Public Prosecutor
v
Tan Thian Earn

[2016] SGHC 59

High Court — Magistrate's Appeal No 115 of 2015
See Kee Oon JC
15 January; 11 March; 11 April 2016

Criminal Procedure and Sentencing *— Sentencing — Benchmark sentences — Appeal against sentence for possessing controlled substance useful for manufacture of methamphetamine — Appropriate sentencing framework — Whether district judge had erred in holding that starting point should be imprisonment for term of two years*

Facts

The respondent pleaded guilty in the district court to four offences, of which one was under s 10A(1)(*c*) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"). This charge pertained to the possession of 126 tablets of pseudoephedrine, which was a substance used in the manufacture of methamphetamine, a controlled drug specified in the MDA. The respondent admitted that he intended to use the tablets of pseudoephedrine to manufacture methamphetamine and that he had successfully done so on at least eight previous occasions. The district judge ("District Judge") held that the starting point for the s 10A(1)(*c*) charge was a term of two years' imprisonment. Taking into account the aggravating factors, she adjusted the sentence upwards and imposed a sentence of four years and six months' imprisonment for the s 10A(1)(*c*) charge. She imposed terms of imprisonment ranging from four weeks to 18 months for the other three charges. The respondent received an aggregate sentence of six years' imprisonment.

The Prosecution only appealed against the sentence imposed in respect of the s 10A(1)(*c*) charge. It was submitted that the sentence was manifestly inadequate for two reasons. First, the District Judge had erred in holding that the appropriate starting point for a sentence meted out for an offence under s 10A(1) of the MDA was an imprisonment term of two years. Second, the District Judge had failed to give adequate weight to the aggravating factors present in this case.

Held, dismissing the appeal:

(1) The object of s 10A(1) of the MDA was the prevention of the manufacture of controlled drugs. Thus, the sentencing tariffs for this offence should take reference from the sentences prescribed for the actual manufacture of drugs, which was a separate offence. The MDA prescribed three different bands of punishment for the actual manufacture of three different categories of drugs. The sentences for each varied so significantly that different sentencing tariffs should be applied for s 10A(1) offences committed in respect of drugs falling in each category: at [13], [20] and [21].

(2) A sentencing court should not approach the sentencing of s 10A(1) offences in the same way it approached the sentencing of persons convicted of trafficking. For trafficking, there were clear sentencing bands set out in the MDA based on the weight of the drugs. Thus, the quantity of drugs involved provided a clear quantitative index which could be used to determine the appropriate sentence. This was not so in the case of s 10A(1), particularly where methamphetamine was concerned since there was only a single sentencing band: death, regardless of quantity. Further, the circumstances under which a s 10A(1) offence could be committed varied so widely that no sensible sentencing tariffs could be promulgated which did not take the culpability of the individual offender into account: at [34] to [36].

(3) The sentencing court ought first to have had regard to two parameters – (a) the degree of harm caused and (b) the offender's culpability – in order to derive an appropriate sentencing range for a s 10A(1) offence. The measure of "harm" was the scale of manufacturing the offender's actions had enabled or would have enabled. The offender's "culpability" was the degree of relative blameworthiness disclosed by his actions and it was measured chiefly in relation to the extent and manner of his involvement in the criminal act. This sentencing range was the spectrum of sentences appropriate for the offence in question and not merely an indicative starting point. Once a sentencing range had been identified, the court would examine the aggravating and mitigating factors to decide precisely where the offence fell within that range: at [19], [23], [26] and [31].

(4) The starting point identified by the District Judge was inappropriate for two reasons. First, it failed to accord with the principle of ordinal proportionality as it did not adequately reflect the relative seriousness of the present offence as against the other "supply side" offences in the MDA. Second, it failed to accord with the principle of cardinal proportionality as it did not reflect the relative seriousness of the present offence as against the full range of possible offences under s 10A(1) of the MDA. A more appropriate starting point would have been an imprisonment term of at least three years: at [39], [40], [48], [50] and [54].

(5) The District Judge had properly taken into account the relevant aggravating and mitigating factors and placed the appropriate degree of weight on each. She rightly concluded that the fact that the respondent had successfully manufactured methamphetamine prior to his arrest could only be used to show that he was not entitled to any sentencing discount for being a first-time offender but could not be taken into account as an aggravating factor *per se*. She also rightly rejected the Prosecution's argument that the respondent's actions had posed a risk to public safety. There was no evidence that passers-by or their property were ever in any form of danger. While the Prosecution raised the possibility that his actions could have threatened public safety, the raising of a mere potentiality, without more, could not be the basis for the enhancement of a sentence on this ground: at [66], [70], [71] and [73].

(6) Appellate intervention was only warranted in limited circumstances. While a higher sentence of about five years' imprisonment could have been imposed in respect of the s 10(1)(*c*) charge, the mere fact that an appellate court would have awarded a higher sentence was insufficient to compel intervention. Neither the sentence of four years and six months' imprisonment for the

s 10A(1)(*c*) charge nor the aggregate sentence of six years' imprisonment was manifestly inadequate and they were within the bounds of the sentencing discretion that was conferred on the District Judge: at [75].

Case(s) referred to

Angliss Singapore Pte Ltd v PP [2006] 4 SLR(R) 653; [2006] 4 SLR 653 (refd)

Bachoo Mohan Singh v PP [2010] 4 SLR 137 (refd)

Cabassi v R [2000] WASCA 305 (refd)

Dinesh Singh Bhatia s/o Amarjeet Singh v PP [2005] 3 SLR(R) 1; [2005] 3 SLR 1 (refd)

Loo Pei Xiang Alan v PP [2015] 5 SLR 500 (refd)

Ooi Joo Keong v PP [1996] 3 SLR(R) 866; [1997] 2 SLR 68 (refd)

Poh Boon Kiat v PP [2014] 4 SLR 892 (refd)

PP v Law Aik Meng [2007] 2 SLR(R) 814; [2007] 2 SLR 814 (refd)

PP v Marzuki bin Ahmad [2014] 4 SLR 623 (refd)

PP v Syed Mostofa Romel [2015] 3 SLR 1166 (refd)

PP v Tan Thian Earn [2015] SGDC 243 (refd)

R v Fatu [2006] 2 NZLR 72 (refd)

R v Healy [2012] EWCA Crim 1005 (refd)

R v Wallace [1999] 3 NZLR 159 (refd)

Vasentha d/o Joseph v PP [2015] 5 SLR 122 (refd)

Legislation referred to

Criminal Procedure Code (Cap 68, 2012 Rev Ed)

Miscellaneous Offences (Public Order and Nuisance) Act (Cap 184, 1997 Rev Ed) s 35(1)

Misuse of Drugs Act 1973 (Act 5 of 1973) s 8

Misuse of Drugs Act (Cap 185, 1985 Rev Ed) s 8(*b*)(ii)

Misuse of Drugs Act (Cap 185, 2008 Rev Ed) s 10A(1)(*c*) (consd); ss 2, 6, 8(*a*), 8(*b*)(ii), 10, 10A(1)(*a*), 10A(1)(*b*), 10A(1)(*d*), 12, 59

Penal Code (Cap 224, 2008 Rev Ed) ss 107(*c*), 380

Mohamed Faizal, Tan Yan Ying and Randeep Singh (Attorney-General's Chambers) for the appellant;
Respondent in person;
Lum Junwei Joel (Allen & Gledhill LLP) as amicus curiae.

11 April 2016

See Kee Oon JC:

Introduction

1 This appeal concerns the appropriate sentencing tariffs in respect of offences committed under s 10A(1)(*c*) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"). This offence is part of a range of offences under

s 10A(1) MDA, which proscribes the manufacture, supply, possession, import or export of any controlled equipment, materials, or substances which are useful for the manufacture of a controlled drug.

2 The respondent was represented by counsel when he pleaded guilty to four charges, of which one was a charge under s 10A(1)(*c*) of the MDA, before the district judge ("District Judge"). The Prosecution subsequently filed an appeal against the sentence imposed in respect of this charge, arguing that it was manifestly inadequate. At the hearing of the appeal, the respondent was unrepresented. As this was the first time that a prosecution had been brought under s 10A(1)(*c*) MDA and the appeal concerned the appropriate sentencing framework to be applied in this novel area, Mr Lim Junwei, Joel was appointed as *amicus curiae* to assist the court with submissions. I wish to place on record my appreciation to Mr Lim as well as Mr Mohamed Faizal, who appeared on behalf of the Prosecution, for the valuable assistance and guidance they offered in their written and oral submissions.

3 Having considered the submissions, I concluded that the sentence imposed by the District Judge in relation to the charge under s 10A(1)(*c*) of the MDA was not manifestly inadequate. I was also not persuaded that the aggregate sentence was in need of enhancement. I, therefore, affirmed the sentences and dismissed the appeal. I now set out the grounds for my judgment.

Background facts

4 The respondent was arrested on 25 August 2013 at his flat on suspicion of inhalant abuse and was released after he signed a personal bond. On 26 September 2013, a party of officers from the Central Narcotics Bureau returned to conduct a further search of the respondent's flat whereupon they found, among other things, 126 tablets of pseudoephedrine – a substance commonly found in over-the-counter influenza medication – which is listed in Part I of the Third Schedule to the MDA. Pseudoephedrine is known in law-enforcement parlance as a "precursor chemical" – a substance with a molecular structure similar to that of a controlled drug (in this case, methamphetamine), and, therefore, a critical component of its manufacture. When a precursor chemical is mixed with the right reagents and catalysts, it undergoes a chemical reaction which produces the controlled drug.

5 During the course of investigations, the respondent admitted that he had been manufacturing methamphetamine since December 2012 and that he had done so on at least eight occasions, the latest being two weeks after his arrest on 25 August 2013. He elaborated that he did so to sustain his own consumption habits. He initially conducted the manufacturing entirely in his bedroom, but he explained that – following an accident in which he set fire to the curtains in his bedroom – he decided to move part of his

manufacturing process to the stairwell of a neighbouring multi-storey car park.

6 On 3 July 2015, the respondent pleaded guilty in a district court to four charges of which three involved drug offences. One of these charges, as noted above, was for the possession of a controlled substance (the 126 tablets of pseudoephedrine) used in the manufacture of a controlled drug under s 10A(1)(*c*) of the MDA (the "s 10(1)(*c*) charge"). The other three charges were (a) one charge for the consumption of methamphetamine under s 8(*b*)(*ii*) of the MDA; (b) one charge for the possession of methamphetamine under s 8(*a*) of the MDA; and (c) one charge of theft under s 380 of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code"). In addition to the four charges proceeded with, another three charges, comprising two under the MDA and one count of fraudulent possession under s 35(1) of the Miscellaneous Offences (Public Order and Nuisance) Act (Cap 184, 1997 Rev Ed), were taken into consideration for the purposes of sentencing.

7 The District Judge sentenced the respondent to a term of four years and six months' imprisonment for the s 10A(1)(*c*) charge and terms of imprisonment ranging from four weeks to 18 months for the other three charges which he faced. The 18-month imprisonment term for a charge involving the consumption of methamphetamine was ordered to run consecutively with the sentence for the s 10A(1)(*c*) charge. In the event, he received an aggregate sentence of six years' imprisonment, which was ordered to commence with effect from 28 September 2013.

8 The Prosecution only appealed against the District Judge's sentence in respect of the s 10A(1)(*c*) charge. It was submitted that the sentence was manifestly inadequate for two reasons:

> (a) First, the District Judge had erred in holding that the appropriate starting point for a sentence meted out for an offence under s 10A(1) of the MDA was an imprisonment term of two years.
>
> (b) Second, the District Judge had failed to give adequate weight to the aggravating factors present in this case.

The District Judge's decision

9 The District Judge's grounds of decision were reported at *PP v Tan Thian Earn* [2015] SGDC 243 ("the GD"). She observed that "the gravamen of the section 10A(1)(c) offence of having in possession a precursor controlled substance is for [*sic*] the intended manufacture of a controlled drug" (see the GD at [29]). For this reason, she felt that the appropriate reference points were the sentences meted out for offences which, to borrow an expression used by Mr Lim, relate to the "supply side" offences of manufacturing, cultivating, importing, and trafficking of controlled drugs. Having considered the sentencing ranges for these offences, she held

that the appropriate approach in this case was to distinguish between two different types of cases, depending on the purpose for which the drugs would be manufactured (at [34]):

> (a) The first, which she termed the "higher culpability category", relates to the possession of controlled materials intended for the manufacture of a controlled drug for *supply*.
>
> (b) The second, which she termed the "lower culpability category", relates to the possession of controlled materials intended for the manufacture of a controlled drug for *personal consumption*.

10 For the former category, she held that it was the scale of the operations, the role of the offender, and the level of profits made which would be most pertinent in determining the appropriate sentence to be meted out (at [35]). Additionally, she considered that the presence of any of the factors listed in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (20 December 1988), 1582 UNTS 95 (entered into force 11 November 1990) ("the Vienna Convention"), which s 10A(1) had been enacted to give effect to, would "make the offence particularly serious and push the sentence markedly upwards" (at [35]). These factors included the presence of transnational syndication, the use of violence or arms, committing an offence under the colour of public office, or the victimisation of minors. As for the latter category, she considered that the factors to consider in determining a starting point for the appropriate sentence would be the type of drug intended to be manufactured and the size of the potential output (at [36]).

11 As the present case concerned the manufacture of drugs solely for personal consumption, she held that it came within the lower culpability category. Applying that framework to the present case, she first observed that the drug in question – methamphetamine – was a "Class A" controlled drug which was highly addictive and harmful and which was the drug most commonly abused by new drug users. However, as against that, she noted that the present case involved a "solo operation" which was neither sophisticated nor large in scale and that the theoretical yield was relatively low (at [37]–[39]). In the premises, she held that the appropriate starting point would be a sentence of two years' imprisonment (at [40]). After considering the various aggravating and mitigating factors put forward, she decided that an uplift of 2.5 years from this starting point was warranted and sentenced the respondent to 4.5 years' imprisonment for the s 10A(1)(*c*) charge (at [48]).

The sentencing framework for a section 10A(1) offence

12 In determining whether a sentence of two years' imprisonment is an appropriate starting point for the present offence, it is necessary to first examine the mischief targeted by s 10A(1) before proceeding to assess

where the present offence falls within the sentencing continuum. The appropriate punishment should be determined having regard to the twin factors of harm and culpability.

The mischief targeted by section 10A(1)

13 As the Prosecution rightly pointed out, s 10A(1) is a provision of wide scope. Its purpose, broadly summarised, is to prevent controlled drugs from being manufactured (the actual manufacture of controlled drugs is a separate offence which is punishable under s 6 of the MDA). Section 10A(1) targets would-be manufacturers by making it an offence to have in one's possession or to make available to others any ingredients or apparatus which are useful to the manufacturing process. These ingredients and apparatus which are useful to the manufacturing of controlled drugs are known either as "controlled equipment", "controlled material", or "controlled substances" (hereinafter referred to as "controlled EMS") and are specified in the Third Schedule to the MDA.

14 A perusal of the preamble to the Vienna Convention (with particular reference to para 9), which precipitated the introduction of s 10A, reveals that the concern lay with the clandestine production of controlled drugs assisted by the widespread availability of "dual-use" equipment and chemicals: *ie*, items which have legitimate commercial uses but can also be used in the manufacture of controlled drugs. I pause to note that even though our statute proscribes the proliferation or possession of all three forms of controlled EMS (*ie*, "controlled equipment", "controlled material" and "controlled substances"), the Third Schedule to the MDA only contains a list of controlled *substances* at present. Of course, this is subject to change since the Minister has the power to amend the Third Schedule by way of an order published in the Gazette (see s 59 MDA). However, for now, s 10A(1) can be thought of as a section that deals exclusively with precursor chemicals and for that reason, the Prosecution used the expression "precursor charge" to refer to the s 10A(1)(*c*) charge in this case.

15 When the provision is considered in more detail, it becomes evident that there are four different forms of *actus rei* which are proscribed by s 10A(1) of the MDA. These are the (a) manufacturing, (b) supply, (c) possession and (d) import and export of controlled EMS. All other things being equal, the manufacturing (s 10A(1)(*a*)) and the import and export (s 10A(1)(*d*)) of controlled EMS would seem to be more serious than supplying (s 10A(1)(*b*)) or possessing (s 10A(1)(*c*)) controlled EMS because the former two (ss 10A(1)(*a*) and 10(1)(*d*)) have the effect of increasing the total stock of controlled EMS in Singapore. I note that this is also the position taken by other jurisdictions (albeit in the context of the actual manufacture of drugs): see, *eg*, *Cabassi v The Queen* [2000] WASCA 305 at [10] and *R v Fatu* [2006] 2 NZLR 72 ("*Fatu*") at [22].

16 However, much will turn on the facts. Given that the real mischief of the provision is the manufacturing of the controlled drugs, the central inquiry (at least in so far as the degree of harm is concerned) concerns not so much the manner of the offender's assistance but rather the magnitude of it: *ie*, the extent to which the offender has contributed or is able to contribute to the eventual manufacture of drugs. For that reason, I think there is not much value – as far as sentencing is concerned – in distinguishing between these types of activity on the basis of their labels alone.

17 A further point to note is that there are two different forms of *mentes reae* which are sufficient to ground liability. The first is knowledge that the controlled EMS will be used in or for the manufacture of a controlled drug. The second is having reason to believe that the controlled EMS will be so used. All other things being equal, an offender who knowingly abets the manufacture of drugs is more culpable than one who only has reason to believe that he would, by his actions, be abetting the manufacturing of controlled drugs.

18 As a final point, it is important to appreciate that there is no requirement that the offender himself intends the manufacture of the controlled drug. The Prosecution gave the example of a pharmaceutical company which knowingly manufactures and supplies a controlled substance for profit. If this company knows that the controlled substance will be used for the manufacturing of drugs, it is guilty under s 10A(1) even if it does not itself intend that controlled drugs be manufactured and it might, in fact, even disapprove of the proliferation of illicit drugs. For this reason, the Prosecution contended that supply or possession of controlled EMS with the intention that it be used for eventual manufacture is a significant aggravating factor. I will say more of this later.

The appropriate sentencing framework

19 Against that background, I turn to the appropriate sentencing framework. In order to arrive at a sentence which accurately reflects the seriousness of a crime, a sentencing court should generally have regard to two parameters: (a) the degree of harm caused and (b) the offender's culpability (see *PP v Law Aik Meng* [2007] 2 SLR(R) 814 at [33]). "Harm" is a measure of the injury which has been caused to society by the commission of the offence and it should be measured in terms of the magnitude of the infringement of the legally protected interests which are implicated. The "culpability" of the offender is a measure of the degree of relative blameworthiness disclosed by his actions and it is measured chiefly in relation to the extent and manner of the offender's involvement (*ie*, his role) in the criminal act. Put together, these two cardinal indices of "harm" and "culpability" allow the court to ascertain the gravity of the offence.

The identity of the drug whose manufacture was contemplated

20 Where offences under s 10A(1) of the MDA are concerned, the first consideration for a sentencing court should be the nature of the controlled drug whose manufacture was contemplated. Given that the object of s 10A(1) is to prevent the manufacture of controlled drugs, it stands to reason that the sentencing tariffs provided for the offence should take reference from the sentences imposed for the *actual* manufacture of the drugs. This is a matter of first importance in our legislative framework because Parliament has provided for significantly different punishments for the manufacture of different controlled drugs. The three bands of punishment prescribed in the Second Schedule to the MDA are:

(a) *The manufacture of morphine, diamorphine, cocaine and methamphetamine.* The statutorily prescribed punishment for the manufacture of *any* quantity of these drugs is death. For that reason, it is clear that the sentencing tariffs for assisting in their manufacture via a s 10A(1) offence must correspondingly be more severe than that for the manufacturing of other types of drugs.

(b) *The manufacture of "Class A" and "Class B" drugs except for morphine, diamorphine, cocaine and methamphetamine.* Offenders found liable for manufacturing these drugs will either face a maximum sentence of up to 30 years' imprisonment *or* life imprisonment. In either case, they will also be liable to be sentenced to suffer 15 strokes of the cane. The mandatory minimum sentence is an imprisonment term of ten years and five strokes of the cane.

(c) *The manufacture of "Class C" drugs.* Offenders found liable of manufacturing these drugs will face a maximum of 20 years' imprisonment and 15 strokes of the cane. The mandatory minimum sentence prescribed is five years' imprisonment and five strokes of the cane.

21 In my view, the identity of the drugs is so vital given the significant differences in the punishments involved that different sentencing tariffs should be contemplated for each category. This mirrors the approach taken towards the offence of trafficking, where a separate set of benchmark sentences has been promulgated for the trafficking of different types of drugs: see, *eg*, *Vasentha d/o Joseph v PP* [2015] 5 SLR 122 ("*Vasentha*") (for diamorphine) and *Loo Pei Xiang Alan v PP* [2015] 5 SLR 500 ("*Alan Loo*") (for methamphetamine).

Harm

22 Next, I turn to the harm caused by the offence. In the context of an offence under s 10A(1), the chief measure of harm is the extent to which the offender has contributed to the manufacturing of controlled drugs. I agree with Mr Lim that it would not be appropriate to use the quantity of

controlled drugs *actually manufactured* (usually assessed with reference to the quantity of drugs found in the possession of the accused at the time of arrest) as an indicator of the harm caused. This is because to do so might result in either an over- or undervaluation of the harm caused by the offender's actions. It might result in an overvaluation if the offender's contribution to the manufacturing operation was relatively modest but he supplied it to a large and sophisticated outfit which produced a large quantity of drugs, all of which were seized at arrest but of which the accused was only "accountable" for a part. It might result in an undervaluation if the offender actually supplied a substantial quantity of controlled EMS but the operation was shut down before production could take place.

23 In my view, the fairest approach would be to ask what scale of manufacturing the offender's actions have enabled or would have enabled. This can be conceptualised in terms of the notion of a "theoretical yield". The question to be asked is this: assuming all the controlled EMS which the accused is charged with possessing had been put to use, what quantity of drugs would have been manufactured? Given that s 10A(1) presently only concerns controlled *substances* (see [14] above), it would be fairly easy to obtain a quantitative measure of the drugs that can be manufactured using the controlled substance which forms the subject matter of the offence. This has been done here. Ms Merula Mangudi, an analyst with the Health Sciences Authority, tendered a report in which she explained that the 126 pseudoephedrine tablets which formed the subject matter of the s 10A(1)(*c*) charge had a theoretical yield of 5.60g of methamphetamine.

24 However, it might not be so easy to provide a quantitative estimate of the theoretical yield for other forms of controlled EMS, particularly equipment. For that reason, the descriptions of the categories have been crafted in qualitative terms. Relying on the decision of the New Zealand Court of Appeal in *R v Wallace* [1999] 3 NZLR 159 at [31]–[33], Mr Lim proposed the following classification scheme which is capable of applying to all forms of controlled EMS (including, of course, the precursor substance in this case). I have modified the classification scheme slightly to expand on the explanations of the different categories. The categories are:

(a) Category 1: The quantity of controlled EMS would enable the manufacturing of controlled drugs on a major scale, facilitating widespread proliferation and large scale sales.

(b) Category 2: The quantity of controlled EMS would enable the manufacturing of controlled drugs on a substantial scale sufficient to sustain regular sales to a significant number of persons.

(c) Category 3: The quantity of controlled EMS would enable the manufacturing of controlled drugs on a small scale sufficient to sustain only personal sales to known persons.

(d) Category 4: The quantity of controlled EMS would enable the manufacturing of controlled drugs on a scale sufficient for personal use only.

25 For the purpose of assessing the harm, I accepted Mr Lim's proposed classification scheme (as modified above) and applied it in this case.

Culpability

26 Turning to the culpability of the offender, this should be measured in terms of the role he has played in the actual or intended proliferation of controlled drugs through their manufacture. A variety of different factors should be considered including (a) whether the offender himself intends to carry out the act of manufacture and, if so, the purpose for which the drugs will be manufactured (for personal consumption or for sale); (b) the offender's role in the operations, particularly where the offence involves a syndicate; (c) whether the offending was planned; and (d) the sophistication with which the offence was carried out. These factors inform the classification scheme promulgated by the United Kingdom Sentencing Council ("UK Sentencing Council") in their Drug Offences Definitive Guideline <http://www.sentencingcouncil.org.uk/wp-content/uploads/Drug_Offences_Definitive_Guideline_final_web1.pdf> (accessed 31 March 2016), which I found to be helpful. Since that classification involved the offence of actual manufacturing, I have modified it slightly as follows in order to suit our purposes:

(a) Category A: A syndicate or group of offenders must be involved. The offender must be one directing or organising production on a commercial scale with substantial links to and influence on others in the chain. Such an offender performs the act with an expectation of substantial financial gain. He often performs the acts under colour of legitimacy, perhaps using a legitimate business as a cover, and might abuse a position of trust or responsibility.

(b) Category B: An offender within this category is usually motivated by financial or other advantage and usually conducts his affairs with planning and sophistication. If a syndicate or group is involved then such an offender occupies an operational or management function within the syndicate and involves others in it. He has awareness and understanding of the scale of the operations. If no syndicate or group is involved, a single individual acting alone may, nevertheless, also fall within this category if he acts with the intention to manufacture the drugs himself, whether for sale or for personal consumption.

(c) Category C: If a chain of persons or a syndicate is involved, then the offender will usually be one who performs a limited function under direction or has been coerced or pressured into compliance.

> Such an offender would usually have little or no awareness of the scale of the operations. A single individual who supplies or possesses EMS for limited financial benefit or for personal use only would fall within this category.

27 I considered this modified classification scheme to be equally suited to the Singapore context and I, therefore, applied it in this case.

Sample sentencing matrix

28 The two classification schemes for harm and culpability discussed above are, in broad terms, consistent with the approach taken by the English Courts (as guided by the UK Sentencing Council) towards the sentencing of offenders for the production of controlled drugs: see *Regina v Healy* [2012] EWCA Crim 1005 ("*Healy*"). One important difference, however, is that in the UK, the identity of the drug sought to be manufactured is but one component of the "harm" analysis instead of being an important threshold issue that triggers the application of a different set of tariffs. In order to visualise how this analysis would work, one may present the framework in the form of a simple matrix:

Culpability / **Harm**	**Category A**	**Category B**	**Category C**
Category 1	X years – Y years		
Category 2			
Category 3			
Category 4			

29 Thus, where the relevant indicia fall within the intersection of Category 4 and Category C, it would indicate that the case involves the lowest possible degree of harm and culpability. Conversely, where a case is assessed to fall within the intersection of Category 1 and Category A of the grid, it would constitute one of the most serious instances of an offence under this section. Within each section of the grid will be a sentencing range which sets out the upper and lower bounds of the sentence to be imposed for offences falling within that classification.

30 I note in passing that some combinations of categories may not encompass many, or any, cases in practice. For instance, it is difficult to imagine a case that would fit within the Category 4 harm band *and* the Category A culpability band, because the Category A elements of syndication and financial gain are unlikely to be compatible with a Category 4 scenario involving the production of controlled drugs purely for personal use.

31 Once a sentencing range has been identified, the court should look to the aggravating and mitigating factors in order to decide precisely where within that range the offence falls (and, therefore, what sentence should be imposed). I have deliberately avoided populating the matrix with figures because I do not think it would be appropriate to suggest sentencing ranges across the entire spectrum of s 10A(1) offences since this case is the first instance of prosecution under this section. The framework can be further refined and populated with actual figures to reflect the appropriate sentencing ranges for each section of the grid once there are more sentencing precedents.

32 As the English Court of Appeal clarified in *Healy* at [9], the presentation of the framework in the form of a matrix should not be taken as an indication that the boxes are mutually exclusive. There is an inevitable overlap and a case could well straddle the border between classifications. This reflects the complexity of the sentencing exercise and it is a reminder that this heuristic, while helpful, should not be rigidly and mechanistically applied. In particular, regard should be had to the range of aggravating factors listed in Art 3(5) of the Vienna Convention when assessing the seriousness of an offence. The presence of one or more of these factors could justify the imposition of a sentence beyond the range that would otherwise be prescribed for an offence falling within a certain section of the grid.

33 I should explain that the approach I have taken differs from that suggested by Mr Lim in his submissions as *amicus curiae*. He suggested that different indicative starting points could be pegged purely to the theoretical yield of the controlled substances in the offender's possession without regard for culpability, which he considered separately and used to either enhance the sentence or reduce it from the indicative starting point. However, I favoured the approach taken by the UK Sentencing Council, under which *both* the harm caused and the culpability of the offender are considered in determining a sentencing range (*ie*, the spectrum of sentences appropriate for the offence in question) and not merely an indicative starting point. Mr Lim's suggested approach was similar to that which was adopted in *Vasentha* ([21] *supra*) and in *Alan Loo* ([21] *supra*) in relation to the offence of drug trafficking but I did not think it was wholly appropriate here.

34 For the offence of drug trafficking, unlike an offence under s 10A(1) of the MDA, there are clear sentencing bands set out in the Second Schedule to the MDA which are based on the weight of the drugs which form the subject matter of the offence. Thus, the quantity of drugs involved provides the sentencing court with a clear quantitative index, provided by Parliament, which could be used to determine the appropriate sentence. This is not so in the case of s 10A(1), particularly where methamphetamine is concerned since there is only a single sentencing band – death, regardless of quantity. Thus, it did not seem to me that any useful indicative starting points could be derived based purely on the theoretical yield of the drugs in question.

35 Furthermore, offenders who commit s 10A(1) offences might do so in a variety of circumstances and for a variety of reasons (more so, I would say, than those convicted of trafficking). Take the following examples, all of which involve offences with the same level of harm (assuming, for the sake of the illustration, a Category 1 level of harm) and all of which involve an offender who possesses a controlled substance knowing that it will be used in the manufacture of a controlled drug:

(a) The offender is pressured by a drug syndicate into allowing them to store a large quantity of controlled substances in his home knowing that they will be used in the large scale manufacturing of methamphetamine. The offender is not a member of the syndicate and does not himself intend to participate in the manufacture. This is a case involving Category C culpability.

(b) The offender is a member of a drug syndicate which manufactures drugs at multiple locations. This offender is in charge of the cache of controlled substances stored at his home and he regularly arranges for them to be brought to another location for the manufacturing to take place. For this he is paid a monthly fee. He has some awareness of the syndicate's overall operations but no real supervisory role or understanding of its extent. This is a case involving Category B culpability.

(c) An offender is in charge of a sizeable part of the syndicate's operations and the nexus of their activities is his home, where a large part of the controlled substances is stored. He directs the manufacturing and sale of controlled drugs on a large scale. This is a case involving Category A culpability.

36 In all these cases, the same controlled drug is involved, the scale of manufacturing facilitated is the same, and the *mens rea* of the offender is the same (knowledge, rather than having reason to believe). However, each of the offenders would, in my view, be deserving of vastly different punishments such that it would not make any sense to begin at the same starting point, "indicative" though it might be. In the circumstances, I am of

the view that where s 10A(1) offences are concerned, no sensible sentencing tariffs can be promulgated for, which do not take the culpability of the individual offender into account. This differs somewhat from the offence of trafficking, where the range of scenarios is more restricted and therefore the use of the quantity of drugs involved (which is the primary determinant of harm) suffices to provide a useful starting point. For these reasons, I preferred the approach adopted by the UK Sentencing Council.

The District Judge's starting point of two years' imprisonment

37 I turn now to the Prosecution's first ground of appeal, which is that the District Judge had erred in holding that two years' imprisonment was the appropriate starting point for the present offence. Having considered the arguments presented, I agreed with the Prosecution that the starting point adopted by the District Judge was inappropriate for the following two reasons. First, it failed to accord with the principle of ordinal proportionality – it did not adequately reflect the relative seriousness of the present offence as reflected in the maximum punishments provided as against the other "supply side" offences in the schema of the MDA. Second, it failed to accord with the principle of cardinal proportionality – it did not reflect the relative seriousness of the present offence as against the full range of possible offences under s 10A(1) of the MDA.

The argument from ordinal proportionality

38 I begin with the argument from ordinal proportionality. The first point I considered was the sentences prescribed for offences under s 10 of the MDA. Section 10 makes it an offence for a person to cultivate any plant from which cannabis or cocaine can be extracted. This is a provision which is as old as the MDA itself. It was first introduced via s 8 of the Misuse of Drugs Act 1973 (Act 5 of 1973) and has remained unchanged since. The minimum sentence prescribed for an offence under s 10 of the MDA is three years' imprisonment or a $5,000 fine or both.

39 In a sense, s 10 can be seen as a subset of s 10A(1). The cultivation of a plant from which cannabis or cocaine can be extracted is, loosely speaking, to "manufacture" a "controlled substance". In this case, the cultivation of the plant is the act of manufacturing (s 2 of the MDA defines the expression "manufacture" in the context of controlled substances as the "process of producing the substance and the refining or transformation of one substance into another") while the plant is the "controlled substance" since it is the raw material from which cannabis or cocaine may be produced. I note, parenthetically, that even though the cultivation of cannabis and cocaine plants are both proscribed under s 10 of the MDA and the cultivation of both attract the same punishments, the *actual manufacturing* of cannabis and cocaine attract different sentences. The mandatory minimum punishment for manufacturing cannabis is ten years'

imprisonment (with a maximum of 30 years' imprisonment) whereas the punishment for manufacturing any quantity of cocaine – like methamphetamine – is death.

40 I agreed with the Prosecution that this was a strong indicator that the starting point of two years' imprisonment identified by the District Judge was incorrect. It seemed to me that if the *minimum* sentence imposed for cultivating cannabis was three years' imprisonment, then the starting point for the present sentence should not be imprisonment for a term of two years. (I leave aside for the moment the possibility that a mere fine may be imposed since, as the Prosecution pointed out, a custodial term is almost invariably awarded.) This was particularly so because the present case did not involve possession *simpliciter*, but possession in circumstances where the offender intended to, and did in fact use, the controlled substance for the manufacture of drugs and was, therefore, one in which a more than minimal level of culpability was disclosed.

41 I am conscious that the comparison with s 10 is not a perfect one in the present case because the respondent has not been charged with manufacturing pseudoephedrine (an offence under s 10A(1)(*a*) of the MDA), but with possessing it (an offence under s 10A(1)(*c*) of the MDA). However, I did not think this distinction alone would have justified this disparity in starting points, particularly since, as I explained above at [15], the different forms of *actus rei*, while relevant, should not make too much of a difference where sentencing is concerned.

42 The second point I considered was that, under the MDA, acts of abetment are punished in like manner as the primary offence (s 12 of the MDA). If we consider s 10A(1) offences to be specific instances in which one abets or attempts – loosely speaking – the actual manufacture of drugs then the difference between the starting point identified by the District Judge and the statutorily prescribed punishment for the abetment of a s 6 offence becomes untenable. The minimum punishment for manufacturing any drug is five years' imprisonment and five strokes of the cane and so, viewed in that light, the starting point of two years' imprisonment identified by the District Judge appears somewhat low.

43 I accept that, once again, the comparison is somewhat imperfect. Abetment by aiding (under s 107(*c*) of the Penal Code) requires proof of two things: (a) that the offender performed an act which facilitated the commission of the primary offence; and (b) that the offender had knowledge of the circumstances of the offence (see *Bachoo Mohan Singh v PP* [2010] 4 SLR 137 at [111]). There are instances in which an offender charged with an offence under s 10A(1) of the MDA would fail to satisfy the knowledge requirement needed to be charged with abetment. For example, he might only have reasonable grounds to believe that manufacturing would take place instead of actual knowledge. Or he might only know that

the controlled EMS would be used in the manufacturing of drugs, but not know the precise "circumstances of the offence".

44 However, these are not the facts in the present case. The respondent knew exactly what the circumstances of manufacturing were going to be for he possessed the tablets of pseudoephedrine in order that he might use them and he did in fact use them to manufacture methamphetamine. This was the basis upon which he was charged and the court should have regard to this when assessing his culpability and deciding what sentence he ought to face.

The argument from cardinal proportionality

45 Next, I turn to the argument from cardinal proportionality. The District Judge rightly observed that the court must have regard to the entire range of punishments statutorily provided for when deciding what sentence to impose (citing *Poh Boon Kiat v PP* [2014] 4 SLR 892 at [60]). This exercise may be performed in two parts. First, the court should consider what the offence covers: *viz*, all possible instances of conduct proscribed by the particular provision. Second, the court has to determine where the present offence falls along the spectrum of possible offending: *ie*, the relative severity of the present offence as against the full range of possible offences that could fall within the provision. In this case, with respect, the District Judge did not have regard to the full range of conduct proscribed by s 10A(1)(*c*) of the MDA.

46 Both the two broad categories promulgated by District Judge (*viz*, the "higher culpability category" and the "lower culpability category") differ in only one respect: the purpose of manufacture – *ie*, whether it was for supply to others or for personal use. I pause to observe that while the District Judge uses the expression "culpability", it appears that she is using it in the wider sense to mean the overall seriousness of the offence, rather than the narrower sense of relative blameworthiness as measured in terms of the role played by the offender in facilitating the manufacturing of controlled drugs, which is how I have used it in the proposed sentencing framework I set out above (see [12] and [26] above).

47 With that in mind, I agree with the Prosecution that the difficulty with adopting the District Judge's two-fold classification is immediately apparent. First, it does not take into account the nature of the controlled drug sought to be manufactured which, as I explained above, is a matter of chief importance. Second, it draws no distinction between an offender who knows that the controlled substances will be used for the manufacturing of a controlled drug and one who merely has reason to believe that it will be so used. As I explained above, there is an appreciable difference in culpability between one who knows that drugs will be manufactured and one who merely has reason to believe so. Third, it fails to draw a distinction between an offender who personally intends to manufacture the drugs and one who

merely possesses the controlled substances in order to assist *another* and does not himself intend to manufacture the drugs. This is the difference between a drug kingpin and one who is a mere associate in the syndicate and it is a significant factor involving culpability. I would go so far as to say that if an offender has the controlled substances in his possession with the intention to personally manufacture the controlled drugs, then for that reason alone the case should not fall into the lowest end of the spectrum of possible offending.

48 On the facts of the present case, as the Prosecution rightly pointed out, the offence is aggravated at least to the extent that (a) the offender knew (and, in fact, he personally intended) that the controlled substances would be used for the manufacturing of drugs and (b) the drug sought to be manufactured is methamphetamine, which belongs in that group of drugs in respect of which the stiffest penalties would be imposed. I, therefore, disagreed with the District Judge's characterisation of the respondent as one who is "less culpable" merely on the basis that the drugs were intended to be manufactured for personal consumption – such a conclusion would not adequately reflect the full range of offending conduct proscribed by s 10A(1)(*c*) of the MDA.

49 However, if what the District Judge meant was that her two-fold classification was only intended to apply to that small sub-set of offences under s 10A(1)(*c*) of the MDA where it has already been established (a) that the offender possessed the controlled substances with the *intention* to personally manufacture drugs and (b) that the drug sought to be manufactured is methamphetamine, then I would say, with respect, that she had erred in fixing the sentencing range at two years' imprisonment. A starting point of two years' imprisonment seemed to me to represent what was more likely to be the lowest end of the scale or close to the lowest end, being but a tenth of the maximum punishment possible. The two features of the present offence (the nature of the drug in question and the fact that he intended to manufacture the drugs personally) are serious. Taken together, they would necessitate that the inquiry as to the proper sentence in these circumstances begin at a starting point higher than two years' imprisonment.

50 Of course, the intended purpose of the manufacture is important for this will determine the harm caused by the respondent's actions. However, the point here is that he already belongs to a class of offenders who, as a whole, have committed a more serious form of a s 10A(1) offence. In my judgment, therefore, although the respondent could be properly classified as being "less culpable" *relative to other like offenders in this class of offenders* (which I am prepared to accept), this would not *ipso facto* mean he is deserving of a "starting point" sentence of two years' imprisonment.

Application of the sentencing framework

51 Applying the sentencing framework I set out above, I first noted that the present offence concerns the potential manufacture of methamphetamine, which attracts the most severe punishments. For that reason, I was of the view that a sentence of two years' imprisonment would only be appropriate if the offence were one involving Category 4 harm and Category C culpability. However, this is plainly not such a case, given that the element of knowing intent to manufacture the drugs featured prominently on the facts.

52 I classified this as a case involving Category 4 harm since the respondent possessed controlled EMS in quantities sufficient only for personal consumption. The Prosecution also appeared to have accepted this, as they never argued that the quantity of controlled substances found in the respondent's possession was sufficient for supply to others (though they did allude to the possibility – which was merely speculative – that the respondent might one day "graduate" to manufacturing controlled drugs for the purpose of sale). In terms of culpability, I viewed his conduct as falling on the borderline of Category B and Category C, since he had acted with consciousness of his contribution to drug manufacturing and had intended to manufacture the drugs himself. Considering matters in the round, I held that this was a case which fell within Category B, albeit one at the lower end of the scale. I noted that there was no evidence of criminal syndication or a profit motive and I would be slow to characterise his activities as being particularly sophisticated even though they were clearly planned and premeditated.

53 The upper end of the range for a case within the Category 4 harm band and Category B culpability band might possibly be pegged at six years' imprisonment, perhaps where the facts involve the offender having participated as part of a syndicate or group, with some financial motivation in mind instead of personal consumption. These were not our facts. I would venture to suggest then that a possible sentence range for a case coming within the Category 4 harm band and Category C culpability band could be between one to three years' imprisonment.

54 For the reasons set out above, I was of the view that a more appropriate starting point ought to have been at least three years' imprisonment, similar to that imposed in respect of s 10 offences. Having said this, I should note that the point may be somewhat academic because – as stated below – I did not find the District Judge's assessment of the aggravating and mitigating factors to be wanting and thus, ultimately, I could see no reason to conclude that the sentence imposed was manifestly inadequate.

The aggravating and mitigating factors

55 I move to the next ground of appeal. As a preliminary point, I note that even though the Prosecution submitted that the District Judge had also erred in her treatment of the aggravating and mitigating factors, they had not pressed for any more of an uplift than was ordered. The Prosecution contended that an uplift of two to three years' imprisonment was warranted while the District Judge had ultimately concluded that an increase of 2.5 years' imprisonment was justified, which was well within the range the Prosecution submitted for. Nevertheless, I will proceed to consider the Prosecution's arguments in this area, as they have raised a number of points which merit further comment.

56 Although the Prosecution raised five factors, only two require in-depth discussion. The Prosecution's arguments on the five factors can be summarised as follows:

(a) First, it was an aggravating factor that the respondent continued offending even after he was released on bail. The respondent was first arrested on 25 August 2013 on suspicion of inhalant abuse and he was released on a personal bond. He was re-arrested on 26 September 2013 and that was when his home was searched and the controlled substances found. Upon questioning, he admitted that he had last manufactured methamphetamine in early September (after his first arrest) (see the GD ([9] *supra*) at [6]–[8]).

(b) Second, the present offence is one which is difficult to detect, given the "dual-use" nature of the drugs. The respondent also took conscious steps to avoid detection by buying low quantities of pseudoephedrine each time. The fact that the present offence was difficult to detect was borne out by the fact that the respondent was able to clandestinely manufacture methamphetamine at home for ten months with his family being none the wiser.

(c) Third, the respondent admitted to having successfully manufactured methamphetamine on at least eight previous occasions. He was more culpable than one who had only manufactured methamphetamine once before. The District Judge had erred in not taking this into account on the ground that it did not form the subject matter of the charge.

(d) Fourth, the level of planning and deliberation should be taken into account. The respondent had refined his techniques through trial and error and had done research on the internet to improve his understanding of the manufacturing process. The District Judge had unjustifiably discounted the relevance of this factor when she held that "elements of planning will be present in most of such offences" (see the GD at [41]).

(e) Fifth, there were public safety considerations. The act of manufacturing resulted in a small fire in his room. When this happened, the respondent externalised the risk by performing the manufacturing at a public car park. This showed "blatant disregard for the safety of others".

57 The first, second and fourth factors can quickly be dealt with as the District Judge took all of them into account (see the GD at [41]–[43]). While she did say, in relation to the point about planning and deliberation, that "elements of planning will be present in most of such offences", I do not think the Prosecution was correct in saying that she "downplayed the significance of this factor". Immediately after making this observation, the District Judge went on to say that she "took into account" the fact that the accused had "read up on the manufacturing process in order to obtain the equipment and materials required" and also "restricted the purchase to 60 tablets on each occasion to avoid suspicion" (at [41]). In the circumstances, I could see no reason to fault her treatment of these three points.

The fact of previous offending

58 The third factor raises a vexed legal question: *viz*, to what extent can a sentencing court have regard to offences which are disclosed in the statement of facts (or entered into evidence at trial) but in respect of which no charges were formally brought? The Prosecution accepted that the respondent could not be punished for having manufactured drugs in the past *per se*. However, they argued that there was a distinction between "punishing an offender for uncharged offences and taking into consideration the factual matrix in which an offence was committed". A crucial component of the factual matrix in this case, they contended, was the fact that the "accused had embarked on the production and produced the drug successfully" and that it was not only permissible but also "*necessary* to contextualise an offence and to shed light on its severity" [emphasis in original]. They, therefore, submitted that the District Judge had erred in holding that this admission could not result in the imposition of a more substantial sentence and by failing to "take into account the fact that 'the accused had embarked on the production and produced the drug successfully'" (see the GD at [40]).

59 With respect, the distinction drawn by the Prosecution was of little assistance because it still begged the question: what precisely did it mean for the court to "take into account" the fact of prior offending? This question was recently considered in *Vasentha* ([21] *supra*) at [58]–[62] where Sundaresh Menon CJ identified two different approaches that could be taken.

60 The first, which Menon CJ associated with *Angliss Singapore Pte Ltd v PP* [2006] 4 SLR(R) 653 ("*Angliss*"), does not permit the fact of previous offending (for which the offender was not charged) to be taken into

consideration as aggravating factor *per se*. Instead, the "fact that the offender was involved in criminal activities for a period of time prior to his arrest can only be used to negate the mitigating weight of the offender's assertion that it was his first or only offence" (*Vasentha* at [59]). The latter approach, which he associated with *Dinesh Singh Bhatia s/o Amarjeet Singh v PP* [2005] 3 SLR(R) 1 ("*Dinesh Singh*"), suggests that convincing evidence of past offending, even if there had been no conviction, can be taken into consideration for the purpose of enhancing a sentence. In *Dinesh Singh* at [60], V K Rajah J (as he then was) wrote, "[i]f there is indeed convincing evidence of drug abuse … then it may only be appropriate that such offenders receive their just dessert in the form of enhanced sentences" [emphasis in original omitted].

61 To borrow a metaphor from another area of the law, the difference between these two approaches appears to be this. If an offender admits to having committed offences in respect of which he was not charged, the *Angliss* approach would allow only this to be used as a "shield" (against the argument that the offender is a first-time offender and should, therefore, receive a sentencing discount) and not as a "sword" (*ie*, used as a standalone aggravating factor). However, the *Dinesh Singh* approach appears to contemplate that it might be used as an aggravating factor which justifies the imposition of an enhanced sentence. Menon CJ indicated his preference for the former approach, which he opined was more consistent with the principle that an offender could only be punished for offences of which he had been convicted. He, therefore, held that a sentencing court could only have regard to charges in respect of which an offender has been convicted or those which he has explicitly (and consistently with the provisions of the Criminal Procedure Code (Cap 68, 2012 Rev Ed)) consented to being taken into consideration for the purposes of sentencing (see *Vasentha* at [62]).

62 As a matter of principle, I would agree with Menon CJ. Not punishing an offender for an offence for which he was not charged is an elementary component of fairness. There is also, to my mind, a constitutional dimension to this issue. At the end of the day, the decision whether to frame a charge and, if so, what charge to frame, is the constitutional prerogative of the Public Prosecutor ("PP"). In the scenario that the PP elects to frame a lower charge, it would not be for the courts to go behind the PP's decision by sentencing the offender as if he had been charged under a more serious provision. Conversely, if the PP chooses not to frame a charge for each of the antecedent acts of offending then I do not think that the court should be asked to indirectly sanction the offender for the commission of those acts by way of an enhancement to the sentence in respect of a charge which they *did* frame. I accept that the example I gave is slightly different but the point of principle is the same. If the Prosecution desires the offence to be taken into consideration, they should draw up an appropriate charge. If they elect not to or if they cannot (*eg*, because of a lack or insufficiency of evidence)

then there is no reason why they should expect to be entitled to ask for this to be taken into account in sentencing.

63 Furthermore, I am not entirely convinced that *Dinesh Singh* and *Angliss* are in conflict. The precise issue in *Dinesh Singh* was the appropriate sentencing tariff for first-time offenders convicted of consuming a Class A drug under s 8(*b*)(ii) of the Misuse of Drugs Act (Cap 185, 1985 Rev Ed) (see *Dinesh Singh* at [28]). The question before the court was whether the accused ought to receive a sentence of between 12 and 18 months' imprisonment, which was the tariff approved of by Yong Pung How CJ in *Ooi Joo Keong v PP* [1996] 3 SLR(R) 866 ("*Ooi*") at [19]. In answering that question in the negative, Rajah J held that all Yong CJ did in *Ooi* was approve of the tariff of between 12 and 18 months' imprisonment for that particular offender (as propounded by the senior district judge in the court below) without any intention that this be used as a benchmark sentence for first-time offenders charged with the offence of consuming a specified drug (*Dinesh Singh* at [34]). He went on hold (at [38]) that an appropriate sentencing range for first-time offenders would be a sentence of between six months' imprisonment and 18 months' imprisonment and that, in the case before him, a sentence of eight months' imprisonment was a suitable punishment (at [58]).

64 Rajah J noted that unlike the offenders in the cases cited by the Prosecution (including the offender in *Ooi*'s case, whom Rajah J described as having a "montage of variegated antecedents": at [57]), the offence for which the accused was charged constituted a "one-off episode". He accepted that higher sentences might be meted out where recalcitrant drug abusers are concerned. Elaborating on this, he said (at [60]):

> … I would also suggest, for the future, that if the Prosecution intends to press for a particularly deterrent sentence in relation to a consumption offence, it should adduce evidence either through the Statement of Facts or otherwise of the circumstances pertaining to the act of consumption. *PP v Simmonds Nigel Bruce* is a helpful illustration. The Statement of Facts in that case makes it abundantly clear that he was a confirmed drug addict. Such persons should receive more severe sentences. *While such persons are in literal terms first-time offenders in the sense that they are facing the music for the first time*, ***serious consideration ought to be given to whether they should receive a sentence outside the general tariff.*** *If there is indeed convincing evidence of repeated drug abuse and a history of flagrant disregard of the MDA, then it may only be appropriate that such offenders receive their just dessert in the form of enhanced sentences.* ***In so far as such offenders are concerned, one might even say cogently, that the 'first-time offender' label is a legal misnomer.*** … [emphasis in original omitted; emphasis added in italics and bold italics]

The point that Rajah J was making is that a departure from the usual sentence imposed for first-timers would be justified if it could be shown that the offender was a confirmed addict who was fortunate to have hitherto

avoided arrest. In those circumstances, a sentence within the higher end of the sentencing range of six to 18 months' imprisonment (and higher than the benchmark sentence normally imposed for *genuine first-timers*) would, therefore, be appropriate. As I see it, this is functionally equivalent to saying, as he later did in *Angliss* ([60] *supra*), that the fact of prior offending can be used to negate the mitigatory weight of a plea that one is a first-time offender. In my view, it is not clear that Rajah J ever intended for evidence of past offending for which the offender was not charged to be used an aggravating factor *per se* to justify the enhancement of a sentence.

65 Moreover, on the facts in this case, it was clear that the evidence of the respondent's previous offending would only have emerged because the respondent was forthcoming in volunteering such information in the course of investigations. It did not appear that there was any other independent evidence pointing to his past offending. To allow his admission to operate as a standalone aggravating factor would, in effect, mean that enhanced penalties would await those offenders who are cooperative in investigations, while offenders who cynically maintain a position of reticent non-cooperation would, in the absence of other independent incriminating evidence, be "rewarded". This strikes me as unjust.

66 I would, therefore, accept that the District Judge was correct in saying that the fact that the respondent had successfully manufactured methamphetamine eight times prior to his arrest can only be used to show that he is not entitled to any sentencing discount for being a first-time offender (see the GD ([9] *supra*) at [40]). In any case, this point was of little practical significance since the respondent was traced for inhalant abuse and theft and would, therefore, not be entitled to be considered a first-time offender anyway.

The risk to public safety

67 The fifth factor – the danger to public safety – is one which I have some difficulty with. In order for such an argument to succeed, the risk to public safety must be real and not speculative. The recent decision of Menon CJ in *PP v Syed Mostofa Romel* [2015] 3 SLR 1166 ("*Syed Mostofa Romel*") is instructive. The accused in that case was an associate consultant with a firm of marine surveyors whose duties included certifying that a vessel was seaworthy and free of high risk defects. This was an integral part of the port's safety procedures, as it would not admit vessels with high risk defects due to the risks it posed to other vessels. On several occasions, the accused corruptly received sums in gratification in return for the issuance of favourable reports which either omitted or under-reported the high risk defects he noticed. The accused pleaded guilty and was sentenced. The Prosecution appealed against the sentence imposed, arguing it was inadequate because the District Judge had failed to take into account the

public safety risks involved. In response, the defence argued that the particulars of the safety risks posed had not been identified with specificity and so there was nothing to suggest that public safety was at stake. Menon CJ disagreed. He held (at [44]) that what was relevant was not the "precise nature of the safety risks", but the fact that they existed, which was undisputed, given the integral role played by the offender in ensuring the safety of the port.

68 Menon CJ distinguished the situation in *Syed Mostofa Romel* from that in the earlier case of *PP v Marzuki bin Ahmad* [2014] 4 SLR 623 ("*Marzuki*"), which had also been decided by Menon CJ. In *Marzuki*, the offender was a property executive employed by the Jurong Town Corp. His job was to conduct inspections at foreign worker dormitories and to report on any instances of non-compliance identified. The accused corruptly accepted gratification in exchange for his forbearing to report that foreign workers had been housed in several premises even though the requisite permits had not been obtained. Menon CJ noted that while the accused's actions had the "potential to affect public safety" (because the premises which he failed to report on could have been unfit to house foreign workers, thereby exposing the occupants to danger), there was nothing in the statement of facts which conclusively established that such a safety issue had in fact arisen (*Marzuki* at [31]). For that reason, he declined to place any weight on this as a sentencing consideration. The difference between *Marzuki* and *Syed Mostafa Romel* was that the risk to public safety in the former was "purely speculative" whereas the risk in the latter was uncontroverted (and incontrovertible): see *Syed Mostofa Romel* at [44].

69 In the present case, the Prosecution submitted that the respondent's actions posed an issue of public safety because the synthesis of chemicals during the manufacturing process gave rise to a risk of a chemical fire which could result in personal injury and property damage. In support of this, they pointed to the fact that the respondent had set fire to the curtains in his room on one occasion after which he decided to shift his operations to the stairwell at a nearby car park (see [5] above). This, the Prosecution submitted, was an "attempt by the Respondent to shift the risks involved in his operations further away from himself and his property, and to the public instead". The problem with this argument, in my judgment, is that the Prosecution had not shown clearly where the danger to the public lay. In this sense, I thought the present case was closer to *Marzuki* than *Syed Mostofa*.

70 On the facts, there was no evidence that the stairwell had ever caught fire or that passers-by or their property were ever in any form of danger. I accept that the respondent's acts *could have* affected public safety. However, the raising of a mere potentiality, without more, cannot be the basis for the enhancement of the sentence on the ground of public safety: see *Syed Mostofa* at [44]. Without venturing too far into the realm of conjecture, I

would go so far as to say that a stairwell, made as it is of concrete and metal, is quite different from a cramped bedroom filled with upholstery and all manner of flammable materials, which – judging by the photographs tendered in evidence – the respondent's bedroom was. Without excusing his conduct, I would observe that the risk of fire starting in a stairwell might well be lower compared to the risk of fire arising from the manufacture of drugs in his own bedroom. Further, the risk to public safety posed by a fire started in a stairwell in the car park is likely to be lower than that which would be posed by a fire in an apartment unit, considering the danger that such a fire would pose to his neighbours occupying the surrounding apartment units.

71 In my assessment, this was what the District Judge meant when she said that the "actual extent of the risk was not self-evident" (the GD ([9] *supra*) at [45]). What was unclear was not so much the *degree* of risk to the public but, critically, the very *existence* of a palpable risk to the public. The District Judge accepted that the synthesis of chemicals could pose a risk of fire but she held – quite rightly, in my view – that it had not been established and it was not self-evident that such a fire would be so dangerous as to pose a danger to the public.

72 On a separate but somewhat related note, the Prosecution had submitted before the District Judge that the fact that the offence took place in a residential area within 241 metres from a primary school was also an aggravating factor. The District Judge rightly placed no weight on this argument, reasoning pointedly in her GD that "there was no evidence of anyone else being present or exposed to what the respondent did" (at [44]). This argument did not feature in the Prosecution's submissions on appeal but, if it had been raised, I would have had no hesitation rejecting it for the same reason stated by the District Judge.

73 In summary, I was satisfied that the District Judge had properly taken the relevant aggravating and mitigating factors into account, placing the appropriate degree of weight on each. I noted in particular that she had accepted the respondent's genuine remorse in readily cooperating with the authorities in their investigations, even though little weight could be attached to his near-inevitable plea of guilt.

Conclusion

74 The appeal revolved around the adequacy of the sentence in respect of the s 10A(1)(*c*) charge. On my assessment of the facts, this case involved a relatively low degree of harm since the possession of the 126 tablets in question involved a quantity sufficient only for personal consumption (*ie*, Category 4 harm). I characterised the respondent's conduct as involving the lower end of Category B culpability and thus – taking into account both culpability and harm – I differed from the District Judge's view as to the appropriate starting point for sentencing for the offence. In my view, the

starting point in this case should have been at least three years' imprisonment.

75 However, I was mindful that appellate intervention is warranted only in limited circumstances. While my analysis had led me to conclude that a higher sentence in the range of about five years' imprisonment could have been imposed in respect of the s 10(1)(*c*) charge, the mere fact that an appellate court would have awarded a higher sentence is not a sufficient basis to compel intervention (see *Angliss* ([60] *supra*) at [14]). In the overall analysis, I did not find the sentence of four years and six months' imprisonment imposed by the District Judge or the aggregate sentence of six years' imprisonment to be manifestly inadequate. In my judgment, and having considered all the circumstances, I was satisfied that the sentence imposed was within the bounds of the sentencing discretion that was conferred on the District Judge and I, therefore, dismissed the Prosecution's appeal.

Reported by Scott Tan.