Public Prosecutor *v* Saiful Rizam bin Assim and other appeals
[2014] SGHC 12

Case Number : Magistrates' Appeals Nos 76, 78 and 79 of 2013

Decision Date : 15 January 2014

Tribunal/Court : High Court

Coram : Chao Hick Tin JA

Counsel Name(s) : Leong Wing Tuck and Nicholas Seng (Attorney-General's Chambers) for the appellant; Amarick Gill and Tan Jia Wei (Amarick Gill & Co) for the respondents; Tan Kai Liang (Allen & Gledhill LLP) as amicus curiae.

Parties : Public Prosecutor — Saiful Rizam bin Assim

Criminal Procedure and Sentencing – sentencing

15 January 2014

Chao Hick Tin JA:

Introduction

1 These three appeals (*viz*, Magistrate's Appeals Nos 76, 78 and 79 of 2013, collectively "the present appeals") were brought by the prosecution ("the Appellant") against the sentences meted out by the District Judge to 19-year old Saiful Rizam bin Assim ("R1 Saiful"), 20-year old Muhammad Erman bin Iman Tauhid ("R2 Erman") and 19-year old Muhammad Yunus bin Aziz ("R3 Yunus") (collectively, "the Respondents"). The Respondents had all pleaded guilty to the following charges:

	Charges convicted on	**Charges taken into consideration**
R1 Saiful	• 1 × theft as servant under s 381 of the Penal Code (Cap 224, 2008 Rev Ed) ("the PC") (DAC 45721/2012)	• 1 × theft as servant under s 381 of the PC
R2 Erman	• 1 × dishonestly receiving stolen property under s 411(1) of the PC (DAC 45729/2012) • 1 × voluntarily assisting in making away with stolen property under s 414(1) of the PC (DAC 45731/2012) • 2 × theft as servant under s 381 of the PC (DAC 45735 & 45738/2012) • 1 × theft as servant in furtherance of common intention under s 381 read with s 34 of the PC (DAC 45737/2012) • 1 × abetment by conspiracy of theft as servant under s 381 read with s 109 of the PC (DAC 45739/2012)	• 4 × theft as servant under s 381 of the PC • 1 × abetting theft as servant under s 381 read with s 109 of the PC

R3 Yunus	• 1 × dishonestly receiving stolen property under s 411(1) of the PC (DAC 45725/2012) • 1 × theft as servant in furtherance of common intention under s 381 read with s 34 of the PC (DAC 45726/2012) • 1 × abetment by conspiracy of theft as servant under s 381 read with s 109 of the PC (DAC 45727/2012)	• 1 × theft as servant under s 381 of the PC

Facts

2 At all material times, the Respondents were serving their national service with the Singapore Police Force ("SPF") and were posted as staff assistants to the officer in charge of the Case Property Store of Ang Mo Kio Police Division ("the Store"). Case exhibits seized in the course of police investigations were kept in the Store. R1 Saiful and R3 Yunus were Vigilante Corps Officers and R2 Erman was a Special Constabulary Officer. The Store had *metal* cabinets labelled "2011" and "2012" with a central locking mechanism that would lock all the cabinets simultaneously. There was also a *wooden* cabinet where handphones condemned for disposal were kept ("the pedestal cabinet"). The keys to these cabinets were kept by the officer in charge of the Store ("the complainant"). The complainant had given R2 Erman a key to unlock the door to the Store ("the key") for emergencies when she was not around. The complainant had also warned R2 Erman not to return to the Store after office hours or otherwise abuse the privilege of having the key.

3 On 13 April 2012, when the complainant was away on leave, R1 Saiful searched her drawer and found the keys to open the pedestal cabinet. R1 Saiful showed R2 Erman what was in the cabinet and took four handphones from it. R1 Saiful kept two for himself and gave two to R2 Erman who sold them to a second hand dealer for $100.

4 On a day in May 2012, R1 Saiful went to the Store and took two pairs of beach shorts and a haversack which were meant for disposal and told R2 Erman about it. At R1 Saiful's request, R2 Erman helped the former removed the shorts and haversack from their office and R2 Erman passed them to R1 Saiful who kept them for his own use.

5 On 7 July 2012, a day on which R2 Erman was not on duty, he returned and unlocked the Store with the key, forcibly opening the first drawer of the "2011" cabinet and taking therefrom six handphones. He later disposed of two, sold three (for $1,200) and gave one to R3 Yunus a week later (13 July 2012) who accepted it knowing that it was stolen from the Store.

6 On 13 July 2012, R2 Erman agreed to R3 Yunus' suggestion to go back to the Store to steal. The two met on 14 July 2012 and took four handphones from the "2011" cabinet which R2 Erman later sold for $1,350 at Ang Mo Kio Central.

7 On 15 July 2012, R2 Erman took four handphones from the "2011" and "2012" cabinets and sold them for $1,900.

8 On 16 July 2012, R2 Erman and R3 Yunus went to the Store in accordance with their agreement the previous day. R3 Yunus waited at the stadium opposite the police station while R2 Erman took 12 handphones from the "2011" and "2012" cabinets. R2 Erman threw away six of the handphones which he deemed to be of poor quality, and met up with R3 Yunus. They then travelled to Ang Mo Kio

Central where they sold the other six handphones for $1,700.

9 On 18 July 2012, an investigation officer went to the Store to withdraw a case exhibit but was unable to find it. A check was conducted and several handphones were found to be missing. The complainant lodged a police report. The Respondents eventually admitted to the offences.

10 On 20 February 2013, having been convicted of the charges relating to the thefts and while on bail, R2 Erman stole his mother's handphone which he sold for $600.

The Appellant's case

11 The Appellant argued that the District Judge had erred in failing to consider reformative training as the appropriate sentence for the Respondents and urged this court to call for pre-sentence reports for reformative training in order to evaluate the Respondents' suitability for reformative training.

The Respondents' case

12 The Respondents cited various precedents and submitted that the appropriate sentencing range for such offences was three to 18 months' imprisonment, and further pointed out that offenders sentenced to an imprisonment term would normally be eligible for a one-third remission of their sentence for good behaviour. In contrast, there was no such remission for reformative training which had a minimum institutional term of 18 months and that it would be "unjust" and "not realistic" to sentence the Respondents to reformative training.

Decision Below

13 The District Judge was of the view that the main sentencing considerations in relation to the offences committed by the Respondents were deterrence and retribution. This was in light of the nature and circumstances of the offences in question which involved many aggravating factors such as the Respondents being law enforcement officers and abusing their positions and breaching the public trust, citing *PP v Loqmanul Hakim bin Buang* [2007] 4 SLR(R) 753 ("*Loqmanul*") (although I should also point out that the District Judge did note that *Loqmanul* was distinguishable as it contained many aggravating factors such as the offender committing the offence in uniform, while on bail, and carrying a weapon). However, the District Judge considered some of the aggravating factors in this case to be the "wanton and repeated" stealing, the increasing boldness of R2 Erman and R3 Yunus (shown by the frequency of offending and increasing number of handphones taken) and the blatant dishonesty displayed by R2 Erman in lying to the second-hand handphone dealer. On the other hand, he also considered the mitigating factors such as the youthfulness of the Respondents, their guilty pleas at an early stage, and R3 Yunus and R1 Saiful's clean records.

14 Bearing in mind the principle of proportionality, the District Judge felt that a normal jail term instead of reformative training was appropriate. Although he noted their youth, he was mindful that rehabilitation was not "invariably the dominant consideration" in cases involving young offenders. Upon considering the Deputy Public Prosecutor's ("the DPP") four-page report on the programmes available in reformative training and in prison, the District Judge observed that both had structured programmes for the rehabilitation of offenders. He noted, however, that the DPP was unable to share in open court information on the recidivism rates of each category of inmates. He thought that the Respondents were mature enough not to allow themselves to be corrupted in prison, although he was also mindful that an adult prison was not "tailor-made" for them and might even subject them to "negative influences".

15 The District Judge felt that a jail term of some length would be a strong signal that such conduct would not be tolerated, and to send offenders with "no previous record of imprisonment" for reformative training would be a "crushing sentence" on them as it would involve a period of incarceration far in excess of what an adult offender would be liable to under the current sentencing precedents. He also noted the situation in *PP v Foo Shik Jin and others* [1996] SGHC 186 ("*Foo Shik Jin*") where the court, while prepared to impose reformative training, chose to sentence a young offender to jail instead as the latter did not agree to reformative training. The District Judge considered R1 Saiful the least culpable of the three, and sentenced him to seven months' imprisonment. R3 Yunus was sentenced to four months' imprisonment in respect of dishonestly receiving a handphone, and seven months' imprisonment each for the theft of four handphones in furtherance of a common intention and conspiring to commit theft of cell phones, with the sentences in respect of two theft charges ordered to run consecutively, resulting in an aggregate sentence of 14 months' imprisonment. The District Judge thought that R2 Erman was the most culpable as he had been entrusted with the key to the Store and was warned not to abuse that privilege. He also re-offended while on bail. Hence R2 Erman was sentenced to a total of 18 months' imprisonment.

Issues before this court

16 The issues in these appeals were as follows:

(a) Were the imprisonment sentences meted out by the District Judge on the Respondents appropriate?

(b) In the event that this court was of a view that reformative training should have been imposed instead of imprisonment, was it fair to impose it at this point?

Decision

Did the District Judge correctly sentence the Respondents to imprisonment?

Main sentencing principle

17 I did not quite understand why the District Judge held that "deterrence and retribution" should be the main sentencing considerations here and ruled out rehabilitation. Given that the Respondents were all between the ages of 19 and 20 at the time of conviction, the gravity of the offences, and that the hurt caused to "victims" here was not especially grievous, there was hardly any persuasive reason why *rehabilitation* should not also have been a primary sentencing consideration here, if not the primary sentencing consideration. In *Public Prosecutor v Mohammad Al-Ansari bin Basri* [2008] 1 SLR(R) 449 ("*Al-Ansari*") V K Rajah JA made the following remarks on when rehabilitation should be a "predominant consideration" (at [77]):

> Accordingly, in dealing with sentencing young offenders involved in serious offences, I propose the following analytical framework. First, the court must ask itself whether rehabilitation can remain a predominant consideration. If the *offence was particularly heinous* or the *offender has a long history of offending*, then reform and rehabilitation may not even be possible or relevant, notwithstanding the youth of the offender. In this case, the statutorily prescribed punishment (in most cases a term of imprisonment) will be appropriate.
>
> [emphasis added]

18 Here the Respondents were young, free of antecedents (for R1 Saiful and R3 Yunus), and the

crimes which they had committed were not particularly heinous – factors indicating that rehabilitation should be a predominant consideration in sentencing but which were unfortunately not given sufficient consideration by the District Judge. Hence, if rehabilitation had been identified as the primary sentencing consideration in sentencing, which should have been the case here, the choice would have been between probation and reformative training – not imprisonment (*Al-Ansari* at [78]). Reformative training, in particular, would have a more deterrent effect than probation, due to its structured regimentation and the element of incarceration, and is definitely not a "soft option" (see *Nur Azilah bte Ithnin v PP* [2010] 4 SLR 731 ("*Nur Azilah*") at [23]).

19 In my view, based on the circumstances of their offences, the Respondents were *precisely* the types of young offenders whom the court should seek to reform, instead of merely punishing them for the purposes of retribution: they had clearly showed their susceptibility to negative influence – as seen from how they mutually introduced and encouraged one another to steal from the Store – despite being in an environment like the SPF where there are strict rules and regimes to abide by.

20 In this regard, I would observe that the District Judge had called for a report from the DPP for the purposes of comparing the rehabilitative programs available in prison and under reformative training [note: 1] and noted that both clearly had "structured programmes for the rehabilitation of prisoners and inmates". However, he seemed to have taken exception to the fact that the DPP was "not prepared to share in open court the issue of recidivism concerning both categories of inmates". [note: 2] With respect, I failed to see how the question of recidivism mattered, as if to imply that if the recidivism of both categories were not significantly different then it would be a waste of effort to sentence young offenders to reformative training. The District Judge failed to sufficiently appreciate the different focus of reformative training as compared to imprisonment, and in this respect the DPP's submissions on the essential differences between the two programmes were insightful. Trainees under reformative training are "constructively engaged" [note: 3] during the period of incarceration, and are subject to a compulsory post-release phase where they are placed under supervision and liable to be recalled if they fail to comply with the requirements imposed on them. This regime involves a combined effort by the trainees' mentors, family members and senior re-integration officers from the supervision centre to ensure a smooth reintegration of each trainee back into society. In contrast, the post-release programme for a normal prisoner, *viz*, the Community Aftercare Programme, is entirely voluntary. Hence the Respondents might better benefit from reformative training which has a greater emphasis on the rehabilitative and structured aspects of punishment.

Maturity of Respondents

21 I also thought that the District Judge's conclusion that the Respondents would have been "mature" enough to withstand the negative influences of a prison environment was questionable. Notwithstanding the seeming *absence* of such "maturity" in the Respondents (given the crimes committed and how they easily influenced one another), this finding also went against the wisdom of not subjecting young offenders to contact with the harsh and hardened criminals in the prison environment, as explained in *Nur Azilah* (at [22]):

> In sentencing the Appellant to imprisonment, the District Judge considered that rehabilitation was also possible in prison. With respect, perhaps, *the District Judge did not wholly appreciate the corruptive environment and stigmatisation that imprisonment would bring*. More importantly, ***even if there are rehabilitative elements or programmes in prison, they are clearly not tailor-made for young offenders*** …
>
> [emphasis added in italics and bold italics]

22 While I accept that one cannot discern very much about the "maturity" of an individual from the mere fact of his age, it also seemed wholly unrealistic to expect young persons like the Respondents, who had already demonstrated an inability to resist temptations and who did go on to commit crimes, to be able to exhibit the requisite amount of resilient "maturity" which would set them on the right path in a prison environment. Indeed, what the Respondents' conduct showed was that they were of immature minds which were unable to differentiate between right and wrong. Contrary to what the District Judge thought, they badly needed a strong guiding hand.

Wishes of Respondents

23 With respect, the District Judge also wrongly relied on *Foo Shik Jin* for the proposition that an offender's wishes against reformative training in favour of imprisonment could be taken into account and, in consequence, in dealing with the Respondents, did consider the fact that they had indicated a preference for imprisonment over reformative training. As rightly pointed out by the Appellant, *Foo Shik Jin* did not stand for such a proposition, as the judge in that case considered that the offender was "clearly not a case suitable for reformative training" and even made the remark that "[the offender was] clearly a bad case so far as [his] character and conduct [were] concerned" (at [6]) – hence whatever parallels could be drawn from *Foo Shik Jin* must be limited. In any event, it is trite that the preferences of an offender simply cannot figure as a consideration in a judge's sentencing discretion, for it would otherwise completely undermine the established sentencing framework in our law.

Reformative training crushing?

24 Lastly, I also regrettably have to disagree with the District Judge's conclusion that to "impose a sentence of reformative training [on those] who had no previous record of imprisonment … would be to impose on them a *crushing* sentence" [note: 4] [emphasis added]. The following passage from Kow Keng Siong, *Sentencing Principles in Singapore* (Academy Publishing 2009) ("*Sentencing Principles in Singapore*") at para 29.022 explains why this view was incorrect as follows:

> … the fact that the tariff sentence for the offence is shorter than the prescribed period of reformative training is an irrelevant consideration, if the dominant sentencing objective in a particular case is to reform the accused. In this regard, consider *Public Prosecutor v Lim Jingyi Jasmine* [2004] SGDC 113 at [20], per District Judge Tan Puay Boon, where the accused was convicted of theft (relating to property valued at $721) and shoplifting charges (relating to property valued at $79.50):
>
> > The period for reformative training can range from 18 to 36 months: section 13(7) read with Schedule D, para 1, Criminal Procedure Code (Cap 86). This period is therefore *much longer than the prison sentences the accused would otherwise have received if she had been sentenced to imprisonment, given the nature of her present offences.* However, *this long period of detention is necessary if a final attempt is to be made to rehabilitate her.* If the accused is sentenced to imprisonment, she would just have to serve a relatively short sentence before being released, without any benefit from any programme of rehabilitation. Given her character, it is likely that she would re-offend.
>
> [emphasis added]

25 Hence the fact that the minimum period of reformative training (18 months) was longer than what the District Judge intended to impose on R1 Saiful and R3 Yunus (seven months and 14 months respectively) should not have stood as a *bar* to reformative training being ordered against them. The

District Judge's consideration that reformative training would have been "crushing" was effectively an allusion to the principle of proportionality, an issue that was brought even more sharply into focus in the light of the situations which the Respondents eventually found themselves in by the time of the first appeal hearing before me on 31 July 2013. While I will discuss this principle a little more later (where the English position will be examined), it would suffice to say for now that imposing reformative training on the Respondent at the point when they were *before the District Judge* would not have been so grossly disproportionate or crushing that imprisonment would have been the more appropriate punishment. It must be borne in mind that reformative training is a special programme put in place for young offenders. Of course it has an element of punishment in it as the young offender is deprived of his liberty. Parliament had, in its wisdom, deemed it fit to impose a minimum period of 18 months in order to ensure that the programme would achieve its objective of rehabilitating the young offender. Thus when the principle of proportionality is being considered, the aim of the reformative programme must not be lost sight of.

26 It would be clear from the foregoing that if I had been in the District Judge's position, there was no doubt that I would have sentenced the Respondents to reformative training. Accordingly, in my view, the District Judge was wrong in principle to have imposed on each of the Respondents a normal imprisonment term. However, given the particular circumstances of the Respondents at the stage at which these appeals came before me for hearing, I decided, for reasons which I will now explain, that I should not substitute reformative training for the imprisonment terms imposed on the Respondents.

The Respondents' situation on 31 July 2013 (the first hearing)

27 Unfortunately, by the time I heard the prosecution's appeal against the Respondents' sentences on 31 July 2013, the Respondents had already served out a considerable proportion of their imprisonment terms. R1 Saiful was sentenced to 7 months' imprisonment with effect from 3 April 2013 and by 31 July 2013, he had served almost 4 months. R2 Erman had been sentenced to 18 months' imprisonment with effect from 28 February 2013 and at that point had served almost 5 months. R3 Yunus was sentenced to 14 months' imprisonment with effect from 3 April 2013 and at that point had served almost 4 months. The situation was most acute in the case of R1 Saiful, as he had by then already served *more than half* of his total imprisonment sentence, and given the normal one-third remission for good behaviour, he would have been due to be released on 24 August 2013, only twenty four days to go. Similarly, R2 Erman would have been released on 27 February 2014 and R3 Yunus on 12 January 2014, assuming they were entitled to the one-third remission of their sentence for good behaviour.

28 These circumstances made all the difference as to whether I should, sitting in an appellate capacity, nevertheless order reformative training for the Respondents instead of allowing them to continue to serve out their imprisonment terms. Reformative training has a minimum period of 18 months, and cannot be backdated. Hence if I were to have allowed the appeal and ordered reformative training for the Respondents in substitution for their imprisonment sentences, time would have to start running all over again for them, as they still would have to complete at least 18 months of reformative training *regardless of the amount of time already spent incarcerated in prison*. Such a situation would clearly be unfair to them. As such, I called for Mr Tan Kai Liang ("Mr Tan") (from the Supreme Court young *amicus curiae* panel) as *amicus curiae* to provide this court with assistance on these issues and adjourned the hearing to 21 August 2013.

The principle of proportionality

29 As mentioned above, these appeals brought into sharp focus the role and place of the principle of *proportionality* in the sentence of reformative training (which has a minimum period of 18 months).

This principle, while not often explicitly referred to, is a natural corollary to the sentencing goal of retribution (see *PP v Tan Fook Sum* [1999] 1 SLR(R) 1022 at [17]). There are various formulations of this principle (see *Sentencing Principles in Singapore* at para 12.005), such as the precepts that the sentence must be commensurate with the gravity of the offence, that the sentence must fit the crime, and that the court should not lose sight of the "proportion which must be maintained between the offence and the penalty and the extenuating circumstances which might exist in the case" (see *Liow Siow Long v PP* [1970] 1 MLJ 40 at 42). All of these serve to make the same point: that an offender should only receive a punishment that is in line with what the offence he had committed deserves, and no more.

30 This question of proportionality has been widely discussed in English cases where the maximum sentence of imprisonment for the accused's crimes falls below the minimum period required for borstal training, the English equivalent of reformative training. While this was not the exact same situation that presented itself in the present appeals (which involved the accused persons, when the matter came up for hearing on appeal, already having served a substantial portion of their imprisonment terms where the maximum punishments which the court could impose for the offences in question would *not* be less than the period prescribed for reformative training), these appeals did in a sense raise issues of proportionality.

31 With the exception of R2 Erman, the minimum period in respect of which the Respondents would be kept in incarceration under the sentence of reformative training would be longer than the tariff period of imprisonment which they would be liable to be sentenced. As stated in the passage from *Sentencing Principles in Singapore* quoted above (at [24]), the fact that this is so is not *in itself* a sufficient reason why reformative training should not be ordered. In that sense, the Appellant's argument that it was "an irrelevant consideration … that the Respondents would have been sentenced to an imprisonment term which is shorter than the period of Reformative Training" [note: 5] might be too absolute. I could accept it as a general proposition but there could be circumstances, like the present appeals, or the circumstances in the Hong Kong case discussed below (at [38]–[41]) where the principle of proportionality should be given due consideration in determining the appropriateness of a reformative training sentence. This appears to be the "middle ground" advocated in the submissions of Mr Tan between the two different threads of judicial thought in England on the issue of whether it would be appropriate to order borstal training if the period of detention would be far in excess of the maximum sentence prescribed for the offence committed. At this juncture, I should turn to discuss briefly the English position.

English cases

32 The problem that the principle of proportionality posed in the face of borstal training was set out in D A Thomas, "Theories of Punishment in the Court of Criminal Appeal" (1964) 27 Mod L Rev 546 ("*Theories of Punishment*") at p 551 as follows:

> … the concept of just proportion is not fully applied to sentences of Borstal Training, corrective training and preventive detention. These sentences are designed to free the courts from the restrictions of the theory of proportion and to make it possible to pass sentences, in cases where these forms of sentence are available, involving detention or a period longer than the sentence of imprisonment which would have been justified by the offence. The notion of just proportion has not been entirely eliminated from the use of these sentences, however, although it is no longer a dominating factor.

33 The first line of English cases saw the courts advocating "strict proportionality" in that a sentence of borstal training would be inappropriate if it exceeded the maximum term permitted for the

offence committed. In one such case, *R v James* [1960] 2 All ER 863, the court had to consider if borstal training was suitable given that the maximum sentence for the crime that the accused was convicted of was 3 months imprisonment, and borstal training would far exceed the prescribed sentence under the statute. Lord Parker CJ followed the earlier decision of *R v Longstreeth* (unreported) as follows (at 864B–D):

> [In] *R v. Longstreeth*, LORD GODDARD, C.J. pointed out that three months was the maximum sentence, whereas a sentence of borstal training would be very much longer. He said:
>
> > "I dare say it would be very much better that they" [that is, prisoners of that sort] should go somewhere to be trained, but on the whole I do not think it is a satisfactory sentence because it does deprive the appellant of his liberty. If he is sentenced to imprisonment he cannot be deprived of his liberty for more than three months, and if he behaves himself, that is reduced to two months. That is the position, and the court thinks that on the whole they ought to set aside the sentence of borstal training."
>
> …
>
> In a probation officer's report, which this court has called for, it is clear that the probation officer does not think that she has reached that stage of stability where she can be relied upon not to go to coloured cafés. Accordingly, ***it is just the sort of case where the appellant would benefit from borstal training*** . ***Nevertheless, this court has, as I have indicated, said that in these circumstances borstal training is the wrong sentence*** . …
>
> [emphasis added in bold italics]

34 The second line of cases gave a much stronger emphasis on the rehabilitation of the offenders. For instance, in *R v Amos* [1961] 1 All ER 191, a sentence of borstal training was imposed notwithstanding the much longer term of detention compared to the maximum sentence of 12 months imprisonment for the crime committed. Lord Parker CJ seemed to have reviewed the stance he took in *R v James* when made the following remarks (at 4):

> In so far as those two decisions [*R v Longstreeth* and *R v James*] imply that ***where the maximum sentence fixed by statute is less than the period for which a prisoner would undergo borstal training then borstal training is wholly inapplicable*** , ***that is clearly wrong*** . No doubt the maximum sentence fixed by statute is a ***relevant consideration*** , but it is ***no more than that*** ; indeed, were it otherwise, a severe limitation would be imposed on the powers of justices to commit to quarter sessions under s 28 of the Magistrates' Courts Act 1952, and, indeed, on the powers of the court under s. 20 of the Criminal Justice Act, 1948.
>
> [emphasis added in bold italics]

35 The court in *R v Amos* considered the element of proportionality to be *but a factor* (and "no more than that"), and did not find the "strict proportionality" stance of earlier cases to be persuasive. However, as Mr Tan pointed out in his written submissions, this concern with the rehabilitative needs of the offender was eventually extended even to cases where borstal training was being imposed for trivial offences which might not even have attracted a custodial sentence to begin with. Thus the balance was seemingly tipped too much in favour of needing to reform the offenders, without giving due consideration to the need for just proportionality. For instance, in *R v Trigg* [1961] Crim L R 126, the mere larceny of a glove attracted the sentence of borstal training as the court felt that it was in the offender's best interests despite being "conscious of the difficulty of the triviality of the offence"

(see *Theories of Punishment* at pp 551–552).

36 Fortunately for me, these appeals did not concern trivial offences and as stated at [30] above, the maximum punishment which the court was empowered to impose for each of the offences was certainly not less than the prescribed maximum period for reformative training. In the circumstances, I need not have to come to a definite view as to the stand our courts should take *vis-à-vis* reformative training if indeed the offence committed by a young person was trivial. It suffices for me to say that the discussions at [37] to [41] below would be germane.

Section 305 of the Criminal Procedure Code

37 The requirements which need to be satisfied before reformative training can be ordered are set out in s 305(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC") as follows:

> **Reformative training**
>
> **305.**—(1) Where a person is convicted by a court of an offence punishable with imprisonment and that person is, on the day of his conviction —
>
> (*a*) of or above the age of 16 years but below the age of 21 years; or
>
> (*b*) of or above the age of 14 years but below the age of 16 years and has, before that conviction, been dealt with by a court in connection with another offence and had, for that offence, been ordered to be sent to a juvenile rehabilitation centre established under section 64 of the Children and Young Persons Act (Cap. 38),
>
> the court ***may*** impose a sentence of reformative training in lieu of any other sentence if it is satisfied, having regard to his character, previous conduct and ***the circumstances of the offence*** , that to reform him and to prevent crime he should undergo a period of training in a reformative training centre.
>
> [emphasis added in bold italics]

38 The phrase "the circumstances of the offence" would, in my view, include considerations of proportionality between the punishment meted out and the gravity of the offence. In this regard, the Hong Kong decision of *Wong Chun Cheong v HKSAR* (2001) 4 HKCFAR 12 ("*Wong Chun Cheong*"), which concerned s 4(1) of the Training Centres Ordinance (Cap 280) (HK) ("Training Centres Ordinance") (which is largely *in pari materia* with s 305 of the CPC), is particularly instructive. There the 16-year old offender had participated in a lion dance while his companions solicited money from the stallholders of a street market, and was convicted on a charge of participating in a lion dance without a permit. The magistrate had sentenced him to detention in a youth training centre (the Hong Kong equivalent of reformative training, where the period of detention ranged from 6 months to 3 years) when the maximum sentence for his offence was a fine of $2,000 and 6 months imprisonment. On appeal against the sentence, Beeson J upheld the magistrate's sentence, holding that the detention was necessary in view of the appellant's "problems and needs" which required to be addressed expediently. On further appeal before the Hong Kong Court of Final Appeal, the detention was substituted with a fine of $100 as the court took the view that the offence was so trivial that it would be wholly disproportionate to impose a training order. Ribeiro PJ, in his judgment, gave a comprehensive consideration of both threads of English cases as well as made some highly illuminating observations (at 16–18):

There is no doubt that both the Magistrate and the Judge acted out of the noblest of motives. However, ***can such a sentence be justified on the basis that it is for a young offender's "own good"*** ?

Before the twentieth century, the answer would have been a clear "No". Conservative thought focussed on retribution, deterrence and the protection of society, laying little emphasis on reform of the offender as the object of penal policy. Liberal nineteenth century philosophers would have rejected the notion of detention for an offender's own good as an unwarranted application of the state's power. Thus, in a well-known passage in his essay *On Liberty*, John Stuart Mill wrote as follows:

> … the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. (*The Harvard Classics* (1909 ed.) Vol.25, p.212)

The traditional approach was simply one of imposing a sentence proportionate to the offence . Professor HLA Hart, cites a description of such approach as follows:

> Sentencing used to be a comparatively simple matter. The primary objective was to fix a sentence proportionate to the offender's culpability, and the system has been loosely described as the "tariff system" … In addition, the courts have always had in mind the need to protect society from the persistent offender, to deter potential offenders and to deter or reform the individual offender. But in general it was thought that the "tariff system" took the three other objectives in its stride: giving an offender the punishment he deserved was thought to be the best way of deterring him and others and of protecting society. (*Punishment and Responsibility* OUP 1968, pp.167–168, quoting from the Streatfield Report, Cmnd 1289 (1961), paras.257–258)

The idea of imposing ***individualised sentences reflecting the offender's record, personal circumstances and background with a view to his rehabilitation*** is therefore of comparatively ***recent origin*** . Professor Hart (at p.165) traces the changes to the Gladstone Report of 1895, following which a range of sentencing options were introduced, including probation, Borstal training, corrective training, preventive detention, as well as powers of absolute and conditional discharge, whereby:

> For the first time [judges] were charged with the duty of considering the suitability of a sentence whose aim was sharply differentiated from retribution for past wickedness … and [they] were made to participate in an activity which in the main had been a matter for administrators.

Judges have frequently found it less than easy to decide how ***the competing, and often conflicting, demands of proportionate punishment on the one hand and reform on the other*** , can be reconciled in particular cases. Professor Hart illustrates the point by reference to sentences of Borstal training, the institution upon which Hong Kong's training centres are based:

> … our judges have always felt uneasy when faced with a conflict between what they consider to be a punishment appropriate to the seriousness of a crime, and the steps which one of the individualised forms of punishment might require. Sometimes this emerges into the light of day in reported cases. Thus it is now the law that a young offender may be sent to Borstal training which may last as long as three years, although his last offence is punishable by a maximum penalty of one year. But, for many years, courts of first instance have refused

> to do this and the Court of Criminal Appeal upheld them in this until last year [in *R v Amos* (1961) 45 Cr App R 42] when, by a sudden reversal of principle, hard indeed to reconcile with a doctrine of binding precedent, the offender's last offence was allowed to figure as a symptom of the need for reformative treatment rather than as determining by itself the measure of punishment. (Hart, *Punishment and Responsibility* (1968) p.167)
>
> The question at the heart of this appeal ***is whether it is acceptable as a matter of law to treat the offender's last offence "as a symptom of the need for reformative treatment" and therefore, as the basis for imposing a training centre sentence, regardless of its triviality*** .
>
> [emphasis added in bold italics]

39 In particular, Ribeiro PJ's identification of the issue in the last paragraph quoted above is, in my view, spot on. The question of how the *gravity* of an offence and the perceived need for *rehabilitation* are to be balanced is an important one, but it is a question which has yet to receive much attention in our jurisprudence. In this respect, Ribeiro PJ's interpretation of s 4(1) of the Training Centres Ordinance, which also includes the phrase "the circumstances of the offence" and which is also found in s 305 of the CPC, is instructive (at 23):

> ... the court must have regard to the offender's character and previous conduct and to the circumstances of the offence before deciding to make the detention order aimed at his rehabilitation and (it would follow) the prevention of crime.
>
> It is significant that the court must look at both the characteristics of the offender and the circumstances of the offence. The *raison-d'être* of the training centre is the rehabilitation of young offenders, so the court must obviously look at the character and previous conduct of the possible detainee to assess his suitability for training. However, what this part of s.4(1) makes clear is that the court cannot make the order without having also considered the circumstances of the offence.
>
> The words used are "the circumstances of the offence". It follows that the court must consider the ***specific facts*** and hence the ***nature and gravity of the offence*** with a view to assessing the appropriateness of a training centre order. It ***cannot merely use the fact of a conviction, however trivial, as the opportunity or justification for a general review of the offender's character and previous conduct for the purpose of deciding whether he needs reformation by detention in a training centre*** .
>
> Having considered the circumstances of the offence, the court may conclude that the offence is ***too serious or too trivial*** to regard the object of rehabilitation by training as expedient in the particular case.
>
> Where the offence is regarded as too serious, the effect of this construction overlaps with the foregoing construction of the "interest of the community" condition. In relation to offences that may be considered too trivial, this construction leans heavily against the use of training centre orders. It supports the view that training centre orders are only appropriate in cases meriting immediate custodial treatment save in exceptional cases.
>
> [emphasis added in bold italics]

40 In finally disposing of the appeal, Ribeiro PJ made the following concluding remarks (at 25):

> Leaving aside the circumstances of the offence, there can be no doubt that on the basis of the various reports prepared on the appellant, the Magistrate and the Judge were fully entitled to regard him as a suitable candidate for a training centre. Nevertheless, as stated at the start of this judgment, ***the offence was plainly trivial and would normally have been dealt with by a fine or other non-custodial measure*** . Indeed, the probation officer's original inclination had been to recommend a further probation order on condition that the appellant would agree to residential training in a probation hostel. This was not pursued because the appellant would not agree to such a condition stating that he wished to be with his girlfriend when their baby was born.
>
> The present case is not in the exceptional category which would justify detention in a training centre for what would be ***a wholly disproportionate period given the triviality of the offence*** . In these circumstances, the appeal must be allowed and the Magistrate's order for detention in a training centre be set aside. As the learned Chief Justice has indicated, a fine of $100 was substituted.
>
> [emphasis added in bold italics]

41 I do not think that there can be any doubt, and indeed it stands to reason, that the nature and gravity of the offence must be carefully considered and weighed before a reformative training order (the aim of which is the rehabilitation of the offender) should be made. I am in agreement with Ribeiro PJ's observation that the mere fact of a conviction should not be sufficient to warrant a reformative training order: the specific facts, and hence the nature and gravity of the offence must be carefully considered. Implicit in his observations is a real concern that due attention should be given to making sure that the punishment meted out is commensurate with the wrong committed; in other words, *proportionality* is key. As much as the rehabilitative effect of reformative training is a valuable and important sentencing goal, it is also imperative that there is a measure of proportionality in making orders for reformative training so that offenders are not unduly punished. It is ultimately justice that the courts are concerned with.

The present appeals

42 In my view the same considerations of proportionality should similarly feature – perhaps even more so – in the situation where a significant proportion of an imprisonment sentence has already been served, as in the present appeals. While this situation is not like that of the English cases discussed above or *Wong Chun Cheong* where the statutory maximum period of imprisonment fell below the minimum period for reformative training, the same *principle of proportionality* remains highly relevant. Bearing that in mind, it was clear to me that to impose reformative training on the Respondents on 21 August 2013 (the date of the second adjourned hearing of the appeals) would result in grossly disproportionate punishment on them. As much as reformative training is largely rehabilitative in nature, it is, nevertheless still a form of punishment (and not a soft option, as mentioned above at [18]). This point was made in *PP v Abdul Hameed s/o Abdul Rahman and another* [1997] 2 SLR(R) 71 at [22] by Yong Pung How CJ :

> … the purpose of reformative training is to take the place of such imprisonment. In character, reformative training is a ***form of incarceration*** or ***deprivation of liberty*** . It corresponds to imprisonment. The substitution of reformative training for imprisonment is thus understandable for it would otherwise render the offender liable to ***double punishment of the same type*** .
>
> [emphasis added in bold italics]

43 Hence what would have troubled me the most if reformative training were to be imposed on the Respondents at that point when they were before me was the fact that this would amount to "double punishment" on them, as both reformative training and imprisonment are forms of incarceration which deprive the offenders of their liberty; this was especially so for R1 Saiful who would have had served his imprisonment sentence mere days after the 21 August 2013 hearing. In respect of R2 Erman and R3 Yunus, even though they still had some time to go (even assuming they earned the one-third remission of their sentence for good behaviour) before they served out their prison terms, the fact remained that if I were to substitute reformative training for the prisons terms imposed by the District Judge on them, there was a certain element of double punishment, as they had already served five months and 21 days and four months 18 days respectively of their prison terms (amounting to approximately 47.5% and 49% of their prison terms, assuming remission for good conduct) and it would not be just. Thus while I disagreed with the District Judge's conclusion that reformative training would have been "crushing" for the Respondents had he ordered that *from the outset*, I was not inclined to order reformative training when I finally decided the appeals on 21 August 2013. I felt that if I had to err, I would prefer to err on the side of being less harsh. Of course, the matter already troubled me when the appeals first came before me on 31 July 2013.

Concluding remarks for future situations

44 Moving forward, what, in my view, is really crucial is that measures be taken to ensure that such an unfortunate situation does not arise again in future appeals, where an offender would have already served his imprisonment term (or a good part of it) before an appeal against sentence is heard. One of the ways in which this can be achieved is to grant the offender bail once the Prosecution decides to lodge an appeal. Section 383(1) of the CPC provides for this:

> **Stay of execution pending appeal**
>
> **383.**—(1) An appeal shall not operate as a stay of execution, but *the trial court and the appellate court may stay execution on any judgment, sentence or order pending appeal*, on any terms as to security for the payment of money or the performance or non-performance of an act or the suffering of a punishment imposed by the judgment, sentence or order as to the court seem reasonable.
>
> [emphasis added]

45 Additionally, this may also be an area that warrants legislative attention, given the potential unfairness which may arise in such situations. But until then, I would only wish to reiterate that parties should take all necessary measures to ensure that the situation which arose in the present appeals is avoided in future.

Conclusion

46 For the foregoing reasons, I dismissed the appeal. Although I was of the opinion that the District Judge should have ordered reformative training from the outset for the Respondents, I was not minded to substitute their imprisonment sentences with reformative training at the hearings of the appeals due to the fact that they had already served a significant portion of their imprisonment terms.

47 Finally, it remains for me to express my deep appreciation to the *amicus curiae*, Mr Tan, for the invaluable assistance which he had rendered to this court.

[note: 1] ROP at 233–237

[note: 2] GD at [23].

[note: 3] The Appellant's Submissions at para 55.

[note: 4] GD at [24]

[note: 5] The Appellant's Submissions on Appeal dated 31 July 2013 at para 24.