Tan Kay Beng v Public Prosecutor
[2006] SGHC 117

Case Number : MA 12/2006

Decision Date : 07 July 2006

Tribunal/Court : High Court

Coram : V K Rajah J

Counsel Name(s) : Subhas Anandan and Sunil Sudheesan (Harry Elias Partnership) for the appellant; Lee Lit Cheng (Deputy Public Prosecutor) for the respondent

Parties : Tan Kay Beng — Public Prosecutor

Criminal Procedure and Sentencing – Deterrence – General and specific – When to apply – Whether court should explain reason for applying deterrence as sentencing consideration – Whether stock phrases to be avoided

Criminal Procedure and Sentencing – Due process – Whether court should employ extreme caution in relying on sentencing considerations not tested in argument

Criminal Procedure and Sentencing – Mitigation – Appeal against sentences for theft and criminal intimidation on ground sentences manifestly excessive – Weight to be accorded to plea of guilt and restitution when deciding on appropriate sentences

Criminal Procedure and Sentencing – Restitution – Whether restoration of status quo may be sentencing consideration

Criminal Procedure and Sentencing – Sentencing – Appeals – Appeal against sentences for theft and criminal intimidation on ground sentences manifestly excessive – Whether criminal antecedent for gaming in common gaming house relevant consideration in sentencing – Whether group offence aggravating factor suggesting act of organised violence – Whether offence taking place in public place an aggravating factor – Whether deterrent sentence warranted

7 July 2006

V K Rajah J:

1 The appellant, Tan Kay Beng ("Tan"), pleaded guilty to a charge of theft under s 379 read with s 34 of the Penal Code (Cap 224, 1985 Rev Ed) ("PC"), as well as to another charge of criminal intimidation under the second limb of s 506 of the PC. The victim in both instances was Wong Loke Hoon ("Wong"), and both offences were committed on the evening of 8 February 2004. The district judge sentenced Tan to 12 months' imprisonment on the theft conviction and to 21 months' imprisonment on the conviction of criminal intimidation. Tan appealed against both sentences on the ground that they were manifestly excessive.

2 It is noteworthy that when the appeal came up for hearing, the prosecution neither justified nor defended the sentence meted out for the theft charge. It did however attempt to justify the sentence for the conviction on criminal intimidation although conceding in the concluding submissions that a sentence of 12 months' imprisonment might be more appropriate. I allowed the appellant's appeal against both sentences on the basis that they were manifestly excessive. For the theft conviction, I substituted a fine of $1,000 (in default, two weeks' imprisonment) for the original term of imprisonment. For the conviction of criminal intimidation, I substituted a term of imprisonment of three months for the original sentence of 21 months. I now set out my reasons.

The facts

3 Tan, 41 years of age, is the sole proprietor of "Tiong Poh & Co" a business which supplies traditional Chinese paraphernalia for funerals, weddings, and prayers. His business is stable and he does not have any current financial problems.

4 At some point in October 2003, Wong requested that Tan supply 20 pieces of "Japan Velvet" silk screens. The price for these items was agreed at $880 and Wong placed a deposit of $80 with Tan. This order was purportedly placed on behalf of the management of OP KTV, Wong's principal. Tan promptly processed the order. However, just prior to the delivery of the items, OP KTV ceased business. Wong then pointedly refused to pay Tan for the screens, insisting that Tan should claim payment from his "boss". He told Tan that as far as he was concerned he had neither any further interest nor any remaining responsibility for the outstanding debt. Upset by his nonchalant stance, Tan insisted that Wong remain responsible for payment. To no avail. Wong insouciantly ignored all his requests for payment.

5 This impasse prevailed until Tan met, by pure chance on 8 February 2004, John, a former customer of his, at a food centre. Tan bitterly complained to John about Wong's cavalier attitude towards the outstanding debt. John offered to assist Tan in collecting the outstanding amount and to meet Wong. Tan then contacted Wong asking if they could meet. Wong agreed, informing Tan where he was. Tan thereafter proceeded to the coffee shop, accompanied by John and the latter's companion. It bears emphasis that the prosecution did not intimate that Tan had any preconceived plan on how he or John intended to persuade Wong to effect payment. There was no prior discussion to threaten or intimidate Wong.

6 Tan and John attempted to reason with Wong that he ought to make payment for the silk screens but were unable to make any headway in reaching an amicable resolution. Suddenly out of frustration Tan banged the table. Wong in turn immediately stood up and held up his beer mug in a menacing posture.

7 In response to Wong's aggressive reaction, John immediately procured a bread knife from the coffee shop kitchen and pointed it at Wong's neck. He demanded that Wong put down the beer mug but the latter initially refused to do so. With the knife pointed at Wong's neck, John then demanded that Wong hand over his possessions in order to settle the debt due to Tan. Wong complied by placing his waist pouch on the table. Tan opened the pouch, removing cash amounting to $166 and a Nokia 8210 mobile phone that has been valued at $100. Tan however returned the SIM card to Wong.

8 John's companion then duly returned the bread knife to the coffee shop kitchen, after which Tan and his two companions then left the scene. Throughout this brief incident the other patrons in the coffee shop appeared unaffected and carried on with their meals. Subsequently, the police apprehended Tan and the items he took from Wong were duly recovered. John and his friend remain at large and have not been prosecuted.

Decision of the District Court

9 The learned district judge observed in his decision ([2006] SGDC 25) that while Tan had no prior record for theft or criminal intimidation, he had an antecedent for gaming in a common gaming house for which he had been fined $1,000. The learned district judge appeared, without any adequate explanation, to have taken into account as a sentencing consideration this prior conviction of gaming. He stated rather cryptically at [12] that, "[t]hough the accused had no prior criminal record for theft and criminal intimidation, this was not the accused's first [brush] with the law". He also seemed to have adopted an uncompromising view that while Tan had pleaded guilty to both charges at the first opportunity, the offences committed were serious and attracted severe penalties.

10 The learned district judge noted that the confrontation that evening "was a confrontation of one person by a group of three". In his view the number of persons could have resulted in the greater likelihood of harm especially since one member of the group was armed. He stated at [11]:

> It is accepted that group pressure and group dynamics may make the offence less likely to be abandoned and could lead to greater harm being caused to the victim or damage being caused. In *PP v Tan Fook Sum* the Hon Chief Justice held –
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> > 14 … Any participation whatsoever, irrespective of its precise form, in an unlawful assembly of this type derives its gravity from becoming one of those who, by weight of numbers, pursued a common and unlawful object. The law of this country has always leaned heavily against those who, attain such purpose, use the threat that lies in the power of numbers. See also *Caird (1970) 54 Cr App R 499* at page 507, and *Mac Cormack [1981] VR 104* at page 108"

and again, further, at [13]:

> … The manner in which the offence was committed smacked of organization. The accused clearly played an active and prominent role in the commission of the commission [*sic*] of the theft. … It could not be ignored that the theft was committed under threatening circumstances as Wong was held at knifepoint was told to remove his waist pouch [*sic*]. The knife, if used as a weapon of offence, could cause serious injury or death. The fact that a knife was threateningly used also aggravated the nature of the offence of criminal intimidation.

11 He then relied on the decision on *PP v Luan Yuanxin* [2002] 2 SLR 98 ("*Luan Yuanxin*") as the benchmark authority for the proposition that the use of a weapon invariably justified a deterrent custodial sentence. In that case, a distinction was drawn between criminal intimidation *simpliciter* and aggravated intimidation emphasising that "the presence of a weapon serves not only to make the threat more menacing, but also goes towards proving the maker's intent to cause alarm to his victim."

12 The learned district judge further assessed the fact that the offences were committed in a public place as an important sentencing consideration; see [17]:

> [I]t is foreseeable that acts of breaching the public peace in a public place in full view of members of the public would have caused alarm and fear to those who witnessed the incident. The Court also took into consideration this fact in determining sentence. The place of the commission of the offence was taken into consideration in sentencing by the learned Senior District Judge in *PP v Diki Zulkarnaini*. He stated –
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> > "16. Account may be taken, for the purpose of sentencing of the nature of the premises and scene where the incident took place. See *Director of Public Prosecutions v Cotcher* (1992) *The Times, 29 December 1992.*"

13 The learned district judge's concluding remarks appear to have been profoundly influenced and engendered by what he perceived as wider public interest considerations meriting a deterrent sentence "necessary to deter the accused and like minded offenders from taking matters into their own hands and to [*sic*] resorting to openly committing offences".

The purported aggravating factors

Antecedents

14 An antecedent is a relevant and important sentencing consideration if it is similar to the pending charge. It may then reflect a pattern or tendency for repeat offending. Both general and specific deterrence could then become almost inexorable sentencing considerations. However, dissimilar antecedents are by and large of no relevance. In *Roslan bin Abdul Rahman v PP* [1999] 2 SLR 211, the appellant pleaded guilty to a charge of robbery causing death under s 394 read with s 397 of the PC. In sentencing, the trial judge took into account as a sentencing consideration the appellant's drug-related antecedents. The Court of Appeal unhesitatingly held that the trial judge should not have done so. Karthigesu JA observed at [14]:

> The learned trial judge had proceeded on wrong principles. The appellant's drug-related antecedents should have no bearing on the present trial as it was completely unrelated to the offence the appellant was charged with. The appellant had no antecedents of offences related to the type of offence he was charged with. The fact that the appellant was a drug addict did not necessarily imply that he was more prone to commit the offence of armed robbery with hurt.

15 Thomas, in *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2nd Ed, 1979), explains at p 203:

> The existence of a difference between the immediate offence and those recorded against the offender in the past … can be seen, despite the earlier offences, as an isolated departure from normal patterns of behaviour. Where the offence seems to be a deliberate excursion into a previously unexplored area of criminal behaviour, the difference between the present and previous offences will *carry less weight.* [emphasis added]

16 It is important to note that this is not to say that dissimilar antecedents can never be a relevant sentencing consideration. For instance dissimilar antecedents that clearly manifest a marked and progressive proclivity towards criminal activity or a cavalier disregard for the law could be relevant. I respectfully agree with the observations of Chief Justice Yong Pung How in *Leong Mun Kwai v PP* [1996] 2 SLR 338 at 342, [19]:

> The effect that these convictions have on sentencing in any case must depend on the facts of the case. In my view, relevant considerations would be the number and nature of these previous convictions. Similarly, for convictions which occurred a long time ago, it would also be relevant to consider the length of time during which the defendant has maintained a blemish-free record. All these are part and parcel of the convicted person's antecedents which the court should take into account.

17 In this context I also consider it profitable to acknowledge and pay heed to the incisive observations of the High Court of Australia in *Veen v The Queen* [No 2] 164 CLR 465 at 477–478:

> … the antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. To do so would be to impose a fresh penalty for past offences: Director of Public Prosecutions v Ottewell. The antecedent criminal history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instance case, or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender and other offenders from committing

> further offences of a like kind. Counsel for the applicant submitted that antecedent criminal history was relevant only to a prisoner's claim for leniency. That is not and has never been the approach of the courts in this country and it would be at odds with the community's understanding of what is relevant to the assessment of criminal penalties.

18 Tan's previous conviction was for illegal gambling. As for the current convictions of theft and criminal intimidation, these arose solely out of his discord and unhappiness with Wong. There has been no suggestion that Tan is prone to or has been involved in any other manner of criminal activity. A person who gambles at a common gambling house does not inevitably graduate to acts of theft or criminal intimidation. His sole antecedent is clearly not an aggravating factor and is in fact entirely irrelevant as a sentencing consideration in this particular case. All said and done the learned district judge erred in choosing to allude to this antecedent given the clearly established legal position on this aspect of sentencing.

Pressure by a Group

19 The learned district judge also cited *PP v Tan Fook Sum* [1999] 2 SLR 523 as authority for the following proposition:

> Any participation whatsoever, irrespective of its precise form, in an unlawful assembly of this type derives its gravity from becoming one of those who, by weight of numbers, pursued a common and unlawful object. The law of this country has always leaned heavily against those who, [to] attain such [a] purpose, use the threat that lies in the power of numbers. See also ***Caird (1970) 54 Cr App R 499*** at page 507, and ***Mac Cormac [1981] VR 104*** at page 108

This quotation has been inaccurately attributed to *PP v Tan Fook Sum*. It should have been attributed to *Caird* (1970) 54 Cr App R 499 at 507. It is also germane to note in this context that *Caird* was a decision dealing with violent demonstrations: see [24] below. Indeed, the High Court has applied *Caird* only in cases where the offender was charged with and convicted of rioting: *Phua Song Hua v Public Prosecutor* [2004] SGHC 33; *Pannirselvam s/o Anthonisamy v Public Prosecutor* [2005] 1 SLR 784. Rioting is a far cry from the factual matrix of the present appeal. Therefore, even at the most general level, *Caird* is not instructive in this case.

20 More pertinently, *Caird* does not stand for the proposition that any and all offences committed by a group will invariably attract sentences of greater severity than if the offences were committed by an individual. To elaborate, a careful reading of *Caird* will reveal that the dictum cited above (at [19]) was in the context of addressing a submission by counsel that the individual offences committed by the applicants ought to be viewed in isolation for sentencing purposes and that the trial judge should not have taken into account the gravity of the total wreckage caused by the entire assembly as a whole. The English Court of Appeal, at 507, unhesitatingly rejected this audacious submission as "a failure to appreciate that on these confused and tumultuous occasions each individual who takes an *active part by deed or encouragement* is guilty of a really grave offence by being *one of the number engaged in a crime* against the peace." In other words, a participant who *engages in* a *riot* or *mob* causes harm to others not only through his individual acts of violence but by his involvement in a group that, in turn, multiplies the effect of his individual acts of violence. To put it in yet another way, a participant in such violent demonstrations cannot be heard to accept responsibility only for his own actions; he is morally culpable for the totality of the consequences that the demonstration causes. After all, it is the intention of every rioter that the magnitude of his conduct be amplified by the similarly violent or improper conduct of others. Herein lies the subtle but critical point: the gist of the holding in *Caird* is not that every offence committed *in a group* should be punished more severely than if the offence were committed by the offender alone; it is that when an

individual actively engages in *group violence*, a proportionate sentence for each participant should include consideration of the net effect of that group violence. Simply put, there may be violence committed in a group (by an individual who has taken things into his own hands) but this does not mean that the entire group, as a whole, has decided on or commenced on a course of violence for which all the group's members must be inevitably held severally and jointly liable for each other's actions.

21 To cross the threshold, it is necessary to show that the offender has played an active part in the violence either by deed or by encouragement: *Caird* at 507. It is also sufficient to prove that rioters who may have refrained from joining in the physical assault of a victim or damage of property nonetheless shared in the common object of the unlawful assembly: *Pannirselvam s/o Anthonisamy* at [72], endorsing *Rajasekaran s/o Armuthelingam v PP* [2001] SGDC 175. However, it must be remembered that even where the principle in *Caird* applies, it "does not inexorably imply that the role of the accused, relative to other offenders, can never be taken into account": *Phua Song Hua* at [40]. For purposes of sentencing Tan in the present appeal, I have found there was no organisation or plan to criminally intimidate and steal from Wong: see [28] below. Accordingly, the principle in *Caird* has no application in this case. Place of crime

Place of Crime

22 The learned district judge considered an observation from *PP v Diki Zulkarnaini bin Saini* District Arrest Case Nos 57026 of 2000, 289 of 2001 and 5608 of 2001 (2001, unreported) ("*Zulkarnaini*") as an authority for the proposition that offences committed in public places merit deterrent sentences. In that case, the accused pleaded guilty, *inter alia,* to a charge of rioting. He was a member of an unlawful assembly at the Accident and Emergency Department of Singapore General Hospital ("A&E Department"), that intended to assault the victim, who was seated outside the A&E Department at six in the morning. It is of course incontrovertible that offences involving any violence or which cause harm in a hospital will attract serious consequences and to that extent I have no difficulty with this aspect of the decision.

23 It will nonetheless be helpful to set out the relevant passage in *Zulkarnaini*'s case that explains the context in which these observations were made:

> There was a brazen disdain for the protective place for the sick and wounded shown by the accused and his accomplices. There was likely fear and vulnerability at the A & E Department, Singapore General Hospital. In deliberately proceeding to the Department to seek out their victim, and rampaging through and around the Department armed with weapons, the accused and his accomplices have, in effect, wantonly endangered the lives of vulnerable innocent persons. … [T]he Department *is a particularly sensitive area of any hospital, dealing with cases of an urgent and often life-threatening nature*. [emphasis added]

24 I pause to emphasise that both *Zulkarnaini* and *Caird* constitute instances of rioting and affray. *Caird*'s case, in particular, was a decision relating to the [in]famous Garden House riots in February 1970 in Cambridge. *Zulkarnaini*'s case involved an attack in a hospital; not just *any* ordinary public place, but a place of peculiar sanctity to which the law accords particular and benevolent protection. In *Caird*'s case, there were violent demonstrations and clashes with the police, resulting in a disruption to legitimate public activities and damage to public property. These are all factors that are conspicuously absent in the present case. To that extent neither of these decisions can afford any particular assistance in assessing the appropriate sentencing considerations for the instant case. Indeed, neither of these decisions strikes me as tangentially relevant and I fail to see why the learned district judge referred to them. Counsel had not cited them.

25 The fact that an offence is committed in public cannot *ipso facto* be an aggravating factor. Conversely, an offence committed in private cannot inevitably or invariably be viewed as meriting more lenient treatment. That is not to say that the location of an incident is irrelevant. Clearly it can be a relevant sentencing consideration and often is. *But it need not invariably be so.* In fact, to accede to such a principle would send the palpably wrong message that criminal intimidation in private places will be more leniently dealt with. There can be no reason in principle why a person who corners another in a non-public place and takes advantage of the fact that there will be no one around to assist should be put in a better position than someone with the temerity to intimidate another in public. Criminal intimidation, whether in public or not, is equally and always reprehensible. A court must not adopt a mechanical approach in appraising the relevance of various sentencing criteria. Sentencing does not simply translate into the blind application of a judicial checklist to the factual matrix. It is a process that mandates the sound application of judicial discretion taking into account the *entire* factual matrix. The emphasis to be given and accorded to various criteria must necessarily vary from case to case and may even differ in the same factual matrix in its application to the different individuals involved in an incident. In the present case, the incident was quintessentially an incident involving Tan's party on the one hand and Wong on the other. There was no affray. The facts do not suggest that the public was disturbed in any way. The level of public fear or alarm generated by an incident is a relevant sentencing consideration; *Regina v Cunningham* [1993] 1 WLR 183 at 187. There must however be some evidential basis from which this inference can be drawn. The prosecution has failed to adduce any evidence inviting any inference that this brief incident caused alarm either to the coffee shop's patrons or to any member of the public.

Organised crime

26 The fact that an offence was committed by a group of persons should not ineluctably be equated with organisation or planning. Planning could be present in offences committed by individuals. Organisation could conversely be lacking in offences committed by groups. Mobs, by any definition, lack any element of coordination or planning. They often coalesce as a consequence of misplaced spontaneity.

27 Tan's party of three cannot by any stretch of imagination be described as a mob. Nor can it be viewed as an example of participants in organised crime. This epithet should be reserved for more heinous offences involving some form of real organisation, system or planning. There is no evidence that Tan and his companions organised or planned to criminally intimidate Wong or to steal his property. Nowhere in the agreed Statement of Facts ("SOF") is there any evidence suggesting prior deliberation in the commission of the offences.

28 The incident at the coffee shop conjures the image of hot-blooded individuals acting impulsively. Critically, no one in Tan's party came armed with a weapon. The bread knife that was employed was procured from the coffee shop itself. Suggesting that Tan and his companions organised and planned to criminally intimidate and steal from Wong at the very outset requires a total suspension of disbelief. More crucially, this is not the prosecution's case.

Deterrence as a sentencing consideration

29 It is often said that in arriving at an appropriate sentence, a court should invariably take into account the sentencing considerations of deterrence, retribution, prevention and rehabilitation. It is however less often noted that these principles are not always complementary and indeed may even engender conflicting consequences when mechanically applied in the process of sentencing. In practice, judges often place emphasis on one or more sentencing considerations in preference to, and sometimes even to the exclusion of all the other remaining considerations. When this occurs, it is

imperative for the court to adequately articulate the justification underpinning the sentence meted out and in particular to explicate its preference for certain particular sentencing considerations over others.

30 In the present case, the trial judge placed considerable and, if I may add, an undue premium on the deterrence principle, to the apparent exclusion of all other sentencing considerations cursorily alluded to at the outset. Unfortunately, he did not fully articulate his reasons for prizing deterrence over the other sentencing principles in this case.

31 Deterrence must always be tempered by proportionality in relation to the severity of the offence committed as well as by the moral and legal culpability of the offender. It is axiomatic that a court must abstain from gratuitous loading in sentences. Deterrence, as a concept, has a multi-faceted dimension and it is inappropriate to invoke it without a proper appreciation of how and when it should be applied. It is premised upon the upholding of certain statutory or public policy concerns or alternatively, upon judicial concern or disquiet about the prevalence of particular offences and the attendant need to prevent such offences from becoming contagious. Deterrence, as a general sentencing principle, is also intended to create an awareness in the public and more particularly among potential offenders that punishment will be certain and unrelenting for certain offences and offenders.

32 Deterrence however also has a more specific application. Specific deterrence is directed at persuading a particular offender from contemplating further mischief. This assumes that a potential offender can balance and weigh consequences before committing an offence. The deterrent function may therefore be weak or non-existent when formulating an appropriate sentence for mentally handicapped or unwell persons. In such cases, as well as instances when a court is persuaded that an offender is unlikely to re-offend, specific deterrence fails to qualify as a relevant consideration, let alone a crucial one.

33 In specific cases, even in the absence of a compelling need for specific deterrence, general deterrence could be the context in which stiff sentences are anchored, given the imperative of upholding law and public order. Granting that concerns of law and public order are indeed crucial considerations in sentencing, this alone however does not provide a licence for unreasonable or unreasoned sentences. There is in the final analysis, an overriding constitutional and public interest imperative warranting that individuals are not unfairly sentenced. All said and done, it would however be wrong to consider that the mandates of law and order on the one hand and the right of the offender to be fairly treated on the other are inimically irreconcilable. It is the duty and obligation of the sentencing judge to assess and balance these competing concerns and to strike an appropriate balance between the two.

34 In sentencing a particular offender, both general and specific deterrence must be scrupulously assessed and measured in the context of that particular factual matrix before deciding exactly how and to what extent each should figure in the equation. While there is neither any magic formula nor any neat and precise calibration to apply in the process, it is however, clearly insufficient to merely *allude* to deterrence as the basis for imposing a stiff sentence, especially in instances where it is invoked as a principal sentencing consideration or when existing guidelines are not followed. In such instances, the precise reasons for invoking deterrence or for choosing to depart from existing guidelines together with the attendant judicial concerns must be clearly and unambiguously articulated. Arbitrary or inadequate reliance on "deterrence" as nothing more than a stock phrase for want of something better fails to discharge the onerous judicial responsibility of ensuring that while a sentence meted out unequivocally conveys the court's assessment of the relevant considerations the offender's position has also been fairly and reasonably assessed.

Mitigating factors

Pleading guilty and restitution

35 Though the lower court acknowledged that Tan had pleaded guilty, it is unclear from the judgment whether any weight was accorded to this. The severity of the sentences imposed indicates that the learned district judge did not take this factor into account in his final reckoning.

36 Our settled sentencing jurisprudence recognises that a timeously-effected plea of guilt merits a sentencing discount in certain situations. A guilty plea is relevant as a mitigation factor (a) when the plea of guilt is a genuine act of contrition – see *Xia Qin Lai v PP* [1999] 4 SLR 343 at [26] and (b) when resources which would otherwise be expended at trial are saved – see *Krishan Chand v PP* [1995] 2 SLR 291 at 293, [6] and Andrew Ashworth, *Sentencing and Criminal Justice* (Butterworths, 2nd Ed, 1995) at p 137. The discount given may range between a quarter to a third of what would otherwise be an appropriate sentence though this is by no means either a hard and fast rule nor an entitlement – see *eg*, *Fu Foo Tong v PP* [1995] 1 SLR 448 at 455, [13].

37 It is pertinent to note that the value of a guilty plea is substantially attenuated when (a) the plea is tactical – see *Xia Qin Lai v PP* (*supra*); (b) there is no other choice but to plead guilty – see *Wong Kai Chuen Philip v PP* [1990] SLR 1011; and (c) where the public interest considerations nevertheless necessitate a deterrent sentence – see *Fu Foo Tong v PP* (*supra*).

38 Closely related to the plea of guilt is the act or fact of restitution: the restoration of the status quo apropos either an accused who has been unjustly enriched or a victim who has been improperly deprived of an asset by a criminal act. Restitution can be viewed as a manifestation of contrition accompanying a genuine plea of guilt – see *Krishan Chand v PP* (*supra*). Restitution engendered purely by an expectation of a lighter sentence may however sometimes be coloured by the same consideration as a tactically-made plea of guilt – see *Soong Hee Sin v PP* [2001] 2 SLR 253 at [9]. Restitution arising from apprehension, as in this case, should not be viewed as an act of contrition.

Determining the appropriate sentence

39 *Regina v Howells* [1999] 1 WLR 307 is an important decision where the English Court of Appeal considered the relevant factors to be taken into account in meting out custodial sentences. Courts should usually approach custodial sentencing by balancing the nature of the accused's moral culpability and the extent of the damage or injury caused to the victim versus wider public interest considerations. *Ceteris paribus*, an offence that manifests deliberation is usually more serious than one which is spontaneous. Furthermore, the infliction of personal injury or psychological trauma will be viewed even more seriously if an injury is permanent. Lord Bingham CJ (as he then was) with his customary acuity noted at 312:

> Courts should always bear in mind that criminal sentences are in almost every case intended to protect the public, whether by punishing the offender or reforming him, or deterring him and others, or all of these things. Courts cannot and should not be unmindful of the important public dimension of criminal sentencing and the importance of maintaining public confidence in the sentencing system.
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> Where the court is of the opinion that an offence, or the combination of an offence and one or more offences associated with it, is so serious that only a custodial sentence can be justified and that such a sentence should be passed, the sentence imposed should be no longer than is

necessary to meet the penal purpose which the court has in mind.

40 In scrutinising and reviewing the cases that the learned district judge appraised in deciding upon the appropriate sentence, I cannot, regrettably, but conclude that most of them were plainly distinguishable from the instant scenario; indeed they were on the whole quite irrelevant. I also note that the prosecution did not cite the authorities he relied on. I now turn to examine the actual sentencing precedents in tandem with some of the precedents he relied on.

Sentencing precedents for criminal intimidation

41 In the case of *Ramanathan Yogendran v PP* [1995] 2 SLR 563, where a sentence of six months' imprisonment was imposed, the appellant had an argument with the victim the day before he threatened to kill him. The appellant called the victim over the telephone, hurled repeated abuses at him, threatened to go to his home to assault him and then kill him. The threat was a very real one.

42 *Luan Yuanxin* (*supra* [11]) was a case exemplifying *extreme* domestic violence. The appellant threatened the victim (his wife) with a 20cm-long meat cleaver. He uttered a death threat to her whilst brandishing the weapon. He then attempted to carry out that threat the very next day. In *Chua Siew Lin v PP* [2004] 4 SLR 497 ("*Chua*"), the court emphasised that *Luan Yuanxin* should be employed as a sentencing precedent *only with caution*. In *Chua's* case, the offender, an employer, pressed a kitchen knife against the collarbone of the victim, a maid. The accused was handed a term of four months' imprisonment for criminal intimidation. On appeal, notwithstanding the policy of deterrence generally and painstakingly applied to maid abuse cases, the sentence was reduced to two months.

43 In assessing the appropriate sentence in *Chua*'s case, the court also considered the case of *PP v Tan Beng Hoe* [2002] SGDC 121. This was another case of marital violence where the accused had used a chopping knife to confront the victim, his wife. He was sentenced to two months' imprisonment. In distinguishing the earlier case of *Luan Yuanxin* from the factual matrix in *PP v Tan Beng Hoe* case, the learned district judge in that case correctly noted at [12]:

> [T]he respondent in that case had demonstrated that he was clearly not incapable of carrying out his threats to kill the victim. He had deliberately carried out his threat with the use of a weapon, and had gone further to attack the victim by strangling and biting her, causing her serious physical injuries and for which she was given three days medical leave. Thus, the unprovoked, violent and vicious acts of the respondent in that case were premeditated and prolonged, which warranted a far more severe sentence.

It is plain to me that the learned district judge in this case was mistaken in applying *Luan Yuanxin* to the present factual matrix. Those rather remarkable circumstances are far removed from the instant context.

44 The decision in *Lwee Kwi Ling Mary v Quek Chin Huat* [2003] 2 SLR 145 affords some assistance. In that case, the offender threatened to kill the victim whilst holding a chopper. The two protagonists had an argument over rent resulting in a scuffle between the offender's husband and the victim. The court opined that when a death threat was uttered, a sentence of at least six months was ordinarily warranted. However, the court was of the view that the circumstances supported a departure from the rule. Firstly, the offender only threatened the victim when the latter was involved in a scuffle with her husband. Secondly, the victim refused to leave the offender's flat. Thirdly, the victim did not appear to have been alarmed by the threat. The court then sentenced the appellant to three months' imprisonment.

45 The prosecution also drew my attention to the following passage from *Sentencing Practice in the Subordinate Courts* (LexisNexis, 2nd Ed, 2003) at p 217:

> A distinction is drawn between criminal intimidation *simpliciter* and an aggravated form of criminal intimidation that attracts a higher punishment. For purposes of sentencing, the nature of the threat, the context in which it was uttered, and the effect on the victim are the most significant factors.
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> If the victim is not only alarmed by the threat but had feared for his or her safety, that is an aggravating factor that goes towards the seriousness of the offence: *PP v Luan Yuanxin* [2002] 2 SLR 98.
>
> If the threat was with a weapon or was accompanied by a weapon, a term of custody will be inevitable. The presence of the [weapon] serves not only to make the threat more menacing, but also goes towards proving the maker's intent to cause alarm to his victim *(PP v Luan Yuanxin).*
>
> A threat to cause death falls within the second limb. Where the threat to kill is without a weapon, the sentencing range for offenders with no prior record is between six to 12 months' imprisonment. Where a weapon was used as part of the threat to cause death, a term of two years' imprisonment was imposed by the High Court in two recent cases.
>
> If the threat is to injure seriously or if it is committed in the course of assault or other criminal conduct, a term of custody can also be expected.
>
> If the threat was uttered in the heat of the moment or if it was not of a particularly serious nature, the offence is likely to dealt with by a fine.
>
> Threats uttered in the context of domestic abuse are treated severely (see *PP v N* [1999] 4 SLR 619 and *PP v Luan Yuanxin*).

I accept this conspectus as general encapsulation of current sentencing practices for this type of offence, with one qualification. While *prima facie* it is correct to assert that aggravated criminal intimidation will attract higher punishment the sentence meted out must be tempered by both proportionality and just as crucially by the specific factual matrix. I stress in addition that these passages are to be viewed as no more than guidelines and should neither be religiously applied nor adhered to mechanically. In the final analysis it must be acknowledged that sentencing precedents function purely as an aid so that consistency in sentencing may be maintained. General consistency in sentencing while desirable is not an overriding sentencing consideration. The factual matrix always remains paramount. Unfortunately, the learned district judge appears to have paid little heed to these guidelines in his misguided attempt to impose severely deterrent sentences on Tan. While he was at liberty to depart from these guidelines, he failed to articulate any basis or rationale for so doing. There was no apparent attempt to identify distinctions between the appellant's offences and comparable offences and offenders.

46 In the present case, it ought to be noted that no death threat was uttered at any point. Further, the SOF significantly failed to incorporate any facts suggesting or asserting that Wong assumed or felt that his life was in danger. Nor is there any evidence of the distance at which the knife was being held. John was the main perpetrator brandishing the knife. Tan never suggested procuring the knife. Nor did he handle it at any point. Be that as it may, it must be acknowledged and recognised that pointing a knife at anyone, even in the absence of any threats, would be sufficient to cause serious alarm (at the very least) to any reasonable person. There can be no question that the

knife was pointed at Wong to threaten him with the prospect of harm and to induce in him fear for his physical safety. While the original intent in pointing the knife at Wong may have been conceived in a misguided response to his aggressive behaviour, this act soon transmuted itself into a full-blown act of criminal intimidation culminating in Wong being coerced to part company with his money and handphone.

47 There is one further point. The learned district judge appeared at some points of his grounds of decision to consider Tan the principal offender and initiator. At [11], he made the following observation:

> It was noted that, the accused in committing the offences had, on the night in question, *willingly enlisted the assistance of two accomplices* to proceed with him to the Starlight Coffee shop to discuss matters with Wong. [emphasis added]

What did the learned district judge mean by referring to the 'two accomplices'? It was not the prosecution's case that when Tan sought John's assistance there was an understanding that improper means would be relied on in order to collect the debt. From the SOF it is abundantly clear that Tan did not initiate the chain of events that culminated in the commission of the offences. It was John who procured the bread knife. That said, it cannot be gainsaid that Tan became a willing participant and accomplice to the commission of the offences. Indeed, the accused accepts this. However, in terms of culpability, Tan cannot be ranked alongside John even though he would have been the beneficiary of those acts. It appears that the learned district judge viewed Tan as the principal transgressor and his companions as mere accomplices. The SOF does not support this characterisation.

Sentencing precedents for minor theft

48 In so far as the theft conviction is in issue, a case in point is *Chua Gin Synn v PP* [2003] 2 SLR 179 ("*Chua Gin Synn*"). In that case, the appellant pleaded guilty to one charge of theft of several items amounting in value to $259.70. The court considered four cases in determining the appropriate sentence.

49 First, *PP v Innasimuthu s/o D M* [2001] SGDC 115. The value of the stolen items was $838 and the sentence was four months. Second, *PP v Nurashikin bte Ahmad Borhan* [2003] 1 SLR 52. The value of the item was $9.70 and the term of imprisonment was two weeks. In both cases the accused had criminal antecedents. Third, *PP v Roddie A K Belamy* Magistrate's Arrest Case No 7705 of 2002 (2002, unreported). Ten items worth $113.90 were stolen. The sentence was two weeks' imprisonment. Last, *PP v Sekharamantri Sairam Patnaik* Magistrate's Arrest Case No 5941 of 2002 (2002, unreported). $84.30 worth of items was stolen. A fine of $2000 was imposed. In the last two cases, the offenders had no relevant criminal record. In *Chua Gin Synn*, the court imposed a fine of $2,000 in lieu of imprisonment in light of the four precedents. These cases buttress the view expressed in *Sentencing Practice in the Subordinate Courts*, *supra* at p 340 that "[i]n cases where the value of the stolen item is low (below $1,000) and the offender has a previous clean record, the sentence imposed will usually be a fine". In the present case, Tan has no relevant antecedents and the value of the property was relatively little. There is little reason to depart from the sentencing guidelines.

Conclusion

50 There are a number of attenuating factors in this case which the learned district judge regrettably appears to have neither acknowledged nor taken into consideration. First, the appellant

pleaded guilty at the earliest opportunity. This appeared to be a genuine expression of remorse. Second, the victim was fully restituted even though in the circumstances this cannot be viewed as an act of contrition. Rather, the relevance of the restitution is that the crime did not cause any financial loss to Wong. This ought to have also been taken into account. Third, the appellant promptly and fully co-operated with the authorities. Fourth, the appellant is a happily-married man with a stable business. The absence of any relevant criminal record, a stable family life and a history of continuous employment together with his heartfelt expression of remorse for what appears to have been an impulsive criminal act ought to be accorded some weightage in this case. In so far as the issue of specific deterrence is relevant, I am convinced that a short custodial sentence not only will suffice, it will leave both a profound and indelible impression on the appellant. That said, one cannot ignore that certain adverse factors also prevail in this case. First, a weapon was used in the commission of the offences. Second, the offences were committed by Tan in concert with others in order to collect a debt. That is entirely unacceptable. Regardless of whether the debt was legitimately due to Tan, such an act of taking the law into one's hands complemented or supplemented by the threat of harm, actual or otherwise, must be deplored and denounced unequivocally through a custodial sentence.

51 All said and done, I am persuaded that the learned district judge made several errors in his grounds of decision in determining the appropriate sentence. He failed to accord any consideration to the plea of guilt. He placed undue emphasis on the purported organisation and planning involved in the incident. He also erred in concluding that this was a confrontation by three persons against a single person. The SOF makes it abundantly clear that Wong was having a meal with his friends. He was not alone. Finally, the appellant's prior antecedent for gaming was an altogether irrelevant consideration. Several of the sentencing precedents that the learned district judge relied on relate to cases of rioting and organised crime and are to that extent wholly irrelevant. The learned district judge also appears to have placed far too much emphasis on the issue of general deterrence. I wholeheartedly accept that general deterrence in a case of this nature is a significant consideration that cannot be overlooked. Individuals cannot take the law into their own hands or draw up their own rules of conduct to govern their commercial relationships. To turn a blind eye or to view such conduct as benign would be tantamount to condoning it that might in turn be the thin end of the wedge for both law and order, and legitimate commercial intercourse. That said, the application of the principle of general deterrence should usually be tempered with proportionality and a notion of fairness to the accused as well save where public interest unyieldingly dictates otherwise. As far as personal and specific deterrence is concerned it was amply clear given Tan's remorse and background that even a short custodial sentence will prove to be a searing experience that will surely leave an indelible impression on him.

52 There is no suggestion from the prosecution that Tan has any prospective proclivity for sliding into criminal activity. He maintains a small but stable business that depends entirely on his physical presence and know-how. The public does not need to be protected from him. What is called for is an appropriate sentence that adequately calibrates and signifies the unacceptable and serious nature of the offences. His conduct should be denounced without destroying his business and family life. He should be given the opportunity to pick up the pieces. A long custodial sentence would have the inevitable and altogether deleterious effect of destroying the livelihood of a legitimate and otherwise respectable businessman. That would not be appropriate in this case.

53 In this case, a custodial sentence is clearly and undeniably warranted although it must be circumscribed by fairness and underpinned by public interest considerations. An appropriate sentence in a case such as this must be consistent with the overriding concern and need to protect the interests of the public and to adequately punish and deter the specific individual. It is sometimes not adequately appreciated that a significant number of offenders can be as justly and effectively dealt with by a shorter custodial sentence rather than a longer one. These are persons who are not ever

likely to offend again. A distinction must be drawn between dangerous offenders and potential recidivists on the one hand and offenders who are unlikely to ever offend again on the other hand. In the latter case, unless there is an unequivocal or a compelling need to publicly denounce the crime or the offender with a stiff sentence the courts should be slow to unnecessarily and perhaps even arbitrarily invoke the mantle of deterrence, simply to justify long custodial sentences that over amplify the message of general deterrence. I also note that in this case the prosecution had not even sought that a deterrent sentence be imposed to begin with. There is of course no requirement in law for the prosecution to apply for deterrent sentencing before a court may consider it in the exercise of its discretion; *PP v Gurmit Singh* [1999] 3 SLR 215 at [9]. That said, a court must always exercise scrupulous caution and measured prudence before relying on or employing a sentencing consideration that has not been the subject of submission or contention by counsel and thus tested by the anvil of argument. The learned district judge also relied on questionable assumptions. He departed from a cardinal principle of sentencing that an offender must be punished on the basis of the facts of the case and not on the basis that he has committed a particular offence.

54 Considering that the term of imprisonment for the theft charge was to run concurrently, a fine in lieu of imprisonment is more appropriate in this case. Indeed the severe but concurrent jail sentence for this relatively minor act of theft appears in my view to be not only unsupported by any sentencing authority but is in the final analysis quite meaningless as it would not have to be served separately. It is an inappropriate paper sentence that lacked both proportionality and bite.

55 In the result, the sentence of 21 months' imprisonment on the charge of criminal intimidation was reduced to three months. The sentence of 12 months' imprisonment for the conviction of theft was substituted with a fine of $1,000 and in default thereof, a sentence of two weeks' imprisonment.