Yap Ah Lai *v* Public Prosecutor
[2014] SGHC 70

Case Number : Magistrate's Appeal No 271 of 2013

Decision Date : 15 April 2014

Tribunal/Court : High Court

Coram : Sundaresh Menon CJ

Counsel Name(s) : The appellant in person; April Phang and Chee Min Ping (Attorney-General's Chambers) for the respondent.

Parties : Yap Ah Lai — Public Prosecutor

Criminal Procedure and Sentencing – Sentencing

15 April 2014 Judgment reserved.

Sundaresh Menon CJ:

Introduction

1 The appellant was 72 years old when he was apprehended on 25 October 2013 for smuggling 161.4kg of cigarettes into Singapore through the Woodlands Checkpoint. He pleaded guilty to two charges under s 128F of the Customs Act (Cap 70, 2004 Rev Ed) ("the Customs Act"): the first for evading excise duty on the cigarettes, and the second for failing to pay Goods and Services Tax ("GST") on them. He was sentenced by the District Judge to 24 months' imprisonment for the excise duty charge and five months' imprisonment for the GST charge. Both sentences were ordered to run concurrently from the date he was first remanded. He has appealed on the basis that the sentence is manifestly excessive.

2 I heard the appeal on 14 February 2014. Having considered the materials that were placed before me, I was troubled by three things. The first was that it was difficult to see any consistency or any clear sentencing trend in previous sentencing decisions in respect of convictions for offences of this nature. This much was evident from the table of sentencing precedents which had helpfully been prepared for this appeal by Ms April Phang, the Deputy Public Prosecutor ("the DPP"). The DPP candidly accepted this evident lack of consistency in the course of her oral submissions but she nonetheless maintained that the term of imprisonment that had been imposed on the appellant by the District Judge was justified in all the circumstances.

3 The second point that concerned me was that the sentence of imprisonment that had been meted out in this case appeared to fall at, if not beyond, the high end of the range of sentences that had been imposed in previous cases involving comparable amounts of smuggled tobacco products.

4 The final thing that concerned me was that certain key paragraphs ([18]–[20]) of the District Judge's decision (see *Public Prosecutor v Yap Ah Lai* [2013] SGDC 383, hereinafter referred to as "the GD") in which he had set out his reasons for the sentences he imposed were identical to three paragraphs of another decision issued by the same District Judge at about the same time: see [18]–[20] of *PP v Kesavan V Matamuthu* [2013] SGDC 403 ("*Kesavan*"). *Kesavan* is a case in which a cigarette smuggler had imported 182.04kg of cigarettes from Malaysia by transporting the cigarettes in a bus; he was similarly sentenced to a total of 24 months' imprisonment. It was one of the

authorities cited to me by the DPP in support of the District Judge's decision in this case. While there were some similarities between the cases, there were enough differences so that it seemed plausible that, at least as a matter of first impression, they might call for differentiated approaches.

5 I therefore reserved judgment in order to consider these matters more thoroughly and having done so I am satisfied that in these circumstances the sentence below was manifestly excessive. Accordingly I allow the appeal and reduce the aggregate period of imprisonment to 15 months for the reasons which follow.

Background facts

6 The appellant is a Malaysian citizen. He admitted to the investigation officers that he had been asked by one "Ah Ong" to smuggle cigarettes into Singapore. In return, he was promised payment of MYR 2,000. "Ah Ong" provided him with a Malaysian-registered motor car in which were hidden the cigarettes in various modified compartments. On 25 October 2013, as the appellant drove the motor car through the Woodlands Checkpoint, he was stopped for a routine check and the cigarettes were found. He was arrested, and on the next day, 26 October 2013, was charged as follows:

> **DAC 41852/2013**
>
> ... [T]hat you, on the 25th day of October 2013, at about 3.40pm, at Arrival Car, 100% Inspection Pit, Woodlands Checkpoint, Singapore, were concerned in the importation of uncustomed goods, to wit, 485 cartons x 200 sticks, 50 cartons x 160 sticks and 2420 packets x 20 sticks assorted brands of duty unpaid cigarettes, weighing **161.400** kilogrammes altogether, from Johor Bahru (West Malaysia) into Singapore in a Malaysian Registered Motorcar no. BJJ947, on which excise duty of **$56,812.80** was unpaid, and you have thereby committed an offence under Section 128F of the Customs Act (Cap 70), punishable under Section 128L(4) of the same Act.
>
> **DAC 41853/2013**
>
> ... [T]hat you, on the 25th day of October 2013, at about 3.40pm, at Arrival Car, 100% Inspection Pit, Woodlands Checkpoint, Singapore, were concerned in the importation of uncustomed goods, to wit, 485 cartons x 200 sticks, 50 cartons x 160 sticks and 2420 packets x 20 sticks assorted brands of duty unpaid cigarettes, weighing **161.400** kilogrammes altogether, from Johor Bahru (West Malaysia) into Singapore in a Malaysian Registered Motorcar no. BJJ947, valued at **$76,147.80** and on which Goods and Services Tax of **$5,330.35** was unpaid, and you have thereby, by virtue of Sections 26 and 77 of the Goods and Services Tax Act (Cap 117A), paragraph 3 of the Goods and Services Tax (Application of Legislation Relating to Customs and Excise Duties) Order (Cap 117A, Order 4) and paragraph 2 of the Goods and Services Tax (Application of Customs Act) (Provisions on Trials, Proceedings, Offences and Penalties) Order (Cap 117A, Order 5), committed an offence under Section 128F of the Customs Act (Cap 70) punishable under Section 128L(4) of the same Act.

7 For first offenders where the goods consist wholly or partly of tobacco products and such products exceed 2kg in weight, s 128L(4) of the Customs Act provides for the following punishment:

> (**4**) Any person who is guilty of any specified offence involving goods consisting wholly or partly of relevant tobacco products shall, if such tobacco products exceed 2 kilogrammes in weight, be liable on conviction —

(*a*) to a fine of —

(i) not less than 15 times the amount of the customs duty, excise duty or tax the payment of which would have been evaded by the commission of the offence, subject to a minimum of $1,000; and

(ii) not more than 20 times the amount of the customs duty, excise duty or tax the payment of which would have been so evaded or $10,000, whichever is the greater amount; or

(*b*) to imprisonment for a term not exceeding 3 years, or to both.

8 On 28 October 2013 the appellant pleaded guilty to the charges and he was sentenced on that day. The charges stated that the appellant had evaded excise duty of $56,812.80 and GST of $5,330.35. Therefore, the District Judge noted that the fine that would have been payable on the excise duty charge (had he been minded to impose this) would range between $852,192 and $1,136,256 and on the GST charge at between $79,955.19 and $106,606.92, these being multiples of 15 and 20 times the duty or tax evaded respectively. Because the appellant was clearly unable to pay these sums the District Judge chose instead to sentence him to 24 months' imprisonment on the excise duty charge and five months' imprisonment on the GST charge, both to run concurrently. The District Judge imposed these terms of imprisonment because he considered that they were within the range of sentences (albeit at the higher end) that have been imposed where an offender is unable to pay fines of such amounts, as established by the practice and precedents of other judges of the State Courts in relation to such offences. It appears therefore that the District Judge started by calculating the range of the fine that might have been imposed and then derived from this the imprisonment term that he considered was called for if there had been a default in paying such a fine.

9 The District Judge further considered (at [19]) that imposing a sentence at the high end of the range was appropriate because the "accused had imported a massive amount of 'duty-unpaid' cigarettes into Singapore. That amount would have flooded the market for illegal cigarettes in Singapore". The District Judge said (at [20]) that running the two sentences consecutively would be manifestly excessive and declined to do so. As I have noted above, [18]–[20] of the GD were repeated in identical terms at [18]–[20] of *Kesavan.*

The appropriate benchmark sentence for an offence under s 128F

10 There has not hitherto been any pronouncement of this court setting out the appropriate sentencing benchmarks for such offences as were committed in this case. I refer here specifically to customs offences in relation to excise duty evaded when importing more than 2kg of tobacco products and my subsequent remarks should be read in this context. I accordingly set out some guidelines below. These guidelines may be applied in accordance with the general principle that like cases should be treated alike, but always in a flexible rather than rigid manner and with due regard to the circumstances of each case: see my remarks in *Edwin s/o Suse Nathen v PP* [2013] 4 SLR 1139 ("*Edwin s/o Suse Nathen*") at [23].

11 In this context, I take this opportunity to reiterate some important points made by Chao Hick Tin JA in *Ong Chee Eng v PP* [2012] 3 SLR 776 ("*Ong Chee Eng*"):

(a) A key principle that undergirds our system of criminal justice is that within the range of criminal sanctions prescribed by the law, the punishment should fit the crime and also the criminal: *Ong Chee Eng* at [23];

(b) Sentencing benchmarks or guidelines stem "from the steady accretion of [judicial] decisions ... [and] are the result of the practical application of statutory penal laws, but [they] should not be mistaken for those laws themselves": *Ong Chee Eng* at [24];

(c) Benchmarks help achieve consistency in treating like cases alike, but judges must ensure that an unstinting focus on these guidelines does not lead to unlike cases being treated alike. The courts must remain sensitive to the particular facts of each case that is presented: *ibid*;

(d) Sentencing decisions in previous cases have limited value if they are unreasoned and unreported. The danger in following such unreasoned decisions unthinkingly is that the sentencing judge is wont to lose sight of the particular facts and circumstances that are of the first importance when determining an appropriate sentence: *Ong Chee Eng* at [33], also citing the decision of Chan Sek Keong CJ in *Luong Tri Trang Kathleen v PP* [2010] 1 SLR 707 at [21].

12 There may be a very wide range of factual circumstances that might give rise to a charge under s 128F and punishable under s 128L(4) of the Customs Act. Any sentencing benchmark must be capable of being simply yet flexibly applied with due regard to the facts presented. In *Edwin s/o Suse Nathen* I undertook much the same exercise in relation to the offence of driving while under the influence of drink, and presented a framework in which the sentencing judge first considers the extent to which the concentration of alcohol in the offender's blood exceeds the prescribed limit and then considers the presence of aggravating or mitigating factors: at [15] and [16]. The essential value of such a framework is to guide the sentencing judge towards an appropriate sentence that is generally consistent with sentences imposed in other like cases; that has due regard to the sentencing range available to the judge; and of critical importance, that has due regard to the particular facts that are presented.

The scheme of the Customs Act

13 I begin with the general scheme of the Customs Act. Section 128F falls within Part XV of the Customs Act which sets out offences and penalties in relation to that Act. The offence at hand is among the more serious offences, which are termed "specified offences" (see s 128L(7) which defines these as offences under ss 128D to 128K, including s 128F). In the main, these are offences concerning uncustomed or prohibited goods and attract enhanced punishment under s 128L. Evasion of excise duty is a specified offence under s 128F, and by virtue of the pieces of subsidiary legislation enumerated in the charge, so is the evasion of GST. In cases of smuggling, as is the case here, charges involving both these types of offences generally run together.

14 These provisions were enacted by way of Act 3 of 2008 but even before that, the offences had existed in a similar way in s 130(1) of the pre-amendment Customs Act. The material difference is that under s 130(1)(*a*) of the older Act, the provision dealt with the offences of importation, exportation, shipping, unshipping, loading and unloading of dutiable goods, whereas following the amendment, these offences have been split into three subsections: ss 128F, 128G and 128H.

15 At the same time as the amendments, enhancements to the sentencing regime were also enacted. Further enhancements were enacted by way of Act 25 of 2011. At present, sentencing for committing a specified offence involving more than 2kg of tobacco products is dealt with by s 128L(4) (see [7] above). For second and subsequent offences that involve more than 2kg in tobacco products, the fine is increased to between 30 and 40 times the tax or duty evaded, and there is also a mandatory imprisonment term for a period not exceeding six years: see s 128L(5A).

16 In most cases where a significant quantity of tobacco product is smuggled, the amount of

excise duty that has been evaded, when subjected to a multiplier of 15 or 20, will result in very large fines that would be beyond the ability of most offenders to pay. In the present case, for instance, the excise duty evaded was assessed at $56,812.80, meaning that the minimum fine for that charge was $852,192 (15 times the duty evaded) while the maximum was $1,136,256 (20 times the duty evaded).

17 The sentencing judge has the option of imposing either a term of imprisonment or a fine or a combination of these penalties. Where it is evident that the offender will likely not be able to pay the fine, consideration should be given to imposing a sentence of imprisonment: see *Chia Kah Boon v PP* [1999] 2 SLR(R) 1163 ("*Chia Kah Boon*") at [15]; and *Low Meng Chay v PP* [1993] 1 SLR(R) 46 ("*Low Meng Chay*") at [13].

18 Where a fine is imposed, the sentencing judge will in any case stipulate the imprisonment term that is to be imposed in default of payment. However, this is not to be taken as a proxy for the punishment imposed for the original offence. The default sentence of imprisonment is imposed in order to prevent the evasion of the fine. For this reason, it would generally be inappropriate to impose a fine and a term of imprisonment in default if the effect of this will be to punish those who are genuinely unable to pay: see *Low Meng Chay* at [13]. Hence, reference to the level of fines prescribed for these offences can only be of limited value in calibrating the appropriate sentence of imprisonment where this, rather than a fine, is the primary sentence.

19 In general, s 319(1)(*d*) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC") governs the imposition of imprisonment sentences in default of payment of a fine, but this rule is displaced in relation to the present case by s 119 of the Customs Act which states:

> **Imprisonment for non-payment of fine**
>
> **119**. Notwithstanding the provisions of the Criminal Procedure Code (Cap. 68), the period of imprisonment imposed by any court in respect of the non-payment of any fine under this Act, or in respect of the default of a sufficient distress to satisfy any such fine, shall be such period as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any case the maximum fixed by the following scale:

Where the fine	*The period may extend to*
does not exceed $50	2 months
exceeds $50 but does not exceed $100	4 months
exceeds $100 but does not exceed $200	6 months

> with one additional month for every $100 after the first $200 of the fine until a maximum period of 6 years is reached.

20 It will be noted of course that this scale sets the *maximum* period of imprisonment that may be imposed in default of payment of the corresponding fine. For the purposes of illustration, it will be evident that on the basis that the maximum period of one month of imprisonment is imposed for every $100 in fines that is in default, one could reach the maximum total of six years when the fine is at or in excess of $6,800. If, instead, only one day of imprisonment is imposed for every $100 in fines that is in default, then the maximum total of six years or 2190 days would be reached when the fine was $219,000. This would be reached once the duty evaded amounted to $14,600 (based on the minimum

multiple of 15 times) or $10,950 (based on the maximum multiple of 20 times).

21 Thus, very little arithmetic is needed to show that on the basis of the current excise duty rates on tobacco products the practical effect of this section is that where the sentencing judge chooses the option of imposing a fine and a term of imprisonment in default thereof, the default sentences would be on the high side and the upper end of the permitted scale would be reached quite quickly.

22 The conclusion I take from this is that it is incorrect in principle to base the appropriate sentence of imprisonment, where this is intended to be the primary penalty as opposed to a default penalty for non-payment of a fine, on the amount of fines that would have been imposed and consequently to take reference from the prescribed schedule of default imprisonment terms contained in s 119 of the Customs Act. In any event, as noted at [18] above, the default sentence of imprisonment is not meant to be a substitute punishment for the primary offence.

The rationale underlying the offence

23 The offence of importation of uncustomed goods is directed at two evils: the first is the loss of revenue to the government, and the second is the offence against the public policy and interest in reducing the consumption of harmful goods by raising their cost to the user.

24 The annual loss of revenue through smuggling runs into the millions of dollars: see *Sentencing Practice in the Subordinate Courts* (LexisNexis, 3rd Ed, 2013) ("*Sentencing Practice*") at p 1597 and *PP v Ng Siong Boon* [2007] SGDC 249 ("*Ng Siong Boon*") at [12]. But aside from the loss of revenue, there is a strong public policy interest in keeping the prices of certain items high enough to discourage their consumption. That is why in Singapore excise duties are imposed on such items as tobacco and liquors: see the First Schedule of the Customs (Duties) Order (Cap 70, O 4, 2009 Rev Ed). This is also illustrated by the statement of the Minister for Finance in Parliament when presenting the 2014 Budget speech, indicating why duties on tobacco products (among other such goods) were to be raised (*Singapore Parliamentary Debates, Official Report* (21 February 2014) vol 91):

> Next, I will raise duties on betting, tobacco and liquor, *in line with our social objective of avoiding excessive consumption or indulgence in these areas.*
>
> Duties on cigarettes and manufactured tobacco products have remained constant since 2005. *In the meantime, smoking prevalence has increased, especially amongst youths aged 18 to 29. To discourage this trend*, I will raise the excise duties for cigarettes and manufactured tobacco products by 10%.
>
> This is expected to yield additional revenue of about $70 million a year.
>
> [emphasis added]

25 In my judgment, the public policy interest in discouraging consumption of the targeted goods is the stronger interest at play than the raising of revenue. Historically, the offence-creating provisions were crafted in terms of dealing with uncustomed goods "with intent to defraud Her Majesty": see for instance s 186 of the Customs Laws Consolidation Act 1876 (c 36) (UK). That is not the case today in Singapore. A similar observation was made by Yong Pung How CJ in *Chia Kah Boon* at [14].

26 Indeed the main objective cannot be to reclaim revenue since the typical course in these cases is to sentence the offender to a term of imprisonment rather than to a fine with a term of imprisonment in default of payment. The high levels of fines are prescribed in the legislation in order to

deter such conduct. As a result, in most cases involving substantial weights of tobacco products, the fines would run into very high figures that would be beyond the means of most offenders. Consequently, fines are not commonly imposed. But it remains a useful exercise to compute the amount of fines that could have been imposed on the basis of the prescribed multiples of the tax or duty evaded, so that it brings home sharply to the sentencing judge the degree of harm that, in Parliament's view, the offender should be taken to have caused.

The sentencing principles

27 From these twin objectives, it should follow that the primary factor to be considered in sentencing for the offence of smuggling is the quantity of tobacco products that has been illegally imported. The greater this amount, the greater is the injury to the public policy of restricting the consumption of such goods and indeed, the greater is the amount of the putative loss to the revenue. It is therefore appropriate, at least as a starting point, to calibrate the sentence to be imposed by reference to the quantity of tobacco product imported. This is consonant with the general principle in sentencing which is that the punishment must be proportionate to the crime (see *PP v Saiful Rizam bin Assim* [2014] SGHC 12 at [29] and *Mohamed Shouffee Bin Adam v PP* [2014] SGHC 34 at [47]–[50]).

28 In *Moey Keng Kong v PP* [2001] 2 SLR(R) 867 ("*Moey Keng Kong*"), Yong Pung How CJ (at [10]) identified five factors that he considered were relevant to sentencing for customs offences, as follows:

> ... the amount of duty evaded, the quantity of goods involved, repetition of the offence, whether the offender was acting on his own or was involved in a syndicated operation, and the role of the offender.

29 In my judgment, these can be distilled into four factors. The first is the quantity of tobacco product imported. Because this has a direct and virtually linear correlation to the amount of duty evaded the two should properly be regarded together.

30 The next factor is the repetition of the offence. While this will generally be relevant in all sentencing decisions, it should be noted that the Customs Act already provides for uplifts of sentences where the offender has committed previous customs offences: see ss 128L(3), 128L(5) and 128L(5A). The application of these sections would provide different starting points for the sentencing exercise. Hence, there might be no need to have separate regard to whether the accused has committed previous *like* offences if and to the extent that this has already been factored into the charges brought against the accused. However, where the prior offence is not a Customs Act offence or in any case is not an offence that has already been factored into the charge, the fact of the offender's antecedents should rightly be considered within the rubric of general aggravating factors (see *Sentencing Practice* at p 141).

31 The third factor is whether the offender was acting on his own or was involved in a syndicated operation. The fact that an offender commits the offence as part of a syndicate is an established aggravating factor that may justify an enhanced sentence in the interest of general deterrence: *PP v Law Aik Meng* [2007] 2 SLR(R) 814 at [25]. Having said that, in most cases where substantial weights are involved and require modifications of vehicles, this element will be found. The precedents will therefore often have incorporated some consideration of this factor.

32 As to the final factor, the role of the offender, this too might to some extent be encapsulated in the kind of charge that is preferred. A specified offence under s 128L refers, as I have said, to

offences set out in s 128D to s 128K. These are, respectively, offences in relation to:

(a) fraudulent evasion of customs or excise duty (s 128D);

(b) dutiable or prohibited goods found in a person's baggage or on his person (s 128E);

(c) importation of uncustomed or prohibited goods (s 128F);

(d) exportation of uncustomed or prohibited goods (s 128G);

(e) shipping, unshipping, loading, unloading *etc* of uncustomed or prohibited goods (s 128H);

(f) possession, storage, conveying and harbouring of goods (s 128I);

(g) misuse of duty-free allowances (s 128J); and

(h) illegal removal of goods from customs control or carrying on of activities without license (s 128K).

33 The nature of the offender's *actus reus* is of course fundamental to an assessment of his criminality. As I have said the issue in the present case is in relation to evading excise duty when importing more than 2kg of uncustomed tobacco products, *ie* an offence under s 128F. In so far as the offender's role is confined to "importation" it would usually be appropriate to measure the gravity of his offence by reference to the amount of tobacco product he has illegally imported.

34 Where however, the offender has taken a greater or more active role in the smuggling operation, the sentencing court should consider whether his criminality has been suitably captured within the charge or charges preferred. Thus, for instance, if he had been involved also in the storage or loading and unloading of contraband cigarettes, the court should consider whether this is reflected in a further charge that may be proceeded with or taken into consideration for purposes of sentencing. Where the only charge brought is one for importation under s 128F, it would generally be appropriate to consider the enhanced role of the offender as an aggravating factor justifying a sentence more severe than that suggested in the first instance by the sentencing guidelines.

35 In my judgment, from the foregoing discussion, it follows that, notwithstanding the many factors that go into determining the sentence in any given case for the offence of smuggling cigarette products, the key parameter informing the sentence as a starting point is the quantity of tobacco products. This may then be adjusted up or down as the case may be on account of aggravating or mitigating factors including:

(a) Whether the case concerns a repeat offence that has not been factored in the charge;

(b) Whether the accused was acting on his own or as part of a syndicate; and

(c) What role the accused played to the extent the criminality inherent in the conduct is not captured in the charge.

36 There may, of course, be other relevant factors. But the sentencing judge ought to apply these considerations in a principled and transparent manner.

The sentencing precedents and the benchmark sentence

37 I turn to the sentencing precedents. The DPP on appeal produced the following helpful table of sentencing precedents of customs offences involving tobacco products; I have added to this table one other case which is reported in *Sentencing Practice* at 1608 and this is marked with an asterisk.

S/N	Case	Weight smuggled (kg)	Offence	Sentence (months)
1	*Wong Chun Gee v PP** (MA 143/06)	679.94	Importation	30
2	*Ong Swee Ching v PP* (MA 144/06)	520	Importation	24
3	*Hamdan Bin Hamzah v PP* (DAC 10977/2013)	210	Importation	22
4	*PP v Kesavan V Matamuthu* [2013] SGDC 403	182.04	Importation	24
5	*Lawrence Law Poung Ying v PP* (DAC 31533-4/2013)	180.38	Importation	12
6	*J Kumaran Krishna v PP* (DAC 35502-3/2013)	180	Importation	12
7	*Mohamed Zaky bin Abdul Wahid v PP* (DAC 25507-8/2013)	171.2	Importation	8
8	*Tee Eng Seng v PP* (DAC 24614-5/2013)	169.7	Importation	24
9	*Eng Chun Chow v PP* (DAC 17147-8/2013)	106	Importation	14
10	*Goh Buck Koon v PP* [2009] SGDC 351	100	Delivery	28
11	*Lin Lai Fu v PP* [2005] SGDC 96	66	Storing	30
12	*Ong Seng Huat v PP* [2009] SGDC 44	58	Delivery	24
13	*R Mahendran A/L Rethinasamy v PP* [2001] SGDC 371	50	Unloading	18
14	*Ng Siong Boon v PP* [2007] SGDC 249	38.02	Importation	22
15	*PP v S Thambiraja s/o Chelladurai* [2011] SGDC 253	23	Importation	6

38 For convenience I also refer to these cases by their serial number in this table.

39 I noted above at [11(d)] that sentencing precedents that are unreasoned and unreported are of relatively little precedential value. Of the 15 cases in the table, full reasons are available for only seven and some of these are not directly relevant as they are not cases to do with importation (S/N 10–13). Of the remaining cases, S/N 1–2 were briefly reported in *Sentencing Practice* at pp 1608–9. As for the rest which were referenced only by the charge numbers, I was given only the brief facts and these cases therefore had to be approached with caution.

40 That said, it is apparent that there is, even on the face of the table, a lack of consistency in the sentences imposed. I confine myself first to those cases where:

(a) the offender's role was confined to "pure importation";

(b) he had pleaded guilty at the earliest chance; and

(c) he was a first offender.

On this basis, it is evident that I can disregard the cases at S/N 10–13. These are not cases confined to importation. Rather, they are cases in which the offender had taken a more active role in the act of smuggling.

41 Their facts can be briefly stated to illustrate the point. In *Goh Buck Koon v PP* [2009] SGDC 351 (S/N 10), the offender actually delivered cigarettes in Singapore using a van on behalf of an unknown Chinese male, in exchange for $400 per delivery. The charge in this case was for an offence under s 128H of the Customs Act. The offender was sentenced to 28 months' imprisonment.

42 In *Lin Lai Fu v PP* [2005] SGDC 96 (S/N 11), the offender had stored 66kg of cigarettes of various brands in a room. The offender admitted that he had been asked to store the cigarettes there and to safeguard them. The charge was for the storage of dutiable or prohibited goods under s 130(1)(c) of the pre-amendment Customs Act (Cap 70, 2004 Rev Ed), which is much the same offence as that in s 128I of the amended Customs Act. The offender was sentenced to 30 months imprisonment.

43 In *Ong Seng Huat v PP* [2009] SGDC 44 (S/N 12), the offender had been engaged by a syndicate to collect duty unpaid cigarettes from a rubbish bin in Hougang and to deliver them to various locations in Geylang. He faced one charge under s 128H. This was rather more akin to S/N 10. The offender pleaded guilty and was sentenced to 24 months' imprisonment. His appeal was withdrawn.

44 In *R Mahendran A/L Rethinasamy v PP* [2001] SGDC 371 (S/N 13), the offender was charged with importing 50kg of duty-unpaid cigarettes, an offence under s 130(1)(*a*) of the pre-amendment Customs Act, now much the same as s 128H of the present Customs Act. The offender was caught not at the Checkpoint, but at Kranji loop, where he was spotted unloading cartons of cigarettes from the lorry in which he had transported the cigarettes into Singapore to a locally registered car. Although the rubric of the charge was that he was "concerned in importing uncustomed goods", it appears that there was the additional element of his having taken an active part in the smuggling *as well as* the loading and unloading of the contraband cigarettes.

45 I therefore do not think these cases can assist in developing a sentencing framework for cases where the offender's *sole* role was to *transport* contraband cigarettes into Singapore.

46 In my judgment, for the offence of importation under s 128F, having regard to the legislative intent and the very heavy fines that are mandated where the sentencing court opts to impose a fine instead of a term of imprisonment, a term of imprisonment will generally be imposed unless there is reason to believe that the fines are within the means of the offender to pay. A graduated scheme that cross-references the quantity of tobacco with the duration of the imprisonment term that can be expected to be imposed as a starting point would be as follows:

Quantity of Tobacco Product (kg)	*Sentencing Range (months)*
2–50	3–6
51–100	6–12

101–200	12–18
201–300	18–24
301–400	24–30
> 400	30–36

47 Turning to the cases at S/N 4 to 9 above, I note that the weights of smuggled product all fall within the range calling for a sentence of between 12 and 18 months. The sentences imposed in the cases at S/N 5, 6, and 9 do in fact fall within this range. Based on the brief facts extracted by the DPP, these were all evidently straightforward importation cases: in all these cases, the offenders had hidden duty unpaid cigarettes in various modified compartments of a vehicle and attempted to smuggle them into Singapore. This was consistent with their being involved with a syndicate.

48 I turn to the other cases. In *Wong Chun Gee v PP* (MA 143/06) (S/N 1), the quantity involved was 679.94kg and the tobacco products had been hidden in various parts of a bus. On the basis of the framework set out above, the offender could have expected a sentence in the highest band of between 30 and 36 months and he was in fact sentenced on appeal to imprisonment for a term of 30 months.

49 In *Ong Swee Ching v PP* (MA 144/06) (S/N 2), the quantity involved was 520kg. The offender had used a bus and the tobacco was concealed in its luggage hold and wheel compartment. Here again, the offender could have expected a sentence of imprisonment for a term of between 30 and 36 months. Having sole regard to the benchmarks I have set out above, the sentence of 24 months which was imposed in that case might possibly have been on the low side but in the absence of any reasoned explanation of the sentence it would be unsafe to draw any conclusion.

50 As for *Hamdan Bin Hamzah v PP* (DAC 10977/2013) (S/N 3), where the sentence was 22 months' imprisonment for smuggling 210kg of cigarettes hidden in the modified floorboard of a bus, this does fall within the range I have set out.

51 Turning to the other cases, *Kesavan* (S/N 4) was decided by the same District Judge who heard this case and I comment on that case separately.

52 The next pair of cases illustrates the difficulties in sentencing practice in this area as well as the dangers of depending on previous decisions which are unreasoned and as a result, unexplained. In *Mohd Zaky bin Abdul Wahid v PP* (DAC 25507-8/2013) (S/N 7) the accused was sentenced to 8 months' imprisonment for importing 171.2kg of tobacco products; while in *Tee Eng Seng v PP* (S/N 8) the accused was sentenced to a term of imprisonment almost three times as long, of 22 months for importing 1.5kg *less* than in the former case. The charge sheets and the statement of facts in these cases were not exhibited and on the face of it, I cannot regard these cases as useful precedents.

53 In *Ng Siong Boon* [2007] SGDC 249 (S/N 14), the offender was apprehended while passing through the Woodlands Checkpoint. A total of 38kg of duty-unpaid cigarettes were found in his car and he was charged for importation under s 130(1)(*a*) of the pre-amendment Customs Act. The District Judge considered that this was a syndicate operation and that a large amount of excise duty had been evaded. The offender was sentenced to 22 months' imprisonment and his appeal lapsed.

54 On the other hand, the facts in *PP v S Thambiraja s/o Chelladurai* [2011] SGDC 253 ("*Thambiraja*") (S/N 15) are somewhat similar to this appeal save that it involved a smaller quantity:

the offender was apprehended at the Woodlands Checkpoint and 23kg of cigarettes were found in his car. However, the District Judge noted that there was no evidence of a criminal syndicate being involved and noted that the offender had done this to pay off loan sharks. She found no mitigating factors other than that he was a first offender and had pleaded guilty. The judge imposed a sentence of six months' imprisonment in that case. I note this would fall within the sentencing framework I have outlined above.

55 It is evident from this analysis that there is a need for a framework of the sort I have set out to guide sentencing courts dealing with such offenders. It bears reiterating that the benchmarks I have laid down will require further calibration in each case in order to give effect to the actual circumstances presented including any aggravating and mitigating factors where present. The weight to be accorded to such factors should generally be linked to the rationale of sentencing that applies in relation to this offence but this is not an inflexible rule: see *Edwin s/o Suse Nathen* at [26]. The duty remains on the sentencing judge always to ensure that the final sentence remains proportionate to the overall criminality of the offender.

56 I make one further point in relation to these benchmarks. In most cases of smuggling, the offender will be charged with two counts, one for evading excise duty, and the other for evading GST. In my view, where the two charges relate to the same goods, it would generally be inappropriate to order that the sentences be imposed consecutively as this would offend the one-transaction rule: see *Mohamed Shouffee bin Adam v PP* [2014] SGHC 34 ("*Mohamed Shouffee*") at [27]. As GST is currently lower than the excise duty, the evasion of GST will generally attract the lesser sentence and so it would follow that the overall sentence will generally be determined by the sentence imposed in respect of the excise duty charge.

57 To summarise the foregoing:

(a) Fines should generally not be imposed where these are beyond the means of the offender to pay. Default terms of imprisonment are meant to punish the non-payment of a fine and not to serve as a substitute form of punishment for the primary offence.

(b) Where a term of imprisonment is to be imposed, the key parameter informing the benchmark sentence will generally be the quantity of tobacco products.

(c) In cases where:

(i) The offender is a first time offender;

(ii) The offender pleads guilty at the earliest opportunity; and

(iii) The offender's role is limited to pure importation;

the table of benchmark sentences set out at [46] above should guide the sentencing court as a starting point, when sentencing an offender who has been convicted of evading excise duty.

(d) Having regard to the suggested ranges, which are not fixed or rigid but are meant only to serve as guidelines, the sentencing judge must then apply his mind to the actual circumstances and adjust the sentence having regard to any aggravating or mitigating factors as may be present.

(e) It would generally be inappropriate to impose consecutive terms of imprisonment for the offences of evading excise duty and GST on the same goods. The final sentence would usually be the sentence imposed in respect of the excise duty charge.

My decision

58 Appellate intervention is called for only in limited circumstances, for instance, where it can be shown that the sentence is wrong in principle or that the sentencing judge has erred in failing to correctly appreciate the material that is before him: see *PP v UI* [2008] 4 SLR(R) 500 ("*PP v UI*") at [12].

59 There were three main reasons the District Judge relied on to impose the sentence that he did. These were:

(a) The practice of the State Courts in relation to the default sentences called for by fines of that magnitude suggested a range of 18 to 24 months' imprisonment for the excise duty charge: at [18];

(b) The "accused had imported a massive amount of 'duty-unpaid' cigarettes into Singapore. That amount would have flooded the market for illegal cigarettes in Singapore", and thus, a sentence at the higher end of that range was justified: at [19];

(c) Running the two sentences consecutively resulting in a total sentence of 29 months' imprisonment would be manifestly excessive and he declined to do so: at [20].

60 The reasons cited by the District Judge do not, in my judgment, bear scrutiny. First, it was not evident that there was any sort of settled sentencing practice in the State Courts in relation to sentences imposed in default of fines for such offences. If it was the practice in the State Courts to calibrate the term of imprisonment to be imposed in cases of cigarette smuggling by reference to the range of fines set out in s 128L(4)(*a*), I have explained above at [16]–[22] why no such correspondence could have been intended and would in any event be wrong in principle.

61 Second, even if this was indeed the practice in the State Courts, it did not result in any consistency in the imposition of imprisonment terms as a primary sentence. As I have noted in the foregoing analysis of the sentencing precedents that were cited to me, there is an evident *lack* of any consistent practice. The precedents show that the sentences that have been imposed in cases where the offence related to quantities of between 160kg and 180kg of tobacco products ranged from eight months' to 24 months' imprisonment (see S/N 4 to 8 at [37] above). This variance is simply too great to warrant a conclusion that there was any consistent practice in this matter.

62 The District Judge's second reason, that the appellant "had imported a massive amount of 'duty-unpaid' cigarettes into Singapore" and thereby "flooded the market for illegal cigarettes", was not sustainable. On the facts the appellant had smuggled 161.4kg of tobacco products, comprising a total of 7,670 packets of cigarettes. This was undoubtedly a large amount, but it was a small fraction of the total number of packets seized last year, which, according to the DPP's submissions, amounted to 2.9 million packets. The fact that the appellant had smuggled a substantial amount of cigarettes into Singapore did not equate with it being a "massive amount" in absolute terms nor with it flooding the market. As seen from the table at [37], there have been a number of cases in which a larger quantity of tobacco products had been involved but in which the offender had received a lower sentence with no basis to conclude (in the absence of reasoned grounds) that the offenders in those cases had been less culpable than the present appellant.

63 Finally, there was one further concern. I have examined the substantial similarities in the reasoning between the present case and *Kesavan* and having done so, I am satisfied that the District Judge had failed correctly to apprehend the material before him.

The similarity with Kesavan

64 *Kesavan* was decided by the same District Judge at almost the same time as the present case. In *Kesavan* there were two charges against a 41 year old Malaysian man for importing 182.04kg of duty-unpaid cigarettes and tobacco into Singapore. The excise duty unpaid was $58,754.76 and the GST evaded was $4,826.83. The goods were valued at $68,954.76. This resulted in two charges for evading excise duty and GST respectively. The offender was sentenced to 24 months for the excise duty charge and 5 months for the GST charge, both to run concurrently. *Kesavan* is presently on appeal to the High Court as Magistrate's Appeal No 274 of 2013. My comments here should not be taken to reflect in any way on the merits of that appeal.

65 The District Judge did not cite *Kesavan* as authority for his decision in the present matter, nor did he cite his decision in this case as authority in *Kesavan*. But the key parts of *Kesavan* setting out the District Judge's reasons for the sentence were in exactly the same terms as that in the present case: see [18]–[20] of both judgments.

The judicial duty to give reasons

66 Judges have a duty to give reasons for their decisions. This is not a mere formality. In *Lai Wee Lian v Singapore Bus Service (1978) Ltd* [1983–1984] SLR(R) 388, the Privy Council (at [5]) noted as follows:

> The need for a judge to state the reasons for his decision is no mere technicality, nor does it depend mainly on the rules of court. It is an important part of a judge's duty in every case, when he gives a final judgment at the end of a trial, to state the grounds of his decision, unless there are special reasons, such as urgency, for not doing so.

67 A duty to give reasons must, in this context, entail the duty to give *sufficient* reasons that adequately engage with the unique circumstances of each case. In *Thong Ah Fat v PP* [2012] 1 SLR 676 ("*Thong Ah Fat*") the Court of Appeal took account of the fact that the requirement to give reasons would increase costs and result in delays but concluded at [30]:

> We think that the correct response to these concerns is to have a standard of explanation *which corresponds to the requirements of the case* rather than to reject the duty totally. The key is to strike an appropriate balance. While such anxieties do not warrant outright rejection of the duty altogether, they have been taken into account quite rightly in dispensing with reasons in certain cases and matters (see below at [32]–[33]), in accepting the appropriateness of abbreviated oral reasons in some situations, and in adjusting the level of detail required of the statement of reasons to suit the circumstances in other cases. [emphasis in original]

68 The duty of a sentencing judge to consider and explain his decisions thoroughly and properly and with due regard to the facts and circumstances was well explained in *R v Sheppard* [2002] SCC 26 at [5]:

> At the broadest level of accountability, the giving of reasoned judgments is central to the legitimacy of judicial institutions in the eyes of the public. Decisions on individual cases are neither submitted to nor blessed at the ballot box. The courts attract public support or criticism

> at least in part by the quality of their reasons. If unexpressed, the judged are prevented from judging the judges.

69 I do not think that a judge is necessarily obliged to give reasons in each and every matter. For instance, the reasons might sometimes be evident from the exchanges between the court and the counsel. Or a court disposing of an appeal might feel that there is nothing of significance to be added to what has already been said. On the other hand, there will be very many instances where at least brief reasons are called for. One such instance is where an appeal has been filed. When that happens, the appellate court is left with only the written reasons of the first instance judge with which to assess whether appellate intervention is warranted. In my judgment, a sentencing judge runs a considerable risk when he reproduces entire passages either from the submissions of the parties or, as in this case, from another of his decisions without attribution or explanation. It is one thing to cite submissions or cases at length while making it clear why they are being cited and how they might or might not be relevant *to the case at hand*. However, it is quite another thing for a judge to reproduce whole passages from another case or matter which he has decided, with neither attribution nor explanation. The main objection is that when the similarities are discovered the parties and other readers are left with the impression, whether or not this was intended, that the judge had not after all considered each matter separately, thoroughly or even sufficiently. As noted by Simon Stern, "Copyright Originality and Judicial Originality" (2013) 63 UTLJ 385 at p 388, the concern here is not so much that the judge is taking credit for the ideas of another but rather that it raises:

> ... questions about the judge's attention to the dispute at hand. Too much cutting and pasting, without modification, may give the appearance of a 'mechanical act' with a canned solution that ignores the particularities of the parties' conflict and lacks the disinterested perspective that the adjudicator should bring to bear.

The principles applied

70 What appearance is conveyed when a judge has reproduced the same crucial passages of reasoning in two judgments dealing with what seem on the face of it to be fairly similar cases? In my judgment, in this instance, the reasonable and impartial observer would think that in *neither* case had the judge properly applied his mind to the facts and circumstances of the case before him. It is impossible to tell which case the judge worked on first and so formed the model for his approach to the other. The observer would therefore reasonably have come to the conclusion that the judge had extracted what he thought were the essential similarities of the two cases and then proceeded to decide them as if they raised identical issues.

71 However, even a brief look at the two cases in question would have shown that they were not necessarily alike. In the first place, the weights differed materially: 161.4kg in the present case and 182.04kg in *Kesavan*, a difference of over 20kg. A person who smuggles 20kg of tobacco products stands to be put in jail for a considerable stretch of months: in *Thambiraja* it was six months and that was even with the benefit of leniency (see *Thambiraja* at [15]). It would therefore seem that a person who smuggles 20kg *more* than another might well expect to receive a longer sentence. If for any reason this was not going to be the case, it would have been incumbent on the sentencing judge to explain why, especially where he is hearing both cases.

72 The second noticeable difference is that the appellant in each case had raised different mitigating circumstances. The appellant here claims old age and infirmity. In *Kesavan* the offender stated that he had four young children, a wife who was not working, and that he had "HIV". Whether or not these mitigating circumstances should have been taken into account, the fact of the differing circumstances would suggest that the cases were not so similar that they could have been decided

as if the identical issues had been presented.

73 In my judgment, there is therefore a reasonable basis for concluding that the District Judge erred in failing to fully appreciate the material that was before him in each case.

74 For all these reasons, I am satisfied that I am entitled to consider the sentencing in this case anew in accordance with the principles I have enunciated above at [10] to [57].

The sentencing principles applied to the present appeal

75 Applying the principles and the sentencing guidelines laid down above, the appropriate starting point for the present case is a term of imprisonment of between 12 and 18 months. Given that the amount in the present case was 161.4kg, which is substantially over 100kg, a sentence in the middle to the upper end of that range could be justified as the appropriate starting point. The question then is the secondary one of whether there are any aggravating or mitigating factors that might justify a deviation from such a starting point.

Aggravating and mitigating factors

76 The appellant was unrepresented. He produced a letter of mitigation in which he made the following points:

(a) He suffers from medical problems including rheumatism, kidney failure and hypertension and is taking medication twice a day.

(b) His wife had passed away and his six children were married and living far away. He therefore lived alone.

(c) His children seldom visited him and he has had to bear the burden of looking after himself and paying his medical fees.

(d) He was old and unable to find a job and therefore was facing financial difficulties.

(e) This was his first offence for which he expressed deep remorse.

77 The DPP on the other hand submitted that there were a number of aggravating factors that justified the higher sentence. The appellant had been acting on behalf of a syndicate, represented by "Ah Ong". The DPP pointed to two further aggravating factors. First, the appellant was motivated by profit as he was promised a remuneration of MYR 2,000 for each successful trip and he was therefore aware that this was a high-risk, high-reward enterprise in which the risk of being caught had eventuated. Second, the cigarettes were concealed in various modified compartments showing pre-meditation and deliberate planning.

78 Moreover, the DPP submitted that the offence was prevalent. Reference was made to the Parliamentary debates in which it was stated that tobacco-related customs offences had increased 24% from 2005 to 2010 and that the number of repeat offenders in that period had increased six times. There was also reference to the fact that in 2013, 2.9 million packets of contraband cigarettes had been seized, up 93.3% from the 1.5 million packets seized in 2012. This smuggling was largely in the control of syndicates. Because of this there had to be a sentence of general deterrence and a substantial penalty was therefore required: *Moey Keng Kong* at [11].

79 In the present case, the appellant had evaded a considerable amount of duty, having smuggled

a very substantial weight of tobacco product which was well above the 2kg limit set out in s 128L(4) of the Customs Act for an enhanced sentence.

80 The DPP also submitted, relying on *PP v UI*, that the appellant's mature age should not be treated as a mitigating factor. In that case, the Court of Appeal observed that a court should not impose a sentence on an offender that, because of his advanced age, would amount to a life sentence. This would be regarded as crushing. The DPP submitted that the operative concern in the present case was that of deterrence; if the appellant was granted mercy solely on account of his age and infirmity, smuggling syndicates would seek out such persons to undertake the risky job of smuggling. In any case, the DPP submitted that the sentence of 24 months could not be said to be crushing or to amount to a life sentence.

81 I am not satisfied that the aggravating factors as submitted by the DPP justify the sentence that had been imposed by the District Judge. The prevalence of the offence and the fact that the appellant was working on behalf of a syndicate are generally accepted as factors aggravating an offence but in my view the seriousness of these points would be adequately captured by a sentence within the range I have set out. As I have noted, the involvement of criminal syndicates will generally be present in cases involving these relatively large quantities. In *Lawrence Law Poung Ying v PP* (DAC 31533-4/2013) (S/N 5) the offender had hidden 180.38kg of cigarettes in the floorboard, dashboard and fuel tank of the vehicle in order to write off a debt owed to one "Ah Seng". The sentence was 12 months' imprisonment. In *J Kumaran Krishna v PP* (DAC 35502-3/2013) (S/N 6) the offender had imported 180kg of cigarettes concealed in various compartments of a bus in order to write off a debt owed to one "Ah Long"; he was sentenced to 12 months' imprisonment as well. In *Eng Chun Chow v PP* (DAC 17147-8/2013) (S/N 9) the offender had smuggled 106kg of cigarettes in a modified floorboard of a bus in return for MYR 700 a trip; he received a sentence of 14 months' imprisonment.

82 Given the involvement of moneylenders or modified vehicles, these cases at least suggest the involvement of criminal syndicates, subject of course to the point that only brief facts were available to me. Yet the sentencing range for these cases was within the bracket of 12 to 18 months. The fact that the smuggled cigarettes were concealed in modified compartments does not add anything significant to the sentencing calculus because if one infers from this the aggravating involvement of a smuggling syndicate it would be wrong to re-input this as an aggravating factor in its own right. I am fully cognisant of the fact that the 2008 and 2011 amendments to the Customs Act had the effect of substantially enhancing the penalties for smuggling so as to deter an offence that had become steadily more prevalent. But, as Chao JA noted in *Ong Chee Eng* at [23], "unrelenting deterrence does not mean indiscriminate deterrence".

83 No doubt the appellant was undertaking a high-risk, high reward enterprise in which the risk of being caught had eventuated. However, this is inherent in the offence of smuggling. The DPP said that the appellant's fee of MYR 2,000 was substantially above the payments received by other apprehended smugglers but I cannot see how this can justify a significantly enhanced sentence. The touchstone of smuggling offences is the harm done to the public policy of restricting consumption of certain specified products and also the loss to the state revenue.

84 Turning to the mitigating factors advanced by the appellant, in my judgment the appellant's expressed remorse cannot count for very much in this case. He was caught red-handed and this militates against any plea that he was motivated by genuine remorse: see *Angliss Singapore Pte Ltd v PP* [2006] 4 SLR(R) 653 at [69]. The fact that he lived alone and faced financial hardship may explain why he committed the offences but cannot exculpate or even mitigate his culpability, particularly as these factors have very little to do with mitigating the mischief that his offence has caused: see above at [55].

Old age as a mitigating factor

85 I turn to the discrete point of the appellant's age and infirmity. This is the main mitigating factor in the present case, and indeed the only one which the appellant advanced which might have any force. The District Judge merely noted the appellant's age (at [11] of the GD) and did not discuss it further.

86 The DPP as I have said relied on the decision of the Court of Appeal in *PP v UI* at [78] and this passage bears setting out in full:

> In this regard, we would add that, in general, the mature age of the offender does not warrant a moderation of the punishment to be meted out (see *Krishan Chand v PP* [1995] 1 SLR(R) 737 at [8]). But, where the sentence is a long term of imprisonment, the offender's age is a relevant factor as, unless the Legislature has prescribed a life sentence for the offence, the court should not impose a sentence that effectively amounts to a life sentence. Such a sentence would be regarded as crushing and would breach the totality principle of sentencing. In the present case, the Respondent will, with remission for good behaviour, be released at an age that should give him some time to spend with his family and to fulfil his wish to make amends to the Victim.

87 I agree and indeed I am bound by this decision. The passage however needs to be unpacked in order to extract the underlying principle. In my judgment, the key emphasis placed by the Court of Appeal was on whether, in all the circumstances of the case, the sentence may be regarded as crushing because of the fact that the aged offender has an abbreviated expectation of his life prospects. This is not a principle limited in its application to cases where the sentence "is a long term of imprisonment" so that the sentence "effectively amounts to a life sentence".

88 The Court of Appeal was clearly raising one example where it would be proper to have regard to the offender's age. However, I do not regard that as excluding consideration of an offender's mature age where a substantial period of imprisonment is under consideration. The key consideration is to assess the *impact* of such a sentence on the offender having regard to his past record and his future life expectation and consider whether this would be disproportionate and crushing because of the offender's particular circumstances.

89 In relation to the offender's past record, advanced age may be relevant in the sense that where a person of mature age commits a first offence some credit might be given for the fact that he has passed most of his life with a clean record and the prospects for rehabilitation may also be taken to be better. This is no more than a special case of the general principle that a first time offender is often accorded some leniency where there are no special reasons not to do so; but it may be somewhat amplified with an older offender given the length of time during which he had not offended.

90 I recognise of course that the appellant is a Malaysian and may have antecedents in his home country not available for reference by the authorities here. Nevertheless, he is entitled to have the benefit of the doubt and to be presumed to have a clean record unless otherwise proven. On the other hand, the sentencing benchmark I have discussed above was presented with a first-time offender in mind and indeed second and serial offenders under the Customs Act are punished more severely (see ss 128L(3), 128L(5) and 128L(5A)); therefore in relation to the present offence this factor would have limited weight.

91 In relation to the offender's prospects of his future life expectation, the principle of equal impact explains why some mitigation may be appropriate. The principle is that "when an offender suffers from certain handicaps that would make his punishment significantly more onerous, the

sanction should be adjusted in order to avoid its having an undue differential impact on him": Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press, 2005) ("*Proportionate Sentencing*") at p 172. Therefore a sanction may be lightened where it may have an undue or disproportionate impact on the offender: *Proportionate Sentencing* at p 176. The consideration particularly pertinent in relation to an elderly offender is the prospect that a jail term may mean spending much of the rest of his life in prison. This was indeed the principle to which the Court of Appeal in *PP v UI* was giving voice in the passage cited above. This is justified not because the court is extending mercy to the offender in view of his advanced age, but because the court is unwilling to make such offenders suffer *more* than others who are similarly situated: see *Proportionate Sentencing* at p 173.

92 In *The Queen v Hunter* [1984] SASR 101, the Supreme Court of South Australia considered that a solicitor who had extensively misappropriated trust moneys over a period of years was rightly granted a discount on the basis that he was 74 years of age when he was sentenced to five years' imprisonment at first instance. The term of imprisonment was upheld on appeal. King CJ noted, at 104, that "each year spent in prison represents a substantial proportion of the remaining years of life which the respondent may expect." It is this consideration that may be germane and given effect to should a sentencing judge consider that a discount ought to be given on account of old age.

93 However, there are necessarily limits to the principle. Otherwise, it could always be argued that an older offender must be sentenced to a shorter term of imprisonment than a younger counterpart. This is plainly not correct. As noted by the Court of Appeal in *PP v UI* there is no *general* principle that age alone would "warrant a moderation of the punishment to be meted out". The limitation is found in the requirement that the impact of the sentence must be so severe as to be disproportionate or crushing. Within this limit, the sentencing court should examine the particular circumstances of the individual offender to see if, *in those circumstances and those circumstances only*, a given period of imprisonment should be moderated. As noted above, this will not be lightly found but the sentencing judge should apply his mind to this consideration.

94 Applying these principles to the present facts, in my judgment, as a matter of principle, it might have been permissible to consider the appellant's advanced age of 72 at the date of the offence especially in the context of his health problems, which did not appear to be challenged by the DPP on appeal. He was also entitled to the benefit of the doubt and to be seen as a person with a clean record. However, this had to be balanced against the length of the term of imprisonment he faced. The critical point is to assess whether, by reason of his age, the appellant would suffer disproportionately from such a term of imprisonment unless some moderation was made. In my judgment, the term which I considered was called for in all the circumstances was not of such duration that any moderation was required in this case on account of the advanced age of the appellant. This was all the more so given the remission he could expect for good behaviour in prison. In these circumstances, there was simply no basis for concluding that the sentence would have a crushing impact on the appellant.

Conclusion

95 In all the premises, I conclude as follows:

(a) The District Judge erred in the approach he took as well as in his reasoning in coming to his decision as to the appropriate sentence that was called for in this case;

(b) The guideline sentence for offences of the type for which the appellant was convicted would range between 12 and 18 months' imprisonment;

(c) A sentence of around 15 months' imprisonment would have been justified here because the appellant had imported a quantity substantially above 100kg;

(d) There are no applicable aggravating factors not already factored into the sentencing framework that I have applied;

(e) It is appropriate to have regard to the appellant's advanced age and to assess whether some moderation of the sentence was called for;

(f) On the facts, I do not consider any moderation is required;

(g) Weighing all the factors, in my judgment, a sentence of 15 months' imprisonment is fair and proportionate.

96 For the foregoing reasons I allow the appeal and sentence the appellant to 15 months' imprisonment in respect of the excise duty charge, to run concurrently with the five months' imprisonment imposed in respect of the GST charge. The total sentence is accordingly reduced to one of 15 months' imprisonment.