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Chew Soo Chun
v
Public Prosecutor and another appeal

[2016] SGHC 06

High Court — Magistrate's Appeal No 24 of 2015/01–02
Sundaresh Menon CJ, Chao Hick Tin JA and See Kee Oon JC
20 July 2015

Criminal procedure and sentencing — Sentencing

20 January 2016 Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the court):

Introduction

1 These appeals raise a common question of sentencing: when would ill-health justify the exercise of judicial mercy or a reduction in the sentence? The offender, Chew Soo Chun, ("the Offender") suffers from a litany of conditions, which have left him in a poor state of health. The District Judge ("the DJ") was invited to consider exercising judicial mercy. But he declined to do so, holding that judicial mercy was not warranted. Nonetheless, he gave a sentencing discount of six months' imprisonment to the aggregate sentence imposed on the offender. Post-discount, the aggregate sentence is 32 months' imprisonment and a fine of $10,000 in default two weeks' imprisonment. The DJ's decision can be found at *Public Prosecutor v Chew Soo Chun* [2015] SGDC 22 ("the Judgment").

2 Both the Offender and the Prosecution have appealed against the sentence. The Offender argues, as he had before the DJ, that judicial mercy should be exercised in his favour so only a nominal imprisonment term should be imposed for the offences he had committed. But should the court refuse to exercise judicial mercy, the Offender contends that a greater downward adjustment on the sentence should be made on the basis that the sentence imposed by the DJ is manifestly excessive and does not adequately take into account the greater hardship he would suffer while serving his prison term because of his ill-health. The Prosecution, on the other hand, takes the position that the exercise of judicial mercy is not warranted in the circumstances of this case and that there is no further and separate basis to moderate a sentence due to ill-health. Given the culpability of the Offender, the Prosecution submits that the sentence imposed by the DJ should not be discounted and should instead be enhanced as it is otherwise manifestly inadequate.

3 Having considered the circumstances of the case and the submissions of the parties, we dismiss both appeals. In our judgment, the circumstances are insufficiently exceptional as to warrant invoking the doctrine of judicial mercy. That said, however, the Offender's ill-health is sufficiently serious such that he would suffer disproportionately in prison compared to other offenders who are not so physically disadvantaged. There is thus a need to attenuate the sentence, not as an act of mercy, but in an endeavour to preserve an element of proportionality in the sentence. We find that the discount of six months' imprisonment determined by the DJ to be an appropriate discount for the disproportionate impact of a prison sentence on the Offender. We also do not consider the sentence of 38 months' imprisonment (to which the discount of six months' imprisonment is applied) to be manifestly inadequate after having regard to the criminality of the Offender's conduct.

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4 The detailed grounds for upholding the DJ's decision follow. First, we shall begin with the facts leading to the Offender's arrest. Second, we will set out a list of medical problems that the Offender is suffering from. Third, we will summarise the decision below. And fourth, we shall identify the principles on which a sentence may be reduced on account of ill-health and apply them to the case at hand.

The facts

5 The Offender was the Chief Executive Officer and Managing Director of Chew Yak Mong-Synerpac Limited, a company listed on the National Stock Exchange of Australia ("the Company" and "NSX" respectively). He owned 38.77% of the Company's shares. The remaining shares were held by his father, Chew Song Hock (34.75%), employees, friends, and 18 Australian individuals whose names were provided by Australian consultants (26.48%).

6 Between 2005 and 2006, the company's financial situation started to deteriorate. The Offender sought to keep the company's books looking healthy so that the Company could remain listed on the NSX. On his instigation, the following fictitious transactions were recorded:

(a) on or around 21 November 2005, $142,785 of sales revenue;

(b) on or around 29 May 2006, $298,050 of cash sales;

(c) on or around 10 June 2005, $298,000 of cash sales;

(d) on or around 25 September 2006, $139,946 of sales on credit term; and

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(e) on or around 30 October 2006, $20,000 of repayments made by its debtors.

These became the subject matter of five charges under s 477A of the Penal Code (Cap 224, 2008 Rev Ed) ("the PC"), *viz*, DAC 7873 of 2011, DAC 7900 of 2011, 7902 of 2011, 7934 of 2011 and 7994 of 2011. The Prosecution proceeded with these charges. There were 108 other charges, also under s 477A of the PC, which were stood down to be taken into consideration for sentencing.

7 In June 2006, the Company needed more funds for its working capital. The Offender applied for invoice financing loans from Overseas-Chinese Banking Corporation Limited ("the Bank") using fictitious documents generated to support the fictitious transactions recorded on the Company's accounts. The Offender deceived the staff of the Bank on multiple occasions into believing that there were sales made by the Company when no such sales were in fact made. As a result, the Bank disbursed to the Company a total of $2,627,355.37, including:

(a) on or around 7 August 2006, $173,414,24;

(b) on or around 15 September 2006, $160,815.48; and

(c) on or around 13 October 2006, $174,424.80.

These became the subject-matter of three charges under s 420 of the PC: DAC 7960 of 2011, DAC 7968 of 2011 and DAC 7972 of 2011. The Prosecution proceeded with these three charges. There were 23 other charges under s 420 of the PC stood down to be taken into consideration for sentencing. On 12 June 2015, the Prosecution reported that the Company still owed the Bank an outstanding balance of $932,282.19.

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8 Sometime in September 2006, the Company's auditor, Chew Whye Lee & Co ("the Auditor"), began auditing the Company's accounts. The Auditor required, *inter alia*, a balance confirmation of a sum of $356,357 owing by a trade debtor, PT Mandara Jasindo Sena, as at 30 June 2006. This balance was in fact fictitious. Consequently, on or around 5 October 2006, the Offender delivered a forged balance confirmation to the Auditor. In respect of this, the Offender was charged under s 471 read with s 465 of the PC – this was the subject of the charge in DAC 8013 of 2011 which was proceeded with. Seven other charges under s 471 read with s 465 of the PC were stood down to be taken into consideration for purposes of sentencing.

9 Because of the fictitious accounting entries made in November and December 2005, the Company's financial statements for the financial period ended 31 December 2005 did not give a true and fair view of the Company's state of affairs. The sales revenue was overstated by 32% to 65%, while the trade debtors balance was overstated by 53% to 179%. The Offender nevertheless presented the financial statements at the Company's annual general meeting on 30 June 2006. This was an offence punishable under s 204(1) of the Companies Act (Cap 50, 2006 Rev Ed) ("the CA"), and this formed the subject of the charge against the Offender in DAC 8015 of 2011 which was proceeded with.

10 Between 4 January 2006 and 6 February 2007, the Offender failed to keep accurate accounting records of the Company. He was charged under s 199(6) read with s 408(3) of the CA in DAC 8014 of 2011. The Prosecution stood down this charge to be taken into consideration for sentencing.

11 Altogether, the Prosecution proceeded with ten charges and stood down a further 139 charges to be taken into consideration for sentencing.

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The Offender's medical conditions

12 The Offender suffers from two mental disorders:

(a) major depression with a risk of suicide; and

(b) claustrophobia.

He is taking anti-depressant and anxiolytic medication, and is receiving therapy to manage these disorders.

13 In terms of physical ailments, the Offender suffers from:

(a) traumatic anosmia resulting in loss of taste and smell;

(b) post-concussion syndrome characterised by frequent headaches and severe dizziness;

(c) a blood clot in one of the arteries leading to the brain which could give rise to a risk of a stroke attack;

(d) hypertension;

(e) stage one salivary gland cancer;

(f) deviated nasal septum;

(g) turbinate hypertrophy;

(h) severe obstructive sleep apnea;

(i) left shoulder cuff tendonitis; and

(j) prostate enlargement.

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The Offender makes regular follow-up visits to his doctors in respect of ailments (b), (d), and (j). He is required to monitor his blood pressure every four hours daily and take medication for ailment (d). He is on Continuous Positive Air Pressure treatment (*ie*, he receives pumped air through a firmly-fitting facial mask during sleep) to alleviate ailment (h). He requires a mattress that can support his sleep posture because of ailment (i).

14 Additionally, it has been recommended to the Offender that he should undergo surgery to treat ailments (e), (f), and (g). The surgical procedures are the removal of the salivary gland tumour, facial reconstruction (if the facial nerves are affected by the salivary gland tumour), submucus resection of nasal septum, and endoscopic trimming of inferior turbinates. Adjuvant radiotherapy will also be required to complete the treatment of ailment (e).

15 The Offender had also been previously afflicted with other conditions. From 2000 to 2005, he suffered chronic low mood (dysthymia). In 2013, he experienced a transient ischemic attack, which presented as numbness at the left side of his body.

The decision below

16 The DJ dealt first with the nature of the offences that the Offender was charged with. He considered that there was personal gain involved in the s 477A offences because the company effectively belonged to the Offender and his family; the Offender was the single largest shareholder, CEO and MD of the Company; and the Offender drew a monthly salary of $10,000 in 2005: the Judgment at [9]. He also found that the first 35 counts of s 477A offences which were committed before the invoice financing fraud (*ie*, before June 2006) were not motivated by the Company's financial difficulties, but were planned to artificially boost the sales revenue of the Company in order to attract investors.

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The DJ held that, therefore, in respect of these 35 counts, there was a separate and additional layer of culpability: the Judgment at [13].

17 The element of personal gain and the deliberate deception of potential investors was highlighted by the DJ to distinguish the present case from *Tan Thiam Wee v Public Prosecutor* [2012] SGHC 142 ("*Tan Thiam Wee*"): at [18(i)–(ii)]. These aggravating factors, as well as the higher losses (*ie*, of $298,207.11) suffered by the Bank was relied on by the DJ to impose a higher global sentence as compared to *Tan Thiam Wee*: at [18(iii)]. The DJ ordered the sentences in DAC 7900/2011, DAC 7972/2011 and DAC 8013/2011 to run consecutively with the remaining sentences to run concurrently, giving a global sentence of 38 months' imprisonment and a fine of $10,000 (in default two weeks' imprisonment): the Judgment at [19].

18 The DJ then dealt with the issue of the Offender's ill-health. He rejected the Offender's submission that judicial mercy is warranted in the present case. There were three main reasons. First, in the light of the aggravating factors in the case, there was substantial public interest in ensuring that a non-nominal custodial sentence was meted out. Otherwise, the aims of general and specific deterrence and the demands of retribution would not be assuaged: the Judgment at [22(i)]. Second, there was insufficient evidence that the imprisonment term would exacerbate the Offender's condition to a point that the punishment would become manifestly excessive of what a prisoner without his health condition would suffer, or that the punishment imposed would be patently disproportionate to his moral culpability, or both. Nothing in the medical reports revealed that the Offender's conditions would give rise to disproportionate hardship if he was imprisoned. Moreover, the prison authorities had confirmed that they were able to manage the Offender's conditions and would arrange for him to undergo treatment at designated hospitals should the need arise: the

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Judgment at [22(iv)–(v)]. Third, the psychological impact of incarceration was generally irrelevant for the purposes of sentencing. Finally, the lack of access to social and family support and the family's (financial or non-financial) dependence on the Offender were irrelevant because they had to be regarded as normal concomitants of imprisonment: the Judgment at [22(vi)–(vii)].

19 The DJ, however, accepted on the authority of *Idya Nurhazlyn bte Ahmad Khir v Public Prosecutor and another appeal* [2014] 1 SLR 756 that there was a further and separate basis, apart from judicial mercy, to allow a court to make downward adjustments in sentence to take into account an offender's condition where it would cause undue hardship to the offender in the event that he was incarcerated: the Judgment at [25]. On that account, the DJ reduced the sentences that should be imposed in respect of DAC 7900/2011, DAC 7972/2011 and DAC 8013/2011 by two months each. The final sentences imposed are set out in the following table:

Charge	Sentence
DAC 7873/2011	12 months' imprisonment
DAC 7900/2011	**16 months' imprisonment (reduced by two months)**
DAC 7902/2011	18 months' imprisonment
DAC 7934/2011	12 months' imprisonment
DAC 7994/2011	12 months' imprisonment
DAC 7960/2011	16 months' imprisonment
DAC 7968/2011	14 months' imprisonment
DAC 7972/2011	**14 months' imprisonment (reduced by two months)**

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DAC 8013/2011	**Two months' imprisonment (reduced by two months)**
DAC 8015/2011	$10,000 fine in default two weeks' imprisonment

20 The sentences in bold were ordered to run consecutively, making a total of 32 months' imprisonment and a fine of $10,000, in default two weeks' imprisonment.

The principles for reducing a sentence on account of ill-health

Judicial mercy

21 Judicial mercy tempers the imposition of a punishment in the light of the offender's personal circumstances. It is borne out of a humanitarian concern, one which reacts to the suffering of the offender of "some grave misfortune which will be cruelly exacerbated by the infliction in full measure of his just deserts": John Tasioulas, "Mercy" (2003) 103 Proceedings of the Aristotelian Society 101 at p 117. In these exceptional circumstances, the court ameliorates the harshness of the punishment as a reflection of how society will react in the face of the offender's plight and express its humanity. For example, in *Public Prosecutor v Lim Kim Hock* [1998] SGHC 274 ("*Lim Kim Hock*"), the offender who was described as "facing a potential death sentence of another sort by virtue of his medical condition" was accorded some sympathy for the medical condition and was only sentenced to the minimum mandated by law (at [11]).

22 The conceptual basis for judicial mercy, which is humanity, should be emphasised. It explains the way the courts have in very serious situations, *ie*, where the medical condition of the offender is dire, found it just to alleviate the punishment that would otherwise have been warranted by the gravity of the offence committed. As was noted in *Lim Kay Han Irene v Public Prosecutor*

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[2010] 3 SLR 340 at [46], judicial mercy had been exercised in these two situations. First, where the offender was suffering from terminal illness. Second, where the offender was so ill that a sentence of imprisonment would carry a high risk of endangering his life. There may be other situations arising in the future which also call for the exercise of mercy, but we need not and should not pronounce on them at this stage. Suffice it to say, it would not be right to anticipate or circumscribe the circumstances which would justify the exercise of mercy by the court. Given the wide and varied nature of human conditions, it is not possible to exhaustively state what are the exceptional circumstances or fully explain every circumstance which would qualify as exceptional. Each case stands on its own facts and has to be guided ultimately by the general principle that mercy is extended as a matter of humanity.

23 What would have to be guarded against, by the same token, is an unprincipled response. Judicial mercy is an exceptional jurisdiction. The effect of mercy is that the court displaces the culpability of the offender as one of the central considerations in its determination of the appropriate sentence by considerations of humanity and where benchmark sentences will effectively play no part. For the court to exercise mercy, there must be exceptional circumstances from which humanitarian considerations arise, outweighing the public interests in having the offender punished for what he had done wrong against the law.

24 As a general proposition, there are very weighty public interests in ensuring that those who are guilty of an offence be punished appropriately:

(a) First, there is a dimension of retributive justice. The retributive norm is stated in the case of *R v Chan Kui Sheung* [1996] 3 HKC 279 in these words (at 281): "Any sentence imposed must reflect public

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abhorrence of the crime committed and redress the grievance suffered by the victim, his friends and relatives." The more heinous the crime, the greater the public interest in condemning the crime, and the more likely it would be that a court will hold that the sentence for that crime cannot countenance reduction on account of ill-health. So it was that in *HKSAR v Tsang Wai Kei* [2003] HKCA 141 ("*Tsang Wai Kei*") and *HKSAR v Lkhaijav Bayanmunkh* [2012] 2 HKC 233 ("*Bayanmunkh*"), the courts refused to exercise judicial mercy on account, *inter alia*, of the fact that the crime committed was drug trafficking. In coming to their decisions, the courts considered that public interest must prevail in offences of extreme gravity (*Tsang Wai Kei* at [18]) and that, specifically, "drug trafficking is a crime where an offender's personal circumstances are not given the same weight they might be given for other crimes" (*Bayanmunkh* at [14]).

(b) Secondly, there are social benefits to be derived from punishment, mainly, the protection of society from the particular offender, and deterrence. These valuable effects will be lost if there is no censure of those who commit offences. In cases involving "extremely grave offences", it can even be said that "a court would be failing in its duty to the public if it did not impose heavy deterrent sentence": *Yip Kai Foon v HKSAR* [2000] 1 HKC 335 at 338. Conversely, there could be a risk that the offender would likely repeat his wrongdoing if he were at large. If the risks are high enough, this clearly militates against mercy as public interest must be prioritised; the scales will tip towards imprisoning the offender in order to prevent him and deter others from committing similar offences: see *R v Gerrard Michael Stark* (1992) 13 Cr App R (S) 548 at 550. Indeed, the risk of re-offending was expressly identified as a relevant consideration in *Chng Yew Chin v Public*

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> *Prosecutor* [2006] 4 SLR(R) 124 ("*Chng Yew Chin*") at [59(d)]: "The court's assessment of the offender's proclivity to re-offend is important, and may include, *inter alia*, an appraisal of the accused's criminal record and whether the accused is likely to be placed in the same or similar situational or environmental circumstances which engendered the offence in the first place. It may well be that considerations of compassion must yield to those of public interest."

25 In the final analysis, the grant of judicial mercy is always a question of weighing the relative interests concerned – the public interests in punishing crimes in order to denounce it and to benefit and safeguard society, and the interests against punishment that would unduly place gravely ill offenders at risk. This requires the court to undertake a holistic review of the circumstances before making its finding of whether humanitarian considerations supporting the exercise of judicial mercy should ultimately, if they exist, prevail over other interests of society.

26 Should the courts moderate punishment on an unprincipled basis, there are at least two dangers. First, the courts would "appear to endorse the view that ill-health is a licence to commit crime or in some way shield an offender from the consequences of his conduct" if it exercised judicial mercy generously: *Bayanmunkh* at [10(1)]. Second, the courts run a real risk of disparate and uneven sentencing by departing from principle. It cannot be gainsaid that judicial mercy is an exceptional jurisdiction that is to be invoked carefully and only sparingly, lest there be a radical and unfounded departure from our traditional theory of criminal justice.

27 As mentioned at [22] above, what can constitute exceptional circumstances include terminal illness, or conditions that will lead to an

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endangerment of life by reason of either the imprisonment or the deprivation of certain necessaries during imprisonment which an offender critically depends on to enhance his prospects of recovery. It will, in principle, also include other circumstances that are equally grave. To establish any of these circumstances, there would of course have to be clear evidence. It would only be proper to exercise judicial mercy if the test of exceptionality has been satisfied and there is an absence of overwhelming, countervailing public interest considerations which favour punishment.

28 The result of exercising judicial mercy is a substantial reduction in the sentence to be imposed, *ie*, it should lead to no imprisonment, or a nominal period of imprisonment, or the statutory minimum. The reduction is substantial precisely because it is made in response to circumstances which are exceptional. Thus, the overall imprisonment term, which would be calibrated to the minimum, is only commensurate with that high threshold. In contending so strongly that it is right that the court should exercise mercy here, counsel for the Offender argues that this court should only impose on the Offender a nominal imprisonment term of two days.

Mitigating factor

29 Aside from cases falling within the realm of the exceptional, there are also cases where a term of incarceration would cause an offender a greater and disproportional impact because of his ill-health than it would on an ordinary person who is not suffering from the same medical condition. The principle of proportionality will apply in such cases such that the court will need to consider how to adjust the sentence with a view to equalising the burden, even though the court cannot and will not exercise judicial mercy.

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30 It is useful to first set out the taxonomy of mitigation. Broadly, there are three kinds of mitigating circumstances in law: (a) where the offender's culpability is not as great as the nature of the offence suggested ("decreased culpability"); (b) where the offender has behaved in a meritorious way which, though it affects neither his culpability nor his sensitivity to the penalty, should count in his favour ("behavioural credit"); and (c) where the offender is fully culpable but will suffer more than most offenders would from the normal penalty ("increased sensitivity") (see Nigel Walker, *Aggravation, Mitigation and Mercy in English Criminal Justice* (Blackstone Press Limited, 1999) at p 95).

31 These three categories are borne out in the case law. The foremost instances of the decreased culpability category are mental disorders, like kleptomania, which are directly linked to the commission of the crime (see *eg*, *Public Prosecutor v Goh Lee Yin and another appeal* [2008] 1 SLR(R) 824). With respect to behavioural credit, offenders have had their sentences reduced for timeous and appropriate pleas of guilt (*Angliss Singapore Pte Ltd v Public Prosecutor* [2006] 4 SLR(R) 653 at [77]) or for co-operating with the authorities (*Public Prosecutor v Siew Boon Loong* [2005] 1 SLR(R) 611 at [16]–[18]). In relation to the increased sensitivity, the mature age of an offender could warrant a moderation of punishment where a long term of imprisonment is concerned because a court should not impose a sentence effectively amounting to a life sentence (*Public Prosecutor v UI* [2008] 4 SLR(R) 500 ("*PP v UI*") at [78]).

32 To restate the underlying principles, a sentence may be mitigated to recognise the decreased culpability; to encourage salutary effects; and to equalise the impact of sentences.

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33 Ill-health can fit within the first and third categories as it can have a direct bearing on culpability, or also cause imprisonment to have a disproportionate impact on the offender. The two categories are not mutually exclusive, and where they arise in tandem, ill-health may lead to consideration being given in relation to sentence on two levels; first, it can affect the question of culpability, and second, it can give rise to consideration of disproportionate suffering.

34 This case is primarily concerned with the third category, which we will focus on. Under this category, the question is very much one of whether the offender faces far greater suffering than the usual hardship in serving a term of imprisonment. This depends on the possible consequences of the offender's medical condition, which may, in turn, be contingent on other surrounding circumstances. But generally, it is constituted by a risk of significant deterioration in health or a significant exacerbation of pain and suffering. Where the impact on the offender does rise to such a sufficiently serious level, it causes the sentence that is otherwise appropriate with regard to the offence committed, to be out of line on the ground of proportionality. Consequently, the sentence ought to be mitigated, because other things being equal, offenders ought to be subject to the same impact.

35 At this juncture, we hasten to add that there is an apparent overlap in the test for invoking ill-health as a mitigating factor and for the exercise of judicial mercy. A significant deterioration in the offender's condition may count towards either the mitigation of a sentence as a matter of equalising the burden on the prisoner or the exercise of judicial mercy as a matter of humanity. The difference here is one of degree – it would take a greater extent of deterioration, to the point of endangering the offender's life, to warrant an exercise of mercy, as opposed to it being regarded as a point in mitigation.

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36 We recognise that this difference is also reflected in the discount to be accorded where the risk of deterioration is advanced in mitigation of sentence. Where ill-health is successfully invoked as a mitigating factor, the discount in sentence will not be as substantial as in a case where judicial mercy is exercised, but will only be to equalise the punishment. This principle may appear somewhat broad, but given the nature of the issue that is being considered, one can hardly be expected to devise a more definitive formula to calibrate the amount of discount. It is impossible to plot a graph of sentencing by reference to a range of medical conditions. Neither can the additional suffering which an offender will likely sustain in prison on account of ill-health be put under microscopic examination. The discount to be given on account of the disproportionate impact will necessarily depend on the evidence presented to court – whether it reveals that there is indeed a real likelihood of such disproportionate impact on the offender and, if so, its magnitude.

37 Of course, other relevant mitigating or aggravating considerations should also be reckoned and accounted for. Wider public interests may exist, which may countermand any reduction of a sentence despite the threshold being met for raising ill-health as a mitigating factor. These considerations, along with the consideration of the disproportionate impact, will have to be weighed to arrive at a just sentence.

The dichotomous approach

38 In summary, ill-health is relevant to sentencing in two ways. First, it is a ground for the exercise of judicial mercy. Judicial mercy is an exceptional recourse available for truly exceptional cases and which will likely result in an exceptional sentence. Where mercy is exercised, the court is compelled by humanitarian considerations arising from the exceptional circumstances to order

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the minimum imprisonment term or a non-custodial sentence where appropriate. Secondly, it exists as a mitigating factor. The cases where ill-health will be regarded as a mitigating factor include those which do not fall within the realm of the exceptional but involve markedly disproportionate impact of an imprisonment term on an offender by reason of his ill-health. The court takes into account the fact that ill-health may render an imprisonment term that will not otherwise be crushing to one offender but may be so to another, and attenuates the sentence accordingly for the latter offender so that it will not be disproportionate to his culpability and physical condition.

39 In all other cases, ill-health is irrelevant to sentencing. It may be that the offender has a condition or several conditions, but unless he can satisfy the tests for exercising judicial mercy or for mitigating a sentence because of disproportionate suffering or decreased culpability, there is no proper basis to vary the sentence. Hence, it will be insufficient for an offender to merely show that he is ill. Even if the contention is that imprisonment would have a significantly adverse impact on an offender due to his ill-health, the following conditions would have fallen short:

(a) Conditions that can be addressed by certain procedures, such as surgery or treatment. If the prison has the capability of addressing the conditions to an acceptable standard (and by that, it means that the prison need not meet the best medical standard), they would be a neutral factor. This is because the conditions, once addressed, will no longer result in a greater impact on the offender.

(b) Conditions that carry only the normal and inevitable consequences in the prison setting. If the consequences will transpire independently of whether the offender is in or outside of prison or the

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> risk of them transpiring is not significantly enhanced by the imprisonment, then they are also a neutral factor as imprisonment would make no difference to the offender's state of health or the suffering he will sustain in prison.

40 Essentially, there is no broader discretionary approach to adjusting a sentence based on the offender's ill-health; and that is especially so if the condition in question does not ultimately make a difference to the offender's outlook in prison. The instances in which ill-health may reduce a sentence will have to be informed and constrained by the principles of judicial mercy and mitigation set out above, otherwise the danger that "sentencing … [will] degenerate into an exercise of personal whim or indulgence" that was cautioned against in *PP v UI* at [63] risks coming to pass.

The distinction between mercy and mitigation

41 For the purpose of conceptual clarity, it is important to bear in mind the distinction between the exercise of judicial mercy and the consideration of ill-health as a mitigating factor as the two questions are founded on distinct conceptual bases. They should not be conflated and be amalgamated into a single sentencing process as some cases would appear to have done. Judicial mercy is exercised when the court is moved by humanitarian impulses in a case. As a corollary, the court is not concerned so much about correlating a length of a custodial sentence with the seriousness of the offender's wrongdoing, but about alleviating the effects of a custodial sentence on the basis that it is humane to do so in the particular circumstances of an offender. Indeed, as alluded to at [36], judicial mercy has a tendency to reduce a sentence far beyond what a mitigating factor can do. Accordingly, judicial mercy falls outside the framework of proportionality. In contrast, one of the rationales for invoking ill-

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health as a mitigating factor is proportionality. Ill-health may cause a custodial sentence to have such impact on the offender that it is out of proportion to the gravity of the offence. And where it does so, it may be raised as a mitigating factor in order to reduce the length of the custodial sentence so that the sentence in fact imposed will fall within the ambit of proportionality. The variance in the outcomes between mercy and mitigation is in fact symptomatic of their conceptual differences.

42 While we acknowledge that whether a particular factual circumstance will give rise to consideration of mercy or mitigation will be a matter of judgment call, it is important for the court, having arrived at a determination to keep them distinct, as the consequences following from that determination are not the same. Conflation could give rise to misunderstanding and confusion. An example of the conflation of the two concepts may be seen in the case of *Chng Yew Chin*.

43 In *Chng Yew Chin*, the court included the general principle of proportionality in the test for judicial mercy. This can be seen at [60(c)] of the judgment where it is stated that "the likelihood of the term of imprisonment or other punishment exacting a hardship either manifestly excessive of what a prisoner without his health condition would suffer or patently disproportionate to his moral culpability or both" as a relevant factor to the court's decision on whether or not to exercise mercy. The judgment also cited the Australian case of *R v Smith* (1987) 44 SASR 587 ("*R v Smith*"), where King CJ observed at 589 that: "Generally speaking ill health will be a factor tending to mitigate punishment only when it appears that imprisonment will be a greater burden on the offender by reason of his state of health or when there is a serious risk of imprisonment having a gravely adverse effect on the offender's health."

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44 With respect, the principle of proportionality is not consistent with the basic rationale for the exercise of judicial mercy. Proportionality implicitly preserves a link between culpability and punishment, but the conceptual basis for judicial mercy, which is humanity, does not. Instead, in giving effect to humanity, the need for punishment is obviated so far as it is permissible under the legislation and justifiable in the public interests. More likely than not, the outcome of an exercise of judicial mercy will not be in line with the culpability of the offender, because once the circumstances are exceptional enough, the degree of culpability should not play a significant role in determining sentence as humanitarian considerations take centre stage. If proportionality is subsumed within the rubric of judicial mercy, it constrains the reduction of the sentence, and that could conflict with the sentence humanity would have commanded. *R v Smith* was really a case about ill-health as a mitigating factor, rather than a case concerning judicial mercy. The statement by King CJ consists of two limbs: whether the offender's state of health makes imprisonment more burdensome upon him; and whether the offender's health would be worsened by imprisonment. These are proportionality considerations, not humanitarian considerations. The analysis in *R v Smith* centred on how ill-health would be treated as a mitigating factor where it caused imprisonment to bear more heavily upon the offender than upon a healthy person. Therefore, *Chng Yew Chin* should not have alluded to proportionality, or the considerations in *R v Smith*, in its consideration of the criteria for the exercise of judicial mercy.

45 Neither should *Chng Yew Chin* have cobbled separate strands of reasoning from various Australian, Hong Kong and English cases concerning ill-health into a single approach for judicial mercy. The predominant approaches to ill-health in sentencing in these jurisdictions differ. As stated, the Australian approach emphasises proportionality, and correspondingly, the need to equalise punishment. This is evident from *R v Smith* as well as the subsequent cases

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citing *R v Smith*: see, *eg*, *AG v Pope* [1996] QCA 318, *R v Marshall* [2010] QCA 29 at [23]. The Hong Kong approach, on the other hand, appears to ground its decision on humanity. Although this is not clearly enunciated in the cases, it may be inferred from the fact that the courts confine their regard of an offender's ill-health for the purpose of reducing a sentence to "the rarest cases" and adopt "a stronger stance" than that which would accommodate the "additional hardship suffered by a prisoner as a result of bad health or physical disability [by treating it] as a ground for mitigation": *R v Ho Mei Lin* [1996] 4 HKC 491 at 493, citing D A Thomas *Principles of Sentencing* (Heinemann Educational Books Ltd, 2nd Ed, 1979) at p 216. This would appear to be the opposite of the Australian approach, since it does not accept the greater impact of imprisonment on an offender on account of his ill-health as a sufficient reason to mitigate a sentence. Instead, by requiring exceptionality in the circumstances, it suggests that the main or perhaps sole basis for taking into account offender's ill-health is humanity. Finally, the English approach accepts both conceptual bases of humanity and proportionality. It has been summarised in *R v Daniel Patrick Hall* [2013] 2 Cr App R (S) 68 at [14] in the following way: "the sentencing court is fully entitled to take account of a medical condition by way of mitigation as a reason for reducing the length of the sentence, either on the ground of the greater impact which imprisonment will have on the appellant, or as a matter of generally expressed mercy in the individual circumstances of the case". It is in fact very much like the dichotomous approach which we have set out above, in that there are two conceptual bases operating to the exclusion of the other on which the court can resort to, to determine the appropriate sentence.

46 Empirically, the result in the cases in which judicial mercy was exercised, including *Chng Yew Chin*, suggests that humanity was the overriding consideration. In *Chng Yew Chin*, the offender had incurable nasopharyngeal cancer. The High Court exercised judicial mercy and imposed no imprisonment

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term, and sentenced him to only a $5,000 fine on one of the three charges of outrage of modesty and a $3,000 fine for each of the other two charges. Equally, in three other cases, the minimum imprisonment term was imposed. In *Public Prosecutor v Tang Wee Sung* [2008] SGDC 262, the offender, who had end-stage renal failure, was sentenced to a $7,000 fine for a charge of trading in organs, and one day's imprisonment and a $10,000 fine for the second charge of making false statements in a statutory declaration (for which imprisonment was mandatory). In *Public Prosecutor v Teo See Khiang Willy* [2012] SGDC 187 ("*Willy Teo*"), the offender developed major depression with psychotic symptoms over the course of the investigation; he was sentenced to a total of two days' imprisonment for one charge of corruptly agreeing to accept gratification and five charges of falsification of accounts. In *Lim Kim Hock*, the offender had contracted HIV, which was potentially fatal for him; his global sentence was comparatively higher at 22 years' imprisonment and 15 strokes of the cane, but that was "the absolute minimum for each charge" (at [11]). As for the cases in which the plea for judicial mercy was rejected but a discount in sentence was given, the conceptual basis was similarly unexpressed, but it appears that the principle of proportionality was accorded due consideration in at least some of them. In *Tan Kim Hock Anthony v Public Prosecutor and another appeal* [2014] 2 SLR 795 ("*Anthony Tan*"), for instance, the High Court decided (at [40]) to accord "some degree of compassion" on account of the offender's advanced age, citing the Australian decision in *Edward Alfred Braham v R* [1994] NTCCA 60 at [21] for the reason that "the rigour of imprisonment is, generally speaking, a harsh experience for elderly offenders". In another case, *Public Prosecutor v Sim Choon Wee Kenny* [2013] SGDC 82 ("*Kenny Sim (DC)*"), the District Court considered (at [64]) that "the prison environment will be more difficult for the accused than a person without the same disabilities" and took that into account in determining the sentence of eight

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weeks' imprisonment; that sentence was not disturbed on appeal: see *Sim Choon Wee Kenny v Public Prosecutor and another appeal* [2013] SGHC 182. The main question in both cases may well be viewed in this light – whether an offender would have suffered disproportionately in prison because of his advanced age (*Anthony Tan*) or his medical condition and physical disabilities (*Kenny Sim (DC)*). So understood, they are also consistent with the dichotomous approach.

47 We wish to make one comment on *Kenny Sim (DC).* As we have stated earlier, *Chng Yew Chin* was a case which seems to have blurred the different considerations which apply for the invocation of judicial mercy and those solely for mitigation of sentence. The way *Kenny Sim (DC)* dealt with the issue of mitigation would appear to have perpetuated that conflation of the two concepts. This can be seen where the DJ said at [63]: "[t]hat leaves me with the question of whether it was possible for the court to exercise judicial mercy to a lesser extent and to give an appropriate discount in the sentence. …I took the view that I had that sentencing option and discretion". It remains for us to reiterate the point that the court should make clear whether a reduction in sentence was done as a matter of mercy (which will normally be quite drastic) or mitigation, bearing in mind the distinct conceptual bases and the circumstances for which each may be invoked.

Evidence of the Offender's ill-health

48 Two preliminary objections are taken by the Prosecution as to the evidence relating to the illnesses suffered by the Offender. We will first deal with these objections.

49 First, the Prosecution submits that the Offender was making every effort to search for a basis to ask the court to exercise judicial mercy. This is borne out

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by the fact that he refused to undergo treatment for his cancer, and delayed the trial time and again before finally furnishing medical reports that detailed his conditions on 21 February, 8 April and 29 July 2014. It may well be true that there was some delay. On the other hand, there could be various reasons why a person like the Offender did not act with due speed. It is a serious imputation to make against a person that his purpose in refusing treatment is to deliberately worsen his own condition with the hope of using it as a ground to invoke judicial mercy. Such an inference should not be lightly drawn unless there is clear proof that that is what the person intended. In any event, it does not seem likely that anyone would be so reckless with his own life. It seems wholly irrational that the Offender in the present case would go to such lengths to obtain a reduction in sentence, particularly given that the undiscounted sentence ordered by the DJ is 38 months, whereas cancer, if left untreated, can be terminal. In any event, of more significance to the court is whether at the time of sentencing the Offender was in fact suffering from any physical illness warranting the exercise of judicial mercy or the mitigation of sentence. So long as the Offender has proven his conditions, *viz*, by producing doctors' opinions which themselves have not been disputed, that will be a fact which the court must take into consideration.

50 Secondly, the Prosecution submits that the Offender's self-reporting formed the basis for the medical opinions on his mental disorders and so little weight should be accorded to them. We do not think such a broad sweeping approach is justified. By its very nature, a psychiatrist will need to talk to the patient to assess his mental well-being or otherwise. Unless there are reasons to the contrary, medical opinions properly arrived at must be accorded due consideration. In terms of the Offender's depression and claustrophobia, the Institute of Mental Health memo from Dr Natarajan Kathirvel, the Sayang Wellness Centre memo from Dr Sharon Lu, and the report from Dr Yeo Seem Huat indicate that the Offender has been receiving treatment since 2007. The

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Offender has also been taking anti-depressant medication and anxiolytic medication for depression and claustrophobia respectively. One of the documents that Dr Munidasa Winslow and Dr Julia CY Lam from Winslow Clinic perused was a list of medication that the Offender had taken. That, together with other medical reports and records, led to their opinion that the Offender suffered depression and claustrophobia. These mental disorders were not conjured up by the Offender after the charges were brought against him. Significantly, even as the Prosecution challenges the completeness or accuracy of the reports at the hearing, the Prosecution conceded that it did not seek to get more information about the conditions because it was prepared to have the DJ consider them on the basis of the medical reports submitted by the Offender.

51 In the circumstances, and there being no contrary evidence, we do not see how we can reasonably disregard the medical conditions of the Offender described in the various medical reports.

The Offender's appeal

52 The Offender's primary argument is that judicial mercy ought to have been exercised by the DJ. Applying the approach which we have adopted, the question is whether this is an exceptional case in which it would only be humane to reduce the sentence exceptionally so that only a minimum imprisonment term should be imposed on the Offender. His counsel, Mr Philip Fong Yeng Fatt ("Mr Fong"), identified a number of factors to highlight the exceptionality of the present case.

53 First, Mr Fong identifies the inability of the prison authorities to address the Offender's needs for treatment in a community setting. He emphasises the undisputed medical finding that the Offender's illnesses need to be better addressed and treated in a community setting involving a multi-modal approach,

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that is, pharmacological, social, family and even occupational rehabilitation, which he will be deprived of in the prison environment. That is the basis of his argument to say that the circumstances of the case are so exceptional that judicial mercy should be applied. However, we do not see these circumstances as being so exceptional as to warrant the exercise of judicial mercy. There will be many prisoners who can equally say that they would benefit from having their families' support. In fact, it is one of the fundamental precepts of rehabilitation theory that the involvement of the family will be helpful. In the context of any medical condition, without question, the prospects for recovery will be better with familial support. The lack of a community setting in prison therefore cannot *per se* be an exceptional factor justifying the exercise of judicial mercy. If it were, judicial mercy would be at the tip of the lips of every counsel and the interests of society would thereby be gravely undermined. Such an approach would inevitably lead to a wholly unprincipled response.

54 The second factor Mr Fong highlights is the multitude of illnesses suffered by the Offender. To illustrate, Mr Fong points out the most severe conditions: depression and attendant suicidal tendencies, cancer, and risk of a stroke arising from a blood clot in one of the arteries leading to the brain. He argues that the totality of these conditions places the case within the category of the exceptional. But this argument has been addressed at [39]. There is a need to parse the various conditions, and separate out conditions that are simply not serious, and conditions that are serious but have no downstream adverse consequences in prison either because they do not affect an offender differently, whether he is inside or outside of prison, or they can be dealt with by surgery or other forms of therapy that the prison authorities can provide.

55 The blood clot is one such condition. There is a risk it will produce a fatal stroke, but there is no evidence that the risk is any different in a prison

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setting. Dr Yeow Yew Kim confines his assessment as follows: the Offender is at "risk of a stroke attack which may lead to paralysis or death if not cared or monitored carefully". This is to be read with the prison authorities' response that they are able to manage the Offender's condition, coordinate with the restructured hospitals to provide psychiatric and specialist services, and provide, if required, ward-based care in the prison's medical centre for the duration of the Offender's imprisonment. In relation to the Offender's cancer, it is also within the capability of the prison working with the restructured hospitals to ensure that he gets surgical treatment, chemotherapy and follow-up consultations as instructed by the doctors. This is not seriously contested.

56 Like the blood clot, the cancer is also not a condition which dictates that judicial mercy should necessarily be exercised in his favour. The short response to Mr Fong's argument is that it is not a principle of judicial mercy that an offender who suffers from many conditions should be shown mercy; the test is more nuanced than that. It inquires into whether the conditions suffered by the offender are so serious that he has not much longer to live or sending him to prison is going to endanger his life or will occasion something of equivalent gravity (see [27] above). Nothing, however, is said to this effect in the medical reports. Although there is consensus in the reports that the Offender's health will worsen in prison, one has to go further than that to justify the exercise of mercy.

57 Finally, there is the matter of the DJ's holding that *Willy Teo* can be distinguished from the present case. Mr Fong submits that the DJ erred in this respect because the cases are in fact very similar; the condition of major depression with a risk of suicide being a common feature, and the sole distinction made by the DJ is flawed because it rests upon the responses given by the prison authorities which are not conclusive on the issue of judicial mercy.

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Specifically, the prison authorities in *Willy Teo* admitted to an inability to manage the offender's condition. The letter from the prison authorities stated (at [11]): "[the offender's] psychiatric condition would deteriorate in Singapore Prison Service custodial setup without the multi-modal resources and occupational rehabilitation", whereas in this case, the prison authorities are confident that they can manage the Offender's condition.

58 In this connection, we make three points. First, we agree that what the prison authorities have said is not to be accepted unconditionally. If evidence can be put forward to suggest that the prison authorities have not fully appreciated the needs of a prisoner, then clearly, the court is entitled to take that into account. Secondly, the main thrust of counsel's submissions is that the DJ seems to think that judicial mercy was to be answered by whether the prison authorities have the ability to meet the needs of a prisoner, which will only be concerned with a limited review of the facilities in the prison and the arrangement made between the prison and the restructured hospitals where prisoners may be conveyed to if the need arises. That may not be all that the prison authorities' letter is communicating or, indeed, what the DJ perceived the letter to be about. The words used in the letter ("we will be able to manage [the Offender's] condition should he be incarcerated") are broad enough to have covered the issue of whether the Offender's situation is going to be markedly worse or endangered from imprisonment, which goes to the heart of whether judicial mercy ought to be exercised in a case. On the other hand, the words, vague as they are, may not have been intended in this sense. The letter is bereft of details indicating what exactly the prison authorities meant. Thirdly, and in any event, even if the prison authorities mean to say that they can care for the Offender, that fact necessarily feeds into the issue of the impact of imprisonment on the Offender's health. The adequacy of caregiving in the prison or in the restructured hospitals will ameliorate at least some of the adverse effects of

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imprisonment. Whichever way the prison authorities' letter is interpreted, it points away from the case as being exceptional. In the result, the DJ is not incorrect to take the letter into account in distinguishing *Willy Teo* from this case. We agree with the DJ that judicial mercy is not warranted here.

59 We now turn to the alternative submission that a larger discount ought to have been granted in recognition of the greater impact of imprisonment on the Offender because of his ill-health. On the evidence, there can be no doubt that the Offender's ill-health, particularly his mental disorders, will pose problems for him in prison.

60 Dr Munidasa Winslow and Dr Julia C Y Lam have opined that the Offender's "Phonic Anxiety disorder (claustrophobia) will … have a major impact on his psychological well-bring if incarcerated"; that his "medical and psychological conditions will negatively impact his ability to adjust and adapt to prison" and that as a result of his claustrophobia, "an extended imprisonment term will also severely affect his psychological well-being and has the potential to worsen his medical conditions." Dr Yeow Yew Kim ("Dr Yeow") has opined more generally that "[i]n the best interest of managing his condition … [the Offender] is unsuitable to work or be placed in confined spaces and environment". There is a similar opinion from Dr Yeow that the Offender "is unsuitable to work or be placed in a confined environment as he will not be able to cope with the anxiety or stress being confined in a claustrophobic environment. It will have an adverse effect on his health and current condition will deteriorate." Likewise, Dr Natarajan Kathirvel has opined that the Offender "is unsuitable to be placed in a highly confined[d] space or enclosed environment as this will exacerbate his condition."

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61 These are variations of an unequivocal view that the Offender will experience significant hardship in undergoing imprisonment by reason of his mental conditions. Importantly, they are also unqualified. By contrast, there are other opinions expressed which are contingent on a lack of sufficient care of the Offender's conditions in prison: *eg*, "an incarceration sentence will … adversely exacerbate [the Offender's] medical and psychological conditions as much needed treatment and monitoring could be denied". Such latter opinions will have to be disregarded, given the prison authorities' representation that they can coordinate with the restructured hospitals to care for the Offender. In other words, the contingency does not arise. But as regards the opinions of the former category, they constitute clear evidence that certain of the Offender's conditions, namely, his major depression and claustrophobia, will deteriorate in prison and will also cause him disproportionate suffering. The broad statement by the prison authorities that they can manage the Offender's condition does not quite contradict the medical reports, since it did not clearly state that they can prevent disproportionate suffering on the part of the Offender. As mentioned (at [57] above), it is unclear whether the prison authorities were confining their response to an ability to provide adequate care, or whether their response can be taken to be an evaluation of the ultimate effect of imprisonment on the Offender. Without any clarity in this respect, it would be improper to assume one or the other. It follows that there is really no basis on which to doubt the medical reports or to disregard the opinion expressed therein that the Offender would sustain a greater burden of imprisonment on account of his medical conditions.

62 The question which arises from this is what is the appropriate discount which the court ought to give because of the added burden which the Offender will have to bear on account of his medical conditions or, to put it another way, what proportionality would demand that the appropriate custodial sentence be

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reduced by. The DJ held that there should be a discount of two months' imprisonment for each of the three charges running consecutively. Cumulatively, they amount to a six months' discount.

63 Mr Fong asks for a further reduction. His submission is twofold. First, he submits that 30 months is the maximum imprisonment term that would have been warranted but for the presence of grounds for mitigation. The case of *Tan Thiam Wee* is relied on as a benchmark as in that case as well as the present, there were multiple s 420 cheating offences. The *modus operandi* was to create false documentation to obtain loans from a bank, huge losses were sustained by the bank, and a large number of other charges were taken into consideration. By parity of sentencing, Mr Fong contends that the aggregate sentence of 30 months' imprisonment that was imposed in *Tan Thiam Wee* should be imposed here. Secondly, Mr Fong submits that the Offender's ill-health necessitates a 50% discount in the sentence. Accordingly depending on whether 30 months (following the authority of *Tan Thiam Wee*) or 38 months (as was ordered by the DJ) is taken as the starting point, the aggregate length of the custodial sentence should be 15 months or 19 months after the discount.

64 We are unable to accept this submission. In our view, leaving aside the mitigating factor of ill-health for the moment, the undiscounted sentence of 38 months' imprisonment is not manifestly excessive having regard to the nature of the offences committed and the harm caused. *Tan Thiam Wee* is not exactly a comparable to the present case in terms of moral culpability. Rather, there are two distinctions between that case and this case. These have been correctly identified by the DJ. First, there are numerous counts of s 477A offences in the present case which involved the falsification of records to keep the books of a publicly-listed company looking healthy and which correspondingly deceived the potential investing public. Second, the losses in the present case are higher

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than in *Tan Thiam Wee*. An eight-month difference in sentencing appropriately reflects the two distinctions. Turning next to the question of mitigation of sentence on account of the Offender's ill-health, we do not see anything in the medical opinions which warrant a drastic discount of 50%. The medical opinions have not expressed the effect of imprisonment on the Offender by reason of his medical conditions in such drastic terms. While we acknowledge that imprisonment will be a harsher experience for the Offender because of his conditions, it is not shown that his medical conditions are so aggravated that it takes halving the imprisonment term to maintain proportionality. There is nothing to suggest that the DJ had failed to take any relevant evidence into consideration. In agreement with the DJ, we find that a discount of six months' imprisonment is sufficient recognition of the adverse impact on the Offender.

The Prosecution's appeal

65 The Prosecution's appraisal of the case is the opposite of the Offender's, its appeal being founded on a view that it is erroneous to reduce a sentence on account of ill-health other than by an exceptional act of judicial mercy and that, in any event, the undiscounted sentence meted out by the DJ is manifestly inadequate.

66 The first point has been earlier addressed. In so far as the Prosecution's position on ill-health on sentencing is founded on the framework in *Chng Yew Chin*, which merges mercy and mitigation, we are unable to accept it. As we have stated earlier, the conceptual bases of mercy and mitigation are distinct: see [44] above. For clarity, it would be better to lay a separate track for analysing ill-health as a mitigating factor where it would not need to meet the high threshold for the exercise of judicial mercy. Indeed, the shortcoming of the merged approach is illustrated by the Prosecution's submission that the sentence

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may not be adjusted on account of an offender's ill-health since the circumstances are not exceptional enough to warrant the exercise of judicial mercy, even though it will, in our view, intensify the punishment. In our judgment, the disproportionate effect of the sentence on the Offender triggers the need to moderate the sentence on a separate basis of proportionality. This was correctly done by the DJ in giving a discount of six months' imprisonment.

67 In relation to the second point, leaving aside for the moment the mitigating factor of ill-health, we find that the sentence of 38 months' imprisonment is at the lower end of the established range, but it is not so low as to be manifestly inadequate. The Prosecution in fact accepts that the individual sentences imposed by the DJ for the s 477A, s 420 and s 471 offences are well within the realm of the benchmarks submitted, but submits that the Offender's criminality deserves a higher aggregate sentence.

68 At the hearing, Mr Alan Loh Yong Kah ("Mr Loh"), representing the Prosecution, pointed out that fraud was involved in this case. When the Offender was asked by the auditors to produce confirmation of outstanding balances from companies that appeared to owe to the Company, the Offender forged the confirmation. Therefore, Mr Loh submits that the Offender's criminality is more serious than that of the offenders in the precedents for s 477A offences (*ie*, *Public Prosecutor v Ng Teck Boon* [2005] SGDC 273 ("*Ng Teck Boon*"), *Public Prosecutor v Tan Liang Chye* [2006] SGDC 109 ("*Tan Liang Chye*"), *Public Prosecutor v Tan Hor Peow Victor* [2006] SGDC 148 ("*Victor Tan*"), *Public Prosecutor v Yip Hwai Chong* [2006] SGDC 27 ("*Yip Hwai Chong*"), and *Tan Puay Boon v Public Prosecutor* [2003] 3 SLR(R) 390 ("*Tan Puay Boon*")) because they did not take the extra step to deceive the auditors. Yet the aggregate sentence of 38 months in this case is less than the punishments imposed in those cases.

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69 While we note the Prosecution's contention, two comments are in order. First, the deception of the Auditor must have been considered by the DJ. It is, after all, the subject of a s 471 offence that the Offender was convicted for. The Prosecution has not elaborated on how the DJ had failed to give this factor adequate consideration or weight or why the sentence should be enhanced beyond what the DJ has ordered. Secondly, it is doubtful whether the Offender's criminality is in fact more serious than the criminality involved in those precedents. The evidence suggests that the foremost desire of the Offender was to rescue the Company; specifically, he sought to keep the Company listed on the NSX and to maintain its credit line and trade facilities with the bank. The mitigation plea before the DJ was that the Offender was trying to keep the Company afloat. Consistent with that, the Offender pleaded that he was channelling the bank loans and further loans from his father and uncle into the Company with a view to easing the cash flow situation of the Company. That pleaded fact is also undisputed. By contrast, there was an element of greed in each of the five precedents cited by the Prosecution. In *Ng Teck Boon* and *Tan Liang Chye*, the offenders sought to increase the profitability of the company by selling illegally-retained electronic chips and then camouflaging how the profits were being made by creating false documents. Similarly, in *Victor Tan* and *Yip Hwai Chong*, the offenders sought to boost the profitability of the company's refurbishment business by creating false documents to extract payments from a third party and to show the existence of the fictitious refurbishment business. Lastly, in *Tan Puay Boon*, the offender made false entries in the company's accounts in order to siphon money from the company. To use the words of the court in *Tan Thiam Wee* at [16], it would seem that "the degree of malicious intent" of the Offender in the present case is lower.

70 We acknowledge that the DJ made a finding that the Offender committed the offences for personal gain. The reasoning of the DJ in making

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this finding is that the Offender was a major (*ie*, 38.77%) shareholder in the Company and he would stand to gain when the Company gains. Another reason is that the Offender drew a salary (*ie*, $10,000 per month in 2005) from the Company; in this sense his fortunes were tied to that of the Company. But this finding is valid only up to a point. There is, of course, no question that the Offender's rescue efforts could potentially benefit himself as a shareholder and an employee of the Company. This situation, however, cannot be automatically equated with an intention to gain personally. In *Tan Thiam Wee*, the offender owned the entire shareholding of the company. He too defrauded a bank to ameliorate a tough financial situation. Yet the court in *Tan Thiam Wee* did not consider the offender to have intended to gain personally; it considered that the offender's "motivation was to stave off what he thought was temporary insolvency so that his company could survive and his employees could remain in their jobs". This was, the court added, "vastly different from [the situation] where the perpetrator commits an offence for direct financial gain or to repay gambling debts": at [13]. The position of the Offender here is, at the very worst, similar to that; indeed bearing in mind that the Offender only owned 38.77% of the shares in the Company, a company listed on the NSX, it will be even harder to suggest that what he did was directly for personal gain.

71 Cases where findings were made that the offenders intended to gain from their offences tend to involve more deliberate and direct attempts to make a financial gain. The two cases cited by the Prosecution which have such findings are *Victor Tan* and *Yip Hwai Chong*, and they contain the following facts. The offenders released unaudited financial statements containing false figures and, in so doing, committed offences under the Securities and Futures Act (Cap 289, 2002 Rev Ed). The inflation of the revenue and profits in the financial statements were to such extent as to be "likely to induce others to purchase shares" and in turn "likely [to] have a positive effect on the overall demand and

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subsequent price of its shares": *Victor Tan* at [43]; *Yip Hwai Chong* at [28]. The offender in *Yip Hwai Chong* sold his shares when the share prices were "artificially maintained or raised" and so profited: *Victor Tan* at [18(b)] and [37]. The essential point here is that an intention to gain personally should be established on clearer circumstantial evidence other than the mere fact that an offender could, in the nature of things, potentially gain.

72 Finally, there is an important mitigating factor in this case which must be taken into consideration. The Offender has expressed remorse for his wrongs. This is evident in his choosing to plead guilty, his willingness to cooperate with the authorities, and the *frankness and comprehensiveness* of his answers to the police. Due weight must be accorded to them. They are clearly mitigating factors deserving of consideration.

Conclusion

73 We are thus not persuaded that the sentence imposed by the DJ ought to be disturbed and accordingly, we dismiss both appeals. It remains for us to express our profound gratitude to the *amicus curiae*, Mr Jordan Tan Zhengxian, for the invaluable assistance which he has rendered to us in his submissions where he has comprehensively surveyed the law and practice prevailing on the subject in England, Australia, Hong Kong and, of course, Singapore.

Sundaresh Menon	Chao Hick Tin	See Kee Oon
Chief Justice	Judge of Appeal	Judicial Commissioner

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