

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 97

Criminal Case No 79 of 2017

Between

Public Prosecutor

And

- (1) Nimalan Ananda Jothi
- (2) Theyagarajan Amuthavelan

GROUND S OF DECISION

[Criminal Law] — [Statutory offences] — [Misuse of Drugs Act]
[Criminal Procedure and Sentencing] — [Sentencing] — [Appropriate
sentencing framework]

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Public Prosecutor
v
Nimalan Ananda Jothi and another

[2018] SGHC 97

High Court — Criminal Case No 79 of 2017
Chua Lee Ming J
29 January 2018

24 April 2018

Chua Lee Ming J:

Introduction

1 The first accused is Nimalan Ananda Jothi (“Nimalan”), a 23-year-old male Malaysian national. Nimalan pleaded guilty before me to trafficking in not less than 14.99 grams (“g”) of diamorphine, a Class A controlled drug listed in the First Schedule to the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) (“MDA”), an offence under s 5(1)(a) and punishable under s 33(1) of the MDA.

2 The second accused is Theyagarajan Amuthavelan (“Theyagarajan”), a 49-year-old male Singaporean citizen. At the same hearing as Nimalan, Theyagarajan pleaded guilty to three charges:

- (a) Having in his possession not less than 14.99 g of diamorphine for the purposes of trafficking, an offence under s 5(1)(a) read with s

5(2) and punishable under s 33(1) of the MDA (“the trafficking offence”);

(b) Possession of not less than 0.2 g of diamorphine, an offence under s 8(a) and punishable with enhanced punishment under s 33(1) of the MDA (“the enhanced possession offence”) as a result of a previous conviction; and

(c) Consumption of monoacetylmorphine, an offence under s 8(b)(ii) and punishable under s 33A(2) of the MDA (“the LT-2 consumption offence”) as a result of a previous conviction under s 8(b)(ii) for which he had been punished under s 33A(1) of the Misuse of Drugs Act (Cap 185, 1998 Rev Ed).

3 Theyagarajan also consented to four other charges being taken into consideration for the purposes of sentencing:

(a) Enhanced possession of not less than 0.21 g of diamorphine; and

(b) Three counts of a failure to report for a urine test, each an offence under Regulation 15(3)(f) punishable under Regulation 15(6)(a) of the Misuse of Drugs (Approved Institutions and Treatment and Rehabilitation) Regulations (Rg 3, 1999 Rev Ed).

4 I sentenced Nimalan to 26 years’ imprisonment and the mandatory 15 strokes of the cane. I ordered that the sentence of imprisonment commence from the date of remand, *ie*, 25 June 2016.

5 I sentenced Theyagarajan as follows:

- (a) 28 years and six months' imprisonment and the mandatory 15 strokes of the cane for the trafficking offence;
- (b) Three years' imprisonment for the enhanced possession offence; and
- (c) Eight years and six months' imprisonment and six strokes of the cane for the LT-2 consumption offence.
- (d) The sentences for the trafficking offence and the enhanced possession offence were to run consecutively whilst the sentence for the LT-2 consumption offence was to run concurrently. The total sentence of imprisonment was therefore 31 years and six months.
- (e) The sentences of imprisonment were to commence on the date of remand, *ie*, 25 June 2016.

6 Both accused have appealed against their sentences.

Facts

7 The following facts were admitted without qualification by Nimalan and Theyagarajan respectively.

Nimalan

8 Nimalan was experiencing financial difficulties and his friend, Rubananthan a/l Ramayam ("Rubhan") told him he could make money quickly if he helped transport "*sappadu*" from Malaysia into Singapore. Rubhan promised Nimalan RM800 for each round of deliveries completed, out of which Rubhan would take a cut of RM100. Nimalan knew that "*sappadu*" referred to drugs but nevertheless agreed to Rubhan's proposal.

9 Rubhan gave Nimalan the contact number of a man named “Vishnu”. Nimalan was instructed to call Vishnu each time he cleared Singapore Customs with the “*sappadu*”. Vishnu would then tell Nimalan where he was to make delivery at and give Nimalan the buyer’s contact number. After making delivery, Nimalan would return to Johor Bahru, Malaysia and pass the money collected from the buyers to Rubhan. Rubhan promised Nimalan RM800 as remuneration for each delivery, of which Rubhan would take a share of RM100.

10 Nimalan admitted to having delivered “*sappadu*” into Singapore on a total of five to six occasions since April 2016. At least three of these deliveries were to Theyagarajan. Nimalan admitted that after completing his first delivery of “*sappadu*” to Theyagarajan, Rubhan had shown him a clear packet containing a brown substance and told Nimalan that this was the “*sappadu*” that he had been bringing into Singapore.

11 On 23 June 2016, at about 12.30 pm, Rubhan informed Nimalan that there was a delivery of “*sappadu*” to be made into Singapore that day. Nimalan agreed to make the delivery.

12 Rubhan proceeded to hide two bundles of “*sappadu*” in the compartment beneath the seat of Nimalan’s motorcycle (“the Motorcycle”). Rubhan told Nimalan to deliver the bundles to Theyagarajan. Nimalan then left for Singapore on the Motorcycle. Nimalan knew that the two bundles contained diamorphine.

13 Upon clearing Singapore Customs at about 2.28 pm that afternoon, Nimalan called Theyagarajan. Theyagarajan directed Nimalan to meet him at the carpark at Block 427, Ang Mo Kio Avenue 3, Singapore (“the AMK carpark”). At about 3.00 pm, Nimalan arrived at the AMK carpark and handed two bundles wrapped in black masking tape (“A1A1” and “A1A2”) to

Theyagarajan. In return, Theyagarajan passed S\$3,500 in cash to Nimalan. Nimalan then stored the S\$3,500 (which he put in a pink plastic bag) in the compartment beneath the seat of the Motorcycle.

14 At about 4.50 pm on the same day, Nimalan was arrested at the Lakshmi Vilas Restaurant at 16 Morse Road, Singapore. Nimalan was brought to his workplace at Certis CISCO Centre, 20 Jalan Afifi, Singapore where Central Narcotics Bureau (CNB) officers recovered a pink plastic bag containing cash of S\$3,500 and an envelope containing cash of S\$11,000 from the compartment under the rider's seat of the Motorcycle. Nimalan admitted that he had received the S\$3,500 from Theyagarajan and that he received the envelope containing S\$11,000 from another buyer known as "Jo" after delivering one bundle of "*sappadu*" to him.

Theyagarajan

15 Sometime in April 2016, Theyagarajan was introduced to a drug supplier, "Vishnu". Theyagarajan admitted to having ordered a pound of "heroin" (a street name for diamorphine) from "Vishnu" on five occasions. On the first occasion, he received his order from an unidentified Malaysian man. On the four other occasions (including the occasion mentioned in the trafficking charge), Theyagarajan received his deliveries from Nimalan.

16 After receiving the heroin, Theyagarajan would bring it to his rented apartment at Block 146 Jalan Bukit Merah ("the Unit"). There, Theyagarajan would grind the heroin, measure them using a digital weighing scale, and repack them into 45 to 50 smaller packets of 8 g each. Any remaining heroin was kept for his consumption.

17 Theyagarajan had reached out to his friends who were heroin consumers

to take orders from them. He also requested them to pass his contact number to potential clients. Each of the smaller packets was resold to his clients at the price of \$120 to \$140 each. In the course of investigations, Theyagarajan identified at least 31 clients and admitted he made about \$1,900 to \$2,800 from selling about 45 packets of heroin.

18 Two days before his arrest on 23 June 2016, Theyagarajan called Vishnu and placed an order for one pound of heroin. Vishnu informed Theyagarajan that Nimalan would be delivering his order.

19 On 23 June 2016, at about 2.28 pm, Nimalan called Theyagarajan, informing him that he was on his way to deliver the drugs to him. Theyagarajan directed Nimalan to meet him at the AMK carpark.

20 Theyagarajan arrived at the AMK carpark at about 3.00 pm and Nimalan arrived shortly after. Nimalan handed two bundles of heroin to Theyagarajan. In return, Theyagarajan passed S\$3,500 in cash to Nimalan. Nimalan stored the S\$3,500 (which he had put in a pink plastic bag) in the compartment beneath the seat of the Motorcycle.

21 At about 3.25 pm that day, Theyagarajan was arrested at the ground floor lift lobby of the block where the Unit was at. CNB officers recovered the following from a paper bag which Theyagarajan dropped onto the ground:

- (a) two bundles wrapped in black masking tape (“A1A1” and “A1A2”);
- (b) two packets of brown granular/powdery substance (“A2A”);
- (c) one straw of brown granular/powdery substance (“A3A”); and

- (d) S\$8,000 in cash.

“A1A1” and “A1A2” were subsequently analysed and found to contain not less than 8.25 g and not less than 9.37 g of diamorphine respectively.

22 Theyagarajan admitted that the S\$8,000 was revenue he had made from selling heroin. He also admitted possession and ownership of the above items (at [21]) and that they contained heroin which he had intended to sell to his customers.

23 The CNB officers brought Theyagarajan to the Unit and conducted a search. Theyagarajan informed them that he kept some drugs in a wardrobe in his bedroom. The CNB officers recovered the following from the wardrobe:

- (a) five straws containing off-white granular/powdery substance (“C1A”);
- (b) one packet of brown granular/powdery substance (“C2”);
- (c) two packets containing numerous empty plastic packets (“C3”);
and
- (d) one digital weighing scale (“C4”).

“C1A” and “C2” were subsequently analysed and found to contain not less than 0.2 g of diamorphine.

24 Theyagarajan admitted to possession and ownership of the above items (at [23]) and that “C1A” and “C2” contained heroin and that they were meant for his personal consumption. Theyagarajan further informed the CNB officers

that he had obtained “A1A1” and “A1A2” from a Malaysian Indian man known as “Boy”. Theyagarajan identified “Boy” from a photo-board to be Nimalan.

25 Theyagarajan was previously convicted on 15 June 2010 of an offence of possession of morphine, a Class A controlled drug listed in the First Schedule to the MDA, under s 8(a) and sentenced under s 33(1) of the MDA to two years and six months’ imprisonment.

26 Following his arrest, Theyagarajan provided two urine samples which were sent for analysis. Monoacetylmorphine was found to be present in both samples. The presence of monoacetylmorphine in the urine is the result of consumption of diamorphine. In the course of investigations, Theyagarajan admitted that he consumed heroin and had last consumed it on the morning of his arrest.

27 Theyagarajan was previously convicted on 16 April 1999 of an offence of consumption of morphine, a specified drug listed in the Fourth Schedule to the MDA, under s 8(b)(ii) and sentenced under s 33A(1) of the Misuse of Drugs Act (Cap 185, 1998 Rev Ed) to five years’ imprisonment and three strokes of the cane.

Sentencing

Whether the Suventher guidelines applied to the trafficking offences

28 In *Suventher Shanmugam v Public Prosecutor* [2017] 2 SLR 115 (“*Suventher*”), the Court of Appeal endorsed the approach in *Vasentha d/o Joseph v Public Prosecutor* [2015] 5 SLR 122 (“*Vasentha*”) that the full spectrum of possible sentences should be utilised and the indicative starting points should be broadly proportional to the quantity of drugs trafficked or

imported. Noting that the indicative starting point for the highest weight range should not be fixed at or close to the maximum sentence, the Court of Appeal set out the following sentencing guidelines (“the *Suventher* guidelines”) for the unauthorised import or trafficking of cannabis (at [29]):

- (a) 330 to 380 g: 20 to 22 years’ imprisonment.
- (b) 381 to 430 g: 23 to 25 years’ imprisonment.
- (c) 431 to 500 g: 26 to 29 years’ imprisonment.

For unauthorised importation or trafficking of 330–500 g of cannabis, the minimum sentence is 20 years’ imprisonment and 15 strokes of the cane and maximum is 30 years’ imprisonment or imprisonment for life and 15 strokes of the cane: s 33(1) read with the Second Schedule of the MDA.

29 The indicative sentence may then be adjusted upward or downward to take into account the offender’s culpability and the presence of aggravating or mitigating factors (at [30]). The Court of Appeal observed that it is possible to use the proposed sentencing range for offences involving other types of drugs where the range of prescribed punishment is the same (at [31]).

30 Compared to the sentences meted out in pre-*Suventher* cases, the *Suventher* guidelines would generally result in heavier sentences of imprisonment in cases (such as the present cases) where the quantity of drugs involved is at the higher end of the range. As the Court of Appeal noted in *Suventher* (at [23]), the sentences in pre-*Suventher* cases for the offence of trafficking or unauthorised importation of cannabis, where the amount in the charge is just short of 500 g, appear to be at the lower end of the sentencing range of between 20 years’ imprisonment and 30 years’ imprisonment or

imprisonment for life. The Court of Appeal also observed (at [26]) that such a sentencing trend did not seem consistent with the strong deterrent stance that Parliament has taken against drug offences and it is the duty of the court to consider the full spectrum of sentences in determining the appropriate sentence.

31 In *Public Prosecutor v Tan Lye Heng* [2017] 5 SLR 564 (“*Tan Lye Heng*”) the High Court applied the *Suventher* guidelines to derive the following sentencing guidelines for trafficking in diamorphine:

- (a) 10 to 11.5 g: 20 to 22 years’ imprisonment;
- (b) 11.51 to 13 g: 23 to 25 years’ imprisonment; and
- (c) 13.01 to 15 g: 26 to 29 years’ imprisonment.

For trafficking in 10–15 g of diamorphine, the minimum sentence is 20 years and 15 strokes of the cane and the maximum is 30 years’ imprisonment or imprisonment for life and 15 strokes of the cane: s 33(1) read with the Second Schedule of the MDA.

32 In the present case, the Prosecution submitted that the *Suventher* guidelines, as applied to trafficking of diamorphine in *Tan Lye Heng*, were applicable to the trafficking offences on which both Nimalan and Theyagarajan were convicted in this case.

33 Counsel for Nimalan did not challenge the applicability of the *Suventher* guidelines. However, Counsel for Theyagarajan submitted that the *Suventher* guidelines were not applicable because the Court of Appeal’s judgment in *Suventher* was issued on 4 April 2017 whereas Theyagarajan had committed the

trafficking offence in 2016. Counsel referred me to *Public Prosecutor v Manogaran s/o Ramu* [1996] 3 SLR(R) 390 and submitted that the *Suventher* guidelines should be given prospective effect because they had the effect of judicial overruling of the sentencing trend set by pre-*Suventher* cases. Accordingly, he submitted that Theyagarajan should be sentenced according to the sentencing trends prevailing at the time of his offence.

34 I disagreed with Counsel for Theyagarajan. In my view, the *Suventher* guidelines were retroactive in nature.

35 Judicial pronouncements are, by default, fully retroactive in nature and appellate courts have the discretion, in exceptional circumstances, to restrict the retroactive effect of their pronouncements: *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 at [124].

36 I agreed with the Prosecution that the Court of Appeal in *Suventher* did not restrict the retroactive effect of the guidelines. This was clear from the fact that the Court of Appeal in *Suventher* had applied the guidelines to the case before it. One of the grounds for dismissing the accused's appeal against sentence in *Suventher* was the fact that "having regard to the guidelines ..., the sentence could in fact have been much more severe" (at [41]).

37 I would add that a similar challenge against the retroactive effect of the *Suventher* guidelines also did not succeed in *Public Prosecutor v Adri Anton Kalangie* [2017] SGHC 217 ("*Adri*") in which the High Court decided (at [33]) that prospective overruling was not applicable to the *Suventher* guidelines. It has also come to my attention in the course of writing these grounds of decision that the appeal against the decision in *Adri* (CCA 34/2017) has been dismissed by the Court of Appeal.

Nimalan's sentence

38 Nimalan was convicted of trafficking in not less than 14.99 g of diamorphine. The quantity involved placed the offence at the upper end of the third band set out in *Tan Lye Heng*. I agreed with the Prosecution that, applying the *Suventher* guidelines and *Tan Lye Heng* (see [28] and [31] above), the indicative starting sentence of imprisonment would be 29 years. The next step was to adjust the indicative sentence upward or downward to take into account Nimalan's culpability and the presence of aggravating or mitigating factors (see [29] above).

39 Nimalan was untraced, but he admitted to making heroin deliveries into Singapore on five or six occasions, with at least three to Theyagarajan (see [10] above). I therefore did not accord mitigating weight to Nimalan's putative status as a "first-time offender" (*Vasentha* at [81]).

40 On the other hand, I accepted that Nimalan's role as a courier, and his corresponding limited role within the syndicate, lowered his culpability. I also took into account the fact that he was only 21 years old when he committed the offence.

41 Taking into account the mitigating factors in his favour, I decided that a sentence at the lower end of the third band in *Tan Lye Heng* would be appropriate. Accordingly, I sentenced Nimalan to 26 years' imprisonment and the mandatory 15 strokes of the cane. I further ordered that the sentence of imprisonment be backdated to the date of remand on 25 June 2016.

Theyagarajan's sentence for the trafficking offence

42 Theyagarajan was also convicted of trafficking in not less than 14.99 g

of diamorphine. The indicative starting sentence of imprisonment in his case was therefore also 29 years.

43 I agreed with the Prosecution that Theyagarajan's culpability was higher. Although the facts suggested that one of Theyagarajan's motives was to fund his own drug habit, I could not ignore the fact that he had systematically built up and organised a regular clientele to sell to. I rejected his claim that he had resorted to trafficking only to sustain his addiction and that he did not enrich himself. He not only sold heroin to his friends who were heroin consumers, he also asked them to pass his contact number around to other potential clients. Despite what appeared to be a one-man drug trafficking operation, Theyagarajan was methodical. After each shipment, he would carefully grind, then weigh, and repackage the heroin into smaller, re-saleable packets. The apparatuses for his operation were seized in the Unit. Theyagarajan admitted that the \$8,000 found in his possession when he was arrested, was revenue he had made from selling heroin.

44 Theyagarajan also admitted to having ordered five deliveries of heroin; four of the orders were delivered by Nimalan (see [15] above). He was not a "first-time" drug trafficker.

45 Counsel for Theyagarajan submitted that Theyagarajan was a heavy heroin addict who could not escape the clasp of heroin addiction. I did not think this merited much consideration as a mitigating factor

46 That said, I accepted that Theyagarajan's early plea of guilt and his cooperation with the authorities that led to the arrest of Nimalan, were mitigating factors. However, given all the aggravating factors against him, I was of the view that only a modest downward adjustment was warranted. I agreed

with the Prosecution’s submission that an imprisonment term of 28 years and six months was appropriate. I therefore sentenced Theyagarajan to 28 years and six months’ imprisonment with the mandatory sentence of 15 strokes of the cane.

Theyagarajan’s sentences for the enhanced possession and LT-2 consumption offences

47 Theyagarajan’s prior drug-related antecedents¹ comprised fifteen offences spanning more than two decades. He has been subjected to drug supervision orders, admitted to the Drug Rehabilitation Centre and punished with imprisonment and caning.

The enhanced possession offence

48 This was Theyagarajan’s third enhanced possession offence. Theyagarajan last received a sentence of two years’ and six months’ imprisonment for enhanced possession of morphine in 2010. There was also an additional charge of enhanced possession taken into consideration for the purposes of sentencing. Both the Prosecution and Counsel for Theyagarajan submitted that a sentence of three years’ imprisonment on this charge was appropriate. I agreed.

The LT-2 offence

49 Theyagarajan was a “repeat” LT-2 offender. For his previous LT-2 offence in 2010, he was sentenced to eight years’ imprisonment and six strokes of the cane.

¹ Prosecution’s Sentencing Submissions for Theyagarajan at [15].

50 The Prosecution submitted that a sentence of eight years and six months' imprisonment and the mandatory minimum of six strokes of the cane was appropriate. Unsurprisingly, Counsel for Theyagarajan agreed. I saw no reason to disagree and sentenced him accordingly.

Whether Theyagarajan's sentences should run consecutively

51 Section 307(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) mandates that I must order the sentences for at least two of the offences on which Theyagarajan has been convicted by me, to run consecutively. There is no rule that the two most severe sentences (*ie*, for the trafficking and LT-2 consumption charges) should run consecutively.

52 In *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 (*"Shouffee"*) it was held that a sentencing court should consider:

- (a) The "one-transaction" rule. Consecutive sentences are inappropriate where the offences were the single invasion of the same legally protected interest (at [31]).
- (b) The "totality principle". The first limb required an examination of whether the aggregate sentence imposed by consecutive sentences was "substantially above the *normal* level of sentences for the most serious of the offences committed" [*emphasis in original*] (at [54]).
- (c) The second limb of the totality principle would consider whether the effect of the aggregate sentence was "crushing and not in keeping with [the accused's] past record and his future prospects" (at [57]).
- (d) If the application of either limb appeared to indicate an excessive sentence, the sentencing judge ought to choose different sentences to run

consecutively *or* to make downward adjustments in individual sentences (at [59], [81(i)]).

53 The Prosecution accepted that running the imprisonment sentences for all three offences consecutively would not be warranted. The Prosecution submitted that the sentences for the LT-2 consumption charge should run consecutively with the sentence for the trafficking charge, making a combined total of 37 years' imprisonment. The Prosecution conceded that such a sentence may violate the totality principle and suggested that the sentences could be individually adjusted downward for a total of 35 years' imprisonment.²

54 Counsel for Theyagarajan submitted that it would be sufficient for the sentence for the enhanced possession charge to run consecutively with the sentence for the trafficking charge. This would result in a total imprisonment term of 31 years and six months. It was submitted that given the length of the sentence, Theyagarajan, who is now 49 years old, would be effectively incarcerated well into his old age, with little prospect of re-offending.

55 I agreed with Counsel for Theyagarajan and ordered the sentences for the trafficking offence and the enhanced possession offence to run consecutively and the sentence for the LT-2 consumption offence to run concurrently.

² Prosecution's Sentencing Submissions for Theyagarajan at [37].

56 The global sentence for Theyagarajan would therefore be 31 years and six months' imprisonment and 21 strokes of the cane. I further ordered that the sentence of imprisonment be backdated to the date of remand on 25 June 2016.

Chua Lee Ming
Judge

Mark Tay and Rebecca Wong (Attorney-General's Chambers)
for the Public Prosecutor;
K P Allagarsamy (Allagarsamy & Co) for the first accused;
Uthayasurian s/o Sidambaram and Xavier Lim (Surian & Partners)
for the second accused.
