IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 196

Magistrate's Appeal No 9033 of 2019

Between

Kanagaratnam Nicholas Jens

… *Appellant*

And

Public Prosecutor

… *Respondent*

JUDGMENT

[Criminal Law] — [Statutory offences] — [Misuse of Drugs Act]

[Criminal Procedure and Sentencing] — [Sentencing]

Kanagaratnam Nicholas Jens
v
Public Prosecutor

[2019] SGHC 196

High Court — Magistrate's Appeal No 9033 of 2019
Sundaresh Menon CJ
1 August 2019

30 August 2019 Judgment reserved.

Sundaresh Menon CJ:

Introduction

1 Judges may be called upon, from time to time, to rule on matters giving rise to issues which are beyond their professional expertise. In such circumstances, experts in the relevant field may be called as witnesses. The assistance which these experts provide can be invaluable because it assists the Court, enabling it to better appreciate the technical aspects of the evidence and in turn assess the merits of the parties' cases more accurately. In the context of criminal cases, psychiatric reports prepared by psychiatrists or psychologists are commonly tendered by the Prosecution and the Defence respectively. These reports typically contain a professional assessment of the offender's mental culpability, which is a key factor in questions of liability as well as sentencing. It is therefore no exaggeration to say that psychiatric reports are of vital importance because they can have a real impact on an offender's life and liberty.

2 Given the importance of such evidence, experts must appreciate that they cannot merely present their conclusions without also presenting the underlying evidence and the analytical process by which the conclusions are reached. Otherwise, the Court will not be in a position to evaluate the soundness of the proffered views. Where this is the case, the Court will commonly reject that evidence: *Singapore Medical Council v Lim Lian Arn* [2019] SGHC 172 at [43]; *PP v Chia Kee Chen and another appeal* [2018] 2 SLR 249 at [119].

3 Unfortunately, this point appears to have been lost on the professionals who prepared the psychiatric report in this case. The psychiatric report that was tendered in the proceedings below asserts that there was a causal link between the appellant's psychiatric conditions and his commission of the offences in question. On this basis, the appellant sought an order for probation even though the drug offences which he pleaded guilty to were serious offences. However, the report is singularly unhelpful because the professionals merely stated their conclusions without explaining their reasons. I am therefore not able to place any reliance on the report. This was, in effect, also the view of the district judge ("District Judge"), who on that basis, went on to rule out probation as a sentencing option. In my judgment, she was correct to do so.

Facts relating to the offences

4 The appellant was 30 years old when he was arrested on 26 February 2018 for suspected drug-related offences. He admitted giving one Teng Yi Gang (also known as "Peter") a packet of vegetable matter containing not less than 2.35g of cannabis mixture two days prior, on 24 February 2018. This formed the subject of the first proceeded charge: abetment of possession of a Controlled

Drug under the First Schedule of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"), an offence under s 8(*a*) read with s 12 of the MDA.

5 After his arrest, the appellant provided two bottles of urine samples for analysis. The samples tested positive for a cannabinol derivative. The appellant admitted to having consumed "weed" (the street name for cannabis) prior to his arrest. This formed the subject of the second proceeded charge: consumption of a Specified Drug under the Fourth Schedule of the MDA, an offence under s 8(*b*)(ii) of the MDA.

6 In addition, a Ziplock bag seized from the appellant during his arrest was found to contain not less than 9.28g of cannabis. The appellant admitted that the bag belonged to him and that the cannabis found in it was for his own consumption. This formed the subject for the third proceeded charge: possession of a Controlled Drug under s 8(*a*) of the MDA.

7 In this judgment, I will refer to these charges as the abetment charge, the consumption charge and the possession charge respectively.

8 With the appellant's consent, two other charges were taken into consideration ("TIC") for the purposes of sentencing: one count of possession of a Controlled Drug (13.8g of cannabis mixture) under s 8(*a*) of the MDA and one count of possession of utensils for drug-taking under s 9 of the MDA.

The proceedings below

The pre-sentencing reports

9 Having elected to plead guilty, when it came to sentencing, the appellant sought an order for probation on the basis that that he was suffering from certain

psychiatric conditions which, he contended, were causally connected to the commissions of the offences in question. On this basis, he submitted that the dominant sentencing objective in this case is rehabilitation, not deterrence.

10 The appellant's diagnoses were confirmed by two professional reports which he tendered with his mitigation plea. The first is a report written by Dr Meng Zi Jie Aaron, a Senior Resident at the Institute of Mental Health ("IMH"). It states that the appellant was suffering from Adjustment Disorder with Depressed Mood and Attention Deficit Hyperactivity Disorder ("ADHD"). However, the report does not state whether there was any causal link between the appellant's diagnoses and offending.

11 The second report, which the appellant does rely on for the purposes of this appeal, is written by Dr Munidasa Winslow and Mr Cheoh Yen Han, Senior Consultant Psychiatrist and Psychologist respectively at Winslow Clinic. For convenience, I shall refer to this as the "Winslow report". The report records the appellant's description of himself as someone with a social, easy-going personality and an impulsive streak, which was said to be reflected in his frequent overspending on items such as clothes, photography equipment and sneakers. The report then sets out the appellant's account that he had been self-medicating his long-term sleep and concentration problems with cannabis over an extended period of time since his twenties. The appellant recounted that he would get stressed easily and that this would exacerbate his sleep problems.

12 The authors assessed the appellant to be "relevant and forthcoming during his mental state examination". The appellant "appeared to be remorseful" and "displayed insight into his issues". The authors also confirmed the appellant's previous diagnosis of ADHD. The impact of the appellant's

psychiatric conditions on his offending is set out in the following two paragraphs of the Winslow report:

> 18 In summary, Nicholas was suffering from an **Insomnia Disorder** … **and [ADHD]** at the material time. In our professional opinion, Nicholas' ADHD and Insomnia Disorder have been present for an extended period prior to his arrest, and he used cannabis primarily to self-medicate his untreated symptoms. **It is likely that these factors combined with an increase in the severity of his symptomology due to work stress, significantly contributed to his poor judgement in continuing his use of cannabis**.
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> 19 Nicholas is an individual with high levels of impulsivity and presents with significant problems with impulse control (as seen in his psychological testing, and his ADHD diagnosis). **His psychiatric conditions together with the stressors leading up to the alleged offences, including his financial problems, are likely to have impacted his judgment and impulse control leading to the commission of the alleged offences**. Nicholas' commission of the alleged offences should be seen in the context of someone who was using substances to cope with his underlying psychiatric issues. Despite his psychiatric conditions, he would not be of unsound mind, and would be fit to plead, advise counsel and stand trial.
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> [original emphasis omitted; emphasis added in bold]

13 In addition to the two reports tendered by the appellant, the District Judge called for a probation report in order to assess the appellant's suitability for probation. The probation officer, Mrs Rajini Moganaruban, recognised that there were "risk factors" which militated against probation. These included the appellant's willingness to engage in illegal acts for self-gratification; the appellant's history of drug use to manage his insomnia and stressors; and his indiscriminate peer associations, exposure to negative habits, lack of self-control and poor consequential thinking. Nevertheless, Mrs Moganaruban assessed the appellant suitable for probation in the light of his positive response to trial probation conditions; strong support from his parents; and his

willingness to receive professional help to abstain from drugs, treat his insomnia disorder and improve his way of coping with stressors.

The District Judge's decision

14 Notwithstanding the positive recommendation, the District Judge declined to sentence the appellant to probation. She concluded that the dominant sentencing objective in this case was deterrence, not rehabilitation. She was not convinced that the appellant's psychiatric conditions had *caused* him to offend. In particular, the Winslow report did not clearly state or explain the presence of a causal link between the appellant's mental conditions and the offences. The authors had simply put forth their opinions with any explanations. The report failed to set out any underlying evidence, details of the analytical process that was adopted or even the reasons supporting the authors' conclusions: *PP v Kanagaratnam Nicholas Jens* [2019] SGDC 56 ("GD") at [36]–[40]. Further, the appellant admitted to the probation officer that he had abused drugs as a lifestyle activity for fun and relaxation, that he had shared his supply of cannabis with other drug abusers and that he had gone overseas to smoke cannabis for fun and enjoyment. These, the District Judge thought, undermined the position that there was a causal link between the appellant's psychiatric disorders and his offences: GD at [42]–[45].

15 Having regard to the sentencing range of between 6 and 18 months' imprisonment laid down in *Dinesh Singh Bhatia s/o Amarjeet Singh v PP* [2005] 3 SLR(R) 1 for a first time offender, the District Judge imposed the following sentences in respect of the proceeded charges:

(a) abetment charge: 8 months' imprisonment

(b) consumption charge: 10 months' imprisonment

(c) possession charge: 15 months' imprisonment

16 In sentencing the appellant, the District Judge took into account the fact that the appellant had been a casual user of drugs and the TIC charge for possession of 13.8g of cannabis mixture: GD at [57] and [58]. She ordered that the sentence for the abetment charge was to run consecutively with the sentence for the consumption charge, yielding an aggregate sentence of 18 months' imprisonment. The appellant appealed against the decision of the District Judge. He continues to seek an order for probation.

Applicable principles to sentencing adult drug offenders

17 This case is somewhat unusual because the appellant seeks an order for probation even though he was 30 years old when he offended. Such orders are more commonly made in favour of younger offenders. As I explained in *PP v Lim Cheng Ji Alvin* [2017] 5 SLR 671 ("*Alvin Lim*") at [6], a different approach is adopted when dealing with young offenders because:

(a) the chances of effective rehabilitation in the case of young offenders are thought to be greater than in the case of adults;

(b) the young may know no better; some regard should therefore be had to the fact that the limited nature of their life experiences might explain their actions and justify some consideration being extended to them; and

(c) with young offenders, society generally has an especially strong interest in their rehabilitation; their diversion from the prison

environment is therefore a desirable goal where this will enhance their prospects of rehabilitation.

18 Nevertheless, the appellant is correct to point out that the Probation of Offenders Act (Cap 252, 1985 Rev Ed) does not impose an age limit for probation orders. Even so, as I have noted in *A Karthik v PP* [2018] 5 SLR 1289, "the age of an offender is nonetheless a critical factor in the court's determination of whether an offender should be granted probation in lieu of imprisonment": at [33].

19 To succeed in this appeal, the appellant must show that the dominant sentencing consideration here is rehabilitation rather than deterrence. He faces an uphill task. As I explained in *Alvin Lim*, deterrence, both general and specific, is generally the key sentencing consideration for drug offences, particularly for older offenders. However, I clarified that rehabilitation may be the dominant sentencing consideration in a "purely exceptional case", such as where an offender can prove that he was suffering from a psychiatric or other condition that was in some way causally related to his drug offence: at [7] and [17]. This appeal therefore turns on whether the appellant's psychiatric conditions were causally related to his offences.

The parties' submissions

20 In that light, it is unsurprising that the Winslow report takes centre stage in the appellant's submissions. By his counsel, Mr Peter Fernando, the appellant submits, first, that the District Judge had misconstrued the Winslow report which caused her to conclude that it failed to disclose a causal link between the appellant's psychiatric conditions and his offending behaviour. The District Judge ought to have considered the Winslow report in its entirety instead of

focusing her attention on paragraphs 18–19. This way, so the argument developed, "the court would be more apprised of the symptoms of Insomnia Disorder and ADHD", which "would in turn assist the court in deciding whether there was a causal link".

21 He further points out that his behaviour evidences the fact that he was impulsive, which is a significant feature of ADHD. His impulsiveness had directly impacted his ability to think about the consequences of his actions before acting, which is evident from his poor decision in continuing his use of cannabis. Since impulsiveness is a symptom of ADHD, it follows that his ADHD is causally linked to his commission of the offence of consumption of cannabis.

22 The appellant further submits that his ADHD is causally linked to the abetment charge. Peter was persistent in calling the appellant to pass him some cannabis. He ultimately gave Peter the cannabis because he wanted Peter to leave him alone. The unrelenting request by Peter coupled with the "increasing severity of the symptomology" of the appellant's psychiatric conditions caused him to succumb to Peter's badgering. Further, he did not receive any monetary benefit from this transaction.

23 In relation to the District Judge's point that the offences were neither opportunistic nor one-off in nature, he submits that a person's lack of impulse control would arise on each occasion that person has to make a decision. This can be inferred from paragraph 18 of the Winslow report, where the authors opined that the increase in symptomology of the appellant's psychiatric conditions significantly contributed to his poor choice in continuing his use of cannabis.

24 In addition, the appellant submits that the District Judge erred in criticising the Winslow report for not being sufficiently reasoned. The authors' professional opinion at paragraphs 18–19 of their report was amply supported by their diagnosis at paragraph 16, which were in turn based on their psychiatric assessment of the appellant at paragraphs 4–16.

25 On the other hand, the respondent submits that the District Judge was correct in declining to sentence the appellant to probation. The authorities establish that deterrence is the dominant sentencing consideration for drug offences. Further, the appellant had been committing drug offences for the preceding 12 years despite knowing that he was breaking the law. Thus, the dominant sentencing consideration in this case must be that of deterrence, both general and specific. In addition, the appellant abused drugs as a lifestyle activity for fun and relaxation. Worse, he corrupted others by passing drugs to them.

26 The respondent does not challenge the diagnosis of ADHD, insomnia disorder or even Adjustment Disorder with Depressed Mood, though the latter did not feature in the appellant's submissions in any material way. The respondent's real attack is concentrated in its contention that the evidence does not show that there was a causal link between the appellant's ADHD and his commission of the offences. As to this, the respondent contends that the Winslow report is, as the District Judge found, too vague to be of any assistance to the Court. In addition, the appellant had not informed the authors that he had abused drugs as a lifestyle activity for fun and relaxation or that he had gone overseas with his girlfriend to smoke cannabis for fun and enjoyment. The authors had instead simply adopted the appellant's explanation that he had consumed cannabis to self-medicate his long term sleep and concentration

problems. Further, even if the appellant's impulse control had been impacted, impulse control played a limited role in the context of the offences, which were neither opportunistic nor one-off in nature. There was certainly no evidence that the appellant's impaired impulse control was responsible for his decision to pass drugs to Peter. In any event, the authorities show that probation is not invariably imposed even where the offender suffers from a psychiatric disorder which bears a causal link with his offences.

The appellant's psychiatric conditions

27 In *PP v Low Ji Qing* [2019] SGHC 174, I summarised at [44] the applicable principles when sentencing an offender with a mental disorder:

(a) The existence of a mental disorder on the part of the offender is generally a relevant factor in the sentencing process.

(b) The manner and extent of its relevance depends on the circumstances of each case, in particular, the nature and severity of the mental disorder.

(c) The element of general deterrence may be accorded full weight in some circumstances, such as where the mental disorder is not serious or is not causally related to the commission of the offence, and the offence is a serious one.

(d) In spite of the existence of a mental disorder on the part of the accused person, specific deterrence may remain relevant in instances where the offence is premeditated or where there is a conscious choice to commit the offence.

(e) If the serious psychiatric condition or mental disorder renders deterrence less relevant, where for instance the offender has a significantly impaired ability to appreciate the nature and quality of his actions, then rehabilitation may take precedence.

(f) Even though rehabilitation may be a relevant consideration, it does not necessarily dictate a sentence that excludes incarceration. The accused person could well be rehabilitated in prison.

(g) Finally, in cases involving heinous or serious offences, even when the accused person is labouring under a serious mental disorder, there is no reason why the retributive and protective principles of sentencing should not prevail over the principle of rehabilitation.

28 The Court of Appeal has also noted in *PP v ASR* [2019] 1 SLR 941 ("*ASR*") at [71]–[72] that where there is a causal link between the impairment of the mind and the commission of the offences, this might attenuate an offender's culpability and attract mitigating weight. Where such a causal link affects an offender's understanding of the gravity of his offending conduct, it would correspondingly reduce the weight placed on general and specific deterrence: at [115].

29 The key issue in this appeal is whether the appellant's undisputed diagnoses of ADHD and Insomnia Disorder were causally related to his offences. In this regard, the Winslow report is central to the issue because it makes this assertion. But, with respect, the report is deficient in so many respects that I am unable to place any reliance on it. I have summarised the contents of the Winslow report above at [11]–[12]. I set out again the only two

paragraphs where the authors discussed the link between the appellant's psychiatric conditions and his offences:

> 18 In summary, Nicholas was suffering from an Insomnia Disorder … and [ADHD] at the material time. In our professional opinion, Nicholas' ADHD and Insomnia Disorder have been present for an extended period prior to his arrest, and he used cannabis primarily to self-medicate his untreated symptoms. It is likely that these factors combined with an increase in the severity of his symptomology due to work stress, significantly contributed to his poor judgement in continuing his use of cannabis.
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> 19 Nicholas is an individual with high levels of impulsivity and presents with significant problems with impulse control (as seen in his psychological testing, and his ADHD diagnosis). His psychiatric conditions together with the stressors leading up to the alleged offences, including his financial problems, are likely to have impacted his judgment and impulse control leading to the commission of the alleged offences. Nicholas' commission of the alleged offences should be seen in the context of someone who was using substances to cope with his underlying psychiatric issues. Despite his psychiatric conditions, he would not be of unsound mind, and would be fit to plead, advise counsel and stand trial.
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> [original emphasis omitted]

30 It is immediately apparent that the authors did not explain their reasons for the conclusion that the appellant's ADHD and Insomnia Disorder affected his judgment or ability to control his impulses. Rather, the conclusion was simply stated. There is no explanation as to how the appellant's psychiatric conditions affected his cognition or how this impacts on his culpability. The Court is therefore left none the wiser as to whether these conclusions were sound or had any factual basis.

31 In fact, the sentence in paragraph 18, "In our professional opinion, Nicholas' ADHD and Insomnia Disorder have been present for some time, and he used cannabis primarily to self-medicate his untreated symptoms", is

troubling. The authors began the sentence with the somewhat bombastic words, "In our professional opinion". With respect, those words are devoid of meaning in this context and seem to have been inserted to give the sentence the sheen of being a *bona fide* medical or scientific conclusion, when it is nothing of the sort. Quite apart from the absence of any reasoning or explanation, the rest of the sentence is nothing more than a reproduction of what the appellant himself had told the authors: namely, that he had had these conditions for some time and used drugs to self-medicate – see paragraph 11 of the report. Are the authors saying no more than that in their "professional opinion" they *believe* what the appellant told them? If so, again ignoring the absence of any explanation for this, their stated opinion is irrelevant. Credibility is a matter for the Court and it is not commonly the case that an expert will have anything useful to say about that.

32 Furthermore, aspects of those two paragraphs are remarkably vague. At paragraph 18, the authors referred to "these factors", but did not explain what those factors were. In both paragraphs, the authors also stated that the appellant's psychiatric conditions and stressors "contributed to his poor judgement" or "impacted his judgment". But as the District Judge pointed out, it is unclear what the authors meant by "judgment". It could mean (1) the appellant's knowledge of the *legal* rightness or wrongness of his actions or (2) his awareness of the *moral* rightness or wrongness of his offending actions: *ASR* at [108]–[110]. It could also mean the ability of the appellant to consider the risks of offending and balance it against the reward he hopes to get before taking a chance: *Nagaenthran a/l K Dharmalingam v PP and another appeal* [2019] SGCA 37 at [40]–[41]. As I explained at the hearing, lack of judgment in the latter sense can hardly be mitigating because every criminal hopes not to get caught and can be said to lack judgment in this respect. The authors did not

explain which aspect or aspects of the appellant's judgment they are referring to. Thus, the Court is left without any assistance as to whether or how the appellant's supposedly impaired judgment has any bearing on his culpability.

33 The authors' opinions are also contradicted by the appellant's admissions to the probation officer, Mrs Moganaruban. Contrary to the supposedly professional opinion of the authors that the appellant had acted solely to self-medicate his conditions, the appellant admitted to Mrs Moganaruban that he had "abused drugs as a life style activity for fun and relaxation" and that he had travelled overseas to smoke cannabis as it was illegal to do so in Singapore. Mrs Moganaruban indicated that the appellant "[u]nderstood the severity of his offence and expressed regret". These flatly contradict any suggestion that the appellant was self-medicating and that his psychiatric conditions contributed to his poor judgment and lack of impulse control which ultimately led him to offend. His overseas escapades are evidence of his knowledge that smoking cannabis is *legally* wrong. His capacity to express regret shows his awareness that smoking cannabis is *morally* wrong. It therefore appears that the appellant's judgment was not affected by his psychiatric conditions. Further, the fact that the appellant went overseas to smoke cannabis shows that his consumption was not impulsive but instead planned with due regard for the risks and consequences of being caught committing such acts in Singapore. None of this is addressed in the Winslow report. This could mean one of two things: either the appellant did not inform the authors that he abused drugs for "fun and relaxation" (which highlights the danger of professionals relying solely on their clients' self-reporting) or the authors chose to omit this crucial fact from their report. Either way, the Winslow report is severely undermined as a result.

34 In any event, I digress to observe that self-medication is not an excuse or justification for taking cannabis. As the High Court noted in *Leon Russel Francis v PP* [2014] 4 SLR 651 ("*Leon Russel Francis*") at [27], there are proper legal avenues for drugs to be administered or consumed for medical purposes. *Leon Russel Francis* was an exceptional case. The offender there suffered from a serious genetic medical condition known as EDS Type IV. Because of this condition, the offender was left permanently dependent on a colostomy (stoma) bag to collect his intestinal waste. He smoked cannabis to ease the discomfort he felt from his colostomy bag. On these exceptional facts, the High Court imposed an order for probation. In so doing, it "caution[ed] against any reliance on this case in the future for its precedential value because the [circumstances there] were indeed exceptional in that the [offender] suffer[ed] from a rare genetic medical condition which cause[ed] him discomfort and anxiety": at [26]. The present case can plainly be distinguished from *Leon Russel Francis*. The appellant's condition, at least on the evidence before the Court, is not causally linked to the commission of the offences; further, as already noted, unlike the offender in *Leon Russel Francis*, the appellant cannot even show that he took cannabis to self-medicate.

35 Before me, Mr Fernando criticised the District Judge and the Prosecution for not calling for further evidence to supplement any deficiencies in the Winslow report. Relying on the following paragraph in *Tan Kian Tiong v PP* [2014] 4 SLR 131 ("*Tan Kian Tiong*"), he submitted that additional evidence should be called whenever there is a dispute on the facts which could have an impact on sentence:

> 12 … Where there is a dispute in relation to facts that may have a material effect on sentence (notwithstanding that the plea of guilt remains valid) and the dispute cannot be resolved, the proper course would be for the court to convene a post-

> conviction (or Newton) hearing pursuant to s 228(5) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) and hear evidence, if necessary.

36 However, as I explained at the hearing, *Tan Kian Tiong* is not strictly applicable because while we are ultimately concerned with a question of fact (whether the appellant's psychiatric conditions had any causal link to his offences), the evidence that is being challenged is *opinion* evidence, not factual evidence. The opinion evidence in question is so deficient as to be valueless to the Court in this case. In such circumstances, there is no duty on the Court or the Prosecution to supplement shortcomings in the evidence put forward by the Defence. If the Defence wishes to rely on a disputed fact in mitigation, it alone bears the onus to prove that fact to the requisite standard of proof. Otherwise, the Court will resolve the dispute in favour of the Prosecution and sentence the offender on that basis. This is simply a question of applying the rules on burden of proof. If the party having that burden fails to discharge it, the asserted fact is not proved and cannot be relied on.

37 Further, I reiterate that a Newton hearing is the exception rather than the norm. As I held in *Ng Chun Hian v PP* [2014] 2 SLR 783, a Newton hearing should not be ordinarily convened unless the sentencing judge is satisfied that it is necessary to do so to resolve a difficult question of fact that is material to the determination of the sentence. In addition, the Court may decline to convene a Newton hearing if the case sought to be advanced is absurd or obviously untenable: at [24]. In a case like this, the decision to hold a Newton hearing would turn largely on the value of the professional report. For instance, if the report is potentially valuable on its face and the Prosecution disputes the opinion presented, or states that certain potentially aggravating facts should be inferred because of some extraneous factors, there might well be a basis for a Newton

hearing. Conversely, there would typically be no case for a Newton hearing to be held if the argument rests on the need to fill gaps in a poorly-reasoned professional report, which the Court finds to be valueless in the circumstances.

38 Mr Fernando also drew my attention to *PP v Lee Han Fong Lyon* [2014] SGHC 89 ("*Lee Han Fong Lyon*"). In that case, the High Court affirmed a sentence of probation for a 25-year-old drug offender, noting that the offender's ADHD "was a factor in his criminality", even though it was not the sole factor: see at [6] and [11]. Mr Fernando emphasised that in that case, several adjournments were granted for pre-sentencing reports to be prepared and a consultant at the IMH was even examined in Court at a Newton hearing. However, each case turns on its own facts. The fact that a particular course was adopted by the Court in that case does not mean that the same approach should be adopted in every other case. In any event, it is not clear why the Court proceeded as it did in *Lee Han Fong Lyon*, given that the contents of the expert reports are not apparent from the judgment.

39 I briefly address the appellant's remaining criticisms of the District Judge's analysis of the Winslow report.

(a) In relation to his contention that the District Judge ought to have considered the Winslow report in its entirety ([20] above), the appellant highlights in particular paragraphs 8–13 and 16 of the Winslow report, which set out the appellant's history of impulsive behaviour and insomnia. With respect, this does not assist the appellant. It is not disputed that he is suffering from ADHD and Insomnia Disorder. The real question is whether these conditions caused him to offend.

(b) The appellant submits that since impulsiveness is a symptom of ADHD, it follows that the appellant's ADHD is causally linked to his commission of the offence of consumption of cannabis ([21] above). With respect, it is not clear how or why this is so, for the reasons explained at [32]–[33] above.

(c) As for the appellant's claim that his ADHD is causally linked to the abetment charge ([22] above), I note that the Winslow report addresses only the appellant's *consumption* of cannabis (see [29] above). Further, as the District Judge pointed out at [39] of the GD, the appellant's initial rejection of Peter's request for drugs shows that he had the capacity to refuse Peter's request. Even assuming that Peter's persistence eventually wore down the appellant's resistance, this does not amount to impulsive behaviour on the latter's part.

(d) Finally, the appellant's submission that the authors' opinion was amply supported by their diagnosis at paragraph 16, which was in turn supported by their assessment of the appellant at paragraphs 4–16 ([24] above), is without merit as well. Those paragraphs relate to the appellant's history and symptoms. They do not address the crucial question: whether there was a causal connection between the appellant's psychiatric conditions and his offences.

40 The upshot of the foregoing discussion is that no reliance can be placed on the Winslow report. It follows that the appellant has not tendered any cogent evidence to prove the presence of a causal link between his psychiatric conditions and his offences. Since the appellant has not even begun to show that rehabilitation should displace deterrence as the dominant sentencing

consideration in this case, the District Judge was correct to rule out probation as an option.

The sentence

41 At the hearing, the learned Deputy Public Prosecutor, Mr Bhajanvir Singh, informed me that the respondent would not rely on the TIC charge pertaining to the possession of 13.8g cannabis mixture for the purposes of sentencing: see [8] above. He explained that the cannabis mixture in relation to this charge arose from the same block of vegetable matter as the cannabis which forms the subject of the possession charge (see [6] above), and acknowledged that the implications of this were pending consideration by the Court of Appeal in an unrelated matter. In any case, it should be noted that the sentence for the possession charge was ordered to run concurrently with the sentences for the other two charges. Thus, any reduction in the sentence for this charge is unlikely to affect the overall sentence imposed by the District Judge.

42 What then should the sentence be for the possession charge? In imposing a sentence of 15 months' imprisonment, the District Judge had taken into account the quantity of cannabis involved (9.28g) *and* the TIC charge (involving 13.8g of cannabis mixture). In the light of the respondent's current position on the TIC charge, Mr Singh submitted that an appropriate sentence would be a term of 8 to 10 months' imprisonment. I think this is correct. I therefore set aside the sentence of 15 months' imprisonment and sentence the appellant to 10 months' imprisonment, having regard to the quantity of cannabis in this case.

43 I now turn to the consumption charge: see [5] above. While the respondent sought a sentence of 8 months' imprisonment in the proceedings

below, the District Judge imposed a sentence of 10 months' imprisonment on the basis that the appellant was "a casual user of drugs as opposed to a one-off user": GD at [57]. With respect, this approach is wrong in principle. In *Vasentha d/o Joseph v PP* [2015] 5 SLR 122 ("*Vasentha*"), I held that an offender cannot be punished for conduct that does not form the subject of the charges brought against him: at [62]. As the High Court explained in *PP v Tan Thian Earn* [2016] 3 SLR 269 ("*Tan Thian Earn*"), it is an elementary component of fairness that an offender is not punished for an offence for which he was not charged with: at [62]. Since none of the TIC charges relate to the appellant's consumption of cannabis, and since the fact that the appellant was a casual user of drugs was not reflected in the agreed statement of facts, in my judgment, the District Judge was wrong to rely on this to impose a harsher sentence. I therefore vary the sentence imposed in respect of this charge to 8 months' imprisonment.

44 Thus, the appellant is sentenced to 8 months' imprisonment for the consumption charge and the abetment charge. The sentences of at least two charges must run consecutively. The District Judge ran the sentences for the consumption charge and the abetment charge consecutively and I see no reason to interfere with this. This yields an aggregate sentence of 16 months' imprisonment. It remains for me to consider whether this aggregate sentence should be adjusted in the light of the appellant's overall criminality: the Prosecution proceeded with only three charges and the appellant has no antecedents. Nonetheless, in my judgment, there is no need for any further adjustment. As I pointed out in *Vasentha*, while a Court may not enhance an offender's sentence on the basis of other offences which he has admitted to but has not been charged with, the Court should equally not blind itself to the obvious: at [58]–[59]. Where an offender admits to previous conduct which amounts to an offence, the fact that the offender was involved in criminal

activities for a period of time prior to his arrest can be used to negate the mitigating weight of the offender's assertion that it was his first or only offence. As the High Court put it in *Tan Thian Earn*, an offender's admission can be used as a "shield", though not as a "sword": at [61]. Thus, it would not have been open to the appellant to assert that his offences were one-off in nature and seek a reduction in sentence on that basis. To be fair to the appellant, he did not do so.

Conclusion

45 For these reasons, I allow the appeal against sentence in part. While I agree with the District Judge that probation is not justified, I vary the sentence imposed on the possession charge from 15 months' imprisonment to 10 months, and the sentence imposed for the consumption charge from 10 months' imprisonment to 8 months; and running the sentences for the consumption charge and the abetment charge consecutively, as the District Judge did, I vary aggregate sentence imposed on the appellant to 16 months' imprisonment.

Sundaresh Menon
Chief Justice

Peter Keith Fernando, Kavita Pandey and Renuga Devi (Leo Fernando LLC) for the appellant;
Bhajanvir Singh (Attorney-General's Chambers) for the respondent.
