Public Prosecutor
v
Hang Tuah bin Jumaat

[2016] SGHC 20

High Court — Magistrate's Appeal No 89 of 2015
Chao Hick Tin JA
11 November 2015

Criminal procedure and sentencing — Sentencing — Date of commencement

18 February 2016

Chao Hick Tin JA:

Introduction

1 The present magistrate's appeal was brought by the Prosecution against the decision of a district judge imposing a further term of four years and 11 months' imprisonment on the Respondent, Hang Tuah bin Jumaat, who was still serving a 12 year term of imprisonment, to commence *immediately* on the date of his sentence pursuant to s 322 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("s 322" and "CPC" respectively). Section 322 confers on the court the discretion, in cases such as this where a person undergoing a sentence of imprisonment is sentenced to a further term of imprisonment, to order the further sentence of imprisonment to commence either immediately or at the expiration of the imprisonment term to which he was previously sentenced. By preferring the former commencement date in this case, the district judge in the

court below effectively *subsumed* the further term of imprisonment within the 12 year term that had been imposed earlier. The Prosecution submitted on appeal that this was wrong in law as it essentially rendered the further term of imprisonment nugatory. The Prosecution's position was that the further term of imprisonment should have been ordered to commence only after the Respondent had completely served his then imprisonment term, which would have resulted in a total imprisonment term of 16 years and 11 months.

2 I heard the Prosecution's appeal on 11 November 2015 and allowed it, but I declined to enhance the overall sentence imposed on the Respondent to 16 years and 11 months as that would, in my view, be a crushing sentence. Therefore, although I ordered the further term of imprisonment to start at the *end* of the existing 12 year imprisonment sentence, I reduced it from four years and 11 months to two years. These grounds set out my reasons for doing so, and the approach I took in reaching that result.

Background facts

Offences for which 12 year imprisonment term was imposed

3 When the present case came before the district judge below, the Respondent was already in the midst of serving an imprisonment term of 12 years (in addition to 12 strokes of the cane). This constituted a global sentence that had earlier been imposed by the High Court on the Respondent in respect of two previous convictions – one was for an offence of rape under s 375(1)(*b*) and punishable under s 375(2) of the Penal Code (Cap 224, 2008 Rev Ed), and the other was for an offence of driving a lorry without a valid Class 4 driving licence under s 35(3) and punishable under s 131(2) of the Road Traffic Act (Cap 276, 2004 Rev Ed) ("RTA") (see *Public Prosecutor v Hang Tuah bin*

Jumaat [2013] SGHC 28 ("*Hang Tuah 1*")). The charges in respect of these two offences read as follows:

> That you, **Hang Tuah bin Jumaat**
>
> First Charge
>
> sometime between 6 pm on the 21st day of April 2010 and 12 am on the 22nd day of April 2010 in motor lorry bearing registration number YL 4802S, parked along a road near Kranji Camp, Singapore, did penetrate with your penis the vagina of one XXX (D.O.B. 15 September 1996), a woman then under 14 years of age, and you have thereby committed an offence under section 375(1)(b) punishable under section 375(2) of the Penal Code, Chapter 224.
>
> Second Charge
>
> between 5 pm on the 21st day of April 2010 and 12 am on the 22nd day of April 2010 from Sungei Kadut and to a road near Kranji Camp, Singapore, did drive motor lorry bearing registration number YL 4802S when you were not a holder of a valid Class 4 driving licence, and you have thereby contravened section 35(1) and committed an offence under section 35(3) punishable under section 131(2) of the Road Traffic Act, Chapter 276.

4 The brief facts giving rise to the two offences were these. On 21 April 2010, the Respondent's wife saw him drive motor lorry YL 8178J from the car park at their flat in Boon Lay Drive. At his employer's premises at Sungei Kadut, the Respondent then switched this lorry for a bigger one bearing registration number YL 4802S.

5 With this bigger vehicle, the Respondent picked up the victim (*ie*, the victim mentioned in the first charge) and her former boyfriend, Ramdan, and drove them to a road near Kranji Camp. The Respondent did not have a valid licence to drive the bigger lorry (YL 4802S) and this formed the subject of the second charge. While parked along a road near Kranji Camp, the Respondent, Ramdan and the victim started drinking vodka and orange. Eventually, the

victim became drunk and the Respondent raped her. This formed the subject of the first charge. Subsequently, the Respondent drove Ramdan and the victim back to Boon Lay Drive and told the latter to sleep in the lorry. The Respondent also gave her $5. The next morning, on 22 April 2010, the victim went straight to school. The victim was questioned by her school teacher who had, by then, been approached by the victim's mother and aunt because the victim did not return home the night before. The victim recounted what had happened in response to her teacher's questions and, consequently, the police were called. The victim underwent a medical examination which showed that she had a hymenal tear. Her clothing was also taken for forensic examination and this showed that DNA belonging to the Respondent was found on various articles of her clothing, including her skirt, shorts and brassiere.

6 The Respondent claimed trial to both charges. He was unrepresented at the trial and ran his own defence claiming that, in so far as the rape charge was concerned, he was at home at the time of the alleged offence. However, the trial judge did not believe his claim. The trial judge was satisfied on the evidence that the Prosecution had proven its case beyond reasonable doubt in respect of both offences and duly convicted the Respondent (see *Hang Tuah 1* at [5]).

7 Prior to sentencing the Respondent, the trial judge observed that the Respondent also faced several other charges comprising a mix of sexual offence charges and charges under the RTA. In response to a query from the trial judge as to how these remaining charges were to be dealt with, the Deputy Public Prosecutor replied that he would have to take instructions on what offer could

be made to the Respondent.[1] The trial judge, however, was concerned that the Respondent might not be able to understand the full consequences of whatever offer was made to him and so adjourned the hearing on sentence for the Respondent to obtain legal representation through the Law Society.[2] Mr Gopinath Pillai and Mr Aloysius Tan of Messrs Tan Jin Hwee LLC were duly appointed to represent the Respondent and, in spite of their legal advice, the Respondent declined to have the remaining charges taken into consideration for the purposes of sentencing (see *Hang Tuah 1* at [5], reproduced at [15] below).

8 On 1 November 2012, the Respondent was duly sentenced in respect of the two aforementioned charges. A sentence of 12 years' imprisonment and 12 strokes of the cane was imposed for the offence of rape while a sentence of two months' imprisonment was imposed for the offence of driving without a valid licence. The two sentences were ordered to run concurrently. The 12 year imprisonment term was backdated to take effect from the date of the Respondent's first remand, *ie*, 24 April 2010.

9 The Respondent appealed against the sentence but this was dismissed by the Court of Appeal on 30 April 2013. No written grounds of decision were issued.

---

1 Day 6 of Notes of Evidence in Record of Proceedings (vol 1) of Criminal Appeal No 11 of 2012 at p 16 lines 4–16.

2 Day 6 of Notes of Evidence in Record of Proceedings (vol 1) of Criminal Appeal No 11 of 2012 at p 16 line 17 to p 17 line 5.

Offences for which further imprisonment term of four years 11 months was imposed

10 Out of the multiple charges which remained outstanding against the Respondent, the Prosecution next proceeded against him on one charge of sexual penetration of a minor under s 376A(1)(*a*), punishable under s 376A(2) of the Penal Code (District Arrest Case No 35746 of 2011 ("DAC 35746/2011")). The Respondent claimed trial to this charge which read as follows:

> You are charged that you, on 7 October 2009 at the 8th floor staircase landing of Blk 188 Boon Lay Drive, Singapore, did penetrate with your penis, the vagina of one XXX (Date of Birth: 14 February 1995), a female then under 16 years of age, and you have thereby committed an offence under Section 376A(1)(a) and punishable under Section 376A(2) of the Penal Code, Chapter 224 (2008 Rev Ed).

11 The trial was heard in the District Court over four days in April 2015. The Respondent was unrepresented. At the conclusion of the trial, the district judge was of the view that this was "an open and shut case" as the evidence against the Respondent was "overwhelming and incontrovertible" (see *Public Prosecutor v Hang Tuah bin Jumaat* [2015] SGDC 163 ("*Hang Tuah 2*") at [3]). In this regard, the evidence showed that, on 7 October 2009, the Respondent had met the female victim, aged 14 years and eight months then, at the corridor near her home. He accused her of sniffing glue. The victim denied doing so. The Respondent then proceeded to carry her up a flight of stairs to a staircase landing where he forcibly had sex with her against her will. The victim was sent for medical examination and sperm DNA belonging to the Respondent was found on the vaginal swab. This scientific evidence was unchallenged by the Respondent who, in his defence, could only muster a bare denial that he did not have sex with the victim. Satisfied that the charge of sexual penetration had

been made out on the evidence, the district judge convicted the Respondent accordingly.

12 At the conclusion of the trial before the district judge, and prior to sentencing the Respondent, the Prosecution again made the latter an offer regarding his remaining charges, of which there were 17 altogether. On this occasion, the Respondent accepted the Prosecution's offer as follows (see *Hang Tuah 2* at [11]):

(a) The Respondent pleaded guilty to five charges consisting of:

(i) four charges of driving without a valid driving licence under s 35(1), read with s 35(3) and punishable under s 131(2) of the RTA; and

(ii) one charge of possession of obscene videos punishable under s 30(2)(*a*) of the Films Act (Cap 107, 1998 Rev Ed).

(b) In addition, the Respondent also gave his consent for four charges of driving without a valid licence under s 35(1), read with s 35(3) and punishable under s 131(2) of the RTA, to be taken into consideration for the purposes of sentencing.

(c) As for the final eight charges, which pertained to sexual offences, the Prosecution applied to withdraw them. As a result, the district judge granted the Respondent a discharge amounting to an acquittal in respect of these eight charges.

13 On 29 May 2015, the district judge sentenced the Respondent as follows in respect of the proceeded charges:

(a) four years eight months' imprisonment for the charge of sexually penetrating a minor;

(b) two months' imprisonment, in addition to three years' disqualification from driving all classes of vehicles, for each of the four charges of driving without a valid licence; and

(c) one month's imprisonment for the charge of possession of obscene videos.

14 Three of the imprisonment sentences, one from each category of the above offences, were ordered to run consecutively while the rest of the imprisonment sentences were ordered to run concurrently. In this way, the total imprisonment sentence imposed on the Respondent was four years and 11 months.

15 As mentioned at the outset of these grounds of decision, the district judge could have, in exercising his discretion under s 322 of the CPC, ordered that this sentence of four years 11 months commence either immediately or at the expiry of the previous 12 year imprisonment sentence which had been imposed in *Hang Tuah 1*. The district judge preferred the former option, citing, in this vein, the following observation which was made by the High Court in *Hang Tuah 1* (at [5]) when sentencing the Respondent to 12 years' imprisonment:

> … [T]here were some complications in this case which might be due to the fact that the accused was not represented until it became obvious that he required advice, which, of course, must come only from defence counsel. The complications concerned the other charges which the accused, in spite of legal advice, declined to have this court take into consideration for the purposes of sentencing. Consequently, he will have to face trial and if convicted <u>may result</u> in him having to serve a far longer

> time in prison than he would have had he agreed to have the other offences dealt with in this court. All that was rendered academic and speculative given his decision. [original emphasis in underline]

16 The district judge in *Hang Tuah 2* stated (at [14]) that he "shared the same concerns" as the High Court in *Hang Tuah 1* in that, if he were to order the further sentence of four years and 11 months imprisonment to begin only at the expiry of the previous 12 year imprisonment term, this would result in an overall imprisonment term of 16 years and 11 months, which he considered as having a "crushing" effect on the Respondent. The district judge noted (at [15]) that, on one view, there was little sympathy for the Respondent who was "so foolishly stubborn" as to decline the offer made at the hearing in *Hang Tuah 1* that he should consent to having the court take into consideration his remaining outstanding charges for the purposes of sentencing. Nevertheless, the district judge was willing to give the Respondent the benefit of the doubt by observing (at [14]) that the latter "either could not or did not appreciate what he was up against" even though, as he observed, the Prosecution had an "ironclad case" against the Respondent in so far as the charge for sexually penetrating a minor was concerned.

17 Based on these considerations, the district judge ordered the imprisonment term of four years and 11 months' imprisonment to commence immediately from the date of sentencing itself, *ie*, 29 May 2015. In practical terms, this meant that the said imprisonment term was wholly *subsumed* or effectively ordered to run *concurrently* with the previous imprisonment term of 12 years. Indeed, the Singapore Prisons Service had confirmed with the Prosecution in these proceedings that the Respondent's earliest date of release in so far as his imprisonment term in *Hang Tuah 1* is concerned is 13 May 2018

and, further, that this remains unchanged with his subsequent conviction and sentence by the district judge in *Hang Tuah 2*.[3]

18 On 8 June 2015, the Prosecution filed its notice of appeal against the district judge's decision in ordering the sentence of 4 years and 11 months' imprisonment to commence on 29 May 2015.

The present appeal

The central issue and the arguments on appeal

19 The central issue in this appeal was whether or not the district judge was correct in the exercise of his discretion under s 322 of the CPC. For ease of reference, I set out the relevant parts of s 322, which read:

> **Commencement of sentence of imprisonment on prisoner already undergoing imprisonment**
>
> **322.**—(1) Where a person who is an escaped convict or is undergoing a sentence of imprisonment is sentenced again to imprisonment, the latter sentence of imprisonment must begin either immediately or at the end of the imprisonment to which he was previously sentenced, as the court awarding the sentence directs.
>
> …
>
> (3) Nothing in subsection (1) may be held to excuse a person from any part of the punishment to which he is liable upon his former or subsequent conviction.

20 As mentioned earlier, the Prosecution, through its counsel Deputy Public Prosecutor Kavita Uthrapathy, broadly submitted that the district judge erred in law as his decision essentially rendered the further term of imprisonment nugatory. The Prosecution's position was that the further term of

---

[3] Appellant's Submissions dated 2 November 2015 at [31].

imprisonment should have been ordered to commence after the Respondent had served his existing imprisonment term, which would have resulted in a total imprisonment term of 16 years and 11 months.

21 The Respondent, who appeared in person, urged me not to disturb the district judge's decision. During the hearing of this magistrate's appeal, I also took the exceptional step of allowing the Respondent's mother to address me. She pleaded for leniency on the Respondent's behalf. I indicated in response that while I understood her sentiments perfectly in wanting her son to be released from prison as soon as possible, I had a duty, in the public interest, to ensure that a just sentence was meted out.

Legal principles on the exercise of the discretion under s 322(1)

22 Section 322(1) of the CPC confers on the court the discretion, in cases when a person who is an escaped convict or is undergoing a sentence of imprisonment is sentenced to a further term of imprisonment, to order the latter sentence of imprisonment to commence either (a) immediately or (b) at the expiration of the term of imprisonment to which he was previously sentenced. The effect of choosing the latter option will mean that the earlier sentence and the further sentence run consecutively (*Halsbury's Laws of Singapore* vol 8(2) (LexisNexis, 2015 Reissue) at para 95.187 at footnote 13), whereas choosing the former option will invariably involve an overlap in the earlier sentence and the further term of imprisonment.

23 Section 322(3) goes on to add that nothing in s 322(1) shall be held to excuse any person from any part of his punishment to which he is liable upon his former or subsequent conviction. I regard s 322(3) as no more than a clarifying provision since, under s 322(1), the court could in an appropriate case

order the later sentence to run immediately – the effect being that, to an extent, the two sentences are to run concurrently (see also [42] and [43] below).

24 What is now s 322(1) of the CPC was formerly s 234(1) of the 1985 edition of the CPC (Cap 68, 1985 Rev Ed) ("s 234(1)"). Obviously whatever principles enunciated by the courts in past cases in relation to s 234(1) remain relevant and applicable for s 322(1) as the two provisions are almost identical. Section 234(1) reads:

> When a person who is an escaped convict or is undergoing a sentence of imprisonment is sentenced to imprisonment the latter sentence shall commence either immediately or at the expiration of the imprisonment to which he was previously sentenced as the court awarding the sentence directs.

25 First, the discretion conferred under s 234(1) must undoubtedly be exercised judiciously (*Tham Wing Fai Peter v Public Prosecutor* [1989] 1 SLR(R) 400 ("*Peter Tham*") at [13]).

26 Second, the court is not entitled to backdate the sentence of any offender who is an escaped convict or is undergoing a sentence of imprisonment (*Chua Chuan Heng Allan v Public Prosecutor* [2003] 2 SLR(R) 409 at [18], *per* Yong Pung How CJ).

27 Third, in deciding whether to order a subsequent term of imprisonment to run immediately or at the expiration of the earlier term of imprisonment, the court should have regard to whether the subsequent offence(s) arose in the "same transaction" as the earlier offence(s), and also the totality of the sentence to be served (*Teo Kian Leong v Public Prosecutor* [2002] 1 SLR(R) 386 ("*Teo Kian Leong*") at [7] *per* Yong CJ, citing the decision of the Indian Supreme Court in *Mohd Akhtar Hussain v Assistant Collector of Customs* AIR (75(2))

1988 SC 2143 with approval). Conversely, the fact that the subsequent offence(s) arose in different transactions is a weighty consideration that warrants the imposition of an order that the subsequent term of imprisonment should start at the expiration of the earlier term of imprisonment.

28 In a similar vein, Yong CJ in *Nicholas Kenneth v Public Prosecutor* [2003] 1 SLR(R) 80 ("*Nicholas Kenneth*") opined at [21] that it was Parliament's intention in passing s 234(1) to give the courts the power to ensure that aggregate sentences that were imposed on an offender through multiple trials was reflective of the seriousness of the offences that formed the basis of subsequent trials when an offender was already serving a sentence. It is therefore not surprising that our courts have thus far, in line with the spirit of this third principle, exercised the discretion conferred under s 322(1) or its predecessor provision, s 234(1), by ordering the further term of imprisonment to commence at the expiration of the term of imprisonment to which he was previously sentenced.

29 I start first with *Peter Tham*, a previous decision of mine. There, the appellant dishonestly disposed of funds of a company, of which he was the chairman, to finance a client of the stockbroking company of which he was a director and major shareholder. He was convicted of criminal breach of trust under s 406 of the Penal Code (Cap 224, 1985 Rev Ed) and sentenced to two years' imprisonment, to commence at the expiration of an eight year imprisonment term to which he had previously been sentenced on his conviction on 36 charges of forgery. The statement of facts, which was admitted by the appellant, clearly described how he gained control of certain other companies and used their funds to finance the clients of the stockbroking company. Notwithstanding that these facts formed the basis of charges which were later

withdrawn by the Prosecution, the district judge took them into account when sentencing the appellant. The appellant appealed on grounds that the sentence was manifestly excessive and the district judge failed to exercise his discretion judiciously when he ordered the sentence to commence after the appellant had served his then-current sentence. The appeal was allowed in part, on the basis that the district judge had taken into account materials which had nothing to do with the charge. But the appeal in respect of the issue of commencement of sentence for the subsequent conviction was dismissed. I held that, as the present offence was dissimilar to the previous charges on which the appellant had been convicted, it was not wrong of the district judge to order the term of imprisonment for the present offence to take effect after the expiry of the current sentence (*Peter Tham* at [14] and [15]).

30 Another local case where the court ordered the subsequent sentence to start from the expiration of the earlier sentence is *Teo Kian Leong*. There, the appellant who was serving a 12 month term of imprisonment for offences relating to a number of share transactions, was sentenced to a further term of six months' imprisonment for similar charges. The trial judge ordered the six month sentence to commence at the expiration of the existing 12 month sentence, thus bringing the cumulative term of imprisonment to 18 months. The appellant appealed, contending that the trial judge had erred in the exercise of his judicial discretion when ordering the six month sentence to commence at the expiration of the existing sentence instead of immediately. His appeal was dismissed.

31 Similarly, in *Public Prosecutor v Goh Hum Boon* [2013] SGDC 354, the Prosecution preferred six charges against the defendant under the Misuse of Drugs Act (Cap 185, 2008 Rev Ed). The accused pleaded guilty to the proceeded third and fifth charges – for possession of methamphetamine, and for

consumption of methamphetamine, respectively. The four remaining charges were taken into consideration. The accused was sentenced to four years' imprisonment on the third charge, and five years six months' imprisonment on the fifth charge. The two sentences were ordered to run concurrently, making the total sentence five years six months' imprisonment. Prior to this, the defendant had been sentenced to 12 years' imprisonment for trafficking in diamorphine, and when he pleaded guilty, he was still serving his 12 year imprisonment term. The question that arose was whether the five years six months' imprisonment should be ordered to run immediately or only after the defendant had served the earlier 12 year imprisonment term. The district judge held that this term of imprisonment should run from the end of the initial sentence. The defendant appealed to the High Court against the decision of the district judge, and his appeal was dismissed in Magistrate's Appeal No 246 of 2013.

32 Another instance where the court ordered a later term of imprisonment to run at the expiration of the earlier sentence is *Abdul Nasir bin Amer Hamsah v Public Prosecutor* [1997] 2 SLR(R) 842 ("*Abdul Nasir*"), a decision of our Court of Appeal. There, the appellant was charged for kidnapping, an offence committed during his attempted escape from the police lock-up and during which he held a prison officer hostage. He was convicted and sentenced to life imprisonment and 12 strokes of the cane. At the time the appellant was sentenced for the kidnapping charge, he had already been convicted on a separate charge of robbery with hurt and sentenced to 18 years' imprisonment and 18 strokes of the cane. The trial judge ordered the life imprisonment term for kidnapping to commence only upon the expiration of the sentence for the appellant's earlier offence of robbery with hurt. The appellant appealed, contending that the judge had exercised his discretion erroneously in ordering

his life sentence to run consecutively to his previous imprisonment term of 18 years, instead of concurrently, in which case he would effectively serve only 20 years' imprisonment. The court held that "life imprisonment" meant imprisonment for the remaining natural life of the prisoner, and ordered it to start from the expiry of the sentence for robbery. Yong CJ, delivering the judgment of the court, held at [68]:

> In our view, the trial judge would have erred had he ordered the present sentence to run immediately since the appellant would effectively not have to suffer the consequences of the second conviction, and he might feel justified in making similar attempts. *It was necessary to send a deterrent message to prisoners that they would have to pay a heavy price should they attempt to escape from custody, especially by holding prison officers as hostages. A concurrent sentence might encourage other prisoners with long imprisonment terms to make similar attempts since they would, in effect, escape punishment for such actions.* [emphasis added]

33 The fourth principle on the exercise of the discretion under s 322(1) of the CPC is this: the court ultimately has a primary duty to determine the appropriate sentence which would best ensure that the ends of justice are met. No single consideration can conclusively determine the proper sentence and, in seeking to arrive at the proper sentence, the court must balance many factors, sometimes rejecting some. One factor that the court should consider is whether the totality of the sentence served is proportionate to the inherent gravity of all the offences committed by the accused. Hence, while the individual sentence for a particular offence may be perfectly appropriate, the cumulative effect of the sentences may well result in a total term of imprisonment that is disproportionate to the overall criminality of the accused (*Teo Kian Leong* at [8]).

34 Finally, in contemplating the totality of the sentences imposed on the accused, the trial judge should consider this question: if all the offences had been before him, would he still have passed a sentence of similar length? If not, the judge should adjust the sentence imposed for the latest offence in light of the aggregate sentence (*Teo Kian Leong* at [8], citing the decisions of the English Court of Appeal in *Darren Lee Watts* [2000] 1 Cr App R (S) 460 and *Gerald Hugh Millen* (1980) 2 Cr App R (S) 357 with approval). Whether this is done by imposing a shorter sentence to run consecutively or a long sentence to commence immediately, does not at the end of the day make much difference, although in principle, the judge should, as far as possible, try to impose a sentence that is reflective of the gravity of the latest offence(s) in question (*Teo Kian Leong* at [8]).

35 *Darren Lee Watts* and *Gerald Hugh Millen*, which were cited with approval in *Teo Kian Leong* at [8], provide useful illustrations as to how a court can adjust the sentence imposed for the latest offence in light of the aggregate sentence to ensure that it is not crushing.

36 In *Darren Lee Watts*, the offender pleaded guilty to various charges involving robbery, burglary, theft, false accounting and perverting the course of justice. In addition, 68 offences of dishonestly obtaining benefit were taken into consideration for the purpose of sentencing. The total sentence passed in respect of the various offences was one of five and a half years' imprisonment, ordered to run consecutive to an earlier three year imprisonment term imposed in respect of a separate offence of wounding with intent. The appellant appealed to the English Court of Appeal, contending that the resulting sentence of eight and a half years was manifestly excessive. He succeeded in his appeal. The English Court of Appeal ordered one of the sentences for robbery to run concurrent with

the other charges, rather than consecutive, bringing his sentence imposed for the subsequent conviction down from five and a half years to four years, and later ordered the four years' imprisonment term to run consecutive to the earlier three year imprisonment term imposed. This resulted in a global sentence of seven years' imprisonment, which, in the court's judgment, better reflected the overall criminality of the offender's conduct.

37 Similarly, in *Gerald Hugh Millen*, the offender was sentenced for robbery and other offences to a total of five years' imprisonment with a suspended sentence of two years activated consecutively (due to his breach of a two year suspended sentence for an earlier conviction). In other words, he was sentenced to seven years' imprisonment in all. Eight days later he appeared in another court and was sentenced to three years' imprisonment for burglary, that sentence to be consecutive to the seven year term to which he was already subject. The sentencing judge, in imposing the second sentence, refused to consider the sentence in relation to the imprisonment term which the offender was already subject. On this the sentencing judge was overruled by the English Court of Appeal which held that he should have regard to the principle of totality. Accordingly, the English Court of Appeal reduced the sentence for burglary from three years' imprisonment to one year, and reduced the sentence for robbery from five years' imprisonment to four. It left untouched the activated two year suspended sentence. Thus the offender had to serve a total sentence of seven years' imprisonment.

38 Another case which provides a useful illustration as to how an appellate court may adjust the sentence imposed for the latest offence in light of the principle of totality is *Nicholas Kenneth*. There, the appellant faced four charges of: (a) kidnapping N, a nine-year old girl; (b) kidnapping Q, a five-year old girl;

(c) using criminal force with intent to outrage N's modesty; and (d) using criminal force with intent to outrage Q's modesty and causing fear of instant hurt to Q. He pleaded guilty to all four charges before a district judge. He also consented to having a fifth charge of voluntarily causing hurt to Q taken into consideration for the purpose of sentencing. On the morning of 12 August 2002, the district judge imposed on the appellant a cumulative sentence of 20 years of preventive detention and 12 strokes of the cane.

39 In a separate hearing before a different district judge later that day in the afternoon, the appellant also pleaded guilty to one charge of kidnapping Z, a seven-year old girl, and a separate charge of having two prohibited publications in his possession under the Undesirable Publications Act (Cap 338, 1998 Rev Ed). The district judge sentenced the appellant to 20 years of preventive detention and three strokes of the cane. The district judge also ordered that the sentences of preventive detention ordered by herself and the earlier district judge commence on the same day.

40 The appellant appealed against both the sentences imposed on him by the respective district judges. Yong CJ dismissed the appeal in respect of the sentence meted out in the morning, but allowed the other appeal, reducing the sentence imposed in respect of that to 10 years' preventive detention. Furthermore, Yong CJ also ordered the sentence of 10 years' preventive detention to commence only on the expiration of the earlier sentence, resulting in an aggregate sentence of 30 years' preventive detention. The respective number of strokes of the cane imposed by the different district judges was not disturbed on appeal.

41 The approach taken in *Darren Lee Watts*, *Millen* and *Nicholas Kenneth* is consistent with s 390(1)(*c*) read with s 390(2) of the CPC, which confer on appellate courts the power to adjust the sentence imposed for the latest offence in light of the aggregate sentence, to ensure that an overall just sentence is meted out. Section 390(1)(*c*) and 390(2) of the CPC read:

> **Decision on appeal**
>
> **390.**—(1) At the hearing of the appeal, the appellate court may, if it considers there is no sufficient ground for interfering dismiss the appeal, or may —
>
> …
>
> (*c*) in an appeal as to sentence, reduce or enhance the sentence, or alter the nature of the sentence; …
>
> …
>
> (2) Nothing in subsection (1) shall be taken to prevent the appellate court from making such other order in the matter as it may think just, and by such order exercise any power which the trial court might have exercised.

42 The approach taken above may, at first blush, not sit well with the wording of s 322(3) of the CPC, which for convenience I quote again:

> Nothing in [s 322(1)] may be held to excuse a person from any part of the punishment to which he is liable upon his former or subsequent conviction.

43 The wording of s 322(3) may suggest that a reduction in sentence for a later conviction(s) is not permitted, and that in order to ensure that an offender is not "excused" from any part of his punishment to which he is liable upon his subsequent conviction(s), the courts must order *all* sentences arising from subsequent conviction(s) to run consecutive to the earlier ones imposed. This would in my view, be untenable for the following reasons:

(a) First, adopting this approach may result in the imposition of excessive sentences;

(b) Second, this approach would effectively render the option given to the court in ordering later sentences to start immediately under s 322(1) otiose. In granting the courts the discretion to order a sentence for subsequent conviction(s) to run immediately, the courts would invariably be permitting an offender to be "excused" for some part of the sentence for the subsequent conviction as at least part of the sentences for both the earlier and subsequent conviction(s) would effectively run concurrently.

44 In my view, s 322(3) should be viewed as no more than a clarifying provision which makes it clear that, even though the court may, in an appropriate case, exercise its discretion under s 322(1) to order the later sentence to begin immediately, the fact that that sentence in effect runs concurrently with the current sentence that the offender is serving does not excuse the offender from liability for the later offence. On that footing, I would also add that s 322(3) is not a basis for arguing that the court must, in passing sentence under s 322(1), act with leniency or must order that the later sentence should run concurrently with the offender's current sentence. The court must still have regard to the total criminality of the offender and the principles of totality and proportionality.

Application of the legal principles to the facts

45 With the above legal principles in mind, I applied them to the facts.

46 I was in agreement with the Prosecution's submission that the district judge erred in the exercise of his discretion under s 322 in ordering the later

term of four years and 11 months' imprisonment to start immediately on the date on which he was sentenced, *ie*, 29 May 2015. On the facts of this case I was of the view that this approach was wrong as it effectively rendered the sentences imposed in respect of the offences he had to deal with nugatory. Indeed, as mentioned above, the fact that the subsequent offence(s) arose in different transactions is a weighty consideration that warrants the imposition of the subsequent term of imprisonment to start at the expiration of the earlier term of imprisonment (see [27] above).

47 Having said that, I had still to ensure that the overall sentence meted out should be proportionate and not crushing. In this regard, it would be noted that (see [7] above) it was originally proposed that the offences (in respect of which a term of four years and 11 months were now imposed) were to be taken into account for the purposes of sentencing in *Hang Tuah 1*. If that proposal were accepted by the Respondent, the court in *Hang Tuah 1* would probably have just marginally enhanced the aggregate sentence imposed on the Respondent. Whatever might have been the reason for the Respondent to have refused the proposal, it was apparent to me that the overall sentence sought by the Prosecution of 16 years and 11 months' imprisonment was excessive, and in my view, an aggregate sentence of 14 years' imprisonment was appropriate. In these premises, I reduced the overall imprisonment sentence imposed on the Respondent by the district judge from that of four years 11 months to that of two years. This was derived by first reducing the sentence imposed in respect of DAC 35746/2011 to one year nine months' imprisonment and adding to it the other two consecutive sentences of two months' and one month's imprisonment respectively (see [13] and [14] above). The Respondent was ordered to serve his two years' imprisonment after he had completed his term

of imprisonment imposed in *Hang Tuah 1*. The three years' disqualification from driving all classes of vehicles imposed by the district judge was to remain.

Conclusion

48 For the above reasons, I allowed the Prosecution's appeal but declined to enhance the overall sentence imposed on the Respondent to 16 years and 11 months as that would, in my view, be a crushing sentence. Therefore, although I ordered the further term of imprisonment to start at the *end* of the earlier 12 year imprisonment term, I reduced it from four years and 11 months to two years.

Chao Hick Tin
Judge of Appeal

Kavita Uthrapathy and Sheryl Janet George (Attorney-General's Chambers) for the appellant;
The respondent in person.