# Public Prosecutor *v* Ng Kim Hong
# [2014] SGHC 2

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| **Case Number** | : Magistrate's Appeal No 66 of 2013 |
| **Decision Date** | : 07 January 2014 |
| **Tribunal/Court** | : High Court |
| **Coram** | : Chao Hick Tin JA |
| **Counsel Name(s)** | : Amardeep Singh and Leong Wing Tuck (Attorney-General's Chambers) for the appellant; N Sreenivasan SC (Straits Law Practice LLC) for the respondent. |
| **Parties** | : Public Prosecutor — Ng Kim Hong |

*Criminal Procedure and Sentencing – appeal*

7 January 2014

**Chao Hick Tin JA:**

1 The respondent, a 39-year old male ("the Respondent"), was sentenced to 48 months' imprisonment upon his plea of guilt to the following charges:

(a) three charges of criminal breach of trust under s 406 of the Penal Code (Cap 224, 2008 Rev Ed) ("the Penal Code") ("CBT");

(b) one charge of cheating and dishonestly inducing delivery of property under s 420 of the Penal Code ("cheating"); and

(c) one charge of theft in dwelling under s 380 of the Penal Code ("theft in dwelling").

Three other charges of CBT, one other charge of cheating and one other charge of theft in dwelling were taken into consideration for the purposes of sentencing. The Public Prosecutor filed the present appeal against the sentence on the ground that it was manifestly inadequate.

2 I allowed the appeal at the conclusion of the hearing before me. I now give the detailed reasons for my decision.

**Background facts**

3 The salient facts pertaining to the three CBT charges proceeded with were as follows. The Respondent approached his victims at three separate locations, *ie*, a shopping centre, a void deck, and a coffee shop. He requested to borrow their handphones, claiming that the battery in his own handphone had run out or that he needed to make an urgent call. He then took off with the victims' handphones (an Apple iPhone 4s, an Apple iPhone 5 and a LG Optimus handphone).

4 As for the cheating charge that was proceeded with, the Respondent came into contact with his victim online. The Respondent told the victim that he could "trade in" the victim's Samsung Galaxy Note 1 handphone for a Samsung Galaxy Note 2 handphone at a good price, without ever intending to help the victim do so. The victim was induced to deliver his Samsung Galaxy Note 1 handphone to the Respondent, after which the latter became uncontactable.

5 In respect of the theft in dwelling charge that was proceeded with, the Respondent took the victim's handphone (an Apple iPhone 5) and $1,500 in cash when the victim was asleep in a hotel room.

6 The total amount involved in respect of all of the charges (including the other five charges that were not proceeded with but were taken into consideration for the purposes of sentencing), was $4,950, of which only $950 was recovered. All the offences were carried out in a span of about a month.

**The decision below**

7 The District Judge gave his written grounds on the sentence imposed in *Public Prosecutor v Ng Kim Hong* [2013] SGDC 98 ("the GD").

8 The District Judge ordered a pre-sentencing report ("the Report") to assess the Respondent's suitability to undergo Corrective Training ("CT") or Preventive Detention ("PD"). The Respondent was reported to be physically and mentally fit to undergo these sentences. The Report found that he had a "Moderate-Risk/Need of criminal re-offending" and belonged to the group of prisoners with a "more than or equal to 32% probability of recidivism within 2 years of release". Specific risk factors of re-offending included his criminal history and his "maladaptive methods and pro-criminal attitude to cope with and resolve his financial woes". The one probable protective factor identified was the Respondent's ability to maintain stable employment for more than a year.

9 The District Judge considered the Report but decided not to impose a sentence of CT or a PD as there were, in his view, "special reasons" not to do so. The first special reason concerned the Respondent's probability of recidivism. The District Judge observed that the Respondent could "still have at the lowest recidivism rate a 32% probability of criminal re-offending with a 68% probability of not re-offending" (see the GD at [16]). The District Judge reasoned that the Respondent ought therefore be given the benefit of a reasonable doubt and a further chance to reform. The second special reason was the Respondent's genuine remorse (see the GD at [20]).

10 Having decided not to impose a CT or a PD sentence, the District Judge then turned to the issue of the appropriate length of the imprisonment term. He noted that the Respondent's relevant antecedents included certain offences in 1999 where he was sentenced to six consecutive sentences for six proceeded charges, resulting in a global sentence of 66 months' imprisonment (see the table below at [17]). The District Judge observed that this "appeared to be manifestly excessive and inconsistent with the established sentencing principles of totality and proportionality" (see the GD at [18(ii)]). The District Judge further held that if that were indeed so, then the Respondent's 8 years' CT term sentence in respect of yet another set of antecedents in 2003 "would seem to be equally manifestly excessive and inappropriate if the sentencing court in 2003 had taken into account his 1999 sentence" (see the GD at [18(ii)]).

11 As such, the District Judge was of the view that the Respondent should not be sentenced to a global imprisonment term longer than that in respect of his 1999 offences. He thus sentenced the Respondent in respect of the five charges that were proceeded with in the following manner:

(a) 1st charge (CBT), involving $700: 12 months' imprisonment;

(b) 4th charge (CBT), involving $250: 6 months' imprisonment;

(c) 5th charge (CBT), value involved unknown: 1 month's imprisonment;

(d) 7th charge (cheating), involving $500: 12 months' imprisonment; and

(e) 10th charge (theft in dwelling), involving $2,588: 24 months' imprisonment.

The 1st, 7th and 10th charges were ordered to run consecutively, with the 4th and 5th charges running concurrently, resulting in the aggregate term of 48 months' imprisonment.

**The parties' cases on appeal**

12 The prosecution submitted that the sentence imposed by the District Judge was manifestly inadequate. It was contended, in the main, that the District Judge erred in law and in fact in:

(a) failing to consider the appropriateness of a sentence of CT or PD;

(b) failing to accord sufficient weight to the risk factors featured in the Report; and

(c) giving undue weight to the mitigating factors raised by the Respondent.

The Prosecution submitted that the imprisonment term should be set aside and substituted with a CT term longer than the 8 years' CT term previously imposed in respect of the Respondent's 2003 antecedents.

13 In reply, counsel for the Respondent submitted that in view of the Respondent's less than 50% risk of reoffending, the District Judge did not err in not ordering a CT or a PD sentence. In relation to the length of the imprisonment term imposed by the District Judge, it was submitted that the District Judge was right in not blindly using the Respondent's antecedent sentences as a starting point. Counsel for the Respondent also pointed out that the imprisonment terms imposed by the District Judge were already at the higher end of the usual sentencing range. I was urged, for these reasons, to dismiss the appeal.

**The issues on appeal**

14 The issues before me in this appeal were as follows. First, what was the appropriate sentence? Second, what was the proper length of the appropriate sentence?

***The appropriate sentence***

15 Section 304(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC") provides for the conditions under which a sentence of CT should be imposed. It reads as follows:

> **Corrective training and preventive detention**
>
> **304.**—(1) Where a person of the age of 18 years or above —
>
> (*a*) is convicted before the High Court or a District Court of an offence punishable with imprisonment for 2 years or more, and has been convicted in Singapore or elsewhere at least twice since he reached the age of 16 years for offences punishable with such a sentence; or
>
> (*b*) is convicted at one trial before the High Court or a District Court of 3 or more distinct offences punishable with imprisonment for 2 years or more, and has been convicted and sentenced in Singapore or elsewhere to imprisonment for at least one month since he

reached the age of 16 years for an offence punishable with imprisonment for 2 years or more,

then, if the court is satisfied that *it is expedient with a view to his reformation and the prevention of crime* that he should receive training of a corrective character for a substantial period of time, followed by a period of supervision if released before the expiration of his sentence, *the court, unless it has* ***special reasons*** *for not doing so, shall sentence him to corrective training* for a period of 5 to 14 years in lieu of any sentence of imprisonment.

[emphasis added in italics and in bold italics]

Put simply, once a court is satisfied that it would be expedient to order a CT term having regard to an accused person's reformation and the prevention of crime, it *should* do so *unless* there are "special reasons".

16 The objectives of imposing a CT sentence have been discussed in several cases (see, *eg*, *Kua Hoon Chua v Public Prosecutor* [1995] 2 SLR(R) 1 ("*Kua*") at [6], *Public Prosecutor v Wong Wing Hung* [1999] 3 SLR(R) 304 at [13], *G Ravichander v Public Prosecutor* [2002] 2 SLR(R) 665 at [18]–[20] and *Public Prosecutor v Mahat bin Salim* [2005] 3 SLR(R) 104 ("*Mahat*") at [13]). It is well settled that the chief aim of such a sentence is to rehabilitate an offender who has a propensity to lead a criminal life by "[turning] him away from the easy allure of crime by putting him through a regime of discipline and by teaching him certain work skills" (*Mahat* at [13]). Crime prevention is the other main objective.

17 Having regard to these objectives, I was of the view that it was both necessary and appropriate to sentence the Respondent to a term of CT. I arrived at this decision after considering several factors. First and foremost, the Respondent had unfortunate proclivities towards crime, and in particular, offences relating to property. This is evidenced by his criminal record as summarised in the table below:

| **Date of conviction** | **Charge(s)** | | **Sentence** |
|---|---|---|---|
| 15 March 1988 | 1 count of housebreaking and theft by night | s 457, Penal Code | Probation (24 months) |
| | 3 counts of theft | s 379, Penal Code | |
| 21 June 1988 | 2 counts of robbery | s 392, Penal Code | Juvenile home (36 months) |
| | 4 counts of theft | s 379, Penal Code | |
| 14 August 1990 | 1 count of theft | s 379, Penal Code | Juvenile home (36 months) |
| | 1 count of cheating | s 420, Penal Code | |
| 12 January 1991 | 1 count of theft | s 379, Penal Code | Reformative Training |
| 6 July 1995 | 1 count of robbery | s 392, Penal Code | Imprisonment (aggregate 3 years) and 12 strokes of the cane |
| | 1 count of theft | s 380, Penal Code | |
| 17 March 1999 | 12 counts of cheating (5 proceeded, 7 taken into consideration ("TIC")) | s 420, Penal Code | Imprisonment (aggregate 66 months) |

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|---|---|---|---|
| | 1 count of fraudulent possession of property | s 35(1), Miscellaneous Offences (Public Order and Nuisance Act (Cap 184, 1997 Rev Ed) | |
| 10 September 2003 | 2 counts of CBT | s 406, Penal Code | CT (8 years) and 6 strokes of the cane |
| | 1 count of criminal intimidation | s 506, Penal Code | |
| | 1 count of theft in dwelling | s 380, Penal Code | |
| | 1 count of unlawful possession of weapon | s 6(1), Penal Code | |
| | 1 count of gaming in public (TIC) | s 8(2), Common Gaming Houses Act (Cap 49, 1985 Rev Ed) | |
| | 1 count of assisting in concealing/ disposal of stolen property (TIC) | s 414, Penal Code | |

18 The Respondent's life of crime started in 1988 when he had barely turned 14 years' of age. He subsequently re-offended in 1990, 1991, 1995, 1999, 2003, and again, in 2012. It would be fair to say that he did not commit any crime only when he was incarcerated. I also noted that the Respondent committed the present offences a mere 14 months after he was released on completing his 8 years' CT term in respect of his 2003 offences. In view of all these facts, I could not help but agree with the Correctional Rehabilitation Specialist's observations in the Report that the Respondent "appeared to possess [a] pro-criminal attitude and had the tendency to utilize [*sic*] maladaptive methods to alleviate his financial woes".

19 Next, I noted that the Respondent's previous sentences of imprisonment ultimately proved to be of no deterrent or rehabilitative effect. In particular, the Respondent re-offended even after serving his 66 months' imprisonment term in respect of his 1999 offences, which sentence the District Judge himself commented "appeared to be manifestly excessive" (see the GD at [18(ii)]).

20 This leads me to my third point, which is that the more regimented environment in a CT term would, in my view, have a better chance of successfully reversing the Respondent's criminal tendencies as compared to an imprisonment term. The CT regime has a significant aspect of helping the offender develop work skills, with also a focus on character, discipline, values, and personal responsibility. I noted that the Respondent did not seem to lack work skills. He had no difficulty securing gainful employment and maintaining it for more than a year each time he was released from custody. Hence, in the present case, considerations as to the usefulness of learning work skills in a CT term would carry less weight. Nevertheless, the other aspects of the CT regime, in particular, the focus on character-building, discipline, and values, are equally (if not more) significant and therefore weighed heavily in my assessment of the appropriate sentence.

21 Next, my view that a longer time spent serving a CT term would be appropriate was fortified by the Respondent's risk of re-offending. The Correctional Rehabilitation Specialist who prepared the Report subsequently clarified that the 32% recidivism rate stated the Report was inaccurate. The correct figure was actually higher. Using Singapore norms, the Respondent actually had a 35% to 46%

probability of re-offending within 2 years of release. In this regard, I noted that the Respondent re-offended within 14 months of serving his 8 years' CT term for his 2003 offences. His likelihood of re-offending made it all the more crucial that there should be concerted focus on his true and complete reform.

22 Fifth, there was basis for me to believe that the Respondent was still amenable to and capable of reform, notwithstanding that he re-offended soon after serving his previous 8 years' CT term. The District Judge observed that this time around, the Respondent "sincerely wanted to repent and reform his misdeeds", and that "[h]e swore and promised in the name of his Christian God not to re-offend" (see the GD at [15]). I gave these assurances some weight although his string of antecedents gave me some cause to view them with a degree of circumspection. I also noted that the Respondent had, in his life, some support from various positive sources. He had indicated to the Correctional Rehabilitation Specialist that he was close to his family members and that he had some association with members of his church. As for the Respondent's age (39), this was a neutral factor as there was nothing to indicate that he was "too old", so to speak, for the reformative aims of CT (see also *Kua* at [6], *Zulkifle bin Hassan v Public Prosecutor* [2002] SGDC 211, and *Public Prosecutor v Dorai Antoine* [2004] SGDC 7). Overall, I was sufficiently satisfied that the Respondent was amenable to and could be reformed. Indeed, if I had thought that he was so incorrigible as to be beyond reform, I would have been entitled to seriously consider whether to impose a sentence of PD instead as he had already served a CT term.

23 Finally, it was self-evident that the other objective of a CT term, namely that of crime prevention, would be met during the period that the Respondent undergoes CT.

24 For the above reasons, I was satisfied that it would be expedient within the meaning of s 304(1) of the CPC to impose a CT sentence. Indeed, the District Judge did not seem to have disputed this threshold issue. From the GD, it seemed that the District Judge decided not to impose a CT term not because he was of the view that a CT term was inappropriate on the facts in the first place, but because there were, in his view, "special reasons" not to do so. And it is to this issue that I will now turn to.

25 The phrase "special reasons" is not defined in the CPC. It was considered in the case of *Public Prosecutor v Perumal s/o Suppiah* [2000] 2 SLR(R) 145 ("*Perumal*"), albeit in the context of a PD term under s 12(2) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed). In that case, Yong Pung How CJ held that "special reasons" rendering an offender unsuitable for PD would "generally refer to the offender's physical and mental suitability" (*Perumal* at [41]). After noting that it was not possible to identify all the circumstances which could amount to "special reasons", he observed (at [41]) that each case would depend on its own facts. However, the reasons must be "exceptional" to qualify as "special reasons" (at [41]). I agreed with these principles and saw no reason why they should not similarly apply in the present context of a CT sentence. This was particularly since the statutory framework within which the observations in *Perumal* were made was materially similar to that in the present context, *viz*, s 304(1) of the CPC.

26 I now turn to the application of these principles to the present facts. It was undisputed that the Respondent was certified to be both physically and mentally fit to undergo CT. The issue therefore was whether the reasons relied on by the District Judge to justify his decision not to impose a CT term constituted "special reasons" in law as set out in the preceding paragraph. I found that they were not. I explain more below.

27 As alluded to above at [9], the primary factor relied upon by the District Judge was the Respondent's risk of re-offending. His reasoning was essentially this. Given that the Respondent's

recidivism rate was more than or equal to 32%, there was a 68% probability of him not re-offending, and he should therefore be given the benefit of a reasonable doubt. Such an approach, with respect, was flawed. The two cases relied upon by the District Judge for his approach, namely *Public Prosecutor v Mohamad Noor Bin Aris* [2009] SGDC 1 and *Public Prosecutor v Azlan Bin Abdullah* [2009] SGDC 418, both decided by him, suffered from the same deficient reasoning as well. Unfortunately, as the appeals in those two cases were withdrawn before they were heard, there had been no opportunity until now to clarify this point of law. "Reasonable doubt" is a standard used to measure whether one's burden of proof has been discharged. The District Judge thus erred in importing this concept into the realm of sentencing and in applying it on the basis of the numerical percentage of recidivism rates. Sentencing, after all, involves a sentencing judge's exercise of discretion based upon the facts before him and in accordance with established precedents and principles. The likelihood of re-offending is not a matter that needs to be proved or disproved as a matter of fact. It is an assessment of future likelihood that the court is entitled to take into consideration, in addition to all other relevant factors, in determining whether to impose a sentence of CT. The Respondent' recidivism rate was therefore not an exceptional reason at all. Even if it were, I did not see how it could seriously be argued that his likelihood of re-offending was low when the fact was that on his release from CT (on account of the 2003 offences) he committed the offences which formed the subject of the present proceedings within 14 months.

28 The second factor relied upon by the District Judge was the Respondent's genuine remorse. Apart from the fact that there was cause to view the Respondent's assurances with some degree of circumspection in light of his past record, this was simply not exceptional and therefore could not qualify as a special reason within the meaning of s 304(1) of the CPC.

29 There being no true "special reasons" to justify otherwise, the law required the Respondent to be sentenced to a CT term in lieu of imprisonment, and I so ordered. For completeness, I should also mention that the fact that the Respondent was previously sentenced to a CT term did not preclude me from imposing a CT term again, so long as I was satisfied that it would be expedient to do so having regard to the twin objectives of the CT sentence, and there were no "special reasons" not to do so (see, *eg*, *Tan Chung Meng v Public Prosecutor* [2002] SGDC 115, *Public Prosecutor v Chua Kim Teck* [2003] SGDC 113 (which decision was upheld on appeal in Magistrate's Appeal No 89 of 2003) and *Public Prosecutor v Leow Sin Hwee Jackson* [2004] SGDC 308).

***The proper length of the appropriate sentence***

30 I now turn to the issue of the appropriate length of the CT term. Section 304(1) of the CPC (reproduced at [15] above) provides that CT may be imposed "for a period of 5 to 14 years". I was of the view that a CT term longer than the Respondent's previous 8 years' CT term was necessary since that previous term seemed to have had no apparent effect on him (as evidenced by the commission of the present offences). However, I was not minded to impose a *significantly* longer term in view of the factors in his favour. On balance, I decided that a slightly longer CT term of 9 years would be sufficient, and I so ordered.

31 Since I found that the appropriate sentence in the present case was a term of CT (and therefore not imprisonment), I will just make some brief comments on the District Judge's reasoning in respect of the length of the imprisonment term that he imposed. The District Judge had commented that the imprisonment term imposed in respect of the Respondent's 1999 offences "appeared" to him to be manifestly excessive and inconsistent with the established sentencing principles of totality and proportionality. The earlier court had, in relation to the Respondent's six 1999 offences, ordered that those sentences run consecutively resulting in the aggregate imprisonment term of 66 months. It is unusual for a court to order six sentences to run consecutively. However, in the absence of detailed

grounds issued by the court that passed that order, it may not be prudent for a later court to pass any judgment on that order. While the District Judge might have quite correctly used the word "appeared" in describing the 66 months' imprisonment term for the 1999 offences, he nevertheless seemed to have relied on this view, though tentative, in his calibration of the appropriate length of the imprisonment term for the present offences. This did not appear to me to be a prudent basis to do so as it involved too much speculation.

**Conclusion**

32 For the above reasons, I found the 48 months' imprisonment term imposed by the District Judge to be wrong in law. I therefore allowed the Prosecution's appeal and substituted the sentence below with a 9 years' CT term instead. Hopefully, this would provide the Respondent with the right environment and the personal impetus to truly and completely reform. The 9 years' CT term would run from the date of my order. As a CT term is a different and distinct sentence from imprisonment, there was no basis for any backdating.