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

[2021] SGHC 97

Criminal Case No 16 of 2021

Between

Public Prosecutor

And

Yogeswaran Wairan

GROUNDS OF DECISION

[Criminal Law] — [Statutory offences] — [Misuse of Drugs Act]
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Public Prosecutor
v
Yogeswaran Wairan

[2021] SGHC 97

General Division of the High Court — Criminal Case No 16 of 2021
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See Kee Oon J:

1 The accused is Yogeswaran Wairan ("the Accused"), a 26-year-old male Malaysian national. The Accused pleaded guilty before me to trafficking in not less than 14.99 grams of diamorphine, a Class A controlled drug listed in the First Schedule to the Misuse of Drugs Act (Cap 185, 2008 Rev Ed)("MDA"), which is an offence under s 5(1)(*a*) and punishable under s 33(1) of the MDA.

2 I sentenced the Accused to 25 years' imprisonment and the mandatory 15 strokes of the cane, and ordered that the sentence of imprisonment commence from the date of arrest, *ie*, 1 August 2017. The Accused has appealed against his sentence.

Facts

3 Between 30 July 2017 and 1 August 2017, the Accused and Barathithasan a/l Murugapillai ("Barathithasan"), a 30-year-old male Malaysian

national, had arranged with a man named "Shashi" to deliver three "kallu" ("the Drugs") from Malaysia into Singapore using motorcycles. The Accused knew that "kallu" referred to packets of heroin, which is the street name for diamorphine. The Accused was aware of and had discussed the arrangements between himself, Barathithasan, Shashi and others for the delivery of the Drugs into Singapore.

4 On 1 August 2017, at 6.52 am, Barathithasan brought the Drugs into Singapore together with another friend. The Accused did not join Barathithasan as he had to attend a funeral in the morning, but he subsequently entered Singapore later at 10.46 am on the same day. Sometime between 10.46 am and 1.05 pm on 1 August 2017, the Accused met up with Barathithasan. At the material time, the Accused knew that Barathithasan had already brought the Drugs into Singapore earlier that day. Sometime after meeting up, Barathithasan received instructions on his handphone to proceed to deliver the Drugs. According to the Accused, Barathithasan did not know the way to the location for delivery of the Drugs, and asked the Accused to guide him there.

5 At about 1.05 pm, Barathithasan and the Accused arrived at the location for delivery of the Drugs. As the stored value balance in Barathithasan's handphone was running low, he utilised the Accused's handphone to make a phone call to obtain further instructions for the delivery of the Drugs. Having obtained such further instructions, both Barathithasan and the Accused proceeded to a nearby coffeeshop to await the arrival of a Malay man in a blue shirt, who was later identified as Mohamed Zakir bin Mohamed Ayub ("Zakir").

6 At or about 1.25pm, noticing a person fitting Zakir's description across the road from the coffeeshop, Barathithasan and the Accused proceeded to enter the coffeeshop and placed the black bag containing the Drugs on a chair for

Zakir to pick up. Zakir proceeded to enter the coffeeshop and headed to where Barathithasan and the Accused were. He picked up the black bag containing the Drugs and passed S$100 to the Accused. Zakir then left the coffeeshop without speaking to either Barathithasan or the Accused.

7 After leaving the coffeeshop, Barathithasan and the Accused were arrested by Central Narcotics Bureau ("CNB") officers at the traffic junction along Changi Road at or about 1.26 pm. Zakir was also arrested by CNB officers along Changi Road at or about 1.26 pm. The black bag containing the Drugs was recovered from Zakir by the CNB officers, and found to contain three packets of granular/powdery substance separately marked as "A1A1A", "A1B1A", and "A1C1A".

8 "A1A1A", "A1B1A", and "A1C1A" were separately analysed and found to contain not less than 7.74 grams, 7.65 grams, and 10.32 grams of diamorphine respectively. In total, the Drugs contained not less than 1369.7 grams of granular/powdery substance, which when analysed were found to contain not less than 25.71 grams of diamorphine. Diamorphine is a Class A controlled drug listed in the First Schedule to the MDA.

9 The Accused had admitted to the preceding facts without qualification. The Accused had, together with Barathithasan, and in furtherance of the common intention of them both, trafficked in the Drugs (which contained not less than 14.99 grams of diamorphine) by delivering the Drugs to Zakir, when the Accused was not authorised under the MDA or the Regulations made thereunder to traffic in diamorphine. Accordingly, I convicted the Accused of the proceeded charge. Both Barathithasan and Zakir were not parties to the proceedings before me.

Sentencing

Indicative sentencing starting point

10 In *Suventher Shanmugam v Public Prosecutor* [2017] 2 SLR 115 ("*Suventher*"), the Court of Appeal adopted the sentencing approach set out by Sundaresh Menon CJ in *Vasentha d/o Joseph v Public Prosecutor* [2015] 5 SLR 122 ("*Vasentha*"), which involved using the quantity of the drugs in the charge to obtain an indicative starting sentence before making upward or downward adjustments to reflect the offender's culpability and the presence of any aggravating or mitigating factors (see *Suventher* at [17]). In adopting the *Vasentha* sentencing approach, the court in *Suventher* had held at [21] that:

> 21 The sentence passed for any crime should be proportional to the gravity of the offence. *Where the offence concerns the trafficking or importation of drugs, the gravity of the offence is measured by the quantity of drugs involved.* The sentence imposed should thus be proportional to the quantity of drugs in the offender's possession … The quantity of drugs (measured in terms of net weight) that has been trafficked would have a direct correlation with the degree of harm to society. Accordingly, quantity serves as a reliable indicator of the seriousness of the offence…
>
> [emphasis added]

11 In *Public Prosecutor v Tan Lye Heng* [2017] 5 SLR 564 ("*Tan Lye Heng*"), Steven Chong JA followed the *Vasentha* sentencing approach and the sentencing ranges laid out in *Suventher* for the unauthorised import or trafficking of between 330 grams to 500 grams of cannabis. Chong JA derived the following indicative starting points for imprisonment for trafficking between 10 grams and 15 grams of diamorphine (at [124]-[125]):

(a) 10 to 11.5 grams: 20 to 22 years' imprisonment;

(b) 11.51 to 13 grams: 23 to 25 years' imprisonment; and

(c) 13.01 to 15 grams: 26 to 29 years' imprisonment.

12 In this regard, in *Public Prosecutor v Poopathi Chinaiyah s/o Paliandi* [2020] 5 SLR 734 ("*Poopathi*"), Chua Lee Ming J had held at [24] that the sentence imposed should be proportional to the quantity of drugs involved. Therefore where the quantity of drugs is at or near the upper limit of the sentencing range set out, the starting point should accordingly begin at the upper limit of that sentencing range. On the facts in *Poopathi*, Chua J had held that the indicative starting sentence for trafficking in 499.99 grams of cannabis was 29 years' imprisonment following the *Suventher* guidelines. The indicative starting sentence adopted by Chua J was upheld on appeal. In *Public Prosecutor v Nimalan Ananda Jothi and another* [2018] SGHC 97 ("*Nimalan*"), Chua J had also similarly held at [38] that for trafficking in not less than 14.99 grams of diamorphine, the indicative starting sentence of imprisonment would be 29 years' imprisonment following both the *Suventher* guidelines and the sentencing ranges set out in *Tan Lye Heng*. The Court of Appeal similarly affirmed Chua J's decision.

13 In the current proceedings, I accepted the Prosecution's submissions that the indicative starting sentence of imprisonment should be at least 29 years' imprisonment, based on the decisions in *Poopathi* and *Nimalan*. This is at the upper limit of the sentencing range set out in *Tan Lye Heng*. The Defence did not appear to take a different position from the Prosecution, and submitted only that the indicative starting point should not be fixed at or close to the maximum sentence, which is 30 years or imprisonment for life in the present case. As

stated in *Vasentha* at [45], the starting point is based only on the quantity of drugs involved, and room should be left "for the sentencing judge to adjust the sentence upwards in an appropriate case to reflect the offender's culpability as well as other aggravating circumstances."

Adjustment for culpability

14 In order to assess the offender's culpability, the court has to consider the offender's motive, the nature and extent of the offender's role and involvement in the drug trade, and make a holistic assessment of all the circumstances (see *Vasentha* at [49]-[50]).

15 Having considered the non-exhaustive indicia for assessing an offender's culpability as set out in *Vasentha* at [51], I was of the view that the Accused was not as naïve as the Defence sought to portray him to be. There was no indication that he had been pressured or exploited into committing the offence. That said, it also did not appear that the Accused was involved in very elaborate plans for the delivery of the Drugs.

16 From the admitted facts, while it was clear that the Accused had known that the Drugs were heroin, had discussed the arrangements for delivery of the Drugs, and had participated in their eventual delivery to Zakir, it was not immediately clear if those discussions encompassed the direction or organisation of a drug trade, such as to warrant the finding of moderate culpability that the Prosecution sought. In my view, the Accused's role was not very far removed from that of a courier. He appeared to have been involved in a one-off operation which was not particularly sophisticated. Accordingly, I was of the opinion that the Accused's culpability fell within the lower range. Thus,

I found that an initial downward adjustment of two years from the indicative starting sentence of 29 years' imprisonment would be appropriate.

Adjustment for aggravating and mitigating factors

17 Having taken into account the quantity of diamorphine and the culpability of the Accused, the next step in the *Vasentha* sentencing framework would be to adjust the sentence to reflect the relevant aggravating and mitigating factors.

18 Having considered the non-exhaustive list of aggravating and mitigating factors set out in *Vasentha* at [54]-[76], I accepted the Prosecution's submission that there were no aggravating factors in the present case.

19 With regard to mitigating factors, the Prosecution submitted that the only mitigating factor was the fact that the Accused had elected to plead guilty. On the other hand, the Defence submitted that the fact that he was only 23 years old at the time of the offence and had a clean record should be accorded additional mitigatory weight.

20 It is clearly established that the fact that an offender is a first-time offender is at best a neutral factor in sentencing. It is not positive evidence of good character such as to amount to a mitigating factor (see *Kunasekaran s/o Kalimuthu Somasundara v Public Prosecutor* [2018] 4 SLR 580 at [65]; *Public Prosecutor v Tan Fook Sum* [1999] 1 SLR(R) 1022 at [32]). However, I recognised that this appeared to be the first and only time the Accused had been involved in any drug activities. There was no evidence of any previous involvement in drug-related activities whether within or outside Singapore. The facts in the present case were therefore unlike those in the case of *Nimalan*,

which was relied upon by the Prosecution as a sentencing precedent, as there had been clear evidence in *Nimalan* of five or six previous drug deliveries.

21 With regard to the Defence's contention that the Accused should be accorded the same sentencing considerations afforded to the youthful offenders in *Public Prosecutor v Muhammad Nor Haiqal Bin Shaman* [2017] SGHC 292 ("*Haiqal*") and *Public Prosecutor v Parthiban Kanapathy* [2019] SGHC 226 ("*Parthiban*"), I was mindful that the offenders in both *Parthiban* and *Haiqal* were only 20 years old or younger at the time of their offences. Even though it is clear that "the law takes a *presumptive* view that where youthful offenders are concerned, the primary sentencing consideration is rehabilitation" (see *A Karthik v Public Prosecutor* [2018] 5 SLR 1289 at [33]), such an approach would not be applicable in the present case. The Accused was already 23 years old at the time of the offence. He was not a youthful offender by any characterisation, and he was not at the margins of the threshold age of 21. There were no exceptional reasons to consider his age as a mitigating factor.

22 That being said, I was of the view that the fact that the Accused had demonstrated his willingness to cooperate and testify as a witness for the prosecution in the trial of his co-accused should be accorded mitigatory weight (see Kow Keng Siong, *Sentencing Principles in Singapore* (Academy Publishing, 2nd Ed, 2019) at paras 20.116). Alongside his plea of guilt, I considered that a further downward adjustment of two years in his imprisonment term would be fair and justified, leading to 25 years' imprisonment as a result.

Conclusion

23 For the reasons stated above, I calibrated the sentence at 25 years' imprisonment and 15 strokes of the cane. I further ordered that the sentence of imprisonment be backdated to the date of arrest on 1 August 2017.

See Kee Oon
Judge of the High Court

Terence Chua, Jaime Pang, Wee Yang Xi (Attorney-General's Chambers) for the prosecution;
Ramesh Tiwary (Ramesh Tiwary Advocates & Solicitors), Selvarajan Balamurugan (K&L Gates Straits Law LLC) for the accused.