IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA 68

Criminal Appeal No 10 of 2022

Between

Muhamad Azmi bin Kamil

… *Appellant*

And

Public Prosecutor

… *Respondent*

JUDGMENT

[Criminal Law — Statutory offences — Misuse of Drugs Act]
[Criminal Procedure And Sentencing — Appeal — Oral hearings]

Muhamad Azmi bin Kamil
v
Public Prosecutor

[2022] SGCA 68

Court of Appeal — Criminal Appeal No 10 of 2022
Sundaresh Menon CJ, Judith Prakash JCA and Steven Chong JCA
8 September 2022

19 October 2022

Steven Chong JCA (delivering the judgment of the court):

1 The appellant pleaded guilty to one charge of trafficking in not less than 249.99 grams of methamphetamine (the "Methamphetamine Charge"), which is an offence under s 5(1)(*a*) read with s 5(2) and punishable under s 33(1) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"). Another charge of trafficking in cannabis was taken into consideration for the purpose of sentencing (the "TIC Charge"). The Judge imposed the sentence of 25 years' imprisonment and 15 strokes of the cane, which was the sentence sought by the Prosecution.

2 The appellant appealed against the *sentence*. We have considered the arguments raised by the appellant and are satisfied that none of them has any merit. We therefore dismiss the appeal without an oral hearing for the reasons set out below.

Background

3 In the hearing before the Judge below, the appellant, Muhamad Azmi bin Kamil, admitted to the Agreed Statement of Facts without qualification when he pleaded guilty.

4 The appellant is a 40-year-old male Singaporean who drove the car bearing registration number SGU3516R (the "Car") on 2 May 2017 in which the drugs were found. His role was that of a courier for one Ahmad Ashikin bin Ahmad Sulaiman ("Ahmad"), who is a 36-year-old male Singaporean and a Malaysia-based supplier who supplied drugs to his customers in Singapore. The customers would place orders for drugs with Ahmad, and Ahmad would use the appellant as a courier to bring the drugs from Malaysia to Singapore. The appellant may also be contacted directly by Ahmad's customers to arrange for delivery of the drugs. The customers would pay the appellant either in cash or transfer money directly into Ahmad's bank accounts. The appellant would pass the cash to Ahmad in Malaysia.

5 On 2 May 2017, at about 10.30pm at the Woodlands Checkpoint, the Checkpoint Inspector SSgt Zulfadhli Mazli ("SSgt Zulfadhli") stopped the appellant's car and observed that there was a box of "Daia" washing powder (the "Daia Washing Powder Box") amongst multiple "Giant" plastic bags containing grocery items. Sgt Ho Chin Ming Edwin ("Sgt Edwin") directed the appellant to open the Daia Washing Powder Box. Multiple grocery boxes were recovered in the Giant plastic bags. The following controlled drugs (collectively referred to as the "Drugs") were recovered and seized by SSgt Chong:

(a) Two blocks of vegetable matter, and one packet of crystalline substance found in the Daia Washing Powder Box (the packet of

crystalline substance was later analysed and found to contain not less than 677.5g of methamphetamine); and

(b) One packet of crystalline substance found in a "Kellogg's Cornflakes" box (the "Kellogg's Cornflakes Box"), which was later analysed and found to contain not less than 627.6g of methamphetamine.

6 The appellant knew that he was delivering the Drugs to Ahmad's customers, Adeeb and Fazri, who had ordered drugs from Ahmad on multiple occasions in 2017. For the 2 May 2017 delivery, Adeeb ordered the drugs in the Daia Washing Powder Box, while Fazri ordered the drugs in the Kellogg's Cornflakes Box. In the evening of 2 May 2017, the appellant collected the Drugs as *per* Ahmad's direction and travelled to Singapore, where he was arrested.

7 On 12 October 2017, Ahmad was separately arrested in Singapore.

8 The appellant knew of the nature and quantity of the Drugs, and intended to deliver the Drugs to Adeeb and Fazri on Ahmad's directions. The appellant had therefore committed an offence under s 5(1)(*a*) read with s 5(2) of the MDA, and punishable under s 33(1) of the MDA, for having two packets containing not less than 249.99g of methamphetamine in his possession for the purpose of trafficking.

Relevant sentencing frameworks

9 In *Suventher Shanmugam v Public Prosecutor* [2017] 2 SLR 115 ("*Suventher*"), this court set out the sentencing guidelines for the offence of trafficking or importation of drugs. The indicative starting sentence, as a matter of principle, should be proportional to the quantity/weight of drugs trafficked or imported. The court will first identify the indicative starting range, and then

adjust the starting sentence upward and downward based on the offender's culpability and the presence of aggravating and mitigating factors (*Suventher* at [29] and [30]).

10 Under s 33 of the MDA read with the Second Schedule of the MDA, the statutory sentencing range for the importation of 167g to 250g of methamphetamine is between 20 and 30 years' imprisonment together with caning fixed at 15 strokes. Based on this statutory sentencing range, this court in *Adri Anton Kalangie v Public Prosecutor* [2018] 2 SLR 557 ("*Adri Anton*") at [80] developed the indicative sentencing framework for the importation of methamphetamine as follows:

Sentencing band	**Quantity of methamphetamine trafficked or imported**	**Imprisonment (years)**	**Caning**
1	167.00–192.99g	20–22	15 strokes
2	193.00–216.99g	23–25	
3	217.00–250.00g	26–29	

The Parties' cases below and the Judge's findings

11 Before the Judge, the Prosecution submitted for a sentence of 25 years' imprisonment and 15 strokes of the cane. The Prosecution submitted that the indicative starting sentence based on the type and weight of the drugs trafficked should be 26 to 29 years' imprisonment with 15 strokes of the cane, based on this court's decision in *Adri Anton*.

12 At the second stage of adjustment based on culpability, the Prosecution recognised that the appellant's role was limited to that of a courier, as he took instructions from Ahmad to deliver the Drugs and collect monies on Ahmad's behalf. The only aggravating factor was the TIC Charge. But given that the appellant had pleaded guilty and provided extensive assistance to the authorities, the Prosecution submitted that this would be a weighty mitigating factor in the appellant's favour. Thus, the overall sentence of 25 years would be fair.

13 The appellant was unrepresented and pleaded for the minimum sentence. The Judge considered that the indicative starting sentence for the Methamphetamine Charge would be 29 years' imprisonment. But the Judge considered that the appellant's culpability was limited to that of a courier, and there were *mitigating factors* such as his plea of guilt and extensive cooperation with the authorities. Accordingly, the Judge imposed an imprisonment term of 25 years, and 15 strokes of the cane which we note was *below* the sentencing range of 26 to 29 years for trafficking in 249.99g of methamphetamine. The imprisonment sentence was backdated to the date of his arrest on 2 May 2017.

Procedural history

14 At the time when the appellant filed his Notice and Petition of Appeal, he was unrepresented. After the appellant appointed counsel to represent him on 30 July 2022, we directed to dispose of the matter without an oral hearing, pursuant to s 238A of the Criminal Procedure Code 2010 ("CPC"). The appellant informed the court that he has no objections to the hearing being conducted by way of written submissions, but sought leave to file further written submissions as he was unrepresented at the time when his submissions were

filed. We granted leave, and further submissions were filed by the appellant's counsel.

The Parties' cases on appeal

15 On appeal, the appellant submits that the Judge had erred when he fixed the indicative starting sentence at 29 years' imprisonment. As the starting sentence was fixed at 29 years, close to the maximum sentence of 30 years, it left inadequate room for the sentencing judge to adjust the sentencing upwards to reflect the offender's culpability. The Judge's identification of the starting sentence was also mechanistic, and there appeared to be no consideration that the punishment should fit the crime. Instead, the appellant argues that the indicative starting sentence should have been 27 years' imprisonment. Next, the indicative starting sentence should have been adjusted downwards. The appellant's culpability was low as he was a mere courier. In addition to his limited role as a courier, he had pleaded guilty, was genuinely remorseful, and had also provided extensive assistance. His low culpability coupled with the mitigating factors warranted a reduction of seven years. Given that the only aggravating factor was the TIC Charge, which would only warrant an uplift of one year, there should, in total, have been a downward adjustment of six years to 21 years. In contrast, Ahmad who was the supplier of the Drugs was sentenced to only 22 years' imprisonment.

16 The Respondent submits that the sentence imposed by the Judge could not be said to be manifestly excessive. The Judge was correct to find that based on the weight of the drugs (249.99g of methamphetamine), the indicative starting sentence should be 29 years. The Judge was also correct in his assessment of the appellant's culpability, and found that the appellant's role was limited to that of a courier, and that the only aggravating factor was the TIC

Charge. Thus, the Judge had fairly considered the aggravating and mitigating factors in reaching the final sentence of 25 years' imprisonment and 15 strokes of the cane.

Our decision

Whether an oral hearing is necessary

17 Under s 238A of the CPC, the court has broad powers to decide any matter without hearing oral arguments, unless oral evidence is expected to be given. Here, no new oral evidence was adduced for the appeal and no objection was raised by the appellant for this court to decide the appeal without an oral hearing. However, the issue is whether s 238A can apply to an appeal made before 1 April 2022, as s 238A, introduced by s 13 of the Courts (Civil and Criminal Justice) Reform Act 2021 ("CCCJRA"), only came into operation on 1 April 2022 after the appellant's Notice of Appeal dated 21 March 2021. Section 238A provides as follows:

> **Oral hearing not needed generally**
>
> **238A.**—(1) Subject to subsection (2), a court may decide any matter without hearing oral arguments, other than a matter prescribed by the Criminal Procedure Rules.
>
> (2) Subsection (1) does not allow any part of a proceeding where oral evidence is given (including any part of a trial of an offence) to be conducted without an oral hearing.
>
> (3) Subject to subsection (4), a court may, in any matter that the court may decide without hearing oral arguments, direct that the matter be heard in an asynchronous manner by exchange of written correspondence with the party or parties, using such means of communication as directed by the court.
>
> (4) The court must not hear a matter in an asynchronous manner if to do so would be inconsistent with the court's duty to ensure that the proceedings are conducted fairly to all parties.

> (5) To avoid doubt, this section does not affect the power of a court to hear oral arguments before deciding any matter that may be decided without hearing oral arguments.

18 The court is therefore given a broad discretion under s 238A to decide a criminal appeal without an oral hearing and may instead direct the appeal to be heard in an asynchronous manner by exchange of written correspondence with the parties. This amendment was introduced to improve efficiency in the judicial process (see *Singapore Parliamentary Debate*s, *Official Report* (13 September 2021) vol 95 (Edwin Tong Chun Fai, Second Minister for Law)), and the court is to exercise the discretion judiciously whilst protecting the accused's right to be heard (*Singapore Parliamentary Debate*s, *Official Report* (14 September 2021) vol 95 (K Shanmugam, Minister for Law)). Part 15 of the CCCJRA, which provides for the transitional provisions, does not stipulate that s 13 would only apply to matters including appeals that were made after 1 April 2022. In our view, the court has the discretion to dispense with an oral hearing, so long as the appeal is *heard* after 1 April 2022. This is in line with Parliament's intent to expedite court processes. As the court's discretion to deal with any hearing on paper is entirely procedural in nature, it does not interfere with any of the appellant's substantive rights which may have accrued when the appeal was made.

19 The exercise of the court's discretion to decide any matter without an oral hearing would, ultimately, depend on the circumstances of each individual case, such as the nature and the complexity of the matter, having due regard to the appellant's right to be heard. It is also trite that the right to be heard need not necessarily be oral. A hearing in writing may also suffice: see *Manjit Singh s/o Kirpal Singh and another v Attorney-General* [2013] 2 SLR 844 at [88]. In this case, this court has properly taken into account the fact that the appellant

only engaged counsel after his written skeletal arguments was filed when we granted leave to the appellant's counsel to file further written submissions.

Whether the sentence imposed was manifestly excessive

20 In terms of the merits of his appeal, we do not think that the sentence imposed by the Judge was manifestly excessive.

21 Based on the sentencing framework in *Adri Anton* (see above at [10]), the Judge had rightly identified the indicative starting sentence to be between 26 and 29 years based on the weight of the drugs in the Methamphetamine Charge, *ie*, 249.99g. We reject the appellant's argument that the Judge's identification of the starting sentence was mechanistic or excessive. Based on the weight of the drugs, the starting sentence was, in our view, correctly determined by the Judge to fall on the higher end of the 26 to 29 years range.

22 As for the second stage of the analysis, *ie*, the identification of the aggravating and mitigating factors, the Judge had rightly taken into account the TIC Charge as an aggravating factor. The Judge also did not err in finding that there was mitigating value in the appellant's plea of guilt and his extensive cooperation with the authorities. As such, the Judge correctly calibrated the sentence downwards to 25 years' imprisonment. This could not be said to be manifestly excessive in light of the weight of the methamphetamine. In fact, as we have observed above, the sentence was even *below* the lower end of the indicative starting range of 26 to 29 years' imprisonment.

23 In any event, we note that the sentence of 25 years' imprisonment imposed by the Judge was also in line with the precedents:

(a) In *Adri Anton*, the offender similarly pleaded guilty to a charge of importation of not less than 249.99g of methamphetamine. The offender voluntarily confessed to the crime, cooperated with the authorities, and pleaded guilty at an early stage. He was sentenced to 25 years' imprisonment and 15 strokes of the cane.

(b) In *Public Prosecutor v Muhammad Nur Azam bin Mohamad Indra and another* [2020] 4 SLR 1255, the accused pleaded guilty to five charges, including a charge of importation of not less than 499.99g of cannabis for which the indicative starting sentence was also 29 years. He was sentenced to 26 years' imprisonment, on account of mitigating factors such as his plea of guilty and that he was a first-time offender.

The principle of parity

24 Although the appellant does not contend that the parity principle was offended, the appellant's counsel highlights that Ahmad, who was the supplier of the Drugs, was sentenced to 22 years' imprisonment. We note, however, that Ahmad had pleaded guilty to a *lesser* charge, which was a charge of abetment to traffic not less than *192.99g* of methamphetamine. It is perhaps apposite for us to make a few brief observations about the applicability of the principle of parity where the disparity stems from the exercise of prosecutorial discretion.

25 The court has accepted that the parity principle may apply even where co-offenders in the same criminal enterprise are charged with different offences. The principle is to ensure that where two or more offenders are to be sentenced for participating in the same criminal enterprise, the sentences passed on them should generally be the same, *unless there is a relevant difference in their responsibility or their personal circumstances*. This principle stems from the rule of equality before the law, and should not be rigidly confined to cases where

co-offenders are charged with the same offence: *Public Prosecutor v Ng Sae Kiat and other appeals* [2015] 5 SLR 167 at [74]–[76] and [78]. However, where the sentencing disparities are caused by the exercise of prosecutorial discretion to charge different co-offenders differently, the parity principle should ordinarily not be used to correct sentences which seem to be disproportionate solely as a result of such charging decisions: see *Lim Bee Ngan Karen v Public Prosecutor* [2015] 4 SLR 1120 at [38] and [41].

26 In our view, in such a situation where the sentencing disparity is due to the exercise of prosecutorial discretion, much turns on whether the co-offenders are similarly situated, and whether the differential treatment is justified. As we recently observed *in Xu Yuan Chen (alias Terry Xu) v Attorney-General* [2022] SGCA 59 at [26] and [29], in the context of considering an argument raised under Art 12(1) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint), the Prosecution may have justifiable reasons to proceed on different charges for each offender in the same criminal enterprise. There are multitude of factors that the Prosecution is entitled and obliged to take into consideration in deciding to proceed on different charges, as a part of the exercise of prosecutorial discretion, such as whether one offender is willing to co-operate and testify against his co-offenders, *etc*. In the context of the parity principle, the enquiry is fact-based, and invariably rests on whether the co-offenders were equally situated such that the disparities in outcome are justifiable.

27 Here, although Ahmad and the appellant were co-offenders in a common criminal enterprise, the disparity in sentencing was a consequence arising from the exercise of prosecutorial discretion. Significantly, the appellant was aware, at the time when he elected to plead guilty to the Methamphetamine Charge, that Ahmad had pleaded guilty to and was sentenced based on a *lesser* charge.

In the absence of any suggestion by the appellant that the prosecutorial discretion in preferring different charges was improperly exercised, or that Ahmad and the appellant were similarly situated such that the differential treatment was unjustified, we do not think that the parity principle is engaged in this case.

Conclusion

28 For reasons stated above, we dismiss the appellant's appeal, and uphold the sentence imposed by the Judge.

Sundaresh Menon
Chief Justice

Judith Prakash
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Hassan Esa Almenoar and Liane Yong (R Ramason & Almenoar), Diana Foo (Tan See Swan & Co) for the appellant;
Anandan Bala, Jaime Pang and Bharat Punjabi (Attorney-General's Chambers) for the respondent.