IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 72

Magistrate's Appeal No 9174 of 2015

Between

TAN WEI

… *Appellant*

And

PUBLIC PROSECUTOR

… *Respondent*

JUDGMENT

[Criminal Procedure and Sentencing] — [Sentencing] — [Appeals]

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Introduction

1 The principle that like cases should be treated alike is an integral part of fairness. In criminal law, sentencing benchmarks and guidelines help to ensure consistency in the court's exercise of its wide sentencing discretion. They also simplify the judicial task of coming to a just sentence. However, as the present case demonstrates, sentencing benchmarks and guidelines must be applied with care and sensitivity to the facts of each case. As much as consistency in sentencing is an important aspect of fairness, the court must never exercise its sentencing discretion in a purely formulaic manner. Sentencing is always fact-sensitive. The court plays the important role of tempering justice with mercy, and of making a well-rounded assessment of what would be a fair sentence on the facts of *each* case.

Background facts

2 The appellant in the present appeal, Ms Tan Wei ("the Appellant"), pleaded guilty to 11 charges under s 49(*c*) of the Trade Marks Act (Cap 332, 2005 Rev Ed) ("TMA") in the court below.[1] She consented to 46 similar charges being taken into consideration for the purposes of sentencing.[2] All the charges related to her "[having] in [her] possession for the purpose of trade" counterfeit luxury goods (bags, shoes, clothes, belts, watches, accessories, *etc*). The counterfeit goods, which were seized from a retail shop at No 810 Geylang Road, #02-25, City Plaza ("the #02-25 City Plaza shop") and the Appellant's residence at Unit #15-02 of the same building (the Appellant's "#15-02 City Plaza residence"), all had the trade marks of various luxury brands falsely applied on them. The district judge ("the DJ") sentenced the Appellant to an aggregate sentence of 14 months' imprisonment,[3] and she has appealed against that sentence on the ground that it is manifestly excessive.

3 The Appellant is a 33-year-old People's Republic of China national.[4] She was involved in selling counterfeit luxury goods with her boyfriend, one Chiu Yee Seng ("Chiu"), a 32-year-old Singapore national.[5] In August 2012, Chiu had registered a sole proprietorship running a total of three shops selling counterfeit goods.[6] At that time, the Appellant assisted Chiu in manning the shops, and travelled with him once to Guangzhou, China, to procure counterfeit goods.[7] For her assistance, the Appellant was paid a salary of

[1] ROP pp153-154

[2] ROP p154

[3] ROP pp174-175, at [39]

[4] Statement of facts at para 2, ROP p43

[5] Statement of facts at para 3, ROP p43

[6] Statement of facts at para 10, ROP p44

between $2,000 and $3,000 per month.[8] Additionally, part of the business proceeds were used to pay the rent for her #15-02 City Plaza residence as well.[9]

4 In mid-November 2012, Chiu was arrested and imprisoned for drug offences.[10] After Chiu's incarceration, the Appellant continued to run and manage the three retail shops single-handedly, paying herself $2,000 per month.[11] On a few occasions, she travelled alone to Guangzhou, China, to obtain more counterfeit goods.[12] The counterfeit goods were priced at least 50% above the cost price;[13] but, given the varied nature of the goods involved (ranging from hair-clips to larger items such as bags and shoes), the actual amount of profit earned per infringing article ranged from a few dollars to $60.[14] The Appellant hired two shop assistants and paid them around $1,100 to $1,200 per month.[15] She collected the sales proceeds from the shops every three to four days.[16]

5 In early 2013, sometime after Chinese New Year, the Appellant requested Chiu's brother to ask Chiu, who was then still in prison, whether to close the three shops as the tenancy agreements were expiring soon and the shops were not making money.[17] I was given to understand at the hearing that

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[7] Statement of facts at para 10, ROP p44

[8] Statement of facts at para 10, ROP p44

[9] Statement of facts at para 15, ROP p45

[10] Statement of facts at para 11, ROP p44

[11] Statement of facts at paras 11, 14 and 15, ROP pp44-45

[12] Statement of facts at para 14, ROP p45

[13] Statement of facts at para 14, ROP p45

[14] Respondent's submissions at para 51

[15] Statement of facts at para 14, ROP p45

[16] Statement of facts at para 14, ROP p45

the Appellant, not being a relative of Chiu, would not have been able to see Chiu in prison, and hence had to go through Chiu's brother. Chiu agreed to close two of the shops, but asked the Appellant to maintain the #02-25 City Plaza shop, which had the lowest rental, so as to clear the remaining stock.[18] The Appellant did as instructed.[19] The profits earned from the #02-25 City Plaza shop's sales averaged $2,000 to $3,000 per month, and increased to $4,000 to $5,000 per month during festive periods.[20] There were, however, also periods where the shop's revenue barely covered the expenses incurred, which included the cost of renting the Appellant's #15-02 City Plaza residence and other business expenses.[21] At all material times, the Appellant knew that the goods were counterfeit and that it was an offence to sell them.[22]

6 The police apprehended the Appellant on 15 November 2013. At about 12.50pm that day, the police raided the #02-25 City Plaza shop and seized approximately 1,700 counterfeit items.[23] At about 1.30pm on the same day, a follow-up raid was conducted at the Appellant's #15-02 City Plaza residence.[24] When the police arrived at the 15th floor of City Plaza, they found boxes of branded women's products scattered at the staircase landing.[25] Investigations revealed that the Appellant had received a tip-off from a customer that the

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[17] Statement of facts at para 12, ROP p45

[18] Statement of facts at para 12, ROP p45

[19] Statement of facts at para 13, ROP p45

[20] Statement of facts at para 15, ROP p45

[21] Statement of facts at para 15, ROP p45

[22] Statement of facts at para 16, ROP p45

[23] Statement of facts at para 6, ROP p43

[24] Statement of facts at para 7, ROP p44

[25] Statement of facts at para 7, ROP p44

police were checking on the #02-25 City Plaza shop, and had therefore moved the counterfeit goods to the staircase landing on the 15th floor.[26] When the police knocked on her door, however, the Appellant responded and admitted that the boxes of women's products at the staircase landing were hers, and that the #02-25 City Plaza shop was run by her as well.[27] The police seized approximately 3,900 counterfeit items from the Appellant's #15-02 City Plaza residence and the staircase landing.[28]

The decision below

7 In arriving at his sentencing decision, which is reported as *Public Prosecutor v Tan Wei* [2015] SGDC 287 ("the Judgment"), the DJ took the following factors into account:

(a) The harm caused, based on the "nature and extent" of the infringement, and bearing in mind the following facts (see the Judgment at [29]):[29]

(i) the Appellant operated the business on her own from mid-November 2012, when Chiu was incarcerated;

(ii) the goods concerned infringed the trade marks of luxury brands;

(iii) the goods were sold at prices marked up by at least 50%;

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[26] Statement of facts at para 7, ROP p44

[27] Statement of facts at para 8, ROP p44

[28] Statement of facts at para 9, ROP p44

[29] The Judgment at [29], ROP pp171-172

(iv) the goods were sold at a shopping mall that was easily accessible to the public; and

(v) the business earned enough to pay for the rental of the #02-25 City Plaza shop, the salaries of two shop assistants and the Appellant's $2,000 monthly salary.

(b) The Appellant's level of involvement in the business was "moderate", taking into account the fact that: (i) she did not act alone, but instead acted together with Chiu; (ii) she ran the business single-handedly from mid-November 2012 after Chiu's incarceration; (iii) she hired two shop assistants; (iv) she went to China to procure more counterfeit goods by herself; and (v) she was responsible for collecting the sales proceeds from the shops (see the Judgment at [32]–[34]).

(c) The Appellant was a first-time offender who had pleaded guilty (see the Judgment at [35.1]).

8 Following the sentencing guideline laid down in *Goik Soon Guan v Public Prosecutor* [2015] 2 SLR 655 ("*Goik Soon Guan*") of six to seven months' imprisonment for each charge under s 49(*c*) of the TMA in "moderate" involvement cases, the DJ imposed imprisonment terms of between one and seven months for each of the 11 charges proceeded with (depending on the number of infringing articles involved in each charge). He ordered three of the sentences (*viz*, the sentences for the charges in District Arrest Cases Nos 916470 of 2014 ("DAC 916470/2014"), 916473 of 2014 ("DAC 916473/2014") and 916497 of 2014 ("DAC 916497/2014")) to run consecutively, bringing the total sentence to imprisonment of *14 months*.[30]

[30] The Judgment at [39] and [40], ROP pp174-175

The Appellant's arguments on appeal

9 The appellant's counsel, Mr Mervyn Tan ("Mr Tan"), submits that the aggregate sentence of 14 months' imprisonment which the DJ imposed is manifestly excessive for the following reasons:

(a) The Appellant is a first-time offender with no previous criminal record.[31]

(b) The Appellant's involvement was, at worst, at the lower end of the moderate spectrum because she was merely Chiu's "runner" and an employee receiving a fixed salary. She was not the owner of the business.[32]

(c) The Appellant merely carried out Chiu's instructions and continued the business after Chiu's incarceration because she was under "some form of psychological duress" from Chiu.[33]

(d) The majority of the infringing articles were not big-ticket items and the business was not always profitable.[34]

(e) The Appellant is a single mother with a young child.[35]

10 Mr Tan also cites the case of *Public Prosecutor v Li Na* [2015] SGDC 260 ("*PP v Li Na*"), where the offender was sentenced to an aggregate imprisonment term of six months and two weeks for operating a shop selling

[31] Appellant's submissions at para 2.1

[32] Appellant's submissions at paras 2.2 and 2.3

[33] Appellant's submissions at paras 2.5.3, 2.5.6 and 2.5.7

[34] Appellant's submissions at paras 2.4 and 2.5.1

[35] Appellant's submissions at para 2.5.4

counterfeit goods sourced from Guangzhou, China, over a period of approximately three months. There were approximately 861 infringing articles involved, and the offender had two similar prior convictions, for both of which she had only been fined. Mr Tan submits that in view of the larger number of aggravating factors present in *PP v Li Na*, the aggregate sentence of 14 months' imprisonment which the Appellant received is manifestly excessive.

The applicable sentencing principles

11 An offender who is convicted of an offence under s 49(*c*) of the TMA is liable to "a fine not exceeding $10,000 for each goods or thing to which the trade mark is falsely applied (but not exceeding in the aggregate $100,000) or to imprisonment for a term not exceeding 5 years or to both". In my previous decision in *Goik Soon Guan*, I considered the appropriate sentencing principles and benchmarks for a s 49(*c*) TMA offence. This appeal presents an opportunity for those guidelines to be revisited and refined.

12 In *Goik Soon Guan* at [32], I held that a good starting point was to consider the offender's level of involvement in the whole operation relating to the s 49(*c*) TMA offence. Three different levels of involvement were identified:

(a) low involvement, where the offender was merely an employee (see *Goik Soon Guan* at [35]);

(b) moderate involvement, where the offender owned and operated the business, but the scale of the business was generally quite small (*eg*, a small shop) (see *Goik Soon Guan* at [34]); and

(c) high involvement, where the offender ran a relatively large-scale or complex operation, and/or was heavily involved in many levels of the "trade or manufacture" of counterfeit products, including manufacturing or sourcing for the products, distributing the products to other retailers and/or selling the infringing products (see *Goik Soon Guan* at [33]).

13 Having considered the relevant case precedents, I held in *Goik Soon Guan* that the *starting point* for sentencing for a s 49(*c*) TMA offence should vary based on the offender's level of involvement (at [38]):

> … [F]or cases with **low involvement** by the offender, the sentencing range would be from two to four months' imprisonment for each charge. For cases with **moderate involvement** by the offender, the sentencing range would be from six to seven months' imprisonment for each charge. For cases with **high involvement** by the offender …, the sentencing range would be from ten to 20 months' imprisonment for each charge. [emphasis in bold in original]

14 I emphasise that the above sentencing guidelines merely provide a *starting point*. The actual sentence meted out for each s 49(*c*) TMA charge should be determined only after the following factors, among others, have been taken into account as well:

(a) the size of the offender's business;

(b) the number of employees in the offender's business;

(c) the financial figures relating to the offender's business (in terms of both revenue and profits);

(d) whether a syndicate was involved;

(e) the number of infringing articles involved;

(f) the nature and value of the infringing articles;

(g) the duration of the infringement;

(h) the manner of infringement and the degree of permanence in the offender's dealings with the infringing articles (*eg*, whether the offender had a shopfront); and

(i) whether compensation was made to the affected trade mark owners.

15 These factors were mentioned and discussed in *Goik Soon Guan*, and I reiterate what I stated there. I would also add that particularly in the context of a s 49(*c*) TMA offence, which typically involves a significant number of variables, the court must be especially careful not to be overly formulaic in its approach. Having considered the facts and the issues arising in the present appeal, I would make several additional observations to supplement the sentencing framework outlined in *Goik Soon Guan*.

16 First, Mr Tan has pointed out to this court that looking purely at the *number of infringing articles* involved may not accurately reflect the scale of the offender's operations or the gravity of his wrongdoing. I find some merit in this submission. It would be inaccurate to assess the gravity of a s 49(*c*) TMA offence by looking at the *number* of infringing articles in isolation, without also taking into account their *nature* (including their value). For example, as the learned deputy public prosecutor, Ms Tan Si En ("Ms Tan"), has confirmed, a pair of earrings or a pair of shoes would count as *two* items (by virtue of the fact that a pair consists of two articles), whereas a single article such as a hair-clip or a hair-tie would count as *one* item, and likewise for single items of a larger size and/or a higher value such as a bag or a play-

station. It is therefore important that the court does not simply compare the total number of infringing articles with past precedents without taking into account the nature of the infringing articles involved. As an illustration, it would probably be fair to say that an offender who is found selling 500 hair-clips or 500 pairs of earrings is guilty of a less serious offence than another offender selling 100 counterfeit play-stations, in that the value of the infringing articles in the former scenario would, in all likelihood, be significantly lower. Yet, if the court were to simply compare the number of infringing articles involved, the scale of the operations in the former scenario would seem to be much larger.

17 Second, caution must be exercised when assessing the gravity of a s 49(*c*) TMA offence based on the *number of charges* which the offender faces. In this regard, Ms Tan has informed the court that the number of charges brought against an offender depends on the class of goods involved and the number of trade mark proprietors affected. A separate charge is brought for each class of goods, as well as for each instance of infringing a different trade mark proprietor's intellectual property rights. In other words, the more diverse the trade marks falsely applied and the wider the range of goods sold by an offender, the higher the number of charges he will face. In my view, the court should not automatically treat the totality of an offender's wrongdoing as being more serious merely because a greater number of charges are brought against him. The point I wish to underscore here is that the wrongful use of a wider range of trade marks and/or the sale of a wider range of infringing goods does not *ipso facto* mean that greater harm is therefore caused. Equally pertinent factors in this regard are (among others) the *number* and the *nature* of the infringing articles, as well as their value – items of modest value cannot be treated in the same way as big-ticket items.

Therefore, care must be exercised when comparing the number of charges in a case with sentencing precedents.

18 A further point should be made in this regard. The sentencing guidelines articulated in *Goik Soon Guan* (and cited at [13] above) operate on a *per charge* basis. Where three or more charges are preferred against an offender, the sentences of at least two of the charges (and normally, it would not be more than two charges) would be ordered to run consecutively (see s 307(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) and *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 ("*Mohamed Shouffee*") at [80]). Therefore, the number of charges brought against an offender could affect the harshness of his total sentence. Take, for example, an offender who sets up a business selling solely counterfeit Prada bags, as compared to an offender who sells an equal number of bags bearing a greater variety of counterfeit trade marks. The offender in the latter scenario would face many more charges due to his false application of a wider range of trade marks. All things being equal, however, the sentence received by the offender in each of these scenarios should not differ too greatly. The court should ensure that an offender facing three or more charges is not punished *significantly more harshly* than an offender facing less than three charges. In such situations, the court should scrutinise the facts carefully and calibrate the sentence appropriately, so that where an offender's culpability is broadly the same as that of another offender, there should not be *great disparity* in their sentences even if the number of charges brought against them is different.

19 As new fact patterns come before the court, further refinements to the application of the sentencing principles and guidelines discussed above will need to be made. What is important to bear in mind in this regard is that as much as these benchmark sentences and guidelines are helpful, the court must

ultimately ensure that in each case, the overall sentence matches the gravity of the offence(s) committed.

Was the sentence imposed by the DJ manifestly excessive?

20 In the course of the submissions before this court, the sentence imposed on the Appellant was compared primarily with three sentencing precedents, namely, *Goik Soon Guan*, *PP v Li Na* and *Public Prosecutor v Goh Chor Guan* [2010] SGDC 336 ("*Goh Chor Guan*"). Having considered these precedents and the relevant sentencing principles set out above, I find the aggregate sentence of 14 months' imprisonment which the DJ imposed manifestly excessive. In my view, having regard to the Appellant's role in the entire counterfeit operation, her aggregate sentence should be reduced to nine months' imprisonment.

21 As explained in *Goik Soon Guan* at [32], a good starting point is to consider the offender's *level of involvement* in the entire counterfeit operation. In the present case, the DJ held that the Appellant's involvement in the business was "at the very least in the 'moderate' category" (see the Judgment at [34]). In making this finding, the DJ took into account the fact that the Appellant: (a) ran the #02-25 City Plaza shop single-handedly from mid-November 2012 to November 2013; (b) employed two shop assistants; (c) went to China a few times on her own to procure further counterfeit goods; and (d) was responsible for collecting the sales proceeds from the shops (see the Judgment at [33]; see also [7(b)] above). On behalf of the Appellant, Mr Tan submits that the Appellant, at the worst, falls within the "lower end of the moderate spectrum" rather than the "moderate" category *simpliciter* because Chiu was the real person in charge, whereas the Appellant was essentially a "glorified employee" receiving a fixed salary as opposed to a

share of the business's profits.[36] In response, Ms Tan submits, on behalf of the Prosecution, that the fact that the Appellant was receiving a fixed salary does not in itself mean that she was simply an employee; the question remains as to what her role in the business was.

22 I accept Mr Tan's submission that the Appellant's involvement was at the lower end of the moderate category. In my view, it is clear that from August to mid-November 2012, prior to Chiu's incarceration, the Appellant was a mere employee and her involvement fell within the "low" category. Things *did* change after Chiu's incarceration. The three shops continued in operation (until early 2013 for two of the shops), and the Appellant appears to have assumed a more managerial role, which involved tasks such as collecting the sales proceeds from the shops and travelling to China to source for more counterfeit goods on her own. It seems to me, however, that the Appellant never became the owner or completely in charge of the business even after Chiu was incarcerated. In particular, it is significant that in early 2013, she consulted Chiu about whether to close the three shops and did exactly as Chiu instructed her to. This suggests that even after Chiu's incarceration, the Appellant never fully assumed the role of the boss or the owner of the business. She simply continued to assist Chiu in keeping his business afloat while he served his prison sentence.

23 Although the Appellant was undeniably the *de facto* person running the business while Chiu was in prison, it is fair to say that she only had operational control, but never had the power to direct the scale or the development of the business. She still deferred to Chiu in those regards. Indeed, while I agree with the Prosecution that the mere fact that the Appellant

[36] Appellant's submissions at paras 2.2 and 2.3

was receiving a fixed salary did not necessarily reduce her *level of involvement* in the business to that of a mere employee, the fact that she treated the business's profits as belonging to Chiu (and only obtained a salary from the business without sharing in the profits) shows that she did not own the business; nor was she totally in charge. Therefore, although the Appellant was certainly not a mere employee so as to fall into the "low" involvement category, she was not the typical business owner running her own small business selling counterfeit goods either. I therefore find that the DJ erred in classifying the Appellant's involvement as simply falling within the "moderate" category, and instead accept Mr Tan's submission that her level of involvement fell within the *lower end* of the "moderate" category.

24 Moving on to consider the sentencing precedents cited, I find it difficult to accept the DJ's ruling that the present case is "similar but slightly more serious" than *Goh Chor Guan* (see the Judgment at [36]–[37]).[37] In *Goh Chor Guan*, the offender was charged and convicted under s 49(*c*) of the TMA for possessing counterfeit apparel and bags for the purpose of trade, and was sentenced to 13 months' imprisonment. The offender and his wife ran a business selling counterfeit apparel and bags sourced from Guangzhou, China. They set up makeshift stalls at various housing estates to sell the goods, and also appeared to have operated two shops. Furthermore, they used their residence to store the counterfeit goods shipped from China. A total of 4,073 infringing goods were involved, taking into account both the five charges proceeded with and the ten charges which were taken into consideration. I would add that the judge in *Goh Chor Guan* found that the offences were "premeditated and well organized" (at [9]). He also held that the offender was

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[37] ROP p 174

"the prime mover in importing and selling [the] counterfeit goods", and was "assisted by his wife" (at [9]).

25 The number of infringing items involved in *Goh Chor Guan* is quite comparable to that in the present case. While it is arguable that the initial scale of the business in the present case was not dissimilar to that in *Goh Chor Guan*, that was no longer so after the Appellant closed two of the three shops in early 2013. Moreover, there is one key point of difference. Unlike the offender in *Goh Chor Guan*, the Appellant was not in charge of the entire business and did not own it; she was only the temporary manager. Furthermore, the duration of the infringement in *Goh Chor Guan* was close to two years (from February 2008 to January 2010), unlike the infringement in the present case, which was for about a year from mid-November 2012 to November 2013 (*viz*, the period during which the Appellant ran the business single-handedly following Chiu's incarceration). Bearing all these factors in mind, I am of the view that the offender's wrongdoing in *Goh Chor Guan* was more serious than the Appellant's wrongdoing in the present case.

26 Mr Tan has sought to persuade me that the present case is less serious than *PP v Li Na*, where the offender was sentenced to an aggregate imprisonment term of only six months and two weeks. The key facts of *PP v Li Na* were described at [10] above and do not have to be repeated here. It suffices to say that I have some difficulties in accepting Mr Tan's submissions on this point. In my view, the present case is *more* serious than *PP v Li Na* because the duration of the infringement is far longer (about a year, compared to approximately three months in *PP v Li Na*), and the scale of the business is also significantly larger. In *PP v Li Na*, the offender operated only one shop and was found with less than a thousand infringing articles in her possession. In the present case, the Appellant, for a few months at least, operated three

shops. Further, more than 3,000 infringing articles are involved in the present case even if I take into account only the 11 charges which the Appellant pleaded guilty to; more than 6,000 infringing articles are involved if the charges taken into consideration are included (see [18] of the Judgment). Of course, I recognise that in *PP v Li Na*, the offender was the owner of the business, whereas the Appellant here was only the temporary manager of the business; I also note that the offender in *PP v Li Na* had two prior similar convictions (for both of which she only received fines). Still, weighing up all the pertinent factors, I find that the Appellant deserves a heavier aggregate sentence than that meted out in *PP v Li Na*.

27 Turning now to *Goik Soon Guan*, the Prosecution submits that the aggregate sentence of nine months' imprisonment which this court imposed in that case, on appeal by the offender, was justified because the offender had voluntarily made compensation of $100,000 to the affected trade mark proprietors. In *Goik Soon Guan*, the offender sold bedding products on which trade marks of well-known brands such as Disney, Hello Kitty, Doraemon, Thomas and Friends as well as Manchester United Football Club had been falsely applied. The products were sourced from Guangzhou, China. The offender rented a shop, and also operated out of temporary makeshift stalls located at night markets and outside shops in heartland areas. At the trial, the Prosecution proceeded with four charges: one under s 49(*c*) of the TMA, which involved a total of 3,015 infringing products, and three under s 136(2)(*b*) of the Copyright Act (Cap 63, 2006 Rev Ed) ("CA"), which involved approximately 3,400 infringing articles. (For present purposes, the s 136(2)(*b*) CA offence can be taken to be the copyright equivalent of the s 49(*c*) TMA offence as the two offences are, in essence, very much the same and also carry the same sentence.) At first instance, the district judge

sentenced the offender to an aggregate sentence of 15 months' imprisonment. On appeal to the High Court, that aggregate sentence was reduced to nine months' imprisonment.

28 The scale of the operations in *Goik Soon Guan* is quite similar to that in the present case: approximately 3,000 infringing articles were involved in the TMA charge(s) proceeded with in both cases, and the offenders in both cases ran relatively small-scale businesses, but owned or operated more than one shop (by which I include the temporary makeshift stalls operated in *Goik Soon Guan*) during the period of the infringement. Certain factual aspects of *Goik Soon Guan* tend to make the offender's wrongdoing in that case *more* serious than the Appellant's wrongdoing in the present case, namely: (a) the offender in *Goik Soon Guan* was still operating more than one shop at the time of his arrest, whereas the Appellant operated only one shop (*viz*, the #02-25 City Plaza shop) at the time she was arrested in November 2013, having, much earlier that year, closed the other two shops originally set up by Chiu (see [5] above); (b) the profit margins of the offender in *Goik Soon Guan* were far higher in percentage terms (up to 90%) than the Appellant's profit margins; (c) the offender in *Goik Soon Guan* owned the business concerned, whereas the Appellant did not; and (d) a far greater number of infringing items were involved in the charges proceeded with in *Goik Soon Guan* (this does not, however, detract from what I said earlier at [16] above about the importance of not looking at the number of infringing articles involved *in isolation*). At the same time, however, the following factors in *Goik Soon Guan* tend to make the offender's wrongdoing in that case *less* serious than the Appellant's wrongdoing: (a) the offender in *Goik Soon Guan* sold only bedding products, whereas the Appellant sold many types of luxury goods (see [2] above); (b) the profit margins of the offender in *Goik Soon Guan* amounted, in

absolute terms, to only $9 (see *Goik Soon Guan* at [41]), whereas the Appellant's profit margins in absolute terms, although only a few dollars for smaller items such as earrings, were as high as $60 for larger items such as bags; and (c) the offender in *Goik Soon Guan* voluntarily made compensation of $100,000 to the trade mark owners concerned.

29 All things considered, I find, on balance, that the Appellant's s 49(*c*) TMA offences can be said to be of similar gravity to the offences in *Goik Soon Guan* (*viz*, one s 49(*c*) TMA offence and three s 136(2)(*b*) CA offences). However, while I categorised the offender's level of involvement in *Goik Soon Guan* as being "somewhere in the moderate to high involvement band" (at [40]) due to his ownership of the business concerned, I find, in contrast, that the Appellant's level of involvement in the present case falls within the *lower end* of the moderate category (see [22]–[23] above). This is because the Appellant was, in essence, an employee, albeit one who, owing to the circumstances, also temporarily managed the business on behalf of Chiu, the owner, while the latter was incarcerated.

30 At this juncture, I should explain why, in *Goik Soon Guan*, an aggregate imprisonment term of only nine months – the same length as that which I am imposing in the present appeal – was meted out despite the offender's higher level of involvement and the far greater number of infringing articles in the former. This was because of the offender's voluntary payment of compensation of $100,000 to the affected trade mark owners. In this regard, it is important to note – and I emphasise this point – that while the payment of compensation is a mitigating factor, it *does not* follow that the non-payment of compensation amounts to an aggravating factor. As I mentioned earlier in this judgment, sentencing is invariably a fact-sensitive exercise which requires careful judgment, and does not lend itself to an

excessively formulaic approach. The remorse of an offender must be assessed holistically, with any compensation paid being but one factor in that holistic assessment.

31 Mr Tan submits that the absence of compensation by the Appellant in the present case should not be held against her because she does not have the means to offer compensation to the trade mark proprietors concerned. I agree. Although there is slim evidence on the Appellant's means, what evidence there is before this court shows that the Appellant earned only $2,000 per month at the time she was managing the business; she also has a young child to support. Furthermore, as mentioned at [29] above, the Appellant was essentially an employee, albeit one who was temporarily managing the business due to the circumstances. (Indeed, this factor also accounts for my decision to classify the Appellant's involvement as being at the *lower end* of the moderate spectrum; if the Appellant had in fact been the *owner*-cum-manager of the business, I would have put her level of involvement in the clear moderate category.) On the facts before me, I do not think that the Appellant's non-payment of compensation similar to that made in *Goik Soon Guan* warrants imposing a stiffer sentence on her; she should be sentenced appropriately *without* treating her non-payment of compensation as an aggravating factor. I reiterate that the length of the aggregate imprisonment sentence imposed in *Goik Soon Guan* is, as explained at [30] above, due to the mitigating effect of the offender's voluntary payment of compensation in that case. As the appellate judge who decided *Goik Soon Guan*, I am in a position to say that if not for this factor, the aggregate imprisonment sentence which I would have imposed on the offender would have been longer than that which I am imposing on the Appellant in the present appeal.

32 Given my ruling that the Appellant's involvement in the business was at the lower end of the moderate category, and that her s 49(*c*) TMA offences were less serious than those in *Goh Chor Guan*, but more serious than those in *PP v Li Na* and of similar gravity to the s 49(*c*) TMA and the s 136(2)(*b*) CA offences in *Goik Soon Guan* (after giving credit for the compensation made by the offender in that case), I find that the aggregate sentence of 14 months' imprisonment which the DJ imposed is manifestly excessive, and that a total imprisonment term of nine months is more appropriate. Accordingly, I would reduce the sentences meted out by the DJ for the Appellant's offences as follows:

Case No.	**No. of goods**	**DJ's sentence (No. of months)**	**My sentence (No. of months)**
DAC 916389/2014	13	3	2
DAC 916468/2014	44	3	2
DAC 916470/2014	**124**	**6**	**4**
DAC 916473/2014	**2,711**	**7**	**5**
DAC 916478/2014	16	3	2
DAC 916483/2014	297	6	4
DAC 916486/2014	425	6	4
DAC 916492/2014	22	3	2
DAC 916496/2014	17	3	2
DAC 916497/2014	3	1	1
DAC 916498/2014	24	3	2

33 In addition, unlike the DJ, who ordered the sentences for three of the Appellant's offences to run consecutively, I am ordering only two of the sentences – *viz*, those for the offences in DAC 916470/2014 and DAC 916473/2014 (as highlighted in bold in the table above) – to run consecutively. The rest of the sentences are to run concurrently. This is because all of the Appellant's offences arose, in essence, from the same business operation, and there are no exceptional circumstances which warrant ordering more than two of the sentences to run consecutively (see *Mohamed Shouffee* at [80]).

Conclusion

34 In conclusion, for the reasons set out above, I allow the Appellant's appeal against her sentence. I find the aggregate sentence of 14 months' imprisonment which the DJ imposed manifestly excessive, and substitute it with an aggregate sentence of nine months' imprisonment.

Chao Hick Tin
Judge of Appeal

Mervyn Tan (Anthony Law Corporation) for the appellant;
Tan Si En (Attorney-General's Chambers) for the respondent.