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EMPIRICAL STUDY ON APPELLATE INTERVENTION IN MANIFESTLY EXCESSIVE OR INADEQUATE SENTENCES IN SINGAPORE

Once upon a time there was a judge named Goldilocks. She was scheduled to hear magistrate's appeals in the afternoon. On her desk were the briefs for three different cases. She read the first file. "This sentence is manifestly excessive!" she exclaimed. Next, she read the second file. "This sentence is manifestly inadequate!" she lamented. At last, after reading the last file, she leaned back in her chair and smiled. "Ah!" she exclaimed, "this sentence is neither manifestly excessive nor inadequate and gives sufficient weight to both the principles of deterrence and rehabilitation and is proportionate to the gravity of the offence, having regard also to the personal circumstances of the offender". In reality, unlike for Judge Goldilocks, it may not be as clear whether a sentence is manifestly excessive or inadequate, because the sentence might simply be on the high side (or low side) without warranting appellate intervention. This article surveys all reported appeals against sentence from 1990 to 2017 to provide an overview of when an appellate court will intervene in an appeal against sentence on the grounds of manifest excessiveness or inadequacy.

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I. Introduction

1 Much has been said about achieving fairness and consistency in sentencing,[2] in which appellate guidance and intervention is an indispensable ingredient. The appellate courts provide guidance and clarity in sentencing law and practice, and resolve incongruent,

1 This article was written as a directed research paper during the course of the author's undergraduate studies under the guidance of Prof Kumaralingam Amirthalingam. The author is grateful to him and the anonymous reviewer for their very insightful and invaluable comments.

2 Justice See Kee Oon, speech at the Sentencing Conference 2017: Review, Rehabilitation and Reintegration (26 October 2017) at para 4.

contradictory or uneven sentencing precedents and practices.[3] However, relatively little attention has been given to the practice of the appellate courts themselves and whether they themselves have been consistent in their guidance and intervention.

2 It has been observed, albeit anecdotally, that most appeals against sentence are lodged on the grounds of manifest excessiveness or inadequacy,[4] a ground of appeal also found in several other Commonwealth jurisdictions.[5] Despite that, surprisingly little has been said about *when* sentences are considered manifestly excessive or inadequate, and it is this dearth of guidance and discussion in Singapore that motivates this study. An oft-quoted exposition by ex-Chief Justice Yong Pung How reads:[6]

> When a sentence is said to be manifestly inadequate, or conversely, manifestly excessive, it means that the sentence is *unjustly lenient or severe*, … ***and*** requires *substantial alterations rather than minute corrections* to remedy the injustice … [emphasis added in italics and in bold italics]

From this passage there seem to be two requirements before appellate intervention on the ground of manifest excessiveness or inadequacy is justified: First, the sentence must be unjustly lenient or severe. Second, substantial alterations must be required to remedy the injustice. While the first requirement is uncontroversial, the second is intriguing because it seems to import a quantitative threshold that must be met. So far, no exposition has been given by the courts on when an alteration is considered "substantial", and no major empirical studies have been done to examine the pattern of appellate intervention. This article aims to fill this gap in knowledge by determining empirically and quantitatively whether a threshold exists for when alterations are considered "substantial" enough to warrant appellate intervention.

3 The results of this study do not offer strong support for the existence of a quantitative threshold for appellate intervention. A few cases and one commentator suggest that there may be a quantitative threshold of an alteration of at least 25%, but the data shows that there is a small but significant proportion of cases in which corrections

3 Chief Justice Sundaresh Menon, opening address at Sentencing Conference 2014: Trends, Tools and Technology (9 October 2014) at para 23.

4 Justice Chao Hick Tin, "The Art of Sentencing – An Appellate Court's Perspective", speech at Sentencing Conference 2014: Trends, Tools and Technology (9 October 2014) at para 11; *Public Prosecutor v Siew Boon Loong* [2005] 1 SLR(R) 611 at [22]; *Kavitha d/o Mailvaganam v Public Prosecutor* [2017] 4 SLR 1349 at [14]. This is so in Australia as well: Arie Freiberg & Sarah Krasnostein, "Statistics, Damn Statistics and Sentencing" (2011) 21 JJA 73 at 17.

5 These include Hong Kong, the UK and Canada.

6 *Public Prosecutor v Siew Boon Loong* [2005] 1 SLR(R) 611 at [22].

of less than 25% were made instead. This article considered several explanations for this contradiction, and found that it was unlikely to be due to (a) courts using the term "manifestly excessive or inadequate" loosely and conflating it with other grounds of appeal; (b) differing time periods; or (c) differences in original sentence lengths (for imprisonment terms) or amounts (for fines). Instead, this observation is more likely due to unobservable factors, such as appellate courts not considering the positions taken by other appellate judges, or perhaps not even relying on a quantitative threshold. Part II[7] of this article provides a brief overview of the law and practice regarding the appellate review of sentences, Part III[8] sets out the research methodology, Part IV[9] analyses the data gathered, Part V[10] offers several suggestions for improving the approach towards manifestly excessive or inadequate sentences, and Part VI[11] concludes.

II. Appellate review of sentences

A. Grounds of appeal

4 The power of an appellate court to modify sentences is found in s 394 of the Criminal Procedure Code[12] ("CPC"), which provides that an appellate court may intervene if the sentence meted out below was (a) wrong in law; or (b) manifestly excessive or inadequate. Section 394 is reproduced here for ease of reference:

> Any … sentence … of a trial court may be reversed or set aside only where the appellate court is satisfied that it was wrong in law or against the weight of the evidence or, in the case of a sentence, manifestly excessive or manifestly inadequate in all the circumstances of the case.

The Court of Appeal has also noted that *in addition* to s 394 of the CPC, appellate intervention is also warranted if:[13]

> (a) The sentencing judge had made the wrong decision as to the proper factual matrix for the sentence.

7 See paras 4–14 below.
8 See paras 15–19 below.
9 See paras 20–47 below.
10 See paras 48–65 below.
11 See paras 66–68 below.
12 Criminal Procedure Code (Cap 68, 2012 Rev Ed) s 394.
13 *Public Prosecutor v Kwong Kok Hing* [2008] 2 SLR(R) 684 at [14]–[15], reiterated in *Ang Lilian v Public Prosecutor* [2017] 4 SLR 1072 at [68].

(b) The sentencing judge had erred in appreciating the material before him or her.

(c) The sentence was wrong in principle.

There is thus a total of five possible *disjunctive*[14] grounds of appeal against sentence. Although s 394 of the CPC provides that a sentence may be set aside if it is "against the weight of the evidence", such language has never been used by the courts in their written judgment in allowing an appeal against sentence. As such, this clause is not analysed as a ground of appeal, although how it might be interpreted and employed is further discussed in Part V below.[15]

(1) Wrong in law

5 A sentence may be considered wrong in law if the judge proceeds on an erroneous view of the underlying policy concern of the offence or punishment,[16] or fails to consider the wider public interest.[17] An error of law is also committed if the law is misapplied, such as where certain conditions for imposing the initial sentence were not fulfilled,[18] or where a sentencing principle was wrongly applied.[19]

(2) Proper factual matrix

6 A judge will have committed an error with regard to the proper factual matrix of a sentencing if he fails to consider relevant facts that may affect the sentence imposed,[20] errs in making findings of fact not supported by the evidence,[21] draws conclusions not supported by the

14 *Kavitha d/o Mailvaganam v Public Prosecutor* [2017] 4 SLR 1349 at [13]; *Public Prosecutor v Kwong Kok Hing* [2008] 2 SLR(R) 684 at [14].

15 See paras 48–65 below.

16 *Public Prosecutor v Wong Wing Hung* [1999] 3 SLR(R) 304 at [8]–[10].

17 *Ong Chow Hong v Public Prosecutor* [2011] 3 SLR 1093 at [11] and [26]: The sentencing judge proceeded on the basis that the objective of a disqualification order under s 154(2)(*b*) of the Companies Act (Cap 50, 2006 Rev Ed) was "predominantly punitive in nature", and thus failed to take into account the wider public interest.

18 *Public Prosecutor v Ng Kim Hong* [2014] 2 SLR 245 at [24] and [32]: The lower court's sentence was held to be wrong in law because the sentencing judge was of the view that there were special reasons not to impose a sentence of corrective training, when in fact there were none seen. See also *Public Prosecutor v Chong Hou En* [2015] 3 SLR 222 at [90].

19 *Navaseelan Balasingam v Public Prosecutor* [2007] 1 SLR(R) 767 at [32].

20 *Lim Bee Ngan Karen v Public Prosecutor* [2015] 4 SLR 1120 at [63]: This includes failing to take into account the sentences imposed on the accused's co-offenders.

21 *Kavitha d/o Mailvaganam v Public Prosecutor* [2017] 4 SLR 1349 at [17]: The sentencing judge erred in finding that the offender committed the offence in question for financial gain despite the offender's unchallenged assertion to the contrary.

facts,[22] or misanalyses the facts.[23] A sentencing judge may also err in appreciating the proper factual matrix through no fault of his or hers, but because the facts were not made known nor clarified before him or her.[24]

(3) Appreciating material

7 A judge will have failed to appreciate the material before him or her if he or she fails properly to appreciate the statement of facts,[25] exaggerates the extent of harm caused,[26] or gives insufficient weight to certain mitigating factors and/or overemphasises aggravating factors.[27] In *Yap Ah Lai v Public Prosecutor*,[28] the sentencing judge was found to have thus erred when he reproduced the same crucial passages of reasoning in two seemingly similar cases.[29]

(4) Wrong in principle

8 A sentence has been regarded as being wrong in principle where the sentencing judge imposes the wrong type of sentence,[30] fails to consider certain sentencing principles,[31] or imposes a sentence out of line with precedents.[32] This ground also includes situations where insufficient weight was given to the aggravating circumstances of the case[33] and/or where undue weight was given to mitigating factors,[34] or if the judge

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22 *Kavitha d/o Mailvaganam v Public Prosecutor* [2017] 4 SLR 1349 at [18]: The judge held that the offender was in a "high position of trust" when there was no evidence to suggest this; for another example of this, see *Public Prosecutor v Ang Seng Thor* [2011] 4 SLR 217.

23 *Public Prosecutor v Kusrini Bt Caslan Arja* [2017] SGHC 94 at [6]–[7]: The Singapore High Court held that the sentencing judge erred for task analysing the case as someone being punished because she was not equipped for a particular task, instead of for her disregard of a child's safety and suffering.

24 *Lim Hsien Hwei v Public Prosecutor* [2014] 3 SLR 15 at [15]: The sentencing judge seemed to take the position that the offender drove against oncoming traffic while on the wrong side of the road because that was how the charge was framed. In reality, the offender merely made a left turn from a lane which only permitted a right turn. This was only clarified on appeal as the offender was unpresented at the hearing below; see also *Wuu David v Public Prosecutor* [2008] 4 SLR(R) 83 at [19].

25 *Public Prosecutor v Soh Lip Yong* [1999] 3 SLR(R) 364.

26 *Angliss Singapore Pte Ltd v Public Prosecutor* [2006] 4 SLR(R) 653 at [48]–[49].

27 *Tan Sai Tiang v Public Prosecutor* [2000] 1 SLR(R) 33.

28 [2014] 3 SLR 180.

29 *Yap Ah Lai v Public Prosecutor* [2014] 3 SLR 180 at [70]–[73]: Similar cases of [tobacco smuggling] that differed in terms of the weight of cigarettes smuggled and the mitigating factors raised.

30 *Public Prosecutor v Neo Boon Seng* [2008] 4 SLR(R) 216 at [9].

31 *Public Prosecutor v Tan Fook Sum* [1999] 1 SLR(R) 1022 at [36].

32 *Public Prosecutor v Soh Lip Yong* [1999] 3 SLR(R) 364 at [29].

33 *Public Prosecutor v Syamsul Hilal bin Ismail* [2012] 1 SLR 973 at [43].

34 *Public Prosecutor v UI* [2008] 4 SLR(R) 500 at [76].

failed to appreciate that a certain factor is an important sentencing consideration.[35]

(5) *Manifest excessiveness or inadequacy*

9 A manifestly excessive or inadequate sentence is one that is unjustly lenient or severe and requires substantial alterations to remedy the injustice.[36] Sentences have also been said to be manifestly excessive or inadequate if they fail to accommodate mitigating or extenuating circumstances or factors,[37] if they are plainly out of line with an established benchmark,[38] or if they reflect only one sentencing principle (for example, deterrence) when they should reflect more (for example, both deterrence and retribution).[39]

B. Distinguishing manifestly excessive or inadequate sentences

10 However, the grounds of appellate intervention do not all operate in the same way. Sentences that are manifestly excessive or inadequate must be clearly distinguished from the other four disjunctive grounds mentioned above for two reasons.

11 Firstly, manifest excessiveness or inadequacy is conceptually different from the errors that form the basis of the other four grounds of appeal (collectively "sentencing errors"). Alleging that a sentencing error has been committed is to impugn the *process* by which the sentencing judge arrived at the sentence.[40] An error at any step in the process renders the result objectionable, regardless of what the final sentence is. In other words, the ends do not justify the means. On the other hand, in assessing whether a sentence is manifestly excessive or inadequate, the focus is on the *outcome* of the sentencing process. In such situations, the sentencing judge may have applied the correct principles and considered all the

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35 *Kavitha d/o Mailvaganam v Public Prosecutor* [2017] 4 SLR 1349.

36 *Public Prosecutor v Siew Boon Loong* [2005] 1 SLR(R) 611 at [22].

37 *Sim Boon Chai v Public Prosecutor* [1982] 1 MLJ 353, cited in *Public Prosecutor v Mohammed Liton Mohammed Syeed Mallik* [2008] 1 SLR(R) 601 at [83].

38 *Tuen Huan Rui Mary v Public Prosecutor* [2003] 3 SLR(R) 70, cited in Public Prosecutor v Mohammed *Liton Mohammed Syeed Mallik* [2008] 1 SLR(R) 601 at [83].

39 *Moey Keng Kong v Public Prosecutor* [2001] 2 SLR(R) 867; cited in *Public Prosecutor v Mohammed Liton Mohammed Syeed Mallik* [2008] 1 SLR(R) 601 at [83].

40 The term "procedural reasonableness" has been employed by other academics. See Briana Lynn Rosenbaum, "Sentence Appeals in England: Promoting Consistent Sentencing through Robust Appellate Review" (2013) 14 J App Prac & Process 81 at 88.

relevant factors, but nevertheless imposed a sentence that is too low or high in the eyes of the appellate court.

12 Secondly, the extent of intervention required in manifestly excessive or inadequate sentences and sentencing errors differ. When a sentence is said to be manifestly excessive or inadequate, the threshold for intervention is whether *substantial alterations* must be made to the sentence.[41] The mere fact that the appellate court would have imposed a different sentence is not sufficient grounds for intervention.[42] On the other hand, no minimum alteration exists where the case involves a sentencing error. Instead, the court may determine the sentence *afresh* on the basis of the correct facts and/or principles.[43] As the Singapore High Court in *Angliss Singapore Pte Ltd v Public Prosecutor*[44] put it:[45]

> 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. [emphasis added]

13 Different thresholds exist because different degrees of deference are accorded to the sentencing judge in each situation. Where no sentencing error is committed, appellate courts ostensibly accept that different judges have different sentencing tendencies, and that intervention is unnecessary as long as the judge acts within the boundaries of his or her discretion. This is because sentencing is a discretionary exercise, and as a general rule the discretion of the judge is not lightly disturbed[46] unless he or she oversteps his or her discretion by imposing a sentence that is "substantially" out of the norm.[47] However, this is not the case where the judge makes an error. The error vitiates the propriety of the judge's exercise of discretion, and makes it improper for the appellate courts to grant *any* deference to him or her.[48]

41 *Public Prosecutor v Siew Boon Loong* [2005] 1 SLR(R) 611 at [22]; *Public Prosecutor v UI* [2008] 4 SLR(R) 500 at [14].
42 *Chan Chun Hong v Public Prosecutor* [2016] 3 SLR 465 at [139].
43 *Kavitha d/o Mailvaganam v Public Prosecutor* [2017] 4 SLR 1349 at [15] and [20]; *Lim Bee Ngan Karen v Public Prosecutor* [2015] 4 SLR 1120 at [63]; *Yap Ah Lai v Public Prosecutor* [2014] 3 SLR 180 at [74]. In other jurisdictions, this is referred to as a sentence being determined *de novo*.
44 [2006] 4 SLR(R) 653.
45 *Angliss Singapore Pte Ltd v Public Prosecutor* [2006] 4 SLR(R) 653 at [14].
46 *Public Prosecutor v Ali bin Bakar* [2012] SGHC 83 at [5].
47 *Public Prosecutor v Siew Boon Loong* [2005] 1 SLR(R) 611 at [22].
48 *Kavitha d/o Mailvaganam v Public Prosecutor* [2017] 4 SLR 1349 at [15].

14 Thus, while sentencing errors and manifestly excessive or inadequate sentences are related in the sense that sentencing errors are likely to result in manifestly excessive or inadequate sentences, the two broad grounds of appeal should be distinguished because of their different foci. Given the higher threshold for intervening with manifestly excessive or inadequate sentences, one might expect to see smaller alterations to the sentence imposed in appeals allowed for sentencing errors. Even though a sentence that is imposed in error may also be manifestly excessive or inadequate, one can expect the smallest alteration for a manifestly excessive or inadequate sentence to be larger than the smallest alteration for a sentence imposed in error.

III. Methodology

15 There has hitherto been no major empirical study, whether local or overseas, that sheds light on what a manifestly excessive or inadequate sentence is. The closest anyone has come to quantifying this is Kow Keng Siong, who observed that a sentence will be manifestly excessive or inadequate if it is "at least about 25% more (or less) than the appropriate sentence".[49] This study thus aims to build upon and/or confirm Kow's observations by way of an empirical analysis with the most up-to-date information available at the time of writing.

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49 Kow Keng Siong, *Sentencing Principles in Singapore* (Academy Publishing, 2009) at para 36.058. While this observation may be valid, the five cases are cited in support of this observation do not offer strong support. Three of the cases (Ong *Tiong Poh v Public Prosecutor* [1998] 2 SLR(R) 547; *Tay Kim Kuan v Public Prosecutor* [2001] 2 SLR(R) 876; and *Phua Mong Seng v Public Prosecutor* [2001] 3 SLR(R) 602) involve the enhancement of the accused's sentence despite no appeal being lodged by the Prosecution. While this may have been more common in the past, this no longer seems to be common practice by our courts, which have in recent times expressed an unwillingness to enhance an offender's sentence in the absence of an appeal by the Prosecution in order to not discourage appellants from exercising their right to appeal because of undue anxiety over the possibility of an enhanced sentence (*Wong Hoi Len v Public Prosecutor* [2009] 1 SLR(R) 115 at [21]; see also *Lee Chiang Theng v Public Prosecutor* [2012] 1 SLR 751 at [43]; *Chan Siak Huat v Public Prosecutor* [2012] 2 SLR 1093; *Ang Jeanette v Public Prosecutor* [2011] 4 SLR 1; *Chan Chun Hong v Public Prosecutor* [2016] 3 SLR 465 at [142]). Between 2014 and 2017, there is only one reported case where an offender's sentence was enhanced on her appeal, and that was due to her "deplorable lack of remorse" (*Ang Lilian v Public Prosecutor* [2017] 4 SLR 1072 at [84]). The remaining two cases involve errors committed by the sentencing judge and thus, strictly speaking, not instances where the sentence was manifestly excessive or inadequate (*Public Prosecutor v Soh Lip Yong* [1999] 3 SLR(R) 364 at [37]; *Mohd Shahrin bin Shwi v Public Prosecutor* [1996] 3 SLR(R) 174 at [22]).

A. Search strategy

16 This study surveys all cases of reported appeals against sentence to the Supreme Court between 1990 and 2017, both years inclusive. The data search was conducted exclusively on LawNet.[50] The search terms "magistrate's appeal", "magistrate* appeal"[51] and "MA" were used to search for appeals from the State Courts to the High Court, and the terms "criminal appeal*" and "CCA" were used to search for appeals from the High Court to the Court of Appeal (although it was possible to appeal from the Supreme Court to the Judicial Committee of the Privy Council until early 1994, there are no appeals against sentence to the Privy Council). The cases obtained were then examined, and those that did not involve an appeal against sentence were excluded, leaving a total of 639 cases.[52]

B. Data

17 The cases were selected over a long time period in order to maximise the statistical power of this study, even though the cases from the early 1990s and 2000s may not be as relevant because the judges who heard appeals against sentence then are no longer sitting on the Supreme Court bench. Unreported cases are excluded from this study because of their limited precedential value:[53] not only is it impossible to determine the grounds on which the lower court's sentence was set aside, but any particular facts or circumstances that might warrant minute corrections to the sentence will also not be captured. A breakdown of the number of cases from each court per year is illustrated in Figure 1. For the purpose of the foregoing analysis, appeals to both courts are aggregated because there is no discernible difference in the approach by each court in determining the manifest excessiveness or inadequacy of the sentence imposed.

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50 LawNet website https://www.lawnet.sg/lawnet/web/lawnet/home (accessed 8 May 2020).

51 The "*" represents a Boolean wildcard character.

52 Note: The dataset includes the case of *Lin Bin v Public Prosecutor* [2005] SGHC 213: This was an appeal against conviction where the sentence was set aside for being manifestly inadequate even though there was no appeal against the sentence by either party. This is the only such case uncovered.

53 *Ong Chee Eng v Public Prosecutor* [2012] 3 SLR 776 at [33]; *Yap Ah Lai v Public Prosecutor* [2014] 3 SLR 180 at [11(d)]. Although the phrase "unreported cases" may also refer to cases that are not published in any law reports, this article uses the phrase to refer to cases with no written grounds of decision because this is the nomenclature adopted by the courts.

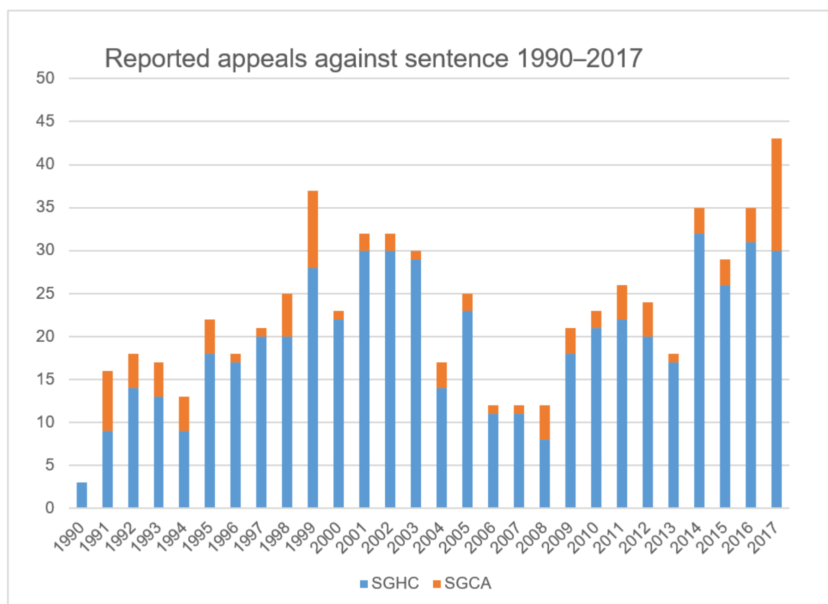

Figure 1: Number of reported appeals against sentence per year

C. Variables

(1) Independent variable ("IV") and sample

18 The sample for this study comprises cases which are decided on the grounds of manifest excessiveness or inadequacy (*N*=488), represented graphically in Figure 2 below. A case is deemed to have been decided on this ground under the following conditions:

(a) The court finds that the sentence is (or is not) manifestly excessive or inadequate. These cases are included even if multiple grounds of appellate intervention are present because the finding that the sentence was manifestly excessive or inadequate indicates that the appellate court would have intervened *even if* no error was present.

(b) The appellant argues that the sentence is manifestly excessive or inadequate and the appellate court allows the appeal but does not specify the ground(s) on which it intervenes, provided that either one of two further sub-conditions are met: (i) the reasons provided for intervention are similar to the reasons given for intervening with a manifestly excessive or inadequate

sentence;[54] or (ii) the reasons do not clearly disclose any other grounds for intervention.[55] It is important to distinguish the *grounds* of appellate intervention[56] from the *reasons* for intervention. The latter may take many different forms, such as the sentence being out of line with the precedents,[57] or that the sentencing judge failed to take into account or give adequate weight to certain aggravating or mitigating factors.[58] The cases that this paragraph refers to are those in which the court provides the *reasons* but not the *grounds* for intervention.

(c) No specific grounds of appeal *and* grounds for intervention are provided in the judgment. Where a petition of appeal does not explicitly plead a specific ground for intervention, courts have nevertheless proceeded to consider whether the sentence was manifestly excessive or inadequate.[59] Accordingly, if the appeal is allowed, and the reasons given do no clearly disclose other grounds for intervention, one may reasonably infer that the sentence was decided on the grounds of manifest excessiveness or inadequacy.[60]

(d) No appeal is lodged against sentence, but the sentence is reduced or enhanced on the grounds of manifest excessiveness or inadequacy.

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54 For example, that the sentence was not warranted in the circumstances of the case (*Kalaiarasi d/o Marimuthu Innasimuthu v Public Prosecutor* [2012] 2 SLR 774; *Teo Kok Leong Kevin v Public Prosecutor* [2010] SGHC 281 at [5]; *Ganesh s/o M Sinnathamby v Public Prosecutor* [2008] 1 SLR(R) 495) or out of line with precedents, or where the judge failed to take into consideration certain factors.

55 Examples of clearly disclosing other grounds is where the sentence was based on some erroneous interpretation of statute.

56 *Viz*, (a) wrong in law; (b) wrong in principle; (c) wrong decision as to the proper factual matrix; (d) error in appreciating the material before him or her; and (e) manifestly excessive or inadequate (see para 4 above).

57 *Public Prosecutor v Prem Hirubalan* [2016] SGHC 156 at [2]; *Knight Glenn Jeyasingam v Public Prosecutor* [1992] 1 SLR(R) 523 at [24].

58 *Public Prosecutor v Tay Sheo Tang Elvilin* [2011] 4 SLR 206; *Bachoo Mohan Singh v Public Prosecutor* [2009] 3 SLR(R) 1037; *Chan Kum Hong Randy v Public Prosecutor* [2008] 2 SLR(R) 1019; *Public Prosecutor v Hue An Li* [2014] 4 SLR 661.

59 *Lim Mong Hong v Public Prosecutor* [2003] 3 SLR(R) 88 at [48] *ff*.

60 Even though this approach risks over-including cases in the sample, it is submitted that such risk is inevitable because these cases must ultimately either be categorised under one (or more) ground(s) of appeal, and including them under another ground of review runs the risk of over-including cases on *that* ground. It would seem odd to classify a case as one involving an error if one does not identify what that error is.

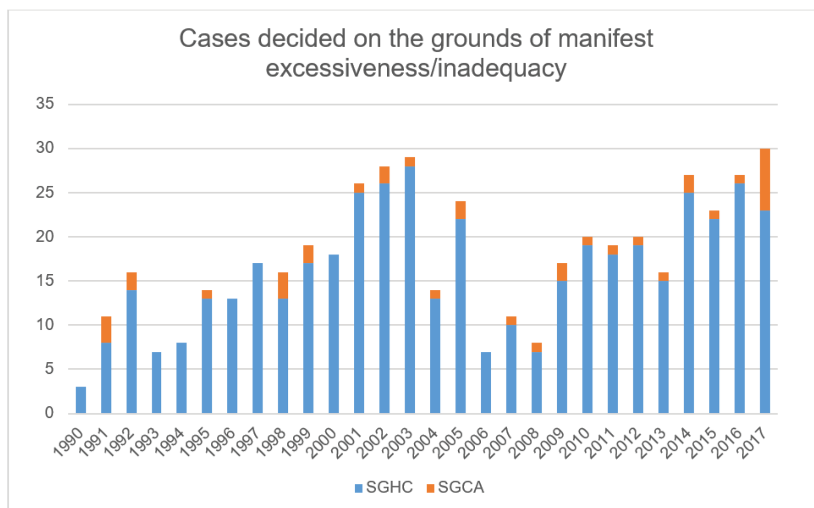

Figure 2: Number of cases decided on the grounds of manifest excessiveness or inadequacy per year

(2) Dependent variable

19 The dependent variable for this study is the percentage change in sentence in the relevant sentence(s) that court is concerned with. Changes in sentence are measured in percentage terms in order to (a) facilitate comparison between different types of sentences imposed (that is, it makes it possible to compare a reduction in a fine and a reduction in an imprisonment term); and (b) account for sentences of different lengths or amounts. While parties may appeal against one or more sentences, not every change in sentence is relevant. Since changes to individual sentences often inevitably affect the global sentence, measuring both would result in double-counting. The relevant metric is thus the sentence(s) the court found to be manifestly excessive or inadequate. If the court finds that the aggregate sentence is manifestly excessive or inadequate, but not the individual sentences,[61] then changes to the latter are ignored,[62] and *vice versa*.[63]

61 See, *eg*, *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998.

62 Adjustments might be made to the individual sentences in achieving an appropriate aggregate. See, *eg*, *Poh Boon Kiat v Public Prosecutor* [2014] 4 SLR 892 and *Lim Seng Soon v Public Prosecutor* [2015] 1 SLR 1195.

63 *Loo Pei Xiang Alan v Public Prosecutor* [2015] 5 SLR 500: In the unusual case where the individual sentences are increased but the aggregate sentence is decreased by running the sentences concurrently instead of consecutively, the change in aggregate sentence is disregarded unless the court also explicitly states that the initial aggregate sentence was manifestly excessive. This is because in such situations, all that can be

(cont'd on the next page)

IV. Analysis

20 Of the 488 cases in the sample, there were 275 cases where at least one appeal was allowed. The remaining 213 cases were dismissed. This in turn yielded 338 instances (that is, the sentence for an offence that the offender was charged with)[64] where the sentence was altered. Of these, 251 instances involved a change in the sentence quantum, while 87 instances involved a change in the sentence type (represented graphically in Figure 3 below). Cases involving a change in the type of sentence are excluded from the scope of this study because it is impossible to quantify the difference between the various types of sentences.

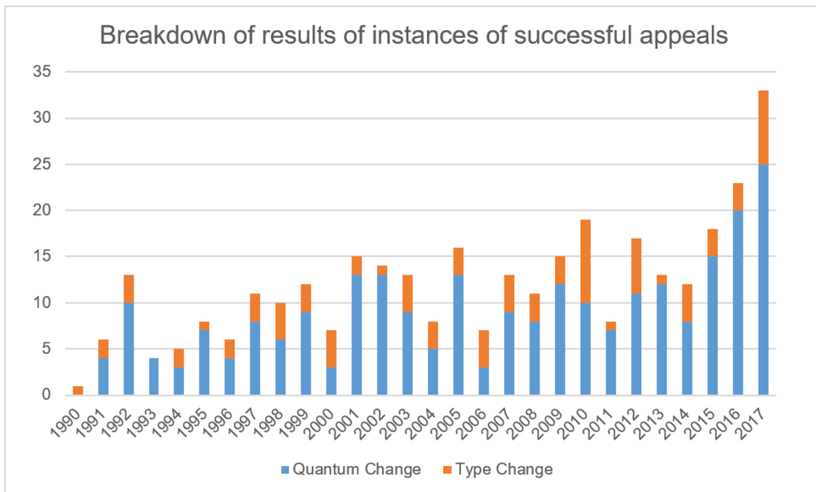

Figure 3: Breakdown of results of instances of successful appeals

21 The data is spread across an extremely wide range of 10%–39,900% (see Figure 4 below), with a mean of 281.60%. However, the mean's function as a measure of central tendency is impaired because it is heavily distorted by an instance of a 39,900% change.[65] Accordingly,

inferred is that running the enhanced sentences consecutively would be manifestly excessive. It *cannot* be inferred that the initial aggregate sentence was *also* manifestly excessive: *Chua Whye Woon v Public Prosecutor* [2016] SGHC 189; *Soh Guan Cheow Anthony v Public Prosecutor* [2017] 3 SLR 147.

64 Note: A single case may have multiple instances if the offender or Prosecution appeals against sentence for multiple charges.

65 *Public Prosecutor v Lee Seck Hing* [1992] 2 SLR(R) 374: Sentence increased from one day to one year.

the quartile boundary values,[66] which are 38.75%, 55.56%, 100% and 39,900% respectively, are more helpful in identifying the most common alterations to sentences. It indicates that half of the sentences were altered by ≤55.56%, a large majority (75%) of instances were altered by ≤100%. The data also indicated that 69.32% of sentences underwent a change of ≥50%. Figure 4 below provides a visual representation of the data, several aspects of which merit further discussion.

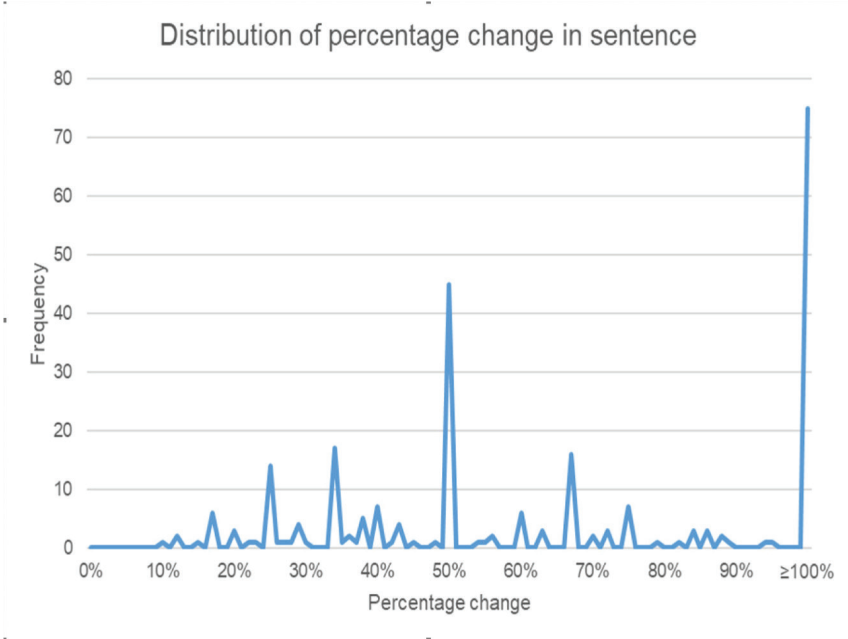

Figure 4: Distribution of percentage changes in sentence

A. Significance of peaks

22 What immediately stands out in Figure 4 are the two major peaks and three minor peaks. The major peaks correspond to percentage changes of ≥100% (*N*=75) and 50% (*N*=45), which account for 29.88% and 17.93% of sentences respectively. The percentage of sentences altered by 100% (*N*=24) is 9.56%, although this is not reflected in Figure 4. The minor peaks correspond to 25% (*N*=14), 33.3% (*N*=17) and 67% (*N*=16),

66 That is, if the percentage change in each instance is arranged in ascending order, the lowest one quarter (*ie*, the first quartile) of instances would have percentage changes of 38.75% and below. The percentage changes of instances in the next two quarters (*ie*, the second and third quartile) would fall within the ranges of 38.75%–55.56%, and 55.56%–100% respectively, and the final quarter (*ie*, the fourth quartile) of instances would have percentage changes of 100% and above.

which account for 5.58%, 6.77% and 6.37% of sentences in the sample respectively. Although the peak at ≥100% is unsurprising because it includes a large range of data, the presence of distinct peaks at various percentage-change values is interesting. Given that the results of each appeal are determined based on the merits of each case, one would expect the percentage changes to be distributed more evenly, instead of being cluttered at certain specific peaks.

23 There are two possible interpretations of this observation. First is that sentencing judges are more prone to imposing a sentence that deviates from the sentencing norm for the offence in question by the percentage values that the peaks above represent. However, this cannot be conclusively confirmed by the data, because the appellate courts only note that there is a clearly established sentencing norm in four of these cases.[67] The second and more plausible interpretation is that appellate courts generally tend to make alterations to sentences in a rough-and-ready way, instead of resorting to strict mathematical analysis. This is supported by how the peaks correspond to easily divisible units, *viz*, a quarter, a third, half, two-thirds or double, which account for 46.21% of the sample. If sentences that are tripled or quadrupled are included as well, these would make up 53.78% of the sample.

24 This does not mean that an appeal is most likely to succeed if counsel is asking for a percentage change that corresponds to one of the peaks. Rather, it means that once the appellate court has decided that an error has been made or that the sentence is manifestly excessive, its most likely course of action is to reduce or enhance the sentence by an easily divisible unit. In other words, a court enhancing a 12-month sentence is more likely to increase it to 18 or 24 months, rather than 17 or 23 months.

25 However, the more significant implication is the insight that this gives into understanding the thought process of the appellate court. It provides some evidence that appellate courts derive the "correct" sentence by starting with the original sentence and then determining what enhancement or reduction is warranted, instead of determining the sentence afresh. It also suggests that once appellate intervention is warranted, the appellate courts do not actively try to minimise their interference with the sentence imposed at first instance by enhancing or reducing it by the smallest amount possible to bring it within the

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67 Only *Lee Kwang Peng v Public Prosecutor* [1997] 2 SLR(R) 569 at [140]; *Tan Mui Teck v Public Prosecutor* [2003] 3 SLR(R) 139 at [23]; *Krishan Chand v Public Prosecutor* [1995] 1 SLR(R) 737 at [17]; and *AQW v Public Prosecutor* [2015] 4 SLR 150 at [29]–[41]. Admittedly, there may be unwritten sentencing norms, particularly at the State Courts level. However, since those norms cannot be ascertained with certainty, they have not been considered.

acceptable sentencing range. Not only does this shed light on a thought process that was hitherto unclear, but this finding also highlights a practical difference between the approach in appellate intervention for sentencing errors and a manifestly excessive or inadequate sentence.[68]

B. Significance of small percentage changes

26 Figure 4 also indicates that a small but significant number of sentences (*N*=29, or 11.55% of the sample) are altered by ≤25%. Not only is this odd given Kow's observation that there is a 25% threshold for appellate intervention on the ground of manifest excessiveness or inadequacy,[69] but these findings also seem anomalous in light of the cases in Table 1 below, where the court explicitly declined to amend a sentence because it was excessive or inadequate, but not *manifestly* so (these cases are collectively referred to as "illustrative cases"):

Case	Imposed sentence (months)	Proposed sentence (months)	Difference (months)	Percentage change rejected
DT v Public Prosecutor[70]	18	15	3	16.67%
Loo Weng Fatt v Public Prosecutor[71]	15	18	3	20%
Tan Sai Tiang v Public Prosecutor[72]	24	18	6	25%

68 In this case, counsel might find it more useful to persuade the court why the sentence should be lowered or enhanced by whatever amount, instead of arguing over how the sentencing judge might have arrived at a different sentence.

69 See para 15 above.

70 [2001] 2 SLR(R) 583 at [74]: The offender was sentenced to 18 months' imprisonment on a charge of outrage of modesty. The appellate court found that this sentence was on the high side in light of a precedent in which 15 months' imprisonment was imposed for more serious cases of molest. Nevertheless, the sentence was not manifestly excessive because the two cases differed by only three months.

71 [2001] 2 SLR(R) 539 at [65]: The court declined to interfere with a sentence of 15 months' imprisonment when the benchmark sentence was 18 months.

72 [2000] 1 SLR(R) 33 at [49]: This case is different from the others. The court reduced the offender's sentence from 24 months to 18 months, but stated that this was on the basis that the sentencing judge had erred and that the sentence *could not be said to be* manifestly excessive.

Chua Siew Peng v Public Prosecutor[73]	24	21	3	12.5%
Public Prosecutor v Tan Thian Earn[74]	54	60	6	11.1%

Table 1: Table of illustrative cases

27 The illustrative cases suggest that percentage changes of 11.1%–25% should not be regarded as a *substantial alteration*, although none of them purport to set a minimum threshold for appellate intervention. Merely five illustrative cases do not constitute a strong enough consensus for one to conclude that they represent the threshold for appellate intervention, and it remains possible for future courts to find that a change of 30% is unsubstantial as well. Nevertheless, given that no better data is available, this study assumes that the threshold set by the illustrative cases (that is, an alteration of 25%) is the quantitative threshold for appellate intervention. This article is concerned with *why*, despite the decisions in the above cases, there are still anomalies, *viz*, sentences altered by 25% or less.

28 This article hypothesised that several external, observable variables may possibly account for this inconsistency, such as (a) wrongly conflating sentencing errors and manifestly excessive or inadequate sentences; (b) differences in time periods; and (c) differences in the length or amount of the original sentence. However, as this part demonstrates, these variables do not conclusively account for these anomalies. Each variable is analysed in turn.

(1) Misleading use of "manifestly excessive or inadequate"

29 The first possible contributing factor is that the term "manifestly excessive or inadequate" may have been used in a misleading manner. This may partly be due to the argument sometimes made by lawyers that a sentence is manifestly excessive or inadequate *because* of a sentencing error. For example, in *Muhammad Zuhairie Adely bin Zulkifli v Public*

73 [2017] 4 SLR 1247 at [137]: The court held that the difference between 21 and 24 weeks' imprisonment cannot be considered substantially higher than the normal range of sentences (12.5%). Although this was in the context of whether sentences should run consecutively or concurrently, the fact that such a difference was not substantial strongly suggests that it would not be manifestly excessive.

74 [2016] 3 SLR 269 at [75]: Although the appellate court was of the view that a sentence of five years' imprisonment was appropriate, the sentence of 4.5 years imposed by the sentencing judge was not manifestly inadequate.

Prosecutor[75] ("*Muhammad Zuhairie*"), counsel for the appellant argued that the sentence was manifestly excessive *because* "rehabilitation should … be the predominant sentencing consideration".[76] Similarly, in *Public Prosecutor v Quek Li Hao*[77] ("*Quek Li Hao*"), the Prosecution argued that the sentences imposed were manifestly inadequate *because* the lower court had erred in fact and law.[78] These statements actually contain two separate grounds of appeal: (a) that the sentence is manifestly excessive; and (b) in *Muhammad Zuhairie*, that the judge erred in not considering rehabilitation as the dominant sentencing principle, and in *Quek Li Hao*, that the court erred in fact and in law.

30 While it is true that sentences imposed in error may also be manifestly excessive or inadequate, the two should not be conflated. Doing so may give the impression that there is a *direct causal relationship* between sentencing errors and manifestly excessive or inadequate sentences where only a correlation exists. That is, sentences imposed in error *tend to be* manifestly excessive or inadequate, but are not necessarily so. Sentencing errors are defects in the process of determining the sentence, whereas the grounds of manifest excessiveness or inadequacy assess the outcome.[79] It follows that a sentence imposed in error is not manifestly excessive or inadequate *unless* the sentence imposed is *also* substantially out of the norm. Thus, arguing that a sentencing error has resulted in a manifestly excessive or inadequate sentence without explaining *why* the sentence imposed was manifestly excessive or inadequate suggests that the sentencing error *ipso facto* resulted in a manifestly excessive or inadequate sentence, which is wrong.[80]

31 Since the threshold and basis for appellate intervention between sentencing errors and manifestly excessive or inadequate sentences differ, falsely equating them might cause two additional problems. Firstly, judges may adopt the higher threshold for manifestly excessive or inadequate sentences of "substantial alterations" when dealing with a sentencing

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75 [2016] 4 SLR 697.

76 *Muhammad Zuhairie Adely bin Zulkifli v Public Prosecutor* [2016] 4 SLR 697 at [19(a)].

77 [2013] 4 SLR 471.

78 *Public Prosecutor v Quek Li Hao* [2013] 4 SLR 471 at [16].

79 See para 11 above.

80 For a somewhat different view, see *Archbold: Criminal Pleading, Evidence and Practice 2009* (P J Richardson ed) (London: Sweet & Maxwell, 2009) at paras 7-136–7-143, especially at para 7-141, which states: "[Manifest excessiveness and 'wrong in principle'] are not distinct grounds of appeal, for the court will conclude that if the sentence is manifestly excessive there must have been an error in principle." However, as argued below, this may not necessarily be true, and there are various situations in which a court may consider a sentence to be manifestly excessive or inadequate despite there being no error committed by the sentencing judge.

error. However, since sentencing errors may also result in sentences that are excessive or inadequate but not *manifestly* so, such appeals may be wrongly dismissed. On the other hand, the second problem is that the term "manifestly excessive or inadequate" may be loosely employed. The risk is of sentences imposed in error being described as being manifestly excessive or inadequate, even where the alterations to those sentences are not substantial. Instead, it may be used out of convenience to describe how the sentence is higher or lower than it would have been had no error been committed, which makes the threshold for intervening in manifestly excessive or inadequate sentences seem lower than it actually is. Until courts clarify the relationship between manifestly excessive or inadequate sentences and sentences imposed in error, the possibility of these problems operating cannot be excluded with certainty.[81]

32 In order to account for the possibility of such occurrences, the data was analysed while excluding cases involving sentencing errors from the sample ("the errorless sample"). An error is deemed to have been committed if the appellate court explicitly stated that the sentencing judge had erred, or if the reasons given for allowing the appeal indicate that an error has been committed. Common indicators of error are where (a) a sentence is out of line with precedents;[82] (b) inappropriate weight was accorded to certain factors;[83] (c) relevant factors were not taken into account;[84] and/or (d) irrelevant factors were taken into account.[85] This yielded a total sample size of 348 cases and 368 instances (Figure 5), of which the appeal was allowed in only 157 instances.

81 On this note, the lawyers in the cases at para 29 above were not corrected.
82 See para 8 above.
83 See para 7 above.
84 *Chua Siew Peng v Public Prosecutor* [2017] 4 SLR 1247 at [112].
85 *Public Prosecutor v Lim Hoon Choo* [1999] 3 SLR(R) 803 at [19].

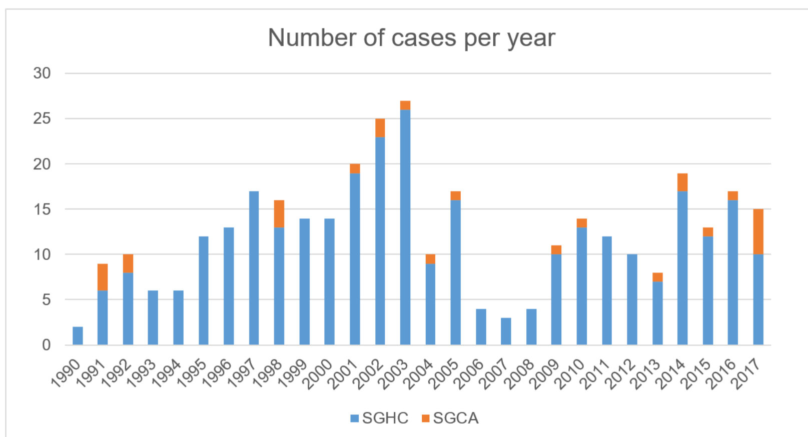

Figure 5: Breakdown of number of cases per year for errorless sample per year

33 Of the 157 instances, 114 involved a change in the length of the sentence, and 43 involved a change in the type of the sentence.[86]

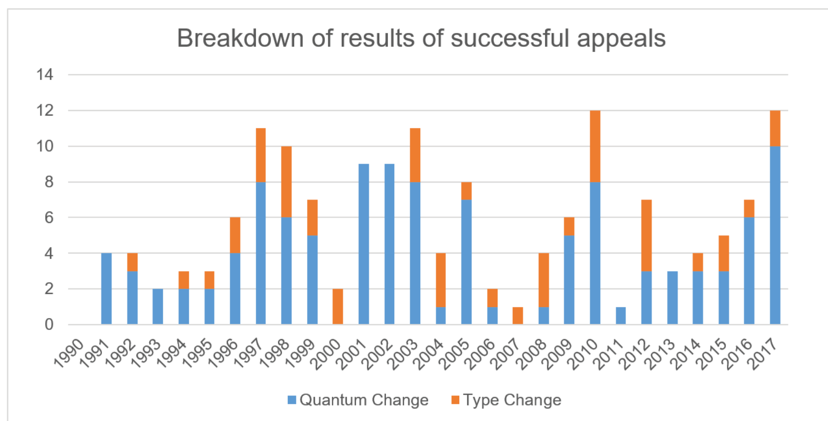

Figure 6: Breakdown of results of successful instances per year

34 As Figure 7 below shows, there is no observable difference between the sentencing patterns of the initial sample and errorless sample. The range of percentage changes in the errorless sample is from 10% and 2,300%, with a mean of 107.14% and a median of 57.44%. Like the initial sample, it yields two major peaks at 50% (*N*=22) and ≥100%

86 See Figure 6 below.

(N=31) with cases scattered along the y-axis. Minor peaks are observed at 33.33% (N=7) and 66.67% (N=11), but not at 25%.

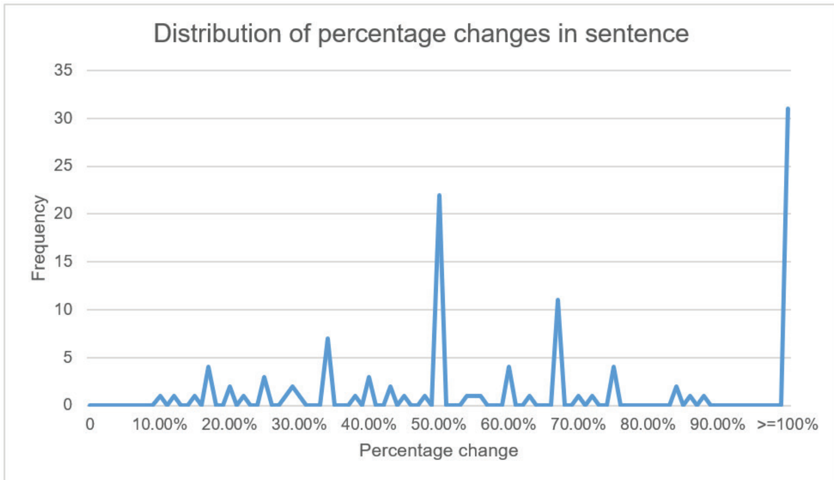

Figure 7: Distribution of percentage changes of sentence for errorless sample

35 A similarly low but significant number of sentences were altered by ≤25% (N=13). This accounts for 11.4% of the errorless sample, which is about the same percentage as the original sample (see Table 2 below). The similar patterns of distribution in the original sample and errorless sample indicate that sentences in both samples are altered in similar ways. This could mean that (a) some sentences that were deemed to be manifestly excessive or inadequate were altered as if they were sentences imposed in error, thus resulting in the anomalies; or that (b) judges have not use the term "manifestly excessive or inadequate" in an overly broad way, or both. However, these possibilities are not conclusive, nor can they be excluded. Instead, all that can be inferred with certainty is that the anomalies cannot be entirely attributed to judges who loosely refer to sentences imposed in error as being manifestly excessive or inadequate. It is worth mentioning that the research design classified cases in the original sample as involving manifest excessiveness or inadequacy even if a ground of error was present.[87] While this may potentially have been a source of error and a design flaw if judges had indeed used the phrase "manifestly excessive or inadequate" loosely, the fact that the errorless sample displays the same distribution of sentence alterations suggest that judges did not do so.

87 See para 18(a) above.

Sample	Total no of instances	Instances in ≤25% range	% of instances
Original sample	251	29	11.55%
Errorless sample	114	13	11.40%

Table 2: Breakdown of instances involving a ≤25% change in sentence

(2) Time

36 Another possible factor contributing to the anomalies is the time period in which they were decided. Those cases could have been decided before the illustrative cases in Table 1 were decided, or the sentencing trends could have changed over time. To account for the time factor or any change in the appellate courts' approach over time, the sample was divided up into three time periods: 1990–2005, 2006–2012 and 2013–2017. The time periods roughly correspond to changes in the Chief Justice in order to account for any difference in sentencing approaches of the individual judges that hear appeals in each time period,[88] as well as any possible unobservable influence that the Chief Justice might have on the sentencing policy.

37 Figures 8–10 present the distribution of percentage changes in sentence across the three time periods:

88 *Eg*, Yong Pung How CJ heard most of the magistrate's appeals while he was Chief Justice; V K Rajah and Woo Bih Li JJ heard some appeals in 2006–2012 but not in 2013–2017; notably, the courts in the 1990s seem to have been more willing to enhance sentences even if there was no appeal by the Prosecution against the adequacy of the sentence. There are only eight observations of this phenomena in the reported cases, and all of them were decided in the 1990s.

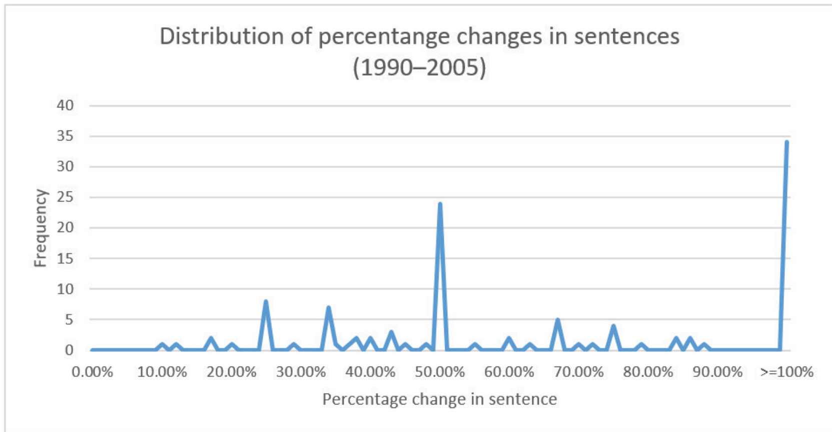

Figure 8: Distribution of percentage changes in sentences 1990–2005

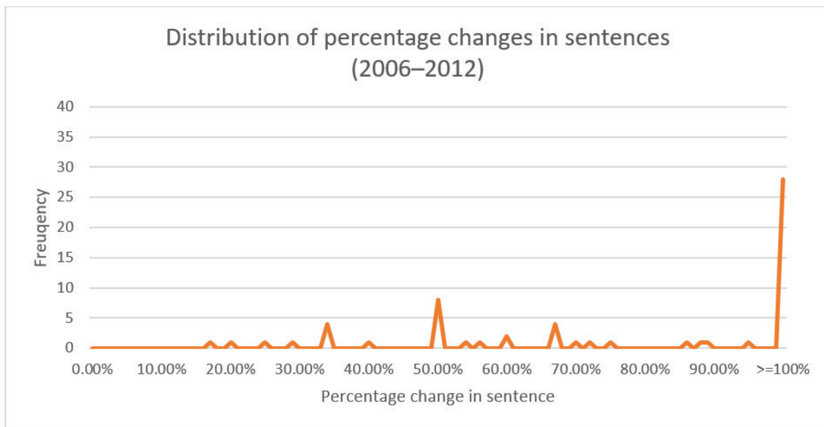

Figure 9: Distribution of percentage changes in sentences 2005–2012

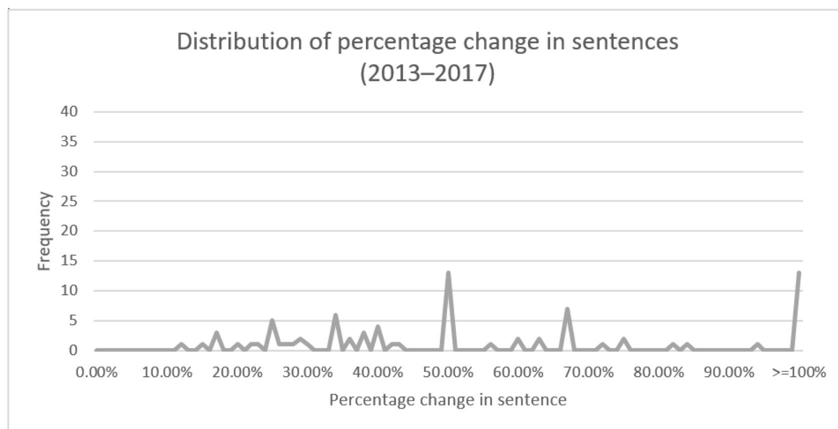

Figure 10: Distribution of percentage changes in sentences 2013–2017

38 Even though it may readily be observed that the incidence of anomalies differs across the three time periods,[89] there seems to be no clear pattern or explanation for them. Instead, it seems that the illustrative cases setting out what is *not* manifestly excessive or inadequate have so far had no significant impact on the sentencing patterns of subsequent decisions in both their own time period *and* subsequent time periods. Even though three of the five illustrative cases were decided in 2000–2001, five of the 13 anomalies in the 1990–2005 period were decided after these three cases, followed by 16 anomalies from 2006–2017. The impact of the earlier three illustrative cases on contemporary sentencing practice is further called into question given that between 2013 and 2017 alone, a five-year period, 13 anomalies have been recorded. This is equal to the anomalies from 1990 to 2005 (16 years), and more than double those from 2006 to 2012 (seven years).

Sample	Total no of instances	Instances involving a change of ≤25%	% of instances involving a change of ≤25%
Original sample	251	29	11.55%
1990–2005	111	13	11.71%
2005–2012	60	3	5.00%
2013–2017	80	13	16.25%

89 See Table 3 below.

Errorless sample	114	13	11.40%

Table 3: Breakdown of instances involving a ≤25% change in sentence across time periods

39 Thus, not only do the illustrative cases seem to have had no effect, but the trend also seems to be moving in the opposite direction. The greater number of anomalies from 2013 to 2017 is possibly an indication that appellate courts are now more willing to make smaller alterations to a manifestly excessive or inadequate sentence. This, together with the increase in the number of sentencing guidelines prescribed,[90] could be signs of increasing appellate supervision over the lower courts' sentencing decisions, although the motivation for doing so remains unclear. The remaining two illustrative cases were decided in 2016–2017, and it remains to be seen what effect they will have, if any.

40 Anomalies aside, there is little evidence of any change in the overall sentencing trend since the histograms for each time period share a similar shape: two peaks at 50% and ≥100%, with numerous smaller bumps along the *y*-axis. The key difference between the graphs is the prominence of those two peaks, which are smaller in the 2006–2012 and 2013–2017 periods, as compared to the 1990–2005 period. However, the mere difference in the heights of those peaks, without more, is not conclusive of any change in sentencing trends. Since the percentage changes in sentence do not follow a fixed distribution but depend ultimately on the facts and circumstances of each particular instance, a mere reduction in a peak's height could simply mean that less cases that would warrant such a change in sentence were appealed against. On the other hand, a reduction in one peak coupled with the emergence of a new peak, assuming all else remains equal, would be compelling evidence of a changing sentencing trend, but this is not the case here. These results thus strongly suggest that the time factor does not account for the occurrence of anomalies.

(3) Correlation between sentence length and percentage change

41 Another possible contributing factor to the anomalies is the quantum of the original sentence. One hypothesis was that courts would be more willing to make smaller percentage changes when the length or amount of the sentence is higher, because a small percentage change

90 Selina Lum, "Increase in Sentencing Guidelines Set Recently" *The Straits Times* (14 September 2017).

for a heavy sentence may translate to a considerable amount of time or money in absolute terms, which would make a significant difference to the offender. Conversely, courts would be less willing to intervene in short sentences (for example, from four weeks' to three weeks' imprisonment) because such alterations would be minute corrections. The data was examined for any correlation between the original sentence and the percentage change on appeal (Figure 11).[91] However, this was only done for sentences of imprisonment (*N*=227) because there were insufficient data points for other types of sentences.[92]

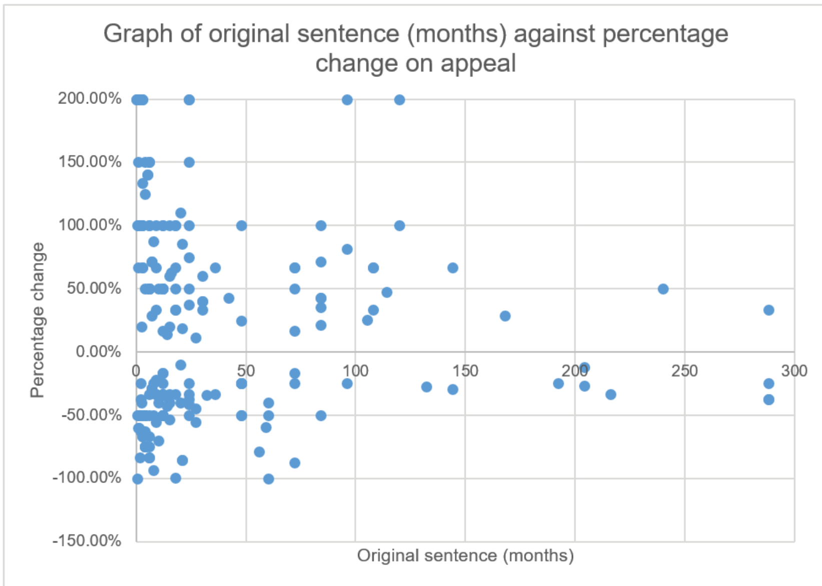

Figure 11: Original sentence (months) against the percentage change in sentence

42 The data, illustrated in Figure 11 above, shows that there seems to be no correlation between the initial sentence imposed and the percentage change on appeal. While longer sentences tend to see smaller percentage changes *relative to* shorter sentences as a whole, smaller percentage changes are not unique to longer sentences. In fact, instances with shorter initial sentences see similarly low, if not lower, percentage changes on appeal. The Pearson correlation coefficient between the sentence length and the percentage change, which measures the degree

91 Note that Figure 11 is truncated for legibility – It does not display two data points of 384 months (–25% change) and 480 months (–50% change), which would otherwise stretch the graph too much, and result in a lower resolution of the data points.

92 Of the remaining 24 sentences, 17 involved fines, five involved disqualification orders and two involved caning.

of correlation between these two variables, is –0.014, which indicates that there is virtually no association between the length of the initial sentence and the percentage change on appeal. Longer initial sentences thus cannot account for the anomalies either.

(4) Unobservable factors

43 The fact that the observable factors discussed above cannot fully account for the anomalies suggests that unobservable factors may play a part. This article suggests several possibilities.

44 The first is that appellate judges have not taken into account the positions taken by their fellow judges in the illustrative cases, a possibility supported by how the illustrative cases have not been referred to in other judgments as examples of when a sentence may be excessive or lenient but not manifestly so. Yet this is understandable when one considers the nature of appeals against sentence, where the respondent's strategy is usually to argue that the lower court's sentence was correct or justifiable, rather than to acknowledge that the sentence is excessive or inadequate but not *manifestly* so. As such, when dealing with precedents where an appeal against sentence was dismissed, counsel was likely to focus on the *very fact* that the lower court's sentence was upheld on appeal, instead of *why* the appeal was dismissed. Furthermore, counsel was unlikely to cite the illustrative cases unless the offence on appeal was the exact same one as that in the illustrative case because lawyers usually focus on precedents directly related to the offence in question instead of looking at sentencing trends holistically.

45 A second possibility is that judges do not care for a quantitative threshold at all. Not only is there no principled way for determining an acceptable quantitative threshold, even if one managed to decide on a particular numerical threshold, but it is also unlikely to operate independently of various other factors such as the facts and circumstances of the case, and the length or amount of the original sentence. Furthermore, insistence on a particular numerical value is likely to result in a rigid and inflexible rule that is ill-suited for taking into account exceptional circumstances. Judges may therefore prefer to eschew strict adherence to numerical guidance, in which case what *appears* to be anomalies in this study may not be anomalous at all, but may instead be viewed as manifestations of individual judges' thresholds between what is "substantial" and what is not.

46 Third, the anomalies may be due to courts being compelled to intervene to do justice to a case, notwithstanding the fact that the alternation may not be truly "substantial". If so, then the anomalies represent a legitimate exception to the general threshold for intervention

on the grounds of manifest excessiveness or inadequacy. However, there is nothing in the data that supports this position, and this possibility cannot be explored further at this point in time.

47 Unfortunately, there is no way of confirming which of the above possibilities are the reason for the anomalies with the present data. All that is clear is that the inconsistencies (or apparent inconsistencies) between the illustrative cases and the anomalies cannot be readily explained,[93] and gives the impression that there is no uniform approach for assessing whether a sentence is manifestly excessive or inadequate.

V. Suggestions

48 Moving forward, there certainly seems to be room for improving how manifestly excessive or inadequate sentences are dealt with. This article's main suggestion is that courts should avoid using a quantitative threshold to determine when appellate intervention on the grounds of manifest excessiveness or inadequacy is warranted, and also makes several observations on how untangling the grounds of manifest excessiveness or inadequacy from sentencing errors can provide greater clarity in this area of law.

A. Moving away from a quantitative threshold

49 A key requirement for appellate intervention on the grounds of manifest excessiveness or inadequacy is the need for alterations to be "substantial" instead of being "minute corrections".[94] However, this test is problematic, in so far as it implies that there is a quantitative threshold that must first be met, for two main reasons.

50 First is the difficulty with identifying what the threshold of a "substantial alteration" is. The cases give no indication of what this might be, and the data does not offer strong support for the existence of one. The operative threshold of around 25% suggested by Kow and derived from the illustrative cases[95] does not seem to be well established, given that the data records numerous anomalies that fall below this mark.

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93 See also Sarah Krasnostein & Arie Freiberg, "Manifest Error: Grounds for Review?" (2012) 36 ABR 54 at 72, which observes, in the Australian context, that while the threshold for intervening in manifestly excessive or inadequate sentences is ostensibly high, the reality of practice is otherwise.

94 *Public Prosecutor v Siew Boon Loong* [2005] 1 SLR(R) 611 at [22].

95 See para 26 above.

51 It is possible to argue that the threshold should be 10% or lower because no alterations of less than 10% were observed. However, this argument will still need to account for the positions taken in the illustrative cases. Unless the thresholds set in the illustrative cases can be ignored or confined to their facts, and there is no clear reason why they should, they indicate that individual judges have considerable latitude to vary the threshold for intervention, which again accentuates the difficulty in identifying a consistent threshold. One way to harmonise the data and the illustrative cases is to view the threshold as a range instead of a fixed figure, but doing so still requires the boundaries of that range to be determined.

52 The second and deeper problem with having a quantitative threshold is why, in the context of the two requirements in *Public Prosecutor v Siew Boon Loong*[96] ("*Siew Boon Loong*"),[97] there is even a need to require alterations to be "substantial". If an appellate court has already determined that a sentence imposed by a lower court was *unjustly* lenient or severe, it would seem extremely odd indeed if it did not intervene to remedy the injustice. Arguably the whole point of the appellate intervention is to remedy any injustice, and the extent of the alteration is the outcome of that process. To say that the extent of the alteration must reach a certain threshold before appellate intervention is warranted would be putting the cart before the horse.

53 It is therefore suggested that a better solution would be to focus on the *qualitative* aspect of the test for manifest excessiveness or inadequacy, that is, on whether the sentence is *unjustly* lenient or severe. This would also be consistent with the qualitative approach that other jurisdictions employ. For example, a *Wednesbury*-type standard of review was applied in Victoria, Australia, where a sentence is manifestly excessive "if it can be shown that no reasonable sentencing judge could have imposed this sentence on this offender in these circumstances".[98] Similarly, the Privy Council has held that "to interfere with a criminal sentence there must be something so irregular or so outrageous as to shock the very basis of justice".[99]

54 One might even argue that *Siew Boon Loong* does not purport to introduce a quantitative threshold, and that there is no basis for thinking that one exists. This is especially in light of the following comments

96 [2005] 1 SLR(R) 611.
97 See para 2 above.
98 *R v Abbott* [2007] VSCA 32 at [14]; see also *White v The Queen* [2010] VSCA 261 and *Guden v The Queen* [2010] VSCA 196.
99 *Mohindar Singh v The King-Emperor* (1931–1932) LRIA 233 at 235.

Yong CJ made in *Soong Hee Sin v Public Prosecutor*[100] (which he reiterated in *Siew Boon Loong*):[101]

> [Any] attempt to reduce the law of sentencing into a rigid and inflexible mathematical formula in which all sentences are deemed capable of being tabulated with absolute scientific precision [will] be highly unrealistic. … In my view, the regime of sentencing is a matter of law which involves a hotchpotch of such varied and manifold factors that no two cases can ever be completely identical in this regard. While past cases are no doubt helpful and sometimes serve as critical guidelines for the sentencing court, that is also all that they are, *ie* mere guidelines only. … At the end of the day, every case which comes before the courts must be looked at on its own facts, each particular accused in his own circumstances, and counsel be kept constantly and keenly apprised of the fact that it is just not possible to categorise cases based simply on mere numerals and decimal points.

55 Although these remarks were made in the context of determining the appropriate sentence for an offender, they are equally applicable in the context of appellate intervention as well. It is thus unfortunate that the phrases "substantial alterations" and "minute corrections" were also used in *Siew Boon Loong*. Yong CJ was cautioning against the "lore of nicely calculated less or more" in matters of sentencing,[102] which one can intuitively appreciate with an extreme example: it would seem ridiculous to increase a ten-year imprisonment sentence by two days. However, appeals against sentence are never this extreme, and the decision on whether to intervene is less clear cut. The problem with cautioning against the "lore of calculated less or more" is that questions of "how much less" or "how much more" remain. It is suggested that the underlying thrust of Yong CJ's guidance was that the discretion of the sentencing judge should not be readily interfered with unless there has been an unjust factor, and perhaps that should be the main consideration of appellate courts in deciding whether a sentence is manifestly excessive or inadequate.

56 Given the above discussion, perhaps the illustrative cases are best interpreted as instances where the appellate court did not find the offender's sentence *unjust*, even though the sentence was higher or lower than what the appellate court would have imposed. This reconciles the illustrative cases with the anomalies, while implying that there is some room for individual judge's sentencing tendencies. After all, sentencing guidelines are not tramlines. It is further suggested that the grounds of manifest excessiveness or inadequacy should not be liberally invoked, and that appellate courts should be slow to intervene when the

100 [2001] 1 SLR(R) 475.

101 *Soong Hee Sin v Public Prosecutor* [2001] 1 SLR(R) 475 at [12], cited in *Public Prosecutor v Siew Boon Loong* [2005] 1 SLR(R) 611 at [23].

102 *Public Prosecutor v Siew Boon Loong* [2005] 1 SLR(R) 611 at [22].

sentencing judge has committed no error. Unduly strict supervision may result in judges being overly concerned about whether their sentences get appealed against and overturned,[103] which in turn results in sentences being clustered around a range that is narrower than desired.

B. Clearly segregating errors and manifest excessiveness or inadequacy

57 This article's second suggestion is that courts should clearly state the primary ground on which they intervene to avoid problems associated with conflating different grounds of appeal.[104] This is particularly important where a sentence imposed in error *is also* manifestly excessive or inadequate. Since the role of the appellate court in such situations is to provide guidance by identifying and correcting the error instead of scrutinising the severity or leniency of the sentence imposed *per se*, the primary ground of appellate intervention would be that of a sentencing error. The fact that the sentence was manifestly excessive or inadequate is secondary because the presence of an error *alone* warrants appellate intervention. Since there was a problem with the process, there is no point scrutinising the result. Relatedly, courts may also wish to refrain from using reasons that are more accurately classified as sentencing errors (such as giving improper weight to certain sentencing factors)[105] to justify finding a sentence to be manifestly excessive or inadequate.

C. Situations involving a manifestly excessive or inadequate sentence

58 Since hitherto most reasons for appellate intervention on the grounds of manifest excessiveness or inadequacy actually evince a sentencing error, there will likely be fewer circumstances in which the ground of manifest excessiveness or inadequacy should be invoked. While it is difficult to come up with a principled general rule for *all* future appeals, several situations where this may be pleaded are where:

> (a) The case is unprecedented[106] (or where there are few precedents directly on point)[107] and the appellate court is of the opinion that the starting point set by the sentencing judge is inappropriate and requires substantial alteration.

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103 The Right Honourable Sir Anthony Hooper, "Sentencing: Art or Science" (2015) 27 SAcLJ 17 at 17–18 and 19, paras 5 and 11.

104 See paras 29–31 above.

105 See para 9 above.

106 *Public Prosecutor v Wang Minjiang* [2009] 1 SLR(R) 867 at [3].

107 See, *eg*, *Idya Nurhazlyn bte Ahmad Khir v Public Prosecutor* [2014] 1 SLR 756 at [29].

(b) The precedents do not indicate any clear sentencing norm,[108] where there have been no reported decisions at the appellate level,[109] or where past sentences imposed have been inconsistent with each other.[110] In such scenarios, the court may wish to provide guidance in the form of a guideline judgment. In the event that the doctrine of prospective overruling is not applied,[111] the sentence below may be altered if it is manifestly excessive or inadequate according to the new guidelines.

(c) The court is of the opinion that the existing precedents or benchmarks need to be recalibrated,[112] possibly in light of changing policy concerns. For example, in *Ding Si Yang v Public Prosecutor*,[113] the court recalibrated the sentencing norms for bribery upwards in light of the increased lucrativeness and anonymity of match-fixing offences as well as the increased potential for reputational harm to Singapore.[114]

(d) The sentencing judge does not give sufficient reasons for his or her decision such that the appellate court cannot assess the propriety of the judge's reasoning process, and that accordingly, the only grounds of appeal on which the sentence may be modified is the grounds of manifest excessiveness or inadequacy.[115]

(e) The extraordinary circumstances of the case demand a higher or lower sentence be imposed. This would include cases where appellate court wishes to exercise judicial mercy.

59 The aforementioned scenarios are not intended to be exhaustive, and more may be added to the list over time. Scenarios (a)–(c) involve the setting or recalibration of sentencing guidelines, and the number of successful appeals in such situations is likely to be relatively low compared to the other grounds of appeal, and will decrease over time. As courts continue to develop guidelines for more offences, there will be fewer opportunities for these scenarios to arise. Furthermore, once guidelines are issued for a particular offence, they are unlikely to require regular recalibration. Scenarios (d)–(e) involve a change in sentence in

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108 See, *eg*, *Yap Ah Lai v Public Prosecutor* [2014] 3 SLR 180 at [10].
109 See, *eg*, *Public Prosecutor v Nelson Jeyaraj s/o Chandran* [2011] 2 SLR 1130 at [44].
110 See, *eg*, *Adam bin Darsin v Public Prosecutor* [2001] 1 SLR(R) 709 at [14].
111 *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 at [124]–[125].
112 *Public Prosecutor v GS Engineering & Construction Corp* [2017] 3 SLR 682.
113 [2015] 2 SLR 229.
114 *Ding Si Yang v Public Prosecutor* [2015] 2 SLR 229 at [57]; see also *Teo Keng Pong v Public Prosecutor* [1996] 2 SLR(R) 890 at [91] where the court held that in non-aggravated cases of molest, a fine would usually be sufficient.
115 *Public Prosecutor v Lee Cheow Loong Charles* [2008] 4 SLR(R) 961 at [24].

light of exceptional or unusual circumstances of the case, which should likewise be rare occurrences.

60 On this note, it is further submitted that scenario (e) helps to integrate the exercise of judicial mercy into the statutory framework. The courts have stated that they have a residuary discretion to exercise mercy in appropriate cases, which usually takes the form of a substantial reduction in the sentence to be imposed.[116] However, it is unclear what the legal basis for this residuary discretion is, especially since s 394 of the CPC does not permit any reduction *other than* where a sentence is wrong in law, against the weight of the evidence, or manifestly excessive.

61 Thus far, the cases have not explored how this residual discretion should be harmonised with the CPC. While one may contend that judicial mercy is a discretionary power or "exceptional jurisdiction"[117] that exists outside and above s 394 of the CPC, it would seem odd if discretionary powers can override the clear words of a statute, which might then pave the way for lawyers to urge courts to invoke their inherent or exceptional jurisdiction to override statutes in future cases. It is thus submitted that the better approach for exercising judicial mercy is for the courts to find that the sentence would be manifestly excessive given the offender's personal circumstances, which grounds the exercise of the discretion within s 394 of the CPC. This is merely an application of the oft-repeated notion that a sentence must be calibrated not just to the offence but to the offender.

D. Reorganising the grounds of appeal against sentence

62 Finally, while only tangentially related to the issue of manifestly excessive or inadequate sentences, this article further proposes that the grounds of appeal not found in s 394 of the CPC, *viz*, where (a) the sentence wrong in principle; (b) the judge made the wrong decision as to the proper factual matrix; and (c) the judge erred in appreciating the material before him or her (henceforth referred to as "non-statutory grounds"), should not be treated as disjunctive grounds of appeal that co-exist with s 394. Instead, they should be treated as *examples* of the grounds of appeal found under s 394.

63 There are two main reasons for doing so. Firstly, this is in line with s 394 of the CPC, where the phrase "set aside *only* where …" [emphasis added] suggests that no additional grounds of appellate

116 *Chng Yew Chin v Public Prosecutor* [2006] 4 SLR(R) 124 at [50]–[62]; *Chew Soo Chun v Public Prosecutor* [2016] 2 SLR 78 at [28].
117 *Chew Soo Chun v Public Prosecutor* [2016] 2 SLR 78 at [23].

intervention can be accommodated unless they fit within either "wrong in law", "against the weight of the evidence", or "manifestly excessive or inadequate". Interestingly, the three categories of sentencing errors were only first mentioned in the 1986 decision in *Tan Koon Swan v Public Prosecutor*,[118] where the Court of Appeal adopted them from *Archbold: Criminal Pleading, Evidence and Practice* without explaining how these grounds fit within the CPC in force at that time.[119]

64 It is suggested that the three non-statutory grounds can easily fit into s 394 of the CPC. A sentence that is wrong in principle can be classified as a sentence that is "wrong in law". The word "law" is not defined in the CPC, although the ordinary sense of the word appears to include both statute *and* common law principles.[120] Thus, a sentence that fails to consider or apply sentencing principles that are established in case law can rightly be regarded as being wrong in law. Further, sentences imposed where the judge failed to appreciate the proper factual matrix or the material before him may be regarded as sentences that are "against the weight of the evidence". It is submitted that this approach is better than the current framework with five disjunctive grounds of appeal because it preserves the integrity of s 394 of the CPC.

65 Another reason why the non-statutory grounds can be subsumed under s 394 of the CPC is because the courts do not rigidly apply the non-statutory grounds. This is supported by three observations: Firstly, the appellate courts do not always specify the grounds of error on which it intervenes, and sometimes merely points out the error made by the sentencing judge.[121] Secondly, errors in appreciating the proper factual matrix or the material before the judge have been treated collectively as "factual errors".[122] Thirdly, the Court of Appeal has broadly referred to the grounds of error as "a decision made in error",[123] which suggests that a degree of generality in approaching the grounds of error is permissible. In any case, there is little utility in determining what *kind* of error has been committed. Instead, it suffices to focus *how exactly* the judge had erred. Therefore, the grounds of appeal should be reorganised as recommended

118 [1985–1986] SLR(R) 976.

119 *Tan Koon Swan v Public Prosecutor* [1985–1986] SLR(R) 976 at [3], Referring to a passage in *Archbold: Criminal Pleading, Evidence and Practice 2009* (P J Richardson ed) (London: Sweet & Maxwell, 2009) at paras 7-136–7-143 which mentions the three additional grounds accepted today. Section 261 of the then Criminal Procedure Code (Cap 68, 1985 Rev Ed), which is the equivalent of s 394 of today's Criminal Procedure Code (Cap 68, 2012 Rev Ed), was not discussed.

120 *Public Prosecutor v Manogaran s/o R Ramu* [1996] 3 SLR(R) 390 at [65]–[66].

121 See, *eg*, *Mohamad Fairuuz bin Saleh v Public Prosecutor* [2015] 1 SLR 1145 at [78]; see also *Public Prosecutor v Ang Seng Thor* [2011] 4 SLR 217.

122 See *Public Prosecutor v Tee Fook Boon Andrew* [2011] SGHC 192 at [26].

123 *Public Prosecutor v Tan Kei Loon Allan* [1998] 3 SLR(R) 679 at [33].

above to harmonise the current common law practice with s 394 of the CPC.

VI. Conclusion

66 This article has sought to review the law and practice of appellate intervention from both a qualitative and quantitative perspective. It differs from Kow's earlier commentary[124] in that it did not observe any indication of a quantitative threshold that must be crossed before appellate intervention is warranted on the grounds of manifest excessiveness or inadequacy, although this difference may be partly due to the fact that cases with no written grounds of decision were excluded from this present review. Regardless, this article has suggested that any quantitative guidelines should be discarded in favour of a qualitative approach that focuses on whether the lower court's sentence is just, and whether the sentencing judge's discretion should be interfered with. The survey of the cases also uncovered several other inconsistencies in the area of sentencing that hopefully can be addressed, such as the distinction between sentencing errors and the grounds of manifest excessiveness or inadequacy, and how to harmonise the current grounds of appellate intervention with s 394 of the CPC.

67 This study also uncovers several pertinent issues for further consideration that are beyond the scope of this article to discuss. For example, should courts consider providing more detailed *qualitative* guidelines for determining when a sentence is manifestly excessive or inadequate? Furthermore, with the increasing number of guideline judgments, are judges likely to impose sentences that are clustered around a specific range, and if so, should the threshold for manifestly excessive or inadequate sentences remain the same in this context? And where the appellate courts intervene on a manifestly excessive or inadequate sentence, should there be a principle of "minimal intervention", where the sentence is enhanced or reduced by *as little as possible* to bring it within the acceptable range?

68 Consistency in sentencing reflects the legitimacy and integrity of the criminal justice system and increases the confidence that may be placed therein. As the courts strive for a robust approach in sentencing, clarity and consistency in the appellate review of sentences cannot be

124 See para 15 above.

neglected. This article suggests several steps that can be taken in that direction.