Vasentha d/o Joseph *v* Public Prosecutor
[2015] SGHC 197

Case Number : Magistrate's Appeal No 160 of 2014

Decision Date : 29 July 2015

Tribunal/Court : High Court

Coram : Sundaresh Menon CJ

Counsel Name(s) : Tito Isaac and Jonathan Wong (Tito Isaac & Co LLP) for the appellant; Marcus Foo Guo Wen (Attorney-General's Chambers) for the respondent.

Parties : Vasentha d/o Joseph — Public Prosecutor

Criminal Procedure and Sentencing —Sentencing

29 July 2015 Judgment reserved.

Sundaresh Menon CJ:

Introduction

1 The appellant was apprehended at a car park in Jurong West by officers from the Central Narcotics Bureau ("CNB") on 5 November 2012. At the time of her arrest, she was in possession of a weighing scale and six packets of brown granular substance weighing 501.91g, which was subsequently found to contain not less than 8.98g of diamorphine. She pleaded guilty to a single charge of possession of 8.98g of diamorphine for the purpose of trafficking under s 5(1)(*a*) read with s 5(2) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the MDA"), and was sentenced by the district judge ("the District Judge") to 11 years' imprisonment. She appealed against the sentence on the basis that it was manifestly excessive.

2 I heard the appeal on 23 April 2015. At the end of the hearing, I reserved judgment as I had some concerns. It struck me that the sentencing precedents had tended to focus very much on the harm caused by the offence by reference to the quantity of the drugs involved, with little if any attention paid to the culpability of the offender. I raised this during the hearing, and at the end of the oral arguments, I invited counsel to reflect on this and to submit further arguments within a week if they had anything further to add. Both counsel did so on 29 April 2015. Having considered the matter, I am satisfied that in the circumstances of the present case the sentence imposed by the District Judge was manifestly excessive. I therefore allow the appeal and reduce the sentence to a term of imprisonment of 8 years for the reasons that follow.

Background facts

3 The appellant was a housewife at the time of her arrest. She has three children. On 6 or 7 September 2012, while the appellant was heavily pregnant with her third child, her husband was arrested for a drug-related offence. On or about 18 October 2012, the appellant received a call on her husband's handphone, her husband being in prison at the time. The caller was a person known as "Muru". Later that day, Muru delivered some drugs to the appellant for sale, telling her that she would be contacted through her husband's handphone by persons wishing to take delivery of some of the drugs he had passed to her. Muru told her to take her time to sell the drugs before paying him for it.

4 Between 18 October and 5 November 2012 (which was the day she was arrested), the appellant delivered or sold various quantities of drugs to six individuals, identified only as "Bob", "Kak", "Kadir", "M Rajan", "Aja" and "Sam". Some of them paid for the drugs they took, while others did not. The appellant claimed that she had received a total of $20 from all these deliveries, and this was not challenged by the Prosecution.

5 The District Judge sentenced the appellant to 11 years' imprisonment (see *Public Prosecutor v Vasentha d/o Joseph* [2014] SGDC 315 ("GD")). He considered that deterrence was the primary sentencing consideration in such cases. He also relied on the table of sentencing precedents for cases involving trafficking or importation of diamorphine which was set out in *Public Prosecutor v Kovalan a/l Mogan* [2013] SGDC 395 ("*Kovalan*"). In particular, it was observed that in *Kovalan* at [24], the range of sentences for cases involving 8–10g of diamorphine was between 10–20 years' imprisonment and 7–15 strokes of the cane. He found that the appellant's mitigation plea was not exceptional. While he accepted that the appellant was a "first offender" insofar as she did not have any past convictions, he concluded that she was an "experienced offender" given that she had been selling drugs to various people prior to her arrest (GD at [22]). He considered this a "significant aggravating factor" (GD at [25]). He acknowledged, however, that the Prosecution had no evidence to suggest that the appellant was part of a syndicate (GD at [25]). The District Judge also gave little weight to the fact that the appellant had pleaded guilty and "assisted the police" in light of the fact that she had been caught red-handed with the drugs in her possession (GD at [23]). He nevertheless accepted that the period of nine months that the appellant spent in remand before she made bail should be "factored into the sentence imposed" (GD at [24]).

6 As I have noted above, the appellant appealed against the sentence on the basis that it was manifestly excessive.

The drug problem and the legal framework in place to restrict the supply of controlled drugs

7 The drug problem is a scourge. The binds of addiction make it difficult for those ensnared to break free. Singapore has recognised the evils of drug abuse and enacted legislation to address the problem since the early part of the last century. For instance, the Straits Settlement Deleterious Drugs Ordinance (No 27 of 1910) made it an offence to import, administer or possess any deleterious drugs such as diamorphine. In more recent times, legislation such as the Dangerous Drugs Ordinance (No 7 of 1951) and the Drugs (Prevention of Misuse) Act (Cap 154, 1970 Rev Ed) were passed to address the drug problem. These two pieces of legislation were the predecessors of the MDA which was enacted in 1973.

8 At the second reading of the Misuse of Drugs Bill in 1973, Mr Chua Sian Chin, then Minister for Home Affairs, explained that the tough penalties for traffickers were there by design in order to suppress the drug trade. He said (*Singapore Parliamentary Debates, Official Report* (16 February 1973) vol 32 at cols 415–420):

> The ill-gotten gains of the drug traffic are huge. The key men operating behind the scene are ruthless and cunning and possess ample funds. They do their utmost to push their drugs through. Though we may not have drug-trafficking and drug addiction to the same degree as, for instance, in the United States, we have here some quite big-time traffickers and their pedlars moving around the Republic selling their evil goods and corrupting the lives of all those who succumb to them.
>
> *They and their trade must be stopped. To do this effectively, heavy penalties have to be provided for trafficking*. ...

> ... The existing law on dangerous drugs provides for the offence of trafficking, but there is no distinction as regards the age of the person to whom the drugs are sold. The penalties for the offence of trafficking in the existing law are $10,000 or five years, or both. These penalties are obviously totally inadequate as deterrents ...
>
> Government views the present situation with deep concern. *To act as an effective deterrent, the punishment provided for an offence of this nature must be decidedly heavy. We have, therefore, expressly provided minimum penalties and the rotan for trafficking*. However, we have not gone as far as some countries which impose the death penalty for drug trafficking.
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> ...
>
> Finally, I wish to state quite categorically here that whatever heavy penalties that are being provided in this Bill, they by themselves are not sufficient to solve the drug problem in Singapore. We shall require all the co-operation from parents, teachers, doctors, social workers and, in fact, the whole public if we are to successfully meet that problem. It is going to be an uphill task all the way. Of course, *highly deterrent laws against drug traffickers will help us tremendously in our fight against drug trafficking and addiction*.
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> [emphasis added]

9 In 1975, the MDA was amended to provide even harsher penalties for drug traffickers. The prescribed minimum and maximum sentences for trafficking in controlled drugs were adjusted upwards; and the death penalty was introduced for trafficking in more than 30g of morphine or 15g of diamorphine (commonly known as "heroin"). At the second reading of the Misuse of Drugs (Amendment) Bill, Mr Chua Sian Chin explained the rationale behind the changes as follows (*Singapore Parliamentary Debates, Official Report* (20 November 1975) vol 34 at cols 1381–1382):

> Heroin is one of the most potent and dangerous drugs. In the first half of 1974 only nine out of 1,793 drug abusers arrested consumed heroin. In the corresponding period this year 1,007 out of 1,921 drug abusers arrested consumed heroin. Thus the number of heroin abusers arrested increased by almost 112 times in 12 months. This is an explosive increase by any reckoning. Equally significant is the fact that the number of traffickers arrested for dealing in heroin had also increased from six in the first half of 1974 to 26 in the corresponding period this year.
>
> *These statistics show clearly that existing penalties under the Misuse of Drugs Act, 1973, have not been a sufficient deterrence to traffickers.* …
>
> Clause 13 of this Bill, therefore, seeks to amend the Second Schedule of the Misuse of Drugs Act, 1973, so that the death penalty will be imposed for the unauthorised manufacture of morphine and heroin irrespective of amounts involved. The death penalty will also be imposed for the unauthorised import, export or trafficking of more than 30 grammes of morphine or more than 15 grammes of heroin.
>
> [emphasis added]

10 Later, in 1977, Mr Chua Sian Chin clarified that the harsh penalties for drug traffickers were underpinned by considerations of both general and specific deterrence: *Singapore Parliamentary Debates, Official Report* (27 May 1977) vol 37 at cols 34–35.

11 The MDA was subsequently amended several times to provide stiffer penalties for trafficking in

controlled drugs such as cannabis mixture, methamphetamine (commonly known as "ice") and ketamine (see Misuse of Drugs (Amendment) Act (Act 40 of 1993); Misuse of Drugs (Amendment) Act (Act 20 of 1998) and Misuse of Drugs (Amendment) Act (Act 2 of 2006)). These amendments were necessitated by changes in the local and global drug situation (including the emergence of new synthetic drugs) and they seek to ensure that we can continue to effectively curb drug abuse and drug trafficking in Singapore.

12 A "key pillar" of our drug control strategy has been to restrict the supply of controlled drugs by "eradicating trafficking activities through tough laws and robust enforcement" (see *Singapore Parliamentary Debates, Official Report* (15 September 2010) vol 87 at col 1163 (Wong Kan Seng, Deputy Prime Minister and Minister for Home Affairs)). To that end, Singapore has adopted a strong deterrent stance in relation to drug trafficking. This remains true notwithstanding the amendments to the MDA in 2012 which give the courts the discretion to spare a drug courier from the death penalty under certain limited circumstances. In the ministerial statement introducing this change, Mr Teo Chee Hean, the Deputy Prime Minister and Minister for Home Affairs, emphasised the continuing need for deterrence: *Singapore Parliamentary Debates, Official Report* (9 July 2012) vol 89.

13 The point was reiterated at the second reading of the Misuse of Drugs (Amendment) Bill in 2012 (*Singapore Parliamentary Debates, Official Report* (12 November 2012) vol 89), where Mr Teo Chee Hean said:

> Those who trade in illegal drugs are still attracted by the huge financial gains to be made, and deterring them requires the strictest enforcement coupled with the severest of penalties.

14 The legal framework under the MDA undoubtedly reflects the strong stance taken by Singapore against drugs in the severe punishments provided for drug trafficking. The MDA sentencing framework with regard to trafficking rests primarily on the *type* and the *quantity* of the drugs. As I explain below, both factors reflect the extent of harm that may be caused by the distribution of the drugs in question and this goes towards the seriousness of the offence.

15 The First Schedule of the MDA classifies the various *types* of controlled drugs into Classes A, B and C based on their relative harmfulness. A similar three-tier classification system can be found in the Misuse of Drugs Act 1971 (c 38) (UK) ("the UK Act"). At the second reading of the Misuse of Drugs Bill in 1970, Mr James Callaghan, the then United Kingdom Secretary of State for the Home Department, explained the rationale underlying the classification system in the UK Act as follows (United Kingdom, House of Commons, *Parliamentary Debates* (25 March 1970) vol 798 at col 1453):

> I want now to make a few comments about Clause 2 and Schedule 2. These establish a three-tier classification of drugs for the purposes of the penalties provided by Clause 25 and Schedule 4. The object here is to make, so far as possible, a more sensible differentiation between drugs. *It will divide them according to their accepted dangers and harmfulness in the light of current knowledge and it will provide for changes to be made in classification in the light of new scientific knowledge*. ... [emphasis added]

16 The classification system was eventually introduced in the UK Act that was enacted in 1971. The rationale offered by Mr Callaghan is instructive given that the three-tier classification system in our MDA appears to have been modelled on the UK Act (as was the New Zealand Misuse of Drugs Act 1975 (No 116 of 1975) (see New Zealand Law Commission, *Controlling and Regulating Drugs: A Review of the Misuse of Drugs Act 1975* (NZLC R122, 2011) (President: The Honourable Justice Grant Hammond) at pp 150–151)) which, in turn, was guided by the Single Convention on Narcotic Drugs (30 March 1961) 520 UNTS 151 (entered into force 13 December 1964). At the second reading of the

MDA, Mr Chua Sian Chin explained that (*Singapore Parliamentary Debates, Official Report* (16 February 1973) vol 32 at col 415):

> Control has been brought in line with those in force in other countries closely concerned with the spread of the addictive use of such drugs within their own countries and the increased international traffic which supplies such demands. The different categories of control as recommended by the United Nations have been incorporated into this Bill.

17 Diamorphine is a Class A controlled drug under the MDA. This classification reflects the fact that diamorphine is "one of the most potent and dangerous drugs" (see [9] above). Under s 33 read with the Second Schedule of the MDA, a person convicted for trafficking in diamorphine may be punished as follows:

Net weight	Minimum sentence	Maximum sentence
Below 10g	5 years and 5 strokes	20 years and 15 strokes
10g to not more than 15g	20 years and 15 strokes	30 years or imprisonment for life and 15 strokes
More than 15g	Death (subject to s 33B of the MDA)	

18 It is evident from this table that aside from the harmfulness of the drug in question, which is reflected in its classification, the other key factor that affects the prescribed sentences for a trafficking charge under the MDA is its quantity. The parliamentary debates shed some light on the rationale behind the significance of weight. In particular, the response of Mr Teo Chee Hean to questions and concerns raised by parliamentarians at the debates on the amendments to the MDA in 2012 is instructive (*Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89):

> Sir, when Parliament sat in 1975 to consider the drug problem, they were faced with a serious drug situation which was threatening to overwhelm Singapore. *They weighed the damage that drugs and those who traffic in drugs were doing to our society. They decided to institute tougher laws and penalties, coupled with strong enforcement*.
>
> Severe penalties were introduced, including the mandatory death penalty for those trafficking significant amounts of drugs. *Even though the penalties were severe, they were instituted in a measured and calibrated way, with only those convicted of trafficking substantial amounts of drugs subject to the mandatory death penalty*. In the case of heroin, for example, the threshold amount for capital punishment is set at 15 grams of pure diamorphine. This may not sound like very much, but it is, in fact, equivalent to the pure diamorphine content of some 2,200 straws of heroin, with a current street value of $66,000. *This is enough to supply one straw per day to more than 300 addicts for a week*.
>
> [emphasis added]

19 It is obvious that the quantity of drugs (measured in terms of *net* weight) that has been trafficked would have a direct correlation with the degree of harm to the society: see *Ong Ah Chuan and another v Public Prosecutor* [1979-1980] SLR(R) 710 ("*Ong Ah Chuan*") at [38]; *Yong Vui Kong v Public Prosecutor and another matter* [2010] 3 SLR 489 at [112]; quantity therefore serves as a reliable indicator of the seriousness of the offence.

20 Aside from the type and quantity of the drugs, there are some other factors that may affect the prescribed sentences for a trafficking offence. Section 33(4A) and (4B) of the MDA provide enhanced punishments for repeat traffickers, and traffickers who direct their activities to young or vulnerable persons, but they do not arise in the present case.

21 The MDA thus prescribes the minimum and maximum sentences based on the type and quantity of the drugs involved and for these to be enhanced in certain circumstances. Subject to these statutory limits, the sentencing discretion remains with the courts. In that light, I turn to consider the sentencing precedents.

The sentencing precedents

22 At the hearing before me, both parties relied substantially on the sentencing precedents to argue that the sentence imposed on the appellant was or was not manifestly excessive. The Prosecution concentrated on the quantity of drugs involved and relied on the range of sentences imposed in cases that involved similar quantities. The appellant, on the other hand, argued that the facts pertaining to her culpability for the offence in this case were so far removed from those in the precedent cases that the sentences imposed in those cases could not have been a guide to what might have been appropriate in this case.

23 In my judgment, the quantity of drugs involved in a trafficking charge will inevitably have a strong bearing on the sentence to be imposed in any given case. I have explained earlier at [19] that the quantity of the drugs will usually be proportionate to the harm and thus serves as a reliable indicator of the seriousness of the offence. However, the quantity of drugs cannot be the *only* consideration when determining the appropriate sentence to be imposed in any given case. This has been acknowledged in several High Court decisions, even though some of the earlier cases appear to have placed less emphasis on the offender's culpability: see for example *Public Prosecutor v Ang Soon Huat* (Criminal Case No 34 of 1987, unreported), where the High Court observed that:

> ... the gravity of the offence of drug trafficking lay not in the personal circumstances in which the offender committed the offence, like in many other offences, but simply in the amount that was trafficked ... Therefore it must follow, that in the ordinary case where there are no exceptional circumstances affecting the offender's conduct, the sentence should be proportionate to the gravity of the offence, which is the quantity of the drugs that is being trafficked in. [original emphasis omitted]

24 This passage was cited with approval by Yong Pung How CJ in *Public Prosecutor v Hardave Singh s/o Gurcharan Singh* [2003] SGHC 237 at [15]. It has also been cited in numerous District Court decisions which tended to focus on the portion of the *dictum* that emphasised the need for the sentence to be proportionate to the quantity of the drugs (see, *eg*, *Koh Bak Kiang v Public Prosecutor* [2008] SGDC 18 ("*Koh Bak Kiang*") at [15]). It should be noted, however, that the principle is stated as being applicable only "in the ordinary case where there are no exceptional circumstances affecting the offender's conduct". More recently, Chan Sek Keong CJ in *Jeffery bin Abdullah v Public Prosecutor* [2009] 3 SLR(R) 414 ("*Jeffery*") at [7] accepted the view of the learned editors of *Sentencing Practice in the Subordinate Courts* (LexisNexis, 2nd Ed, 2003) at pp 638–639 that the following sentencing factors will generally be relevant when sentencing an offender for drug trafficking:

(a) the quantity of the drug in the possession of the offender;

(b) the type of drug;

(c) the duration and sophistication in planning and carrying out of the offence; and

(d) the relative levels of participation where more than one offender is involved and there are accomplices.

25 In my judgment, this is significant for its acknowledgement that the nature and extent of the offender's role will be relevant to the sentence and some cases have on the basis of *Jeffery* taken this into account when deciding on the appropriate sentence (see *Public Prosecutor v Norhisham Bin Mohamad Dahlan* [2010] SGDC 310 ("*Norhisham*") at [16]–[17]; *Kovalan* at [17]–[19]).

26 Despite this, there has remained a tendency for the lower courts to use a single dominant point of reference – namely, the quantity of diamorphine – to derive the applicable range of sentences. *Kovalan*, which the Prosecution relied substantially on, is an example of this. There, the district judge said as follows at [24]:

> I had also considered the sentences imposed in previous reported cases that involved trafficking or importation of diamorphine of substantial amounts [see the table below] and having done so, I noted the following:
>
> - for cases involving more than 5 grams and less than 8 grams of diamorphine, the sentencing range is between 8 years to 12 years imprisonment and 6 to 12 strokes; and
>
> - for cases involving more than 8 grams and less than 10 grams of diamorphine, the sentencing range is between 10 years to 20 years imprisonment and 7 strokes to 15 strokes.

27 I note that the district judge in *Kovalan* proceeded to carefully consider the circumstances of each of the precedents that she sought to rely on (at [25]–[28]) to justify the sentence imposed in that case. However, I doubt that a range of sentences which seemingly emphasises the quantity of diamorphine is ultimately helpful because it has the potential to divert attention away from other relevant considerations. The sentences in cases that feature the same or similar quantities of diamorphine may or may not be similar because sentencing takes account of other circumstances, such as the offender's personal culpability or the presence of aggravating and mitigating factors.

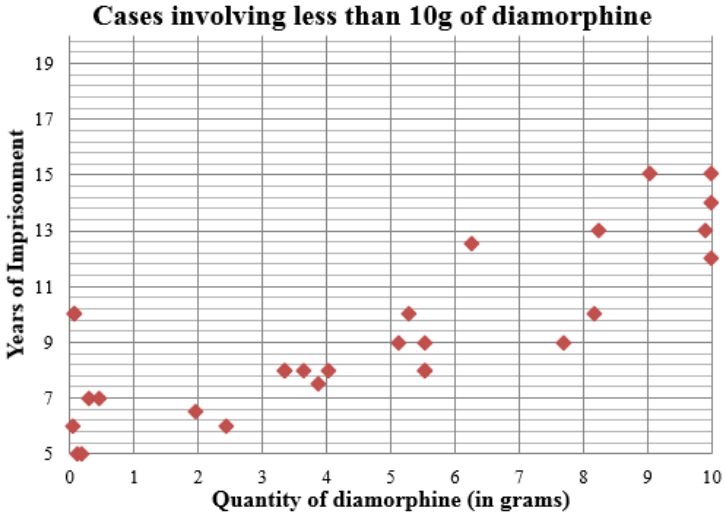
28 The Prosecution accepted the broad proposition that all the circumstances had to be considered in arriving at a just sentence. Nonetheless, it also contended that a consideration of the relevant case law reveals a correlation between the quantity of diamorphine and the length of the imprisonment term imposed. My analysis, however, suggests that such a correlation is weak. Having reviewed 27 cases where written grounds were issued and which involved offenders who pleaded guilty to a trafficking charge involving less than 10g of diamorphine, I found it useful to tabulate them as follows:

S/No	Case	Quantity	Sentence
1	*Public Prosecutor v Jamal s/o Mohamed Sha* [2011] SGDC 252	0.03g	6 years and 5 strokes
2	*Public Prosecutor v Abdul Khaliq bin Mohammed Shan* [2010] SGDC 81	0.06g	10 years and 8 strokes
3	*Oh Beng Lye v Public Prosecutor* [2002] SGDC 255	0.09g	10 years and 10 strokes

4	*Public Prosecutor v Ong Nancy* [2009] SGDC 398	0.12g	5 years
5	*Public Prosecutor v Sali bin Mohd* [2011] SGDC 194	0.19g	5 years and 5 strokes
6	*Rangasamy Balasubramaniam v Public Prosecutor* [2000] SGDC 56	0.29g	7 years and 6 strokes
7	*Jeffery bin Abdullah v Public Prosecutor* [2009] 3 SLR(R) 414	0.43g	7 years and 7 strokes
8	*Public Prosecutor v Shaifful Bahri Bin Mohammad Sunarto* [2010] SGDC 497	1.94g	6 years 6 months and 7 strokes
9	*Lur Choo Lai v Public Prosecutor* [1992] SGDC 1	2.45g	6 years and 9 strokes
10	*Public Prosecutor v Abdul Kahar Bin Mohamad* [2012] SGDC 237	3.33g	8 years and 5 strokes
11	*Public Prosecutor v Sim Kim Yea* [1995] SGDC 2	3.36g	8 years
12	*Public Prosecutor v Mohamed Sohaili Bin Mohamed Supri* [2013] SGDC 289	3.65g	8 years and 6 strokes
13	*Public Prosecutor v Haizul bin Ahmad* [2014] SGDC 45	3.89g	7 years 6 months and 8 strokes
14	*Public Prosecutor v Norhisham Bin Mohamad Dahlan [2010] SGDC 310*	4.03g	8 years and 8 strokes
15	*Public Prosecutor v Rembang Perkasa Bin Hasiron* [2012] SGDC 196	5.11g	9 years and 8 strokes
16	*Public Prosecutor v Puvaneswaran Chandran* [2013] SGDC 251	5.27g	10 years and 10 strokes
17	*Public Prosecutor v Pang Poh Lee* [2013] SGDC 221	5.52g	9 years and 9 strokes
18	*Public Prosecutor v Wong Chin Yong* [2007] SGDC 333	5.53g	8 years and 6 strokes
19	*Public Prosecutor v Mohamad Rashid Bin Angullia Ajam* [2013] SGDC 337	5.54g	8 years
20	*Public Prosecutor v Azahari bin Saleh* [2013] SGDC 300	6.24g	12 years 6 months and 12 strokes
21	*Public Prosecutor v Hamry Bin Ham Kamsi* [2014] SGDC 272	7.68g	9 years and 5 strokes
22	*Public Prosecutor v Ayup Khan s/o Muzaffa Khan* [2010] SGDC 503	8.17g	10 years

23	*Public Prosecutor v Kovalan a/l Mogan* [2013] SGDC 395	8.23g	13 years and 10 strokes
24	*Public Prosecutor v Liyakath Ali s/o Maideen* [2008] SGDC 216	9.04g	15 years and 10 strokes
25	*Public Prosecutor v Amir bin Monawar Hussin* [2010] SGDC 347	9.91g	13 years and 11 strokes
26	*Public Prosecutor v Mohamed Yasin Bin Sutoh and another* [2010] SGDC 354 (Magistrate's Appeal No 279 of 2010 – appeal allowed)	9.99g	1st appellant: 15 years (reduced to 12 years on appeal) 2nd appellant: 15 years and 10 strokes
27	*Public Prosecutor v Mohamed Rafiq Abdullah* [2012] SGDC 200	9.99g	14 years and 7 strokes

29 I plotted these cases on the following graph to reflect the relationship between the quantity of diamorphine and the sentence imposed:



30 It is evident from this that beyond a general upward trend, the relationship is less than clear. In particular, it appears that there can be a wide range of sentences imposed for cases with the same or similar weight – see, for example, the cases at or near 0.1g which feature sentences of between 5 and 10 years and those at or near 9.99g which feature sentences of between 12 and 15 years. Furthermore, the cases over a range of weights can have relatively similar sentences. This is most obvious in the cases involving quantities of between 3g and 6g where, except for one case, the sentences were all within in a tight band of between 7½ and 9 years.

31 In my judgment, the actual correlation between the quantity of drugs trafficked and the term of imprisonment that is imposed is somewhat weak and this is precisely because the quantity of drugs is not the sole or overriding sentencing consideration.

32 I can illustrate the broad point by reference to the decision in *Public Prosecutor v Mohamed Yasin Bin Sutoh and another* [2010] SGDC 354 (S/No 26 of the table). There, the 1st accused person was asked by an acquaintance to pass a bag to the 2nd accused person, and he obliged. The bag contained diamorphine, which was subsequently analysed to be not less than 9.99g in quantity. The 1st accused person had neither any "share in nor stood to benefit from the transaction" (at [15]). In contrast, the 2nd accused person admitted that he had intended to repackage the drugs into smaller packets to be sold to his drug clients. Both accused persons pleaded guilty and were sentenced to a term of imprisonment of 15 years. Only the 2nd accused person was sentenced to 10 strokes of the cane; the 1st accused person was past the permissible age limit for a sentence of caning to be imposed on him. While both accused persons dealt with the identical quantity of drugs, they clearly did not share the same level of culpability. In particular, their motives as well as the nature of their involvement differed significantly. It is unsurprising having regard to these differences that on appeal, the sentence of the 1st accused person was reduced to 12 years' imprisonment (Magistrate's Appeal No 279 of 2010, unreported).

33 Similarly, the sentences in *Public Prosecutor v Abdul Khaliq bin Mohammed Shan* [2010] SGDC 81 ("*Khaliq*") (S/No 2 of the table) and *Public Prosecutor v Ong Nancy* [2009] SGDC 398 ("*Ong Nancy*") (S/No 4 of the table) were different even though the quantities were similar. *Khaliq* and *Ong Nancy* involved quantities of 0.09g and 0.12g of diamorphine respectively. Notwithstanding this, the accused in *Khaliq* was sentenced to 10 years' imprisonment and 8 strokes of the cane whereas the accused in *Ong Nancy* was given the statutory minimum sentence of 5 years' imprisonment. The difference, it seems, lay in the circumstances of the two cases (and specifically, the antecedents of the two accused persons). The district judge in *Khaliq* found at [12] that the accused person had not been deterred from carrying on his drug-related activities within a short time of being released from prison, even though he had already been imprisoned twice for substantial periods for drug-related offences (12 years and 2 months for a drug trafficking charge in 1995, and 5 years for multiple drug charges in 2005). Hence, on the facts of that case, the district judge considered that an aggravated sentence was warranted. In contrast, the accused person in *Ong Nancy* had a prior conviction for drug trafficking that dated back almost 30 years (in 1979) when she was a juvenile and moreover, had never been sentenced to imprisonment for more than 3 years. The district judge found that the statutory minimum sentence was appropriate in the circumstances.

34 Hence, while I accept that there will generally be some correlation between the quantity of the drugs involved and the severity of the punishment that is imposed, it would not be sufficient to focus on the quantity alone as that will only tell part of the story. The sentencing judge must have due regard to all the circumstances of the case, and this would include the culpability of the offender and the presence of aggravating or mitigating factors.

The culpability of the offender

35 It is clear that deterrence is the key sentencing consideration when dealing with the offence of drug trafficking, and this has been recognised by the courts on several occasions (see *Public Prosecutor v Tan Kiam Peng* [2007] 1 SLR(R) 522 at [10]). However, an unyielding focus on deterrence must not displace the need to ensure that the sentence meted out is one that fits *both* the offence and the offender. This has been repeatedly acknowledged: see, for instance, *Ng Teng Yi Melvin v Public Prosecutor* [2014] 1 SLR 1165 at [14]). In *Tan Kay Beng v Public Prosecutor* [2006] 4 SLR(R) 10, V K Rajah J (as he then was) observed at [31] that "[d]eterrence must always be tempered by proportionality in relation to the severity of the offence committed as well as by the moral and legal culpability of the offender".

36 More recently, I observed in *Muhammad Saiful bin Ismail v Public Prosecutor* [2014] 2 SLR 1028

at [21] that "[p]roportionality acts as a counterbalance to the principles of deterrence, retribution and prevention in the sentencing matrix". As I noted in that case, for an offence of driving whilst on a disqualification order, it would well have served the objectives of deterrence and prevention to impose a lifetime ban on driving rather than a ban of a shorter duration. However, the courts do not routinely do so; only when they find that such a sentence is appropriate in light of the circumstances of the case do they do so. Proportionality ensures that the sentence is commensurate with the seriousness of the offence and this in turn is affected not only by the harm caused by the offence but also by the culpability of the offender (see *Public Prosecutor v Law Aik Meng* [2007] 2 SLR(R) 814 at [33], citing Andrew von Hirsch, "Deservedness and Dangerousness in Sentencing Policy" (1986) Crim L R 79 at p 85).

37 That being the general position, should a different rule apply for drug traffickers? I see no reason for thinking that. It is true that the legislature has provided minimum and maximum sentences, but beyond that, it has left the actual sentence to the discretion of the sentencing judge. In that context, it is not evident why or on what basis an entirely different rule should apply to drug trafficking. Admittedly, the parliamentary debates place a strong emphasis on the importance of deterrence but this does not mean that the culpability of the offender is to be regarded as irrelevant.

38 To be fair, although the Prosecution submitted that the focus should be on the quantity of diamorphine, it too accepted in the final analysis that the culpability of an offender is a relevant sentencing consideration for a drug trafficking charge. Indeed, in light of the foregoing, it would be difficult to suggest otherwise.

39 Drug syndicates are often transnational criminal organisations with individuals playing any of a number of different roles in the chain of operations, from the mastermind to peddlers and couriers. It would be illogical to treat all of them as equally culpable. This was implicitly acknowledged in *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49, where the Court of Appeal examined the earlier case of *Thiruselvam s/o Nagaratnam v Public Prosecutor* [2001] 1 SLR(R) 362 and stated at [38] that:

> ... The evidence in that case showed that Thiruselvam had instructed Katheraven to pay him the proceeds from the sale of the drugs upon the successful delivery of those drugs. Thiruselvam was thus either Katheraven's controller or supplier in relation to the latter's drug trafficking. If, in this situation, Thiruselvam occupied a higher or more significant position in the supply chain of illegal drugs, then his criminal activities would have been more significant in terms of the potential harm caused to society. In comparison, Katheraven would have been a mere courier. Thus, from a policy perspective, Thiruselvam could be said to have been more culpable an offender than Katheraven in the context of combating drug trafficking in Singapore.

40 Moreover, not all offenders performing the same role may be equally culpable. It may be relevant, for instance, to have regard to such factors as the offender's motive. One who engages in drug trafficking activities for personal gain would bear a higher degree of culpability than one who becomes involved only because he was coerced or threatened into doing it, or was exploited by virtue of his low intellectual ability or naivety. In line with this, Chan Sek Keong CJ observed in *Zhao Zhipeng v Public Prosecutor* [2008] 4 SLR(R) 879 at [37] that "motive affects the degree of an offender's culpability for sentencing purposes". He went on to observe that "[p]ersons who act out of pure self-interest and greed will rarely be treated with much sympathy" while "those who are motivated by fear will usually be found to be less blameworthy". This was later endorsed by the Court of Appeal in *Tan Kheng Chun Ray v Public Prosecutor* [2012] 2 SLR 437 at [17].

41 I should also mention the 2012 amendments to the MDA which introduced a distinction between

couriers and non-couriers. Specifically, the courts may decide not to impose the death penalty on a courier when certain conditions are met (see s 33B of the MDA). This does not arise in the present case, but it bears noting in this context that couriers were recognised as having relatively lower culpability than the "drug king pins" or "drug lords who direct such couriers" (see *Singapore Parliamentary Debates, Official Report* (12 November 2012) vol 89 (Teo Chee Hean, Deputy Prime Minister and Coordinating Minister for National Security and Minister for Home Affairs)). This again is consistent with my earlier observation at [39] that the offender's culpability may vary according to his role. This is not to say that couriers have low culpability; just that it may be lower than that of their controllers and on this ground, may in the specified circumstances, gain them a reprieve from the death penalty.

42 Hence, when it comes to sentencing for drug trafficking, it will be important to have regard also to the culpability of the offender. This will entail a consideration of other factors including the offender's role and involvement in the offence, his motive and the circumstances in which he came to be involved in the commission of the offence at hand.

The appropriate benchmark sentence for trafficking in diamorphine

43 In light of the foregoing, I set out a framework with which to approach sentencing for offenders convicted for trafficking in diamorphine in quantities up to 9.99g. I should reiterate that the Prosecution had accepted the relevance of examining the offender's culpability and advanced a number of factors to be incorporated in any sentencing framework.

44 In broad terms, I consider that sentencing should be approached in the following way subject to any prescribed mandatory minimum or maximum sentence:

(a) because the quantity of the diamorphine reflects the degree of harm to the society and is a reliable indicator of the seriousness of the offence, it will provide a good starting point;

(b) after the indicative starting point has been identified, the sentencing judge should consider the necessary adjustments upwards or downwards based on:

(i) the offender's culpability; and

(ii) the presence of relevant aggravating or mitigating factors;

(c) lastly, the sentencing judge may, where appropriate, take into account the time that the offender had spent in remand prior to the conviction either by backdating the sentence or discounting the intended sentence.

The indicative starting points based on quantity

45 I should start by mentioning the considerations that I took into account in deciding what should be the appropriate indicative starting points. The first is that the maximum sentence is usually reserved for the "worse type of cases falling within the prohibition" [original emphasis omitted], and the courts would impose a sentence close to or fixed at the statutory maximum only if the offender's conduct is "among the worst conceivable for that offence": *Angliss Singapore Pte Ltd v Public Prosecutor* [2006] 4 SLR(R) 653 ("*Angliss*") at [84] citing *Sim Gek Yong v Public Prosecutor* [1995] 1 SLR(R) 185 at [12]–[13]. The sentence must correspond to the seriousness of the offence, and that requires an examination of not only the harm but also the culpability of the offender and other relevant circumstances. The starting point is based only on the quantity of diamorphine and, as the

name suggests, leaves room for the sentencing judge to adjust the sentence upwards in an appropriate case to reflect the offender's culpability as well as other aggravating circumstances. As such, I do not fix the indicative starting point for those cases involving 9 to 9.99g of diamorphine at or close to the maximum sentence.

46 The second consideration is that the cases should generally utilise the full spectrum of possible sentences. I also made this point in *Poh Boon Kiat v Public Prosecutor* [2014] 4 SLR 892 at [60]. It follows, therefore, that the indicative starting points would span the range of possible sentences but stop short of the statutory maximum sentence. The third consideration is that in general, because of the importance of the degree of harm as a sentencing consideration, the starting points should be broadly proportional to the quantity of diamorphine (*ie*, the greater the quantity, the higher the sentence).

47 In my judgment, the indicative starting points on this basis, for first-time offenders trafficking in diamorphine, which I have banded according to the quantity, should be as follows:

Quantity	Imprisonment	Caning
Up to 3g	5–6 years	5–6 strokes
3–5g	6–7 years	6–7 strokes
5–7g	7–8 years	7–8 strokes
7–8g	8–9 years	8–9 strokes
8–9g	10–13 years	9–10 strokes
9–9.99g	13–15 years	10–11 strokes

48 These indicative starting points, which are based only on the quantity of diamorphine, will then have to be adjusted, where appropriate, to reflect the offender's culpability and the presence of aggravating or mitigating circumstances. In a case where no adjustment is necessary, the indicative starting point may well be the appropriate sentence to be imposed. Further, the indicative starting points are not rigid or inflexible categories, and the sentencing judge may, in an appropriate case, depart from it. The precise sentence to be imposed in each case would depend on the specific circumstances of that case.

Adjustment for culpability

49 As I have indicated above, in order to assess the offender's culpability, the sentencing judge would have to consider his motive as well as the nature and extent of his role and involvement in the drug trade. These are the factors that were considered in *Norhisham* (S/No 14 of the table) at [6] and [16]–[17] and also in *Koh Bak Kiang* at [23].

50 In my judgment, the inquiry into the offender's culpability would require a holistic assessment of all the circumstances. This may include such considerations as whether special efforts were made to avoid detection (see, *eg*, *Public Prosecutor v Mohamed Sohaili bin Mohamed Supri* [2013] SGDC 289 ("*Sohaili*") (S/No 12 of the table) at [22]; as well as *Kovalan* (S/No 23 of the table), where the district judge considered that it was appropriate to increase the sentence given that the accused had tried to conceal the drugs to avoid detection (at [19])).

51 Having regard to the past cases, I formulate a list of indicia for assessing an offender's culpability as follows:

Culpability	Indicia
Higher	• Directing or organising drug trade on a commercial scale (*eg*, having regular clientele or offering wide variety of drugs) • Involving others in the operation whether by pressure, influence, intimidation or reward • Being motivated by financial or other advantage, whether operating as part of a drug syndicate or alone (*eg*, to sustain offender's own drug habits) • Taking active steps to avoid detection of the offence
Lower	• Performing only a limited function under direction • Being engaged by pressure, coercion and intimidation, or being involved through naivety and exploitation

52 This is a non-exhaustive list that is merely illustrative and should be developed with the accretion of our case law.

Adjustment for aggravating and mitigating factors

53 The next step in the sentencing process, having taken into account the quantity of diamorphine and the culpability of the offender, would be to adjust the sentence to reflect the aggravating and mitigating factors that apply in the case at hand.

Aggravating factors

54 I start with the main circumstances that have been recognised by the courts as aggravating in drug trafficking cases. These include:

(a) the presence of relevant antecedents;

(b) offences taken into consideration and the offender's involvement in other offences;

(c) the commission of an offence on bail;

(d) the attempt to conceal or dispose of evidence of the offence; and

(e) trafficking in a variety of drugs.

55 In light of the sentencing framework that I have outlined above, the sentencing judge should be mindful to ensure that he assiduously avoids double-counting factors. To give one example, it would not be appropriate to have regard to the offender's relevant antecedents *to the extent these have already been taken into account* in an enhanced sentencing regime that is provided for by statute as is the case with ss 33A and 33(4A) of the MDA pursuant to which the sentencing framework already provides for mandatory enhanced penalties for recalcitrant abusers and repeat traffickers; and to give another, it would not be appropriate to have regard to attempts to conceal the evidence as a separate aggravating factor to the extent this has already been considered in assessing the

offender's culpability. Subject to these reservations, I make some observations on the common aggravating and mitigating factors.

(1) Antecedents

56 The most common aggravating factor in drug trafficking cases is the presence of relevant antecedents. This is not surprising given that many drugs addicts will resort to related crimes in order to fund their habit. We have seen a number of these cases in the courts (see, *eg*, *Public Prosecutor v Jamal s/o Mohamed Sha* [2011] SGDC 252 (S/No 1 of the table) at [7] and [24]; *Public Prosecutor v Sali bin Mohd* [2011] SGDC 194 ("*Sali*") at [3] and [9]). Subject to the caveat noted in the preceding paragraph, this will be a relevant consideration as it will signal, at the very least, a greater need for specific deterrence.

(2) Offences taken into consideration and other offences

57 The accused may commonly consent to having other offences taken into consideration for the purpose of sentencing. Consideration ought to be given to whether this should result in the sentence being enhanced especially if the offences were similar in nature to those being proceeded with: *Public Prosecutor v BNN* [2014] SGHC 7 at [48]–[49] citing *Public Prosecutor v Chow Yee Sze* [2011] 1 SLR 481 at [34]. Such offences may provide the context for the offence of which the offender is being convicted and is to be sentenced and it may show whether the offence was a "one-off" incident or part of a pattern of criminality.

58 But what about offences for which charges were never brought? In *Angliss*, the appellant was convicted of an offence for having illegally affixed a halal certification mark on its food product without approval. The appellant had no antecedents but admitted to at least one prior breach of the same offence. The appellant argued that it should be punished as a first offender. Rajah J rejected that contention and held that although that fact could not be taken into consideration for the purposes of enhancing the sentence, the court should not "turn a blind eye to the obvious" (*Angliss* at [81]). In arriving at this view, he referred to the decision of the English Court of Criminal Appeal in *R v Twisse* [2001] 2 Cr App R (S) 9 where the appellant who pleaded guilty to supplying heroin also admitted that he had been dealing in heroin for about nine months. Kennedy LJ there held that such matters may, to a limited degree, be taken into account and he observed as follows at [7]–[8]:

> If the prosecution can prove that a defendant has been acting as a supplier over a substantial period of time, it can put the court in a position to sentence properly in one of three ways: first, by charging a number of offences of supplying or possession of drugs at different dates; or, secondly, by charging the defendant with conspiracy to supply over a prescribed period; or, thirdly, by charging him with being concerned in the supply of a controlled drug over a specified period, contrary to section 4(3)(b) of the Misuse of Drugs Act 1971.
>
> What, however, is important is that, if the indictment is not drawn as we have suggested and the defendant does not ask for offences to be taken into consideration, judges when sentencing should refrain from drawing inferences as to the extent of the defendant's criminal activity, even if such inferences are inescapable having regard, for example, to admissions made or equipment found. In other words, a defendant charged with one offence of supply cannot receive a more substantial sentence because it is clear to the court that he has been trading for nine months: *but the court is not require* [*sic*] *to blind itself to the obvious. If he claims that the occasion in question was an isolated transaction, that submission can be rejected. He can be given the appropriate sentence for that one offence without the credit he would receive if he really were an isolated offender*.

[emphasis added]

59 This suggests that the fact that the offender was involved in criminal activities for a period of time prior to his arrest can only be used to negate the mitigating weight of the offender's assertion that it was his first or only offence (see *Louis Joseph Marie Gerard Tyack v Mauritius* [2006] UKPC 18 at [21] and [31]). According to Lord Mance at [31], the offender "*loses the possibility of such mitigation* as would have existed if he had committed no more than an isolated slip" [emphasis added]. In my judgment, there is good sense in this.

60 But V K Rajah JA (as he then was) refined the approach he took in *Angliss* in *Dinesh Singh Bhatia s/o Amarjeet Singh v Public Prosecutor* [2005] 3 SLR(R) 1 saying as follows at [60]:

> ... The incident in question was to all intents and purposes a one-off episode unlike the other known prosecutions in the Laroussi cluster of cases. I would also suggest, for the future, that if the Prosecution intends to press for a particularly deterrent sentence in relation to a consumption offence, it should adduce evidence either through the Statement of Facts or otherwise of the circumstances pertaining to the act of consumption. *PP v Simmonds Nigel Bruce* is a helpful illustration. The Statement of Facts in that case makes it abundantly clear that he was a confirmed drug addict. Such persons should receive more severe sentences. While such persons are in literal terms first-time offenders in the sense that they are facing the music for the first time, *serious consideration ought to be given to whether they should receive a sentence outside the general tariff*. If there is indeed convincing evidence of repeated drug abuse and a history of flagrant disregard of the MDA, then *it may only be appropriate that such offenders receive their just dessert in the form of enhanced sentences*. In so far as such offenders are concerned, one might even say cogently, that the 'first-time offender' label is a legal misnomer. I realised that this is a distinction that the lower courts have not always properly appraised or responded to. [emphasis added; original emphasis omitted]

61 This passage suggests that the presence of convincing evidence of prior drug abuse, even if there has been no conviction, can be taken into consideration for the purposes of enhancing the sentence. I have reservations over this.

62 In my judgment, an offender cannot be punished for conduct which has not formed the subject of the charges brought against him; he can only be sentenced for offences of which he has been convicted, either by trial or a plea of guilt, and in doing so, regard may properly be had only to any other charges which the accused has consented to being taken into consideration for the purpose of sentencing.

(3) Reoffending on bail

63 Another common aggravating factor is when the offender has reoffended while on bail (see, *eg*, *Public Prosecutor v Liyakath Ali s/o Maideen* [2008] SGDC 216 ("*Liyakath*") (S/No 24 of the table) at [17]). Among other things, this may indicate that the offender is not genuinely remorseful (see *Chen Weixiong Jerriek v Public Prosecutor* [2003] 2 SLR(R) 334 at [18]–[23]) and warrants greater attention being placed on the need for specific deterrence.

(4) Trafficking in a variety of drugs

64 A number of recent District Court cases have treated the fact that the offender was trafficking in a variety of drugs as an aggravating factor (see, *eg*, *Sohaili* (S/No 12 of the table) at [12]; *Sali* at [8], [13] and [15]). However, there has been no clear articulation of *when* or *why* this factor should

operate to enhance the sentence.

65 Some of the cases seem to have accepted that the mere fact that a variety of drugs has been found to be in the possession of the offender, for the purpose of trafficking or otherwise, would suffice to constitute an aggravating factor. In *Public Prosecutor v Azahari bin Saleh* [2013] SGDC 300 (S/No 20 of the table), the offender pleaded guilty to four drug offences, with three others taken into consideration for the purpose of sentencing. The district judge considered that the "sheer variety of the drugs found" was itself an aggravating factor (at [13]). Similarly, the district judge in *Sali* said (at [8]) that she was "unable to ignore the fact that [the offender] was dealing in three different kinds of drugs", but she did not explain why this was so.

66 Other cases appear to have approached the variety of drugs as evidence of the offender's culpability. In both *Public Prosecutor v Lim Loy Hock* [2010] SGDC 428 at [22] and *Public Prosecutor v Chai Kok Leong* [2010] SGDC 229 at [23], the variety of drugs was taken as evidence that the offender was "not a naïve or inexperienced dealer of drugs" and "could not have been an amateur in drug activities". Similarly, the district judge in *Norhisham* (S/No 14 of the table) considered at [16] that the circumstances, including the quantity and types of drug that the offender had in his possession, indicated that he had been in the business of selling drugs prior to his arrest. The same reasoning has been applied even to a courier (as opposed to a peddler) who was apprehended with a variety of drugs. In *Public Prosecutor v Puvaneswaran Chandran* [2013] SGDC 251 (S/No 16 of the table), the district judge reasoned at [10] that:

> ... With several bundles, containing a variety of Controlled Drugs in powder (Heroin), pill (Ecstasy) and crystalline form (Ice), there was no reason to put Mr Chandran (who was being punished with two Charges with another three being taken into consideration for the purposes of sentence) in the same category as offenders who traffic in only one kind of drug (and thus face only one Charge). Removing this link with culpability would perversely encourage couriers to make the most of their runs, and we would be the worse for it.

67 In my judgment, a higher sentence for an offender who is trafficking in a variety of drugs would be warranted where it can be reasonably inferred from this, together with any other circumstances including the absence of any other explanation, that there is a higher degree of sophistication in the offender's drug operations or that these exist on a larger scale or that he is reaching out to a wider range of abusers. The cases have articulated this rationale in different ways (*eg*, that the offender is not a "naïve or inexperienced dealer" or is able to cater or appeal to a wider group). In this regard, see also: *HKSAR v Yim Hung Lui Ricky* [2012] HKCU 333 at [11] and *R v Murphy* [2011] CarswellMan 519 at [15] and [43]. In the final analysis, the question for the sentencing judge in each case is whether it can safely be inferred from this that the offender is more culpable or blameworthy such that this should be reflected in a more onerous sentence.

(5) Attempt to conceal or dispose of evidence

68 This issue has arisen in at least two previous cases involving trafficking in diamorphine. In *Jeffery* (S/No 7 of the table), the CNB officers engaged in a four-hour-long vehicle pursuit of the appellant and his co-accused. At one point during the chase, the appellant tore open two plastic packets and threw the contents out of the lorry before throwing the empty packets out as well. He also put up a violent struggle to resist arrest. The appellant was eventually arrested with two packets containing 0.41g and 0.43g of diamorphine in his possession. The empty packets recovered were certified by the Health Sciences Authority as being stained with diamorphine. The appellant was a first offender. At first instance, he had been sentenced to 7 years' imprisonment and 7 strokes of the cane. His appeal was dismissed. Chan Sek Keong CJ expressly considered that the appellant was

deserving of a higher sentence (than he would otherwise have had) for having successfully emptied the contents of the two packets in order to avoid being arrested with a higher quantity of diamorphine (at [9]–[10]). This can be contrasted with the case of *Public Prosecutor v Mohamed Rafiq Abdullah* [2012] SGDC 200 (S/No 27 of the table). In that case, the two accused persons tried to dispose of the drugs in their possession by flushing them down the toilet when they realised that the CNB officers were forcing their way into the flat. Their attempt was thwarted by the CNB officers. The district judge in this case (unlike *Jeffery*) did not explicitly take into account the attempt to dispose of the drugs as an aggravating factor perhaps because it had not been successful.

69 In my judgment, an offender's attempt to conceal or dispose of the evidence of his offence, such as drugs or paraphernalia, in order to avoid prosecution or a heavier sentence should be treated as an aggravating factor. The rationale for this is not dissimilar to the basis on which attempts to conceal the offence or prevent detection are treated as enhancing culpability. In these cases, the accused is generally seeking to do one or more of a number of things: to avoid detection in order to continue the unlawful conduct; to avoid the full and proper consequences of his illicit actions; or to thwart law enforcement efforts. The aggravating weight to be placed on this may depend on the circumstances. Where the offender has successfully disposed of the drugs in his possession, the sentencing judge must not speculate on the original quantity of drugs and attempt to sentence the offender as if the drugs had not been disposed of; but the judge would undoubtedly be entitled to enhance the sentence having regard to this aggravating factor.

Mitigating factors

70 I turn to consider the mitigating factors that are frequently raised in drug trafficking cases. These include:

(a) the admission of guilt;

(b) the cooperation accorded to the authorities in their investigation;

(c) the offender's mental condition; and

(d) the exceptional hardship that the offender's family would suffer as a result of the conviction.

(1) Pleading guilty

71 It is well accepted that an admission of guilt that reflects genuine remorse is a mitigating factor. However, the courts have frequently given little weight to the offender's plea of guilty in cases where the offender has been caught red-handed and has little choice but to plead guilty. In most drug trafficking cases, given the presumptions in the MDA, an offender caught red-handed with the drugs in his possession will plead guilty. The courts have generally been reluctant in such cases to give significant mitigating weight to the plea of guilty: see, *eg*, *Ong Nancy* at [14]; *Koh Bak Kiang* at [20]. Mitigating weight should only be given in deserving cases where it is clear that the admission of guilt was genuinely made out of remorse (see *Public Prosecutor v Fernando Payagala Waduge Malitha Kumar* [2007] 2 SLR(R) 334 at [54]).

(2) Cooperation with authorities

72 One good way to demonstrate the offender's remorse, aside from pleading guilty at the first available opportunity, would be to cooperate fully with the authorities in their investigations. The

relevance and weight that should be given to the offender's cooperation with the authorities in their investigations would depend on the circumstances of the case. Nevertheless, the past cases do provide some guidance.

73 The courts have generally considered that the offender's cooperation is not a strong mitigating factor where there is overwhelming evidence against the offender: *Chia Kah Boon v Public Prosecutor* [1999] 2 SLR(R) 1163 at [12]; *Public Prosecutor v Lim Hoon Choo* [1999] 3 SLR(R) 803 at [16]. As I have noted above, this applies with even greater force to drug trafficking cases in the light of the presumption. On the other hand, substantial mitigating weight may be given in cases where the offender extends his cooperation beyond his own confession. In *Public Prosecutor v Wong Jia Yi* [2003] SGDC 53 ("*Wong Jia Yi*"), the accused pleaded guilty to a drug trafficking charge. In deciding the appropriate sentence, the district judge took into account the fact that she "co-operated fully with the police, even to the extent of providing information as to her drug source": *Wong Jia Yi* at [36]. Similarly, the district judge in *Koh Bak Kiang* at [20] gave substantial mitigating weight to the fact that the accused had cooperated with the authorities and was willing to be a witness for the prosecution in the trial against his accomplice.

(3) Mental condition

74 An offender's mental condition may operate as a mitigating factor in a drug trafficking case. But the sentencing judge must guard against the possibility that offender is seeking in truth to escape the legal consequences of his offence by pretending to suffer from some form of mental condition (see *Public Prosecutor v Goh Lee Yin and another appeal* [2008] 1 SLR(R) 824 at [2]). Medical evidence must be adduced to prove not only the existence and nature of the medical condition affecting the offender but also the causal connection with the offence. If the offender cannot establish that there is a causal connection between the mental condition and the commission of the offence, then the offender ought to be sentenced in accordance with the usual sentencing principles and benchmarks (see *Ng So Kuen Connie v Public Prosecutor* [2003] 3 SLR(R) 178 at [58]). In this connection, it has been said that general deterrence may be accorded full weight in circumstances where the mental condition is "not serious" or "not causally related to the commission of the offence" and the offence is a serious one (see *Public Prosecutor v Chong Hou En* [2015] 3 SLR 222 at [24]; *Lim Ghim Peow v Public Prosecutor* [2014] 4 SLR 1287 at [28]).

(4) Exceptional hardship to offender's family

75 It is well settled that, except in the most exceptional circumstances, hardship to the offender's family has very little, if any, mitigating value: *Lai Oei Mui Jenny v Public Prosecutor* [1993] 2 SLR(R) 406 ("*Jenny*") at [11]; *Public Prosecutor v Yue Mun Yew Gary* [2013] 1 SLR 39 at [67]–[68]. Each case will have to be decided on its own facts, but the past cases have shown that the threshold is a very high one.

76 It is oft-said that drug trafficking is a highly rational and calculated crime (see *Singapore Parliamentary Debates, Official Report* (12 November 2012) vol 89 (Christopher de Souza, Member of Parliament for Holland-Bukit Timah)), and the motive is no more than "cold calculated greed" (see *Ong Ah Chuan* at [39]). An offender who takes this course runs the risk that his actions might cause severe hardship to his family. But this is the inevitable result of the offender's own acts and he must then face those consequences.

The appropriate sentence in the present appeal

77 I now turn to the appropriate sentence in this case. In accordance with the sentencing

framework set out above, the first step is to ascertain the starting point based on the quantity of diamorphine involved. Since the present case involves 8.98g of diamorphine, the indicative starting point would be within the range of 10–13 years' imprisonment. As the quantity involved in this case is at the high end of the range, I take as an indicative starting point a sentence of 12 years' and 9 months' imprisonment.

78 The next step is to consider whether it is necessary to adjust the sentence according to the culpability of the offender. In assessing the culpability of an offender, a sentencing judge can only proceed on the evidence that is before him. The sentencing judge may draw inferences based on the circumstances, but he is not entitled to speculate. It is therefore imperative for the Prosecution to ensure that the key facts that are necessary to illustrate the offender's culpability are included in the statement of facts.

79 In the present case, the evidence suggests that the appellant bore a relatively low degree of culpability. The Prosecution conceded that there was no evidence that the appellant was acting as part of a drug syndicate (GD at [25]). It also appears that there was little sophistication in the appellant's operations – she had merely delivered the drugs to the six individuals at "pre-arranged locations" (GD at [22]). The Prosecution submitted that the appellant was not coerced into drug trafficking. But that misses the point. The evidence before me points to the conclusion that the appellant had been exploited by Muru to act as his peddler. This was shortly after the appellant's husband had been arrested when she was heavily pregnant.

80 I am not persuaded by the Prosecution's contention that the appellant has a higher degree of culpability just because she had sold or delivered drugs to six persons prior to her arrest and may have continued to do so if she had not been apprehended. While I acknowledge that the appellant was tasked to sell or deliver the drugs that were handed to her by Muru, this cannot be viewed in isolation. The appellant's unchallenged position was that she had received no more than $20 for the drugs that she had sold or delivered. She was also not a drug addict herself. So there is nothing at all to suggest that she was doing this in order to finance a drug habit or anything else for that matter. Indeed, there appears to be no reason why she would have done this except for Muru's exploitation of her naivety. In this regard, there was evidence before me to indicate that she was a person of low intellect. In my judgment, the appellant's culpability, having regard to her role, her motives, her intelligence and her personal circumstances, is relatively low. Indeed, I regard hers as an exceptional case in this regard. I am therefore satisfied that the circumstances in this case warrant a significant reduction from the indicative starting point. In my judgment, the appropriate adjustment would be to reduce the indicative starting sentence of 12 years and 9 months to a term of 9 years. The effect of this adjustment is to bring the appellant down a band (in terms of the table of starting points at [47] above) on account of the exceptional circumstances. There is no precise formula or science to this. Rather, it is a matter of judgment as to what the appropriate adjustment should be.

81 I next consider if there is a need to make adjustments for aggravating or mitigating factors. In my judgment, there are no relevant aggravating factors in this case. With respect, I disagree with the District Judge's finding that the appellant's prior involvement in drugs should be considered as a "significant aggravating factor" (GD at [25]). I have explained at [62] why such circumstances would not *per se* constitute an aggravating factor, even though they may negate the mitigating weight of the offender's assertion that he was a first-time offender. In this regard, I agree with the District Judge that the appellant is a "first offender" only in the sense that she did not have any antecedents (GD at [22]) and I accordingly give no weight to this. However, as I have explained earlier, I do not consider that the fact that the appellant had delivered or sold drugs to six individuals prior to her arrest, when taken with the totality of the evidence, suggests that the appellant is of a higher level of culpability. It is important to bear in mind that the assessment as to the culpability of the offender

must be a holistic one and for the reasons outlined in the previous paragraph, I do not think that is an aggravating factor in the present context.

82 I move to the mitigating factors. For a start, I would give some weight to the fact that the appellant had cooperated with the authorities in their investigations. In particular, I note that the appellant had disclosed that she had previously sold or delivered drugs to six individuals even though she need not have mentioned this. In fact, but for her admission of this fact, there is nothing to indicate that investigations would have uncovered this. In my judgment, this is an indication of genuine remorse. The Prosecution, I note, accepted this.

83 However, I find that no weight should be given to the appellant's contention that she was suffering from an "adjustment disorder" at the time of the offence. This contention was not raised before the District Judge. Before me, the appellant sought to rely on the report of Dr Subhash Gupta from the Institute of Mental Health dated 14 January 2015 ("the IMH Report"). I observe that the medical assessment for the report was done more than *two years* after the commission of the offence. In any case, it is evident from the IMH Report that the adjustment disorder had *no* causal connection with the commission of the offence. In that sense, this case is similar to *Idya Nurhazlyn bte Ahmad Khir v Public Prosecutor and another appeal* [2014] 1 SLR 756, where I observed at [40]–[41] that the "Adjustment Disorder with Depressed Mood" had no causal connection with the offence and therefore could not be considered as a mitigating factor.

84 I am also unpersuaded by the appellant's argument that the District Judge failed to give adequate weight to her "unique and exceptional circumstances and personal mitigating factors". The appellant's argument revolved primarily around the fact that her husband is in prison, and they have three young children. However, the present case is not different from past cases such as *Jenny* at [11]–[12] and *Public Prosecutor v Perumal s/o Suppiah* [2000] 2 SLR(R) 145 at [23] where the courts have declined to accept similar circumstances as sufficiently exceptional to be given any mitigating weight. I agree with those decisions, and on the present facts, I see no reason to differ.

85 In the circumstances, there is only a need to make a modest adjustment on account of the additional mitigating factor that I have referred to at [82] above. In my judgment, this can be given effect by reducing the term of 9 years by a further 3 months to yield a total of 8 years and 9 months.

86 I turn to whether the sentence should take into account the nine months that the appellant spent in remand. I note that See Kee Oon JC had, in the recent case of *Public Prosecutor v Sivanantha Danabala* [2015] SGHC 154, backdated the sentence to the date of arrest to take into account the period spent in remand even though there was a "break" in the period of custody. He considered that it was necessary in that case so as to ensure that the accused was not excessively punished (at [42]). I agree that the time spent in remand should not be disregarded simply because the accused was granted bail. To hold otherwise would disincentivise an accused person from seeking to make bail once a substantial time has been spent in remand and that seems wrong in principle. In the present case, the Prosecution accepted that the period in which the appellant spent in remand could be taken into account and I agree because it is only fair. I accordingly make a further reduction of 9 months resulting in a final sentence of 8 years' imprisonment.

87 Finally, as a check of consistency, I consider the term of 8 years that I have arrived at in the context of the earlier cases involving similar quantities of diamorphine, namely *Public Prosecutor v Ayup Khan s/o Muzaffa Khan* [2010] SGDC 503 ("*Ayup Khan*"), *Kovalan* and *Liyakath* (respectively S/Nos 22, 23 and 24 of the table). The accused in *Ayup Khan* pleaded guilty and was sentenced to 10 years' imprisonment for trafficking in 8.17g of diamorphine. Another charge of drug trafficking was taken into consideration. The accused intended to repack the drugs in straws for the purpose of sale

and he expected to make a profit of $2,000 from it (at [5]). The accused had also been selling diamorphine for several months prior to his arrest (at [5]). The district judge found that the accused was a "recalcitrant offender who had scant regard for the law" in light of the fact that he had re-offended while he was out on bail (at [15]). After examining the long list of antecedents, the district judge noted that the accused had "graduated to trafficking for profit" and reoffended within less than 2 years after he had been released from 7 years' preventive detention (at [16]). The district judge did give weight to the accused's plea of guilt and cooperation with the authorities.

88 In *Kovalan*, the accused was sentenced to 13 years' imprisonment and 10 strokes of the cane for trafficking in 8.23g of diamorphine. Based on the statement of facts, the accused had agreed to deliver the drugs from Malaysia into Singapore for a price. He concealed the drugs in the side cover of the motorcycle and rode it into Singapore. He later removed the drugs and placed it into a "KFC" box and then in a "KFC" plastic bag, which he then passed to his co-accused. The district judge considered that the offence was "well-planned and well-executed" (at [18]), and that there was nothing exceptional about the accused's personal mitigating factors (at [30]–[32]). The district judge noted that while the accused was harassed by "loansharks" for his debts, the accused had neither been forced nor threatened by them to make the delivery. Instead, the accused had chosen to do so "in order to clear his debt" (at [32]). Hence, the district judge did not give this much weight.

89 As for *Liyakath*, the accused pleaded guilty to five drug-related charges and consented to having another seven drug-related charges taken into consideration for the purpose of sentencing. Out of the five proceeded charges, two of them were for trafficking in diamorphine (9.04g and 7.85g respectively) and one was for trafficking in buprenorphine, a Class A controlled drug. The accused was sentenced to 15 years' imprisonment and 10 strokes of the cane for trafficking in 9.04g of diamorphine. The district judge took into account the fact that the accused had re-offended while on bail which demonstrated his "continuing attitude of disobedience of the law" (at [17]). Further, the district judge considered the accused's previous drug-related antecedents, and the fact that he had re-offended very shortly after he had been released from prison (at [18]–[19]). The district judge also noted that there were a substantial number of drug-related charges taken into consideration for purpose of sentencing (at [20]).

90 The circumstances in the present case are far removed from each of the three cases that I have examined above. The differences are obvious and require no further elaboration. I need only say that, in light of the circumstances, the sentence in the present case should be markedly lower than those imposed in *Ayup Khan*, *Kovalan* and *Liyakath* because fairness demands that those who are less culpable are punished less severely. In that light, I am satisfied that the sentence of 8 years' imprisonment is fair and just.

Conclusion

91 For these reasons, I allow the appeal and reduce the sentence of imprisonment to a term of 8 years.