Ng Chun Hian *v* Public Prosecutor
[2014] SGHC 31

Case Number	: Magistrate's Appeal No 183 of 2013
Decision Date	: 19 February 2014
Tribunal/Court	: High Court
Coram	: Sundaresh Menon CJ
Counsel Name(s)	: Gurdaib Singh (Gurdaib, Cheong & Partners) for the appellant; Andrew Tan and Krystle Chiang (Attorney-General's Chambers) for the respondent.
Parties	: Ng Chun Hian — Public Prosecutor

Criminal Procedure and Sentencing – Newton hearings

19 February 2014

Sundaresh Menon CJ:

1 The accused, Ng Chun Hian ("the appellant"), appealed against the decision of the District Judge ("the DJ") sentencing him to 12 years' corrective training and six strokes of the cane for a conviction in respect of one charge of house-breaking under s 454 of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code") punishable under s 458A Penal Code, with two ot her charges being taken into consideration for the purposes of sentencing. The appellant submitted that the DJ had erred in failing to have regard to his mental condition, which he contended had directly contributed to his commission of the offence.

2 At the conclusion of the appeal, I set aside the appellant's sentence and remitted the case to the DJ for a Newton Hearing. I now give my reasons.

Background

The appellant

3 The appellant is 35 years old. He was unemployed when he committed the present offences. His parents divorced when he was seven years old and he lived with his mother and sister until he was sent to the Singapore Boys Home in 1992. The appellant had a long history of antecedents. Shortly before the commission of the present offences, he completed a ten-year sentence of corrective training for house-breaking and theft and was released from prison on 26 September 2012.

The charges

4 On 14 June 2013, the appellant pleaded guilty to one charge of house-breaking (DAC No 39172 of 2012) under s 454 Penal Code, for breaking into and entering a dwelling unit on 8 October 2012 at about 2.00pm in order to commit theft of S$1,900 in cash and about S$1,000 in foreign currency. As an offender with a previous conviction under s 454 Penal Code, the appellant was additionally liable to be punished under s 458A Penal Code, which prescribes a mandatory sentence of caning:

> **Punishment for subsequent offence under section 454 or 457**

458A. Whoever, having been convicted of an offence under section 454, 455, 457 or 458, commits an offence under section 454 or 457 shall be punished with caning in addition to the punishment prescribed for that offence.

5 According to the Statement of Facts, which the appellant admitted without qualification, the stolen items were not recovered as the appellant had spent all the money.

6 The appellant also consented to two other charges being taken into consideration for the purposes of sentencing:

(a) one charge of house-breaking under s 454 read with s 458A Penal Code (DAC No 37985 of 2012) for the theft of goods with a total value of S$1,820 from a flat on 11 October 2012; and

(b) one charge of attempted house-breaking under s 454 read with s 511 (DAC No 39171 of 2012) for an attempt to enter a dwelling unit in order to commit theft on 11 October 2012.

7 The three offences were committed over the course of four days. The first of these occurred less than two weeks after his release from prison following the completion of a ten-year sentence of corrective training.

The psychiatric reports

8 Two psychiatric reports were presented before the DJ for the purpose of sentencing. The Prosecution submitted a report dated 5 November 2012 from Dr Jerome Goh Hern Yee ("Dr Goh") from the Institute of Mental Health ("IMH"). Counsel for the appellant submitted a psychiatric report dated 20 June 2013 from Dr Lionel Lim Chee Chong ("Dr Lim") of L P Clinic Pte Ltd, who was in private practice.

The IMH report

9 The appellant was remanded at the IMH from 19 October 2012 to 5 November 2012 following his arrest for the above offences. Dr Goh examined the appellant on three occasions on 23 October 2012, 31 October 2012 and 2 November 2012. In addition, Dr Goh relied on the following sources of information to prepare his report:

(a) an interview with the appellant's father on 30 October 2012;

(b) documented observations by IMH nursing staff during his remand;

(c) a report on the appellant prepared by IMH's Medical Social Worker;

(d) the appellant's IMH clinical notes;

(e) the charge sheets; and

(f) the report and summary of facts prepared by the investigating officer.

10 In his report, Dr Goh noted the appellant's claims that he had started hearing "voices" upon his recent release from prison and that the "voices" were inside his head, telling him that he would not get caught. However, these voices did not specifically instruct him to do anything in particular or to commit the house-breaking offences. The appellant also said that he did not hear the "voices" when

he committed the offences. The appellant also claimed that house-breaking was to him "just a game"; that he "just enjoyed it" and that he felt very happy when he was committing house-breaking. Finally, the appellant also said that he kept thinking about house-breaking and could not stop himself once he started house-breaking.

11 Dr Goh diagnosed the appellant with an antisocial personality disorder, but concluded that the appellant was not suffering from a mental illness. Dr Goh thought that the "voices" described by the appellant were not consistent with auditory hallucinations of a psychotic nature. He further opined that the appellant was not of unsound mind at the time of the alleged offences and was fit to plead in court.

Dr Lim's report

12 The appellant was interviewed by Dr Lim on 21 March 2013. In addition to this interview, Dr Lim also relied on other sources of information, including the following, to prepare his report:

(a) interviews with the appellant's father, sister and long-time pen friend;

(b) the charge sheets;

(c) the IMH psychiatric report; and

(d) the Prison medical report dated 8 May 2013.

13 The appellant was recorded as informing Dr Lim that he started to experience an urge to break into houses two days after his release from prison and that he finally yielded to these impulses on 8 October 2012. The appellant also claimed that he felt "very excited" when committing house-breaking and described the urge as akin to an addiction. He said that he would experience a sense of great relief and a release of inner tension once he had committed a house-breaking offence. The appellant also told Dr Lim that he had thrown away the items that he had stolen, including a laptop, a handphone and a walkman.

14 Dr Lim concluded that the appellant was suffering from kleptomania, a psychiatric disorder. I set out the more significant extracts from his report as follows:

> 1. Chun Hian suffers from Kleptomania, an Impulse-Control Disorder. This disorder may be associated with compulsive behaviour. …
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> …
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> 3. Chun Hian's psychological disorder was previously undiagnosed. His psychological condition started some years back and he continued to experience these symptoms during his imprisonment. The symptoms probably contributed to his insomnia.
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> …
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> 5. The psychiatric medication that he received from the prison psychiatrists was not consistent with a diagnosis of Antisocial Personality Disorder. As stated previously, he was on one antipsychotic, one anti-itch/anti-anxiety and two antidepressant medication. Indeed, if Chun Hian has antisocial personality disorder and does not have a mental illness …, then it is difficult to understand why treatment was given to him during and after his imprisonment.

6. The medication that he received in prison unwittingly treated the symptoms of Impulse-Control Disorder. This probably explained for the recurrence of his compulsive house breaking behaviour when he erroneously stopped the treatment after his release from prison.

…

15 Relying on Dr Lim's diagnosis of kleptomania, counsel for the appellant urged the DJ to impose a short custodial sentence to enable the appellant to receive treatment for his medical disorder.

16 In response, the Prosecution submitted that this was not appropriate given the different diagnoses put forward by the psychiatrists. The Prosecution observed that there were some discrepancies in the version of events given by the appellant to each psychiatrist and submitted that the police statement which was given by the appellant four days after the commission of the offence should be given more weight than what he told Dr Lim months after the offence. The Prosecution also submitted that contrary to the first of the five diagnostic criteria for kleptomania stated in the *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Association, text revision, 2000) ("the DSM-IV-TR"), the Accused had stolen items of value.

The corrective training report

17 The DJ called for a pre-sentencing report for corrective training ("the CT Report") in view of the appellant's multiple antecedents. Both psychiatric reports were made available for the purposes of preparing the CT Report.

18 The CT Report consisted of a Medical Officer's Memorandum dated 13 July 2013 and a Pre-Sentencing Report dated 29 July 2013. The former stated that the appellant was fit at the time of the examination to undergo corrective training and certified him to be suffering from "mood disorder, insomnia and eczema since 2012 at least." The latter stated that the appellant was fit to undergo corrective training and assessed the appellant's risk of re-offending in the category of high risk/need of criminal offending, with a ≥ 62% probability of recidivism within two years of release.

The decision below

19 The DJ accepted that in principle, the element of general deterrence could be given considerably less weight where an offender suffered from a mental illness that contributed to the commission of the offence. However, the DJ noted that this would depend on whether there was a causal link between the illness and the offence, as well as the seriousness of the mental condition, the likelihood of re-offending and the severity of the crime (at [17] of the DJ's Grounds of Decision ("GD")). The DJ noted the different diagnoses in the reports of Dr Goh and Dr Lim and appeared to have come to the conclusion that as the appellant did not satisfy one of the five diagnostic criteria for kleptomania that were noted in Dr Lim's report, namely, the theft of items that were unnecessary for personal use or that were of no monetary value, Dr Lim's report would be accorded less weight (at [18] of the GD). The DJ also observed that neither report indicated any causal link between the appellant's alleged mental disorder and the offence (at [18] of the GD).

20 The DJ also noted that the appellant had a long history of property-related antecedents, primarily house-breaking offences, and had committed the present offences within days of his release from prison. In the circumstances, the DJ rejected counsel's submissions that the appellant had acted out of character, and considered that a short custodial sentence would be inappropriate (at [19] of the GD).

21 In the light of the CT Report which indicated the appellant's high risk of recidivism and his fitness for corrective training, the DJ was satisfied that it was expedient with a view to the appellant's reformation that he should receive a sentence of corrective training for a substantial period of time and imposed a sentence of 12 years' corrective training and six strokes of the cane (at [20] of the GD).

The appeal

22 The parties initially appeared before me on 3 October 2013. Two aspects of the case troubled me at that time.

23 First, there were two conflicting psychiatric reports concerning the appellant's mental condition before the court. The Prosecution took issue with Dr Lim's diagnosis of kleptomania. Yet neither doctor responsible for these reports had been cross-examined. Moreover, the CT Report indicated a third diagnosis of mood disorder which was not elaborated upon. In the light of this, a question arose as to whether a Newton hearing should be called to determine whether the appellant indeed suffered from kleptomania (or any other mental condition).

24 A Newton hearing is called when a fact is contested and it is material to sentencing. In such circumstances, the court will hear evidence and then make a finding: *R v Robert John Newton* (1982) 4 Cr App R(S) 388. I recognise that a Newton hearing is the exception rather than the norm and should not ordinarily be convened unless the court is satisfied that it is necessary to do so in order to resolve a difficult question of fact that is material to the court's determination of the appropriate sentence: see *R v Kevin John Underwood* [2005] 1 Cr App R(S) 90 ("*Underwood*") (at [10(e)]), adopted in *PP v Soh Song Soon* [2010] 1 SLR 857 (at [3]–[4]). Undoubtedly, the sentencing judge has a discretion to decline to hear such evidence if he is satisfied that the case advanced on the defendant's behalf is, with good reason, to be regarded as "absurd or obviously untenable". In such a case, the judge should explain his conclusion: *Underwood* (at [10(f)]). Ultimately, the sentencing judge must do justice and sentence the offender as far as possible on the basis of accurate facts: see *PP v Aniza bte Essa* [2009] 3 SLR(R) 327 (at [62]).

25 Second, I was troubled by the fact that the appellant had a long list of house-breaking antecedents which stretched back to his days as a juvenile offender. Despite having been incarcerated for much of his life, the appellant had been unable to remain crime-free for any period of significant length from the time he was first sentenced to prison in 1995. As noted above, he committed the present offences within two weeks of being released after serving a ten-year sentence of corrective training.

26 The corrective training regime is focussed on the *rehabilitation* of the offender. This is unlike the preventive detention regime which primarily serves the aim of incapacitating recalcitrant offenders from re-offending through prolonged custody. As was observed in *G Ravichander v PP* [2002] 2 SLR(R) 665 at [25]:

> On the other hand, when determining what a suitable term is for corrective training, the court should keep in mind that this form of punishment, though in substance very similar to imprisonment …, should not be treated as a lesser form of preventive detention. *Those undergoing corrective training must first be capable of reform, while those sent in for preventive detention are hardened criminals. Sending hardened criminals through the corrective training regime would not only dilute the programme's aims but also endanger the reformative path of more promising prisoners.* [emphasis added]

27 This was echoed by the Court of Appeal in *PP v Rosli bin Yassin* [2013] 2 SLR 831 (at [11]), where it cited with approval Yong CJ's observation in *PP v Wong Wing Hung* [1999] 3 SLR(R) 304 (at [10]) that the "sentence of [preventive detention] is meant essentially for habitual offenders … whom the court considers to be *beyond redemption* and *too recalcitrant for reformation*" [emphasis added]. It seemed uncertain to me that corrective training was the appropriate sentence in the light of the appellant's constant re-offending, and I thought consideration ought to have been given to whether preventive detention was a more suitable option in the absence of any other explanation for his behaviour such as a psychiatric disorder.

28 In the premises, I raised three queries at the first hearing of the matter and invited the parties to make further submissions on them:

(a) whether the appellant's psychiatric condition is irrelevant to sentencing, as the Prosecution contends;

(b) how corrective training would benefit the appellant given the scant evidence showing any capacity for reform; and

(c) in the event the court was of the view that preventive detention should be imposed upon the appellant, how should the appellant's previous sentence of corrective training affect the court's consideration of the length of a sentence of preventive detention.

29 In response to query (a), the Prosecution advanced three grounds in support of its position that the appellant's psychiatric condition was irrelevant to the sentence that was to be meted upon him:

(a) first, it was submitted that there was insufficient evidence to support a conclusion that the appellant suffered from kleptomania;

(b) second, it was submitted that Dr Lim's report did not state that there was a causal link between the alleged condition of kleptomania and the commission of the offence; and

(c) finally, it was submitted that the severity of the appellant's criminal tendencies rendered any psychiatric condition irrelevant.

30 Counsel for the appellant submitted that the appellant's medical condition *was* material to the question of whether there were "special reasons" rendering him unfit for corrective training or preventive detention under s 304(1) and (2) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed).

31 Both parties also made submissions on the remaining two questions but, as it transpired, it was unnecessary for me to consider those matters.

My decision

32 The key question for me was whether the appellant's alleged psychiatric condition of kleptomania was a relevant sentencing consideration. In my judgment it was plainly relevant to determining what the appropriate sentence should be as well as whether it should be coupled with a suitable treatment plan. It is well established that rehabilitation is often the foremost sentencing consideration for a sentencing court when dealing with a mentally-disordered offender, including one suffering from an impulse control disorder such as kleptomania that causes the commission of the offence at hand: see *Goh Lee Yin v PP* [2006] 1 SLR(R) 530 at [108]; and *PP v Goh Lee Yin* [2008] 1

SLR(R) 824 at [97], [100] and [107]. A diagnosis of kleptomania would therefore, at least potentially, be relevant to:

(a) the question of whether the Appellant is "*beyond redemption or too recalcitrant for reformation*";

(b) the question of whether a sentence of incarceration should be paired with a suitable mental health treatment and rehabilitation regime that could be offered to the Appellant by the Prison authorities; and

(c) the question of what type of incarceration should be imposed upon him and for what duration.

33 If there exists an underlying psychiatric condition which caused the appellant to offend as he did and this were left untreated, the appellant's cycle of re-offending is likely to continue as soon as he is released. This indeed is what happened in the present case and it is consistent with his pattern of offending.

34 The Prosecution's submission that there was insufficient evidence to support Dr Lim's diagnosis of kleptomania missed the mark. Once it was established that the psychiatric diagnosis of kleptomania is a relevant sentencing consideration, the next question that arises is whether this material fact was contested. It undoubtedly was in this case, with the two psychiatric opinions pulling in different directions. In these circumstances, it was not evident to me how I, or the DJ, could have resolved this divergence without evidence being taken from both Dr Goh and Dr Lim.

35 I make no comment on the Prosecution's submissions on Dr Lim's report but it was plain to me that I was in no position to dismiss it as patently untenable or absurd. Even if there was a failure to meet one of the diagnostic criteria, it was not evident that this fact alone would rule out a valid diagnosis of kleptomania.

36 As for the Prosecution's alternative submission that there was no causal link between the appellant's alleged psychiatric condition and the commission of the offences, this appeared to have been inspired by the DJ's observation that Dr Lim's report did not specifically state that there was such a link.

37 I accept that as a matter of principle, such a causal link must be proved: see *Ng So Kuen Connie v PP* [2003] 3 SLR(R) 178 at [58]. In my judgment, where the DJ erred was in concluding that Dr Lim had not attested to such a link. Although there was no sentence in the report that specifically stated a causal link, it was clear that Dr Lim's report evinced such a causal link. Dr Lim's report must be read fairly and in context. In it, he dealt substantially with the appellant's past history of house-breaking and his account of events leading to the commission of the offence and its aftermath. Dr Lim specifically stated that the recurrence of the appellant's compulsive house-breaking behaviour could have been due to his ceasing to take the medications he had been prescribed in prison after his release; medications which Dr Lim averred "unwittingly treated the symptoms of Impulse-Control Disorder" – this "Impulse-Control Disorder" being kleptomania, as Dr Lim made clear at page 7 of his report. In the circumstances, it was clear to me that Dr Lim did find and put forward a causal link between his diagnosis and the commission of the present offences.

38 As to the final argument advanced by the Prosecution, although I agreed that the severity of the appellant's criminal tendencies were potentially relevant to the question of the length of any period of incarceration, this could not render the appellant's mental condition irrelevant as a

sentencing consideration. This was especially so here, where the court had to choose from among a variety of alternative sentences.

39 For completeness, I mention some other points which I noticed and thought might benefit from further examination in a Newton hearing:

(a) Although Dr Goh had stated in his report that the appellant was not suffering from mental illness, the appellant had been prescribed medicines whilst he was in prison which, according to Dr Lim, were medicines that are prescribed in order to treat psychiatric conditions.

(b) Although both Dr Lim's report and the CT Report averred that the appellant had previously undergone mental health treatment in prison, Dr Goh appeared to be under the impression that the appellant had never undergone any prior treatment for a mental health disorder.

(c) There was a diagnosis of "mood disorder" in the CT Report which was not further elaborated on and which remains unexplained.

(d) Finally, as previously mentioned at [25] above, I was struck by the very short periods of time that elapsed between the appellant's release from prison after long sentences for property related offences and the commission of further offences of the same sort. I considered that it would be useful to invite the psychiatrists to comment on whether such a pattern of offending could be attributed to a person of normal mental health.

40 For all these reasons, I held that a Newton hearing would be appropriate in the circumstances. In the light of this, there was no need for me to consider at this stage whether corrective training or preventive detention was appropriate. Any sentencing decision should be taken on the basis of the conclusions that are reached at the Newton hearing.

Conclusion

41 For the foregoing reasons, I allowed the appeal and set aside the DJ's sentence. I ordered that the case be remitted to the same DJ for a Newton hearing. Without seeking to constrain the discretion of the DJ, I directed that the following questions should be considered:

(a) whether the appellant is a kleptomaniac and if so, the relevance of that condition to the commission of his offences; and

(b) if the appellant is a kleptomaniac what the appropriate type and period of incarceration should be, and whether the appellant should be offered an appropriate treatment programme that could be undertaken in conjunction with the period of incarceration to which he is eventually sentenced.

42 Counsel for both parties agreed that the appellant should continue to be remanded in the meantime.