IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC 25

Magistrate's Appeal No 9195 of 2022/01

Between

Kesavan Chandiran

… *Appellant*

And

Public Prosecutor

… *Respondent*

EX TEMPORE JUDGMENT

[Criminal Procedure and Sentencing] — [Sentencing] — [Principles]

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Kesavan Chandiran
v
Public Prosecutor

[2023] SGHC 25

General Division of the High Court — Magistrate's Appeal No 9195/2022
Vincent Hoong J
1 February 2023

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Vincent Hoong J:

Introduction

1 The appellant pleaded guilty on 22 September 2022 to one charge under s 146 punishable under s 147 of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code"). A further charge under Regulation 6(1) of the Covid-19 (Temporary Measures) (Control Order) Regulations 2020 punishable under s 34(7) of the Covid-19 (Temporary Measures) Act 2020 was taken into consideration.

2 Briefly, on 4 August 2019, the appellant and 17 other co-accused persons attacked five victims at a club after a dispute between two groups. In addition to punching the victims who were outnumbered, various members of the assailant group used pitchers, cups, glass bottles, and even tables to carry out their assault. The injuries to the victims included multiple lacerations, at least one of which required surgical intervention.

3 In the court below, the Prosecution sought a term of 18 months' imprisonment and three strokes of the cane. The Prosecution contended that this was consistent with the observation of the High Court in *Phua Song Hua v Public Prosecutor* [2004] SGHC 33 at [42], where it was noted that for rioting, the courts have consistently imposed between 18 to 36 months' imprisonment with three to 12 strokes of the cane.[1]

4 Counsel for the appellant at that time, Mr Gino Hardial Singh ("Mr Singh") in his written submissions left the term of imprisonment to the District Judge ("DJ") and submitted one stroke of the cane was appropriate. Subsequently, at the hearing Mr Singh submitted orally that no caning should be imposed as the appellant had a sad childhood and his role was relatively minor.[2]

5 The DJ sentenced the appellant to 17 months' imprisonment and three strokes of the cane (see *Kesavan Chandiran v PP* [2022] SGDC 250).

6 The appellant appeals against the sentence and is now represented by Mr Justin Ng ("Mr Ng'). I note from Mr Ng's written submissions that the appellant only takes issue with the number of strokes of caning on the ground that it is manifestly excessive, but not the imprisonment term of 17 months.[3]

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1 Grounds of Decision ("GD") at [9].

2 Plea in Mitigation at para 6, Record of Appeal at p 359.

3 Appellant's submissions at para 16.

My decision

The correct starting point

7 I first consider whether the DJ adopted the correct starting point in sentencing the appellant.

8 The appellant submits that the relevant comparison for parity of sentence should not only be the co-accused Mr Muhammad Hafiz Bin Nuryusof ("Hafiz"), but the co-accused Mr Selvastanlly s/o Selvarajan ("Selva") as well. Hafiz was sentenced to 16 months' imprisonment and three strokes of the cane for the s 147 Penal Code offence. Selva was sentenced to 17 months' and 3 weeks' imprisonment with no caning. I am unable to accept the appellant's submissions on this point. I find that the DJ did not err in assessing the comparison with the co-accused Hafiz to be appropriate.

9 There are material differences between Selva's involvement in the offence compared to the appellant's. While both used implements and threw a table at some point of time during the fight, the appellant's assaults were far more concerted and his degree of culpability correspondingly higher. Moreover, Selva demonstrated positive pre-emptive attempts at de-escalation by talking to the parties and trying to separate them. In contrast, the appellant merely ceased his ongoing assault against the victims. While some credit can be given to the appellant for helping to carry an injured person away after the damage had already been done, this reactive gesture does not in my view suffice to bring the appellant's culpability closer to Selva's than that of Hafiz.

10 I also do not agree with the appellant's submission that Selva's de-escalation should not be considered by this court merely because it was not captured in the Statement of Facts that Selva accepted when he pleaded guilty.

The decision is unreported and un-reasoned, and it would be premature to conclude that the issue was not canvassed either orally or in written submissions by parties. In fact, the appellant himself seeks to rely on inferences from the CCTV footage that are not found in the Statement of Facts, such as Hafiz's use of what counsel asserts to be broken glass during the fighting.

11 On balance, Hafiz's involvement is more similar to that of the appellant's as someone who had flung a table at the victims and made no attempt to de-escalate the situation. The DJ thus did not err in considering a comparison with Hafiz to be a relevant starting point.

Comparison of culpability

12 I next assess the DJ's treatment of the relative culpability of Hafiz and the appellant in terms of offence-specific factors.

13 I note that the DJ did in fact find that Hafiz's conduct was more egregious. To this extent, I agree with the appellant's submissions that Hafiz demonstrated a significantly higher degree of violence.

a) As noted by the DJ, Hafiz threw the bar table twice compared to the appellant who threw it only once.

b) The potential harm of Hafiz's actions would also have been greater than that of the appellant. In this regard, I do not fully accept the appellant's submission that the appellant's throw of the table landed only at the foot of the sofa, as it is not clear from the footage whether the table landed on the leg of a victim. I also take into account the respondent's submissions that the appellant was the first person to utilize the bar table as an implement. However, I find Hafiz to have

on balance engaged in more aggravated use of the bar table than the appellant. In particular, the second use of the table by Hafiz was aimed squarely at the head and chest area of the victim from a close distance. This was much more intentional and a repeated targeting of a vulnerable area of the body than was demonstrated by the appellant.

c) The potential harm of the Hafiz's behaviour was also greater in respect of the other implements used by him. While both Hafiz and the appellant used a pitcher as an implement in their assaults, Hafiz additionally used a piece of what appears to be broken glass from the floor to hit the victims.

d) The degree of culpability of both co-accused persons is also differentiated by their responses to the violence. As noted earlier, the appellant helped to carry away an injured person from the scene. Hafiz conversely did not offer any assistance. Hafiz's attacks on the victim also continued after Jude's intervention, even after the appellant had ceased participating in the fight.

14 In view of the above, a downward calibration from Hafiz's three strokes to one stroke would be appropriate before consideration of the offender-specific factors.

15 In reaching this conclusion, I attribute minimal weight to the fact that Hafiz was involved in the initial dispute before any violence occurred. On this point, I accept the respondent's submissions that the escalation of the fight was triggered primarily by M Dipan's disproportionate and sudden use of violence, and that the context of the original dispute is thus of limited relevance.

16 I now turn to examine the offender-specific factors.

17 I agree with the DJ that the appellant's past record points towards an uplift in sentence. Only two and a half years ago, the appellant had been placed on probation for the exact same offence. Specific deterrence would have elevated importance in such a situation.

18 However, it must also be considered that Hafiz had reoffended while on bail. This was his second offence which was committed while on court bail and a significant aggravating factor in Hafiz's case. This consideration does not apply to the appellant. While the absence of offending on bail does not obviate the need for specific deterrence, it is nevertheless a valid consideration in the calibration of parity between co-accused persons.

19 In relation to the appellant's age, I reject the appellant's submission that there should be no distinction between the appellant and the co-accused Hafiz just because both are above 21 years old. The appellant argues that no presumption in favour of rehabilitation exists when an offender is above the age of 21, on the basis of cases such as *Public Prosecutor v Mok Ping Wuen Maurice* [1998] 3 SLR(R) 439, *Public Prosecutor v Lim Cheng Ji Alvin* [2017] 5 SLR 671 and *A Karthik v Public Prosecutor* [2018] SGHC 202 ("*A Karthik*"). In my view, this is a red herring. The DJ in this case did not make any finding regarding the existence of a presumption in favour of rehabilitation on the basis of Hafiz's age. Instead, the DJ considered the relative youth of Hafiz compared to the appellant as a general factor in calibrating the parity of their sentences.[4]

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4 GD at [19].

20 Assessing the correctness of the DJ's consideration thus requires answering the following question: Can a difference in the age of co-offenders engaged in the same criminal enterprise be a valid basis for modifying the application of the parity principle between them, if both are above the age of majority?

21 I answer this question in the affirmative. I first consider that the age of an offender is in general a factor that the court is empowered to take into account during sentencing. Specifically, the relative youth of an offender can be relevant in determining the weight to be attributed to the sentencing objectives of deterrence and rehabilitation, as per *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 ("*Terence Ng*"). In this regard, I note that both *Public Prosecutor v Wang Jian Bin* [2011] SGHC 212 ("*Wang Jian Bin*") and *Haliffie bin Mamat v Public Prosecutor and other appeals* [2016] 5 SLR 636 ("*Haliffie*"), cited in *Terence Ng* at [65], involved accused persons who were above 21 years of age at the time of offending. Despite this, in both cases the High Court and the Court of Appeal respectively took into consideration the mitigating value of the youth of the accused. Accordingly, the young age of an offender, even if they are above the age of majority, is relevant to the sentencing calculus.

22 I then consider the parity principle, which is not to be applied in a rigid and inflexible manner: *Chong Han Rui v Public Prosecutor* [2016] SGHC 25 ("*Chong Han Rui*") at [52]. It is clear that as a general rule, the personal circumstances of co-accused persons engaged in the same criminal enterprise must be accounted for when applying this principle: *Lim Bee Ngan Karen v Public Prosecutor* [2015] 4 SLR 1120 at [46*], Lim Poh Tee v Public Prosecutor* [2001] 1 SLR(R) 241 at [36]. This would naturally include their respective ages.

23 I note that the relative age of co-offenders, albeit where they were below the age of majority, was taken into account in *Public Prosecutor v Lee Wei Zheng Winston* [2002] 2 SLR(R) 800. There, Yong Pung How CJ took cognizance of the "disparity in ages" between offenders who were 16, 17, and 18 at the time of offending, although this was ultimately insufficient to justify a difference of three strokes of the cane.

24 I see no reason why the same considerations should not apply to offenders above the age of majority, subject to two caveats. First, the difference in the age of the offenders should be significant (see *Sentencing Principles in Singapore* (Academy Publishing, 2nd Ed, 2019) at [12.116]). Second, the threshold for finding that a difference in age is significant will be lower where the younger offender is close to the age of majority, and higher where both offenders are much older than the age of majority. This is because the basis of age, and in particular youth, being a relevant factor in sentencing is a possible indication of the weight to be placed on rehabilitation as opposed to deterrence. Consideration of the former will be more relevant the closer the offender is to the age of majority, particularly as the court also needs to keep in view the potential for arbitrariness when dealing with offenders at the margins of the threshold age of 21: *A Karthik* at [43]. As seen in *Wang Jian Bin* and *Haliffie*, while offenders just above the age of majority may not attract a presumption in favour of rehabilitation, this does not mean that the relative importance of rehabilitation becomes a complete non-factor the moment they exceed this age.

25 Accordingly, I find that the difference in age of co-offenders engaged in the same criminal enterprise can be a valid basis for modifying the application of the parity principle between them, even if both are above the age of majority. In reaching this conclusion, I am mindful that taking into account the relative ages of co-offenders is unlikely to result in sentences so disparate that it would

undermine public confidence in the administration of justice: *Chong Han Rui* at [47].

26 In the present case, it is important to note that Hafiz was 22 years old at the time of offending, only one year above the age of majority. The appellant was seven years older than him (29 years old). In light of Hafiz's young age, I find that this difference in age is significant enough for this to be a valid reason for potentially modifying the application of the parity principle in relation to their sentences.

27 However, I must also consider the weight to be attributed to this factor. Unlike the cases of *Wang Jian Bin* and *Haliffie*, the disparity in sentence highlighted on appeal relates to the number of strokes of the cane rather than the length of the term of imprisonment. This would point towards a higher threshold needed to justify a difference between their sentences. I am cognisant that both co-offenders were below 30 years old at the time of the offence. In my view, the difference in age between the appellant and Hafiz does not suffice to justify a further enhancement of the appellant's sentence from the starting point of one stroke of the cane, after considering the fact that the appellant had been placed on probation for the same offence previously, but unlike Hafiz, had not reoffended while on bail.

Conclusion

28 For these reasons, I find that no adjustment to the starting point of one stroke of the cane is necessary after consideration of the offender-specific factors. I thus allow the appeal in part in that the sentence of three stokes of the cane is reduced to one stroke of the cane. I affirm the sentence of an imprisonment term of 17 months.

Vincent Hoong
Judge of the High Court

Ng Cho Yang, Justin (Kalco Law LLC) for the appellant;
Yang Ziliang and Nicolle Ng Hui Min (Attorney-General's Chambers)
for the respondent.