IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 251

Magistrate's Appeal No 9161 of 2018

Between

Koh Jaw Hung

… *Appellant*

And

Public Prosecutor

… *Respondent*

GROUNDS OF DECISION

[Criminal Law] — [Statutory offences] — [Women's Charter]

[Criminal Procedure and Sentencing] — [Sentencing] — [Fines] — [Disgorgement of criminal proceeds]

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Hoo Sheau Peng J:

Introduction

1 The appellant, Koh Jaw Hung, set up an online vice ring involving seven prostitutes for a period of over a month. He pleaded guilty to four charges of vice-related offences under Part XI of the Women's Charter (Cap 353, 2009 Rev Ed) ("Act"), with a further three charges taken into consideration for the purpose of sentencing. On the four proceeded charges, the District Judge sentenced him as follows:

Charge No	Offence	Sentence
DAC 916148/2018 (The "1st charge")	Knowingly living in part on the earnings of prostitution (s 146(1) of the Act) ("living on immoral earnings")	Six months' imprisonment and fine of $5,000 (in default one month's imprisonment)

DAC 916150/2018 (The "3rd charge")	Receiving a prostitute knowing that she has been procured for prostitution and with intent to aid such purpose (s 140(1)(*d*) of the Act) ("receiving a prostitute")	Five months' imprisonment and fine of $5,000 (in default one month's imprisonment)
DAC 916151/2018 (The "4th charge")	Operating a remote communication service in the course of business offering the provision of sexual services by women to persons for payment (s 146A(1)(*a*) of the Act) ("operating a remote communication service")	Three months' imprisonment and fine of $1,000 (in default one week's imprisonment)
DAC 916154/2018 (The "7th charge")	Harbouring a prostitute knowing that she has been procured for prostitution and with intent to aid such purpose (s 140(1)(*d*) of the Act) ("harbouring a prostitute")	Five months' imprisonment and fine of $5,000 (in default one month's imprisonment)

2 The 1st, 3rd and 7th charges in relation to ss 146(1) and 140(1)(*d*) of the Act for living on immoral earnings and receiving and harbouring prostitutes were specific to two Thai nationals ("A1" and "A2") in the appellant's vice ring. The sentences of imprisonment for the 1st and 4th charges under s 146(1) and s 146A(1)(*a*) of the Act (for living on immoral earnings and for operating a remote communication service) were ordered to run consecutively for an aggregate term of nine months' imprisonment and a total fine of $16,000 (in default three months and one week's imprisonment).

3 The appellant appealed against the sentence imposed. After considering the parties' arguments, I dismissed the appeal. As there were a few points of law

raised by the parties, I now give my full reasons.

Background facts

4 The appellant is a 46-year-old Singaporean male. Unemployed and heavily in debt as a result of a gambling habit, in January 2018, he decided to set up a vice ring as a means of earning fast cash. On an online web forum, he met other users from whom he learnt the ropes on how to procure women from Thailand to work as prostitutes in Singapore.

5 Using that same web forum, the appellant engaged an unknown person to create a website to advertise the services of the prostitutes he would procure. The appellant paid the unknown person $5,500 for his services. Eventually, the vice website was set up.

6 Around the same time, the appellant purchased a SIM card for $60, bearing a mobile phone number registered by a foreign worker who had already left Singapore. The mobile phone number was then used as the contact number for customers who wished to book sexual services with the prostitutes.

7 The entire vice operation was set up and run by the appellant. In particular, he carried out the following:

(a) contacted female Thai prostitutes whom he met during his trips to Thailand to recommend female prostitutes to work for him;

(b) contacted his Thai agent to purchase air tickets for the female Thai prostitutes who had expressed interest to work for him to come to Singapore. In doing so, the appellant could defer the costs of the air tickets until he had collected earnings from the prostitutes;

(c) received the prostitutes at the Golden Mile Complex, and briefed them on their job scope and mode of communication;

(d) provided the prostitutes with items like condoms, mouthwash and towels;

(e) harboured the prostitutes in various hotels, making sure that they were moved to a different hotel every few days. In relation to A1 and A2, the appellant had also arranged for them to provide sexual services at these hotels;

(f) promoted the services of the prostitutes on the vice website by listing the mobile phone number he had obtained to allow customers to contact him directly for the booking of prostitutes;

(g) using the same mobile phone number, the accused would communicate the price of the particular sexual service a customer desired, and arranged the specific dates, times and locations for customers to meet the prostitutes, including A1 and A2, with customers texting him the word "in" upon arrival and the word "out" upon departure;

(h) fixed the rates chargeable to customers ($110–$150) and apportioned the percentage of earnings that he would take (100% for the first 15 customers, and about 50% per subsequent customer); and

(i) collected the prostitution earnings from the prostitutes in person.

8 All of this came to an end on 26 February 2018 when the appellant was apprehended, together with A1 and A2, following police raids on two hotels. While the appellant was charged only for offences relating to A1 and A2, an

accounts book recovered from his residence showed that the appellant had been managing a total of seven prostitutes from 18 January 2018 until his arrest on 26 February 2018, and that he had taken a gross total of $33,145 in prostitution earnings.

The proceedings below

9 As mentioned above, the appellant pleaded guilty to four charges under the Act. In respect of the s 140(1)(*d*) offences (of receiving a prostitute and harbouring a prostitute) and the s 146(1) offence (of living on immoral earnings), the Prosecution submitted that based on the sentencing framework set out in *Poh Boon Kiat v Public Prosecutor* [2014] 4 SLR 892 ("*Poh Boon Kiat*"), the circumstances of the offending disclosed Category B culpability and Category 2 harm, and that a term of five to six months' imprisonment per charge would be appropriate.

10 As for the s 146A(1)(*a*) offence (of operating a remote communication service), the Prosecution asked for a term of three months' imprisonment on the basis of the sentencing precedents tendered.

11 The Prosecution also submitted that a fine would be appropriate to disgorge the appellant of his immoral earnings, but left the quantum of the fine to the court as there was no evidence of the expenses incurred by the appellant in running the vice ring.

12 The appellant appeared in person and raised the following points, *inter alia*, in mitigation. First, he had a clean record, and had fully cooperated with the authorities. Second, after deducting expenses, his overall profit was at most $10,000. Third, it was the circumstances of his limited financial means that had led him to commit the offences.

13 The District Judge applied the sentencing benchmarks in *Poh Boon Kiat* and agreed with the Prosecution's categorisation of the appellant's culpability and harm. In finding that the appellant fell within Category B culpability, the District Judge observed that the appellant had planned the whole operation "from beginning till the end" and was closely involved in the work of the prostitutes through control of their finances, choice of clients and working conditions. As for his finding that the harm fell within Category 2, he noted that there was no cruel treatment of the prostitutes or any evidence that the appellant had secured their services by oppressive means. The District Judge also considered the transnational nature of the offending an aggravating factor. Accordingly, the District Judge imposed a sentence of six months' imprisonment in respect of the s 146(1) charge (of living on immoral earnings) and five months' imprisonment per charge for the s 140(1)(*d*) offences (of receiving and harbouring a prostitute).

14 Turning to the s 146A(1)(*a*) charge (of operating a remote communication service), the District Judge considered it aggravating that the appellant had made use of an illegally-purchased SIM card to avoid detection. Having considered sentencing precedents indicating a sentencing range of 12–14 weeks' imprisonment, the District Judge imposed a term of three months' imprisonment in respect of the charge.

15 The District Judge also imposed a fine to "disgorge the profits earned by the [appellant]", and accepted that the appellant would have incurred some expenses for the vice website, hotel rooms, air tickets and other miscellaneous items. However, noting that the Prosecution was unable to give any indication as to the appellant's expenses, the District Judge took the "rough and ready approach" of halving the gross earnings to reach a rounded down figure of $16,000 "as the net immoral gains realised by the [appellant]". A total term of

three months and one week's imprisonment was imposed in default of payment of the fines.

The appellant's case

16 The appellant's case may be summarised as follows.

17 First, in relation to the s 140(1)(*d*) and s 146(1) offences, counsel for the appellant did not challenge the District Judge's categorisation of the appellant's culpability and harm caused by his offending, and the applicability of the benchmarks in *Poh Boon Kiat*. Instead, he argued that the sentences imposed were manifestly excessive when compared with those imposed in the District Court cases of *Public Prosecutor v Desmo Vu* [2016] SGDC 229 ("*Desmo Vu*") and *Public Prosecutor v Zhang Weida* [2017] SGDC 123 ("*Zhang Weida*").

18 Second, for the s 146A(1)(*a*) offence, counsel for the appellant submitted that the starting point ought to be a fine. Specifically, the starting point of three months' imprisonment established in *Poh Boon Kiat* (at [78]) for offences under ss 147 and 148 (of managing a place of assignation or brothel) should not be applied to offences under s 146A(1)(*a*) of the Act.

19 Third, in respect of the fines imposed, counsel for the appellant agreed that fines may be imposed to disgorge an offender of the proceeds of the crime, but that only the net *profit* ought to be disgorged. Since the appellant's position that his net profit came up to only $10,000 was not challenged by the Prosecution, this should have been accepted by the District Judge. Accordingly, the District Judge erred in taking a "rough and ready approach" by halving his gross earnings and imposing a fine of $16,000.

20 Finally, where terms of imprisonment are imposed in default of payment

of fines, the court should be mindful of the principle of totality and should ensure that the in default sentences do not result in an aggregate sentence which is "crushing". It was contended that the overall sentence imposed on the appellant was manifestly excessive.

The Prosecution's case

21 The Prosecution submitted that the individual terms of imprisonment imposed were not manifestly excessive. It distinguished the cases relied on by the appellant relating to the s 140(1)(*d*) and s 146(1) offences.

22 In relation to the s 146A(1)(*a*) offence, the Prosecution argued that the benchmarks for offences under ss 147 and 148 set out in *Poh Boon Kiat* should be applied to offences under s 146A(1)(*a*) as they were "analogous", and that the sentence imposed by the District Judge fell well within the range of sentencing benchmarks set out in *Poh Boon Kiat*.

23 As for the quantum of the total fine imposed, the Prosecution disagreed with the District Judge that the fine should be reduced for alleged "expenses" incurred by the offender in the course of his illegal business. I should, however, note that it was not the Prosecution's submission that the quantum of the appellant's fines should be increased. All that was said was that given that the correct approach should have been to take into account the gross earnings, the fine of $16,000 was not manifestly excessive. In this regard, where the fine is imposed to deny the offender the fruits of the crime rather than to punish him for it, the fines should not be depressed on account of the totality principle.

24 Finally, the Prosecution submitted that the in default sentences imposed were appropriate, and the overall aggregate sentence was not manifestly excessive.

My decision

25 The law on appellate intervention is clear. An appellate court will not ordinarily interfere with the sentence meted out at first instance unless it is satisfied that the judge at first instance had, amongst other grounds, imposed a sentence that was wrong in principle or that was manifestly excessive (*Public Prosecutor v Kwong Kok Hing* [2008] 2 SLR(R) 684 at [13]–[14]). As regards what amounts to a manifestly excessive sentence, this threshold would be met if there is a need for a substantial alteration to the sentence, rather than an insignificant correction to remedy the injustice (*Public Prosecutor v UI* [2008] 4 SLR(R) 500 at [13]). As I found no basis for appellate intervention, I dismissed the appeal. I shall deal with the grounds of appeal in turn.

The offences of receiving a prostitute, harbouring a prostitute and living on immoral earnings

26 In *Poh Boon Kiat,* the following matrix is set out for the offences of receiving or harbouring a prostitute (s 140(1)(*d*)) and for living on immoral earnings (s 146(1) of the Act):

	A Culpability	**B Culpability**	**C Culpability**
Cat 1 Harm	Start: 3 years 6 months Indicative Range: 2 years 6 months to 5 years	Start: 2 years Indicative Range: 1 year 6 months to 3 years	Start: 9 months Indicative Range: 1 to 12 months
Cat 2 Harm	Start: 2 years Indicative Range: 1 year 6 months to 3 years	Start: 6 months Indicative Range: 3 months to 1 year 6 months	Indicative Range: 1 day to 3 months

27 According to the benchmarks, the starting point for sentencing in a case involving Category B culpability and Category 2 harm would be six months' imprisonment, within an indicative range of three months' to one year and six months' imprisonment (at [77]). Counsel for the appellant submitted that the benchmarks notwithstanding, a reduction of the length of sentences was warranted when the circumstances of the offending were compared with those of the offenders in the cases of *Desmo Vu* and *Zhang Weida*.

28 In *Desmo Vu*, the accused faced a total of 17 prostitution-related charges under the Act, of which four charges under s 146(1) and two charges under s 140(1)(*b*) were proceeded with. In that case, the accused had a total of nine prostitutes working for him over a period of ten months, whereby he secured a total of 81 bookings for the female prostitutes in the proceeded charges, netting him some $10,960 in earnings (*Desmo Vu* at [5]). Applying the *Poh Boon Kiat* benchmarks, the district judge held that the accused's offending fell within Category B for culpability and Category 2 for harm caused, and sentenced the accused to five months' imprisonment (with a fine to disgorge his earnings) for each charge, with the sentence of imprisonment for three charges to run consecutively resulting in an aggregate term of imprisonment of 15 months.

29 Counsel for the appellant submitted that the appellant's vice operation had generated a comparatively lower degree of harm, and that accordingly, the sentence for each of the charges ought to be reduced. I rejected that submission. Even if the appellant's offending had resulted in relatively less harm than in *Desmo Vu* – given that his vice operation involved marginally fewer prostitutes (seven) for a shorter duration (over a month) – the circumstances of his offending disclosed a comparatively higher level of culpability. Unlike the accused in *Desmo Vu*, the appellant had actively recruited women from overseas as prostitutes, arranged for their accommodation and provided them with

various items to facilitate the provision of sexual services. Furthermore, a direct comparison of the individual sentences imposed in respect of the each charge in *Desmo Vu* would not be appropriate given that much of the court's reprobation was accounted for in the *global* sentence; the district judge ordered that *three* sentences run consecutively instead of the usual two, resulting in a global sentence of 15 months' imprisonment – which was markedly higher than the aggregate sentence of nine months' imprisonment imposed on the appellant by the District Judge.

30 The appellant's reliance on the case of *Zhang Weida* was equally misplaced. The accused in *Zhang Weida* pleaded guilty to four charges under s 146 and one charge under s 148(2) of the Act, with seven charges taken into consideration for the purpose of sentencing. He was sentenced to five months' imprisonment in respect of each of the charges under s 146 of the Act. The accused's appeal against sentence in *Zhang Weida* was subsequently dismissed by the High Court (*Zhang Weida v Public Prosecutor* Magistrate's Appeal No 9114 of 2017 (31 August 2017)). In that case, the accused's role was limited to assisting prostitutes in securing accommodation in Singapore from which they would provide sexual services and referring the prostitutes to a webmaster to advertise their sexual services (*Zhang Weida* at [11]–[12]). That scenario was quite different from the present case, in which the appellant was essentially the directing mind and organiser of the entire vice operation.

31 In my view, neither *Desmo Vu* nor *Zhang Weida* assisted the appellant. Given that the starting point for an offender matching the appellant's culpability-harm matrix would be six months' imprisonment, I saw no reason to disturb the sentence of five months' imprisonment imposed for each of the charges under s 140(1)(*d*) and six months' imprisonment imposed for the charge under s 146(1) of the Act.

The offence of operating a remote communication service

32 Section 146A is a relatively new provision within the Act (having been enacted in 2016, *after* the decision in *Poh Boon Kiat*) and criminalises the act of, amongst others, operating or maintaining a remote communication service that facilitates the provision of sexual services in return for payment as follows:

> **Remote communication service operated or maintained for offering or facilitating provision of sexual services, etc.**
>
> **146A.**—(1) A person in Singapore who, in the course of business, operates or maintains in Singapore a remote communication service that —
>
> (*a*) offers or facilitates the provision by a woman or girl to another person of sexual services in return for payment or reward; or
>
> (*b*) organises, manages or supervises the provision of sexual services referred to in paragraph (*a*), which may include inviting others to receive or participate in providing those services,
>
> …

33 The Prosecution submitted that the benchmarks set out in *Poh Boon Kiat* (at [78]) for offences under ss 147 and 148 of the Act (*ie*, keeping, managing, or assisting in the management of a place of assignation or brothel, respectively) should similarly apply to offences under s 146A of the Act. On this basis, the sentence of three months' imprisonment imposed by the District Judge should not be disturbed as it fell squarely within the range for an offender exhibiting Category B culpability and Category 2 harm.

34 Counsel for the appellant argued that the benchmarks for ss 147 and 148 ought not to apply to s 146A of the Act, and that the appropriate starting point for the latter offence would be a fine. According to counsel for the appellant, the nature of the offence within s 146A is more akin to the offence of soliciting for the purpose of prostitution in a public place under s 19 of the Miscellaneous

Offences (Public Order and Nuisance) Act (Cap 184, 1997 Rev Ed) ("MOA"), for which first-time offenders are liable only to a fine.

35 In my view, it would be appropriate to extend the *Poh Boon Kiat* benchmarks for offences under ss 147 and 148 to offences under s 146A of the Act for three reasons. First, I agreed with the Prosecution that the offences created by s 146A(1) are the virtual equivalent of the offences of managing a place of assignation or a brothel. Brothels and places of assignation are spaces which exist for the purpose of "offer[ing] or facilitat[ing] the provision by a woman or girl to another person of sexual services in return for payment", the only difference being the medium in which this is done.

36 Second, s 146A was enacted to extend the reach of the law in respect of the same public interests protected by ss 147 and 148. This can be seen from the Second Reading speech of the then-Minister for Social and Family Development, Mr Tan Chuan-Jin (*Singapore Parliamentary Debates, Official Report* (29 February 2016) vol 94):

> … The rise of online media has also allowed vice syndicates to take their businesses online to widen their reach to clients, while hiding behind the anonymity of the Internet. This makes it challenging for the Police to prevent and detect criminal groups conducting such a business. Sexual services at hotels and residences arranged by vice syndicates using new technologies also affect the public's sense of safety and security.
>
> The proposed amendments will enhance the Police's levers to address online vice. They will make it an offence for persons in Singapore to operate or maintain in Singapore any website or other remote communication service that offers or facilitates the provision of sexual services in return for payment. …

37 These same concerns that the law should permit for an equally robust response to new technologies and the evolving manner in which vice syndicates

organise themselves had previously been raised by Chief Justice Sundaresh Menon ("Menon CJ") in *Poh Boon Kiat* (at [70]):

> In recent years, some of these "classic" pimps have taken their business online… Although I express no concluded view on it, the offence of solicitation under the [MOA] seems to presume that it takes place in a physical space. The manner in which pimps and prostitutes organise themselves will inevitably change with technology and this might be something that Parliament might wish to consider further.

38 This leads to the third reason. The prescribed punishment for offences under s 146A of the Act is exactly the same as that provided for in its "offline" counterparts, ss 147(1) and 148, of a fine not exceeding $3,000 or of imprisonment for a term not exceeding three years, or both for a first-time offender. In contrast, the prescribed punishment for a first-time offender under s 19 of the MOA is a fine not exceeding $1,000. This indicates that the criminality that s 146A of the Act is envisaged to deal with is viewed to be far more severe than that dealt with by s 19 of the MOA, and is comparable to that dealt with by ss 147 and 148 of the Act (of managing a place of assignation or a brothel).

39 For the foregoing reasons, I was of the view that the benchmarks laid down in *Poh Boon Kiat* for ss 147 and 148 offences should apply to s 146A offences. For completeness, the benchmarks are as follows:

	A Culpability	**B Culpability**	**C Culpability**
Cat 1 Harm	Start: 2 years Indicative Range: 1 year 6 months to 3 years	Start: 1 year Indicative Range: 9 months to 1 year 6 months	Start: 5 months Indicative Range: $2,500 fine to 8 months
Cat 2	Start:	Start:	Start:

Harm	1 year Indicative Range: 9 months to 1 year 6 months	3 months Indicative Range: $3,000 fine to 9 months	$1,500 fine Indicative Range: Up to $3,000 fine

40 Turning to the facts and circumstances, the appellant had used a phone number that was not registered under his name to evade detection. Further, the appellant's phone number was linked to a customised vice website he had procured. He then used the phone number to transact with multiple clients for all of the female prostitutes working under his charge, specifying particular sexual acts for particular rates and later communicating the location and time of the engagement to the client. Significantly, the clients were to message back once they began engaging in sexual services with a particular prostitute and after they had left the premises, which allowed the appellant to keep close tabs on the prostitutes under his charge.

41 I agreed with the Prosecution that the appellant's culpability fell within Category B and the harm caused fell within Category 2. The starting point would be three months' imprisonment, with an indicative range of a fine of $3,000 to a term of imprisonment of nine months. Thus, I did not think it could be said that the sentence imposed by the District Judge in respect of the charge under s 146A(1)(*a*) of the Act was manifestly excessive.

Quantum of the fines

42 Next, I turn to the issues concerning the quantum of the fines. To reiterate, to "disgorge the profits earned by the [appellant]", the District Judge imposed *combination* sentences – of imprisonment terms and fines – for each of the four charges. The total fine was $16,000.

43 In *Poh Boon Kiat*, Menon CJ, in setting out the benchmark sentences for the vice-related charges, added (at [77]–[78]) that:

> … it would be appropriate to consider imposing a fine (subject of course to the applicable maximum for each charge) – *in addition to the imprisonment term* – in order to disgorge any *profits* which the offender may have made from his illegal behaviour…
>
> [Emphasis added.]

In other words, for vice-related charges where an offender has made a profit from his offending a combination sentence of imprisonment and fine is appropriate.

44 Such a fine is meant to serve a confiscatory purpose when the offender profits from his crime: *see* Kow Keng Siong, *Sentencing Principles in Singapore* (Academy Publishing, 2009) ("*Sentencing Principles in Singapore*"), at paras 25.069—25.072, and 25.075). Indeed, while fines are most commonly employed as a means of punishing the offender, it is well-established that a fine may also be imposed as a rough and ready method of confiscating the proceeds of crime (see also *Sentencing Practice in the Subordinate Courts* (LexisNexis, 3rd Ed, 2013), at p 49; I Grenville Cross & Patrick WS Cheung, *Sentencing in Hong Kong* (LexisNexis, 7th Ed, 2015) at p 253 ("*Sentencing in Hong Kong*").

45 While the parties were in agreement that combination sentences were appropriate for these charges, there were disputes over two key points. First, in determining the quantum of the fine, the parties disagreed as to whether the gross or net earnings of the appellant should be considered by the court. Second, if the expenses incurred by the appellant could be considered, the parties disagreed as to whether the District Judge should have accepted the net profit

as $10,000 (as contended by the appellant), rather than to assess it at $16,000, being approximately half of the gross earnings.

46 Turning to the first point, while the Prosecution had left the issue of quantum in the District Judge's hands in the proceedings below, on appeal, it took the view that expenses incurred by the offender ought not to be taken into account at all. The Prosecution argued that prostitution earnings are immoral earnings, and all such earnings *received* by the offender should be disgorged by way of fines (subject to the applicable statutory maximum for each charge). The appellant maintained that the expenses he incurred ought to be taken into account, such that the criminal proceeds to be disgorged should be his net profit.

47 Both parties cited various authorities in support of their respective positions. None of the authorities dealt squarely with the issue of an offender's expenses. Nevertheless, it seems to me that they incline towards the position that the offender's expenses may be considered, and that in every case, it is the actual gain, benefit or profit which is sought to be disgorged:

> (a) In *Public Prosecutor v Quek Chin Choon* [2015] 1 SLR 1169 ("*Quek Chin Choon*"), cited by the Prosecution, the offender received *fees* for his photographic and advertising services (for which I can hardly imagine that any substantial expenses were incurred by the offender). Although there was no discussion of the issue of expenses, the fees were described by the High Court as "his apparent profits" (at [45]). In reducing the fine imposed for each of the five proceeded s 146(1) charges from $8,000 to $3,000 (for a total of $15,000), the High Court remarked that the $8,000 fine was "exceedingly disproportionate to his profits" (see [45]).

(b) In *Poh Boon Kiat*, again relied on by the Prosecution, the amount of earnings received by the offender was found to be $8,070. While weight was given to this in sentencing (see [97]), no fine was imposed on the offender. There was no discussion on the issue of expenses. Nonetheless, as set out above at [43], it was emphasised that the reason for imposing any fine would be to disgorge "profits" made by an offender.

(c) In *Public Prosecutor v Chew Tiong Wei* [2016] SGDC 59, referred to by the appellant, the accused's total earnings exceeded $2.5m, but the district judge observed that he would have earned about $1m in "[p]rofit" after deducting expenses (at [39] and [43]). After imposing the maximum fine of $10,000 per charge for each of the 13 charges under ss 140(1)(*b*) and 146(1) proceeded upon, the total fine of $130,000 was still a fraction of the accused's criminal proceeds whether or not deductions were made for his expenses (at [14], [39]). Even then, it seems clear to me that the district judge had taken note of the net earnings of the offender, particularly in comparing his "overall profit" against those in the sentencing precedents (at [44]). The accused's appeal against sentence (*Chew Tiong Wei v Public Prosecutor* Magistrate's Appeal No 9032 of 2016 (17 August 2016)) was dismissed by the High Court.

48 To reiterate, the rationale for imposing a fine for its confiscatory effect is to get an offender to disgorge his profit, gain or benefit. As a starting point, I would say that the total earnings, takings or revenue received by an offender – such as the *fees* received by the offender in *Quek Chin Choon* – would represent his profit. However, this is if there is no other evidence showing what has been expended by the offender. Thus, in my view, the burden falls on the offender to

show such expenses, so as to displace the starting point. If the offender adduces evidence of expenses incurred, it seems to me that it would be fair and reasonable to take such expenses into account. Even then, it does not necessarily follow that *full* deduction must be given for *all* expenses claimed by the offender. If the expenses are unrelated, unnecessary or unreasonable, the Prosecution may wish to challenge the evidence of the offender, or at least take a position whether these expenses should be considered. It is for the court to then determine whether these expenses should be taken into account (either in part or in full). At the end of the day, while this is meant to be a rough and ready inquiry, the court aims to determine the actual gain, benefit or profit of the offender, and to fix a fine quantum so as to serve a confiscatory purpose.

49 At this juncture, I turn to the Prosecution's contention that this approach would have the perverse effect of encouraging an offender to dissipate the criminal proceeds to others involved in the vice operation. For instance, the Prosecution argued that an offender may pay larger "salaries" to runners so as to hide them as expenses. I had some difficulty with the argument. It did not make sense that an offender would deliberately take a smaller share of the ill-gotten gains, for fear that he would be called to account for any larger share by way of a fine. In any case, the offender should be called to account for his share of ill-gotten gains. If the criminal proceeds are truly shared with others complicit in the illegal enterprise, the other offenders should be the ones to account for their respective shares of the ill-gotten gains, and not the offender.

50 The Prosecution also argued that whether the offender has chosen to invest these proceeds back into the illegal enterprise or to spend them on personal expenses is irrelevant. To allow for a deduction for expenses incurred in the course of the immoral business would be to favour an offender who *invests* the criminal proceeds back into the illegal enterprise. In my view, if the

offender chooses to plough the criminal proceeds back into the illegal enterprise, depending on the facts of the case, the question arises whether these actually form expenses which are related to the earnings, and whether these should be taken into account as expenses. Further, this factor may go to the offender's culpability insofar as it points to a higher degree of sophistication and permanence in the illegal enterprise. Such concerns may be more appropriately addressed in the imposition of punishment which is punitive, not confiscatory.

51 Turning to the present facts, the District Judge noted that the appellant had incurred about $5,500 for creating the vice website, and that he would have to pay for "the hotel rooms, air tickets and other miscellaneous expenses". In the absence of any objective evidence as to the expenses incurred by the appellant (*eg*, invoices from hotels, airline companies, *etc*), the District Judge took the "rough and ready" approach of assuming that about half the gross earnings of $33,145 was incurred as expenses, and imposed a fine of $16,000 to disgorge the profits earned by the appellant.

52 I did not see any basis for the appellant to complain about this approach. While the Prosecution left the issue of the expenses to the court, the appellant merely made a *bare* assertion that his profit was $10,000. As I said earlier, where the offender seeks to convince the court that his actual profit or gain from the illegal enterprise was lower than his gross takings due to expenses incurred in relation to that enterprise, the burden would be on the appellant to show what expenses he had incurred. However, the appellant did not provide any details of the expenses, or furnish any documentary evidence, to support his claim that his expenses formed about 70% of his gross earnings. As such, the District Judge was fully entitled to reject the appellant's bare assertion.

53 On appeal, apart from repeating the bare assertion that the appellant's profit was $10,000, again, there was no attempt to substantiate this claim further. There was also nothing concrete to explain how the District Judge's assessment was unfair to him. In fact, I should state that contrary to the appellant's contention, given the paucity of evidence, the District Judge might have been generous in the assessment of the expenses incurred by the appellant. As the Prosecution submitted, having given a substantial deduction for expenses, the fine of $16,000 was certainly not manifestly excessive.

54 I should add, however, that even when imposing a fine for the purpose of confiscating the proceeds of crime, the sentencing court must remain mindful of the offender's ability to pay in deciding on the quantum of fine to be imposed (*Low Meng Chay v Public Prosecutor* [1993] 1 SLR(R) 46 at [13]; see also *Sentencing in Hong Kong,* at pp 254–255.

55 Returning to the present facts, the appellant claimed that he was unemployed (see District Judge's Grounds of Decision at [23]). Before me, counsel for the appellant asserted that he "really does not have the money". However, beyond this unsubstantiated assertion, there was nothing to show that he would not be able to pay the fine of $16,000 (especially since presumably he would not contest a fine amount of $10,000). Therefore, in my view, the quantum of the fine was appropriate.

Imprisonment terms in default of payment of fines

56 I deal with the imprisonment terms imposed in default of payment of the fines. Here, counsel for the appellant argued that the in default sentences must be considered with the terms of imprisonment imposed as punishment, and the potential aggregate sentence should be tempered by the principle of totality. Counsel for the appellant submitted that the overall sentence (*ie*, including the

in default sentences) would be "crushing" to the appellant. Relying on *R v Garner* [1986] 1 WLR 73, at 85F-G, the Prosecution argued that the *fines* should not be depressed on account of the totality and proportionality principles. However, it was not entirely clear whether it disagreed that these principles were applicable in the context of consideration of the overall sentence of imprisonment – which was the point raised by the appellant.

57 In *Ho Sheng Yu Garreth v Public Prosecutor* [2012] 2 SLR 375 ("*Garreth Ho*") at [127], the High Court cited with approval the following passage from *Sentencing in Hong Kong* (LexisNexis, 5th Ed, 2007) (at p 245) as a succinct summary of the reasoning to be applied in this context:

> If a term of imprisonment is imposed upon an accused in default, that is not to be regarded as an additional punishment. It is simply the means by which the accused is encouraged to surrender his profits or to pay his debt to society. *However, when imprisonment is coupled with a fine, and a term is fixed in default, a court should consider the overall sentence to which the accused may become subject:* R v Savundra (*1968) 52 Cr App R 637, 646. The court should ensure that in the event of default the total sentence to be served is not disproportionate to the offence:* R v Green and Green *(1984) 6 Cr App R (S) 329,332*. Such sentences, inevitably, will be consecutive to one another. [emphasis added]

58 I agreed with the above. In *Sentencing Principles in Singapore,* the learned author stated that "if a mixed sentence is imposed, the overall term of imprisonment (where the accused has to serve the default term of imprisonment as well) should not exceed the proper tariff for the offence or be wholly disproportionate to the offence" (at para 25.073).

59 With that, I turn to consider whether the individual in default sentences were manifestly excessive, and whether in totality, the overall sentence was manifestly excessive. Counsel for the appellant referred to some cases in the District Courts which seem to suggest a tariff of about one month's

imprisonment in default for every $10,000 in fines. Therefore, it was contended that the in default sentences for the offences of living on immoral earnings, receiving a prostitute, and harbouring a prostitute, each pegged at a month's imprisonment for a fine of $5,000 were manifestly excessive.

60 In this regard, the Prosecution pointed to the unreported District Court's decision of *Public Prosecutor v Lim Kim Lwee Andrew* SC-904213-2014, District Arrest Case No 908192 of 2015 and others (15 April 2016) ("*Andrew Lim*"), which involved a vice website webmaster who earned an estimated $110,000 to $120,000 from prostitutes. Although hefty imprisonment terms were imposed, he was fined only $27,000. It is unclear why the quantum of the fine was pegged at $27,000 as no written reasons were furnished. However, in respect of the fines of $3,000 per s 146(1) charge, in default imprisonment terms of two weeks were imposed. For the total fine of $27,000, the total in default imprisonment term was 18 weeks. As such, the Prosecution contended that the in default imprisonment terms imposed on the appellant were not excessive.

61 To begin with, the terms of imprisonment in default are to be set at a level sufficient to deter the individual offender from evading payment of the fine. Since this would necessarily be a fact-specific exercise taking into account the particular circumstances of each case, the utility of referring to precedents is in my view rather limited (*Sentencing Principles in Singapore*, at para 26.059). In any case, based on *Andrew Lim,* I did not consider the imprisonment terms in default of one month's imprisonment for a fine of $5,000 to be manifestly excessive.

62 As for the overall sentence, should the appellant have to serve the in default sentences, the total sentence would be 12 months and one week of imprisonment. By the benchmarks for the offences of living on immoral

earnings, receiving a prostitute and harbouring a prostitute, the starting point for sentencing in a case involving Category B culpability and Category 2 harm would be six months' imprisonment, within an indicative range of three months' to one year and six months' imprisonment (see [27] above). I therefore did not consider the overall sentence, taking into account the in default terms, to have exceeded the tariff for the offences, or to be wholly disproportionate to the offending.

Conclusion

63 For the foregoing reasons, I dismissed the appeal.

Hoo Sheau Peng
Judge

Nicholas Narayanan and Selina Yap (Nicholas & Tan Partnership LLP) for the appellant;
Gail Wong and Michael Quilindo (Attorney-General's Chambers) for the Prosecution.