Angliss Singapore Pte Ltd v Public Prosecutor
[2006] SGHC 155

Case Number : MA 61/2006

Decision Date : 07 September 2006

Tribunal/Court : High Court

Coram : V K Rajah J

Counsel Name(s) : N Sreenivasan and Ahmad Nizam (Straits Law Practice LLC); Charles Lin (Donaldson & Burkinshaw) for the appellant; Nor'Ashikin binte Samdin (Deputy Public Prosecutor) for the respondent

Parties : Angliss Singapore Pte Ltd — Public Prosecutor

Criminal Procedure and Sentencing – Mitigation – Weight to be accorded to plea of guilt and remedial action when deciding appropriate sentence – Whether plea of guilt motivated by genuine remorse, contriteness or regret and/or desire to facilitate administration of justice

Criminal Procedure and Sentencing – Sentencing – Maximum sentence – Whether strict liability offence automatically attracting maximum sentence prescribed for offence – Whether sentence must be proportionate to culpability of offender and legislative scheme – Section 88A(5)(b) Administration of Muslim Law Act (Cap 3, 1999 Rev Ed)

Criminal Procedure and Sentencing – Sentencing – Principles – Procedural formalities in taking offences into consideration – Whether trial judge entitled to take into account admission of previous offences for which accused not charged for purposes of sentencing

Criminal Procedure and Sentencing – Sentencing – Principles – Public interest – Whether public interest constituting distinct and autonomous sentencing principle

7 September 2006

V K Rajah J:

1 Is there a distinct and autonomous sentencing principle known as "public interest"? What are the procedural formalities that must be observed before a court takes into account misconduct that extends beyond the immediate charges that confront an accused? What is the true rationale that courts in Singapore should adopt in assessing whether an appropriate sentencing discount ought to be accorded to an accused's plea of guilt? In what circumstances can the maximum prescribed sentence be meted out? These important sentencing considerations and principles are considered and explained in these grounds of decision.

2 The appellant pleaded guilty to a single charge of having illegally affixed a specified halal certification mark ("the halal certification") on 11 August 2005 without the approval of the Majlis Ugama Islam Singapura ("MUIS") on a packet of chicken nuggets imported by the appellant into Singapore, contrary to s 88A(5)(*b*) of the Administration of Muslim Law Act (Cap 3, 1999 Rev Ed) ("the AMLA"). Upon conviction, the learned district judge imposed a fine of $9,000: see *PP v Angliss Singapore Pte Ltd* [2006] SGDC 70 ("the GD"). The maximum fine for the offence is set at $10,000. Dissatisfied with the outcome the appellant appealed. On hearing the appeal, I reduced the fine to $2,000.

The factual matrix

3 The undisputed facts can be shortly summarised. On 4 August 2005, an employee of MUIS, Mr Abdul Rahman Lum ("Lum"), found a few packets of chicken nuggets with the halal certification on

the packaging in the course of a random inspection at Seagate Technology Canteen at 16 Woodlands Loop. These chicken nuggets had been labelled under the brand "Dewfresh" by the appellant. It was later ascertained by Lum that approval for the halal certification had not been issued for these products.

4 On 11 August 2005, Mr Mohammed Ariff Mohammed Salleh ("Salleh"), another employee of MUIS, found similar packets of chicken nuggets at Carrefour Hypermart at Suntec City ("Carrefour"). There were about ten packets of chicken nuggets on display, all bearing the brand name "Dewfresh". One of these packets was taken by Salleh as a sample and eventually constituted the central plank for the subject prosecution.

5 MUIS wrote to the appellant on 11 August 2005 about its unauthorised usage of halal certification without MUIS's prior approval. The appellant promptly responded by admitting that it had used the halal certification without the approval of MUIS and issued a written apology to MUIS on 12 August 2005. The appellant also immediately repackaged the chicken nuggets and destroyed all packaging illegally certified as being halal.

6 It bears mention that two years earlier, the appellant had begun importing frozen chicken nuggets under the brand name "Dewfresh" from a manufacturer in Thailand, through their Singapore representative. However, when the appellant decided to import the nuggets directly from the Thai manufacturer, one of the appellant's employees, a newcomer to the job, incorrectly assumed that the halal certification for the appellant's own locally manufactured "Dewpride" products could also be affixed to the packaging of the imported "Dewfresh" chicken nuggets. Such action was the consequence of a pure oversight and was accepted as such by the prosecution.

7 Finally, and most significantly, in so far as the Muslim community is concerned, the products in question were, in fact, halal. Therefore, the only transgression by the appellant company was in its failure to obtain MUIS's approval for the use of the halal certification on its "Dewfresh" products.

The sentence of the district court

8 In assessing the appropriate sentence, the learned district judge took into account the following considerations. First, he determined, purportedly on the basis of prior case law, that the paramount consideration in sentencing is the public interest. In his view public interest apparently forms an overarching, distinct and autonomous principle of punishment. That the public interest warranted a stiff sentence in this case was borne out by the intent of s 88A of the AMLA, which Parliament had enacted primarily to signal to the public in general and the Muslim community in particular that it viewed the regulation of the halal certification with seriousness: see [10] of the GD. Moreover, being a multicultural and multiracial nation, there is a prevailing need to be sensitive towards the practices of all racial and religious communities: see [11] of the GD.

9 Secondly, the judge was also of the view that specific and general deterrence was necessary to discourage further transgressions by the appellant as well as other companies who might be tempted to cut corners given the increasing commercial appeal of the Muslim consumer market: see [11] of the GD.

10 Thirdly, the judge did not attach much weight to the mitigating factors raised by counsel for the appellant. He felt that the prosecution would have had little trouble proving its case and thus a plea of guilt was, in a sense, inevitable: see [12] of the GD. In any event, he found that the overriding need to protect the public interest overshadowed the significance of the appellant's plea of guilt.

11 Finally, the learned district judge emphasised what he considered to be several aggravating circumstances. One of these was that the offending packets of nuggets had been placed on sale at a well-patronised hypermarket, thereby misleading a large sector of the Muslim community into wrongly assuming that these packets had been duly certified by MUIS. He felt it was also relevant that although the ultimate prosecution was in respect of only one packet of nuggets, the number of packets that had been placed on sale to begin with was "not small". Last, but not least, he determined that the appellant had been importing such products into Singapore for the last two years, even acknowledging on one occasion that it had illegally passed them off as halal certified, had to be considered too; see [13] of the GD.

The appeal against sentence

12 Counsel for the appellant made the following submissions:

(a) the learned district judge failed to attach any weight to the fact that the offending packets of chicken nuggets *were*, in fact, halal, even if proper approval for the use of the halal certification had not been sought;

(b) there was no intention by the appellant, as a company, to commit the breach of s 88A(5)(*b*) of the AMLA;

(c) the clean track record of the appellant should be viewed favourably in sentencing;

(d) upon learning of its error, the appellant took immediate steps to rectify the breach;

(e) the sentence imposed by the learned district judge was inconsistent with previous similar cases under s 17 of the Sale of Food Act (Cap 283, 2002 Rev Ed) ("the SFA"); and

(f) given that this case represented the first prosecution under the s 88A(5) of the AMLA, the sentence would be used a benchmark for future prosecutions. To this end, a fine of $9,000 when the maximum allowed by the statute is $10,000 would create the anomalous situation of having to punish potentially far more egregious breaches of the statute with the same sanction.

Appellate intervention in sentencing

13 The prosecution correctly asserted that this court has only a limited scope for appellate intervention apropos sentences meted out by a lower court. This is because sentencing is very much a matter of discretion and requires a fine balancing of myriad considerations. That said, it remains the function of an appellate court to correct sentences where (a) the sentencing judge has erred as to the proper factual basis for the sentence; (b) the sentencing judge has failed to appreciate the material placed before him; (c) the sentence imposed is wrong in principle and/or law; and (d) the sentence imposed is manifestly excessive: *Tan Koon Swan v PP* [1986] SLR 126. Subsequent cases have held that an appellate court could vary manifestly inadequate sentences as well: see *PP v Cheong Hock Lai* [2004] 3 SLR 203 at [26] and *PP v Kang Seong Yong* [2005] 2 SLR 169 at [15].

14 In *PP v Siew Boon Loong* [2005] 1 SLR 611, Yong CJ clarified, at [22], what was meant by a sentence that was manifestly excessive or inadequate:

> When a sentence is said to be manifestly inadequate, or conversely, manifestly excessive, it means that the sentence is unjustly lenient or severe, as the case may be, and *requires substantial alterations rather than minute corrections* to remedy the injustice ... [emphasis

added]

The mere fact that an appellate court would have awarded a higher or lower sentence than the trial judge is not sufficient to compel the exercise of its appellate powers, unless it is coupled with a failure by the trial judge to appreciate the facts placed before him or where the trial judge's exercise of his sentencing discretion was contrary to principle and/or law. I shall now analyse the reasons underpinning the learned district judge's sentencing decision.

The purported aggravating factors

Public interest

15 It is apparent that the learned district judge felt that the facts in this case warranted a heavy sentence in light of the public interest. He formed the view that public interest constituted a separate and distinct principle of punishment and purportedly relied on several decisions in Singapore where it has been held that "the foremost consideration for a court in deciding on an appropriate sentence is that of public interest": see *Sim Gek Yong v PP* [1995] 1 SLR 537 ("*Sim Gek Yong*"), *PP v Tan Fook Sum* [1999] 2 SLR 523 ("*Tan Fook Sum*"), and *Ong Ah Tiong v PP* [2004] 1 SLR 587 ("*Ong Ah Tiong*").

16 It is pertinent to analyse precisely what is meant when a court takes into account public interest considerations in sentencing. The genesis of the *dictum* that "the foremost consideration for a court in deciding on an appropriate sentence is that of public interest" is found in *R v Kenneth John Ball* (1951) 35 Cr App R 164 ("*Ball*") at 165–166:

> In deciding the appropriate sentence a Court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. *A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life.* The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the Court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the Court has the right and the duty to decide whether to be lenient or severe. [emphasis added]

17 It ought to be apparent that Hilbery J did not intend for the notion of public interest to be construed as a separate term of art. Public interest simply refers to what is in the interests of the public. And, in the context of sentencing, it was Hilbery J's view that the interests of the public are best served when a sentencing judge keeps within the periphery of his vision the overarching aim of sentencing, which is the reduction or prevention of criminal conduct – either by deterring or rehabilitating a specific offender or by deterring other would-be offenders. In other words, public interest *per se* does not constitute a stand-alone sentencing consideration. Rather, it is merely an expression of the view that in assessing the appropriate sentence to mete out, a sentencing judge should apply his mind to whether the sentence is necessary and justified by the public's interest in deterring and preventing criminal conduct. Such a concern is however already encapsulated within the conventional sentencing rationales of general deterrence, specific deterrence, retributivism, rehabilitation and prevention. For instance, Hilbery J's concern that the sentence imposed should be

sufficient to deter others from similar criminal wrongdoing is reflected by the principle of general deterrence. Similarly, the need to discourage or prevent the specific offender from re-offending is intrinsic in the principles of specific deterrence, prevention and rehabilitation. As such, it would be wrong to cite *Ball* as authority for holding that the public interest should be regarded as a separate and distinct sentencing principle.

18 However, as Prof Tan Yock Lin astutely notes in *Criminal Procedure* (LexisNexis, 2005) ("*Criminal Procedure*"), at ch XVIII para 652 (May 2001 issue), our local criminal jurisprudence *appears* to suggest that the courts have from time to time analysed public interest considerations separately from conventional sentencing principles. Such judicial analysis is, with respect, entirely misconceived.

19 It may seem at first blush that in *Tan Fook Sum*, Yong CJ appeared to view public interest as an independent and substantive sentencing consideration. In that regard, it would be useful at this juncture to reproduce what was said:

> 19 Closely related is the principle of advancing the public interest. The remarks of Hilbery J in [*Ball*] at pp 165–166 have been cited with approval in the courts on numerous occasions …
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> …
>
> These remarks were made in the context of legislative prescriptions which fix the maximum penalty but they are equally apposite to laws which furnish alternative sentencing options. They emphasise the judicial role in sentencing which is based on advancing the public interest; *thus stated the public interest principle is the deterrence principle*.
>
> 20 In another sense, *the public interest principle often means the protection of the public*. For instance, it varies in proportion to the prevalence of the offence in question. Where an offence is prevalent, a more severe sentence may be meted out to mark the court's disapproval and to acknowledge the seriousness of the offence. Also, the public interest sometimes means quelling the sense of outrage felt by the community; *in this sense it is a reformulation of the retribution principle* …
>
> [emphasis added]

20 It is patently obvious from the above that the reference to public interest reflects no more than and encapsulates the conventional sentencing principles of deterrence, prevention or retributivism; to that extent Yong CJ could not have been prescribing that the public interest be an autonomous and distinct sentencing principle. Indeed, in *Lim Teck Chye v PP* [2004] 2 SLR 525, a case involving corruption, Yong CJ held as follows:

> 74 The appellant referred me to *PP v Tan Fook Sum* … where I examined the various principles a sentencing court has to consider. *These included the objectives of retribution, deterrence, rehabilitation, and prevention. All these may be included under the all-encompassing public interest principle*, which concerns itself with a wide range of other competing policy considerations …
>
> …
>
> 76 The same reasons I had articulated in explaining the departure from the sentencing benchmarks apply equally to answer the appellant's argument that fines, in this case, would be

sufficient to serve the public interest. *I was of the view that the potential negative repercussions of corruption offences of this nature, as well as their prevalence of late, necessitated a strong message to be sent to the appellant and other would-be offenders by the imposition of a custodial sentence. I was also mindful of the fact that the appellant, and others like him, had profited handsomely from these corruption offences. It was therefore clear to me the public interest necessitated a custodial sentence to be imposed on the appellant.* I was not convinced otherwise by the following arguments made by the appellant.

[emphasis added]

21 Two pertinent observations may be made at this juncture. First, it is clear that the public interest is merely an all-embracing reference to the conventional sentencing considerations of retribution, deterrence, rehabilitation and prevention that continue to operate in all cases. Secondly, it is apparent that in holding that the "public interest" necessitated a custodial sentence, all that Yong CJ meant was that a stiff sentence had to be imposed both because of the seriousness of the offence (*ie* retributivism) as well as the need to send a message to the appellant and other would-be offenders of the gravity of corruption in Singapore (*ie* specific and general deterrence.)

22 Indeed, I am hard-pressed to find a case where the concept of the public interest is not ultimately referable to, indeed inextricably interwoven with, the conventional sentencing principles themselves. It is pertinent to note that in the major jurisdictions where the legislature has set guidelines for the exercise of judicial discretion in sentencing, there is nary a reference to the "public interest" *per se*. For example, in New South Wales, s 3A of the Crimes (Sentencing Procedure) Act 1999 states as follows:

The purposes for which a court may impose a sentence on an offender are as follows:

(a) to ensure that the offender is adequately punished for the offence,

(b) to prevent crime by deterring the offender and other persons from committing similar offences,

(c) to protect the community from the offender,

(d) to promote the rehabilitation of the offender,

(e) to make the offender accountable for his or her actions,

(f) to denounce the conduct of the offender,

(g) to recognise the harm done to the victim of the crime and the community.

23 In the United Kingdom, s 142(1) of the recently enacted Criminal Justice Act 2003 (c 44) provides that:

Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing –

(a) the punishment of offenders,

(b) the reduction of crime (including its reduction by deterrence),

(c) the reform and rehabilitation of offenders,

(d) the protection of the public, and

(e) the making of reparation by offenders to persons affected by their offences.

24 These various formulations invariably boil down to and crystallise into what are essentially the sentencing considerations of deterrence, retributivism, rehabilitation and prevention. Therefore, neither authority nor principle compels the conclusion that the public interest *per se* is or ought to be an autonomous and distinct sentencing principle. In this regard, considerable conceptual intelligibility will be restored if the courts are more precise in elucidating and explicating the specific sentencing considerations that are applicable in each case. As I stated in *Tan Kay Beng v PP* [2006] SGHC 117 ("*Tan Kay Beng*") at [34], a sentencing judge should not hide behind the veneer of platitudes as an expedient substitute for the scrupulous and assiduous assessment of the factual matrix of each case in determining the appropriate sentence.

25 On this note, I should add that even after determining what is meant by the public interest, sentencing judges should not blindly and blithely march to the anthem that "the foremost consideration for a court in deciding on an appropriate sentence is that of public interest" with the result that the sentences passed are disproportionate to both the severity of the offence committed as well as the moral and legal culpability of the offender. This, I believe, is the unfortunate scenario in the present appeal. In fact, it may be said that the public interest neither envisages nor requires sentences that are disproportionate to the legal and moral culpability of an offender. It will be recalled that even in *Ball*, Hilbery J expressly stated that "not only in regard to *each crime*, but in regard to *each criminal*, the Court has the right and the duty to decide whether to be lenient *or* severe." In *Ong Ah Tiong*, at [23], Yong CJ was also mindful that, notwithstanding the public interest at stake, a sentencing judge should always have regard to "all the circumstances in which the offences were committed, including the nature and extent of the infringements, and the manner in which the infringements were carried out", citing in turn *Oh Cheng Hai v Ong Yong Yew* [1993] 3 SLR 930.

26 In the present matter, the learned district judge opined that the public interest essentially revolved around the fact that the halal certification was important to the Muslim community, and that the multiracial and multicultural composition of Singapore required sensitivity to the practices, religions and customs of all communities. While I wholeheartedly accept that transgressions pertaining to halal certification cannot be dismissed lightly, and that Muslim consumers must never be placed between the horns of dilemma in having to second-guess the authenticity of halal certifications whenever they are employed, it must be remembered that Parliament has set the *maximum* fine at $10,000. To justify a sentence close to the maximum requires far more than a mere perception that the public interest may plausibly be compromised: see [84]–[87] below. So, while I unequivocally endorse the learned district judge's eloquent exhortation on the imperatives of ensuring vigilance and in preserving the fabric of our multicultural and multiracial society, such a consideration strikes me as neither a critical nor hazardous threat in the context of this case. Had this been a case of deliberately or wilfully or consciously deceptive use of halal certification in order to provoke racial discord, I would have had no hesitation at all in endorsing the learned district judge's sentiments and concerns about sending a harsh signal to would-be transgressors. But this is not such a case, and it would be both inaccurate and unfairly prejudicial to the reputation of the appellant to portray the present scenario as if it were. Therefore, I find that the public interest concerns articulated by the learned district judge did not apply with real cogency to *the facts of this case*.

General and specific deterrence

27 The learned district judge was also of the view that a heavy sentence was necessary to prevent and deter both the appellant and other similar entities from committing similar offences. My view on the application of deterrence as a sentencing principle has been extensively stated in *Tan Kay Beng* at [29] to [34]. Specific deterrence may not always be necessary or appropriate, especially where the offender is able to persuade the court that he is unlikely to repeat his offence. In the present appeal, it is amply evident that there was no intention by the appellant to breach s 88A(5)(*b*) of the AMLA. The appellant's omission to procure MUIS's approval for the use of the halal certification was not intentional. It was, in the appellant's words, an "oversight". This was not disputed. Moreover, upon being notified by MUIS of its illegal use of the halal certification, the appellant expedited a written apology to MUIS within 24 hours and took all appropriate measures to remedy the situation. It promptly destroyed the offending packages and re-packaged the chicken nuggets. Taking into account the cumulative steps unstintingly taken by the appellant, I am persuaded not only that it has no intention of repeating the offence but that it has also instituted the necessary mechanisms within the company to prevent future breaches of the AMLA. In my view, specific deterrence assumes only marginal importance in this case.

28 The principle of general deterrence, on the other hand, is premised upon the upholding of certain statutory or public policy concerns or alternatively, upon judicial concern over the prevalence of particular offences and the attendant need to prevent such offences from becoming rampant: see *Tan Kay Beng* at [31]. The fact that this is the one and only prosecution under the AMLA since 1998 demonstrates that the need for a heavy sentence simply on the grounds of general deterrence is entirely unfounded.

29 I am conscious that s 88A of the AMLA is enacted as a strict liability offence. One must bear in mind, in this regard, that it is axiomatic that even negligent and unintentional breaches of strict liability offences should be treated seriously. This is because Parliament has deemed it fit that the religious sensitivity or welfare of the general public should warrant a high standard of care by all those engaged in the particular activities governed by statutes imposing strict liability.

30 In *Sweet v Parsley* [1970] AC 132, Lord Diplock also explained the basis of strict liability offences as such (at 163):

> Where penal provisions are of general application to the conduct of ordinary citizens in the course of their every day life the presumption is that the standard of care required of them in informing themselves of facts which would make their conduct unlawful, is that of the familiar common law duty of care. *But where the subject-matter of a statute is the regulation of a particular activity involving potential danger to public health, safety or morals in which citizens have a choice as to whether they participate or not, the court may feel driven to infer an intention of Parliament to impose by penal sanctions a higher duty of care on those who choose to participate and to place upon them an obligation to take whatever measures may be necessary to prevent the prohibited act, without regard to those considerations of cost or business practicability which play a part in the determination of what would be required of them in order to fulfil the ordinary common law duty of care*. [emphasis added]

31 These observations apply with considerable pertinence and cogency to the facts of this case. The reason underlying the enactment of s 88A of the AMLA as a strict liability offence is because Parliament views halal certification as an issue of vital importance. Businesses that profit from selling food products to Muslim consumers must bear the concomitant rigorous responsibility and burden of ensuring that they comply with the necessary regulations; these include obtaining the prior approval of MUIS to affix halal certification to their products. It follows inexorably that, where strict liability offences are involved, appropriate punishment must be unflinchingly meted out to an offender,

notwithstanding the lack of any *mens rea*, in order to "encourage greater vigilance to prevent the commission of the prohibited act": *Gammon (Hong Kong) Ltd v Attorney-General of Hong Kong* [1985] AC 1 at 14.

32 That said, there must clearly be a distinction between breaches of strict liability offences where the offender has acted deliberately and with intent on the one hand, and breaches which are merely a result of negligence and oversight on the other. In reality, meting out a sentence near the maximum allowable under the statute for an offence that barely even approximates the "worst type of cases falling within the prohibition" (*Bensegger v R* [1979] WAR 65, referred to in *Sim Gek Yong* at 542, [12]–[13]) is more likely to diminish rather than enhance any general deterrent value. If the difference in penalty between a serious and minor breach of an offences is only marginal, it reduces the incentive (or disincentive) to refrain from committing the more egregious offence. In any event, even where general deterrence is applied as a sentencing consideration, the principle of proportionality in relation to culpability, the magnitude of the offence committed and the particular statutory scheme of punishment that Parliament has designed should not be papered over in assessing the appropriate sentence for that particular case: see [84] to [89] below.

Other misconduct taken into account

33 The learned district judge was explicit in taking into account, for the purposes of enhancing the sentence, the "not small" number of offending packages offered for sale at that time, as well as the fact that the appellant had been importing such products into Singapore for the last two years, even admitting to illegally passing them off as halal certified.

34 Generally, a sentencing judge is not permitted as a matter of law or principle to take into account, for the purposes of sentencing, any allegations, circumstances or offences which the accused has not been charged with, which are neither proved by the prosecution nor expressly acknowledged by the accused. In *Tham Wing Fai Peter v PP* [1989] SLR 448, the appellant pleaded guilty to a charge of criminal breach of trust. In the statement of facts, several other facts were set out as background details. These disclosed facts had the effect of persuading the court that a heavier sentence should be imposed than what the charge alone would have warranted. On appeal, this was corrected by Chao Hick Tin JC (as he then was), at 451, [8], in the following terms:

> In my view the learned district judge was wrong in taking into account materials which, though placed before him, had nothing to do with the charge. It seems to me that he had decided to impose a deterrent sentence because of factors extraneous to the charge.

35 In *Sim Gek Yong* at 543, [15], Yong CJ also emphasised that:

> Once an accused has pleaded guilty to (or been convicted of) a particular charge, it cannot be open to the court, in sentencing him, to consider the possibility that an alternative – and graver – charge might have been brought and to treat him as though he had been found guilty of the graver charge.

36 The principles articulated by Yong CJ and Chao JC are wholly consistent with the statutory policy embodied in s 168 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("the CPC"):

> **168.** *For every distinct offence of which any person is accused there shall be a separate charge* and every such charge shall be tried separately except in the cases mentioned in sections 169, 170, 172 and 176. [emphasis added]

37 In an ordinary case, a trial judge may convict and sentence an accused only on the basis of facts that are immediately relevant to the charge(s) that an accused faces. There are obvious reasons for and clear benefits ensuing from such a requirement. As Yong CJ held in *Viswanathan Ramachandran v PP* [2003] 3 SLR 435, at [24], citing *Lim Beh v Opium Farmer* (1842) 3 Kys 10 at 12:

> [I]f there be any one principle of criminal law and justice clearer and more obvious than all others, it is that the offence imputed must be positively and precisely stated, so that the accused may certainly know with what he is charged, and be prepared to answer the charge as he best may.

38 Prof Tan Yock Lin also correctly notes in *Criminal Procedure* at ch XIV para 1 (December 2005 issue), that a charge would form the precise record for the protection of the accused so that he is not put at risk of double jeopardy.

39 That said, it is neither uncommon nor inappropriate for trial judges to "take into consideration", for the purposes of sentencing (see *PP v Heah Lian Khin* [2000] 3 SLR 609 at [89]), offences other than those for which the accused has actually been charged with and found guilty of. This practice was described by Lord Goddard CJ in *R v Batchelor* (1952) 36 Cr App R 64 at 67–68 as follows:

> [Taking offences into account] is simply a convention under which, if a court is informed that there are outstanding charges against a prisoner who is before it for a particular offence, the court can, *if the prisoner admits the offences and asks that they should be taken into account*, take them into account, which means that the court can give a longer sentence than it would if it were dealing with him only on the charge mentioned in the indictment. [emphasis added]

40 In Singapore, s 178 of the CPC provides a statutory platform for the practice of taking offences into consideration. It reads:

> 178.—(1) Where in any criminal proceedings instituted by or on behalf of the Public Prosecutor the accused is found guilty of an offence, the court, in determining and in passing sentence, may, with the consent of the prosecutor and the accused, take into consideration any other outstanding offence or offences which the accused admits to have committed:
>
> Provided that, if any criminal proceedings are pending in respect of any such outstanding offence or offences and those proceedings were not instituted by or on behalf of the Public Prosecutor, the court shall first be satisfied that the person or authority by whom those proceedings were instituted consents to that course.
>
> (2) When consent is given as in subsection (1) and an outstanding offence is taken into consideration, the court shall enter or cause an entry to that effect to be made on the record and upon sentence being pronounced the accused shall not, unless the conviction which has been had is set aside, be liable to be charged or tried in respect of any such offence so taken into consideration.

41 However, s 178 of the CPC does not explicitly prescribe the mechanism or procedure by which a trial judge might take outstanding offences into consideration. In *Lim Kim Seng v PP* [1992] 1 SLR 743 at 753, [31], the court adopted the English approach (subject to the CPC) as enunciated in *R v Walsh* (8 March 1973, CSP L3.3(a)) ("*Walsh*"). The approach espoused in *Walsh* is as follows:

… *It is essential that, if this practice is to continue, both the court and the accused man should understand perfectly clearly what it is that they are agreeing to do.* The practice is beneficial to the administration of justice and beneficial to the accused man personally. It is beneficial to the administration of justice in that it enables a number of matters which might otherwise have to come to trial to be taken into consideration in a proper case when a man is being sentenced. In fact it removes a work load from the overburdened system of administration of criminal justice. It is of great benefit to the accused man, because it means as a matter of agreement that after the sentence he will be able to face life freed of the threat of punishment for the offences that have been taken into consideration at his request.

Since the matter is essentially one of tacit agreement ... it is essential that those administering justice, both the police in the pre-trial stage and the court at the trial stage, should ensure that the accused man understands what is being done, admits the offences and wishes to have each and every one of them taken into consideration. … it may be of some value to see what are the safeguards that both police and courts can adopt …

First of all, the police have to prepare the list or the schedule which has to be served upon an accused person. If it is known that he intends to plead guilty, this schedule can be served before arraignment, perhaps some days before the day of the trial. If he is going to plead not guilty, then it may be that such a list should not be served until after he has been found guilty. *All that one can say of the standards to be observed by the police in the preparation and service of the list is that they should exercise meticulous care in the preparation of the list and they should ensure that when the list is given to him, his signature is obtained and in so far as it is within the power of the police to ensure it, they should ensure that he gets an opportunity of studying the list before he signs it, and certainly, of course, before he has to deal with it in court.*

But ensuring that he gets the list well before he has to face the court on a plea of guilty is not as easy in practice as it is easy to describe. When the matter is dealt with in court, it will seem to be the best practice that the police officer responsible for serving the list should be called to say that it was served and that he had the document signed by the accused man. But in any event, *it is the court's responsibility at this stage to ensure that the accused man, who after all in this matter is acting in concert and agreement with the court, understands the document that he has received, and has a proper opportunity, which means time, to consider the document; if necessary, time can be given by adjournment.* Before proceeding to sentence, the court must be clear that not only that he understands the document that it has received and has had time to study it, but that he accepts that the listed offences are offences which he has committed and that he desires them to be taken into consideration. If this conventional practice is to continue to the benefit of the administration of justice and to the benefit of accused person, the burden is on the court, and to a lesser extent on the police, to ensure that the man has a full opportunity of understanding what he is being asked to accept. If that is done, then the practice is of benefit to all concerned.

[emphasis added]

42 This continues to be the practice of the English courts: see the UK Sentencing Guidelines Council's "Guideline Judgments Case Compendium", available on its website <http://www.sentencing-guidelines.gov.uk>. I would add that in most matters, the offences that are to be taken into consideration are already the subject of specific charges that have been stood down pursuant to the exercise of the prosecution's discretion, or as a result of an arrangement between the accused and the prosecution in instances where the accused has agreed to plead guilty to certain charges and to have the others taken into consideration. Instances where the offences to be taken into

consideration have been formulated into specific charges are perhaps the embodiment of the ideal practice. Where this is not the case, however, a schedule of offences should at least be produced as was done in *Walsh* so that all the parties including the accused and the court are apprised of the specific offences (and the particulars thereof) that are being taken into consideration.

43 The aim of this procedure is to ensure that the accused appreciates the consequences of allowing a trial judge to take into consideration the outstanding offences against him. As explained and emphasised by the House of Lords in *Anderson v Director of Public Prosecutions* [1978] AC 964, at 977:

> If justice is to be done it is essential that the practice should not be followed except with the *express and unequivocal assent of the offender himself*. Accordingly, he should be *informed explicitly of each offence which the judge proposes to take into consideration*; and should *explicitly admit that he committed them and should state his desire that they should be taken into consideration* in determining the sentence to be passed on him. [emphasis added]

44 An English court has also ruled that it is necessary to obtain the *offender's* consent to take the outstanding offences into consideration and not merely his counsel's: *R v Mortimer* (Unreported, 10 March 1970). I do not think we should extend a similar practice to Singapore. If an accused is represented by counsel it ought to be safely presumed, unless there are unusual circumstances, that his instructions conveyed through counsel are knowingly and accurately given. Where the offender is a corporate body the only feasible and sensible option must also be to allow its solicitor to accept that specific outstanding offences be taken into consideration.

45 In my view, the broad safeguards which have been developed by the English courts are both sound in principle and workable in practice. They apply with considerable cogency to Singapore's criminal justice system. Indeed, for the most part, the framework and principles laid out above apropos the taking of outstanding offences into consideration are already an integral part of the practice of the courts in Singapore.

46 As noted earlier, the learned district judge in the present appeal took into consideration: (a) the "not small" number of offending packages offered for sale; and (b) the fact that the appellant had been importing such products into Singapore for at least two years. The judge pointed out that the appellant had acknowledged illegally passing them off as being halal certified: see [12] of the GD. The process of taking into account these offences for sentencing was as follows:

> Court: Does [Defence Counsel] wish to say anything especially on information relating to similar incidents of infringement by the defendant company?
>
> [Defence]: My instructions are that my client accepts this. Nothing else to add.
>
> [Prosecution]: I think Your Honour can take into account the presence of 9 other similar packets which infringe the Act into considerations [*sic*] for sentencing.
>
> [Defence]: Nothing to add.

47 It is apparent on the face of the record that a number of procedural safeguards were not adhered to. First, the appellant was given neither a schedule of the offences nor a copy of the charges that were being taken into consideration. Indeed it is not even clear whether the learned district judge's reference to "similar incidents of infringement" by the appellant was in relation to the nine other packets of chicken nuggets which were found to have been sold in Carrefour in the

offending packaging, or in respect of the importation of "Dewfresh" products (in the offending packaging) for the last two years. This ambiguity accounts for a second procedural failure: the appellant could not have given the requisite express and unequivocal assent for these other offences to be taken into consideration since it is not clear what these offences were to begin with. If the learned district judge meant only to refer to the nine other packets of chicken nuggets, his consideration of the appellant's illegal imports for the last two years is clearly incorrect in law because the appellant would not (and could not) have consented to taking the entire continuum of offences into consideration. On the other hand, if the learned district judge was concerned about the prior imports, the appellant would not (and could not) have consented to taking into consideration the nine packets of chicken nuggets sold at Carrefour. In addition, there may have been a third procedural lapse. It will be recalled that the learned district judge characterised the number of packets of chicken nuggets sold in the offending packages as "not small". Yet, the prosecution had clearly asked the court to take into account only nine packets of chicken nuggets. In such a context, it was not open to the district court to factor into sentencing other offences, facts or circumstances other than those which the prosecution and the appellant had consented to. Precisely what was he referring to and what did he mean by this reference? Accordingly, the judge's characterisation of the number of offending packets of nuggets on sale as "not small" is open-ended and an error in law.

Extent of damage caused

48 Next, the learned district judge also held that because the offending products had been marketed at a popular retail outlet, "a large sector of the public" had been wrongly misled by the illegal use of the halal certification. It is imperative not to exaggerate or overstate the extent of the harm. First of all, the only evidence before the court below as to how many of the offending packets had been sold stems from the prosecution's own contention that only nine other packets of chicken nuggets need to be taken into consideration. The characterisation of the number of infringing packets of chicken nuggets as "not small" is purely a matter of conjecture on the part of the judge who then unilaterally and inexplicably extrapolated that a large sector had been misled. There was no concrete evidence on this issue on the record. If the judge thought that this was an important consideration, he should have adjourned the matter for the facts to be irrefutably established. Secondly, as counsel for the appellant rightly pointed out, it had taken swift and immediate action in removing the offending stock from sale. Within a day of receiving the letter, the appellant issued an apology and took measures both to destroy the infringing packages as well as repack the frozen nuggets. Accordingly, I find that there is insufficient evidence on the record to support the learned district judge's conclusion that the damage was extensive.

49 In the circumstances, I find that the learned district judge had, without doubt, erred in taking into account, for the purposes of enhancing the appellant's sentence, the circumstances mentioned at [11] of the GD.

The mitigating factors

Plea of guilt and remedial action

50 The learned district judge was correct in observing that a plea of guilt is only one factor in determining the appropriate sentence. Other sentencing considerations may from time to time well outweigh the mitigating value of a plea of guilt. That said, I have already explained (see [26] above) why consideration of the "public interest" was not particularly compelling in this case.

51 What then should one make of the judge's opinion that the appellant's plea of guilt should not be accorded weight simply because the prosecution could quite effortlessly prove its case in any

event without recourse to the plea of guilt?

52 In *Tan Kay Beng*, I summarised the common law position apropos the mitigating value of a guilty plea as follows:

> 36 Our settled sentencing jurisprudence recognises that a timeously-effected plea of guilt merits a sentencing discount in certain situations. A guilty plea is relevant as a mitigation factor (a) when the plea of guilt is a genuine act of contrition – see *Xia Qin Lai v PP* [1999] 4 SLR 343 at [26] and (b) when resources which would otherwise be expended at trial are saved – see *Krishan Chand v PP* [1995] 2 SLR 291 at 293, [6] and Andrew Ashworth, *Sentencing and Criminal Justice* (Butterworths, 2nd Ed, 1995) at p 137. The discount given may range between a quarter to a third of what would otherwise be an appropriate sentence though this is by no means either a hard and fast rule nor an entitlement – see *eg*, *Fu Foo Tong v PP* [1995] 1 SLR 448 at 455, [13].
>
> 37 It is pertinent to note that the value of a guilty plea is substantially attenuated when (a) the plea is tactical – see *Xia Qin Lai v PP* (*supra*); (b) there is no other choice but to plead guilty – see *Wong Kai Chuen Philip v PP* [1990] SLR 1011; and (c) where the public interest considerations nevertheless necessitate a deterrent sentence – see *Fu Foo Tong v PP* (*supra*).

53 The present appeal presents an opportunity to further define and fine-tune the jurisprudence in this area. As noted, our courts have said that there are two jurisprudential bases upon which a reduction in sentence for timeously-effected guilty pleas may be justified. The first is pragmatic: it saves the criminal justice system resources that would have been expended with a full trial. In certain cases, it even spares vulnerable victims and witnesses from having to testify: see *Fu Foo Tong v PP* [1995] 1 SLR 448 ("*Fu Foo Tong*"). This can be termed the *utilitarian* approach. The second is moral: it is not the *fact* that an offender pleads guilty but rather the essence of a guilty plea constituting genuine remorse that attracts the reduction in sentence. This can be termed as the *remorse-based* approach. In respect of the remorse-based approach, two reasons have generally been proffered for placing a premium on and encouraging contrition. The first is that an offender who demonstrates by his plea that he is ready and willing to admit his crime enters the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary: see *United States v Henry* 883 F 2d 1010 (11th Cir, 1989) at 1012, citing *Brady v United States* 397 US 742 (1970) at 753. The second and broader rationale is that there are significant, meaningful and profound effects that a genuine, remorseful apology can engender. As Prof Stephanos Bibas and Prof Richard A Bierschbach argue in their article, "Integrating Remorse and Apology into Criminal Procedure" (2004) 114 Yale L J 85 ("Bibas and Bierschbach") at 109–110, "crime and punishment are as much about social norms, social influence and relations between persons as about individual blame and state-imposed suffering". When a person commits a crime, there is not only a practical, tangible harm that is produced; there is also a violation of society's norms and expectations. This creates an imbalance in the relationship between the offender and his victim as well as society. An apology, on the other hand, recognises this "relational concept" of crime and seeks to "put right" or recalibrate this imbalance: see Bibas and Bierschbach at 110. By apologising, an offender not only disavows his wrongdoing but seeks reconciliation and re-affirms the social values he has violated: see Bibas and Bierschbach at 113. "Contrite offenders … do not just apologize *for* something. They also apologize *to* someone - their victims, their communities, their family and their friends": see Bibas and Bierschbach at 114. It is primarily because of these inherently powerful messages conveyed through an apology that our law encourages offenders to plead guilty by awarding a discount when they do.

54 In some cases, these two strands of purported justification supporting the mitigating value of a guilty plea are compatible and harmonious with each other. For instance, an offender may plead

guilty the moment he is arrested, thus sparing the criminal justice system the unnecessary expenditure of resources that trying him would entail. In addition, his guilty plea may also be inspired by acute and genuine contrition. Here, the two rationales form two sides of the same coin, with no conflict in principle.

55 In other cases, however, the two rationales may be pitted against and collide into each other and point to very different conclusions. Take, for example, an offender who decides to delay his plea of guilt for purely tactical reasons. On the first day of trial, he decides to plead guilty, having finally procured some concession from the prosecution. By implication, one would usually be hard put to trace any hint of remorse in his guilty plea. At the same time, one cannot deny that some measure of resources is saved by his late plea. Depending on which of the justifications the court prefers as authentic and compelling even at that late stage in founding a genuine guilty plea, this particular offender may or may not receive a discount in his sentence. If the court champions the utilitarian approach, one would expect it to assign some mitigating value to the plea of guilt, even if it is less than the usual one-third, given the lateness of his plea which has caused the state to expend resources which it otherwise would not, had the offender pleaded earlier. On the other hand, should the court accept the remorse-based rationale as the underlying basis for discounting sentences upon a guilty plea, the offender in the present hypothesis who is clearly devoid of any genuine remorse cannot expect any reduction in his sentence.

56 In my view, only a remorse-based approach in discerning to whom the sentencing discount ought to apply has any currency in the context of our current jurisprudence. First, a utilitarian view of guilty pleas does not accord with most of our existing case law. If all that the courts should address is how much time and costs are saved by the guilty plea, why should it matter if a plea is purely tactical? Why should it also matter if the offender was caught red-handed or if there is overwhelming evidence in the prosecution's favour? The fact remains that a guilty plea short-circuits the trial process, thus minimising the resources necessary to establish a conviction. Indeed, a truly utilitarian approach to guilty pleas would lead to the conclusion that Ipp J reached in *Atholwood v The Queen* (1999) 109 A Crim R 465 at 467:

> A bare plea of guilty (that is, a plea that is not accompanied by genuine remorse), even when made at the last moment, is a mitigating factor as it avoids the expense of a defended trial, inconvenience to witnesses and delay to other cases in the list. This is so even when the case of the prosecution is strong …

57 The effect of a purely utilitarian view of guilty pleas is also highlighted by the UK's Sentencing Guidelines Council. Paragraph 2.1 of its Final Guideline on "Reduction in Sentence for a Guilty Plea: Guideline" (Sentencing Guidelines Secretariat, December 2004) states that:

> A reduction in sentence is appropriate because a guilty plea avoids the need for a trial (thus enabling other cases to be disposed of more expeditiously), shortens the gap between charge and sentence, saves considerable cost, and, in the case of an early plea, saves victims and witnesses from the concern about having to give evidence.

58 Having justified reductions in sentences for guilty pleas on the utilitarian approach, the Council's guidelines predictably allow for a subtraction in the offender's sentence even if he pleads guilty only after a trial has begun, although the reduction in such circumstances is capped at a maximum of one-tenth. Therefore, a utilitarian approach cannot explain why our current case law carves out exceptions to the discounting practice when an offender pleads guilty.

59 Secondly, even if the current exceptions were abrogated in order to achieve a consistent

utilitarian approach, an undue emphasis on the utilitarian benefits of guilty pleas may greatly diminish any general deterrent value that sentencing may have because future offenders will be armed with the knowledge that simply by pleading guilty at the earliest reasonable opportunity, they can hope to secure a substantial reduction in their sentence. In fact, this utilitarian justification creates an anomalous situation in which it would serve the interests of the offender to be more careful in ensuring that he is not caught in the act, or to erase evidence of his misconduct so as to enhance the likelihood of being given a more significant discount on account of his conviction not being "inevitable".

60 A third collateral effect of a utilitarian approach is that it negatively discriminates against an accused who chooses to go to trial and puts the prosecution to strict proof, which is his constitutional right. A reduction in one's sentence simply for pleading guilty at the earliest reasonable opportunity presents a powerful disincentive to go to trial. Here, I have found it especially profitable to borrow from the lucid and illuminating decision of the Australian High Court in *Cameron v The Queen* (2002) 209 CLR 339 ("*Cameron*"). In particular, the majority (Gaudron, Gummow and Callinan JJ) held as follows:

> 13 *It is difficult to see that a person who has exercised his or her right to trial is not being discriminated against by reason of his or her exercising that right if, in otherwise comparable circumstances, another's plea of guilty results in a reduction of the sentence that would otherwise have been imposed on the pragmatic and objective ground that the plea has saved the community the expense of a trial.* However, the same is not true if the plea is seen, subjectively, as the willingness of the offender to facilitate the course of justice.
>
> 14 Reconciliation of the requirement that a person not be penalised for pleading not guilty with the rule that a plea of guilty may be taken into account in mitigation requires that the rationale for that rule, so far as it depends on factors other than remorse and acceptance of responsibility, be expressed in terms of willingness to facilitate the course of justice and not on the basis that the plea has saved the community the expense of a contested hearing.
>
> [emphasis added]

61 In the eyes of the majority in *Cameron*, while it is permissible to rely on a plea of guilt as evidence of remorse or a willingness to facilitate the course of justice, it is impermissible to rely on the mere fact that an offender pleads guilty because it saves the system resources. I should add that while McHugh J thought that this was an issue best left to the individual states exercising state jurisdiction, he did not disagree with the majority on *principle*. In fact, McHugh J expressed an opinion at [41] similar to the majority, which is also worthy of reproduction:

> 41 The result is that a person who pleads guilty at the earliest possible time almost always obtains a shorter sentence than a person who pleads not guilty and is convicted. The courts are well aware that it "is impermissible to increase what is a proper sentence for the offence committed in order to mark the court's disapproval of the accused's having put the issue to proof or having presented a time-wasting or even scurrilous defence". But *the courts maintain that the accused who pleads not guilty is not being punished and given an increased sentence for pleading not guilty. Rather, the accused who pleads guilty merely gets a lighter sentence than he or she otherwise deserves. The subtlety of this scholastic argument has not escaped criticism from those who see legal issues in terms of substance rather than form*. In *R v Shannon*, Cox J said that a defendant "will need a very subtle mind, unusually sympathetic to the ways of the law" to accept this argument. And, speaking extra-judicially, Pincus J has said that "people are being punished for insisting on a trial, at least in the sense that they may receive a

longer sentence if they plead not guilty than they would if they pleaded guilty".

[emphasis added; footnotes omitted]

62 Kirby J, who also dissented, opined that it was in the public interest to award discounts for guilty pleas because of the attendant utilitarian benefits. However, he did not expressly address the issue of whether it was, on principle, acceptable to discriminate between accused persons solely on the basis that one has pleaded guilty and the other has not. Nor did he address the unfortunate consequences that a regime of awarding discounts on the basis of guilty pleas engenders: see [64] below.

63 In addition, there is another level of discrimination at work if our current jurisprudence invokes solely the utilitarian rationale. A consistent application of the utilitarian principle would require that the courts award varying levels of discounts depending on how "inevitable" the plea of guilt is. The more complex the case is against the accused, or the less evidence the prosecution has of the accused's guilt, the greater the discount ought to be. Yet, whether an accused is caught red-handed or whether the prosecution has been able to gather overwhelming evidence against the accused is sometimes simply a matter of fortuitousness. There is neither an intelligible nor a rational reason to distinguish between the two such offenders.

64 Indeed, there is a risk of the occasional unsafe conviction if sentencing incentives are justified *solely* on the basis of the utilitarian approach. This is because substantial discounts in sentences tend to be given only where the conviction is not inevitable. In other words, the less obvious the case is against the accused, the more he is discouraged to claim trial. Yet, one would have expected the opposite to be true: the more obvious the accused's guilt is, the more the courts should encourage guilty pleas because it would simply be a waste of time to go to trial; conversely, the less certain the accused's guilt is, the less the courts ought to persuade the accused to plead guilty.

65 I am acutely aware that there are tangible benefits to be gained by encouraging guilty pleas through the employment of sentencing discounts. That, in fact, is the primary reason that many jurisdictions continue to award discounts in sentences merely because an accused pleads guilty. For instance, *Cameron* has not been widely applied in Australia apart from Western Australia: see *R v Place* [2002] SASC 101; *R v Sharma* (2002) 130 A Crim R 238; *R v RND* [2002] VSCA 192. This is because the sentencing statutes in these various jurisdictions expressly permit the courts to take into account the fact that an accused has pleaded guilty. In Victoria, for example, it was the legislature that reversed the common law position *vis-à-vis* sentencing discounts for guilty pleas in order to encourage pleas of guilt: see *R v Morton* (1986) 23 A Crim R 433. As McHugh J astutely noted in *Cameron*:

> 39 Australian courts have enthusiastically embraced the proposition that a person who pleads guilty should receive a lesser sentence than one who pleads not guilty and is convicted. In so far as a plea of guilty indicates remorse and contrition on the part of the defendant, the courts have long recognised it as a mitigating factor of importance. *But in recent years, under the pressure of delayed hearings and ever increasing court lists, Australian courts have indicated that they will regard a plea of guilty as a mitigating factor even when no remorse or contrition is present*. They have taken the pragmatic view that giving sentence "discounts" to those who plead guilty at the earliest available opportunity encourages pleas of guilty, reduces the expense of the criminal justice system, reduces court delays, avoids inconvenience to witnesses and prevents the misuse of legal aid funds by the guilty.

4 0 *State legislatures have also encouraged their courts to give discounts to defendants who plead guilty*. On moving the Second Reading Speech of the Bill for the Crimes Legislation (Amendment) Act 1990 (NSW), for example, the Attorney-General for that State said that the aim of the Bill was "to provide appropriate encouragements to those who are guilty of an offence to plead guilty to that offence".

[emphasis added; footnotes omitted]

66 Similarly, in the UK, the *Report of the Royal Commission on Criminal Justice* (Cm 2263, 1993) ("the *Criminal Justice Report*") submitted as follows (at para 45):

> Against the risk that defendants may be tempted to plead guilty to charges of which they are not guilty must be weighed *the benefits to the system* and to defendants of encouraging those who are in fact guilty to plead guilty. [emphasis added]

67 Therefore, notwithstanding the express recognition and acknowledgement that "it would be naive to suppose that innocent persons never plead guilty because of the prospect of the sentence discount" (see the *Criminal Justice Report* at para 42; and the *Report of the Royal Commission on Criminal Procedure* (Cmnd 8092, 1981) at para 8.36), the English position is that such concerns are outweighed by the utilitarian benefits of encouraging guilty pleas.

68 In my view, the trade-off between the material benefits of discouraging trials and the constitutional imperative to ensure that only the guilty are made to suffer punishment is in the final analysis unacceptable. While rewarding prompt pleas of guilt may result in the quicker disposition of cases, it sometimes comes at the heavy price of inducing accused persons to plead guilty even though they may have a reasonable defence. In this regard, the learned Chief Justice Chan Sek Keong's remarks at his welcome reference on 22 April 2006 ring true:

> The fair administration of justice must ultimately trump court efficiency and convenience, where the two are in direct conflict.

In any event, I am also comforted by the fact that, as I note at [76] and [77] below, the remorse-based approach is not without its utilitarian benefits.

69 I now turn to examine the remorse-based approach. It will be recalled that the utilitarian approach does not fully explain why our courts have consistently refused to attach any mitigating value to a plea of guilt if it is in circumstances where the conviction is inevitable: see [55] above. On the other hand, the current tenor of our case law as to when guilty pleas will and will not attract a sentencing discount is more easily and comfortably rationalised when viewed in the context of a remorse-based philosophy. As observed earlier, sincere and genuine expressions of remorse and apology may produce powerful and desirable effects that the courts may encourage and acknowledge by awarding substantial mitigating value. However, not all apologies will be sincere, and where this is the case, often there will be no justification for lightening the offender's sentence. Whether or not a guilty plea is made out of purely tactical considerations or genuine contrition depends on the circumstances of the case. In this regard, the exceptions to the practice of reducing sentences for guilty pleas simply represent and reflect judicial and common experience that where the evidence against the offender is truly overwhelming or where the offender is caught red-handed or where it was only a matter of time before the offender's illegal activities would come to light, it would not be wrong to surmise that a plea of guilt in these circumstances is merely tactical and not genuine. However, it must be cautioned that these are no more than helpful analytical and evidential presumptions to assist a court in assessing whether the offender's guilty plea is activated by sincere

remorse. I do not interpret the cases as laying down an inexorable principle of law that a plea of guilt cannot ever mitigate a sentence where, to use the learned district judge's language, the plea is inevitable. After all, even many obviously guilty persons do not plead guilty or express remorse.

70 In *Wong Kai Chuen Philip v PP* [1990] SLR 1011 ("*Wong Kai Chuen*"), the leading Singapore case on this issue, the reason why the offender's guilty plea evoked little sympathy from the court was not merely because the offender knew he was going to be discovered but because he had acted with impunity in misappropriating large sums of money during the period when he knew he was not in any danger of being caught. Therefore, his volte-face after he knew his game was up was clearly tactical and not indicative of genuine remorse. The critical part of the decision in *Wong Kai Chuen* at 1014, [13] and [14] is as follows:

> 13 Although the appellant surrendered himself to the CAD, it is significant to note that this event occurred at a time when he really had no other choice. He had no choice because the Council of the Law Society had taken over the clients' account of his firm and it was only a question of time before his misdeeds came to light. *This is in stark contrast to the defence he put forward in respect of the claim for $235,000 at a time when his misdeeds remained secret and safe with him.* Similarly, the plea of guilty was not made in a case where the prosecution might have any trouble in proving the charges.
>
> 14 In making these comments, *I do not dissent from the principle applied by the senior district judge that the voluntary surrender by an offender and a plea of guilty by him in court are factors that can be taken into account in mitigation as they may be evidence of remorse and a willingness to accept punishment for his wrongdoing. However, I think that their relevance and the weight to be placed on them must depend on the circumstances of each case.* I do not see any mitigation value in a robber surrendering to the police after he is surrounded and has no means of escape, or much mitigation value in a professional man turning himself in in the face of absolute knowledge that the game is up.
>
> [emphasis added]

71 The determination of Chan Sek Keong J (as he then was) that there is little mitigating value in surrendering or pleading guilty when one's game is up must therefore be read both in the context of the specific facts in that case as well as in accordance with the general principle (that a guilty plea may be indicative of remorse) which he endorsed. *Wong Kai Chuen* should not be construed as signifying that a plea of guilt, when conviction is inevitable, cannot ever be of mitigating value, especially if, on the facts of a particular case, a court is indeed persuaded that the guilty plea is indicative of remorse.

72 I pause here to respond to the criticism levelled by Prof Andrew Ashworth against attaching undue importance to remorse (see Andrew Ashworth, Edmund-Davies Professor of Criminal Law and Criminal Justice (King's College, London), "Sentencing in the 80's and 90's: The Struggle for Power", the Eighth Eve Saville Memorial Lecture (21 May 1997), <http://www.kcl.ac.uk/depsta/rel/ccjs/eighties-sentencing.html> (accessed 4 September 2006)):

> Some judges still solemnly refer to remorse as a principal reason for giving the discount: do they really believe that, in view of all the pressures to plead, they can tell who is genuinely remorseful? Exactly why should it matter? Is it not the truth that the discount is usually a reward for sparing the victim and witnesses from having to give evidence, and saving court time and expense? If so, why state that a defendant who was caught red-handed gets no discount, or a much reduced discount (the authorities are inconsistent)? Is that exception fair, particularly since

some courts apply it and others clearly do not? Here is an opportunity for courts to communicate much more clearly, and to avoid some of the public misunderstandings of which they so frequently complain.

73 With respect, I do not entirely agree with Prof Ashworth. As Lord Thomas Bingham wrote extra-judicially in *The Business of Judging: Selected Essays and Speeches* (Oxford University Press, 2000) at p 307: "There are … a significant number of cases in which an offender is personally devastated by the consequences of what he has done. In such cases, it may be reasonable to hope that the risk of re-offending will be greatly reduced." But even if one were to object that the causal nexus between remorse and recidivism is tenuous, an expression of remorse should nonetheless be encouraged and acknowledged for the benefits that may be brought to the victims of the crime and to society at large: see [53] above. In fact, in pointing out that the authorities are inconsistent in applying the utilitarian approach, Prof Ashworth impliedly concedes an instinctive reluctance on the part of the courts to reward an offender simply because he has pleaded guilty or saved the court time and resources. This intuitive reluctance, as observed above, can only be rationalised and explained on the basis that it is remorse that the courts look for – and should look for – in deciding whether to reduce an offender's sentence.

74 I do, however, qualifiedly accept Prof Ashworth's criticism that it may not always be easy to discern when a plea of guilt is indicative of genuine contrition. In my view, though, the inquiry as to whether a plea of guilt is indicative of remorse is no more or less difficult than other findings of fact that a trial or sentencing judge has to grapple with. There are, however, significant and material tell tale signs that a court may look to in assessing whether the guilty plea is an expression of contrition. For instance, an early bid to cooperate with the investigating authorities and the surrender of an accused person at the early stages of investigation are persuasive indications of remorse: see *PP v Siew Boon Loong* [2005] 1 SLR 611 at [21]. An attempt at offering restitution to the victim at the earliest opportunity is another factor that the courts should look favourably upon. In *Soong Hee Sin v PP* [2001] 2 SLR 253, Yong CJ incisively observed at [9]:

> Restitution made voluntarily before the commencement of criminal proceedings or in its earliest stages thus carries a higher mitigating value for it shows that the offender is genuinely sorry for his mistake. On the other hand, where the sole motive for restitution is the hope or expectation of obtaining a lighter punishment, then the fact of restitution must be of little mitigating value. As such, I found that, even if the district judge had asked the appellant in this case if he intended to make restitution and he had replied that he did, the reasons behind such a response would remain highly questionable. In my view, restitution as a mitigating factor is of decisive significance only when it is made voluntarily for only then would it be a display of true moral conscience on the part of the accused.

75 This was further clarified by Yong CJ in *Chen Weixiong Jerriek v PP* [2003] 2 SLR 334, at [23]:

> While my comments in *Soong Hee Sin* were made in relation to financial restitution in the context of an offence of financial breach of trust, the same principles apply, in my view, to other restitutionary gestures, such as the writing of letters of apology. It is all too easy for an offender to say he is sorry when the strong arm of the law has caught up with him. *Thus, an offender's apologetic gestures must be carefully scrutinised to see whether they constitute evidence of genuine, heartfelt remorse*. [emphasis added]

76 As such, the perception that the offence was not committed wilfully but rather on the spur of the moment, by accident or through foolish neglect, the fact that the offender offers restitution or attempts to rectify the situation after being apprised of his offence, the rapidity with which he offers

restitution or takes remedial steps, and the willingness of the offender in co-operating with the relevant authorities all constitute ambient circumstances that a court can and should take into account in assessing whether the plea of guilt itself is indicative of remorse and if the offender should accordingly receive a discount in his sentence. As for the quantum of discount to be awarded, I see no reason to depart from the guideline established in *Fu Foo Tong* at [13], *viz*, that a court has the discretion to reduce the sentence from between one-quarter to a third of the original sentence.

77 I summarise. A plea of guilt can be taken into consideration in mitigation when it is motivated by genuine remorse, contriteness or regret and/or a desire to facilitate the administration of justice. The mitigating effect should also be compatible with the sentencing purpose(s) and principles the sentencing judge is seeking to achieve and observe through the sentence. A late plea of guilt may sometimes also be accorded some weight depending on the continuum of relevant circumstances. This approach fortuitously also produces tangible and utilitarian benefits. By undertaking a holistic assessment of the totality of the accused's conduct up to and including the plea of guilt, the remorse-based approach encourages accused persons to facilitate, at an early stage, the course of justice not only by short-circuiting the trial process but crucially also by helpfully participating in the investigations.

78 In the present appeal, the appellant was not acting in wilful and blatant disregard of its obligations under the AMLA. The transgression in question was a complete oversight. Upon learning of its blunder, a written apology was issued immediately and unreservedly. The appellant ventured even further: it took remedial steps to ensure that the offending stock was no longer displayed or sold. It may well be that the appellant would have been hard put to defend its actions in court given the stature and tenor of s 88A(5)(*b*) of the AMLA as a strict liability offence. However, in my view, bearing in mind the compelling circumstances of this case, both the apology issued within 24 hours of being contacted by MUIS, as well as the appellant's plea of guilt, ought to carry some force with the court. If, as the learned district judge said, the paramount consideration in this case is the offence that it has caused the Muslim community, then the appellant's apology and explanation should serve amply to assuage the community's concerns and reassure it that no harm was intended, no harm was *de facto* inflicted as the chicken nuggets were in fact halal and that the incident will never be repeated.

The halal nature of the infringing products

79 Counsel for the appellant raised the argument that the fact that the packets of chicken nuggets packaged illegally were actually halal constituted a mitigating factor. As the prosecution correctly pointed out, whether the infringing products turned out to be halal or not was purely fortuitous. In this regard, the holding in *Tan Fook Sum* at [30] is apposite:

> [I]t is not a relevant consideration that no one was actually injured or that there was no serious damage caused to the aircraft. In this connection, an analogy with drunken driving is instructive. In a charge of drunken driving, the fact that no one was injured is not a mitigating factor: *PP v Pet* [1962] MLJ 194 at 194; if someone had been injured the accused could have been charged with another offence. The offence of drunken driving consists of doing a dangerous thing and placing other people in danger; to use the fact that no one was injured in mitigation would be to rob the offence of its essence. Similarly, the essence of an offence under para 45 of the [Air Navigation] Order is to wilfully (or negligently) imperil the safety of the aircraft or that of the persons on board; the fact that no one was injured and that the resulting damage was minimal is really irrelevant.

80 However, unlike *Tan Fook Sum,* this case does not involve a deliberate breach of law by the

offender. It is one thing to hold that an offender who deliberately breaches a statute ought not to receive any leniency by mere dint of the fact that no one was harmed by the commission of the illegal act; it is another to hold that it is entirely irrelevant that no one was injured by a negligent failure to comply with a regulatory offence. In the same way that a court is compelled to take into account the extent of damage caused by an illegal act, a court ought to acknowledge that no one was actually harmed by an illegal act. The salutary purpose of the halal certification regime is to ensure that Muslim consumers do not mistake non-halal for certified halal food products. While s 88A(5)(*b*) of the AMLA renders any omission to seek MUIS's approval for the use of the halal certification an offence, it would be pertinent to take into account that the negligent failure of the appellant in complying with the regulation set out in the AMLA did not occasion any injury or loss to the Muslim community because the appellant's products were, in fact, halal.

Track record

81 I accept that just as an individual's lack of antecedents is a mitigating factor, so too is the track record of a corporate body that has been charged for the first time. However, while the appellant has not been convicted of a prior offence, this court cannot be oblivious to the fact that the appellant has admitted to at least one prior breach of s 88A(5)(*b*) of the AMLA. Even though this fact should not be taken into consideration for the purposes of enhancing a sentence, a court is not obliged to turn a blind eye to the obvious. In this regard, the observations of Kennedy LJ in the English Court of Appeal case of *R v Twisse* [2001] 2 Cr App R (S) 9 at [6] and [8] are most pertinent:

> 6 The next matter to be emphasised, as was recognised by the Court in Djahit, is the importance of only sentencing for the criminality proved or admitted by means of, in most cases, a request that the offence be taken into consideration: see *Canavan* [1998] 1 Cr.App.R.(S.) 243, and, in the context of drug supply, *Brown* [2000] 1 Cr.App.R.(S.) 300. This established precept of English law is now reinforced by Article 6 the European Convention of Human Rights.
>
> …
>
> 8 What, however, is important is that, if the indictment is not drawn as we have suggested and the defendant does not ask for offences to be taken into consideration, judges when sentencing should refrain from drawing inferences as to the extent of the defendant's criminal activity, even if such inferences are inescapable having regard, for example, to admissions made or equipment found. In other words, a defendant charged with one offence of supply cannot receive a more substantial sentence because it is clear to the court that he has been trading for nine months: *but the court is not require* [*sic*] *to blind itself to the obvious. If he claims that the occasion in question was an isolated transaction, that submission can be rejected. He can be given the appropriate sentence for that one offence without the credit he would receive if he really were an isolated offender.*
>
> [emphasis added]

82 Accordingly, I do not accept counsel for the appellant's contention that the appellant ought to be punished as if this were truly a first-time offence.

Determination of the appropriate sentence

Maximum sentences

83 Having considered and weighed the aggravating and mitigating circumstances submitted by

counsel for the appellant and the prosecution, it now remains to analyse how the appropriate sentence was determined.

84 It is trite law that "the maximum sentence should be reserved for the *worst type of cases* falling within the prohibition": see *Sim Gek Yong* at 542, [12]–[13]. By imposing a sentence close to or fixed at the statutory maximum, a court calibrates the offender's conduct as among the worst conceivable for that offence. In other words, when Parliament sets a statutory maximum, it signals the gravity with which the public, through Parliament, views that particular offence: *Cheong Siat Fong v PP* [2005] SGHC 176 at [23]; *R v H* (1980) 3 A Crim R 53 at 65. Therefore, it stands to reason that sentencing judges must take note of the maximum penalty and then apply their minds to determine precisely where the offender's conduct falls within the spectrum of punishment devised by Parliament. As Street CJ in *R v Oliver* (1980) 7 A Crim R 174 put it:

> The first initial consideration is the statutory maximum prescribed by the legislature for the offence in question. The legislature manifests its policy in the enactment of the maximum penalty which may be imposed. The courts are, of course, absolutely bound by the statutory limit itself as well as by the legislative policy disclosed by the statutory maximum.

85 In *R v Dodd* (1991) 57 A Crim R 349 at 354, it was similarly held that:

> [T]here ought to be a reasonable proportionality between a sentence and the circumstances of the crime, and we consider that it is always important in seeking to determine the sentence appropriate to a particular crime to have regard to the gravity of the offence viewed objectively, for without this assessment the other factors requiring consideration in order to arrive at the proper sentence to be imposed cannot properly be given their place. Each crime, as Veen (No 2) (1988) 164 CLR 465 at 472; 33 A Crim R 230 at 234 stresses, has its own objective gravity meriting at the most a sentence proportionate to that gravity, the maximum sentence fixed by the legislature defining the limits of sentence for cases in the most grave category.

86 More recently, it was reiterated in *R v Shankley* [2003] NSWCCA 253 at [19] that:

> In my view, there is real significance in the fact that Parliament has expressed the view that an offence is so serious that it may warrant, in the worst category of case, the most severe sentence that a court can impose; a sentence of life imprisonment. It is a consideration that cannot be ignored by a sentencing court even though there may be no suggestion that the sentence for the actual offence committed by the offender would warrant that penalty. *A consideration of the maximum penalty prescribed for an offence is fundamental to a determination of the appropriate sentence to be imposed*: Oliver (1980) 7 A Crim R 174. *It represents the public's view of the seriousness of the crime*: H (1980) 3 A Crim R 53. It is such an important matter that an incorrect statement by a sentencing judge of the applicable maximum penalty may, of itself, call for the intervention of this Court: R v Mason [2000] NSWCCA 82 at [19]. [emphasis added]

87 If a particular criminal provision prescribes a maximum sentence that seems unduly light or lenient in relation to the potential seriousness of offences that fall under it, meting out a near-maximum sentence is not warranted unless it is demonstrated by the prosecution that that particular offence figures among the worst type of cases *falling within that prohibition*. Thus, there must be a sense that the sentence is proportionate not only to the culpability of the offender but also in the context of the legislative scheme.

88 I should also add for good measure that even if a judge is of the view that the maximum

sentence prescribed for the offence in question is too low, he is not at liberty to take that into account in assigning the sentence: *R v Wayne Robin March* [2002] 2 Cr App R (S) 98 at [23]; see also *R v Walsh* (2004) 142 A Crim R 140 at [3] to [5]. To do so would be tantamount to an unconstitutional violation of the separation of powers. It is one thing for a judge to review a piece of legislation pursuant to his powers of judicial review; it is entirely another to be disloyal to and to disregard the legislation when no challenge has been mounted against the legislation itself.

89 It should by now be patently obvious that a negligent mistake on the part of the appellant in failing to obtain the necessary approval for the use of halal certification cannot be characterised as being among the worst type of cases falling within the conduct prohibited by s 88A(5)(*b*) of the AMLA. There was therefore no reason or justification for inflicting a fine of $9,000 when the maximum is fixed at $10,000.

Sentencing precedents

90 It was argued by counsel for the appellant that it would be useful to refer to the previous sentences meted out under the SFA. According to counsel, the sentences under the SFA ranged from $300 to $1,500. Unfortunately, the facts of those cases were not adduced for consideration. On the other hand, the prosecution urged upon the court that these precedents were of marginal utility because Parliament had intended offences under s 88A(5)(*b*) of the AMLA to be dealt with more severely than under the SFA.

91 Having perused the Parliamentary Debates during the Second Reading of the Administration of Muslim Law (Amendment) Bill on 30 June 1998 (*Singapore Parliamentary Debates, Official Report* (30 June 1998) vol 69 at cols 440–502 ("*Parliamentary Debates*")) and the *Report of the Select Committee on the Administration of Muslim Law (Amendment) Bill* (*Bill No 18/98*) (10 February 1999), I find nothing articulated by the Minister concerned to indicate that s 88A of the AMLA was introduced to enhance the punishment for offenders under that section of the statute. Instead, the Minister explicitly stated that the regulation and prosecution of halal certification was handed over to MUIS in recognition of the fact that as MUIS was already doing much of the work in relation to these areas, it made far more practical and symbolic sense for MUIS to administer this area of Muslim affairs exclusively: see *Parliamentary Debates* at cols 445–446:

> MUIS has also been advising on halal matters as it is an issue of concern to the Muslim public. The proposed amendment will give MUIS the sole authority to advise on halal matters, to regulate halal certification and to issue halal certificates itself.
>
> Prosecution of offenders under the Sale of Food Act and the Penal Code remains unchanged.
>
> *These amendments will strengthen MUIS' position as the authority on Muslim affairs in Singapore*.
>
> [emphasis added]

92 Under the SFA, the maximum penalty is a fine of $5000 for a first-time offender and a fine of $10,000 or three months' imprisonment or both for subsequent offenders. The AMLA on the other hand does away with the distinction between first-time and subsequent offenders, prescribing a maximum of $10,000 and 12 months' imprisonment for all cases. Be that as it may, the latitude that the AMLA allows in sentencing does not in any way signal that even minor offenders ought to be punished heavily. In any event, even if it could be said that Parliament intended offenders under the AMLA to be more firmly dealt with by the law, there is nothing to indicate that Parliament also

intended to override the sentencing principle enunciated in *Sim Gek Yong*; see [84] above.

Conclusion

93 Looking at the matter in the round, I find that the learned district judge erred both in law and in his appreciation of the facts before him in determining that the appropriate fine ought to be $9,000. Given my finding that there are no aggravating factors and, on the contrary, considerable mitigating value in the appellant's unstinting efforts to redress its wrongdoing, this was an offence that warranted a sentence in the lower range. Having regard to the fact that the maximum fine is $10,000, and that previous sentences under the SFA have gone as low as $300, I allowed the appellant's appeal against sentence. In the result, I reduced the appellant's sentence to a fine of $2,000.

94 I append one final observation. In the course of hearing this appeal, counsel for the prosecution submitted that the maximum sentence allowable under the statute was not $10,000 but a term of imprisonment. Needless to say, as corporate bodies cannot be imprisoned, she was clearly referring to the possibility of sentencing an individual holding office in the appellant's management. While I refrain from making any definitive pronouncement in the absence of full argument, I am not *currently* persuaded that the statute *currently* allows for the prosecution of a corporate officer because it is, strictly speaking, the company that "uses" or "issues" the halal certification. This is an application of the separate personality doctrine first enunciated in *Salomon v A Salomon and Company, Limited* [1897] AC 22. One cannot ignore however that a perplexing anomaly is created because natural persons convicted of the same offence may be liable to be jailed whereas the crime, if committed by a corporate entity, entails punishment in the form of a mere fine. Parliament might therefore want to consider amending the AMLA so as to permit the prosecution of officers or directors of a company who knowingly (or perhaps even negligently) allow the illegal use of halal certification on the same basis as an individual acting alone. Given the importance of halal certification to the Muslim community and Singapore's drive to encourage more export oriented food industries to base themselves here, this aspect of the issue ought to be actively considered. This would give appreciable teeth to MUIS's supervisory and enforcement functions in this important and sensitive area of food certification.