Kalaiarasi d/o Marimuthu Innasimuthu *v* Public Prosecutor
[2012] SGHC 58

Case Number	: Criminal Revision No 1 of 2012 and Magistrate's Appeal No 191 of 2011/01
Decision Date	: 19 March 2012
Tribunal/Court	: High Court
Coram	: V K Rajah JA
Counsel Name(s)	: Ezekiel Peter Latimer (Peter Ezekiel & Co) for the appellant in Magistrate's Appeal No 191 of 2011/01 and the respondent in Criminal Revision No 1 of 2012; Darryl Soh (Attorney-General's Chambers) for the respondent in Magistrate's Appeal No 191 of 2011/01 and the petitioner in Criminal Revision No 1 of 2012.
Parties	: Kalaiarasi d/o Marimuthu Innasimuthu — Public Prosecutor

Criminal Procedure and Sentencing

19 March 2012

V K Rajah JA:

Introduction

1 This was an appeal against the sentences imposed by a District Judge ("the DJ") (see *Public Prosecutor v Kalaiarasi d/o Marimuthu Innasimuthu* [2011] SGMC 5 ("the GD")). The DJ had imposed a term of imprisonment of eight weeks on the appellant, a kindergarten teacher, for failing to submit to the Official Assignee ("the OA") accounts of moneys and properties pursuant to s 82(1)*(a)* of the Bankruptcy Act (Cap 20, 2009 Rev Ed) ("BA"). After considering the parties' submissions, I set aside the sentence of imprisonment and granted a conditional discharge pursuant to s 8(1) of the Probation of Offenders Act (Cap 252, 1985 Rev Ed) ("the Act"). I now give the detailed reasons for my decision.

2 This is perhaps a timely opportunity to repeat the exhortation by Chan Sek Keong CJ in an extrajudicial speech (see Chan Sek Keong CJ, Opening Address at the Yellow Ribbon Conference 2006: "Unlocking the Second Prison" (27 September 2006) [note: 1] :

> Each time a judge decides to punish an offender, he must remember to ask himself the additional question: Why punish? This will remind him that the punishment imposed should achieve a societal purpose and cannot be an end in itself.

In a similar vein, Nigel Walker at p 6 of *Why Punish: Theories of Punishment Reassessed* (Oxford University Press, 1991) opined that justification of individual sentences is desirable:

> *Yet a sentencer who regards his consistency with his colleagues' practice as a complete justification is rather like a priest who performs ritual actions without asking himself why they are part of the ritual.* Even a ritual has a meaning. *Punishment is something more than a series of hopefully consistent decisions: as we have seen, it is a social institution. Like other social institutions it must serve – or at least appear to serve – one or more desired functions.* If it did not, it would have been allowed to wither away, like outlawry and craft-guilds, or have come to be regarded as nothing more than a ritual, like the mounting of ceremonial guards. [emphasis added]

3 It is indisputable that sentencing must serve a "societal purpose". Further, it is axiomatic, other than in situations necessitating mandatory fixed sentencing, that the sentence meted out must be rigorously justified by reference to settled sentencing objectives and principles as well as the facts of the particular case. I made this observation in *Biplob Hossain Younus Akan and others v Public Prosecutor and another matter* [2011] 3 SLR 217 (at [18]):

> Each case must *turn on a close examination of its facts*, for which a bland recitation of general principles is no substitute. [emphasis added]

4 Not unlike a decision on sentencing, a decision to prosecute must also serve a societal purpose. Not all offending conduct is subjected to prosecution, and even then, the prosecution in the exercise of its extensive discretion may selectively decide what offending conduct it proposes to sanction. It has the discretion to decide on both the nature of the charges and, in the case of repeated offending, the number of charges. This ought not to be a mechanical exercise. Rather, it should take into account all the pertinent circumstances and the overriding consideration of serving the larger good of the community. Each time before charges are preferred the prosecution too should ask of itself a not dissimilar question: why prosecute? As will be seen, this case raised legitimate concerns about how and why the decision to prefer 30 charges against the appellant was reached by those having carriage of this matter at the Insolvency and Public Trustee's Office ("IPTO"). First, there plainly was substantial delay in prosecuting the appellant – and this delay could not be attributed to the appellant in any way. Second, to compound matters, the gravity of the appellant's offending – in so far as the 30 charges preferred against her were concerned – was directly attributable to the delay in prosecution. Having considered the nature of the offences, the profile of the appellant as well as the entirety of the prevailing circumstances, I unhesitatingly came to the conclusion that the usual punishments of imprisonment or fines would be entirely inappropriate and granted the appellant a conditional discharge. I now set out the factual matrix of this appeal.

Background facts

The charges

5 The appellant was adjudicated a bankrupt on 7 January 2000 through Bankruptcy Order No. 3563 of 1999 together with her husband for a sum below $60,000. [note: 2] The appellant's bankruptcy was a result of being unable to repay a loan facility which she had applied for, but did not benefit from, together with her now estranged husband. By virtue of s 82(1)(*a*) of the BA, the appellant was under an obligation to submit to the OA accounts of monies and properties once every six months or such other period as the OA may specify. Such accounts are filed using Income and Expenditure Statements ("I & E Statements"). Section 82(1) of the BA reads:

> **Bankrupt to submit accounts**
>
> **82.**—(1) A bankrupt who has not obtained his discharge shall, unless otherwise directed by the Official Assignee —
>
> (*a*) submit to the Official Assignee once in every 6 months an account of all moneys and property which have come to his hands for his own use during the preceding 6 months or such other period as the Official Assignee may specify; or
>
> (*b*) pay and make over to the Official Assignee so much of such moneys and property as have not been expended in the necessary expenses of maintenance of himself and his family.

(2) A bankrupt who fails to comply with subsection (1)(*a*) or (*b*) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $10,000 or to imprisonment for a term not exceeding 2 years or to both and, in the case of a continuing offence, to a further fine not exceeding $200 for every day during which the offence continues after conviction.

[emphasis in original in bold]

6 After she was adjudged a bankrupt, on 15 February 2000, the appellant was furnished with bankruptcy information sheets which informed her of her statutory duty to submit her I & E Statements pursuant to s 82(1)*(a)* of the BA. The appellant filed her I & E Statements for the requisite periods between April 2000 and March 2002 and between October 2002 and March 2003. [note: 3] Pertinently, the appellant did not personally prepare the I & E Statements but relied upon her husband to do so prior to appending her signature on them. [note: 4] After 2003, the appellant failed to continue to submit her statements because she incorrectly assumed that her husband, with whom she had become estranged, would submit the relevant statements on her behalf (see [14] below). Just two reminders to file her I & E Statements were thereafter sent to the appellant – the first on 17 May 2003 and the second, more than seven years later, on 7 July 2010. Plainly, the appellant's file was not being appropriately monitored by the IPTO in the interim. Further, her failure to file the relevant I & E Statements was apparently not viewed with any degree of consternation by the IPTO. This can be inferred from the fact that following the last reminder, notwithstanding her failure to file the I & E Statements for more than eight years, on 11 October 2010, the IPTO wrote to the appellant informing that her case was being reviewed for possible discharge from bankruptcy. In the same letter, the IPTO proposed that the appellant pay a sum of $5,000 to expedite her discharge from bankruptcy. The IPTO again wrote to the appellant on 17 March 2011. The contents of the letter of 17 March 2011 were identical to the letter of 11 October 2010. In response to the IPTO's letter of 17 March 2011, the appellant in a letter dated 28 March 2011 expressed her eagerness to be discharged from bankruptcy. However, as she was unable to raise the sum of $5,000 proposed by the IPTO, the appellant offered a sum of $1,000 as the said sum was within her means. *Shortly after this, without any apparent attempt to elicit her reasons for failing to file the relevant I & E Statements for such a substantial period and/ or why she was unable to raise more money to discharge her bankruptcy, 30 charges under s 82(1)*(a) *of the BA (as alluded to at*[4] *above) were abruptly preferred against the appellant.*

The salient facts

7 During the proceedings below, the appellant pleaded guilty to three charges under s 82(1)(*a*) of the BA for failing to meet her obligations under the said provision. The offences occurred during the following periods: April 2002 to September 2002; April 2003 to June 2003; and July 2003 to September 2003. An additional 27 charges under the same provision were taken into consideration for the purpose of sentencing. The 27 charges which were taken into consideration essentially pertained to the appellant having failed to file her I & E Statements from October 2003 to March 2011. Evident from the particulars of each of the 27 charges, 24 charges were preferred for every three month period (*viz*, OAS 000407 to 000430-MSC-2011) and three charges were preferred for every six month period (*viz*, OAS 000431 to 000433-MSC-2011) that the appellant did not file an I & E Statement.

8 During the appeal, I queried the Prosecution at some length as to why there had been such a substantial lapse in time between the appellant's commission of the first offence in 2002 and her eventual prosecution in 2011. Counsel for the Prosecution, Mr Darryl Soh ("Mr Soh"), informed the court that the IPTO does not prosecute offenders under s 82(1)*(a)* of the BA immediately after each infraction. This is to allow bankrupts an opportunity to file their I & E Statements and thereby rectify

their earlier omission(s). [note: 5] *However, Mr Soh also candidly acknowledged that the IPTO's current policy (with effect from January 2010) is to prosecute such offences after three years of persistent non-compliance.* [note: 6] Mr Soh also stated that the IPTO would usually send reminders to bankrupts during the three-year hiatus. [note: 7] In short, a prosecution would ordinarily only be initiated if the bankrupt persisted in defaulting despite reminders being received over a three-year period.

9 The charges against the appellant were preferred on 27 June 2011. [note: 8] It was readily apparent that the nine year lapse between the appellant's first offence and her eventual prosecution could not be justified by reference to the IPTO's current policy of according bankrupts a reasonable opportunity to rectify lapses. Here, the appellant was charged after, and for, nine years of non-compliance with s 82(1)*(a)* of the BA. Significantly, only two reminders were sent to the appellant, the first on 17 May 2003 and the second, after an inexplicable hiatus, on 7 July 2010. In fact, there was absolutely no evidence on record that the 17 May 2003 reminder was even received by her. Even assuming it had been received, it was noteworthy that these reminders were more than seven years apart. After I made these observations during the hearing, Mr Soh acknowledged that "*after the first reminder was given to the appellant on 17 May 2003, there was a lapse by the case officer [handling the appellant's matter] in following up on this matter. So the prolonged failure [by the appellant] to file [her I & E Statements] was only detected in 2010, that [was] when the second reminder was sent.*" [note: 9]

The decision below

10 While the DJ noted that the appellant was a first time offender, he was of the view that a term of imprisonment was justified on the facts. The DJ relied, in the main, on the case of *Public Prosecutor v Choong Kian Haw* [2002] 2 SLR(R) 997 where Yong Pung How CJ stated at [24] that fines were generally an unsuitable means for punishing bankrupts because such persons would typically be unable to pay the fines on their own accord.

11 While acknowledging that fines may be imposed in appropriate situations (at [13] of the GD), the DJ considered (at [15] of the GD) that there were no "exceptional circumstances that warranted the imposition of a fine only or that of a nominal custodial term." On the contrary, the DJ considered the appellant's conduct to have aggravating features. This is evident from [17] of the GD which reads:

> The [appellant] did not (or could not) explain the reason(s) for the extremely long delay in filing her I & E statements. It was not as though she was unaware of this requirement as she had filed her statements required periods (*sic*) between April 2000 and June 2002 *and she had received repeated reminders from the OA. It would appear that the [appellant] had wilfully and blatantly disregarded her statutory duty [for] more than 8 years.* It showed a deliberate disregard for the requirements under the Bankruptcy Act. [emphasis added]

The DJ thus deemed the appropriate sentence to be four weeks' imprisonment for each of the three proceeded charges. Two of the sentences were ordered to be served consecutively. The total sentence imposed by the DJ was thus eight weeks' imprisonment. I should add that the appellant was unrepresented in the proceedings below and it did not appear from the court's certified notes of evidence that the DJ queried either the appellant or the prosecutor why the I & E statements had not been filed for such a substantial period. I was therefore puzzled as to why the DJ referred to the appellant as having received "repeated reminders" when the facts were otherwise. It was also unclear how the DJ concluded that the appellant "had *wilfully and blatantly*" disregarded her statutory duty.

While there was no doubt that the appellant had failed to discharge her statutory duty, it would be a stretch to say that she had done so "wilfully and blatantly". Pertinently, on appeal, the Prosecution only characterised her conduct as "grossly negligent" (see below at [17]). It therefore seemed to me quite plain that the DJ had erroneously considered the appellant to be deserving of exemplary punishment and, as a consequence, mistakenly punished her harshly.

12 The appellant filed an appeal against the DJ's decision.

Criminal Revision No. 1 of 2012

13 At the commencement of the hearing, the Prosecution informed the court that one of the charges (*ie*, OAS 000433-MSC-2011) was erroneously preferred against the appellant. This was one of the 27 charges which were taken into consideration for the purpose of sentencing the appellant during proceedings below. The said charge was preferred against the appellant for having failed to file an I & E Statement for the period between October 2010 and March 2011. As the Prosecution had, after the hearing below, discovered that the appellant had actually fulfilled her statutory obligation pursuant to s 82(1)*(a)* of the BA for the relevant period, the Prosecution filed Criminal Revision No. 1 of 2012 pursuant to s 400 of the Criminal Procedure Code 2010 (Act 15 of 2010) ("CPC 2010") seeking the exercise of this court's revisionary powers pursuant to s 401 of the CPC 2010 to quash the order to take into consideration OAS 000433-MSC-2011 for the purpose of sentencing. By consent, I ordered that OAS 000433-MSC-2011 was not to be taken into consideration for the purpose of sentencing. I should observe that this error amplified the clear shortcomings in how this matter was inattentively processed by the IPTO and also brought into sharp focus the appellant's lack of awareness as to what she had pleaded guilty to.

Counsel's arguments in Magistrate's Appeal No. 191 of 2011

14 The appellant was in person when she pleaded guilty to the offences at the proceedings below. On appeal, her counsel argued that she had no intention to deceive the authorities or conceal any changes to her income and expenditure. [note: 10] In any case, any such changes were not significant. [note: 11] The appellant's counsel also pointed out that she had complied with the statutory requirements for a period of two years before she was charged. [note: 12] Thereafter she incorrectly assumed that her husband, with whom she had become estranged, would submit the relevant statements on her behalf. [note: 13]

15 The appellant's counsel further submitted that the appellant was not flagrant or defiant in her attitude because, as noted at [6] above, she wrote to the IPTO after she had received a second reminder to offer a settlement of $1,000. [note: 14]

16 The appellant also stressed that she was a law abiding person who made an important contribution to her family and society by working as a kindergarten teacher at a People's Action Party Community Foundation ("PCF") kindergarten. [note: 15] She produced a letter from the Chairman of the relevant PCF branch, recording her achievements (see further below at [41]). [note: 16]

17 The Prosecution, on the other hand, submitted that the appellant had not discharged her burden of showing exceptional circumstances that would justify a departure from the custodial norm as set out in the relevant precedents. [note: 17] Before I made the above observations at [9], the Prosecution also highlighted the appellant's culpability by pointing to her prolonged non-compliance, which, it was submitted, showed that she was grossly negligent. [note: 18] Finally, the Prosecution

submitted that the sentence imposed on the appellant was in line with sentencing precedents and could not be considered to be manifestly excessive. [note: 19]

The applicable legal principles

The relevance of a delay in prosecution

18 The facts of this case (as set out at [6]–[9] above) clearly speak for itself: the appellant was charged in court only after nine years of non-compliance with s 82(1)*(a)* of the BA. This aspect of the case was troubling because it appeared that the number of charges preferred against the appellant was a function of the delay in commencement of prosecutorial action. In other words, the length of delay in prosecution was directly related to the period of non-compliance with s 82(1)*(a)* of the BA on the part of the appellant.

19 In *Chan Kum Hong Randy v Public Prosecutor* [2008] 2 SLR(R) 1019 ("*Randy*"), I set out the applicable sentencing considerations where a delay in prosecution has been occasioned (at [32]–[38]):

> 32 In cases of inordinately-delayed prosecution, the first and foremost inquiry should always be whether the accused was in any way responsible for the delay. The courts must be careful to draw a distinction between, on the one hand, cases where the delay is occasioned by the offender's attempts to avoid the consequences of his criminality and, on the other hand, cases where the delay is due to circumstances entirely beyond the offender's control.
>
> 33 In cases where the delay is attributable to the offender's own misconduct (*eg*, where the offender has evaded detection, destroyed evidence, actively misled the police or been less than forthcoming to the investigating authorities), the offender cannot complain of the delay in prosecution, much less seek to opportunistically extract some mitigating credit from it. To allow the offender in such a scenario any discount in sentencing would be contrary to all notions of justice. This axiomatic proposition was endorsed in *R v Whyte* (2004) 7 VR 397, where Winneke P observed (at [25]) as follows:
>
> > I do not think [the trial judge] erred in according to the fact of "delay" little significance. Delay will very frequently be a matter of mitigation, particularly where the accused has used the time involved to rehabilitate himself or herself. For the respondent [*ie*, the prosecuting authorities], Mr Ross contended that the concept of delay as a mitigating factor cannot figure largely in the sentencing process where the delay is "self-inflicted"; rather it will become a major mitigating factor if the delay was not due to the fault of the accused but rather the fault of the prosecuting authority or the system of the administration of justice. *Where, however, the delay cannot be sheeted home to the prosecution or the system, but can be fairly attributed to the accused, such as absconding from bail, fleeing the jurisdiction or otherwise avoiding being brought to justice, delay must necessarily become of less significance, even to the point of giving less credit for rehabilitation established during that period.* [emphasis added]
>
> 34 It is therefore clear both as a matter of principle and common sense that the courts should not afford any leniency to offenders who are responsible for delaying justice or preventing justice from taking its course either by concealing the truth or by obstructing investigations. This would be tantamount to allowing the offender to profit from his own wrongdoing.
>
> 35 Second, the rehabilitative progress of the offender must be considered in the light of the

nature and the gravity of the offence, as well as the wider public interest in each individual case. Considerations of fairness to an accused may in certain circumstances be substantially irrelevant - or, indeed, even outweighed by the public interest - if the offence in question is particularly heinous or where the offender is recalcitrant and/or has numerous antecedents. Convictions for certain offences, I emphasise, cannot be treated lightly, notwithstanding inordinately delayed prosecution.

36 In a similar vein, the length of delay involved must always be assessed in the context of the nature of the investigations - *viz*, whether the case involves complex questions of fact which necessarily engender meticulous and laborious inquiry over an extended period, or whether the case may be disposed of in a relatively uncomplicated manner (for instance, where the offender has fully admitted to his complicity). In the former scenario, an extended period of investigations might not only be expected, but also necessary and vital to uncover sufficient evidence to bring the accused to trial. This is likely to be the case for offences which often, by their nature, resist straightforward inquiry (for instance, sexual offences against young or vulnerable victims and financial fraud involving complex accounting and multi-jurisdictional issues).

37 By way of illustration, in *Yau Kong Kui v Public Prosecutor* [1989] 2 MLJ 139 at 141, Roberts CJ considered a lapse of 16 months between the offender's appearance in court and the date of his eventual sentence to be "difficult to excuse for an offence of this nature" (*ie*, the offence of dangerous driving causing death). Similarly, in *Tan Kiang Kwang* [*v PP* [1995] 3 SLR(R) 746] ([21] *supra*), the accused, who was investigated and arrested in 1988 for offences which "did not involve what might be termed complex or sophisticated fraud" (at [25]), was not charged until some six years later in 1994. Such an aberration was attributed entirely to the Prosecution and was castigated by Yong CJ as "unacceptable" by any standards.

38 At the end of the day, it must be appreciated that every factual matrix is infused with myriad imponderables and subject to its own singular permutation of variable factors, and is, to that extent, unique. Not every instance of a long and protracted investigative process warrants a reduction in sentence. The weight to be attached to fairness and/or rehabilitation as attenuating sentencing considerations in the event of inordinate prosecutorial delay must necessarily vary from case to case.

20 For the reasons explained below (see [41]), I took the view that the appellant's sentence ought to be calibrated with the inordinate delay in prosecution at the forefront of considerations. I therefore asked counsel for submissions on any alternative sentencing options available on the facts which emerged in the course of the hearing. [note: 20]

21 After seeking an adjournment to take instructions, Mr Soh informed me that the possible options included probation, a conditional discharge and a community sentence. [note: 21] Mr Soh objected, however, to an order for a conditional discharge on the ground that the appellant knew of the statutory requirements. [note: 22]

When would an absolute or conditional discharge be an appropriate sentence?

22 For the reasons explained below (see [41]–[43]), I arrived at the conclusion that a conditional discharge was the appropriate sentence for this case. As there has been little critical consideration of the circumstances and factors to be borne in mind in deciding when a conditional discharge (or for that matter an absolute discharge) is appropriate, it would be useful to examine the legislative framework and the relevant case law and commentary in some detail.

The legislative framework

23 The source of the court's power to order a conditional discharge lies in s 8 of the Act which provides as follows:

> **Absolute and conditional discharge**
>
> **8.** —(1) Where a court by or before which a person is convicted of an offence (not being an offence the sentence for which is fixed by law) is of the opinion, *having regard to the circumstances including* the *nature of the offence* and the *character of the offender*, that it is *inexpedient to inflict punishment* and that a *probation order is not appropriate*, the court may make an order discharging him absolutely, or if the court thinks fit, discharging him subject to the condition that he commits no offence during such period, not exceeding 12 months from the date of the order, as may be specified therein:
>
> Provided that where a person is convicted of an offence for which a specified minimum sentence or mandatory minimum sentence of imprisonment or fine or caning is prescribed by law, the court may make an order discharging a person absolutely or an order for conditional discharge if the person —
>
> (*a*) has attained the age of 16 years but has not attained the age of 21 years at the time of his conviction; and
>
> (*b*) has not been previously convicted of any such offence referred to in this proviso, and for this purpose section 11 (1) shall not apply to any such previous conviction.
>
> (2) An order discharging a person subject to such a condition is referred to in this Act as "an order for conditional discharge", and the period specified in any such order as "the period of conditional discharge".
>
> (3) Before making an order for conditional discharge the court shall explain to the offender in ordinary language that if he commits another offence during the period of conditional discharge he will be liable to be sentenced for the original offence.
>
> (4) Where, under the following provisions of this Act, a person conditionally discharged under this section is sentenced for the offence in respect of which the order for conditional discharge was made, that order shall cease to have effect.
>
> [emphasis in original in bold; emphasis added in italics]

On a plain reading, s 8(1) of the Act requires the court to be satisfied of three matters before ordering an absolute or conditional discharge for offenders who have attained the age of 21. First, it must be inexpedient to inflict punishment. Second, a probation order must not be appropriate. In determining whether these two requirements are satisfied, s 8(1) provides that the court is to have regard to the circumstances. Third, the offence is not one for which a specified minimum sentence or mandatory minimum sentence of imprisonment or fine or caning is prescribed by law. Two circumstances in particular are underscored: the nature of the offence and the character of the offender. Section 8(1) should not, however, be read as restricting the court to only these two considerations. The word "including" in the provision makes it clear that the two specified circumstances are not exhaustive.

24 A brief explanation of the origins of s 8 of the Act is apposite (an extensive consideration of the Act's origins may be found in J K Canagarayar, "Probation in Singapore" (1988) 30 MLR 104 at 106; reference ought to be also be made to *Public Prosecutor v Mohammad Al-Ansari bin Basri* [2008] 1 SLR(R) 449 ("*Mohammad Al-Ansari bin Basri*") at [41]–[43]). Apart from an amendment in 1993, which is not relevant for present purposes, s 8 of the Act is as it was when the Act's predecessor, *viz*, the Probation of Offenders Ordinance (Ordinance No. 27 of 1951) ("the Ordinance"), was enacted in 1951 (see s 8 of the Ordinance). The proceedings of the Legislative Council during the second reading of the bill which introduced the Ordinance (*ie*, the Probation of Offenders Bill (S 162/1951) ("the 1951 Bill")), reveals that it was thought that probation is suitable in cases where "neither the *nature of the offence* for which the offender has been convicted nor the *interests of the community* demand that he should be sent to prison" [emphasis added] (see *Proceedings of the Second Legislative Council: Colony of Singapore* (19 June 1951) (Mr C H Butterfield, Solicitor-General) at p B 126; also see *Mohammad Al-Ansari bin Basri* at [43]). Although these remarks were made in the context of probation orders, they are, in my view, equally relevant to absolute or conditional discharges. After all, s 5 of the Act, which confers the court with the power to order probation, is worded in a similar manner to s 8. A key difference, however, is that s 8 of the Act also requires that a probation order must not be appropriate. Hence, the two considerations identified in the proceedings of the Legislative Council are by no means exclusive in determining whether probation, conditional or absolute discharge is an appropriate sentence in a particular case.

Case law and commentary on absolute and conditional discharges

25 Absolute and conditional discharges are infrequently made. In fact, the authors of *Sentencing Practice in the Subordinate Courts* (LexisNexis, 2nd Ed, 2003) ("*Sentencing Practice*") note that there are no known cases in which an absolute discharge has been ordered (see *Sentencing Practice* at p 43). As for conditional discharges, the authors explain that such orders have been made in "rare instances" due to "the triviality of the offence, [the fact that] the offender is virtually blameless, the circumstances in which the offence came to be prosecuted, or matters relating to the offender" (see *Sentencing Practice* at p 43). There are, however, a number of unreported decisions of the Community Court in which a conditional discharge was ordered; several of these decisions involved accused persons with some form of mental illness (see Kow Keng Siong, *Sentencing Principles in Singapore* (Academy Publishing, 2009) at pp 954–955). Apart from offenders with mental illnesses, a conditional discharge has been ordered in a case involving an airline executive who used criminal force against a taxi driver (see Elena Chong, "Conditional discharge for Tiger Airways exec", Straits Times (13 January 2009); also noted in *Public Prosecutor v Mathava Arulananthan s/o Tialagasamy* [2009] SGDC 171 ("*Mathava Arulananthan*") at [10] and [14]). The statement of facts revealed that the Tiger Airways executive ("the accused") had grabbed the neck of the taxi driver in the course of an argument which arose after the taxi driver told the accused that his taxi was not for hire. The accused subsequently disembarked from the taxi and boarded another taxi. He returned after he was told by the taxi driver that he had called the police. The accused waited for the police. The injuries inflicted on the taxi driver appeared to be relatively minor. The accused also offered compensation to the taxi driver and apologised to him. It should be noted that the Prosecution in that case did not object to the grant of a 12-month conditional discharge.

26 The relative infrequency of conditional discharges does not mean that offenders or their counsel have not attempted to seek such orders. There are a number of cases at the Subordinate Courts where submissions for a conditional discharge have been rejected (see *Public Prosecutor v Tang Wee Sung* [2008] SGDC 262 (illegal purchase of a human organ; the court at [52] found that a conditional discharge was not warranted due to the gravity of the offence), *Public Prosecutor v Andrew Bevan Jones* [2008] SGDC 115 (voluntarily causing of hurt to a taxi driver; the court at [24] considered that a conditional discharge was not appropriate) and *Mathava Arulananthan* (entering a protected place;

the court at [15] imposed a fine instead of ordering a conditional discharge because airport security was a "major national concern" and persons less knowledgeable than the accused had been convicted and punished with fines)).

27 It would be useful to consider the approach taken by the English courts particularly since s 8 of the Act has English roots (see *Comparative Table* annexed to the 1951 Bill which shows that s 8 is derived from s 7 of the Criminal Justice Act 1948 (c 58) (UK)). The power of the English courts to order a conditional discharge is now found in s 12 of the Powers of Criminal Courts (Sentencing) Act 2000 (c 6) (UK) ("the PCC(S)A") (see *Regina v Clarke (Joseph)* [2010] 1 WLR 223 at [15], [27], [33] and [38] for a description of the legislative history of the equivalent UK provision). The only material differences between s 12(1) of the PCC(S)A and s 8(1) of the Act are that the former does not require the court to consider if a probation order is inappropriate and it further specifies three offences for which a conditional or absolute discharge may not be ordered.

28 Absolute discharges are also infrequently ordered in England (see D A Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2nd Ed, 1979) ("*Thomas*") at p 226 considering s 7 of the Powers of Criminal Courts Act 1973 (c 62) (UK) which, unlike the s 12 of the PCC(S)A and like s 8(1) of the Act, requires the court to consider if a probation order is inappropriate). A notable exception is *R v Robert John O'Toole* (1971) 55 Cr App R 206 ("*O'Toole*") (noted in *Thomas* at p 226), which involved an ambulance driver who was convicted of driving in a manner dangerous to the public due to his involvement in a collision with another vehicle. No one was injured. The Court of Appeal (Criminal Division) quashed the sentences of a fine and an order of disqualification of 12 months imposed below and substituted it with an absolute discharge. It reasoned that there was no moral blame on the ambulance driver "who was doing his best to get to an emergency and was impeded only by a disastrous piece of driving" on the part of the other driver (at 209 of *O'Toole*). The Court of Appeal (Criminal Division) also considered that it had to balance the need to protect the safety of the roads against the desire not to impede the work of the drivers of ambulances and fire engines. Another case, involving similar facts also resulted in an absolute discharge (see *R v Lundt-Smith* [1964] 2 QB 167 at 170; cited at 209 of *O'Toole*).

29 As for conditional discharges, *Thomas* helpfully identifies that the cases in which such orders were granted appear to fall under different categories (see *Thomas* at pp 227–228):

> … The first category may involve an offence of some degree of seriousness committed by an offender whose ***circumstances are such that a non-custodial individualized measure is appropriate, but for whom the supervision of a probation officer is either unnecessary or unsuitable*** . In one such case [*ie*,*Harrison- Jones*, 19.2.73, 2878/B/72] the appellant was put on probation and ordered to pay compensation for several minor thefts committed in the course of a confused business relationship; in the light of the probation officer's comment that the appellant was 'not in need of the … casework relationship usually associated with probation', the Court substituted a conditional discharge.
>
> An alternative use of the conditional discharge is ***as a tariff sentence in cases of minimal gravity, where the facts of the offence would not justify a sentence of imprisonment (whether or not suspended) and a fine is inappropriate as the offender has no means*** . In *Wilson* [13.11.73, 3834/C/73] the appellant was convicted of stealing materials worth about £3 from a building site and sentenced to nine months' imprisonment suspended for two years. The Court held this sentence to be 'wrong in principle', as the offence would not justify a sentence of immediate imprisonment; the alternative was a fine, but as the appellant was disabled and his family was living on social security, the only kind of fine that could be imposed would make the offence appear 'of no consequence at all'. Accordingly, the only appropriate disposal was a

conditional discharge. …

A conditional discharge ***may be preferred to a fine in cases of modest gravity to reflect the presence of general mitigating factors, where the offence considered in the abstract might have justified a custodial sentence*** . In *McLaughlin* [16.7.73, 2115/A/73] the appellant admitted breaking into his father's house to recover property belonging to himself, and stealing property belonging to his father when he discovered that his own property was missing. The Court described the offence as 'outside … the normal run of offences of burglary' and as the appellant had made an effort to 'put behind him … the adolescent lapses' which had led to an earlier sentence of borstal training, varied his sentence of nine months' imprisonment to a conditional discharge.

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

Questionable exercises of the power to order conditional discharges include *Attorney General's Reference No 70. of 2003 (Alan Roy Bates)* [2004] 2 Cr App R (S) 49, where Latham LJ expressed his view (at [25]) that a conditional discharge was a "lenient sentence" in a case involving an indecent assault on a child, and *R v Young* [1990] BCC 549 where the Court of Appeal (at 553) expressed that it had "considerable difficulty" with the sentencing judge's decision to order a conditional discharge on a charge of managing a company as an undischarged bankrupt which the sentencing judge himself had considered to be a serious offence.

Absolute versus conditional discharges

30 I turn now to the considerations that should be borne in mind in choosing between absolute and conditional discharges.

31 Eric Stockdale and Keith Devlin in *Sentencing* (Waterlow Publishers, 1987) ("*Stockdale & Devlin*") at para 14.03 suggest that an absolute discharge would be appropriate in technical or trivial offences or in situations where rehabilitation is not necessary because either the offender has already been rehabilitated, or because probation or supervision is not necessary to effect rehabilitation. They suggest that a conditional discharge may be warranted where retribution or general deterrence is not necessary but yet there is a need for a "mild deterrent" (at paras 14.03–14.04):

14.03 It is suggested that an absolute discharge could also be used to signify that the offence was *so technical or trivial that no penalty was justified*; or where *in the light of the character of the offender*, *no rehabilitation or reform was necessary*, either because it had *already occurred*, and did not need the reinforcement of a mild deterrent like a conditional discharge, or because *neither the support of probation nor supervision was necessary*.

14.04 A conditional discharge on the other hand is a *mild deterrent*. It is a recognition that the *circumstances of the offence are such that a retributivist approach or a sentence of general deterrence is not justified* but that the avowed good intentions of the offender not to repeat his offence *need some kind of legal reinforcement* which *falls short of the kind of support that probation and supervision would provide*. It is therefore particularly appropriate for the first offender. …

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

32 Another approach for deciding between absolute and conditional discharges may be found in Martin Wasik, "The Grant of an Absolute Discharge" (1985) 5 OJLS 211 ("*Wasik*"). The author, who

examines several English and Canadian authorities, suggests that three factors should be considered: *the triviality of the offence*,*the circumstances in which the offence was prosecuted*, and *the factors relating to the offender* (*Wasik* at p 218). The first factor is obviously a matter of degree and would be determined, *inter alia*, by the "social significance" of the law contravened (*Wasik* at p 219). Controversial questions may arise *vis-à-vis* the first factor such as whether courts could be justified in maintaining a policy of ordering discharges for certain kinds of offences (*Wasik* at p 220). The second factor, which may overlap somewhat with the first factor, allows the court to express its disapproval at the prosecution of an offence (*Wasik* at p 224). An example of a situation which may call for an absolute discharge is where an offence is prosecuted a considerable time after the commission of the offence (*Wasik* at pp 224–225). As for the third factor, the considerations concerning the particular offender which may justify the imposition of an absolute discharge may be viewed as falling under two categories: situations where the offender has a low degree of culpability, and situations where an absolute discharge is appropriate due to "collateral matters" such as the possibility that the offender may have suffered "unofficial or indirect punishment" as a result of his offence such as a loss of employment, *etc* (see *Wasik* at pp 226–233). It seems to me that this is a useful framework to employ in assessing the appropriateness of this genre of sentencing.

Summary of the considerations for determining whether an absolute or conditional discharge is appropriate

33 As provided in s 8(1) of the Act (see [23] above), having been satisfied that the offence in question is one which is not fixed by law, the overriding considerations for determining whether to order an absolute or conditional discharge are twofold. The court must consider if it is inexpedient to inflict punishment and whether probation is inappropriate. In considering these factors, the court should pay close attention to the *nature of the offence* and the *interests which the offence seeks to protect*. In addition, some of the factors that the court should consider include:

(a) the particular circumstances of the *offender*: for example, a relatively minor offence committed by an offender with a mental illness might warrant an order for a discharge; it is also relevant to consider the character of the offender;

(b) the particular circumstances of the *offence*: for example, the context in which an offence was committed (say, in a situation of an emergency) may suggest a low degree of culpability on the part of the offender; and

(c) factors independent of the offender: for example, a delay in the prosecution of an offence, may justify some form of a discharge.

34 In deciding between the two kinds of orders, it is important to bear in mind, as *Stockdale & Devlin* suggests, the difference between the orders is that a conditional discharge has a "mild deterrent" component. A person under a conditional discharge who commits an offence during the operative period of the discharge is liable to be sentenced for the offence for which he received a conditional discharge as if he had just been convicted of that offence (see s 9(5) of the Act). Hence, the touchstone for determining which order is appropriate is whether the circumstances of the offence or the offender call for a superimposition of a deterrent component. Other considerations, such as those highlighted in *Wasik* (*ie*, the triviality of the offence, the circumstances of the prosecution and factors relating to the offender) may also be considered.

When would community-based sentences be appropriate?

The rationale for community-based sentences

35 A new regime for community-based sentencing was introduced in the CPC 2010 (see Part XVII of the CPC 2010). The rationale for these new sentencing options is explained in the introductory speech of the Minister for Law, Mr K Shanmugam, at the second reading of the Criminal Procedure Code Bill (Bill 11 of 2010) ("CPC Bill 2010") (see *Singapore Parliamentary Debates, Official Report* (18 May 2010) vol 87 at col 422 (K Shanmugam, Minister for Law and Second Minister for Home Affairs)):

> ***Rationale for having new community sentences***
>
> Our sentencing philosophy is aimed at deterrence, prevention, retribution and rehabilitation. ***A fair sentencing framework is one that enables the Court to deliver the correct mix of these four objectives on the specific facts of each case*** .
>
> ***CBS [*** **ie**, ***community-based sentencing] gives more flexibility to the Courts*** . Not every offender should be put in prison. ***CBS targets offences and offenders traditionally viewed by the Courts to be on the rehabilitation end of the spectrum: regulatory offences, offences involving younger accused persons and persons with specific and minor mental conditions*** . For such cases, it is ***appropriate to harness the resources of the community*** **. The** ***offender remains gainfully employed and his family benefits from the focused treatment*** .
>
> [emphasis in original in italics; emphasis added in bold italics]

It would be useful to also note two responses by the Minister to points raised during the debates at the second reading of the CPC Bill 2010. First, in his response to a query from a member, the Minister clarified that community-based sentences are not meant to prevent "moral stigmatisation". The focus of community-based sentences is to "prevent the offender from being dislodged from his family, employment and society and to assist his rehabilitation" (see *Singapore Parliamentary Debates, Official Report* (19 May 2010) vol 87 at col 568 (K Shanmugam, Minister for Law and Second Minister for Home Affairs)):

> Ms [Ellen] Lee noted that some community sentences are meant to prevent moral stigmatism and asked whether the implementation will serve the purpose. For example, whether the sentencing will be done on camera and whether the identities of the offenders will be protected when they serve their community sentences. *I should clarify that preventing moral stigmatisation is not the primary objective.* In fact, for example, for Community Work Orders, shaming may or may not be an integral part of the sentence. For Corrective Work Orders in littering cases, for example, offenders must perform their sentences in public.
>
> *A community sentence is intended to prevent the offender from being dislodged from his family, employment and society and to assist his rehabilitation. It remains a punishment.* In and of itself, it cannot form a good reason for a trial to be in camera for an offender's identity to be protected. Trials must be conducted in the open. The Court exercises its discretion as to when a trial could be heard in camera and will do so in accordance with the categories listed in the legislation.
>
> [emphasis added]

Second, in explaining the rationale for not introducing a regime of suspended sentences, the Minister noted that community-based sentences would generally be more appropriate in situations where other jurisdictions which allow for suspended sentences would make such orders (see *Singapore Parliamentary Debates, Official Report* (19 May 2010) vol 87 at col 570):

> As for suspended sentences, they run against the expectation of society that when a sentence is passed, it should be served. *In such cases, where other jurisdictions have used suspended sentences, a CBS-type order will generally be more appropriate and is the approach we are taking. Rather than giving a sentence which hangs in abeyance, the Court has a jurisdiction to give a CBS Order targeted at treatment and rehabilitation, retaining the power to sentence for the breach of the order and for the offence itself.* When it does so, it can probably take into account all the facts of the case and decide on an appropriate sentence. [emphasis added]

36 The focus of community-based sentencing is on the individual offender (see Melanie Chng, "Modernising the Criminal Justice Framework: The Criminal Procedure Code 2010" (2011) 23 SAcLJ 23 ("*Chng*") at para 43). The objective is to identify and address the "root causes" of the offending behaviour (*Chng* at para 43). Although the focus is on the individual, community-based sentencing also promotes the interests of the public because by correcting and rehabilitating offenders, recidivism will be reduced (*Chng* at para 44). As the Minister explained in his response to a question by a member during the second reading of the CPC Bill 2010, community-based sentencing should not be viewed as a "softening of our stance on crimes". The strictures imposed on the ordering of such sentences (see below at [38]) make it clear that the legislative intention is not to allow community-based sentencing in serious offences (see *Singapore Parliamentary Debates, Official Report* (19 May 2010) vol 87 at col 566–568 (K Shanmugam, Minister for Law and Second Minister for Home Affairs)):

> Assoc. Prof. [Paulin Tay] Straughan has sought clarifications on two issues: first, whether the Court will consider the offender's social environment when determining whether a community sentencing is suitable; and second, with reference to the case of the "Monster Dad" reported in the *Straits Times*, whether there are sufficient risk-assessment processes to address recidivism and how we can equip the community to handle such cases.
>
> …
>
> On her second point, I will make the following comments. *CBS is not intended to apply to the kind of serious crimes that she refers to*. On the facts of the reported "Monster Dad" case, that person or any such person will not qualify for CBS. I think Assoc. Prof. Straughan's real point probably is, how should such convicts be treated when they are released from prison and how should the risk of recidivism be assessed. In this context, the current position is that convicts are released upon serving their fixed-sentencing terms.
>
> …
>
> Mdm Ho [Geok Choo] was concerned as to whether CBS will be perceived as a *softening of our stance on crimes*. Yesterday, I spoke about the eligibility criteria for community sentences. *The net effect of the various qualifying criteria, I highlighted yesterday, is that the sentences would be limited to offenders who have not been previously sentenced to imprisonment, other than imprisonment in default of fine payment. It is also limited to minor offences for which there is no mandatory imprisonment term provided and the maximum term for the offence does not exceed three years*. What these amendments do is to make available to the Courts, a wider and more sophisticated range of sentencing options.
>
> [emphasis added]

Reference may also be made to *Chng* at para 45, where the author opines that the eligibility criteria for community-based sentencing (see below at [38]) ensures that the need for deterrence is not unduly compromised by precluding such sentencing options in cases involving serious offences and

where the offender is recalcitrant.

The types of community-based sentences introduced in the CPC 2010

37 I turn now to the types of community-based sentencing options introduced in the CPC 2010. The CPC 2010 allows for five types of community orders to be made, *viz*, a mandatory treatment order, a day reporting order, a community work order, a community service order and a short detention order (see s 336(1) of the CPC 2010). A helpful summary of what each of these orders entails may be found in *Chng* at para 41:

> 41 The commonalities between state and individual interests are further illustrated by the New CPC's [*ie*, CPC 2010] provision for community-based sentencing (or "CBS"). This addition to the sentencing regime represents the latest in a series of efforts to improve the rehabilitative and re-integrative functions of the criminal justice system. To this end, the New CPC provides for five types of community orders:
>
> (a) *Mandatory treatment orders*, which require an offender to undergo psychiatric treatment for not exceeding 24 months. Before making this order, the court must call for a report by a psychiatrist appointed by the Director of Medical Services. The treatment order can only be imposed if the psychiatrist reports to the court that: (i) the offender is suffering from a psychiatric condition that is *susceptible to treatment*, (ii) the offender is *suitable for treatment*, and (iii) the offender's psychiatric condition is *one of the contributing factors for his commission of the offence*.
>
> (b) *Day reporting orders*, which require an offender to regularly report to a day reporting centre for between three to 12 months and undergo such counselling and rehabilitation programmes as his day reporting officer may require. This may include requirements as to the electronic monitoring of the offender's whereabouts during the period of the order. Such orders may be imposed where the court is satisfied, having regard to the circumstances, including the offender's character and the nature of his offence, that it is expedient to do so. Before making this order, the court must request for a day reporting officer to submit a report on the offender's susceptibility to counselling and rehabilitation. However, the court retains the discretion to make the order notwithstanding any recommendations this report may make.
>
> (c) *Community work orders*, which are modelled after the current system of "Corrective Work Orders", require an offender to perform unpaid community work which has some nexus to the offence committed in order to promote the offender's sense of responsibility for, and acknowledgment of, the harm that he has caused through his offence. This order can be made where a court is satisfied that it would be expedient, with a view to the offender's reformation. Each type of community work order is tied to specific offence(s). This decentralised approach strengthens the efficacy of each genre of community work order by giving its parent agency sufficient discretion and flexibility to creatively shape the contours of the order to suit the unique policy considerations underlying the given offence.
>
> (d) *Community service orders*, which require an offender to make amends to the community for his offence by performing acts of service of the type specified in the Fifth Schedule of the New CPC. This order can be made where a court is satisfied that it would be expedient, with a view to the offender's reformation. A community service order cannot be made, *inter alia*, if the court is not satisfied that the offender is a *suitable person* to perform community service based on his mental and physical condition. To this end, before making a

community service order, the court *must* request for a community service officer to submit a report on the offender's *suitability* to perform community service. However, the court retains the discretion to make the order notwithstanding any recommendations this report may make.

(e) *Short detention orders*, which require an offender to be detained in prison for a period not exceeding 14 days. The order is directed at abating an offender's criminal tendencies and reducing his risk of recidivism by giving him a "short sharp shock" in the form of a taste of what incarceration would entail. At the same time, the limited duration of short detention orders minimises the disruption and stigma that could otherwise result from a longer period of imprisonment.

[emphasis in original; footnotes omitted]

Factors to consider in deciding whether to make a community order

38 As a starting point, it is important to bear in mind that there are statutory restrictions to making community orders (see s 337 of the CPC 2010):

Community orders

337. —(1) Subject to subsections (2) and (3), a court shall not exercise any of its powers under this Part to make any community order in respect of —

(*a*) an offence for which the sentence is *fixed by law*;

(*b*) an offence for which a *specified minimum sentence or mandatory minimum sentence of imprisonment or fine or caning is prescribed by law*;

(*c*) an offence which is *specified in the Third Schedule to the Registration of Criminals Act* (Cap. 268);

(*d*) a person who had *previously been sentenced to a term of imprisonment*, other than a term of imprisonment served by him in default of payment of a fine;

(*e*) a person who had *previously been sentenced to reformative training, corrective training or preventive detention*;

(*f*) a person who had *previously been detained or subject to police supervision* under section 30 of the Criminal Law (Temporary Provisions) Act (Cap. 67);

(*g*) a person who had *previously been admitted to an approved institution* under section 34 of the Misuse of Drugs Act (Cap. 185) or to an *approved centre* under section 17 of the Intoxicating Substances Act (Cap. 146A);

(*h*) an offence which is *punishable with a fine only*; or

(*i*) an offence which is *punishable with a term of imprisonment which exceeds 3 years*.

(2) A court may not make a mandatory treatment order in respect of any case referred to in subsection (1) except that it may do so under section 339 even if the offender —

(*a*) had previously been sentenced to a term of imprisonment, whether or not it is a term of imprisonment served by him in default of payment of a fine; or

(*b*) had previously been admitted to an approved institution under section 34 of the Misuse of Drugs Act (Cap. 185) or to an approved centre under section 17 of the Intoxicating Substances Act (Cap. 146A).

(3) A court may not make a community work order in respect of any case referred to in subsection (1) except that it may do so under section 344 even if the offender is convicted of ––

(*a*) an offence which is punishable with a fine only; or

(*b*) an offence for which a specified minimum sentence of fine or a mandatory minimum sentence of fine is prescribed by law.

(4) If an offender convicted of 2 or more offences is sentenced at the same court proceeding for those offences, a court shall not pass a community sentence if any of those offences relate to an offence in respect of which the powers to make community orders conferred by this Part cannot be exercised by the court.

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

The court should also consider the views and recommendations in the reports that must be prepared for some of the community orders (see, *inter alia*, ss 339(2) (mandatory treatment orders – report to be submitted by an appointed psychiatrist) and 341(2) (day reporting orders – report to be submitted by a day reporting officer)).

39 Apart from these obvious considerations, the court should bear in mind that the legislative intent underlying community-based sentencing is to allow for more flexibility in balancing the various sentencing principles in individual cases. The introduction of community-based sentencing in the CPC 2010 is recognition that custodial sentences, caning or a fine may not be appropriate for all *offences* and/or for all *offenders*. The particular circumstances of the offence and the offender in question must therefore be carefully considered to determine whether rehabilitation should be given prominence in the case at hand notwithstanding any countervailing need for deterrence, retribution or prevention.

Application to the facts

40 There is little doubt that our courts take a serious view towards bankruptcy offences. Such an approach is essential because the bankruptcy regime requires bankrupts to comply with various provisions for its smooth operation. As the speech of the Minister for Law at the second reading of the Bankruptcy Bill in 1994 reveals, the general legislative purpose underlying the penalties provided for bankruptcy offences such as s 82(2) of the BA is to ensure that bankrupts perform those "essential legal obligations" imposed on them by the BA (see *Singapore Parliamentary Debates, Official Report* (25 August 1994) vol 63 (Prof S Jayakumar, Minister for Law and Minister for Foreign Affairs) at col 402; also see *Public Prosecutor v Low Kok Heng* [2007] 4 SLR(R) 183 at [82] where I quoted the relevant speech):

The third feature is to *enhance the Official Assignee's powers to enforce the bankrupt's essential legal obligations*. Bankrupts who fail to perform their essential legal obligations will be taken to court. Currently, a bankrupt who fails to fulfil his legal obligations, such as, filing a *six-monthly*

return of income and expenditure, or leaving the country without the Official Assignee's permission, is *only liable to committal proceedings for contempt of court*. This is a costly and circuitous process which also impedes the administration of the estate. *The Bill will subject recalcitrant bankrupts to prosecution*. Also, the Official Assignee will be empowered, if he thinks fit, to detain the passport, or other travel document of a bankrupt, or to request the Controller of Immigration to do so when a bankrupt attempts to leave the country without the Official Assignee's prior approval. [emphasis added]

4 1 *This appeal before me, however, was a case where inordinate delay was occasioned not by the appellant, but by an oversight on the part of the prosecuting authorities*. This much was acknowledged, very fairly in my view, by Mr Soh. I was also constrained to observe that the offences for which the appellant was charged could not possibly have entailed complex or lengthy investigations which could occasion inexpedient prosecution. On the contrary, the offences involved simple non-compliance with the statutory requirement of filing I & E statements. Investigations into such offences would be far from taxing. In addition, I was also persuaded that the appellant did not fit the prototype of a serial offender who deliberately broke the law in order to conceal and/or surreptitiously deal with her assets. The appellant has been employed in a kindergarten since January 2005. [note: 23] Her income during this period has not varied substantially (she was earning $1,200 per month in 2002 and earned $1,800 per month as at 2010). [note: 24] This was not disputed by the Prosecution. Finally, I also noted that the appellant's conduct throughout the approximately nine year period of offending was representative of a hardworking and productive member of society. Her efforts were summarised in a glowing letter from her employer:

> [The appellant] has been employed as a Teacher at the Cashew PCF Kindergarten since 7 January 2005.
>
> Through her hard work and determination over the last six years since she joined the PCF as a childcare teacher, she has progressively attained the post of Head Teacher of the Kindergarten 1 and Kindergarten 2 Levels.
>
> Her duties and responsibilities include nurturing two K2 classes and overseeing all the activities and education programmes in both the K1 and K2 Levels. She currently has 45 students under her care, and these children will be graduating at the end of 2011.
>
> *Since joining the PCF in 2005, [the appellant] has been exemplary in her conduct and has discharged her duties responsibly.*
>
> *This is in addition to her being the sole breadwinner at home for more than two years after her husband's business failed.*
>
> *It must be stated that despite her issues at home with regard to her family's finances, [the appellant] never neglected her duties as a teacher, which is why it came as surprise [sic] and a shock to the Cashew PCF when her problems came to light with her conviction on 8 August.*
>
> She is an essential member of the Cashew PCF and her absence will be sorely felt by the children she is currently looking after.
>
> *A change in teachers will certainly affect the children she is currently caring for, many of whom are very attached to her.*
>
> I hope the court can consider her appeal.

[emphasis added]

In the light of the appellant's gainful employment, character, lack of antecedents, as well as the delay in prosecution, I found that some form of a discharge was appropriate notwithstanding the serious view that courts take towards bankruptcy offences. Unlike the DJ, I did not consider her to have "wilfully and blatantly" breached her statutory obligation to file her I & E Statements. This appeared to be an instance of inadvertent omission. Her explanation that she assumed that her estranged husband had filed the returns on her behalf appeared credible and was not disputed. I also noted that when she received the IPTO's letter on 17 March 2011, she duly responded. I was perplexed as to why the IPTO, after offering to discharge her if she paid the sum of $5,000, had failed to respond at all to her offer and take into account her personal circumstances. Instead, her offer was unceremoniously met with 30 charges for having failed to comply with her statutory obligations under the BA for a period of approximately nine years.

42 I did not consider that it was appropriate to make any community order under the CPC 2010. It did not strike me that rehabilitation was a particularly strong consideration in the circumstances. As mentioned above, the appellant was of demonstrably good character. The circumstances under which she committed the offences, *viz*, her belief that her estranged husband would file returns on her behalf, also suggested that her offending conduct was more of an inadvertent oversight than of a deliberate infraction. For the same reason, I did not think that probation was either necessary or appropriate. I also considered that a discharge was more appropriate to take into account the unjustifiable delay in prosecution.

43 I did not, however, think that an absolute discharge was warranted. Although the delay occasioned by the IPTO's failure to follow up on the appellant's transgressions resulted in the sheer number of charges brought against her, the fact remained that the appellant herself did not take the initiative to ensure that she had complied with her essential legal obligations under the BA. While this was somewhat mitigated by her explanation that she assumed that her estranged husband had filed the I & E Statements on her behalf, this did not entirely exonerate her from her statutory duty. Bearing in mind all the circumstances, I considered that a *conditional* discharge, with its attendant "mild deterrent" component (see above at [31]), was more suitable in the circumstances.

Conclusion

44 I was puzzled why so many charges were preferred against the appellant despite the fact that there had been a patent lapse by the IPTO in monitoring her case and its adoption of an internal policy in January 2010 of preferring charges immediately after the failure to file I & E Statements for three years (see [8] above). At worst, she ought to have faced charges for her alleged lapses for the three prior years. Further, if indeed the appellant's failure to file I & E Statements was viewed as a heinous lapse meriting a stiff custodial sentence, why was the IPTO at one stage even prepared to discharge her from bankruptcy notwithstanding her known earlier lapses (see above at [6])? Regrettably, the processing of this matter was conspicuous for a number of rather obvious oversights, including the lack of foresight and insight in decision making (see above at [4] and [6]). The ostrich, few would disagree, is a worthy bird. But few would agree that it is the best source of inspiration for decision making.

45 For all the reasons given here, I allowed the appeal and ordered that the appellant be conditionally discharged for a period of 12 months. I also ordered the appellant to file a statutory declaration within a week to confirm and itemise her income for the relevant periods and to confirm that, apart from that income, she had not received any other inheritance or other assets from other parties. [note: 25]

[note: 1] See <http://www.prisons.gov.sg/content/sps/default/newsaboutus/in_the_news/speeches_10.html> (accessed 16 March 2012) at para 6)

[note: 2] Appellant's submission at p 3, para 4.

[note: 3] Certified Transcript of hearing on 10 January 2012 at p 2 (lines 21–31).

[note: 4] Certified Transcript of hearing on 10 January 2012 at p 25 (lines 2–17).

[note: 5] Certified Transcript of hearing on 10 January 2012 at p 13 (lines 18–21).

[note: 6] Certified Transcript of hearing on 10 January 2012 at p 14 (lines 22–27).

[note: 7] Certified Transcript of hearing on 10 January 2012 at p 14 (lines 30–31).

[note: 8] Date of being charged in Court 23.

[note: 9] Certified Transcript of hearing on 10 January 2012 at p 13 (lines 3–6).

[note: 10] Appellant's Skeletal Arguments at [6(a)].

[note: 11] *Ibid*.

[note: 12] Appellant's Skeletal Arguments at [6(b)].

[note: 13] *Ibid*.

[note: 14] Appellant's Skeletal Arguments at [6(c)].

[note: 15] Appellant's Skeletal Arguments at [8].

[note: 16] Letter from Chairman, PCF Cashew Branch dated 16 August 2011 (annexed to Appellant's Skeletal Arguments).

[note: 17] Respondent's Written Submissions at [22]–[26].

[note: 18] Respondent's Written Submissions at [33].

[note: 19] Respondent's Written Submissions at [37]–[43].

[note: 20] Certified Transcript of hearing on 10 January 2012 at p 10 (lines 7–17).

[note: 21] Certified Transcript of hearing on 10 January 2012 at p 18 (lines 20–22).

[note: 22] Certified Transcript of hearing on 10 January 2012 at p 21 (lines 11–23).

[note: 23] See letter from Chairman, PCF Cashew Branch dated 16 August 2011 (annexed to the Appellant's Skeletal Arguments).

[note: 24] Appellant's Skeletal Arguments at [6(a)].

[note: 25] Certified Transcript of hearing on 10 January 2012 at p 33 (lines 27–31).