IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 137

Magistrate's Appeal No 9012/2018/01

Between

Ma Wenjie

… *Appellant*

And

Public Prosecutor

… *Respondent*

Magistrate's Appeal No 9012/2018/02

Between

Public Prosecutor

… *Appellant*

And

Ma Wenjie

… *Respondent*

JUDGMENT

[Criminal Law] — [statutory offences] — [Passports Act]
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Introduction

1 The Accused, Ma Wenjie, was convicted after trial in a District Court on 17 charges under s 47(5) of the Passports Act (Cap 220, 2008 Rev Ed). He was sentenced to six months' imprisonment for each charge, and a global sentence of 12 months' imprisonment. The Accused appealed against his conviction and sentence, while the Prosecution appealed against the sentence.

2 The 17 charges against the Accused relate to his possession of People's Republic of China ("PRC") passports without reasonable excuse. The charges are phrased identically, with the only differences being the identity of the holder and the serial number of the foreign travel document that is the subject of each charge. Each charge is worded as follows:

> You … are charged that you, on 05.03.2017 at Changi Airport, Terminal 1 Arrival section, Singapore, without a reasonable excuse, had in possession of a foreign travel document namely a People's Republic of China Passport bearing serial number [serial number] and particulars issued under "[name]", which you knew was not lawfully issued to you and you have thereby committed an offence under Section 47(5) of the Passports Act, which is an offence punishable under the same section of the said Act.

The serial numbers and names stated in the 17 charges respectively are:

S/N	**[serial number]**	**[name]**
1.	G44824755	MA ZHELAIYE (Female / 01.03.1949)
2.	E49953456	YANG JIANCHENG (Male / 01.02.1968)
3.	E55120002	MA GUANGHUI (Male / 13.08.1947)
4.	G44827120	YANG JINMING (Male / 01.05.1972)
5.	G44824754	MA FATUMAI (Female / 01.06.1972)
6.	E64334641	ZONG DEFU (Male / 07.08.1950)
7.	E64374705	MA GASUO (Female / 03.08.1961)
8.	E55120001	MA HAIJICHE (Female / 09.06.1949)
9.	E18223704	MAI JIANRONG (Male / 04.11.1977)
10.	E67166685	MA ZHILIANG (Male / 18.02.1962)
11.	E67166684	MA SHANGZHEN (Female / 30.10.1964)

12.	E16606983	MAI JIANJUN (Male / 03.10.1974)
13.	E64374710	ZHOU ZHANSHAN (Male / 08.03.1968)
14.	E40037737	ZHOU HUSAINI (Male / 01.01.1963)
15.	E49950050	MA SUMU (Female / 01.03.1970)
16.	E21437243	MA GADE (Male / 17.02.1954)
17.	E65711499	HAN ZHONGXIAO (Male / 05.10.1989)

3 Having heard submissions from the parties, I dismiss both the Prosecution's appeal against sentence and the Accused's appeal against conviction and sentence.

Background facts

4 The key background facts are largely undisputed. The Accused got to know one Habibu sometime in 2015 when he was working in Saudi Arabia. He continued to keep in contact with Habibu after he returned to Beijing in 2016. The Accused told Habibu that he intended to come to Singapore to survey the market for potential business opportunities, and Habibu asked the Accused to do him a favour by bringing some PRC passports into Singapore. Habibu told him that there were no problems with the PRC passports and he agreed to help Habibu. Habibu did not tell him the purpose of bringing the PRC passports into Singapore and he did not ask Habibu about the purpose.

5 The arrangement was that a friend of Habibu would hand the PRC passports to the Accused in Beijing, since Habibu was in Saudi Arabia. The

Accused was to call Habibu after he entered Singapore and Habibu would then make arrangements for someone to collect the PRC passports from the Accused in Singapore. The Accused was not told the name nor the contact details of the person who would be waiting to collect the PRC passports. Neither did the Accused ask Habibu for the details of this person.

6 On 4 March 2017, the Accused received a call from an unknown Chinese male claiming to be Habibu's friend. Subsequently, the unknown male met the Accused at the Beijing airport and passed the Accused a red bag, telling the Accused that there were more than 10 passports inside. The Accused took the passports out of the red bag without counting them or looking at their contents, and put them into his hand luggage. The Accused then boarded a plane to Singapore.

7 Upon his arrival in Singapore at Terminal 1 of Changi Airport, while the Accused was going through immigration clearance, it was discovered that his entry visa into Singapore had expired. He was stopped and his hand luggage was searched. 17 passports issued by the PRC were found in his hand luggage. These 17 PRC passports are the subjects of the charges the Accused faced.

8 While the Accused was not promised and did not receive anything from Habibu for bringing the 17 PRC passports into Singapore, he hoped that by helping him, he would get business opportunities from Habibu in the future.

Proceedings below

9 The Accused claimed trial to all of the 17 charges. He did not dispute that the ingredients of the Passports Act charges had been made out, since he was in possession of the 17 PRC passports while knowing that they were not

lawfully issued to him. His main argument was that he had a reasonable excuse under s 47(7) of the Passports Act for possessing the 17 PRC passports.

10 The Accused testified and also called two witnesses in support of his defence. First, the Accused called Zhou Xingwen, who was known to him as Habibu, as a witness to testify that he had arranged for one Ma Mingzhe to pass the 17 PRC passports to the Accused to be brought into Singapore. Habibu said that the purpose of doing so was to apply for visas to Saudi Arabia for the passport-holders of the 17 PRC passports. The Accused tendered a letter purportedly from Zangari Travel & Tourism ("the Zangari letter" and "Zangari" respectively) stating that the Accused worked "as a tour agent to bring Chinese tourists to visit the Arabian Gulf countries" and listed the names of the holders of the 17 PRC passports. It was also stated in the Zangari letter that the purpose of the Accused holding these passports was "to issue them visa from the Embassy of Kingdome [*sic*] of Saudi Arabia and Qatar Embassy in Singapore". Habibu and the Accused however conceded that the Accused was not a tour agent with Zangari, which was purportedly a travel company from Bahrain, and he was not entrusted with the 17 PRC passports in that capacity. The Accused also attempted to adduce 17 letters of invitation purportedly issued by the Ministry of Foreign Affairs of Saudi Arabia ("Letters of Invitation"), one for each of the 17 PRC passports, inviting the passport-holders to visit Saudi Arabia on commercial visas. However, since only three of the 17 Letters of Invitation were translated, only these three translated Letters of Invitation were admitted in evidence.

11 The Accused also called Yang Guojiang ("Yang"), a Chinese national, to testify that it was possible to have his visa application to Saudi Arabia applied for in Singapore without having to come to Singapore personally. Copies of his passport and a commercial visit visa were adduced in evidence. However, Yang,

who was elderly and illiterate, was not one of the passport-holders named in the 17 charges. Yang said he did not know why he was issued a commercial visit visa since he had only wanted to travel to Saudi Arabia for religious purposes.

The decision below

12 The grounds of decision of the District Judge is reported at *PP v Ma Wenjie* [2018] SGDC 41 ("the GD"). The District Judge found that the elements of the offence under s 47(5) of the Passports Act were fulfilled: the Accused did not dispute the *actus reus* or the *mens rea* of the offence; he admitted that he was in possession of the 17 PRC passports and he knew that they were not issued to him. Therefore, the decision turned on whether the Accused could avail himself of the defence of reasonable excuse under s 47(7) of the Passports Act. Section 47(7) states that subsections (2) to (6) "shall not apply if the person has a reasonable excuse".

13 The District Judge analysed the law on reasonable excuse before deciding that the Accused had no reasonable excuse on the facts ([30]–[41] of the GD). She held that the burden was on an accused person to prove, on a balance of probabilities, that the defence of reasonable excuse applied (at [27]). In analysing the elements of reasonable excuse, she relied on the case of *Madiaalakan s/o Muthusamy v PP* [2001] 3 SLR(R) 580 ("*Madiaalakan*"), which involved the failure to provide an adequate breath specimen. The accused in that case argued that he suffered from chronic obstructive lung disease, and this afforded him a reasonable excuse for his failure. Yong Pung How CJ stated the elements of reasonable excuse in the context of failing to provide an adequate breath specimen as follows: (a) no excuse was reasonable unless the accused had tried as hard as he could; (b) whether the accused had a reasonable excuse (this included both subjective and objective elements); and (c) whether

the Prosecution had negatived the defence. The District Judge also relied on *Chan Chun Yee v PP* [1998] 3 SLR(R) 172, where it was held that there must be objective evidence showing that an accused's belief in a fact constituting a reasonable excuse was reasonable in the circumstances. Blind reliance was not sufficient.

14 On the facts, the District Judge found that the Accused did not have a reasonable excuse. At the material time when he came into possession of the 17 PRC passports, all he could say was that he assumed that the passports were to be brought into Singapore for the purpose of visa applications (at [36] of the GD). The Accused attempted to rationalise his possession of the passports only *ex post facto*, by calling Habibu and tendering the Zangari letter stating that the passports were entrusted to Zangari for the purpose of applying for Saudi Arabia visas (at [36]–[38] of the GD). The District Judge found that the Zangari letter was fabricated and held that the material time for determining when the Accused had a reasonable excuse was when he was found in possession of the 17 PRC passports. At that time, he did not even know why he was bringing them into Singapore. Therefore, there was nothing to show that the Accused had "tried hard" to ascertain why he was in possession of these passports (at [39] of the GD). There was also no evidence to support the allegation that the Accused had implied authority from the passport-holders to be in possession of their passports (at [40] of the GD).

15 In relation to sentencing, the District Judge agreed with the Prosecution that the foremost sentencing consideration was general deterrence. The precedents showed that fines had never been imposed and there was nothing exceptional or especially mitigating about the facts of this case that justified a departure from the usual custodial norm (at [47]–[49] of the GD). She found the Accused's culpability to be low because there was little planning and

premeditation on his part, and there was no real personal gain to him (at [51] of the GD). With regard to the harm caused, she did not accept that the passports were indeed being brought into Singapore for the purpose of visa applications to Saudi Arabia. Taking into account potential harm, she found the harm caused to fall somewhere at the higher end of the low scale (at [54] of the GD).

16 The District Judge was generally in agreement with the sentencing matrix proposed by the Prosecution (reproduced at [25] below). However, she did not agree with the Prosecution that 12 months' imprisonment for each charge was necessitated in the light of the precedents (at [55] of the GD). She found the case of *PP v Trinh Van Thao* (District Arrest Case No 932669 of 2014 and another) ("*Trinh Van Thao*") to be the most similar to the present case. In that case, the accused had agreed to bring a passport issued to another person out of Singapore as a favour for a friend. He pleaded guilty and was sentenced to four months' imprisonment. Considering that the Accused had claimed trial in the present case and was not entitled to any discount in sentence, the District Judge sentenced him to six months' imprisonment for each charge, with the sentences for two charges to run consecutively. In arriving at this sentence, the District Judge was mindful that the sentence imposed should not be crushing (at [58] of the GD).

The Appeal

The Accused's submissions

17 On appeal, the Accused again argued that he had a reasonable excuse in possessing the 17 PRC passports. From the outset, his counsel argued that the burden of proof was on the Prosecution to show that he had no reasonable excuse to possess the passports, based on the case *R v Chuks Emmanuel Charles* [2010] 1 WLR 644 ("*Chuks Charles*").

18 The Accused submitted that he had a reasonable excuse because he was given implied authority to bring the passports into Singapore for visa applications. He agreed to help Habibu to bring the passports into Singapore after he was assured that there were no problems with them. It was not disputed that Habibu did not tell him the purpose of bringing the passports into Singapore beforehand and the Accused did not ask. He believed that the passports were for the purpose of visa applications, and it was submitted that he had reason to believe so because he knew that Habibu was in the visa business. The Accused argued that his authority to possess the 17 PRC passports was given to him by Habibu who was an agent of Zangari. Zangari in turn had the authority to possess the passports by virtue of Ma Mingzhe, who had obtained authorisation from the passport-holders.

19 The Accused further submitted that possessing the 17 PRC passports after being assured that there were no problems with them constituted a reasonable excuse at the time he came into possession of the passports. It was submitted that reasonable excuse as to how he came into possession of the passports should not be confused with the reason for bringing the passports, *ie*, for visa applications. Further, it was submitted that the law did not place a burden on the Accused to know why he had to be in possession of the passports, and the law did not require him to conduct further checks as to the reason why the passports were brought into Singapore.

20 The Accused also took issue with the District Judge's characterisation of the Zangari letter as "fabricated". His position was that although it was falsely stated in the letter that he was a tour agent of Zangari, the letter was not false in showing that the passports belonged to Zangari and were brought into Singapore for visa applications.

21 In the event that the appeal against conviction failed, the Accused submitted that the sentence of six months' imprisonment for each charge was manifestly excessive. It was argued that while a deterrent sentence was justifiably used as a means to check or to reduce the prevalence of a particular kind of offence, it should not be so excessive as to be crushing. A custodial sentence was not necessarily the only or even the best form of deterrence against offending. The Accused sought for a fine to be imposed instead, or in the alternative, for his sentence to be reduced.

The Prosecution's submissions

22 The Prosecution agreed with the District Judge's holding that the burden of proof was on the Accused to prove that he had a reasonable excuse in possessing the passports. It also agreed with the District Judge's analysis on what constituted a reasonable excuse, and added a further condition: it would not be appropriate for a court to find that there was a reasonable excuse if the excuse offended some other provision in civil or criminal law. The Prosecution was also in agreement with the District Judge's holding that the relevant timeframe to consider the Accused's conduct and mental state was when he was first found to be in possession of the 17 PRC passports.

23 In the circumstances, the Prosecution submitted that the Accused did not have a reasonable excuse – he had no information whatsoever at the material time on why the passports had to be brought into Singapore. It was also submitted that there was some evidence in the trial below that applying for commercial visas for the purpose of pilgrimages to Saudi Arabia was in breach of Saudi law. Thus, the court should be very slow to find that there was a reasonable excuse.

24 With regard to sentencing, the Prosecution submitted that the appropriate sentence should be 12 months' imprisonment for each charge, with a global sentence of 24 months' imprisonment. The Prosecution argued that while it was not impossible for fines to be imposed for offences under s 47 of the Passports Act, the starting point should be a significant custodial term because the dominant sentencing consideration for these offences was general deterrence. As a matter of general principle, offences relating to public institutions and offences affecting public safety or security would warrant the application of general deterrence in sentencing. Further, there was clear Parliamentary intent to impose "heavy penalties to send a clear message to potential perpetrators" (*Luong Thi Trang Hoang Kathleen v Public Prosecutor* [2010] 1 SLR 707 ("*Kathleen Luong*") at [13], citing *Singapore Parliamentary Debates, Official Report* (16 July 2007) vol 83 at col 1094 *per* Mr Wong Kan Seng, the then Deputy Prime Minister and Minister for Home Affairs ("DPM Wong")). It was further submitted that deterrence was the paramount consideration because these offences were very difficult to detect since the small size of passports made them easy to conceal. It would be an impractical strain on resources to have exhaustive checks on the millions of travellers who pass through Singapore yearly.

25 Taking into account the dominant consideration of deterrence, the Prosecution proposed the following sentencing framework for claim trial cases under s 47(5) of the Passports Act:

		Culpability		
		Low	Medium	High
Potential Harm	Low	At least 6 months	At least 1.5 years	At least 3 years
	Medium	At least 1.5 years	At least 3 years	At least 4.5 years
	High	At least 3 years	At least 4.5 years	At least 6.5 years

26 The Prosecution agreed with the District Judge's finding that the potential harm in this case was on the higher end of the low scale, and that the culpability of the Accused was low. According to the sentencing framework proposed, the starting point for low culpability and low potential harm was 6 to 18 months' imprisonment. The Prosecution further submitted that adducing the Zangari letter, which contained false information the Accused knew to be false, was an aggravating factor. It was submitted that there were no significant mitigating factors. In all the circumstances, the sentence for each charge should be 15 months' imprisonment. However, the Prosecution gave some discount having regard to the fact the Accused was in possession of the passports at the same time, and submitted that the appropriate sentence was 12 months' imprisonment for each charge, with a global sentence of 24 months' imprisonment.

My decision

27 I will deal with the appeal against conviction and the appeals against sentence in turn.

Appeal against conviction

28 The Accused did not dispute in the court below and on appeal that the elements of s 47(5) of the Passports Act are satisfied. The sole issue on appeal is whether the Accused has a "reasonable excuse" under s 47(7) of the Passports Act in possessing the 17 PRC passports.

What constitutes "reasonable excuse"?

29 There has only been one reported case, *PP v Ma Yuxiang* [2017] SGDC 311 ("*Ma Yuxiang*"), that deals with the meaning of "reasonable excuse" in the context of s 47(7) of the Passports Act. The district judge in *Ma Yuxiang* first approached the issue by looking at the dictionary meaning of "reasonable excuse" and found that "the literal meaning of the term means a sound, fair and sensible reason or explanation" and that it "cannot be any or a mere explanation" (at [101] of *Ma Yuxiang*). She agreed with the House of Lords in *R v G & Anor* [2010] 1 AC 43 in holding that whether or not an excuse is reasonable has to be determined in the light of the particular facts and circumstances of the individual case (at [103]–[104] of *Ma Yuxiang*). She opined that where an accused is retaining a passport on behalf of the passport holder with lawful authority, the situation can potentially amount to a reasonable excuse for being in possession of someone else's passport (at [106]). In support of this, she referred to the Parliamentary Debates during the 2nd reading of the Passports Bill on 16 July 2007, where DPM Wong stated "While we can allow travel agents to temporarily hold on to our passport to facilitate our travel documents, e.g. for

visa applications, we should not hand over our passports to persons who demand them as a form of security or surety for any form of goods or services rendered."

30 Yong Pung How CJ in *Lim Ghee v PP* [1997] 1 SLR(R) 849 ("*Lim Ghee*") had also interpreted the meaning of "reasonable excuse" in a similar way. The context of reasonable excuse in *Lim Ghee* involved non-compliance with an order of the Building Control Division under s 23 of the Building Control Act (Cap 29, 1990 Rev Ed). Yong CJ adopted (at [23]) the definition set out in *South East Asia Firebricks Sdn Bhd v Neo-Metallic Mineral Products Manufacturing Employees Union* [1975] 2 MLJ 250 (at 254) where Abdul Hamid J said, in the context of s 15(2)(a) of the Employment Ordinance 1955, that a reasonable excuse:

> … is *an excuse which can be deemed by the court to be reasonable in the sense that a reasonable man would regard as an excuse, consistent with a reasonable standard of conduct according to reason.* In *Re A Solicitor* [1945] KB 368 it was said that: 'the word "reasonable" has in law the *prima facie* meaning of reasonable in regard to those existing circumstances of which the actor called on to act reasonably, knows or ought to know'. Latham CJ in *Opera House Investment Pty Ltd v Devon Buildings Pty Ltd* (1936) 55 CLR 110 speaking of the word 'reasonable' said: 'The word "reasonable" has often been declared to mean "*reasonable in all the circumstances of the case*" …'
>
> [emphasis added]

Yong CJ held that whether an accused had a reasonable excuse must be answered *from the perspective of a reasonable person* in the accused's shoes *at the relevant time* without the benefit of detailed arguments presented in court (at [24]).

31 I agree that whether or not an excuse is reasonable has to be determined in the light of the particular facts and circumstances of the individual case, from

the perspective of a reasonable person in the accused's shoes at the relevant time of the offence.

32 Both the District Judge and the Prosecution have referred to the cases of *Madiaalakan* and *Lim Eng Guan Derek v PP* [2004] 1 SLR(R) 221 ("*Derek Lim*") in determining the meaning of "reasonable excuse" (at [32]–[34] of the GD). The brief facts of *Madiaalakan* have been set out above (at [13]). Yong CJ held that there are three questions to be answered (at [9]–[12]): firstly, what amounted to a reasonable excuse; secondly, whether the offender had a reasonable excuse; thirdly, whether the Prosecution has negatived the defence. Regarding the first question, Yong CJ held that no excuse can be deemed reasonable unless the person had tried as hard as he could to perform what he was legally bound to do. In relation to the second question, he held that there were both objective and subjective elements. Regarding the third question, Yong CJ held that the Prosecution had negatived the defence because the offender did not tell the officer administering the Breath Evidentiary Analyser test about his alleged illness at the point his breath specimen was taken. *Madiaalakan* was later followed in *Derek Lim*, which also involved the issue of reasonable excuse in the context of failing to give an adequate breath specimen. The District Judge and the Prosecution opined that *Madiaalakan* and *Derek Lim* were applicable to the present case, so an accused had to satisfy the first question set out by Yong CJ, *ie*, that he must have tried his best.

33 With respect, I disagree with the District Judge and the Prosecution in this regard. The criterion that an accused must have tried his best before he can rely on the "reasonable excuse" defence was established in the context of failing to provide a breath specimen in *Madiaalakan*. It is notable that in setting out this criterion, Yong CJ (at [9]) adopted the tests set out in *R v Lennard* [1973] 2 ALL ER 831 and *Cotgrove v Cooney* [1987] RTR 124, both of which are also

cases involving the provision of sufficient breath specimens. There is no indication that this criterion is equally applicable to cases outside the context of the provision of breath specimens. In fact, the need to try one's best is only appropriate in cases of provisions of breath specimens (or other bodily specimens) where the law imposes a positive duty on a person and there is an element of physical exertion in performing that duty. In my assessment, the criterion of whether one has tried one's best should be narrowly confined to scenarios requiring forms of physical exertion, in the context of fulfilling a positive legal duty. An analogous example would be the failure to provide a urine specimen in relation to suspected drug consumption.

34 To illustrate this point, take the case of a person who stumbles upon a passport on the street and is initially unsure what to do with it. He eventually concludes that he should hand it over to the police but he decides to do so only over the weekend, after attending to his work and personal commitments. Meanwhile, he retains possession of the passport and is arrested. To be considered to have done his best in such circumstances, he may arguably have to take immediate leave of absence from work and proceed to the nearest police station without delay to surrender the passport. This would surely contradict the meaning of what is "reasonable", *ie*, fair, sound and sensible, and impose an unreasonably onerous burden on the accused to make out the defence. What is considered a reasonable excuse has to be judged in the light of the entire context.

Burden of proof

35 I agree with the District Judge and the Prosecution that the burden of proving a "reasonable excuse" under s 47(7) of the Passports Act falls on an accused and the applicable standard is that of a balance of probabilities. The

district judge in *Ma Yuxiang* has held the same after analysing the burden of proof in detail in her grounds of decision (at [83]–[95]) and I agree with her analysis.

36 From the outset, the burden of proof is not stated within s 47(7). In such a case, the position in Singapore has been set out by the Court of Appeal in *PP v Kum Chee Cheong* [1993] 3 SLR(R) 737 ("*Kum Chee Cheong*"). This case was considered by the High Court in *Chua Hock Soon James v PP* [2017] 5 SLR 997, where Chan Seng Onn J set out the approach to determine on whom the burden of proof lies (at [68]–[77]): it must be determined, on a true construction of the statute (what Chan J termed as the "construction of statute" approach in *Kum Chee Cheong*), whether the positive or negative facts are intended, when established, to constitute a true exception or proviso within the meaning of s 107 of the Evidence Act (Cap 97, 1997 Rev Ed). If so, the accused is to bear the burden of proof. Section 107 of the Evidence Act states:

> **Burden of proving that case of accused comes within exceptions**
>
> **107.** When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code (Cap 224), or within any special exception or proviso contained in any other part of the Penal Code, or in any law defining the offence, is upon him, and the court shall presume the absence of such circumstances.

In determining whether the statute is an exception or proviso that falls under s 107 of the Evidence Act, substance is favoured over form. In this vein, a key consideration is the relative ease of proof. This is statutorily reflected in s 108 of the Evidence Act, which states:

> **Burden of proving fact especially within knowledge**
>
> **108.** When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

37 A consideration of how ss 47(5) and 47(7) of the Passports Act work together shows that s 47(7) is an exception that falls within s 107 of the Evidence Act. An offence under s 47(5) is made out once the elements of *actus reus*, of having or retaining possession or control of a foreign travel document not issued to the accused person, and *mens rea*, of knowing that the travel document was not issued to him, are made out. Section 47(7) works as an exception to the finding of an offence under s 47(5), to exonerate the accused person. It only comes into play after an offence under s 47(5) is established.

38 The Explanatory Statement to the Passports Bill ("Explanatory Statement") confirms this interpretation of s 47(7). The Explanatory Statement is material not forming part of the written law (*ie*, extrinsic material) that is capable of assisting in the ascertainment of the meaning of s 47(7). It can be considered by virtue of s 9A(2)(*a*) of the Interpretation Act (Cap 1, 2002 Rev Ed) to confirm that the meaning of s 47(7) is the ordinary meaning conveyed by the text of the provision, *ie*, that it acts as an exception to s 47(5). A reference to extraneous material under s 9A(2)(*a*) of the Interpretation Act can be useful for demonstrating the soundness – as a matter of policy – of that outcome (*Tan Cheng Bock v AG* [2017] 2 SLR 850 at [49]). In the Explanatory Statement, it was made clear in clause 47 that s 47(7) of the Passports Act operates as a defence. Clause 47 states:

> Clause 47 is in similar terms to clauses 36, 37 and 41, but will cover foreign travel documents and the misuse of these in Singapore. The clause also provides for a *defence* of reasonable excuse.
>
> [emphasis added]

The Explanatory Statement confirms that s 47(7) of the Passports Act is intended by Parliament to operate as a defence – in other words, an exception –

to offences covering foreign travel documents, including the offence under s 47(5).

39 Furthermore, the fact of any reasonable excuse would be especially within the knowledge of an accused. Applying s 108 of the Evidence Act, the burden of proof would be on the accused. It is unlikely that Parliament would have intended to place the burden on the Prosecution to prove the absence of a reasonable excuse. One would expect clear statutory language to that effect had Parliament intended to place the burden of proving a negative on the Prosecution.

40 Turning to the Accused's submissions, his counsel argued that the burden of proof lies with the Prosecution, following *Chuks Charles*. This submission is clearly wrong. *Chuks Charles* involved the determination of the incidence of the burden of proof for s 1(10) of the Crime and Disorder Act 1998 (c 37) (UK) (now repealed and overtaken by the Anti-social Behaviour, Crime and Policing Act 2014 (c 12) (UK)), which stated, "[i]f without reasonable excuse a person does anything which he is prohibited from doing by an anti-social behaviour order, he is guilty of an offence". The court in that case agreed with *R v Hunt* [1987] 1 AC 352 on the proposition that in determining where the burden of proof lies, each case must turn upon the construction of the particular legislation (at [9] of *Chuks Charles*). The court then turned to the construction of s 1(10) and concluded, after analysing Parliamentary intention, that the burden of proving reasonable excuse *for the specific provision of s 1(10)* lies with the Prosecution. The holding in *Chuks Charles* is that the incidence of the burden of proof for any provision depends on its construction. A construction of s 47(7) of the Passports Act shows that the burden of the proof lies on the Accused, as explained above at [35]–[39].

Application to the facts

41 The question on appeal is whether the Accused has proved, on a balance of probabilities, that he had a reasonable excuse in possessing the 17 PRC passports at the time of the offence, in the light of the particular facts and circumstances of this case. This has to be examined from the perspective of a reasonable person in his shoes (*supra* [31]).

42 The particular facts and circumstances of this case were that Habibu had asked the Accused to bring 17 PRC passports belonging to persons the Accused did not know from the PRC into Singapore. Habibu was hardly a close friend or someone with whom the Accused had a long-standing business relationship. Habibu and the Accused had met in a restaurant in Saudi Arabia in 2015, and the interactions that the Accused had with Habibu before the date of the offence cannot be considered to be extensive. He had only met up with Habibu occasionally as he wanted to learn some business skills from Habibu because Habibu owned a transport company in Saudi Arabia. Even if the Accused had genuinely felt favourably disposed towards Habibu and inclined to trust him, there was no reasonable basis for him to have agreed to perform a favour on Habibu's request without even inquiring what the favour really entailed.

43 It was not disputed that when the Accused was found in possession of the 17 PRC passports, he did not *actually know* the purpose of bringing these passports into Singapore. He did not know exactly how many passports he had, as he did not check or count them upon receiving them. Even allowing for some slight shifts in his explanations, what they essentially boiled down to was that he *assumed* that they were brought into Singapore for visa applications. This was reflected in the statements recorded by the Police and in his oral testimony in court. In the first long statement recorded on 5 March 2017, he stated that

although Habibu had told him there were no problems with the 17 PRC passports, he did not know the purpose of bringing the passports into Singapore as he was not informed by Habibu. He stated that he "believed" that Habibu might want to apply for entry visa for the 17 passport holders, and that he was just doing Habibu a favour. In his second long statement recorded on 6 March 2017, he repeated his stance that he was assisting Habibu to bring the 17 PRC passports into Singapore and pass them to someone whom he did not know. He had "guess[ed]" the passports would be brought to Saudi Arabia for visa applications. In court, he testified that at the time of arrest, he was "not very sure" of the purpose of bringing the 17 PRC passports into Singapore but he "believe[d]" the purpose was "for visa". He claimed that he agreed to do Habibu a favour to bring the passports into Singapore without asking for the reason because he trusted Habibu as a Muslim. He conceded that he was not authorised or given permission by the passport-holders of the 17 PRC passports to possess the passports, and further conceded that there was no evidence that the passport-holders had given their passports to Zangari.

44 In the court below, the Accused attempted to adduce 17 Letters of Invitation to demonstrate that the 17 PRC passports were in fact brought into Singapore for the purpose of visa applications, since such letters of invitation would have to be submitted before visas to Saudi Arabia would be issued. Only three of the Letters of Invitation had been translated into English and only these three were admitted in evidence. In any case, the Letters of Invitation were only applied for and obtained *after* the Accused had been charged for the offences. They do not change the fact that at the material time of the offence, the Accused did not know the purpose of bringing the passports into Singapore and did not inquire at all as to what the passports were being brought into Singapore for. He only guessed that they were for the purpose of visa applications.

45 Moreover, considerable doubt was cast on the credibility of his defence when he sought to rely on the Zangari letter. When confronted, both the Accused and Habibu had to concede that the contents were untrue – the Accused was not a tour agent employed by Zangari. The District Judge rightly found (at [38] of the GD) that the letter was fabricated in a desperate bid to exonerate the Accused. No other conclusion would have been logical or tenable in the circumstances.

46 It has also been established that the Accused was not told who to pass the 17 PRC passports to after he reached Singapore. He was only informed by Habibu that someone would be waiting to collect the passports and would contact him after he had cleared immigration.

47 Having regard to all the circumstances, from the perspective of a reasonable person in the Accused's shoes at the relevant time, there was no reasonable excuse in carrying passports belonging to persons whom he did not know into Singapore on the mere basis that he was doing a favour for an acquaintance. He did not find out *at all* what he was carrying the passports into Singapore for. All he could muster was a mere guess that it was for the purpose of applying for visas. This is all the more unsatisfactory considering that passports are important identification documents. It is not enough to satisfy the defence of reasonable excuse simply to be assured that there were no problems with the 17 PRC passports in the sense that they were not fake.

48 It is unnecessary to determine whether the passports were in actual fact brought into Singapore for the purpose of visa applications, because the Accused's mere belief and complete failure to inquire into the reason for his possession of the passports are insufficient to establish a defence of reasonable excuse on a balance of probabilities.

49 The Prosecution has urged the court to be slow in finding that there was a reasonable excuse in the present case, because there was some evidence that the alleged purpose of applying for commercial visas for pilgrimages to Saudi Arabia was in breach of Saudi law. However, there is no positive proof of illegality beyond reasonable doubt or sufficiently cogent and reliable evidence to compel the court to draw an irresistible inference of illegality. There was no expert on Saudi law called to testify, nor any evidence adduced, as to the illegality of the alleged arrangement. Therefore, like the District Judge, I decline to make any finding as to the legality of the alleged arrangement to apply for commercial visas to Saudi Arabia for pilgrimages. Such a finding is in any event unnecessary, as I concur with the District Judge's conclusion that the defence of reasonable excuse is unsustainable. I also agree that Yang's evidence is irrelevant and of no assistance to the court.

Appeals against sentence

50 The Prosecution submitted that this is a good opportunity to set out a sentencing framework for s 47(5) offences and presented one for the court's consideration (see above at [25]). I will proceed to analyse the sentencing precedents before considering the appropriateness of setting out a framework at this juncture and considering the sentence in the present case.

Sentencing precedents

51 There are three reported District Court judgments on s 47(5) of the Passports Act: *PP v Sulaiman bin Pungot* [2010] SGDC 471 ("*Sulaiman bin Pungot*"); *PP v K Ramakrishna Kannusamy* [2016] SGDC 333 ("*Ramakrishna*"); and *Ma Yuxiang* (*supra* [29]).

52 In *Sulaiman bin Pungot*, the offender pleaded guilty, *inter alia*, to one charge under s 47(5) of the Passports Act. An acquaintance had passed him an Indonesian passport issued to one Helmi and requested him to make enquiries with the Immigration and Checkpoints Authority regarding the reasons why Helmi was not allowed to enter Singapore. The accused did so, and later informed the acquaintance that Helmi needed to obtain permission in writing from the Controller of Immigration before he could enter Singapore. The accused tried to return the passport back to the acquaintance but she refused to take it back. The accused placed the passport inside his motorcycle, and it was later discovered at Woodlands Checkpoint. The district judge imposed a sentence of nine months' imprisonment for this charge, on the basis that the misuse of foreign travel documents was to be viewed seriously. However, on appeal, the sentence was reduced to 166 days' imprisonment (about five and a half months) on the ground that nine months' imprisonment was manifestly excessive. The accused was released on the day of the appeal hearing.

53 In *Ramakrishna*, the offender pleaded guilty to three charges under s 47(5) of the Passports Act, two charges under s 41(4) of the Passports Act, 15 charges under s 5(1) of the Moneylenders Act (Cap 188, 2010 Rev Ed) and one charge under s 22(1)(*f*) of the Employment of Foreign Manpower Act (Cap 91A, 2009 Rev Ed). He had 68 foreign passports not issued to him in his possession because he kept them as collateral for his illegal moneylending business. A sentence of six months' imprisonment was imposed for each s 47(5) and s 41(4) charge. In coming to this sentencing decision, the district judge found that although there was a large number of passports and the commission of the offences was not a one-off act, there was no evidence to suggest that the retention of these passports was intended for an unlawful future use nor was there evidence of any direct monetary gain from the possession of these

passports (at [50] and [51] of *Ramakrishna*). The district judge had also helpfully listed some factors affecting the sentence for s 41(4) and s 47(5) offences (at [49]):

(a) Planning and premeditation;

(b) Circumstances leading to the possession of the travel documents;

(c) Level of culpability;

(d) Whether the future use of the false document is intended and the manner of intended usage;

(e) Large scale or syndicated operation;

(f) Frequency and length of commission of the offence;

(g) Personal gains or benefits;

(h) Consequences of the offence;

(i) Difficulty in detection;

(j) Ultimate objective/purpose of the illegal act; and

(k) Safeguarding of national security/protection of public interest.

54 In *Ma Yuxiang*, the accused, a Chinese national, was acquitted after trial on s 47(5) charges. While this case is not relevant as a sentencing precedent, I note that on the facts, it was found that the accused had a reasonable excuse since he possessed the five PRC passports on the authority of the passport-holders for the purpose of applying for visas in Singapore.

55 The Prosecution has also presented unreported cases in the proceedings below. In *PP v Kabir Mansur Ali* (District Arrest Case No 911396 of 2017 and others) ("*Kabir Mansur Ali*"), the accused pleaded guilty to one s 47(5) charge and two charges under the Immigration Act (Cap 133, 2008 Rev Ed), and was sentenced to six months' imprisonment for the s 47(5) charge. He was a Bangladeshi national who was arrested while trying to enter Singapore illegally by swimming, and was found with a passport bearing another's particulars but his photograph. In *PP v Kumaresan Piranavan* (District Arrest Case No 910031 of 2016) ("*Kumaresan Piranavan*"), the accused pleaded guilty to one charge under s 47(5) and was sentenced to six months' imprisonment. He was a Sri Lankan national who was arrested while attempting to leave Singapore. He was found with an Indian passport bearing his particulars but not lawfully issued to him. He had wanted to go to Germany to escape the political instability in his country. In *PP v Thurairajah Ganenthiran* (District Arrest Case No 914637 of 2014 and another) ("*Thurairajah Ganenthiran*"), the accused pleaded guilty to one charge under s 47(5) and was sentenced to eight months' imprisonment. He was a Sri Lankan national who was arrested while trying to leave Singapore. He was found with a Malaysian passport bearing another's particulars not lawfully issued to him, and had wanted to go to France to seek employment. In *PP v Ali Sowkot* (District Arrest Case No 934252 of 2015 and others) ("*Ali Sowkot*"), the accused pleaded guilty to two charges under s 47(5) and one charge under s 15(1) of the Immigration Act with four charges under s 47(5) taken into consideration, and was sentenced to nine months' imprisonment for each charge under s 47(5) with a global sentence of 11 months' imprisonment and four strokes of the cane. The accused was a Bangladeshi national who was arrested as an over-stayer. Six Bangladesh travel documents not lawfully issued to him were found on him and he had attempted to use two of these documents to apply for pre-paid SIM cards. In *Trinh Van Thao* (*supra* [16]), the accused pleaded

guilty to one charge under s 47(5) and one charge under s 15(1) of the Immigration Act, and was sentenced to four months' imprisonment for the s 47(5) charge. A friend had sought the accused's help to bring a luggage back to Vietnam and had told the accused that the luggage contained a Vietnamese passport issued to someone who had been arrested by the Singapore Police. The accused agreed to help out of goodwill. In all of the above cases, with the exception of *Ma Yuxiang*, the accused persons had pleaded guilty.

56 Precedents under s 41(4) of the Passports Act, which is the equivalent provision to s 47(5) for the possession of Singapore travel documents, are also relevant to sentencing for offences under s 47(5) because s 47 of the Passports Act "seeks to punish … with penalties equivalent to that imposed [for] the tampering, forgery and misuse of Singapore passports and travel documents" (*Singapore Parliamentary Debates*, *Official Report* (16 July 2007) vol 83 col 1096 *per* DPM Wong). However, the only case reported on s 41(4) of the Passports Act is *Ramakrishna*, which has been set out above at [53].

57 There has yet to be a sufficient body of sentencing precedents to guide the formulation of a well-informed sentencing framework. Nevertheless, it would be helpful to set out the relevant sentencing considerations to guide the development of sentencing jurisprudence for s 47(5) offences.

Sentencing considerations

58 I agree with the Prosecution that the dominant sentencing principle for s 47(5) offences is deterrence. Firstly, the Parliamentary intention in increasing the imprisonment term from a maximum of six months (in s 3(1)(*o*) of the Passports Act (Cap 220, 1985 Rev Ed)) to 10 years in 2007 is clear. As stated by DPM Wong, the passport offences "carry heavy penalties to send a clear

message to potential perpetrators" (*Singapore Parliamentary Debates*, *Official Report* (16 July 2007) vol 83 col 1094). Any form of passport abuse is viewed seriously and Singapore cannot condone any abuse of passports in Singapore even if the passports are foreign. Secondly, deterrence is the paramount sentencing principle because the detection of the unauthorised possession of passports is very difficult given the impracticality of thorough security surveillance (*supra* [24]). Nevertheless, despite the focus on general deterrence, the sentence has to be proportionate in all the circumstances of the case and does not always have to be custodial. The prescribed punishment ranges from a fine to imprisonment of up to 10 years, catering for the myriad circumstances that s 47(5) may encompass.

59 The two principal parameters which a sentencing court would generally have regard to in evaluating the seriousness of an offence are: (a) the harm caused by the offence; and (b) the accused's culpability (*Lim Ying Ying Luciana v PP* [2016] 4 SLR 1220 at [28]; *PP v Koh Thiam Huat* [2017] 4 SLR 1099 at [41]). "Harm" is a measure of the injury which has been caused to society by the commission of the offence, whereas "culpability" is a measure of the degree of relative blameworthiness disclosed by an offender's actions and is measured chiefly in relation to the extent and manner of the offender's involvement in the criminal act.

60 In the context of s 47(5) offences, the level of harm relates to the harm caused to the legitimate passport-holders and the public interest, including any abuse, forgery and tampering of passports and any use of passports for unlawful purposes. It includes actual harm caused and potential future harm, *ie*, the potential of actualising the intended harm. Potential harm has to be assessed in relation to the intended outcome of possessing a passport in any particular case. It cannot be simply potential harm at large, *ie*, taking into account all possible

uses of the passport, because the criminalisation of possession *simpliciter* already takes into account all such possible uses that may be intended by anyone in possession of a passport not issued to him. Moreover, if potential harm at large is taken into account, it would be over-extensive and over-reaching; the level of harm in all cases would be high since the worst possible kinds of intended use are always included in its determination. Factors affecting the level of harm include, non-exhaustively:

(a) the scale of the commission of offences (including the number of passports affected); and

(b) the presence of any syndicate activities.

61 The factors affecting the culpability of the offender include, non-exhaustively:

(a) the presence of planning and premeditation;

(b) circumstances leading to the possession;

(c) the degree of involvement;

(d) the intended use of the passport;

(e) efforts to avoid detection or apprehension; and

(f) personal gain.

62 The precedents show that the sentences imposed for s 47(5) offences generally range from four months to nine months. At the lower end of the spectrum are cases such as *Trinh Van Thao* and *Sulaiman bin Pungot*, which display low levels of harm and culpability. In each case, the possession of the

passport was not for the accused's own benefit and there was no indication of any plan to use the passport for any unlawful purpose. The sentences imposed in the cases were four months' and 166 days' (about five and a half months') imprisonment respectively. In cases of low harm and culpability, the harm occasioned would generally be characterised by the lack of a serious impact on public interest and the lack of substantial harm caused to the passport-holder. Syndicate activities would also be absent in these cases.

63 On the other hand, where there was indication that the passports would be put to an unlawful use, such as in *Kabir Mansur Ali*, *Kumaresan Piranavan*, *Thurairajah Ganenthiran* and *Ali Sowkot*, the sentences imposed ranged from six months' to nine months' imprisonment. Where there was no indication that the passports would be put to an unlawful use but the possession was for the accused's benefit, as in *Ramakrishna* (where the benefit was in using the passports as collateral for loans), the sentence imposed was six months' imprisonment. These are cases that display a higher level of harm and culpability. In these cases, the accused persons possessed the passports for their own benefit, often in the furtherance of an unlawful purpose. Nonetheless, these cases are not of the highest culpability. Cases of the highest harm and culpability would more likely than not include syndicate activities involving the use of passports to further unlawful activities.

64 After considering the harm caused and the culpability of the offender, the court should take into account the mitigating and aggravating factors present to calibrate the appropriate sentence. Examples of relevant mitigating factors may include an offender's timely plea of guilt and evidence of remorse. Relevant aggravating factors may include the existence of similar antecedents. In all cases, it cannot be over-emphasised that the court must apply its mind to

the facts of each case before it and determine the appropriate sentence accordingly (*Kathleen Luong*, *supra* [24], at [25]).

Application to the facts

65 I agree with the District Judge that the culpability of the Accused is low. There was little planning or premeditation and there was no real personal gain to him ([51]–[54] of the GD). There was no intended use of the 17 PRC passports found by the District Judge on the facts, as she did not accept that they were brought into Singapore for the purpose of visa applications (at [53] of the GD). Her reasoning was that apart from Habibu's bare assertions, there was no contemporaneous evidence to show that this was indeed the intended purpose. The Zangari letter and the Letters of Invitation were plainly afterthoughts, created well after the Accused had been charged, and both the Accused and Habibu had conceded that the contents of the Zangari letter were untrue. There was no contemporaneous independent and objective evidence produced by the defence and none of the passport-holders were called to give evidence.

66 The District Judge was entitled to find that the purpose of bringing the passports into Singapore was not for visa applications, and this finding is not against the weight of the evidence. Due regard must also be given to the evidence of Investigation Officer Mohamed Rudy bin Mahabut ("the IO"), who had testified that his investigations did not reveal that the 17 PRC passports were to be used for illegal purposes. Since there is no finding as to what the passports would be used for, the intended use of the passports is a neutral factor.

67 The level of harm is also low. There is no evidence of any harm, and since there is no finding as to what the passports would be used for, the potential harm cannot be determined with any certainty and is thus a neutral factor. It

would be unfairly speculative to impute a high degree of risk (*eg*, of the passports falling into the wrong hands or being misplaced or misused) when there is no such evidence at all before the court, and particularly when the IO's unequivocal evidence was that his investigations did not show that the passports were to be used for illegal purposes. In the same vein, the number of passports possessed by the Accused (and hence the number of charges) is also not a particularly weighty factor in the present case. The number of passports is ordinarily an aggravating factor insofar as the harm, actual or potential, would be multiplied as the number of passports increases. Since the potential harm caused by possessing each of the 17 PRC passports is a neutral factor, and they were all part of the same transaction, there would be no compounding effect in terms of the harm caused. In addition, and crucially, there is no indication of any syndicate activity nor any large scale operation.

68 As for the mitigating factors, the Accused claimed that his full cooperation with the authorities should be given mitigating weight. However, his cooperation with the police consisted only of giving two statements. Notwithstanding that, he had elected to claim trial, hence depriving himself of any sentencing discount that he might otherwise have obtained if he had pleaded guilty in a timely manner.

69 I further note that the Accused had not sought to conceal the 17 PRC passports in his hand luggage and had apparently not made any effort to evade detection. I also note that he had tried to enter Singapore with an expired visa. Although these points were not specifically raised on appeal, they are neutral considerations at best, because it was more probable that he might not have expected to have been stopped and checked as he was entering Singapore. It could not be immediately inferred from his failure to ensure that he was travelling with a valid visa that he must have acted innocently or without proper

planning, since he could merely have been careless. It would be strange if he should be given credit in mitigation for his carelessness. Similarly, the lack of concealment is not a mitigating factor. At the highest, it only goes to show that he took no active steps to evade detection or apprehension, and thus it does not aggravate his commission of the offences.

70 The production of the Zangari letter, knowing that it contained untrue and patently misleading information, is the sole aggravating factor. The production of evidence containing untrue information that may mislead the court must be viewed with great disapprobation. Nevertheless, in the light of the low levels of harm and culpability, the sentence of six months' imprisonment *per* charge and the global sentence of 12 months' imprisonment are appropriate and in line with the sentencing precedents. The sentence is neither manifestly excessive nor manifestly inadequate on the facts.

Conclusion

71 For the reasons set out above, both the Accused's appeal against conviction and sentence and the Prosecution's appeal against sentence are dismissed.

See Kee Oon
Judge

Ong Lip Cheng Peter (Chung Ting Fai & Co.) for the appellant in Magistrate's Appeal No 9012/2018/01 and the respondent in Magistrate's Appeal No 9012/2018/02;
Ang Feng Qian (Attorney-General's Chambers) for the respondent in Magistrate's Appeal No 9012/2018/01 and the appellant in Magistrate's Appeal No 9012/2018/02.
