IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 226

Magistrate's Appeal No 9882 of 2020/01

Between

Wong Jing Ho, Samuel

… *Appellant*

And

Public Prosecutor

… *Respondent*

GROUNDS OF DECISION

[Criminal Procedure and Sentencing] — [Sentencing] — [Benchmark sentences] — [Appeal against sentence imposed for dealing with duty unpaid cigarettes under s 128I(1)(*b*), punishable under s 128L(4) of the Customs Act (Cap 70, 2004 Rev Ed)] — [Whether the sentencing frameworks for ss 128F and 128H applied to s 128I(1)(*b*) of the Customs Act]
[Criminal Procedure and Sentencing] — [Sentencing] — [Principles] — [Appellant charged with dealing with duty unpaid cigarettes] — [Relevant sentencing considerations] — [Whether sentence imposed was manifestly excessive]

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Wong Jing Ho Samuel
v
Public Prosecutor

[2021] SGHC 226

General Division of the High Court — Magistrate's Appeal No 9882 of 2020/01
Vincent Hoong J
19 May 2021

30 September 2021

Vincent Hoong J:

1 This appeal raised, among others, the issue of what the appropriate sentencing framework for offences under s 128I(1)(*b*) of the Customs Act (Cap 70, 2004 Rev Ed) should be. The provision states as follows:

> **Offences in relation to possession, storage, conveying and harbouring of goods**
>
> **128I.**—(1) Any person who —
>
> …
>
> (b) is in any way concerned in conveying, removing, depositing or *dealing with* any dutiable, uncustomed or prohibited goods with intent to defraud the Government

> of any customs duty or excise duty thereon, or to evade any of the provisions of this Act; or
>
> …
>
> shall be guilty of an offence.
>
> [emphasis in original in bold; emphasis added in italics]

2 Section 128I(1)(*b*) is a "specified offence", as defined under s 128L(7) of the Customs Act. For a "specified offence" involving tobacco products exceeding 2kg in weight, the prescribed punishment is set out in s 128L(4) of the Customs Act:

> (4) Any person who is guilty of any specified offence involving goods consisting wholly or partly of relevant tobacco products shall, if such tobacco products exceed 2 kilogrammes in weight, be liable on conviction —
>
> (*a*) to a fine of —
>
> (i) not less than 15 times the amount of the customs duty, excise duty or tax the payment of which would have been evaded by the commission of the offence, subject to a minimum of $1,000; and
>
> (ii) not more than 20 times the amount of the customs duty, excise duty or tax the payment of which would have been so evaded or $10,000, whichever is the greater amount; or
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> (*b*) to imprisonment for a term not exceeding 3 years,
>
> or to both.

3 The appellant in this case was caught dealing with 12 cartons of duty unpaid cigarettes ("C1"), weighing 2.180kg, and pleaded guilty to two offences under s 128I(1)(*b*) of the Customs Act. The District Judge ("DJ") imposed a global sentence of nine weeks' imprisonment as follows:

(a) The first charge ("the Excise Duty Charge") concerned the appellant's failure to pay excise duty of $1,024.80 for the 2.180kg of cigarettes he dealt with, which was punishable under s 128L(4) of the Customs Act. A sentence of nine weeks' imprisonment was imposed;[1]

(b) The second charge ("the GST Charge") concerned the appellant's failure to pay Goods and Services Tax ("GST") of $82.98 for C1 with intent to defraud the government. C1 was valued at $1,185.36. By virtue of ss 26 and 77 of the Goods and Services Tax Act (Cap 117A, 2005 Rev Ed), paragraph 3 of the Goods and Services Tax (Application of Legislation Relating to Customs and Excise Duties) Order (2009 Rev Ed) and paragraph 2 of the Goods and Services Tax (Application of Customs Act) (Provisions on Trials, Proceedings, Offences and Penalties) Order (2001 Rev Ed), this was an offence under s 128I(1)(*b*) of the Customs Act, punishable under s 128L(4) of the same Act. The DJ imposed one week's imprisonment for this offence and ordered it to run concurrently with the custodial term for the Excise Duty Charge.[2]

4 The appellant appealed against his sentence. In summary, he submitted that nine weeks' imprisonment was manifestly excessive. Among other reasons, the appellant argued that the DJ misapplied the sentencing framework in *Public Prosecutor v Pang Shuo* [2016] 3 SLR 903 ("*Pang Shuo*") and *Yap Ah Lai v Public Prosecutor* [2014] 3 SLR 180 ("*Yap Ah Lai*") and failed to give appropriate weight to various aggravating and mitigating factors.[3]

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1 Charge sheet for Excise Duty Charge: Record of Proceedings ("ROP") at p 4; District Judge's Grounds of Decision ("GD") [2020] SGDC 282 at [23]: ROP at p 56.

2 Charge sheet for GST Charge: ROP at p 6; GD at [23]: ROP at p 56.

3 Petition of Appeal dated 5 January 2021 at paras 3(a)(ii) and 3(d): ROP at pp 15, 17.

5 After considering the parties' submissions, I dismissed the appeal. These are my grounds of decision.

Facts

6 Since October 2019, the appellant had been purchasing duty unpaid cigarettes from one "yaozhenxi521YS" ("the Seller") via the "WeChat" mobile application. The duty unpaid cigarettes were sold by the Seller at $39 to $50 per carton depending on the brand of cigarettes, or at a bulk order price of $39 per carton with a minimum order of ten cartons.[4]

7 After completing his first purchase with the Seller, the appellant started consolidating orders for such cigarettes from three of his friends. He set up a "WhatsApp" group chat named "Stock Up" with these three friends in it to facilitate communication relating to their orders from the Seller. The appellant charged his friends $50 per carton of cigarettes that he obtained from the Seller.

8 The appellant would first inform his friends of the cigarette variants being sold. The appellant's friends would then place their orders and make payment to him. After the appellant placed the order for himself and his friends with the Seller on WeChat, the Seller would arrange for the order to be delivered to the appellant by an unknown person. After the cigarettes were delivered, the appellant informed his friends to collect them from his residence.[5]

9 On the afternoon of 9 October 2020, the appellant ordered C1 from the Seller, which consisted of 12 cartons of 200 sticks of Texas 5 cigarettes. C1 was a consolidated order for the appellant and his friends. On 10 October 2020, at

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4 Statement of Facts ("SOF") at para 3: ROP at p 8.

5 SOF at para 3: ROP at p 9.

or about 6.00pm, the appellant was informed by a phone call that C1 would be delivered to him at Block 122 Bukit Batok Central, Singapore, at about 7.00pm. At about 7.07pm, the appellant met up with the delivery man, later established to be one Chan Choon Kuin ("Chan"), collected C1 from Chan and kept it in a red plastic bag. The appellant handed Chan $468. After the appellant and Chan parted ways, customs officers moved in to detain the appellant and Chan.[6] Chan was detained. The appellant attempted to flee whilst still carrying the red plastic bag containing C1. The appellant was eventually apprehended and C1 was recovered from him.[7]

10 The appellant admitted to knowledge and ownership of the duty unpaid cigarettes found, and further admitted that he had just received C1 from Chan.[8] He also knew that the excise duty and GST leviable on C1 were unpaid at the time of the offences. C1 contained 2.180kg of cigarettes. The excise duty leviable on C1 was $1,024.80. The GST leviable on the same was $82.98.[9]

11 In light of the amount of duties evaded, under s 128L(4) of the Customs Act, as regards the Excise Duty Charge, the available punishment was:

(a) a fine ranging from $15,372 to $20,496 (*ie*, 15 to 20 times the amount of excise duty as stated in ss 128L(4)(*a*)(i) and 128L(4)(*a*)(ii) respectively);

(b) imprisonment for a term not exceeding three years (s 128L(4)(*b*)); or

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6 SOF at para 4: ROP at p 9.

7 SOF at para 2: ROP at p 8.

8 SOF at para 2: ROP at p 8.

9 SOF at paras 5–6: ROP at p 9.

(c) both.

12 As regards the GST Charge, the available punishment was:

(a) A fine ranging from $1,244.70 to $10,000 (*ie*, 15 times the amount of tax evaded to the upper limit set out in s 128L(4)(*a*)(ii) Customs Act);

(b) imprisonment for a term not exceeding three years; or

(c) both.

13 The appellant did not have any similar antecedents.[10]

14 For completeness, on appeal, the appellant submitted that certain parts of the Statement of Facts were wrong.[11] For instance, he claimed that the cost of each carton of cigarettes, when purchased in bulk from the Seller, was not fixed at $39 and that the WhatsApp group was not set up by himself.[12] But, when queried as to whether an application to adduce further evidence on appeal was being made, his counsel agreed to "move on from this, and … not [to] belabour this point further".[13] I therefore proceeded on the basis that these new facts could *not* be relied on in the appeal.

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10 GD at [8], [14]: ROP at p 49.

11 Notes of Evidence for 19 May 2021 ("NE (MA)") at pp 3–4; AS at paras 2–3, 5.

12 NE (MA) at p 3, lines 3–22.

13 NE (MA) at p 4, lines 20–22.

Decision below

15 To recapitulate, the DJ imposed nine weeks' imprisonment for the Excise Duty Charge and one week's imprisonment for the GST Charge, and ordered both sentences to run concurrently.

16 The DJ applied the sentencing benchmarks set out by Chan Seng Onn J in *Pang Shuo* (at [26], [49]) for offences under s 128H (for, *inter alia*, unloading uncustomed goods).[14] Chan J had generally adopted Sundaresh Menon CJ's sentencing benchmarks for offences under s 128F of the Customs Act (importation of uncustomed goods) set out in *Yap Ah Lai* at [46] with slight adjustments (see *Pang Shuo* at [48]). Menon CJ's sentencing benchmarks in *Yap Ah Lai* at [46] are a graduated scheme that cross-reference the quantity of tobacco with the duration of the imprisonment term that can be expected to be imposed as a starting point:

Quantity of tobacco product (kg)	**Sentencing range (months)**
2–50	3–6
51–100	6–12
101–200	12–18
201–300	18–24
301–400	24–30
> 400	30–36

[14] GD at [18], [23(a)]: ROP at pp 54, 56.

These benchmarks in *Yap Ah Lai* are for first-time offenders who plead guilty at the earliest opportunity and whose roles are limited to pure importation (at [57(c)]).

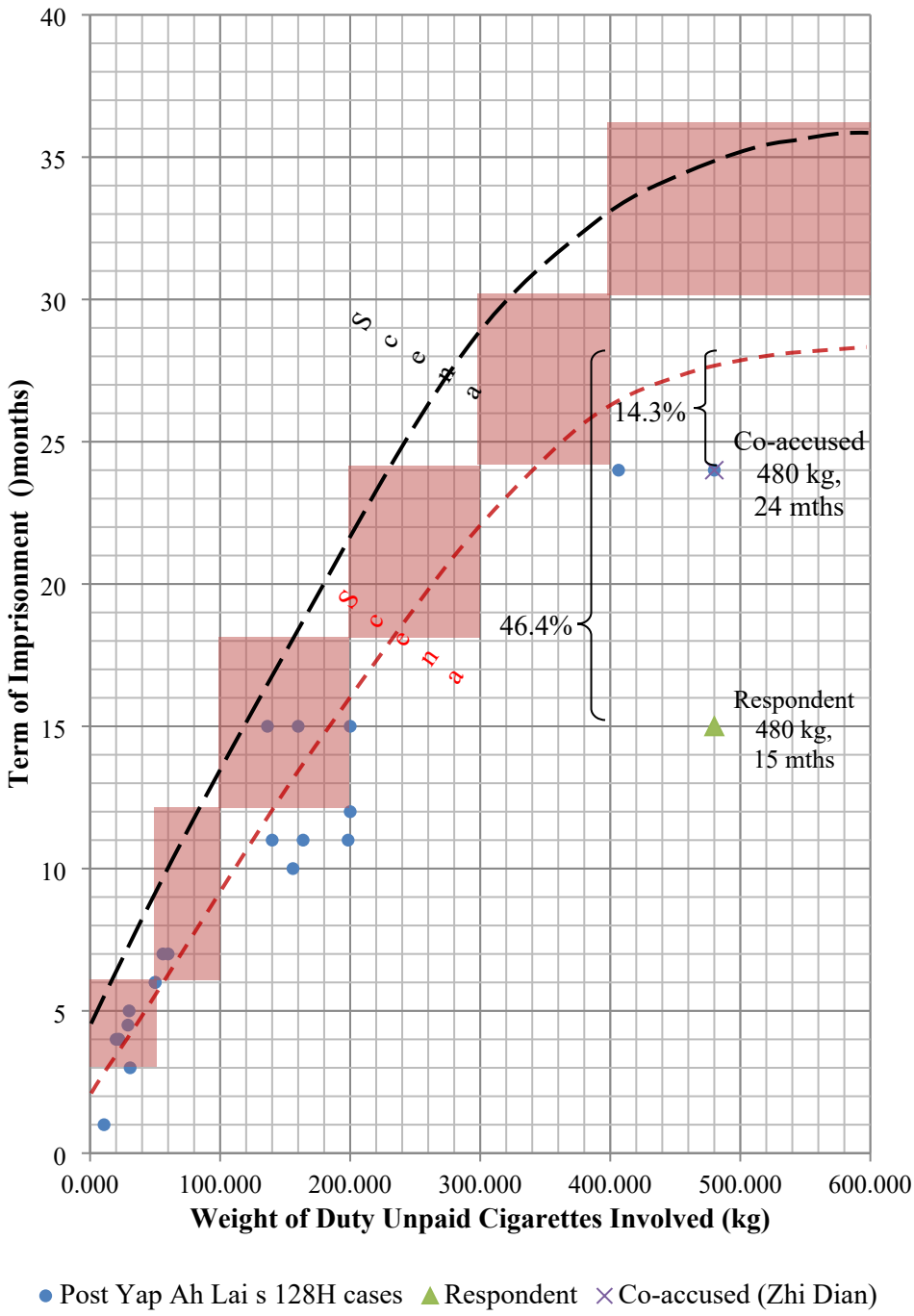
17 Chan J adjusted the sentencing benchmarks in *Yap Ah Lai* slightly to take into account the broader aspects of various possible physical roles that could be played by a paid worker in the whole chain of a typical cigarette smuggling operation on behalf of a syndicate and the impact of a timely guilty plea in the standard case (*Pang Shuo* at [48(c)]). He also outlined two likely scenarios under ss 128H and 128F of the Customs Act which offenders may fall into and plotted respective sentencing curves for these scenarios (*Pang Shuo* at [45] and [49]). I reproduce the DJ's tabulated comparison of Scenarios 1 and 2 as described in *Pang Shuo* at [46]–[47]:[15]

Scenario 1: standard/archetypal offender	**Scenario 2**
First time offender who is not a youthful offender	First time offender who is not a youthful offender
Performing a physical role in a cigarette smuggling operation as a paid worker but with no management control or profit share in the syndicate.	Performing a physical role in a cigarette smuggling operation as a paid worker but with no management control or profit share in the syndicate.
Pleads guilty at the earliest opportunity	Claims trial and shows no remorse

[15] GD at [16]: ROP at pp 52–53.

18 The DJ then set out the graph in *Pang Shuo* (at [49]) which depicted Chan J's sentencing benchmarks. The red shaded areas represented Menon CJ's benchmarks in *Yap Ah Lai*:

Graph 3: Benchmark Sentences for Offences under ss 128F and 128H Customs Act



19 The DJ found that the appellant's situation fell "largely" within Scenario 1 of *Pang Shuo* and that the starting position was two months' imprisonment. This was also the sentence imposed on Chan.[16]

20 However, the DJ considered the appellant to be more culpable than Chan. This was because the appellant played a "distinctly more involved and significant role than [Chan] in his dealings with the duty unpaid cigarettes, and was not merely a paid worker."[17] The DJ highlighted that:

> (a) On previous occasions, the appellant was the middleman between his friends and the Seller – he had set up the WhatsApp Group with his friends inside, consolidated orders for his friends via the WhatsApp group and liaised with the Seller on WeChat to obtain the cigarettes. He also informed his friends when to proceed to his residence to collect the cigarettes. In the present offences, the appellant similarly acted as the middleman;[18]
>
> (b) The appellant appeared to profit from the difference in the amounts he paid the Seller for the cigarettes and the amount he charged his friends for the same.[19] He also secured cheaper cigarettes through his endeavours.

The DJ therefore imposed an uplift on the appellant's sentence.[20]

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16 GD at [18]: ROP at p 54.

17 GD at [19]: ROP at p 54.

18 GD at [19(a)]–[19(c)]: ROP at pp 54–55.

19 GD at [19(d)]: ROP at p 55.

20 GD at [20]: ROP at p 55.

21 In arriving at his sentencing decision, the DJ also considered the mitigating factors raised by the appellant (plea of guilt and family hardship) and post-*Pang Shuo* precedents.[21]

The parties' cases on appeal

Appellant's submissions

22 First, the appellant submitted that the DJ erred in applying the sentencing framework in *Pang Shuo*. He argued that the benchmarks in *Pang Shuo* did not account for situations where a person was charged for one of the specified offences (*ie*, ss 128D–128K, as defined in s 128L(7)) but was not a paid worker acting on behalf of a smuggling syndicate, as in the case at hand.[22] According to him, applying those benchmarks to this case was wrong in principle. The appellant sought for the benchmarks in *Pang Shuo* to be "further developed and or [*sic*] calibrated" for situations where the accused was not running his own syndicated operation but was merely an end-consumer.[23]

23 Second, the appellant submitted that the DJ was "wrong in principle" to find that he was more culpable than Chan.[24] For one, the appellant was an end-consumer of the duty unpaid cigarettes and not a paid worker in a smuggling syndicate like Chan.[25] Further, the appellant denied having resold duty unpaid cigarettes to his friends for profit. He claimed he only earned "tens of dollars",

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21 GD at [21]–[22]: ROP at pp 55–56.

22 Appellant's submissions dated 9 May 2021 ("AS") at paras 11, 24.

23 AS at para 50.

24 AS at para 26.

25 AS at para 29.

not "hundreds of dollars", which was a goodwill gesture extended by his friends to compensate him for his efforts.[26]

24 The appellant also argued that Chan was more culpable than him because Chan was not only paid to work for the syndicate, but also performed more roles in the criminal enterprise.[27] This was evidenced by the other charges under s 128H that were brought against Chan for a larger quantity of duty unpaid cigarettes found in his vehicle pending delivery.[28] Accordingly, the appellant asked for a downward calibration of his sentence.[29]

25 He submitted that the starting point for his case should be a fine because of his low "culpability".[30] Among other reasons, he had not acted to resell the cigarettes for profit and he was merely an "end-consumer".[31] He argued for a downward calibration of the sentencing framework in *Pang Shuo*, which was designed for an accused person who played "a **physical role** in the cigarette smuggling operation **as a paid worker**" [emphasis in original in bold].[32] It was his case that the sentence imposed by the DJ was disproportionate to his criminality.[33]

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26 AS at para 35.

27 AS at para 43.

28 AS at para 43; Sentencing precedents referred to in plead guilty mention before DJ: ROP at p 62.

29 AS at para 45.

30 AS at para 52.

31 AS at paras 51; NE (MA) at p 6, line 22.

32 AS at para 52.

33 AS at para 54(3).

Respondent's submissions

26 The respondent submitted that the sentencing frameworks in *Yap Ah Lai* and *Pang Shuo* were relevant and applicable under s 128I of the Customs Act – the reasons for which Chan J in *Pang Shuo* extended the sentencing framework for s 128F in *Yap Ah Lai* to s 128H applied equally to justify extension of the same to s 128I.[34] Those reasons were as follows:

(a) s 128I of the Customs Act addressed the same two evils involved in customs offences as ss 128F and 128H: the loss of revenue to the Government and the consumption of harmful goods;

(b) In the Customs Act (Cap 70, 1995 Rev Ed) ("Customs Act 1995"), s 128I was subject to the same punishment provision as the predecessor of ss 128F and 128H. Under the Customs Act in force at the time of the offences, s 128I continued to be subject to the same penalty regime as ss 128F and 128H. This suggested that the legislative intention was for ss 128I, 128F and 128H of the Customs Act to be treated with equivalency.[35]

(c) There was no juridical basis to differentiate between ss 128I and 128H of the Customs Act. Much like how it was entirely fortuitous that an offender is caught importing instead of unloading the duty unpaid goods, it was equally fortuitous that an offender was caught dealing with the duty unpaid goods instead of unloading the duty unpaid goods. The different physical acts involved in the chain of smuggling should not be the basis on which the culpability of the offender is differentiated.[36]

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34 Respondent's submissions dated 10 May 2021 ("RS") at para 20.

35 RS at paras 19(b), 20(b).

36 RS at paras 19(c), 20(c).

27 The respondent recognised that the appellant was not a paid worker, unlike the archetypal offender in Scenario 1 in *Pang Shuo*.[37] However, it argued that Chan J's graph in *Pang Shuo* remained relevant because the primary factor to be considered in *Yap Ah Lai* and *Pang Shuo* was the quantity of cigarettes involved.[38] The respondent therefore argued that the DJ was right to find that Scenario 1 applied, and that dealing with 2.180kg of duty unpaid cigarettes attracted a starting point of two months' imprisonment.[39]

28 The respondent further submitted that the appellant was more culpable than Chan. The DJ was therefore right to impose a higher sentence on the appellant. According to the respondent, an offender who ran a one-man operation was far more culpable than a low-level paid worker involved in the smuggling of duty unpaid cigarettes on behalf of a syndicate due to his higher level of ownership and control over the operation.[40] On the facts, the respondent characterised the appellant as the coordinator, purchaser and distributor of duty unpaid cigarettes in a one-man operation.[41] In contrast, the respondent saw Chan as a low-level member of a syndicate with no oversight or managerial functions.[42]

29 Finally, the respondent submitted that the DJ's finding that the appellant offended for monetary benefit was correct. It dismissed the appellant's suggestion that he purchased the cigarettes as a "personal favour" to his friends

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37 RS at para 26.

38 RS at para 26.

39 RS at para 27.

40 RS at para 29.

41 RS at para 31.

42 RS at para 30.

as an afterthought which was contradicted by the evidence.[43] Namely, the respondent highlighted that the appellant charged his friends a mark-up of almost 30% on each carton of cigarettes. Further, given he had been purchasing cigarettes from the Seller for a year before his arrest (since October 2019), and the fact that the Appellant earned at least $11 on each carton of duty unpaid cigarettes he sold to his friends, it was likely that the appellant understated his profits.[44] Even if the appellant was performing a personal favour for his friends, the respondent urged that this was a neutral factor in sentencing and not a mitigating factor.[45]

Issues to be determined

30 In light of the foregoing, the following issues arise for my determination:

(a) Whether the sentencing framework in *Pang Shuo* should apply to offences under s 128I(1)(*b*) of the Customs Act, punishable under s 128L(4) of the same Act.

(b) Whether the appellant was more culpable than Chan.

Whether the sentencing framework in *Pang Shuo* was applicable to offences under s 128I(1)(*b*) of the Customs Act, punishable under s 128L(4) of the same Act

31 I agreed with the respondent that the sentencing framework in *Pang Shuo* should be applied to offences under s 128I(1)(*b*), punishable under s 128L(4) of the Customs Act. I saw no reason to differentiate the magnitude of the penalty imposed on different acts in the chain of steps that form the

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43 RS at para 34.

44 RS at para 36.

45 RS at para 35.

composite act of cigarette smuggling. Dealing with smuggled cigarettes under s 128I(1)(*b*), like importation under s 128F and unloading under s 128H, was merely one of several steps in this chain. I elaborate.

32 First, it was plain to me that the offences under ss 128F, 128H and 128I(1)(*b*) targeted the same evils: the loss of revenue to the Government and the offence against the public policy and interest in reducing the consumption of harmful goods by raising their cost to the user (*Yap Ah Lai* at [23]). This being the case, I was unable to see why different sentencing benchmarks should apply depending on which act, in the chain of cigarette smuggling, the offender was charged with. General deterrence applied equally to each link in the chain.

33 Second, I accepted that the legislative history of the offences of dealing with uncustomed goods, and importing and unloading such goods, suggested that these offences were to be treated equivalently in sentencing (before adjusting for other aggravating and mitigating factors). In the Customs Act 1995, importing and unloading (in s 130(1)(*a*)) and dealing with uncustomed goods (in s 130(1)(*d*)), among other offences, were punishable under ss 130(1)(i) and 130(1)(ii):

> **Penalty for various offences**
>
> **130.**—(1) Whoever —
>
> > (*a*) is concerned in ***importing*** or exporting, or ships, unships, loads, ***unloads***, lands or delivers or assists or is concerned in the shipping, unshipping, landing or delivery of, any uncustomed or prohibited goods whether the goods are shipped, unshipped, loaded, unloaded, landed, delivered or not;
> >
> > …
> >
> > (*d*) is in any way concerned in conveying, removing, depositing or ***dealing*** with any dutiable, uncustomed or prohibited goods with intent to defraud the Government

> of any customs duties thereon, or to evade any of the provisions of this Act or any order or regulations made thereunder;
>
> …
>
> shall for any such offence be liable —
>
> (i) on the first conviction to a fine of not less than 10 times the amount of the customs duty or tax or $5,000 whichever is the lesser amount, and of not more than 20 times the amount of the customs duty or tax or $5,000 whichever is the greater amount:
>
> Provided that when the amount of customs duty cannot be ascertained the penalty may amount to a fine not exceeding $5,000; and
>
> (ii) on the second or subsequent conviction to such fine or to imprisonment for a term not exceeding 2 years or to both.
>
> [emphasis in original in bold; emphasis added in bold italics]

34 Even the enhanced penalties enacted in ss 130(1)(iii) and 130(1)(iv) of the Customs Act 1995, for offences involving tobacco products exceeding 2kg in weight, applied across the board for all offences under s 130 of the Customs Act 1995 in equal measure (*Pang Shuo* at [19]). These enhanced penalties were enacted through the Customs (Amendment) Act 1996 (Act 24 of 1996), s 14(*b*):

> (iii) where the goods consist wholly or partly of tobacco products and such tobacco products exceed 2 kilogrammes in weight — [the person convicted shall] on the first conviction [be liable] to both a fine of not less than 15 times the amount of the customs duty or tax and not more than 20 times the amount of the customs duty or tax or $10,000, whichever is the greater, and to imprisonment for a term not exceeding 3 years; and
>
> (iv) where the goods consist wholly or partly of tobacco products and such tobacco products exceed 2 kilogrammes in weight — [the person convicted shall] on the second or subsequent conviction [be liable] to both a fine of not less than 30 times the amount of the customs duty or tax and not more than 40 times the amount of the customs duty or tax or $20,000, whichever is the greater, and to imprisonment for a term not exceeding 6 years.

35 In other words, as Chan J observed, in the Customs Act 1995, "Parliament thus appears to treat the various acts in the chain with equivalency" (*Pang Shuo* at [19]).

36 In my view, this legislative intention carried through to the Customs Act in force at the time of the offences. This is because even after the reorganisation of the various offences in s 130(1) of the Customs Act 1995 into discrete sections, there was again no differentiation made to the magnitude of the penalties (*ie*, the minimum/maximum fines and the maximum imprisonment terms) prescribed under ss 128L(4), 128L(5) and 128L(5A) for importing (an offence under s 128F), unloading (an offence under s 128H) and dealing with uncustomed goods (an offence under s 128I(1)(*b*)). The relevant provisions, with the exception of ss 128I(1)(*b*) and 128L(4) which are found at [1]–[2] above, are reproduced below:

> **Offences in relation to importation of uncustomed or prohibited goods**
>
> **128F.** Any person who is in any way concerned in importing any uncustomed or prohibited goods shall be guilty of an offence.
>
> **Offences in relation to shipping, unshipping, loading, unloading, etc., of uncustomed or prohibited goods**
>
> **128H.** Any person who ships, unships, loads, unloads, lands or delivers, or who assists or is concerned in the shipping, unshipping, loading, unloading, landing or delivery of, any uncustomed or prohibited goods, whether or not the goods are shipped, unshipped, loaded, unloaded, landed or delivered, shall be guilty of an offence.
>
> **Penalty for various offences**
>
> **128L.** …
>
> (5) Where any person is convicted of a specified offence committed by him on or after the date of commencement of section 17(*d*) of the Customs (Amendment) Act 2011 involving

goods consisting wholly or partly of relevant tobacco products and he has been convicted on a previous occasion of —

(*a*) that or any other specified offence involving such goods; or

(*b*) any offence under the repealed section 130(1) in force immediately before 4th April 2008 involving such goods,

then he shall be liable to —

(i) a fine of —

(A) not less than 30 times the amount of the customs duty, excise duty or tax the payment of which would have been evaded by the commission of the first-mentioned specified offence, subject to a minimum of $2,000; and

(B) not more than 40 times the amount of the customs duty, excise duty or tax the payment of which would have been so evaded or $20,000, whichever is the greater amount; or

(ii) imprisonment for a term not exceeding 6 years,

or to both.

(5A) Notwithstanding subsection (5), where any person is convicted of a specified offence committed by him on or after the date of commencement of section 17(*d*) of the Customs (Amendment) Act 2011 involving goods consisting wholly or partly of relevant tobacco products exceeding 2 kilogrammes in weight and he has been convicted on a previous occasion of —

(*a*) that or any other specified offence involving goods consisting wholly or partly of relevant tobacco products exceeding 2 kilogrammes in weight; or

(*b*) any offence under the repealed section 130(1) in force immediately before 4th April 2008 involving goods

> consisting wholly or partly of relevant tobacco products exceeding 2 kilogrammes in weight,
>
> then he shall be punished with —
>
> (i) a fine of —
>
> (A) not less than 30 times the amount of the customs duty, excise duty or tax the payment of which would have been evaded by the commission of the first-mentioned specified offence, subject to a minimum of $2,000; and
>
> (B) not more than 40 times the amount of the customs duty, excise duty or tax the payment of which would have been so evaded or $20,000, whichever is the greater amount; and
>
> (ii) imprisonment for a term not exceeding 6 years.
>
> [emphasis in original in bold and italics]

37 The re-organisation of the offences in the Customs (Amendment) Act 2008 (Act 3 of 2008) was purely to facilitate comprehensibility, as opposed to creating separate sentencing schemes for different steps in the chain of cigarette smuggling (see *Pang Shuo* at [21]). Then Minister of State for Finance Mrs Lim Hwee Hua's comments on the re-classification were illuminating in this regard (*Singapore Parliamentary Debates, Official Reports* (22 January 2008) vol 84 at col 249):

> ***Simplification of penalty provisions and streamlining the enforcement regime***
>
> Sir, I shall now move on to the second category of amendments that *simplify and streamline* the current penalty provisions and the enforcement regime under the Customs Act.
>
> …
>
> ***Re-classifying customs offences***
>
> The next change relates to the re-classification of customs offences by mode of commission of the offences. This serves to streamline the various offences for *better comprehension*. There

> are *no changes to the penalties* levied on the offences. There are also *no substantive changes* in the scope of customs offences other than the consequential change to cater for the introduction of the composite licence.
>
> [emphasis in original in bold italics; emphasis added in italics]

38 Based on the foregoing, the courts should act in concert with this legislative intention to treat the mischief in question behind the different offences involved in the whole chain of "steps" in cigarette smuggling with equivalency (*Pang Shuo* at [22]).

39 Finally, I agreed with Chan J that *ceteris paribus*, the type of offending acts in the smuggling chain (want of any further details) should not have any serious bearing on the analysis that required a significant differentiation to be made to the extent of the culpability of a worker employed to carry out different physical stages of the smuggling activity involving the same quantity of uncustomed goods (*Pang Shuo* at [25]). Hypothetically, if a paid worker within a criminal smuggling enterprise was involved in every step of the chain, it is perhaps fortuitous that he or she was caught at one step, and not another. It was arbitrary to say that he was more culpable if apprehended at step X, but less culpable if apprehended at step Y. Equally, in my view, it was arbitrary to say that person A, charged with performing step X, was more culpable than person B who was charged with performing step Y. I saw no principled basis to distinguish the culpabilities of two offenders *purely* by looking at which step in the chain they were charged with performing. Instead, the culpability of offenders may be distinguished by examining other factors, such as further involvement in owning, managing and/or controlling the smuggling enterprise (*Pang Shuo* at [25]). In this regard, the factors identified by Menon CJ in *Yap Ah Lai* at [35] may also be relevant:

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

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

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

40 For all these reasons, I held that the sentencing benchmarks in *Pang Shuo*, albeit set out in relation to s 128H and adapted from Menon CJ's benchmarks for s 128F in *Yap Ah Lai*, were relevant and applicable under s 128I(1)(*b*) of the Customs Act.

The appropriate sentence in this case

41 Under the *Pang Shuo* framework, the key parameter informing the sentence as a starting point is the quantity of tobacco products involved in the offence (*Yap Ah Lai* at [35]). Because the appellant entered a plea of guilt, I agreed with the DJ and the respondent that Scenario 1 (as described in *Pang Shuo*) better represented the appellant's situation. Under Scenario 1, if the offence involved 2.180kg of duty unpaid cigarettes, the starting position for the appropriate sentence for the Excise Duty Charge was two months' imprisonment.

42 The appellant argued that he was less culpable than Chan[46] and that the starting position ought to be calibrated downward to a fine (see [24]–[25] above).[47]

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46 AS at para 43.

47 AS at para 52.

43 Therefore, the question I had to consider was whether the appellant's conduct in the offences caused his culpability to exceed Chan's. The answer to this question addressed (a) whether, notwithstanding the reasons at [31]–[40] above, the starting position for the sentences for both charges in this case should be calibrated downwards to a fine, and (b) if not, whether a stiffer sentence was warranted for the appellant as compared to Chan.

44 By way of an aside, although the appellant did not fall neatly within Scenario 1 in *Pang Shuo*, I agreed with the respondent[48] that this did not render the *Pang Shuo* framework inapplicable. The framework simply reflected the cases that made up the bulk of everyday sentencing practice. However, there was still room for upward and downward adjustments from the initial benchmarks to account for each particular case's facts and circumstances (*Pang Shuo* at [31]). The DJ's uplift of the appellant's sentence to account for his greater culpability over an archetypal offender like Chan, whose s 128I(1)(*b*) offence concerned the same quantity of duty unpaid cigarettes, is a prime example of an adjustment from the initial benchmark.[49] Accordingly, the pivotal question was whether the DJ was right in his assessment of the appellant's culpability in comparison to Chan's.

Whether the appellant was more culpable than Chan

45 I have summarised the DJ's reasons for finding that the appellant's culpability was greater than Chan's at [20] above. His full reasons may be found at [19] of his grounds of decision.

46 I was not prepared to disturb the DJ's finding in this regard.

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48 NE (MA) at p 15, lines 5–20.

49 ROP at p 62.

47 First, I agreed that the appellant "played a distinctly more involved and significant role than [Chan] in his dealings with the duty unpaid cigarettes".[50] Chan was merely a paid worker for a syndicate. The appellant accepted this.[51] However, in contrast, the appellant solely controlled and administered the arrangements he had put in place to procure duty unpaid cigarettes from the Seller and distribute them to his friends for *profit*. I discuss the issue of whether the appellant profited from his criminal activities in greater detail at [51]–[53] below.

48 Put another way, the appellant operated and controlled a distribution system for duty unpaid cigarettes in Singapore, albeit one of a small scale. The appellant was the one who set up the WhatsApp group to consolidate orders for cigarettes from his friends. He was responsible for informing them of the variants of cigarettes available and collecting payment from these friends. He also received the cigarettes from the Seller and informed his friends to collect the cigarettes from his residence. I therefore rejected the appellant's contention that he was merely an "end-consumer".[52] The DJ was entitled to regard the appellant's management of this distribution system as having elevated his culpability above Chan's.

49 The following illustration set out in *Pang Shuo* at [40] was also instructive because it confirmed that a person who ran a fairly large one-man smuggling operation should be *much* more culpable than a paid worker in a syndicate smuggling the same quantity of duty unpaid cigarettes:

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50 GD at [19]: ROP at p 54.

51 AS at para 26.

52 AS at para 50.

> … If the offender "X" runs that ***fairly large*** smuggling operation all ***by himself*** and is therefore not involved in any syndicate, is he to be considered more or less culpable in comparison with (a) a person "A" who is the mastermind and the main partner of a syndicate involved in smuggling the same quantity of 200kg of duty unpaid cigarettes; and (b) a person "B" who is a mere paid worker helping "A" with the physical loading, importation, delivery and/or subsequent unloading of the same quantity of 200kg of duty unpaid cigarettes on behalf of the syndicate? All other things being equal, it is my view that "X" should be regarded as less culpable than "A" because "X" is not involved in a syndicate, but "X" should be regarded as ***much*** more culpable than "B" despite the fact that "B" may be involved in the syndicate, because the culpability of "X" is much elevated due to the fact of "X"'s ownership and control over a ***large-scale*** smuggling operation, though not in a syndicate.
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> [emphasis in original omitted; emphasis added in bold italics]

50 Plainly, the appellant's distribution system fell short of being a "fairly large smuggling operation". I therefore did not think that the appellant's culpability was *much* higher than Chan's. However, the DJ did not go that far. He merely held that the appellant's role was "more elaborate" than Chan's, and that the former's sentence should reflect this increase in involvement and culpability.[53] It was not necessary for me to decide whether *all* offenders who ran one-man operations were more culpable than paid workers in syndicates with no management control or profit share. But, for the reasons explained at [47]–[48] above, on the facts of this case, the threshold for appellate intervention was not crossed as regards the DJ's finding that the appellant was more culpable than Chan.

51 Second, and to buttress my refusal to disturb the DJ's finding as regards the appellant's culpability, the DJ was also entitled to find that the appellant "profited from his enterprise".[54] This was another factor the DJ took into

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53 GD at [20]: ROP at p 55.

54 GD at [19(d)]: ROP at p 55.

consideration when determining that the appellant was more culpable than Chan.

52 The DJ did not err in fact by regarding the appellant as having profited from his criminal activities. As the DJ acknowledged, the appellant admitted to earning "tens of dollars" from his friends in his mitigation plea below.[55] The DJ did not speculate further as to whether the appellant earned more than merely "tens of dollars". In addition, the DJ rightfully pointed out that the appellant profited from consolidating orders from his friends in another respect – he enjoyed cost savings by ordering cigarettes in bulk from the Seller.[56] Without a bulk order of minimally ten cartons, the appellant would have had to pay $39 to $50 per carton of duty unpaid cigarettes. By placing a bulk order for himself and his friends, he instead enjoyed a rate of $39 per carton from the Seller. As such, even if the tens of dollars he earned from his friends was money given to him out of "goodwill", he still benefited from these cost savings.

53 As was stated by See Kee Oon JC (as he then was) in *Lee Chee Keet v Public Prosecutor* [2016] 4 SLR 1316 at [47], "[i]t is settled law that the commission of an offence for personal gain is generally an aggravating sentencing consideration." I doubted that the appellant set up the distribution system (where he consolidated orders from his friends) *purely* as a "personal favour for his friends".[57] As the respondent pointed out, if the appellant had acted purely out of charity, there would have been no need to charge his friends a marked up price for each carton of cigarettes.[58] Therefore, that he was

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55 GD at [19(d)]: ROP at p 55; Notes of Evidence for 23 November 2020 at p 3, line 30: ROP at p 38.

56 GD at [19(d)]: ROP at p 55.

57 NE (MA) at p 17, lines 18–19.

58 NE (MA) at p 17, lines 20–22.

motivated by the monetary benefits described above, or *at least* to secure cost savings for himself by consolidating bulk orders with his friends, elevates his culpability.

54 In these premises, I upheld the DJ's finding that the appellant's culpability was greater than Chan's. The appellant was not merely an end-consumer. Rather, he dealt with the duty unpaid cigarettes, in part, as a distributor. The need to generally deter the illicit distribution of duty unpaid cigarettes, which if left unchecked would amplify the evils described at [32], called for a custodial sentence. Thus, having regard to the benchmarks in *Pang Shuo*, and the weight of cigarettes involved in the charges, I agreed that two months' imprisonment was an appropriate starting point for the Excise Duty Charge. The appellant's submission that the starting point for his sentence was a fine because of his "low culpability" had no leg to stand on. Further, because the appellant was more culpable than Chan, a week's uplift to the sentence for the Excise Duty Charge, from the two months' imprisonment which Chan received for his s 128I(1)(*b*) charge involving 2.180kg of smuggled cigarettes, was fair and proportionate.

Conclusion

55 In summary, the DJ did not err in law or fact when sentencing the appellant. There were no grounds to find that the individual sentences for the Excise Duty Charge and GST Charge or global sentence of nine weeks' imprisonment were manifestly excessive.

56 For completeness, as intimated at [16] above, the sentencing benchmarks in *Pang Shuo* and *Yap Ah Lai* are not identical. However, whether one set of benchmarks should prevail over the other was not submitted on, nor was it, in my view, a relevant issue in this appeal. This was because the starting

position in *Yap Ah Lai* is three months' imprisonment (*ie*, a month higher than the starting position in *Pang Shuo* for Scenario 1). If the appellant's sentence was not manifestly excessive under the *Pang Shuo* framework, all the more the threshold for appellate intervention was not met under the *Yap Ah Lai* framework.

57 I therefore dismissed the appellant's appeal against his sentence.

Vincent Hoong
Judge of the High Court

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