IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA 61

Criminal Motion No 10 of 2022

Between

Adeeb Ahmed Khan s/o Iqbal Ahmed Khan

… *Applicant*

And

Public Prosecutor

… *Respondent*

GROUNDS OF DECISION

[Criminal Procedure And Sentencing — Appeal — Out of time]

Adeeb Ahmed Khan s/o Iqbal Ahmed Khan
v
Public Prosecutor

[2022] SGCA 61

Court of Appeal — Criminal Motion No 10 of 2022
Sundaresh Menon CJ, Tay Yong Kwang JCA and Steven Chong JCA
7 September 2022

12 September 2022

Sundaresh Menon CJ (delivering the grounds of decision of the court):

Introduction

1 The ordinary way in which the merits of a decision are reviewed is by way of appeal. In many instances, a dissatisfied litigant has a *right* of appeal, as long as this is invoked and exercised in accordance with the applicable rules and limits. Where a litigant fails to invoke its right of appeal in a timely way, as long as the court is satisfied that this stemmed from some oversight rather than because of an election to accept the merits of the first instance decision, it may exercise its discretion to extend the time for the appeal to be filed. In the criminal context, this will be subject to the analytical framework set out in *Lim Hong Kheng v Public Prosecutor* [2006] 3 SLR (R) 358 ("*Lim Hong Kheng*") and later approved by this court in *Bachoo Mohan Singh v Public Prosecutor and other applications* [2010] SLR 966 ("*Bachoo Mohan Singh*"). We will examine that framework later in these grounds of decision.

2 Where, however, because of the inordinate length of time by which any applicable time limit for filing an appeal has been exceeded, or because of the absence of any explanation to account for the failure to invoke the right of appeal in a timely way, or because of a combination of these and/or other factors, the court concludes that the applicant had *elected to accept the merits of the original decision*, then the more demanding threshold that was laid down in *Public Prosecutor v Pang Chie Wei and other matters* [2022] 1 SLR 452 ("*Pang Chie Wei*") (where we clarified the circumstances under which the court may reopen a previous decision) will have to be crossed before permission will be given to bring an appeal despite the passage of time.

3 In *Pang Chie Wei*, we explained that the starting point of the analysis is that every judgment of the court is final and cannot be reopened on the merits. Certainly, this applies with greater force to decisions in concluded appeals. However, as explained above at [2], this can also apply in the context of a first instance decision. The judicial reluctance to undo concluded decisions is grounded principally in respect for the finality of judgments, and the notion that litigation must at some definite point be brought to an end. Once the trial or appellate process has run its course, a presumption of finality and legality attaches to the conviction and sentence (*Pang Chie Wei* at [7]–[8]). A high threshold is therefore required to persuade the court to allow the presumptive interest in finality to be displaced.

4 CA/CM 10/2022 ("CM 10") was a criminal motion filed by the applicant, Adeeb Ahmed Khan s/o Iqbal Ahmed Khan, on 21 April 2022 seeking an extension of time to file a notice of appeal against the sentence that was meted out to him by the General Division of the High Court on 30 August 2021.

5 The applicant had been charged for several offences in two sets of proceedings before the District Court and the High Court, and did not contest either set of proceedings. In the proceedings before the District Court, he was convicted on 24 August 2021 of two charges, one each under ss 8(*a*) and 8(*b*)(ii) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA") punishable under ss 33(1) and 33A(1) of the MDA respectively. He was sentenced in the aggregate to five years' imprisonment with effect from 3 May 2017 and three strokes of the cane. In the proceedings before the High Court, the applicant was convicted by the High Court judge ("the Judge") some days later on 30 August 2021 of a separate charge of abetting possession for the purpose of trafficking in not less than 166.99g of methamphetamine under s 5(1)(*a*) read with ss 5(2) and 12 of the MDA punishable under s 33(4A)(*i*) of the MDA and was sentenced to 15 years' imprisonment and 14 strokes of the cane. The term of imprisonment for the latter proceedings was to commence after the sentence imposed by the District Court. Another charge of conspiring to possess 329.99g of cannabis for the purpose of trafficking was taken into consideration when the High Court sentenced the applicant. His aggregate sentence arising from the two sets of proceedings was 20 years' imprisonment (backdated to the date of his arrest on 3 May 2017) and 17 strokes of the cane.

6 The applicant did not seek to disturb the decision of the District Court. Indeed, he could not. The District Court sentenced him to the mandatory minimum sentence for one of the two proceeded charges, ordered the sentence for the second proceeded charge to run concurrently, and made no adjustment for seven other charges that the applicant consented to being taken into consideration for the purpose of sentencing. While this might have appeared to suggest undue leniency on the part of the District Court, the fact was that the District Court was aware that the applicant was shortly thereafter to face

separate charges in the High Court. As noted in the preceding paragraph, the applicant did not contest the charges in the High Court and also did not contest the sentence that was imposed for almost eight months. He then filed this motion, seeking permission to bring an appeal against the sentence imposed by the High Court despite being well out of time.

7 After considering the parties' submissions, we were satisfied that the application was wholly without merit and fell far short of the threshold required to justify the grant of permission to appeal out of time in the present circumstances. We therefore summarily dismissed the application without fixing the matter for an oral hearing pursuant to ss 238A and 238B of the Criminal Procedure Code 2010 (2020 Rev Ed). We explain our decision below after setting out the relevant facts.

Facts

8 On 2 May 2017, the applicant ordered a consignment of drugs from a Malaysian-based supplier and was to receive the said consignment from one Muhamad Azmi bin Kamil ("Azmi"). On the same day, a vehicle driven by Azmi was stopped at Woodlands Checkpoint and some 677.5g of methamphetamine was recovered from the vehicle. After Azmi's arrest, he was allowed to receive and make calls to assist the authorities with the arrest of the intended recipients of the drugs seized. Azmi made and received multiple calls to the applicant. The applicant expected that Azmi was to deliver not less than 166.99g of methamphetamine to him and he intended to traffic in the drugs he would receive.

9 On 3 May 2017, at about 1.08am, the applicant was arrested at the loading and unloading bay of Vista Point located in Woodlands. A sachet containing not less than 1.59g of methamphetamine was found in his car. After the applicant was arrested, a urine sample was taken from him and this was found to contain evidence of methamphetamine consumption.

10 These events were the subject of the two proceedings before the District Court and the High Court. As a result of the events on 3 May 2017 summarised at [0] above, the applicant was charged with two offences: (a) one of possession of not less than 1.59g of methamphetamine under s 8(*a*) of the MDA and (b) one of consumption of methamphetamine under s 8(*b*)(ii) of the MDA. The applicant pleaded guilty to both charges. He also consented to seven other charges under the MDA and the Prisons Act (Cap 247, 2000 Rev Ed) being taken into consideration for the purpose of sentencing. The applicant was sentenced by the District Court to five years' imprisonment with effect from 3 May 2017 and three strokes of the cane for the consumption charge and eight months' imprisonment for the possession charge with both charges to be run concurrently. Because of his antecedents, the sentence imposed for the consumption charge had been enhanced and he was sentenced to the mandatory minimum.

11 As a result of the events on 2 May 2017 summarised at [8] above, the applicant was charged with one charge of abetment by conspiring with Azmi to possess for the purpose of trafficking in not less than 166.99g of methamphetamine under s 5(1)(*a*) read with ss 5(2) and 12 of the MDA. The applicant pleaded guilty to the charge. He also did not contest another charge of abetment by conspiracy for Azmi to possess for the purpose of trafficking in not less than 329.99g of cannabis and consented to that charge being taken into consideration for the purpose of sentencing. The applicant was sentenced by the

High Court to 15 years' imprisonment to commence from 3 September 2020 (which was after the completion of the sentence imposed by the District Court) and 14 strokes of the cane. The applicant did not file an appeal against his sentence.

12 CM 10 was filed on 21 April 2022, almost eight months after his conviction and sentence by the High Court. The applicant sought an extension of time to file a notice of appeal against his sentence. At a case management conference on 26 April 2022, the applicant confirmed that CM 10 related only to the sentence imposed by the High Court.

The parties' cases

The applicant's case

13 In an attempt to explain the delay in filing the appeal at this stage, the applicant alleged that he was misled by an initial indication from the Singapore Prison Service ("SPS") that his earliest date of release would be on 25 July 2029. He claimed that on that basis, he decided not to appeal. However, in October 2021, he was told that his earliest date of release would be 2 September 2030; this was confirmed by the SPS. During that time, there had been a lockdown in prison arising from the COVID-19 pandemic. In February 2022, his family approached the Ministry of Home Affairs ("MHA") to seek assistance in clarifying the date of release. The Superintendent of the SPS subsequently saw the applicant and explained the error in the earlier indication by the SPS as to his earliest date of release; this meeting, which took place on 13 April 2022, was also confirmed by the SPS. The applicant claimed he was told his case was unique because he had first been sentenced by the District Court and then subsequently by the High Court and that was why they had difficulty in calculating his earliest date of release. It may be noted that the first

communication by the SPS took place within the period permitted for an appeal to be filed, while the corrected position was communicated a few weeks after the expiry of that period. Nonetheless, it was only six months later that CM 10 was filed.

14 The applicant did not advance a meaningful case as to the prospects of a successful appeal. He only submitted that his sentence should be reduced because it was said to be "too heavy". He claimed that he told his lawyer, Mr Ramesh Tiwary, to ask for the five years' imprisonment term given by the District Court to run concurrently with the eventual sentence given by the High Court and was told that this was up to the sentencing judge. He petitioned this court to allow the two sentences that were imposed to run concurrently because he pleaded guilty immediately, he has a very supportive girlfriend waiting for his release so that they can get married, his mother is very old and in ill health, and he is remorseful. He also contended that he asked his lawyer why there were two sets of proceedings, and why they were not consolidated before the High Court but his lawyer allegedly told him that it could not be done. Ultimately, he sought a review of his sentence and an aggregate sentence of 15 years' imprisonment for all the charges flowing from the two sets of proceedings.

The respondent's case

15 The respondent submitted that CM 10 was devoid of merit and should be dismissed. The delay in the present case, which was more than 15 times the permitted time period of 14 days for filing an appeal, was excessive. The applicant was required to appeal against his sentence within 14 days from the date of his sentence (that is by 13 September 2021). He only filed CM 10 on 21 April 2022, which was out of time by seven months and eight days.

16 The respondent submitted that even if the applicant's delay in seeking to appeal against his sentence could in some part be explained by the erroneous communication regarding the applicant's earliest release date from the SPS, the appeal had no prospects of success. The applicant's plea for the sentences imposed by the District Court and the High Court to run concurrently was without any legal basis and the purported grounds he had advanced were merely personal factors. The applicant had also not shown how the sentence imposed by the High Court may be impugned. On the contrary, the respondent submitted that the sentence imposed on the applicant was entirely appropriate and not wrong in principle or manifestly excessive. The applicant even sought the sentence, that was eventually imposed, in his mitigation plea. The respondent also submitted that it was inaccurate for the applicant to imply that the aggregate sentence imposed would be lower if the charges before the District Court and the High Court were consolidated and heard before the High Court.

Issue

17 The main issue before us in CM 10 was whether the applicant should be granted an extension of time to file a notice of appeal against his sentence. As we have said (at [1]–[2] above), if we viewed the delay in the present application as stemming from the fact that the applicant was content to accept the merits of the original decision, then the high threshold specified in *Pang Chie Wei* applied to warrant allowing him to pursue an appeal at this late stage. Alternatively, if the delay was merely an oversight and/or he advanced a legitimate explanation for the delay, the balancing exercise contemplated in *Lim Hong Kheng* (as affirmed in *Bachoo Mohan Singh*) applied. This would require us to consider:

(a) the length of delay;

(b) the reasons for the delay; and

(c) the prospects of an appeal against sentence.

On either analysis, for the reasons set out below, we were satisfied that the application was hopeless.

Our decision

The law

18 Under s 377(2)(*b*) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC"), the applicant was required to lodge a notice of appeal against his sentence within 14 days after the date of the sentence, namely, by 13 September 2021. While he did not do so, s 380(1) of the CPC provides that an appellate court "may, on the application of any person debarred from appealing for non-compliance with any provision of [the CPC], permit him to appeal against any judgment, sentence or order if it considers it to be in the interests of justice …".

19 The principles relating to the court's exercise of discretion to grant an extension of time are well-established. In the decision of the High Court in *Lim Hong Kheng*, the court dealt with an application by the defence for leave to file a petition of appeal against conviction out of time under the predecessor of s 380(1) of the CPC (that is s 250 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed)). The court, having undertaken a thorough review of the authorities elaborating on the applicable criteria for an extension of time in relation to both criminal and civil appeals, held as follows (at [27]):

> … It virtually goes without saying that the procedural rules and timelines set out in the relevant rules or statutes are there to be obeyed. ***These rules and timetables have been provided for very good reasons but they are there to serve the ends of justice and not to frustrate them. To ensure that justice is done in each case, a measure of flexibility is provided so that transgressions can be excused in appropriate cases***. It is equally clear that a party seeking the court's indulgence to excuse a breach must put forward sufficient material upon which the court may act. No party in breach of such rules has an *entitlement* to an extension of time. The foregoing cases all establish that in exercising the court's discretion under s 250 of the CPC it is relevant to consider all the circumstances, and in doing so to use a framework that incorporates such considerations as:
>
> > (a) the length of the delay in the prosecution of the appeal;
> >
> > (b) the explanation put forward for the delay; and
> >
> > (c) the prospects in the appeal.
>
> [emphasis in original in italics; emphasis added in bold italics]

This was subsequently endorsed by this court in *Bachoo Mohan Singh* at [64].

20 Generally, the burden is on the applicant to explain any delay. The longer the delay, the greater the burden and this is reflected in the degree of scrutiny applied by the court to the explanation put forward for the delay and the prospects of success in the putative appeal (*Bachoo Mohan Singh* at [66]; *Lim Hong Kheng* at [29]).

21 However, as we foreshadowed at [2] above, where the delay and the surrounding circumstances suggest that the applicant did not even intend to challenge the decision at first instance, then in assessing whether the court should deviate from the presumptive finality of a concluded criminal trial and exercise its discretion to grant permission to appeal out of time, a higher threshold may be required. In *Pang Chie Wei* at [70], we endorsed the

application of the high threshold of substantial injustice to applications for permission to appeal out of time.

22 As we set out in *Pang Chie Wei* at [71], the high threshold of substantial injustice in the context of reopening a previous decision requires that:

> (a) Where an applicant seeks to set aside his *conviction*, an injustice will only have arisen if *new material is advanced that strikes at the soundness of the conviction in a fundamental way*. The injustice may be said to be substantial if the new material points to a powerful probability that his conviction is unsound and if the facts do not disclose any other offence of comparable gravity.
>
> (b) Where an applicant seeks to challenge his *sentence*, an injustice will only have arisen if *new material is advanced that shows that the earlier decision was based on a fundamental misapprehension of the law*. The injustice may be said to be substantial if the said misapprehension had a significant bearing on the sentence imposed.

23 In the present context of an application for an extension of time to file an appeal, we adapted the test in *Pang Chie Wei* by not limiting the material to "new" material. Various examples of what might constitute either material that strikes at the soundness of the conviction in a fundamental way, or reveals a fundamental misapprehension of the law that had a significant bearing on the sentence imposed, were set out in *Pang Chie Wei* and it was not necessary for us to rehearse those in these grounds of decision. Suffice it be noted that even if some error or misapprehension be shown, the court must be satisfied that this would very likely have a bearing on the outcome in the case. This can at times entail a reconstruction of events. For instance, in *Pang Chie Wei*, one of the

issues raised pertained to whether the offender in that case would have been sentenced differently at her original trials (or appeals) had regard been had to a change in the law that was effected by an intervening decision of the court in another matter. In considering this, this Court said as follows (at [90]):

> 90 Third, any application for us to reopen a concluded decision based on the change in the law brought about by *Saravanan* essentially invites us to retrospectively alter one part of the factual matrix – in other words, to assume that the position in *Saravanan* was already the applicable law when the case at hand was decided. The difficulty, however, is that any retrospective view of events must also take into account the full range of factors, including how the Prosecution might have acted had it appreciated the legal position in *Saravanan* at the material time. It seems to us that in the vast majority of cases pre-dating *Saravanan* where offenders had been charged pursuant to the Prosecution's 'dual charging practice' and so convicted, the Prosecution could have easily proceeded on charges other than the impugned cannabis mixture charges, such that there would have been no appreciable difference in the aggregate sentence imposed. This is a point of considerable importance …

And we concluded as follows (at [133]):

> 133 As we made clear to Mr Gill, the difficulty in trying to undo Shalni's conviction on the cannabis mixture charge, which was properly rendered at the time, was that we would inevitably have had to consider how the Prosecution might have proceeded had it appreciated the legal position in Saravanan … then. Were we to consider only the first part of that equation and ignore the realities of how the Prosecution might have otherwise proceeded, we would in effect be selectively altering only one part of the factual matrix on hindsight. The first charge against Shalni was originally framed as a capital charge involving more than 15g of diamorphine. Had the Prosecution been earlier apprised of the fact that it could not have proceeded with the cannabis mixture charge, it might well have exercised its prosecutorial discretion differently in deciding whether to reduce the capital charge. With respect, it seemed to us that the perspective that Mr Gill put forward on his client's behalf did not take into account the full range of factors relevant to the reconstruction of past events. Therefore, … we were of the view that there was no powerful probability that substantial injustice had arisen in Shalni's matter.

24 In short, when considering the question of substantial injustice in this context, the court must be mindful of *all* the facts before concluding that the outcome would very likely have been different.

25 Before we turn to analyse the facts of the present case, we should clarify some aspects of the differences in threshold that is applied when considering an application for permission to file an appeal that is out of time because of some oversight and where the court concludes that the intending appeal is an afterthought coming after an earlier election to accept the finality of the particular judgment.

26 We make two brief observations:

(a) First, even in the former case, the length of time by which the applicable time line is exceeded will be material. The longer that time, the greater the scrutiny applied by the court to the merits of the prospective appeal: see [20] above, citing *Lim Hong Kheng* at [29] and *Bachoo Mohan Singh* at [66].

(b) Second, the determination that the case at hand falls within one category rather than the other will be significantly influenced by the length of time that has passed without an appeal being filed. But it will nevertheless be a holistic inquiry in which the court will examine all the factors including the submissions made at the original hearing, the reasons advanced for the delay and any other factors.

27 In that light, we turn to the present case.

The applicant accepted the finality of the decision of the High Court

28 We were satisfied in this case that the applicable framework was that laid down in *Pang Chie Wei*. We took this view because it was evident from the following facts that the applicant accepted the finality and correctness of the decision of the Judge:

(a) After the decision of the Judge was rendered on 30 August 2021, nothing was done by the applicant to challenge that decision for a period of more than seven months. In *Isham bin Kayubi v Public Prosecutor* [2021] SGCA 22, we described a delay of more than three months as "not insubstantial". While the length of the delay is not in itself determinative, the longer the delay, the more suggestive it will be of an intention not to contest the merits of the decision.

(b) That inference will be strengthened considerably if no sensible explanation is advanced to account for the delay. That was certainly the case here. As stated above (at [13]), the applicant attempted to explain the delay by alleging that he was misled by the SPS that his earliest date of release would be on 25 July 2029 and, on that basis, decided not to appeal. However, by October 2021, he was told that his earliest date of release was in fact 2 September 2030. As we have noted, that was six months before CM 10 was filed. The applicant claimed that because of the lockdown occasioned by the COVID-19 pandemic and the time taken to get assistance from the MHA and subsequently the SPS, CM 10 could only be filed when it was. However, these reasons were not credible. The sentence imposed by the High Court of 15 years' imprisonment and 14 strokes of the cane was known to the applicant at

all material times. Even considering that the SPS did err in its initial calculation of his earliest release date, we could not see how this could affect the applicant's decision not to appeal against the sentence imposed by the High Court. The question was whether the applicant applied his mind to the appropriateness of the sentence of 15 years' imprisonment and 14 strokes of the cane. His decision whether to appeal should have been made on that basis. And that assessment cannot depend on whether there was a computation error of the earliest release date. This was so especially given that at the sentencing hearing, the Judge specifically stated that the applicant's 15 years' imprisonment term was to commence on 3 September 2020 (see [11] above). Aside from this, the difference between what he was allegedly told as to his release date and his actual release date was a period of slightly more than 13 months. Hence, on his case, he was content to accept an aggregate term of imprisonment that ended after about 12 years and 3 months (allowing for remission) but not if it ended after about 13 years and 4 months (allowing for remission). This made no sense given his position before us was that his aggregate sentence should be 15 years (or 10 years allowing for remission) which was well below what he claims he thought the position was when he decided not to appeal.

(c) In addition to this, it should be noted that the applicant and his defence counsel below were cognisant of the implications arising from the two sets of proceedings being heard before separate courts. In part because of this, the proceedings before the Judge were not disposed of until the District Court had passed its sentence. Thereafter when the matter came before the Judge, the applicant himself sought a sentence of "less than 15 years' imprisonment and caning" in his mitigation plea with the result that the aggregate sentence would be "just slightly less

> than 20 years". The applicant also explicitly contended for the Judge to adjust the final sentence in view of the totality principle given the separate sentence that was imposed by the District Court. The sentence imposed by the Judge of 15 years' imprisonment and 14 strokes of the cane was very close to what the applicant had sought below. In these circumstances, it was evident why no appeal was filed for such a long time. To put it simply, the applicant got essentially what he had asked for.

29 For these reasons, it followed that the *Pang Chie Wei* framework applied and permission would therefore not be granted unless we were satisfied that the Judge's decision was based on a fundamental misapprehension of the law that had a significant bearing on the sentence that was imposed. It is to this we now turn.

The applicant failed to identify any fundamental misapprehension of law

30 In our judgment, the applicant failed to identify any fundamental misapprehension of law let alone show that this would have a significant bearing on his sentence. There was also no basis for the applicant to assert that the sentences imposed by the District Court and High Court were manifestly excessive. The sentence imposed by the District Court of five years' imprisonment and three strokes of the cane for the consumption of methamphetamine under s 8(*b*)(ii) of the MDA (see [10] above) was the *mandatory minimum* sentence prescribed by s 33A(1) of the MDA since the applicant was a repeat offender. The sentence of eight months' imprisonment for possession of 1.59g of methamphetamine under s 8(*a*) of the MDA was ordered to run concurrently with the sentence imposed for consumption of methamphetamine. This meant that, despite the charge for possession of 1.59g

of methamphetamine and seven other charges taken into consideration, the aggregate sentence imposed on the applicant was only the mandatory minimum sentence of five years' imprisonment and three strokes of the cane. There could not have been a lower sentence imposed by the District Court.

31 The sentence imposed by the High Court of 15 years' imprisonment and 14 strokes of the cane for one charge of abetment by conspiracy for Azmi to possess for the purpose of trafficking in not less than 166.99g of methamphetamine under s 5(1)(*a*) read with ss 5(2) and 12 of the MDA (see [11] above) was at the *low end* of the sentencing band. The applicant had also admitted to another charge of abetment by conspiracy for Azmi to possess for the purpose of trafficking in not less than 329.99g of cannabis and consented for that to be taken into consideration for the purpose of sentencing.

32 As the High Court observed in *Vasentha d/o Joseph v Public Prosecutor* [2015] 5 SLR 122 ("*Vasentha*") at [44], a sentencing court should do the following in determining the appropriate sentence in drug trafficking cases:

> (a) identify the indicative starting point of the appropriate sentence based on the type and quantity of the controlled drug;
>
> (b) make any necessary adjustments upwards or downwards based on the offender's culpability and the presence of relevant aggravating or mitigating factors; and
>
> (c) where appropriate, take into account the time that the offender had spent in remand prior to the conviction either by backdating the sentence or discounting the intended sentence.

33 The High Court set out the indicative starting point for first-time offenders trafficking in diamorphine as follows (*Vasentha* at [47]):

Quantity	**Imprisonment**	**Caning**
Up to 3g	5–6 years	5–6 strokes
3–5g	6–7 years	6–7 strokes
5–7g	7–8 years	7–8 strokes
7–8g	8–9 years	8–9 strokes
8–9g	10–13 years	9–10 strokes
9–9.99g	13–15 years	10–11 strokes

34 In *Public Prosecutor v Lai Teck Guan* [2018] 5 SLR 852 ("*Lai Teck Guan*") at [41]–[42], the High Court set out the indicative uplift for repeated drug offenders for the trafficking of diamorphine as follows:

Weight of diamorphine	**Starting sentence (first-time offender)**	**Indicative uplift**
Up to 3g	5–6 years 5–6 strokes	5–8 years 5–6 strokes
3–5g	6–7 years	5–8 years

	6–7 strokes	4–5 strokes
5–7g	7–8 years 7–8 strokes	5–8 years 4–5 strokes
7–8g	8–9 years 8–9 strokes	4–7 years 3–4 strokes
8–9g	10–13 years 9–10 strokes	4–7 years 3–4 strokes
9–9.99g	13–15 years 10–11 strokes	3–6 years 2–3 strokes
10–11.5g	20–22 years 15 strokes (mandatory)	3–6 years
11.5–13g	23–25 years 15 strokes (mandatory)	2–4 years
13–15g	26–29 years	1–2 years

	15 strokes (mandatory)	

The High Court explained that the court would have to consider the circumstances of re-offending in order to determine the appropriate indicative uplift for repeat offenders for a particular case (*Lai Teck Guan* at [43]). For instance, an offender who commits the repeat offence almost immediately after having served his prison sentence for his first offence should not be treated in the same way as an offender who relapses into crime only after a long period of staying drug-free (*Lai Teck Guan* at [30]). The indicative uplift for the former ought to be higher.

35 In *Loo Pei Xiang Alan v Public Prosecutor* [2015] 5 SLR 500 ("*Loo Pei Xiang Alan*") at [17], the High Court considered that the framework set out in *Vasentha* could be equally applicable to the trafficking of methamphetamine by using a simple conversion scale:

> 17 I am cognisant of the fact that the drug trafficked in *Vasentha* was diamorphine whereas the drug in this case was methamphetamine. Trafficking one gram of diamorphine is of course not necessarily equivalent to trafficking one gram of methamphetamine. But I consider that it is possible to derive some sort of conversion scale, or 'exchange rate', so to speak, between diamorphine and methamphetamine. This is because the Second Schedule of the MDA prescribes the exact same minimum and maximum punishments for trafficking between 10g and 15g of diamorphine and trafficking between 167g and 250g of methamphetamine – the minimum is 20 years' imprisonment and 15 strokes of the cane, and the maximum is imprisonment for life or 30 years and 15 strokes of the cane. This means that, all other things being equal, an offender who traffics between 10g and 15g of diamorphine is to be considered *as culpable* as a person who traffics between 167g and 250g of methamphetamine. Doing the arithmetic, ***the culpability of an offender who traffics one gram of diamorphine is equivalent to the culpability of an identically-situated offender who traffics 16.7g of methamphetamine***.

[emphasis in original in italics; emphasis added in bold italics]

36 In the present case, the applicant was a repeat offender who was convicted for abetment by conspiracy for Azmi to possess for the purpose of trafficking in not less than 166.99g of methamphetamine.

37 We first set out the applicable statutory regime. The Second Schedule to the MDA provides that trafficking in methamphetamine of up to 167g is to be punished by a minimum sentence of five years' imprisonment and five strokes, which corresponds to the punishment range for trafficking in up to 9.9g of diamorphine. As noted in *Loo Pei Xiang Alan* (see [35] above), trafficking in methamphetamine of not less than 167g of methamphetamine and not more than 250g of methamphetamine is punishable with a minimum sentence of 20 years' imprisonment and 15 strokes and a maximum sentence of 30 years' imprisonment or imprisonment for life and 15 strokes. Under s 33(4A)(*c*), a repeat offender for trafficking of methamphetamine shall be punished with not less than 10 years' imprisonment and not more than 30 years' imprisonment and not less than 10 strokes and not more than 15 strokes of the cane. We illustrate the statutory regime in the following table:

Weight of methamphetamine	**First-time offenders**	**Repeat offenders**
Up to 167g	Minimum: 5 years and 5 strokes Maximum: 20 years and 15 strokes	Minimum: 10 years and 10 strokes

Not less than 167g and not more than 250g	Minimum: 20 years and 15 strokes Maximum: 30 years and 15 strokes	Maximum: 30 years imprisonment and 15 strokes

38 Applying the simple conversion in *Loo Pei Xiang Alan* (that is to say the factor of 16.7) to the indicative sentencing framework set out in *Vasentha* and *Lai Teck Guan*, the indicative starting range for an offender who had trafficked in between 150.3g and 192.05g of methamphetamine was as follows:

Corresponding weight of diamorphine	**Weight of methamphetamine**	**Indicative starting point for first-time offenders**	**Uplift for repeat offenders**
9–9.99g	150.3–166.99g*	13–15 years 10–11 strokes	3–6 years 2–3 strokes
10–11.5g	167–192.05g	20–22 years 15 strokes (mandatory)	3–6 years

* This was rounded up to the top of the range below 167g of methamphetamine.

39 If the applicant had been a first-time offender, the indicative starting point of the sentence would be 15 years' imprisonment and 11 strokes of the

cane. Since the applicant was a repeat offender, the court must then consider the appropriate uplift to the indicative starting sentence. We therefore turn to the circumstances of his re-offending. The applicant's previous conviction for drug trafficking under s 5(1)(*a*) of the MDA was on 12 November 2008 and he was sentenced to six years' imprisonment and five strokes of the cane. He was also sentenced to one year's imprisonment for consumption of methamphetamine and one year's imprisonment and six strokes for carrying offensive weapons in public places. These sentences were ordered to run consecutively with the sentence for drug trafficking. After taking into account the possibility of remission of his sentence, the present offence committed on 2 May 2017 would have occurred somewhat less than three years after the applicant had served the aggregate sentence for his previous offences. In these circumstances, an indicative uplift of four years and three strokes of the cane was appropriate. Thus, the indicative starting sentence for the applicant was 19 years' imprisonment and 14 strokes of the cane.

40 We also considered the applicable aggravating and mitigating factors. There were aggravating factors in that there was another drug trafficking charge in not less than 329.99g of cannabis that was taken into consideration for the purpose of sentencing. This was especially relevant because the applicant had various antecedents for drug-related offences. As against this, we noted the mitigating factors, principally the applicant's early plea of guilt and his cooperation with the authorities, were taken into account by the Judge. The Judge, in arriving at a sentence of 15 years' imprisonment and 14 strokes, seemed to have applied a discount of four years' imprisonment considering the various factors above. In our judgment, this was a generous discount and left the applicant facing a sentence that was at the low end of the applicable band.

41 It was noteworthy, as we have already observed, that the applicant himself sought a sentence of "less than 15 years' imprisonment and caning" in his mitigation plea before the Judge so that the aggregate sentence for both proceedings would be "just slightly less than 20 years". The applicant got essentially what he sought and we therefore could not see how the sentence imposed by the Judge could possibly be considered manifestly excessive. In the applicant's mitigation plea, his defence counsel had made express reference to the charges in the District Court and urged the Judge to adjust the final sentence in view of the totality principle.

42 The respondent below also relied on the decision of the High Court in *Teo Kian Leong v Public Prosecutor* [2002] 1 SLR(R) 386 ("*Teo Kian Leong*") where in the context of a case like the present with sentences imposed by separate courts, the issue of proportionality was considered. On this, the court said as follows at [7]–[8]:

> 7 To my mind, the court's judicious exercise of its sentencing discretion in relation to s 234(1) would necessarily involve having regard to the common law principles of sentencing applicable to the imposition of consecutive sentences. These common law principles are, namely, the one transaction rule and the totality principle which have been adopted by the Court of Appeal in *Kanagasuntharam v PP* [1991] 2 SLR(R) 874 and applied in numerous other local decisions. *A sentencing judge, when deciding whether to order a subsequent term of imprisonment to run immediately or at the expiration of an existing term of imprisonment imposed on an earlier occasion, should therefore have regard to whether the subsequent offence arose in the 'same transaction' as the earlier offence(s), and also to the totality of the sentence to be served* (see *Mohd Akhtar Hussain v Assistant Collector of Customs AIR* (75(2)) 1988 SC 2143). Of course, the application of the one transaction rule is subject to s 234(1) which only extends the court's sentencing discretion to ordering the subsequent sentence to commence immediately.
>
> 8 However, one must bear in mind that the common law principles are really there to guide the sentencing courts, whose primary duty is to determine the appropriate sentence which

> would best ensure that the ends of justice are met. No single consideration can conclusively determine the proper sentence and, in arriving at the proper sentence, the court must balance many factors, sometimes rejecting some. One factor that the court should consider is *whether the totality of the sentence to be served is proportional to the inherent gravity of all the offences committed by the accused*. Hence, while the individual sentence for a particular offence may be perfectly appropriate, the cumulative effect of the sentences may result in a total term of imprisonment that is disproportionate to the overall criminality of the accused. ***In contemplating the totality of the sentences which the accused has to undergo, a question that the presiding judge can consider is: If all the offences had been before him, would he still have passed a sentence of similar length?*** If not, the judge should adjust the sentence to be imposed for the latest offence in the light of the aggregate sentence: see *Millen* (1980) 2 Cr App R (S) 357 and *Darren Lee Watts* [2000] 1 Cr App R (S) 460. Whether this is done by imposing a shorter sentence to run consecutively or a longer sentence to commence immediately, does not at the end of the day make much difference, although in principle, the judge should as far as possible try to impose a sentence that is reflective of the gravity of the latest offence(s) in question.
>
> [emphasis added in italics and bold italics]

43 We agreed entirely with the observations made in *Teo Kian Leong* and found them instructive for the present case. In our judgment, the Judge had to consider all the charges that were proceeded on in both proceedings and, in that light, consider what the appropriate sentence should be for the latter set of proceedings. Applying this test, the question for us was whether the position would have been different if these matters had been dealt with in one sitting instead of two. We were amply satisfied that the Judge correctly applied her mind to the applicant's mitigation and the sentence imposed by the District Court in coming to the view that the sentence of 15 years' imprisonment and 14 strokes of the cane was appropriate. The applicant had not satisfied us that there was any fundamental misapprehension of the law on the part of the Judge, much less any injustice that had any bearing on the sentence imposed.

44 We categorically rejected the applicant's contention that his aggregate sentence would have been lower if all the charges from the two sets of proceedings had been heard before the Judge. As explained above at [30]–[40], the sentence imposed by the District Court of five years' imprisonment and three strokes of the cane was the mandatory minimum sentence and the sentence imposed by the High Court of 15 years' imprisonment and 14 strokes of the cane was at the low end of the sentencing band. Further, s 307(1) of the CPC would have applied such that at least two of the sentences for the three different offences would have been ordered to run consecutively. In our judgment, the aggregate sentence of 20 years' imprisonment and 17 strokes of the cane could not in any way be considered to be disproportionate to the overall criminality of the case. And, as we have already noted, the circumstances of this case did not show any injustice let alone "substantial injustice" as would be required to persuade the court to grant permission to allow the applicant to appeal out of time.

In any case, applying the framework in **Lim Hong Kheng** *leads to the same conclusion*

45 In any event, and for completeness, had we applied the framework set out in *Lim Hong Kheng* (at [19] above), we would have come to precisely the same conclusion because:

(a) there was a long delay;

(b) there was no plausible or reasonable explanation for the delay; and

(c) as explained above, there were no prospects of a successful appeal.

Conclusion

46 For the foregoing reasons, we summarily dismissed CM 10. While we noted that the applicant had requested an oral hearing, we did not consider an oral hearing necessary having regard to the utter lack of any merit in the motion.

Sundaresh Menon
Chief Justice

Tay Yong Kwang
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

The applicant (in person);
Anandan Bala, Jamie Pang and Bharat Punjabi (Attorney-General's Chambers) for the respondent.