

## Sentencing Approach for Workplace Safety Breaches:

*Nurun Novi Saydur Rahman v Public Prosecutor* [2019] 3 SLR 413<sup>1</sup>

### I. Introduction

1. The recent case of *Nurun Novi Saydur Rahman v Public Prosecutor*<sup>2</sup> was the first time an offence under s 15(3A) of the Workplace Safety and Health Act (“WSHA”) had been brought before the Singapore High Court.<sup>3</sup> Section 15(3A) states that any person who conducts a negligent act, without reasonable cause, that endangers the safety or health of any individual in a workplace, could be liable for a fine not exceeding \$30,000 or an imprisonment term not exceeding 2 years, or both.<sup>4</sup>
2. The WSHA was enacted to deter risk-taking behaviour in the workplace, so as to protect workers and members of the public.<sup>5</sup> This would be achieved by imposing sufficiently high penalties for non-compliance.<sup>6</sup> Ultimately, Parliament intended to effect a “cultural change” by expanding the liability to ensure that all stakeholders would be held responsible for workplace safety.<sup>7</sup>
3. In *Nurun*, the High Court first explored whether and why the existing sentencing practice under the WSHA ought to be reviewed. The High Court then introduced a new two-stage framework to be applied to cases relating to s 15(3A) of the WSHA and applied it to the facts of the case at hand.<sup>8</sup>
4. This paper will examine the rationale and implications of the proposed sentencing framework in *Nurun* for offences under s 15(3A) of the WSHA. It will first set out Justice Chan’s

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<sup>2</sup> [2019] 3 SLR 413 (“*Nurun*”).

<sup>3</sup> *Nurun*, *supra* n 2, at [60].

<sup>4</sup> Under s 5 of the WSHA, “workplace” is defined as any premises where a person is at work or is to work, for the time being works, or customarily works, and includes a factory.

<sup>5</sup> *Nurun*, *supra* n 2, at [72].

<sup>6</sup> *Id.*, at [73].

<sup>7</sup> *Id.*, at [58].

<sup>8</sup> *Id.*, at [65].

sentencing approach and explain how it was applied in the present case. It will then compare the framework with precedent cases and discuss the utility of the new sentencing table for such offences. It is submitted that the framework better utilises the full sentencing range, while promoting coherence and consistency. However, even though this is a commendable effort to improve the past sentencing process, the author further submits that the approach still possesses innate limitations.

## **II. Material facts**

5. Nurun, a construction foreman, instructed his subordinates to move an air compressor onto a loading platform at the edge of the seventh floor of a building.<sup>9</sup> However, the loading platform was not properly installed and was suspended by a tower crane instead.<sup>10</sup> As a result, the loading platform was slanted away from the tower, with the portion outside the tower tilted lower than the portion within the tower.<sup>11</sup> Furthermore, the workers were neither wearing safety harnesses nor anchored safely to prevent falls from height.<sup>12</sup> This was in breach of a whole slew of safety regulations.<sup>13</sup> Nonetheless, even though several workers expressed concerns, Nurun insisted they continue.<sup>14</sup> The workers complied.<sup>15</sup>
6. When the air compressor was moved onto the loading platform, it rolled away from the building.<sup>16</sup> Two workers, who stood in the path of the air compressor, could not move away in time.<sup>17</sup> They fell seven floors to their deaths.<sup>18</sup>

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<sup>9</sup> *Id.*, at [1].

<sup>10</sup> *Id.*, at [9].

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Id.*, at [1].

<sup>14</sup> *Id.*, at [13].

<sup>15</sup> *Ibid.*

<sup>16</sup> *Id.*, at [9].

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

**A. District Court ruling**

7. The District Court convicted Nurun under s 15(3A) of the WSHA, for instructing workers under his charge to load the air compressor onto the loading platform when it was unsafe to do so.<sup>19</sup> He was sentenced to a \$15,000 fine.<sup>20</sup> Nurun appealed against both the conviction and sentence, while the Prosecution cross-appealed against the sentence.<sup>21</sup>

**III. Sentencing Framework**

8. Justice Chan proposed a two-stage sentencing approach for offences under s 15(3A) of the WSHA. In the first stage, a starting sentence is derived based on potential for harm and culpability.<sup>22</sup> In the second stage, the sentence is adjusted based on aggravating and mitigating factors.<sup>23</sup>

**A. First stage**

9. In the first stage, the starting point for the sentence is assessed based on the potential for harm and culpability.<sup>24</sup> They are two principal factual elements present in all s 15(3A) offences.<sup>25</sup>
10. Factors to be considered in assessing the potential for harm include the seriousness of the harm risked, likelihood of that harm arising, and number of people likely to be exposed to the risk of that harm.<sup>26</sup> Factors to be considered in evaluating an offender's culpability include the nature of the unsafe act, number of unsafe acts committed by the offender, and the level of deviation from established procedure.<sup>27</sup>

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<sup>19</sup> *Id.*, at [2].

<sup>20</sup> *Id.*, at [3].

<sup>21</sup> *Ibid.*

<sup>22</sup> *Id.*, at [79].

<sup>23</sup> *Ibid.*

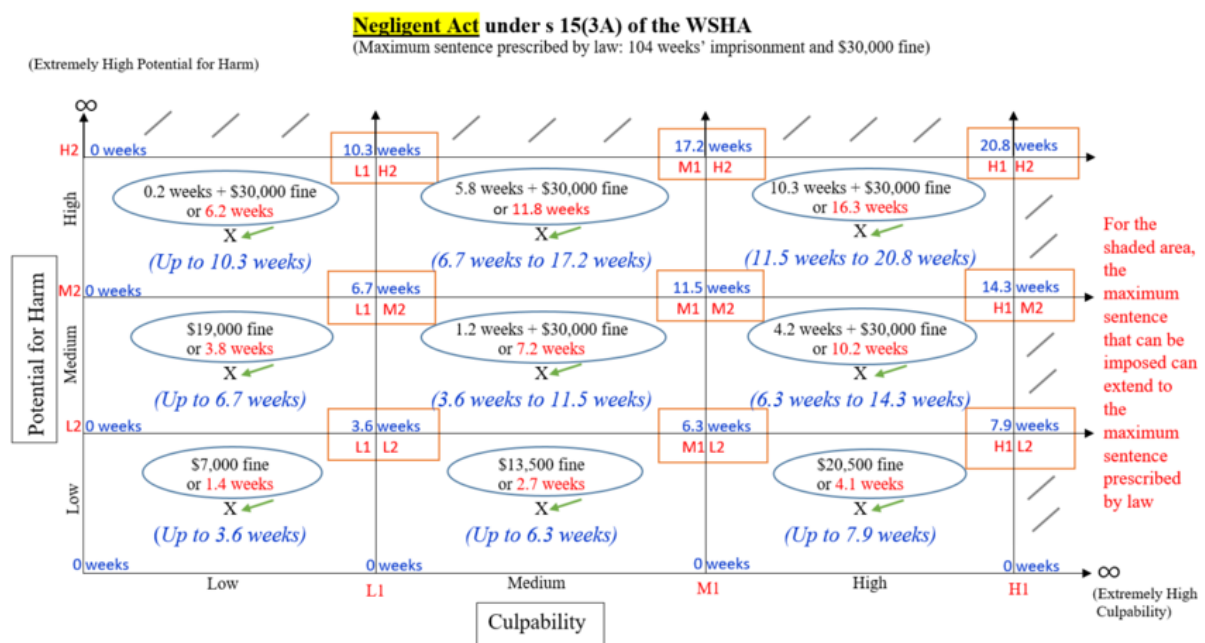
<sup>24</sup> *Ibid.*

<sup>25</sup> *Id.*, at [85].

<sup>26</sup> *Id.*, at [86].

<sup>27</sup> *Id.*, at [87].

11. Justice Chan crafted a table to represent the first stage of the sentencing framework.<sup>28</sup> In the table, potential for harm and culpability for harm are regarded as two continuous independent variables that separately and independently affect the sentence.<sup>29</sup>
12. Each axis is subdivided into three broad bands of “low”, “medium” and “high”.<sup>30</sup> The “X” marks the general midpoint of each of the nine large boxes within the grid.<sup>31</sup> The minimum and maximum sentence for each large box is stated in the small box on the left bottom corner and right top corner respectively.<sup>32</sup>



13. Justice Chan set out a brief guide on how the table is to be used,<sup>33</sup> and stressed that the table is meant only to assist the determination of the starting point in sentencing.<sup>34</sup> First, the judge will ascertain the level of potential for harm and culpability of the offender. This will determine which of the nine large boxes the offender falls within. Using the mid-point “X” as a reference,

<sup>28</sup> *Id.*, at [95]. The table only reflects the situation where the offender has claimed trial. This is because an early plea of guilt from the offender is considered as a mitigating factor only after the starting sentencing range has been determined.

<sup>29</sup> *Id.*, at [94].

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Id.*, at [99].

<sup>33</sup> *Ibid.*

<sup>34</sup> *Id.*, at [95].

the judge will decide where the accused conduct lies within the appropriate large box. Based on this position, the judge can derive a figure for the sentence in terms of the number of weeks of imprisonment.

14. The sentencing judge has the flexibility to impose a fine, an imprisonment term or a combination of the two. In general, the custodial threshold will be crossed when the appropriate sentence exceeds the maximum fine of \$30,000.<sup>35</sup> A notional conversion rate of \$5,000 fine per week of imprisonment was also introduced.<sup>36</sup>

**B. *Second stage***

15. In the second stage, the judge makes further calibrations to the starting sentencing range based on relevant aggravating and mitigating factors.<sup>37</sup>
16. Aggravating factors include: actual harm; whether the unsafe act was a significant cause of the harm that resulted; whether the offender obtained financial gain from the breaches; any relevant antecedents; deliberate concealment of the illegal nature of the activity; and obstruction of justice.<sup>38</sup>
17. In particular, actual harm depends on the severity of harm caused and number of people harmed. If death is caused, an additional eight to 40 weeks' jail should be added. If serious injury is caused, an additional sentence of up to 10 weeks' jail, or the equivalent in fines, may be added.<sup>39</sup>
18. Possible mitigating factors are a high level of co-operation with the authorities; a timely plea of guilt; and whether the offender has voluntarily taken steps to remedy the breach or prevent future occurrences of similar breaches.<sup>40</sup>

**IV. Application of sentencing framework**

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<sup>35</sup> *Id.*, at [97].

<sup>36</sup> *Id.*, at [96].

<sup>37</sup> *Id.*, at [79].

<sup>38</sup> *Id.*, at [107].

<sup>39</sup> *Ibid.*

<sup>40</sup> *Id.*, at [108].

**A. First stage**

19. The court found that a significant number of people were exposed to a high potential for harm.<sup>41</sup> All the workers were not wearing safety harnesses when working seven floors above ground level.<sup>42</sup> Given that the heavy air compressor was on an uninstalled platform that tilted away from the building, any of the workers on it could have fallen off, which would most likely result in death.<sup>43</sup> Moreover, the air compressor could have landed on other workers, resulting in further casualties or fatalities.<sup>44</sup> Hence, there was a very serious risk with a high likelihood of occurrence.<sup>45</sup>
20. In addition, the court held that Nurun belonged in the medium culpability band.<sup>46</sup> Third party conduct that materially contributed to the outcome for which the offender is charged will only affect sentencing if it has a bearing on his culpability.<sup>47</sup> In the present case, the conduct of Nurun's superior was directly relevant to Nurun's negligent acts.<sup>48</sup> Nurun's superior devised the plan to use an uninstalled loading platform and directed Nurun to work in that manner.<sup>49</sup> Since Nurun was less culpable than his superior, his conduct was not classified under the high culpability band.<sup>50</sup>
21. However, Nurun was experienced in the task of using loading platforms, and was also aware of the danger involved in the present case.<sup>51</sup> Despite the safety concerns raised to him, he blatantly deviated from established safety procedures.<sup>52</sup> Thus, the High Court held that Nurun's culpability tended towards the higher portion of the medium culpability range.<sup>53</sup>

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<sup>41</sup> *Id.*, at [111].

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> *Id.*, at [114].

<sup>47</sup> *Id.*, at [115]; see also *Guay Seng Tiong Nickson v Public Prosecutor* [2016] 3 SLR 1079 at [70].

<sup>48</sup> *Nurun*, *supra* n 2, at [116].

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> *Id.*, at [117].

<sup>52</sup> *Ibid.*

<sup>53</sup> *Id.*, at [118].

22. Having applied the first stage of the framework, Justice Chan chose the starting sentencing range of 13 weeks' imprisonment.<sup>54</sup>

**B. *Second stage***

23. There were no mitigating factors in the present case.<sup>55</sup> The key aggravating factor was the death of two individuals. As a result of the aggravating factor, the sentence was calibrated upward by 12 weeks to a total of 25 weeks imprisonment.<sup>56</sup>

**V. *Analysis***

24. The analysis will first set out two benefits of the sentencing framework: addressing the limitations of prior cases, as well as promoting coherence and consistency. It will then explain the inherent limitations to this approach.

**A. *Benefits of this approach***

*(1) Addressing the Limitations of Prior Cases*

25. Since s 15(3A) was introduced in 2011, there have been at least 17 such fatal accident cases.<sup>57</sup> However, no custodial sentence had ever been imposed for a s 15(3A) offence.<sup>58</sup> Admittedly, Justice Chan noted that several past cases involved a relatively high degree of culpability, high potential for harm, and fatalities.<sup>59</sup> Yet, the sentences only constituted of fines between \$5,000 to \$12,000.<sup>60</sup> Since the existing sentencing practice was based on unreported State Court decisions,<sup>61</sup> it is unclear why higher sentences were not imposed for such cases.

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<sup>54</sup> *Id.*, at [119].

<sup>55</sup> *Id.*, at [120].

<sup>56</sup> *Ibid.*

<sup>57</sup> *Id.*, at [69].

<sup>58</sup> *Ibid.*

<sup>59</sup> *Id.*, at [70].

<sup>60</sup> *Ibid.*

<sup>61</sup> *Id.*, at [123].

26. Based on these statistics, the author agrees with the Prosecution that the precedents did not sufficiently utilise the available sentencing range.<sup>62</sup> The clustering of sentences at the lower end indicates that only a segment of the possible sentencing range was used. The courts have cautioned against utilising only a segment of the possible sentencing range as it creates an inadvertent risk of usurping the legislative policy.<sup>63</sup> By undermining the gravity of the individual offence, previous cases do not give effect to its underlying aims of deterrence and protection.

27. Hence, Justice Chan's review of the sentencing framework is timely and constructive, as it better meets the aim of utilising the full sentencing range. This will further legislative intent for cases involving s 15(3A) of the WSHA.

(2) *Promoting Coherence and Consistency*

28. Justice Chan's sentencing table is intended to provide helpful guidance that aid in sentencing exercises. It is submitted that such an approach promotes coherence and consistency for the following reasons.<sup>64</sup>

29. First, the sentences correspond with the severity of criminal conduct in a logical manner.<sup>65</sup> The notional upper limit was based on mathematical calculations using the case of *Abdul Ghani bin Tahir v Public Prosecutor*.<sup>66</sup> The other figures were derived by plotting a graph with sentence scale against culpability scale.<sup>67</sup> In accordance with the WSHA's policy of deterrence, greater weight is accorded to potential for harm.<sup>68</sup> Thus, a similar increase in potential for harm results in a greater increase in the sentence as compared to an increase in culpability.<sup>69</sup>

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<sup>62</sup> *Id.*, at [63].

<sup>63</sup> *Id.*, at [68]; see also *Ong Chee Eng v Public Prosecutor* [2012] 3 SLR 776 at [24].

<sup>64</sup> *Nurun*, *supra* n 2, at [105].

<sup>65</sup> *Ibid.*

<sup>66</sup> [2017] 4 SLR 1153.

<sup>67</sup> *Nurun*, *supra* n 2, at [101].

<sup>68</sup> *Id.*, at [90].

<sup>69</sup> *Id.*, at [98].



30. Second, the sentencing table incorporates interchangeable fines and imprisonment using a notional conversion rate.<sup>70</sup> This enables more consistent decision making when courts exercise greater flexibility in sentencing combinations.<sup>71</sup>

**B. *Limitations of this Approach***

31. Nonetheless, there are limitations to this sentencing table. Justice Chan’s framework tends toward the “staged process” sentencing methodology, which is premised on structured, sequential reasoning.<sup>72</sup> This is evident from the step-by-step process within a numerical grid-based system. Despite assurance that judges retain full discretion,<sup>73</sup> such an approach may hinder a judge’s exercise of discretion. This is because applying the formula prescriptively may restrict flexibility in sentencing. First, if one overly depends on the sentencing table, one may be disinclined to move beyond the starting sentencing range prescribed. It would appear that stage-two factors are less important than stage-one factors in sentencing.<sup>74</sup> As a result, the mitigating and aggravating factors in the second stage would have a diminished influence on the sentencing inquiry. This is in contrast with the “instinctive synthesis” method, which considers all the relevant factors together and makes a holistic judgment in one step.<sup>75</sup> As such, the discretion of the judge may be unduly compromised if there is excessive reliance on the proposed framework. This mechanical application creates the risk of sentencing errors and potential injustice.

32. In addition, the table may not sufficiently accommodate the wide variety of possible situations that may occur. Sentencing is a highly individualised process that must be tailored to the unique factual scenario of each case. The mathematical features, such as specific ratios and graphs,

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<sup>70</sup> *Id.*, at [96].

<sup>71</sup> *Ibid.*

<sup>72</sup> 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 at 6.

<sup>73</sup> *Nurun, supra* n 2, at [105].

<sup>74</sup> 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 at 68.

<sup>75</sup> Hewton, Terry, “Instinctive Synthesis, Structured Reasoning, and Punishment Guidelines: Judicial Discretion in the Modern Sentencing Process” (2010) 31(1) Adelaide Law Review at p 83.

may not be able to capture the full extent of nuanced differences involved. This is especially pertinent for the penalty regime of the WSHA, which has a broad ambit for a myriad of safety breaches.<sup>76</sup> It encompasses situations where there are severe lapses, but no actual harm has been done. This includes near-misses which are unplanned events that, while not resulting in injury, illness or damage, had the potential to do so.<sup>77</sup> Given the possible complexities, the particular sentencing figures stipulated may be incompatible with the precise factual circumstances in a new case. Therefore, it is essential for this standardised algorithm to be balanced with more adaptability.

## **VI. Conclusion**

33. It is argued that Justice Chan's sentencing guideline is a positive legal development, but with inherent limitations. The two-tiered process strives to promote clarity and transparency. It also underscores the court's serious view of workplace safety breaches, which are met with the full force of the law. Nevertheless, it may curtail judicial discretion and constrain the decision-making process. To ensure that appropriate sentences are passed, such sentencing mechanisms should be utilised with circumspection.

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<sup>76</sup> *Nurun, supra* n 2, at [73].

<sup>77</sup> Workplace Safety and Health Council, "Guide to Near Miss Reporting" (May 2016) <<https://wshc.sg/files/wshc/upload/infostop/attachments/2016/IS201605310000000403/WSH%20Near%20Miss%20Reporting.pdf>> (accessed 10 May 2019).