IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 151

Magistrate's Appeal No 9031 of 2018

Between

Public Prosecutor

… *Appellant*

And

Lai Teck Guan

… *Respondent*

JUDGMENT

[Criminal Law] — [Statutory offences] — [Misuse of Drugs Act]

[Criminal Procedure and Sentencing] — [Sentencing] — [Benchmark sentences]

Version No 2: 27 Oct 2020 (22:40 hrs)

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Public Prosecutor
v
Lai Teck Guan

[2018] SGHC 151

High Court — Magistrate's Appeal No 9031 of 2018
Sundaresh Menon CJ
23 April 2018

29 June 2018 Judgment reserved.

Sundaresh Menon CJ:

Introduction

1 The respondent, aged 42 at the time of the offences, pleaded guilty to four charges of drug-related offences in the District Court, as follows:

(a) one charge of possessing not less than 7.75g of diamorphine for the purpose of trafficking, an offence under s 5(1)(*a*) read with s 5(2) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA") punishable with enhanced punishment under s 33(4A)(i) of the MDA ("the trafficking charge");

(b) one charge of consuming methamphetamine, an offence under s 8(*b*)(ii) of the MDA punishable under s 33A(2) of the MDA ("the LT2 consumption charge"); and

(c) two charges of possessing not less than 0.52g of diamorphine and not less than 4.76g of methamphetamine respectively, offences under s 8(*a*) of the MDA punishable with enhanced punishment under s 33(1) of the MDA ("the possession charges").

2 Eight other drug-related charges were taken into account for the purpose of sentencing ("the TIC charges"). They comprised one other charge of LT2 consumption, five other charges of enhanced possession of various drugs and two charges of possessing drug utensils.

3 The District Judge ("the Judge") convicted the respondent and sentenced him to 15 years' imprisonment and 16 strokes of the cane, with the sentences for the trafficking charge and the methamphetamine possession charge to run consecutively: see *Public Prosecutor v Lai Teck Guan* [2018] SGDC 37 ("the GD") at [23].

4 In this appeal, the Prosecution challenges the sentence imposed by the Judge on three grounds. First, the Prosecution submits that the sentence meted out for the trafficking charge does not accord with the principles underlying the sentencing approach I adopted in *Vasentha d/o Joseph v Public Prosecutor* [2015] 5 SLR 122 ("*Vasentha*"), which have subsequently been approved and applied by the Court of Appeal: see *Suventher Shanmugam v Public Prosecutor* [2017] 2 SLR 115 ("*Suventher*") at [28]–[31]. Second, the Prosecution submits that the Judge erred in imposing only the mandatory minimum sentence for the LT2 consumption charge and the possession charges. The Prosecution contends that the Judge, in deciding as he did, failed to take into account the respondent's antecedents and the TIC charges. Third, the Prosecution submits that the Judge erred in principle by considering the likely aggregate sentence before he imposed the sentences for the individual charges. The Prosecution says that this

Version No 2: 27 Oct 2020 (22:40 hrs)

does not accord with the approach outlined in the decision of this court in *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 ("*Shouffee*").

5 I heard the parties on 23 April 2018 and reserved judgment. For the reasons that follow, I allow the Prosecution's appeal in part and set aside the sentence imposed by the Judge. In its place, I impose an aggregate sentence of 16 years and nine months' imprisonment and 17 strokes of the cane, with the trafficking charge and the methamphetamine possession charge continuing to run consecutively and the remaining charges to run concurrently.

Background

6 The facts before me are simple. On 12 July 2016, the respondent was stopped by the police at a shopping centre for a spot check but attempted to flee. He was then arrested on suspicion of drug-related offences. His sling bag was inspected upon arrest and his residence later searched. The drugs and utensils that formed the basis of the charges against him were discovered. At the police station, the respondent's urine was tested and analysed and found to contain methamphetamine.

7 The respondent admitted that just days before his arrest, he had purchased 30 packets of drugs from his supplier. He further admitted that since April 2015, he had bought packets of drugs from his supplier on over 100 occasions and made a profit of $10 per packet from selling those drugs.

Version No 2: 27 Oct 2020 (22:40 hrs)

The decision below

8 As earlier noted, the Judge convicted the respondent, who pleaded guilty, and sentenced him to an aggregate sentence of 15 years' imprisonment and 16 strokes of the cane, which was made up as follows:

(a) 13 years' imprisonment and ten strokes of the cane for the trafficking charge.

(b) The mandatory minimum of seven years' imprisonment and six strokes of the cane for the LT2 consumption charge.

(c) The mandatory minimum of two years' imprisonment for each of the possession charges.

The sentences for the trafficking charge and the methamphetamine possession charge were ordered to run consecutively.

9 On the trafficking charge, the Judge sentenced the respondent to an imprisonment term that was three years above the mandatory minimum having regard to the quantity of drugs that he had in his possession (GD at [16] and [21]). The Judge rejected the Prosecution's submission for a sentence of 16 years' imprisonment and 11 strokes of the cane. The Prosecution had derived this by mathematically adapting the sentencing framework in *Vasentha* to repeat offenders. The Judge reasoned that while "some measure of guidance" (GD at [15]) could be taken from *Vasentha*, that case could not be adapted and then applied directly to repeat offenders for two reasons.

(a) First, the Judge noted that the Prosecution's proposed framework would be inconsistent with *Public Prosecutor v Mohammad Raffie Bin Saide* [2015] SGDC 115 ("*Raffie*"). The Judge considered *Raffie*

Version No 2: 27 Oct 2020 (22:40 hrs)

significant even though it was a District Court decision because on appeal, the High Court upheld the District Court's finding. To the Judge, this implicitly suggested that the High Court would have rejected the Prosecution's proposed framework (GD at [15]–[20]).

(b) Second, the Judge noted that the Prosecution proposed the same framework in *Public Prosecutor v Sufian Bin Sulaiman* [2016] SGDC 298. In that case, the District Court rejected the proposed framework and the Prosecution did not appeal (GD at [26]). While the Judge did not elaborate, presumably he deduced from this that the Prosecution believed that its proposed framework would not have found favour with the High Court.

10 Instead, the Judge interpreted *Vasentha* and *Loo Pei Xiang Alan v Public Prosecutor* [2015] 5 SLR 500 ("*Loo*"), which the Prosecution had also relied on, to stand principally for the proposition that the sentence must give due effect to the interest of general deterrence (GD at [13] and [16]). The Judge gave effect to this consideration by imposing an imprisonment term that was three years higher than the mandatory minimum (GD at [21]).

11 On the LT2 consumption charge and the possession charges, the Judge "considered and imposed the mandatory minimum sentence" (GD at [21]). He did not elaborate further. He also did not refer to the respondent's antecedents or the TIC charges.

12 For all four charges, the Judge rejected the respondent's submission that his plea of guilt and his family circumstances were mitigating factors. The Judge gave no weight to the respondent's plea of guilt because the overwhelming evidence against him meant that his decision not to contest the charges should

Version No 2: 27 Oct 2020 (22:40 hrs)

be viewed with some circumspection; he also gave no weight to the respondent's family circumstances as he deemed those unexceptional (GD at [22]).

13 Finally, the Judge ordered the sentences for the trafficking charge and the methamphetamine possession charge to run consecutively after applying the sentencing principles in *Shouffee*. He backdated the respondent's sentence to the date of remand (GD at [23]–[25]).

Cases on appeal

14 The Prosecution advances three main contentions in the appeal.

15 First, on the trafficking charge, the Prosecution submits that the Judge erred in principle by rejecting the framework that it had proposed. The Prosecution argues that although the sentencing framework in *Vasentha* was articulated for first-time offenders, it can be adapted to different situations.

16 In *Vasentha*, this court was faced with a first-time offender who had pleaded guilty to a charge of possessing 8.98g of diamorphine for the purpose of trafficking. The District Court sentenced the accused to 11 years' imprisonment and the accused appealed. On appeal, I reduced the sentence to eight years' imprisonment after developing and applying a sentencing framework for first-time offenders in such cases. In doing so, I first examined and considered a substantial number of precedents. I noted that they had tended to impose sentences that clustered within tight bands and as a result had failed to utilise the entire sentencing range prescribed by Parliament. However, the sentences in these cases had tended to correlate at least roughly with the quantity of drugs trafficked, because the quantity of drugs operated as a suitable indicator of the potential harm that may be caused and hence of the severity of the offence.

Version No 2: 27 Oct 2020 (22:40 hrs)

Accordingly, I developed a sentencing framework that used the quantity of drugs trafficked as a starting point.

17 While the Prosecution acknowledges that *Vasentha* concerned a first-time offender, it submits that *Vasentha* can be adapted to other situations and refers in this regard to cases such as *Loo*, *Suventher* and *Public Prosecutor v Tan Lye Heng* [2017] 5 SLR 564 ("*Tan Lye Heng*"). Indeed, the Prosecution notes that in *Public Prosecutor v Katty Soh Qiu Xia* [2018] SGDC 50 ("*Katty Soh*"), the District Court adapted *Vasentha* to a repeat offender possessing a quantity below 10g of diamorphine for the purpose of trafficking – a situation identical to the present case. The Prosecution accepts that *Katty Soh* arrived at a different sentencing framework but nonetheless relies on this for the proposition that *Vasentha* can be adapted.

18 The Prosecution accordingly submits that the following sentencing framework should be adopted:

Weight of drugs (diamorphine)	**Imprisonment**	**Caning**
Up to 3g	10 – 12 years	10 – 11 strokes
3 – 5g	12 – 14 years	10 – 11 strokes
5 – 7g	14 – 16 years	11 – 12 strokes
7 – 8g	16 – 18 years	11 – 12 strokes
8 – 9g	18 – 21 years	12 – 13 strokes
9 – 9.99g	21 – 24 years	13 – 14 strokes

19 Applying this framework, the Prosecution submits that the starting point for the respondent, a repeat offender trafficking in 7.75g of diamorphine, would

Version No 2: 27 Oct 2020 (22:40 hrs)

be 16 to 18 years' imprisonment and 11 to 12 strokes of the cane. The Prosecution argues that, if anything, this would need to be increased to account for the fact that the respondent profited by selling drugs to other addicts, which it contends is an aggravating factor. Hence, the Prosecution submits that a sentence of *at least* 16 years' imprisonment and 11 strokes of the cane would be appropriate in this case.

20 Second, the Prosecution submits that the Judge erred by imposing the mandatory minimum sentence for the LT2 consumption charge and the possession charges. The Prosecution argues that the imposition of the mandatory *minimum* sentence is unsatisfactory because it wholly fails to take into account the respondent's antecedents and the TIC charges.

21 Third, the Prosecution submits that the Judge erred in considering the likely aggregate sentence *before* determining the individual sentences. According to the Prosecution, while the Judge was entitled to consider the aggregate sentence when imposing the individual sentences, he should have explicitly said that he was doing so – but he did not. However, the Prosecution does not contest the Judge's decision to run the trafficking charge and the methamphetamine possession charge consecutively.

22 The respondent tendered handwritten submissions. Essentially, he submits that (a) the court should not consider his past offences because it would not be proportionate to his culpability in the present case; (b) the court should reject the Prosecution's sentencing framework because it is inconsistent with *Raffie*; and (c) the court should view his difficult family circumstances and his repentance as mitigating factors.

Version No 2: 27 Oct 2020 (22:40 hrs)

23 I shall address each of the Prosecution's grounds of appeal in turn and, where appropriate, will also touch on the respondent's submissions.

The first ground: the appropriate framework for the trafficking charge

Whether Vasentha *should apply to repeat offenders*

24 The sentencing framework in *Vasentha* was developed for use when sentencing first-time offenders who possess diamorphine for the purpose of trafficking. The framework took its starting point from the quantity of drugs trafficked because, as I have noted above, this was the main, although not the sole, indicator of the seriousness of the offence and hence of the sentence to be imposed. Therefore, while *Vasentha* used the quantity of drugs to derive corresponding starting points for the purpose of sentencing, those starting points were then to be adjusted based on the offender's culpability and the presence of relevant aggravating or mitigating factors (at [44]). *Vasentha* also embodied the principle that the court should strive to utilise the full spectrum of sentencing range (at [46]).

25 As the Prosecution correctly notes, a number of cases have adapted *Vasentha* to different situations. For instance, the Court of Appeal in *Suventher* adapted *Vasentha* to the offence of importing cannabis into Singapore; the High Court in *Tan Lye Heng* applied both *Suventher* and *Vasentha* to extrapolate starting points for the offence of possessing 10 to 15g of diamorphine for the purpose of trafficking; and the High Court in *Loo* used *Vasentha* to obtain an indicative sentence for a repeat offender possessing methamphetamine for the purpose of trafficking, albeit only by analogy.

26 But *Vasentha* has not been universally adopted simply because it is not universally applicable. As the Court of Appeal noted in *Ng Kean Meng Terence*

Version No 2: 27 Oct 2020 (22:40 hrs)

v Public Prosecutor [2017] 2 SLR 449 ("*Terence Ng*"), a *Vasentha*-like approach that isolates one metric and uses it as the primary indication of sentence would only be suitable where the offence in question is clearly targeted at a particular mischief and hence that single metric assumes primacy in sentencing. In *Vasentha*, this was the quantity of drugs. But such an approach may not be suitable where the offence is complex and its seriousness depends on a multitude of factors because such a framework might fail to account for how multiple metrics, each equally important, might interact with each other. So any such sentencing framework would have to afford the sentencing court more flexibility to deal with the multiple variables. An example of such an offence is rape (*Terence Ng* at [30]).

27 Thus, in *Public Prosecutor v Tan Thian Earn* [2016] 3 SLR 269, See Kee Oon JC (as he then was) did not think that the *Vasentha* framework was suitable for an offence under s 10A(1) of the MDA, which proscribes manufacturing, supplying, possessing, importing or exporting controlled equipment useful for manufacturing controlled drugs, because such offences could be committed in a variety of circumstances and for a variety of reasons (at [33]–[35]). See JC thought that in such circumstances, there was no single factor that could produce a reliable starting point for a sentencing framework.

28 Similarly, in *Liew Zheng Yang v Public Prosecutor* [2017] 5 SLR 1160, Steven Chong JA chose not to adapt the *Vasentha* framework to the offence of drug possession under ss 5(2) and 12 of the MDA because he considered that those who committed the offence might have done so for a variety of reasons. They could have possessed the drugs for trafficking, for their own consumption, or for other purposes that were not clear on the evidence (at [12]). Again, he thought that there was no single readily identifiable metric.

Version No 2: 27 Oct 2020 (22:40 hrs)

29 From these cases, it is evident that whether *Vasentha* is suitable for any given offence depends on whether the sentence hinges largely on a single metric (albeit later adjusted for other factors) or whether the gravity of the offence is or may be affected by several metrics, each potentially of importance.

30 In this case, I am faced with a *repeat* offender who possessed diamorphine for the purpose of trafficking. In my judgment, *Vasentha* is not suitable in such a setting because there are at least two important metrics that will feature in the sentencing analysis. First, as the Prosecution submits, the quantity of drugs no doubt remains important as with any other drug offence related to trafficking. But second, and more importantly, because the offender is a repeat offender liable for enhanced punishment, it will potentially be important to ascertain the circumstances in which the repeat offence came about. For instance, an offender who commits the repeat offence almost immediately after having served his prison sentence for his first offence should not be treated in the same way as an offender who lapses back into crime only after a long period of staying drug-free, even if both offenders trafficked the same quantity of drugs the second time. This factor is, of course, not relevant for first-time offenders.

31 In response to this, the Prosecution submits that the circumstances of the repeat offence should be seen as just one aggravating or mitigating factor at the second stage of *Vasentha* instead of as a distinct and significant metric. I do not think that this is appropriate. First, it would not be accurate to consider such circumstances as a factor affecting the assessment of the offender's culpability or as an aggravating factor for *the present* offence, which is a distinct offence of possession for the purpose of trafficking on a repeated occasion. Second, and related to the first point, although antecedents are generally considered at the later stage of sentencing, a prior offence of possessing drugs for the purpose of

Version No 2: 27 Oct 2020 (22:40 hrs)

trafficking cannot be assessed in the same manner as any other antecedent would tend to be. Parliament has provided an entirely different sentencing range prescribing enhanced punishment for at least some categories of repeat offenders. This weighs against the contention that the circumstances affecting the repeat offence should be regarded as just another aggravating or mitigating element in the sentencing analysis.

32 Apart from the Prosecution's submissions, I also consider that other difficulties might arise from adapting *Vasentha* in the way that it has been adapted in some of the precedents that I have referred to. As I pointed out to the Prosecution during the arguments, most significantly, deriving a principled uplift is difficult because the sentencing ranges for first-time offenders and repeat offenders do not mirror each other.

33 In relation to the offence of trafficking in 10 to 15g of diamorphine, first-time offenders and repeat offenders face the same sentencing range of 20 to 30 years' imprisonment and a mandatory 15 strokes of the cane, subject to the possibility of life imprisonment (which I do not discuss here). However, the sentencing ranges for a first-time offender and a repeat offender trafficking in up to 10g of diamorphine differ. First-time offenders face five to 20 years' imprisonment and five to 15 strokes of the cane if they traffic in up to 10g of diamorphine; repeat offenders trafficking in the same range will face ten to 30 years' imprisonment and ten to 15 strokes of the cane. I illustrate these disparities in the following table:

Weight of diamorphine	**First-time offenders**	**Repeat offenders**
Up to 10g	Minimum: 5 years 5 strokes **Maximum: 20 years**	Minimum: 10 years 10 strokes **Maximum: 30 years**

Version No 2: 27 Oct 2020 (22:40 hrs)

	15 strokes	**15 strokes**
10 to 15g	Minimum: 20 years 15 strokes **Maximum: 30 years (or life) 15 strokes**	(but this is subject to the Second Schedule of the MDA where offenders traffic in quantities of 10g or more)

34 These disparities create some dissonance in two ways. First, the uplift that can be imposed where higher quantities of drugs are trafficked is much smaller than the uplift for lower quantities of drugs. Second, with the higher quantities of drugs, in the 10 to 15g range, the minimum and maximum sentences for a repeat offender are exactly the same as that for a first-time offender. Taken together, this means that, somewhat paradoxically, there is an inverse relationship between the quantity of drugs and the amount of uplift: the higher the quantity of drugs, the lower the uplift and possibly even the same length of imprisonment in some cases. At first blush, this seems unsatisfactory.

35 But at least part of what underlies this dissatisfaction is the assumption that the length of the sentence is equivalent to its severity. Hence, it offends common sense that offenders who traffic in a greater quantity of drugs might be treated more leniently when the sense is that they should be treated more severely.

36 But in my view, while the length of the sentence *generally* correlates with its severity, this is probably not inexorably the case. In *Public Prosecutor v Raveen Balakrishnan* [2018] SGHC 148 ("*Raveen*") at [77]–[82], I noted that a relatively long sentence is likely to result in compounded severity because it induces a sense of hopelessness that would negate rehabilitative prospects. In contrast, a relatively shorter sentence would not have the same effect as the compounding effect would not yet have set in. While *Raveen* concerned an

Version No 2: 27 Oct 2020 (22:40 hrs)

aggregate sentence that was the result of two or more sentences ordered to run consecutively, I noted that this "aggregation principle" also applies to a long sentence imposed for a single offence. In my view, this might account for Parliament having prescribed the same maximum sentence for both first-time and repeat offenders where the quantum of the drugs involved exceed 10g, even though the repeat offender is *prima facie* deserving of greater punishment than the first-time offender.

37 Nonetheless, the fact remains that these peculiarities make it inappropriate in my view to develop a sentencing framework that approaches sentencing for the present class of offence as one influenced *primarily* by a single metric. I therefore do not consider it appropriate to adapt *Vasentha* to repeat offences of possessing diamorphine for the purpose of trafficking and accordingly reject the Prosecution's proposed framework, which was based on a mathematical uplift of *Vasentha*.

38 But this does not mean that sentencing courts would have to derive a sentence from scratch each time they sentence a repeat offender. In my judgment, *Vasentha* remains useful when sentencing repeat offenders in the following way:

(a) The sentencing court would first derive the starting point for the sentence based on the quantity of drugs for first-time offenders using *Vasentha*.

(b) The court would then apply an *indicative uplift* on account of the fact that this is a repeat offence and derive an indicative starting point on this basis, having due regard to the circumstances of the repeat offence.

Version No 2: 27 Oct 2020 (22:40 hrs)

(c) Finally, the court would adjust that indicative starting point based on the offender's culpability and the aggravating or mitigating factors, which have not been taken into account in the analysis up to this point.

39 This approach is not without precedent. In *Loo*, Chao Hick Tin JA (as he then was) was faced with a repeat offender who possessed methamphetamine for the purpose of trafficking. Chao JA first noted that the range of sentences for possessing diamorphine and methamphetamine were such that he could derive a conversion ratio between diamorphine and methamphetamine. After applying that conversion ratio, Chao JA then used *Vasentha* to derive the starting point for what would have been the sentence if the offender had committed the offence for the first time. The offender would have faced a sentence in the lowest band of *Vasentha*. Hence, Chao JA reasoned that the indicative starting point for trafficking in that quantity of methamphetamine for a repeat offender "would be very close to the mandatory minimum… if not the minimum itself" (at [22]). In other words, Chao JA used the indicative sentence for a first-time offender to deduce, by analogy, where a repeat offender would fall along the spectrum of sentences.

40 The approach I have proposed at [38] above develops Chao JA's approach in *Loo*. Although *Loo* also used *Vasentha* to derive a starting point and then adapted that starting point to a repeat offender, there was perhaps no need for Chao JA to give detailed guidance in *Loo* as to how the *Vasentha* framework should be modified because, on the facts of *Loo*, the quantity of drugs trafficked was very close to the minimum. But in the absence of such guidance, it is probable that sentencing courts, without the benefit of a principled approach, would err on the side of imposing sentences similar to those in previous cases. This would result in a clustering of sentences and the

Version No 2: 27 Oct 2020 (22:40 hrs)

entire range of sentences not being duly utilised. Furthermore, there are also the potential issues raised by the fact that the sentencing ranges for the repeat offence for quantities below 10g and those from 10 to 15g overlap to a large degree, whereas the sentencing ranges for first time offenders are separate for these categories of offences (see [32]–[34] above). While this issue did not need to be addressed in *Loo* because the quantity of drugs was low, it may be faced by sentencing courts in future cases.

41 For these reasons, I think it is necessary to interpose the second stage of the analysis at [38(b)] above, which is to recognise, at least as a starting point, that an indicative uplift is appropriate to recognise that this is a repeat offence. However, both the specific uplift and how the sentencing court should arrive at it must take into account the disproportionate relationship between the length of the sentence and its severity. I turn to this next.

42 In my judgment, the indicative uplift could be applied as follows:

Weight of diamorphine	**Starting sentence (first-time offender)**	**Indicative uplift**
Up to 3g	5 – 6 years 5 – 6 strokes	5 – 8 years 5 – 6 strokes
3 – 5g	6 – 7 years 6 – 7 strokes	5 – 8 years 4 – 5 strokes
5 – 7g	7 – 8 years 7 – 8 strokes	5 – 8 years 4 – 5 strokes
7 – 8g	8 – 9 years 8 – 9 strokes	4 – 7 years 3 – 4 strokes
8 – 9g	10 – 13 years 9 – 10 strokes	4 – 7 years 3 – 4 strokes
9 – 9.99g	13 – 15 years	3 – 6 years

Version No 2: 27 Oct 2020 (22:40 hrs)

	10 – 11 strokes	2 – 3 strokes
10 – 11.5g	20 – 22 years 15 strokes (mandatory)	3 – 6 years
11.5 – 13g	23 – 25 years 15 strokes (mandatory)	2 – 4 years
13 – 15g	26 – 29 years 15 strokes (mandatory)	1 – 2 years

43 In the table above, the first two columns reflect the quantity of diamorphine and the starting sentence for first-time offenders. These bands and starting sentences are taken from *Vasentha*, for quantities of up to 10g, and from *Tan Lye Heng*, for quantities from 10 to 15g. The rightmost column reflects the indicative uplift for repeat offenders. As I noted above, the sentencing court would have to first determine the starting sentence for first-time offenders. The court would then determine the appropriate indicative uplift from the range given in the right column based on the circumstances of re-offending. The indicative uplift would then be added to the starting sentence to produce an indicative starting point for the repeat offender. Finally, the sentencing court would adjust that indicative sentence, either upwards or downwards, after accounting for other aggravating or mitigating factors.

44 I derived the uplift in the rightmost column in the following manner.

45 First, I noted that the minimum indicative uplift for a repeat offender in the lowest sentencing band is five years' imprisonment. This was derived by comparing the mandatory minimum sentence for first-time offenders and repeat offenders who are involved in trafficking in the lowest quantity of drugs.

Version No 2: 27 Oct 2020 (22:40 hrs)

46 Second, I reasoned that in principle, the minimum indicative uplift for repeat offenders should not exceed five years even for the higher sentencing bands. This would more accurately reflect that the indicative uplift accounts for the circumstances of re-offending rather than for the quantity of drugs. It may be noted from the table above that the minimum indicative uplift decreases as the quantity of drugs trafficked grows higher. It should be clarified that this does not mean that repeat offenders who traffic in higher quantities of drugs are getting a discount for trafficking in higher quantities; rather, this accounts for the narrowing sentencing range at the higher ends of the spectrum when comparing first and repeat offenders as well as the compounding effect of longer sentences (see [32]–[36] above).

47 Third, I considered that the maximum indicative uplift should be eight years' imprisonment. I arrived at this view by balancing two considerations: (a) the need to afford enough discretion to sentencing courts to take into account the circumstances of the repeat offence, and (b) the need to ensure that the maximum sentence for repeat offenders did not reach the statutory maximum until the highest sentencing bands. However, as with the minimum indicative uplift, the maximum indicative uplift and the available range of uplift decreases at the higher ends of the spectrum to account for the narrowing range at the higher ends and the compounding effect of longer sentences.

48 Finally, I applied the same considerations detailed above to the number of strokes of the cane, but with two differences. The first difference is that because of the narrower range of strokes available for repeat offenders, the range of uplift is much narrower. The second difference is that a mandatory 15 strokes of the cane applies for first-time offenders who trafficked above 10g of diamorphine; hence, the sentencing range for repeat offenders also reflects this.

Version No 2: 27 Oct 2020 (22:40 hrs)

49 In my judgment, this approach more accurately reflects the multiple metrics relevant to this offence. The sentencing court first selects a starting sentence based on the quantity of drugs and then applies an uplift based on the circumstances of re-offending. Both are primary considerations for repeat offenders and my approach endeavours to reflect this.

50 I now apply this framework to the facts.

Application to the facts

51 The respondent was found to possess 7.75g of diamorphine for the purpose of trafficking. Under *Vasentha*, if the respondent was a first-time offender, the starting point would be around eight years and nine months' imprisonment and eight to nine strokes of the cane. Applying the framework that I have set out above, the indicative uplift would be four to seven years' imprisonment and three to four strokes of the cane.

52 The respondent was first convicted of drug-related offences in November 2000, for which he was ordered to undergo seven years of corrective training. In February 2009, he was again convicted of multiple drug-related offences, most relevantly one charge of possessing diamorphine for the purpose of trafficking. The respondent was sentenced to six years' imprisonment and six strokes of the cane (slightly above the mandatory minimum) for that charge. Soon after the respondent was released from prison, he was convicted of an offence of consuming morphine and was then placed under drug supervision for 24 months starting October 2014. After his drug supervision ended, he then committed the present offences in July 2016.

53 In my judgment, the respondent is a recalcitrant offender who has not been rehabilitated despite the community order in 2000; nor has he been

Version No 2: 27 Oct 2020 (22:40 hrs)

deterred despite his stint in prison. He has also not taken advantage of the fact that he was sentenced to only slightly more than the mandatory minimum in 2009 and that he was placed on drug supervision in 2014. To reflect these considerations, an uplift of six years' imprisonment and three strokes of the cane would be appropriate. This brings the indicative sentence to 14 years and nine months' imprisonment and 11 strokes of the cane (taking eight strokes of the cane as the starting point).

54 This indicative sentence must then be adjusted for any aggravating and mitigating factors. In terms of mitigating factors, I agree with the Judge and the Prosecution that there are none. The respondent's plea of guilt should be given little weight as he was caught red-handed. The respondent's family circumstances are not so extenuating as to be relevant. Accordingly, I also reject the submissions on mitigation that the respondent made during the hearing.

55 In terms of aggravating factors, the Prosecution submits that it is significant that the respondent "repeatedly gained a profit from his sales to other addicts". I do not agree. In the statement of agreed facts, the respondent admits that he previously purchased packets of drugs on about 100 occasions since April 2015, that he purchased 30 packets days before his arrest, and that he would sell them for a profit of $10 per packet. The most that can be said is that the respondent profited financially from his offences. But in the context of repeat offenders, Chao JA made clear in *Loo* that financial gain *per se* is not an aggravating factor, unless the repeat offender's trade is unusually lucrative or the respondent particularly experienced (at [27]):

> More fundamentally, where repeat traffickers are concerned, I do not think the fact that the offender stands to profit financially from drug trafficking or the fact that the offender appears to be more than a mere "courier" or pawn are significant aggravating factors. This is because, for the vast majority of repeat traffickers, the primary reason that they re-

Version No 2: 27 Oct 2020 (22:40 hrs)

> offend is probably a desire for financial gain. … Thus I consider that **the fact of financial profit *per se* … [has] already been taken into account as aggravating factors in the prescription of a mandatory minimum sentence**, and it would generally be double-counting to consider them aggravating factors that warrant a further increase beyond that minimum. **It may not be double-counting where a repeat trafficker's trade is unusually lucrative or where he is particularly experienced** or established in the drug trade. Even so, it is likely that the quantity of drugs involved will be larger and that in turn will undoubtedly attract a higher sentence. [emphasis added]

In this case, there is no indication that the respondent's profit was unusually lucrative or that the respondent was particularly experienced. Hence, the mere fact of financial gain is not an aggravating factor.

56 Accordingly, the indicative sentence of 14 years and nine months' imprisonment and 11 strokes of the cane does not need to be adjusted. I therefore set aside the sentence of 13 years' imprisonment and ten strokes of the cane that was imposed by the Judge. In its place, I impose a sentence of 14 years and nine months' imprisonment and 11 strokes of the cane.

The second ground: mandatory minimum sentences for the other three charges

57 The Prosecution's second ground of appeal pertains to the remaining three charges: the LT2 consumption charge and the possession charges. The Judge imposed the mandatory minimum sentence for all three charges. The Prosecution submits that the Judge failed to consider the respondent's antecedents and the TIC charges.

58 Specifically, for the LT2 consumption charge, the respondent faced three relevant TIC charges: one other LT2 consumption charge for consuming diamorphine and two charges of possessing drug utensils for drug consumption. He was also previously convicted of drug consumption in 2000 and 2009. In

Version No 2: 27 Oct 2020 (22:40 hrs)

fact, in 2009, the respondent was given the mandatory minimum of seven years' imprisonment and six strokes of the cane for an LT2 consumption charge. As for the possession charges, the respondent faced five TIC charges for enhanced possession. He also had relevant antecedents. In 2009, the respondent was sentenced to two years and six months' imprisonment for enhanced possession charges – slightly above the mandatory minimum.

59 The Prosecution submits that the respondent should be given an imprisonment term higher than those he previously received. Otherwise, the respondent would effectively be given a sentencing discount for re-offending.

60 I accept that in principle, the respondent should not be given the mandatory minimum sentence because it would not reflect his antecedents and the TIC charges. I also accept that as a starting point, the Judge should have given a sentence higher than the previous sentence the respondent received to reflect his recalcitrance. For instance, in *Cheang Geok Lin v Public Prosecutor* [2018] SGHC 5, I was faced with a similar factual situation where the accused had been previously sentenced to the mandatory minimum sentence for enhanced possession charges. I agreed with the Prosecution that the accused's previous charges "warranted an uplift from the mandatory minimum sentence on the ground of specific deterrence". I therefore imposed a sentence of two years and six months' imprisonment, which was higher than the minimum mandatory sentence of two years' imprisonment, which the accused had been given for his previous conviction (at [21] and [32]–[33]). Similarly, here, the Judge erred in principle by imposing only the mandatory minimum sentences.

61 In coming to this conclusion, I considered the possibility that the Judge had imposed the mandatory minimum sentence because he applied the totality principle (as he said he did at [23] of the GD) and concluded that the aggregate

Version No 2: 27 Oct 2020 (22:40 hrs)

sentence would be crushing or not commensurate with the respondent's criminality. The Judge could have reduced the individual sentences to account for the totality principle. However, I find that this is unlikely for two reasons. First, the Judge did not articulate this reason for imposing the mandatory minimum sentence. All the Judge said was that he had "considered and imposed the mandatory minimum sentence" (GD at [21]). Furthermore, the Judge separately applied the totality principle at [23] of the GD. Hence, it is unlikely that he imposed the mandatory minimum sentences because of the totality principle. Second, even if the Judge had meant to use the totality principle to reduce the individual sentences, he could only have done so for the methamphetamine possession charge because it was the only charge ordered to run consecutively with the trafficking charge. The sentences for the other two charges ran concurrently and would not have affected the aggregate sentence.

62 However, this is not to say that the totality principle is not relevant here. As I elaborate below when considering the Prosecution's third ground of appeal, I find that the totality principle *is* relevant and does affect the aggregate sentence. So although I agree with the Prosecution that in principle, the Judge should have imposed a sentence higher than the mandatory minimum for the LT2 consumption charge and the possession charges, I find that the sentence for the methamphetamine possession charge should remain at two years' imprisonment on account of the totality principle, which I elaborate on below.

63 Accordingly, I set aside the sentences imposed by the Judge for the LT2 consumption charge and the diamorphine possession charge. In their place, I impose the following sentences:

(a) For the LT2 consumption charge, seven years and six months' imprisonment and six strokes of the cane.

Version No 2: 27 Oct 2020 (22:40 hrs)

(b) For the diamorphine possession charge, two years and nine months' imprisonment.

These sentences are slightly higher than those the respondent received for his previous convictions, to reflect the respondent's previous convictions and the TIC charges. As I earlier noted, the sentence for the methamphetamine charge remains at two years' imprisonment on account of the totality principle, which is the Prosecution's third ground of appeal. I turn to this next.

The third ground: the totality principle

64 The Prosecution's third ground of appeal is related to the second. The Prosecution submits that the Judge erred in principle by considering the aggregate sentence before imposing the individual sentences. But the Prosecution does not contest the Judge's decision to run the trafficking charge and the methamphetamine possession charge consecutively.

65 At the hearing, the Prosecution conceded that this was a point of form and analytical elegance rather than of substance. In other words, if the Judge had correctly applied the totality principle, then it would not make a difference to the outcome even if he had failed to adequately explain himself. In my view, this concession was rightly made. In *Shouffee*, I noted that it would be "unrealistic" for the sentencing judge to disregard the likely aggregate sentence in deciding the individual sentences for each of the offences. However, I also observed that if the sentencing judge considered the need to adjust the individual sentence(s) on account of the likely aggregate sentence, he should do so "transparently" (at [64]). Hence, while I accept that the Judge could have been more analytically elegant, the crux of the present issue is whether the Judge correctly applied the totality principle in substance.

Version No 2: 27 Oct 2020 (22:40 hrs)

66 As I noted earlier, the only two sentences that were to run consecutively in this case were the sentences for the trafficking charge and the methamphetamine possession charge. For the latter, the Judge imposed the mandatory minimum sentence of two years' imprisonment. I noted earlier in relation to the second ground of appeal that in principle, the Judge erred in imposing the mandatory minimum for the LT2 consumption charge and the diamorphine possession charge because it would not take into account the respondent's antecedents and the TIC charges (see above at [60]–[61]). For the same reasons, I consider that a sentence of two years and nine months' imprisonment would also have been appropriate for the methamphetamine possession charge. The aggregate sentence would therefore have been 17 years and six months' imprisonment and 17 strokes of the cane.

67 However, applying the totality principle, I consider that it would be appropriate to recalibrate the sentence for the methamphetamine possession charge. Two factors are relevant in this context: the length of the contemplated aggregate sentence and the respondent's age. The respondent was 42 years old when he committed the offences in 2016. Assuming the respondent gets a full remission for good behaviour, he would be about 55 years of age when he completes his prison term. In these circumstances, and having regard to the length of the aggregate sentence and the concern of compounding which I have referred to at [36] above, I consider that it would be in order to calibrate the sentence for the methamphetamine possession charge back to the mandatory minimum of two years' imprisonment.

Version No 2: 27 Oct 2020 (22:40 hrs)

68 The recalibrated aggregate sentence is 16 years and nine months' imprisonment and 17 strokes of the cane. I consider this proportionate having regard to all the circumstances before me.

Conclusion

69 For these reasons, I make the following orders.

(a) On the trafficking charge, I set aside the sentence of 13 years' imprisonment and ten strokes of the cane. In its place, I impose a sentence of 14 years and nine months' imprisonment and 11 strokes of the cane.

(b) On the LT2 consumption charge, I set aside the mandatory minimum sentence of seven years' imprisonment and six strokes of the cane. In its place, I impose a sentence of seven years and six months' imprisonment and six strokes of the cane.

(c) On the diamorphine possession charge, I set aside the mandatory minimum sentence of two years' imprisonment. In its place, I impose a sentence of two years and nine months' imprisonment.

(d) On the methamphetamine possession charge, I affirm the sentence of two years' imprisonment, but for different reasons than the Judge.

Version No 2: 27 Oct 2020 (22:40 hrs)

70 The sentences for the trafficking charge and the methamphetamine possession charge should run consecutively as the Judge ordered. The remaining sentences are to run concurrently. The resulting aggregate sentence is 16 years and nine months' imprisonment and 17 strokes of the cane.

Sundaresh Menon
Chief Justice

Mark Tay and Zulhafni Zulkeflee (Attorney-General's Chambers) for the appellant;
Respondent in person.

Version No 2: 27 Oct 2020 (22:40 hrs)