# Ng Teng Yi Melvin *v* Public Prosecutor
# [2013] SGHC 267

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| **Case Number** | : Magistrate's Appeal No 130 of 2013 |
| **Decision Date** | : 09 December 2013 |
| **Tribunal/Court** | : High Court |
| **Coram** | : Chao Hick Tin JA |
| **Counsel Name(s)** | : Zaminder Gill Singh (M/s Hillborne & Co) for the appellant; Timotheus Koh (Attorney-General's Chambers) for the respondent. |
| **Parties** | : Ng Teng Yi Melvin — Public Prosecutor |

*Criminal Procedure and Sentencing – Appeal*

9 December 2013 Judgment reserved.

**Chao Hick Tin JA:**

1 The appellant was sentenced to 4 months' imprisonment and fined $30,000 (in default, 4 weeks' imprisonment) upon his guilty plea to a charge of assisting in the business of unlicensed moneylending ("AUML") together with two other persons, in furtherance of the common intention of them all, by splashing paint on a unit door and writing graffiti on a wall at a staircase landing of a housing block. This was an offence under s 5 of the Moneylenders Act (Cap 188, 2010 Rev Ed) ("the Act"), punishable under s 14(1)(b)(i) and s 14(1A)(a) of the same read with s 34 of the Penal Code (Cap 224, 2008 Rev Ed). A similar charge was taken into consideration for the purposes of sentencing. The appellant filed the present appeal against the sentence on the ground that it was manifestly excessive.

**Background facts**

2 The appellant's friend, one Gerald Tan ("Gerald") had defaulted on his $500 loan from an unlicensed moneylender, one Jason. Gerald asked Jason to give him more time to make repayment, which request Jason refused. Instead, Jason offered Gerald the job of harassing debtors for which the latter would be paid $80 per unit harassed. On 6 July 2010 at about noon, Gerald called the appellant (who was 20 years old then) and promised him a monetary reward if he assisted him with the harassment. The appellant readily agreed and bought the paint. Gerald also managed to recruit a second assistant, one Alicia Tay ("Alicia").

3 That same night, the trio went up to the 13$^{th}$ floor of a housing block. The appellant used an indelible black marker to write "O$P$ #13-129 84465725 Simon" on the wall of the landing. Gerald then discovered that the door of the targeted unit was ajar. He called Jason, who instructed him to splash paint instead on the door of another unit. Gerald conveyed Jason's instructions to the appellant, who accordingly splashed red paint on the door of unit #13-121. Throughout these events, Alicia acted as a look-out. The trio were arrested by the police at the scene at around 10 pm.

4 The trio were charged on 8 July 2010. They were all first time offenders. On 16 September 2010, Gerald pleaded guilty to two counts of harassment on behalf of an unlicensed money-lender ("harassment") with common intention. On 7 October 2010, he was sentenced to Reformative Training

with a 20 months' custodial term. On 22 September 2010, Alicia pleaded guilty to one count of harassment with common intention. On 7 October 2010, she was placed on probation.

5 As for the appellant, the initial two charges of harassment brought against him were eventually reduced to two charges of AUML with common intention. One charge was proceeded with while the second was taken into consideration for the purposes of sentencing. The appellant pleaded guilty to the amended charge on 3 April 2013, when he was 22 years old. He was subsequently sentenced to 4 months' imprisonment and fined $30,000 (in default, 4 weeks' imprisonment) on 19 June 2013, by which time he had turned 23 years old.

**The decision below**

6 The District Judge ("DJ") below gave her written grounds on the sentence imposed in *Public Prosecutor v Ng Teng Yi Melvin* [2013] SGDC 207 ("the GD").

7 Under s 14(1)(b)(i) of the Act, a fine of not less than $30,000 and not more than $300,000 and a mandatory imprisonment term not exceeding 4 years is imposable for the offence in question. A first-time offender is also liable to be punished with not more than 6 strokes of the cane under s 14(1A)(a) of the Act. As the Prosecution did not seek caning in the present case, the issues before the DJ were confined to the appropriate length of the imprisonment term and the quantum of the fine. The appellant was not eligible for probation under s 5 of the Probation of Offenders Act (Cap 252, 1985 Rev Ed) because he was more than 21 years old at the date of his conviction.

8 In determining the sentence to be imposed on the appellant, the DJ considered that the role that the appellant played in both the preparation and the execution of the offence was an aggravating factor. It was immaterial that the appellant was eventually not paid the reward promised by Gerald as they were all arrested at the scene. The DJ was of the view that the sentence sought by the Prosecution of a 6 months' imprisonment term was not unreasonable on the facts of the offence, having regard, in particular, to two precedents cited by the Prosecution where charges brought against the accused persons were similarly reduced from harassment to AUML. The brief details of these two precedents are as follows:

(a) In *Public Prosecutor v Chia Kok Hua* (DAC 12494/2012) ("*Chia Kok Hua*"), the accused was sentenced to 6 months' imprisonment and $40,000 fine (in default, 2 months' imprisonment); and

(b) In *Public Prosecutor v Tan Lian Tong* (DAC 31036/2012) ("*Tan Lian Tong*"), the accused was sentenced to 4 months' imprisonment and $30,000 fine (in default, 4 weeks' imprisonment).

9 The DJ, however, also took into consideration in the appellant's favour his young age at the time of the offence, the fact that he was a first-time offender, the fact that he was and still is suffering from attention deficit hyperactivity disorder ("ADHD"), as well as the fact that from the date of the commission of the offence to the date on which he was sentenced by the court, a period of almost three years, the appellant had not only stayed out of trouble but had taken steps to improve himself. She concluded that a fair sentence would be 4 months' imprisonment and a fine of $30,000 (in default, 4 weeks' imprisonment).

**The parties' contentions**

10 Counsel for the appellant contended in the main that the DJ failed to give sufficient weight to the appellant's ADHD. It was submitted that this factor, when weighed together with the other mitigating factors considered by the DJ (see [9] above), warranted a deviation from the sentencing

precedents relied on by the DJ, and that an imprisonment term of one day would be sufficient punishment for the appellant.

11 In response, the Prosecution submitted that the appeal should be dismissed as the DJ had already given adequate weight to the appellant's particular mitigating circumstances as reflected in the 2 months' reduction that she gave as against the benchmark sentence of 6 months.

**The decision on appeal**

12 The sole issue now before me is the appropriate length of the (mandatory) imprisonment term, as the quantum of fine imposed by the DJ is already the statutory minimum.

13 As a preliminary point, I note and agree with the DJ's observations (at [25]-[26] of the GD) that the primary sentencing consideration for illegal moneylending activities prohibited under the Act is that of deterrence. The need for deterrence arising from the impact that acts of harassment committed by unlicensed moneylenders can have on public safety and security has been considered by our courts on several occasions (see, for example, *Public Prosecutor v Nelson Jeyaraj s/o Chandran* [2011] 2 SLR 1130 at [20]-[23], *Ong Chee Eng v Public Prosecutor* [2012] 3 SLR 776 ("*Ong Chee Eng*") at [10] and *Public Prosecutor v Quek Li Hao* [2013] SGHC 152 at [22]).

14 While there is undoubtedly an express Parliamentary intention for the need for deterrence in respect of illegal moneylending activities, this does not displace the ultimate need to ensure that the punishment fits *both the crime and the criminal*. This sentencing principle had been expressed in various formulations in our case law. In the context of illegal moneylending activities, the following was stated in *Ong Chee Eng* (at [23]-[24], citing the High Court's decision in *Tan Kay Beng v Public Prosecutor* [2006] 4 SLR(R) 10 (at [31]) and the Court of Appeal's decision in *Public Prosecutor v Kwong Kok Hing* [2008] 2 SLR(R) 684 (at [42])):

> 23 A key feature in the administration of criminal justice is that, within the range or confines of the criminal sanctions prescribed by law for an offence, the punishment imposed should fit the crime and the criminal. ***Hence even in a case like the present, where the legislature has unequivocally declared war on loan shark offences, unrelenting deterrence does not mean indiscriminate deterrence.*** As the court very aptly remarked in *Tan Kay Beng v PP* [2006] 4 SLR(R) 10 (at [31]):
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> > ***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. [emphasis added]
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> Similar sentiments were recently expressed by the Court of Appeal in *PP v Kwong Kok Hing* [2008] 2 SLR(R) 684 (at [42]):
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> > Where in relation to a particular offence the court is given a wide discretion in terms of the punishment it may impose, it is critical that it exercises that discretion, as far as possible, in a manner that remains faithful to two essential principles: (a) that the punishment fits the crime, having regard to the circumstances attending the case before the court; and (b) that

like cases be treated alike ...

24 The principle of tailoring the punishment to the crime and the criminal also extends to the use of benchmark sentences. Benchmarks usually arise from the steady accretion of the decisions of the courts. They are the result of the practical application of statutory penal laws, but should not be mistaken for those laws themselves. Benchmarks play a crucial role in achieving some measure of consistency of punishment. But ***the principle of treating like cases alike also means that unlike cases should not be treated alike. The court must resist an unhesitating application of benchmark sentences without first thoroughly considering if the particular factual circumstances of a case fall within the reasonable parameters of the benchmark case.*** Ultimately, where Parliament has enacted a range of possible sentences, it is the duty of the court to ensure that the full spectrum is carefully explored in determining the appropriate sentence. Where benchmarks harden into rigid formulae which suggest that only a segment of the possible sentencing range should be applied by the court, there is a risk that the court might inadvertently usurp the legislative function.

[emphasis added in bold italics]

15 With these principles in mind, I turn now to the facts of the present case. Firstly, did the punishment imposed *fit the crime*? The DJ was certainly correct in referring to the two precedents where the charge of AUML had actually been reduced from one of harassment (see the GD at [20] and [32]). However, with respect, she erred in pegging the starting point in the present case to the 6 month's imprisonment term meted out in *Chia Kok Hua*. The accused in *Chia Kok Hua* was clearly more culpable than the appellant in the present case. In that case, the 40 year old accused person (who was also a repeat offender) had confronted the debtor's mother and threatened to burn her house down and break the debtor's limbs. This element of causing fear in the debtor's family by threatening bodily harm is clearly a more severe aggravating factor than the property damage caused by the appellant in the present case. That having been said, the appellant's culpability is, in turn, undoubtedly higher than the accused person in *Tan Lian Tong* who was sentenced to 4 months' imprisonment. In that case, the accused merely held open a plastic bag while his accomplice poured red paint and luncheon meat into it, knowing that the mixture was to be splashed onto a unit. In contrast, the appellant in the present appeal was the one who executed the acts of graffiti and the splashing of the paint.

16 The appropriate starting point, therefore, should have been a sentence that falls somewhere between the sentences passed in *Chia Kok Hua* and *Tan Lian Tong*. In my view, a starting point of 5 months' imprisonment term is a fairer reflection of the gravity of the appellant's acts.

17 The next consideration that arises is this - did the punishment fit not just the crime but also *the criminal*? For the reasons that set out in the paragraphs below, I do not think so.

18 First, the DJ did not seem to have considered the evidence suggesting that the monetary reward offered by Gerald was not the sole or even main motivating factor for the appellant's commission of his offence. In this regard, the Prosecution confirmed that the fact of the monetary reward offered by Gerald was not stated in the Statement of Facts, but was actually brought up by the appellant himself in his Mitigation Plea. In the psychiatric report of the appellant written by Dr Dhanesh Kumar ("Dr Kumar") from the Institute of Mental Health (whom the Prosecution submitted below was a neutral party) he recorded that the appellant told him that the appellant "accompanied [Gerald], his friend for six years, on persistent request and persuasion by his friend" and that the appellant "just wanted to help his friend so that the friend is not displeased with him". This is consistent with the probation officer's comments in his report that "[s]ocial investigation revealed

that [the appellant] committed the offence out of misguided peer loyalty as well as lack of consequential thinking". Here I would like to underscore that it was not in dispute that the appellant was suffering from ADHD, a condition which probably caused him to find it hard to resist the call for assistance from a friend. Thus, while the appellant was promised some monetary reward (which, as I alluded to earlier, was a point not in the agreed Statement of Facts, but raised by him in mitigation), I am inclined to think that he was actuated more by social pressure than the monetary reward which was offered to him. Indeed, not being the debtor to the loan shark Jason, there was no other conceivable reason why he should have played such an active role. It seems to me that his ADHD was probably the real explanation for his behaviour. Gerald, having associated with the appellant for some six years, would have known what kind of a person the appellant was, and thus, in my view, likely took advantage of the appellant's obliging nature. Indeed, this was alluded to in para 4 of the appellant's mitigation plea below where it was stated that he was "exploited" by Gerald into committing the offences.

19 I am therefore of the view that the promise of a monetary reward, which in the ordinary circumstances would have been an aggravating factor, should nevertheless, in the circumstances here, have been given less weight. The appellant's overall culpability must be assessed in the light of his ADHD. The law recognises the diverse circumstances under which an accused person can become involved in illegal moneylending activities and the corresponding broad spectrum of blameworthiness. The following passage from *Ong Chee Eng* (at [18]) is germane in this regard:

> Naturally the circumstances of those who help loan sharks, either as runners or harassers, are diverse. For present purposes, it suffices for me to make the point that it is important to distinguish between those who, out of genuinely desperate financial need brought about by events not within their control (*eg*, sudden sickness and prolonged retrenchment), borrow from loan sharks whom they are then forced to work for, and others who are perhaps less deserving of sympathy. ***For the latter category, two groups come to mind. The first are youth harassers, whom the loan sharks seem to be recruiting in increasing numbers. They are apparently lured by the easy money and the thrill.*** Parliament's response to this development is, among others, to enact s 28B of the Act, which makes it an offence for anyone above 21 to procure a minor to harass debtors. Youth outreach programs have also been initiated to educate and counsel. The second group are gamblers who harass for the easy money they can obtain to repay their gambling debts.

20 As explained in [18] above, the evidence suggests that the appellant was not truly "lured by the easy money and the thrill", but was actually motivated instead by a misguided sense of friendship and peer loyalty. The psychiatric evidence showed that the appellant's misguided sense of peer loyalty was linked to his ADHD. As the probation officer noted, the ADHD "contributed to [the appellant's] impulsivity" and "may have also played a role in his actions as well". Further, Dr Kumar also observed that the appellant's ADHD resulted in "a tendency to behave impulsively without thinking through the consequences of his behaviour". On this point, I should also emphasise that the appellant had been assessed to be at high risk for ADHD from as early as when he was 13 years old; there was absolutely no suggestion at all that the procurement of this diagnosis was a belated afterthought. In the light of these special circumstances, I am of the view that the deterrence principle, while certainly valid, should not be applied indiscriminately in the present case.

21 In this connection, I note that the appellant was in fact assessed and recommended to be placed under 24 months' supervised probation. Unfortunately, by the time he came to be sentenced by the court, this sentencing option was no longer available to him because the punishment for the offence in question is fixed by law (mandatory minimum fine of $30,000) and the appellant was past the age of 21 at the time of his conviction. I should add, parenthetically, that the delay in the

proceedings was not caused by the police or the Prosecution; it was due to the appellant making representations to the Public Prosecutor's office and obtaining the necessary medical reports. Nevertheless, the fact that the appellant was assessed and recommended for probation strongly suggests that rehabilitation is both possible and relevant as a dominant consideration. This is bolstered by the fact that, as noted by the DJ at [34] of the GD, "the appellant had behaved well and had kept himself out of trouble for the last 3 years … [and] had also taken steps to improve himself by enrolling in higher education". I also take into consideration the fact that the appellant is a first-time offender, is still relatively young, and has expressed remorse for his actions.

22 The specific facts of this case therefore present the need to balance the principle of deterrence with that of rehabilitation. For the reasons explained at [18]-[20] above, I am of the view that the consideration of deterrence should not be applied indiscriminately here. On the contrary, the general principle is that rehabilitation must be the dominant consideration in cases involving young offenders: see *Public Prosecutor v Mohammad Al-Ansari bin Basri* [2008] 1 SLR(R) 449 at [32]-[33]. Moreover, the appellant has no antecedents. Having considered all the relevant facts and circumstances of this case, I come to the conclusion that the balance should tilt towards rehabilitation. It is undisputed that the appellant needs to continue treatment for his ADHD, and while this can be arranged with the prison authorities, I must also give due weight to the real risk that any improvements achieved thus far in respect of his psychiatric condition may deteriorate if he is exposed too long to the negative elements of the prison environment. As Yong Pung How CJ stated in *PP v Mok Ping Wuen Maurice* [1998] 3 SLR(R) 439 at [21], "[t]he corrupt influence of a prison environment … may not be desirable for young offenders". In this regard, I am also mindful of the fact that in view of the appellant's impulsivity and misguided sense of peer loyalty linked to his ADHD, the longer he serves in prison the higher the risk that he would be corrupted, rendering him particularly vulnerable.

23 To sum up my findings, viewing the issue as just a matter of determining an appropriate imprisonment term that fits the crime, something nearer 5 months imprisonment would be in order (see [15]-[16] above). The DJ, having taken the benchmark to be 6 months, reduced it to 4 months in view of the mitigating factors. As I have said, the benchmark of 6 months is perhaps not warranted by the two precedents cited by the DJ (see [15] to [16] above). For the reasons alluded to in [18] to [22] above, an imprisonment term that fits *both the crime and the criminal* requires further adjustment to the benchmark sentence of 5 months. I am of the view that a 4 weeks' imprisonment term is appropriate, sufficient to punish the appellant and make him realise the error of his ways, but not of a duration which is so long as to undermine the prospects of his rehabilitation.

**Conclusion**

24 The appeal is allowed with the 4 months' imprisonment term imposed below to be reduced to a 4 weeks' imprisonment term. The fine of $30,000 (in default, 4 weeks' imprisonment) remains. Let me hasten to add that I am keenly aware of the interests of society and of Parliament in dealing with people who are involved in unlawful moneylending activities sternly and firmly. Still, justice demands that the degree of culpability of the offender should always be given due weight. I would reiterate that this sentence should be sufficient to hold the appellant accountable for his deeds and deter him from re-offending, while at the same time give him the opportunity to be properly rehabilitated, manage his ADHD, continue on in his educational pursuits and hopefully become a contributing member of society.