezhong* at [61].

VI. The new sentencing guidelines

25 Instead, the High Court considered a more appropriate sentencing framework for offences under s 15(3A) of the WSHA, bearing in mind that sentencing guidelines are:

(a) Aimed at deriving sentences that are just and broadly consistent in cases that are broadly similar;[41]

(b) Not meant to yield a mathematically perfect graph identifying a precise point for the sentencing court to arrive at in each case. Rather, they were meant to guide the court towards the appropriate sentence in each case using a broadly consistent methodology;[42] and

(c) Meant to be applied as a matter of common sense in the light of the foregoing observations.[43]

26 Based on the above framework, the main issue that the High Court then had to decide was whether the potential for harm or the offender's culpability should be given greater weight in the sentencing framework.

27 In *Nurun Novi*, Chan J opined that the potential for harm should be given greater weight than the offender's culpability.[44] This was supported by the Prosecution in the present case who argued that the WSHA was enacted to "deter risk-taking behaviour and goes beyond situations where actual harm took place".[45]

28 Ultimately, the High Court held that Parliamentary materials showed that *both* harm and culpability were equally important considerations.[46] It then provided the following two-step sentencing framework:[47]

(a) First, the levels of harm and culpability must be established to derive a starting sentence. For harm, both actual and potential harm are to be taken into account, in terms of their seriousness. For culpability, the factors to be considered include the number of unsafe acts committed, and whether the offender intended to save on costs such that safety was compromised.

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41 *Mao Xuezhong* at [62] citing *Mohd Akebal s/o Ghulam Jilani v Public Prosecutor* [2020] 1 SLR 266 ("*Mohd Akebal*") at [20].

42 *Ibid*.

43 *Ibid*.

44 *Nurun Novi* at [90].

45 *Mao Xuezhong* at [65]. See also *Mao Xuezhong* at [66] where the *amicus curiae* for the present case submitted that the offender's culpability should be emphasised as he was of the opinion that WSHA sought to address the culpable creation of risk in workplaces.

46 *Mao Xuezhong* at [67].

47 *Mao Xuezhong* at [64].

(b) Second, the starting sentence will be adjusted after taking into consideration aggravating and mitigating factors that are specific to the offender, and which have not been taken into account in step one.

A. Application of the new sentencing guidelines

29 Applying the new sentencing guidelines, the High Court found that this case evinced *both* a high degree of harm and culpability:

(a) There was a high degree of harm because:[48]

i. The risk was high: the workers were instructed to descend from a high height without being provided with the appropriate safety equipment, *viz* a lifeline. A fall from that height would undoubtedly lead to severe injury or even death.

ii. The likelihood of harm was high: the workers were in a precarious position as they were no safety barricades and the table form, weighing more than 1,000kg, was on rollers and protruded partially from the building.

iii. Actual significant harm was caused: the deceased suffered fatal injuries from the fall from the table form.

(b) Mao's culpability was high:[49]

i. First, he had instructed the workers to perform the works in a dangerous manner and had even refused to provide a lifeline despite knowing the risks involved.

ii. Second, this negligent act was a sustained practice and not an isolated incident.

iii. Third, Mao had continued with this dangerous practice although he knew about a safer method for lifting works. Granted, this dangerous practice was not started by Mao. However, as the formwork supervisor, he was in a position of seniority to suggest changes.

30 The High Court then considered offender-specific aggravating and mitigating factors. Aggravating factors included Mao's lack of remorse and evasiveness at trial. Conversely, one mitigating factor in his favour was the unexplained delay of more than three and a half years before he was informed that he would be charged. Mao was sentenced to a 12-month imprisonment term, which was the minimum term at the high harm, high culpability sentencing band.[50]

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48 *Mao Xuezhong* at [69].
49 *Mao Xuezhong* at [70].
50 *Mao Xuezhong* at [72]-[74].

VII. Observations

A. Increase in sentencing benchmark for offences under s 15(3A) of the WSHA

31 First, it is clear that under this new sentencing framework, sentences for each band of workplace negligence under s 15(3A) of the WSHA have increased in severity or duration.

32 To illustrate, as compared with Chan J's framework in *Nurun Novi*, the maximum fine under the "medium harm, low culpability" band has increased from $19,000 to $30,000, while the maximum term of imprisonment under the "medium harm, medium culpability" band has more than doubled from 11.5 weeks to 24 weeks.

33 However, it is worth noting that while the High Court provided reasons as to why the *Nurun Novi* framework should not be followed, it neither explained why there was a need to further increase the sentences, even though the *Nurun Novi* framework had already considered the need for increased sentencing to fully utilize the sentencing range that is statutorily provided,[51] nor provided an explanation of how it had derived or formulated the increment in sentences under this new framework.

B. Implications for offences under s 15(3) of the WSHA

34 In *Nurun Novi*, notwithstanding that it was a case concerning an offence under s 15(3A) of the same, Chan J also set out sentencing guidelines with respect to s 15(3) of the WSHA. Section 15(3) provides:

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

35 In the present case, although the High Court did not disturb Chan J's sentencing guidelines for s 15(3) of the WSHA, it is apparent that it would similarly not have approved of them. This is because in deriving his sentencing guidelines for s 15(3) of the WSHA, Chan J had similarly utilized the notional conversion rate and the 10:5:2 ratio. As mentioned above,[52] the main reasons why the High Court departed from Chan J's s 15(3A) sentencing benchmark was because it held that fines and imprisonment terms should not be treated as interchangeable, and that the rationale underpinning the 10:5:2 ratio was flawed as vastly different statutes should not be compared.

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51 *Nurun Novi* at [68].
52 See [20]-[24] of this paper.

36 Accordingly, a future court is unlikely to follow Chan J's sentencing guidelines in respect of s 15(3) of the WSHA as set out in *Nurun Novi*. In any event, they were issued in *obiter* and therefore not binding on a lower court.

C. Scope of applicability of the sentencing framework

37 The court in *Mao Xuezhong* also stated that the newly proposed sentencing framework is to be applied to a first-time offender who claims trial to a charge under s 15(3A) of the WSHA.[53] A question remains as to whether this framework was intended to be applicable *only* to first-time offenders. However, this is unlikely to be the case given that an offender's antecedents may simply be factored in as an aggravating factor under the second step of the framework. Regardless, this remains as a possible point of contention that may arise in future cases.

D. Departed from but not overruled

38 Notably, both the present case and *Nurun Novi* are decisions made at the High Court level. Accordingly, since only the Court of Appeal may overrule High Court authority,[54] the High Court could only depart from but not overrule *Nurun Novi*'s sentencing framework.

39 Nonetheless, it is likely that the sentencing framework pronounced by the High Court in this case will be followed in the future given that a three-Judge coram is essentially a "*de facto* Court of Appeal" and "its decision should generally represent a final and authoritative determination of the issues arising from the case". [55] However, under exceptional circumstances, the Court of Appeal will depart from a decision made by a three-Judge coram.[56]

VIII. Conclusion

40 In all, this new sentencing framework may be said to be a reflection of the court's attempt to bridge the gap between the legislative intent behind the WSHA and sentences that were meted out in past cases. The establishment of sentencing guidelines essentially aim to ensure a more consistent and justifiable process of sentencing, and accordingly, such attempts to do so are to be welcomed.

41 However, it is worth reiterating that sentencing guidelines are ultimately, simply guidelines. Judges still retain the discretion to adjust individual sentences, or even

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53 *Mao Xuezhong* at [64].
54 *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 ("*Lam Leng Hung*") at [58].
55 *Lam Leng Hung* at [56].
56 *Lam Leng Hung* at [58].

decline to apply a sentencing benchmark altogether in the name of fairness and justice. Sentencing is after all an art. Retaining a measure of discretion is still necessary to give due weight to the nuances and peculiarities of each case.
