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

[2022] SGHC 275

Magistrate's Appeal No 9118 of 2022

Between

Chelsea Tan Yan Qi

… *Appellant*

And

Public Prosecutor

… *Respondent*

EX TEMPORE JUDGMENT

[Criminal Procedure and Sentencing — Appeal]
[Criminal Procedure and Sentencing — Sentencing — Forms of punishment]

TABLE OF CONTENTS

Tan Yan Qi Chelsea
v
Public Prosecutor

[2022] SGHC 275

General Division of the High Court — Magistrate's Appeal No 9118 of 2022/01
Vincent Hoong J
2 November 2022

2 November 2022

Vincent Hoong J (delivering the judgment of the court *ex tempore*):

1 Where imprisonment and a fine are options available to a sentencing court, a common issue is whether the custodial threshold is crossed in a given case. A less common issue, but one which arises on the facts of the present case, is whether a court which has deemed a fine to be an appropriate sentence should nevertheless impose a custodial sentence on an indigent offender who is unable to pay the fine. This appeal presents an opportunity to address this issue.

Background facts

2 The appellant, Chelsea Tan Yan Qi, pleaded guilty to nine charges. These spanned three charges under the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA") and six charges under the Tobacco (Control of Advertisements and Sale) Act (Cap 309, 2011 Rev Ed) ("TCASA").

3 The appellant does not take issue with the sentences she received for her offences under the MDA.[1] It thus suffices to note that the appellant pleaded guilty to: (a) one charge under s 5(1)(*a*), punishable under s 33(1) of the MDA for trafficking not less than 3.33g of vegetable matter which was analysed and found to be cannabis to an officer of the Central Narcotics Bureau for $80 ("Trafficking Charge"); (b) one charge under s 8(*b*)(ii), punishable under s 33(3A) of the MDA for consuming methamphetamine ("Consumption Charge"); and (c) one charge under s 8(*a*), punishable under s 33(1) of the MDA for possessing not less than 2.69g of methamphetamine ("Possession Charge").

4 As for the appellant's offences under the TCASA, these broadly pertained to her acts of purchasing electronic cigarettes ("E-Cigarettes") and liquids ("E-Liquids") or pods ("E-Pods") containing nicotine from a supplier in Johor Bahru ("JB"), Malaysia, importing these products into Singapore and either offering them for sale on mobile messaging applications such as Telegram and WhatsApp or possessing these products. More specifically:

> (a) On 28 August 2019, the appellant was found to be in possession of 108 sets of E-Cigarette devices, which were designed to resemble a tobacco product, for the purpose of sale. These devices were found in a vehicle the appellant and her husband, Yeo Zhen Ning ("Yeo"), rented for the purpose of importing E-Cigarette devices into Singapore. This formed the basis of an offence under s 16(1)(*a*), punishable under s 16(3)(*a*) of the TCASA ("21st Charge").[2]

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1 Appellant's Written Submissions dated 21 October 2022 ("AWS") at para 6.

2 21st Charge (Record of Proceedings ("ROP") p 22); Statement of Facts dated 24 August 2021 ("PS2") at paras 4–8 (ROP p 28).

(b) On 28 November 2019, the appellant's co-accused, Devin Fang Siong Ann ("Fang") drove to JB in a rented vehicle. The appellant purchased 41 sets of E-Cigarette devices and 356 boxes containing 1,068 pieces of E-Pods in JB and concealed them within the door panels of the vehicle. Fang drove the vehicle (with the appellant as a passenger) back into Singapore but was stopped by officers from the Immigration and Checkpoints Authority ("ICA") at the Woodlands Checkpoint. ICA officers searched the vehicle and discovered the prohibited products. The foregoing formed the basis of two offences. First, an offence under s 16(1)(*a*), punishable under s 16(3)(*a*) of the TCASA, read with s 34 of the Penal Code (Cap 224, 2008 Rev Ed) ("PC"), for importing imitation tobacco products (namely, 34 sets of RELX devices, six sets of Smok® vaporiser kits, and 1 set of Caliburn vaporiser kit) into Singapore in common intention with Fang ("8th Charge").[3] Second, an offence under s 15(1)(*b*), punishable under s 15(5) of the TCASA, read with s 34 of the PC, for importing harmful tobacco products (namely, 356 boxes containing 1,068 pieces of E-Pods and seven bottles of E-Liquids) into Singapore in common intention with Fang ("9th Charge").[4]

(c) On 20 December 2019, the appellant committed an offence under s 16(1)(*a*), punishable under s 16(3) of the TCASA for offering to sell four sets of E-Cigarettes to one "John Bohyd" *via* WhatsApp for $365 ("15th Charge").[5]

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3 8th Charge (ROP p 17); PS2 at paras 9–11 (ROP pp 28–29).

4 9th Charge (ROP p 18); PS2 at paras 9–11 (ROP pp 28–29).

5 15th Charge (ROP p 20); PS2 at paras 12–14 (ROP pp 29–30).

(d) On 21 December 2019, the appellant committed an offence under s 15(1)(*b*), punishable under s 15(5) of the TCASA for selling 30 bottles of E-Liquids containing 35mg of nicotine to one "Danz" for $300 ("16th Charge").[6]

(e) Finally, on 23 December 2019, the appellant, Fang and Yeo drove to JB in a rented vehicle. They purchased 133 boxes containing 399 pieces of E-Pods from a store in JB, concealed the items in the seats and panel of the vehicle and drove back into Singapore. The items were discovered by ICA officers at the Woodlands Checkpoint when the party attempted to enter Singapore. For importing harmful tobacco products into Singapore, the appellant committed an offence under s 15(1)(*b*), punishable under s 15(5) of the TCASA, read with s 34 of the PC ("13th Charge").[7]

The DJ's decision

5 The detailed grounds of the DJ's decision can be found at *Public Prosecutor v Chelsea Tan Yan Qi* [2022] SGDC 142. In short, the DJ imposed imprisonment terms of five years, one year, and ten months in respect of the appellant's Trafficking Charge, Consumption Charge and Possession Charge.[8]

6 Turning to the appellant's offences under the TCASA, the DJ rejected the appellant's counsel's submission that the appellant ought to be sentenced to imprisonment because she would not be able to pay any fines imposed on her. Whilst the DJ noted the parties' agreement "that the [appellant] would not be

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6 16th Charge (ROP p 21); PS2 at paras 12–14 (ROP at pp 29–30).

7 13th Charge (ROP p 19); PS2 at paras 17–19 (ROP at p 30).

8 Grounds of Decision ("GD") at [28]–[38] (ROP at pp 108–112).

able to pay the fine", he declined to impose custodial sentences on the appellant as "no clear evidence regarding the [appellant's] financial situation [was] provided to the court".[9] He added that his decision to impose fines on the appellant was not necessarily disadvantageous to her. Given the nature of her offences, he would not "have been minded to impose the nominal imprisonment terms sought by the Defence" even if custodial sentences were appropriate.[10]

7 Having determined that fines were appropriate sentences for the appellant's offences under the TCASA, the DJ imposed the fines sought by the Prosecution. The Prosecution calibrated these fines with reference to a number of unreported precedents. The Defence did not challenge the Prosecution's proposed figures.[11]

8 The Defence nevertheless advanced a position on the appropriate duration of the in-default imprisonment sentences tied to the fines. With reference to *Public Prosecutor v Takaaki Masui and another and other matters* [2022] 1 SLR 1033 ("*Takaaki (CA)*") as well as *Public Prosecutor v Ang Wee Tat Vida* [2016] SGDC 163 ("*Vida Ang*"), the Defence suggested that $100,000 of unpaid fines broadly pertained to an in-default imprisonment term of one month.[12] The Defence applied this ratio to the present case and sought in-default sentences of between one and three days' imprisonment *per* charge and an aggregate in-default sentence of nine days.[13]

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9 GD at [42]–[44] (ROP at pp 116–117).

10 GD at [44] (ROP at pp 116–117).

11 GD at [45] (ROP at p 117).

12 GD at [49]–[51] (ROP at pp 118–119).

13 GD at [27], [47] (ROP at pp 106–107, 117).

9 The DJ declined to adopt the ratio of unpaid fines to in-default imprisonment terms purportedly engendered by *Takaaki (CA)* and *Vida Ang*. In his view, the offenders in the two cases "were facing a much higher quantum of fines" and it was hence necessary "to calibrate the in-default sentences such that these would not be crushing or offend the totality principle". Furthermore, the purported ratio did not comport with all the in-default sentences imposed in *Vida Ang*.[14]

10 That said, the DJ observed that an in-default sentence did not generally increase at the same rate as the quantum of a fine. With this in mind, the DJ imposed the following sentences on the appellant for her offences under the TCASA:[15]

Charge	**Sentence**
21st Charge	$2,000 fine, in default, five days' imprisonment
8th Charge	$2,000 fine, in default, five days' imprisonment
9th Charge	$10,000 fine, in default, 16 days' imprisonment
15th Charge	$2,500 fine, in default, seven days' imprisonment
16th Charge	$2,500 fine, in default, seven days' imprisonment
13th Charge	$4,000 fine, in default, ten days' imprisonment

14 GD at [51] (ROP at p 119).

15 GD at [1] (ROP at pp 95–99).

11 Finally, the DJ ordered the imprisonment terms pertaining to the Trafficking Charge and the Possession Charge to run consecutively. The appellant's global sentence was thus five years' and ten months' imprisonment and a fine of $23,000, in default, 50 days' imprisonment.[16]

The parties' submissions

The appellant's submissions

12 The appellant submits that the DJ erred in sentencing her to fines for her offences under the TCASA. A fine should not be imposed when it is clear an offender cannot pay it. That an offender who does not pay a fine will have to serve a default term of imprisonment is no answer to the imposition of a fine in the first place; a default term of imprisonment is imposed to prevent the evasion of a fine and is not a proxy for an ordinary imprisonment sentence.[17]

13 In this connection, the appellant is impecunious. The Prosecution accepted that the appellant was not able to pay a fine.[18] The DJ did not, at any time, challenge the parties' common position or ask for evidence of the appellant's ability to pay the fines.[19] Weight should also be accorded to the fact that the appellant was remanded for more than two years by the time she was sentenced, which shows that the appellant did not come from a family of

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16 GD at [3], [60] (ROP at pp 100, 122).

17 AWS at paras 8.1, 10–14.

18 AWS at para 22.

19 AWS at para 23.

means,[20] as well as the fact that the Defence informed the DJ that they were representing the appellant on a pro bono basis.[21]

14 Additionally, if this court agrees with the appellant that she should have been sentenced to imprisonment for her offences under the TCASA, these imprisonment terms should not be longer than the in-default terms imposed by the DJ.[22] The contrary position would effectively punish the indigent,[23] pay insufficient heed to the harsher nature of imprisonment,[24] and place the appellant in a worse position than if she had simply failed to pay the fines.[25]

15 Alternatively, the in-default imprisonment term of 50 days is manifestly excessive.[26] With reference to *Takaaki (CA)*, the default sentence should be calibrated on the basis of one month's imprisonment for approximately every $100,000 of unpaid fine. This results in an aggregate in-default imprisonment term of nine days, which is sufficient to deter the appellant from evading payment of the fines.[27]

The Prosecution's submissions

16 The Prosecution submits that fines are the usual penalties for offences under the TCASA, which are regulatory in nature.[28]

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20 AWS at para 24.

21 AWS at para 25; ROP p 90 (3/6/22 NE, lines 17–29).

22 AWS at paras 28–33.

23 AWS at paras 34–37.

24 AWS at paras 38–43.

25 AWS at para 44.

26 AWS at para 8.2.

27 AWS at paras 59–70.

28 Respondent's Submissions dated 21 October 2022 ("RS") at paras 18–19.

17 Next, the DJ was correct to impose fines on the appellant as there was insufficient evidence that the appellant could not pay the fines.[29] While the Prosecution accepted that the appellant was "indigent", the High Court had previously noted that it is "frequently a difficult matter for the court to decide whether or not a defendant will in truth be unable to come up with the money to pay a fine" (*Low Meng Chay v Public Prosecutor* [1993] 1 SLR(R) 46 ("*Low Meng Chay*") at [13]).[30] That the appellant was in remand at the time of sentencing and was represented by lawyers acting pro bono did not mean that she did not have the ability to pay the fines.[31]

18 Finally, the in-default sentences imposed by the DJ were not manifestly excessive. The in-default imprisonment terms ranged from five to 16 days. They were well within the limit prescribed by s 319(1)(*d*)(ii) of the Criminal Procedure Code 2010 (2020 Rev Ed) ("CPC") and commensurate with the respective fines ranging from $2,000 to $10,000.[32] The appellant's attempts to compare the in-default sentence she received with those imposed on other offenders and discern a ratio of in-default imprisonment terms to unpaid fines were futile exercises. Sentencing is a fact-specific exercise.[33]

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29 RS at paras 20–22.

30 RS at para 22.

31 RS at para 23.

32 RS at para 28.

33 RS at para 29–30.

My decision

Whether the DJ erred in imposing fines on the appellant for her offences under the TCASA

19 In sentencing an offender, the court's task is to mete out the appropriate punishment, having regard to the gravity of the offence, the culpability of the offender and the offender-specific aggravating and mitigating factors (*Wham Kwok Han Jolovan v Attorney-General and other appeals* [2020] 1 SLR 804 ("*Jolovan Wham*") at [56]).

20 Where imprisonment and fines are options available to the sentencing court, imprisonment is generally regarded as a more severe punishment than a fine. This is reflected in the fact that the custodial threshold is crossed only for more egregious instances of an offence (*Jolovan Wham* at [57]). To give an example, the indicative sentence range for an offence under s 323 of the PC disclosing low harm is a fine or a short custodial term of up to four weeks. This range, however, increases to between six to 24 months' imprisonment where the offender has caused serious harm (*Low Song Chye v Public Prosecutor and another appeal* [2019] 5 SLR 526 at [77]). The foregoing can be explained on the basis that a custodial sentence constitutes a greater restriction on the liberty of an individual.

21 That said, the case law indicates that the court has the power to impose a custodial sentence where a fine would otherwise be appropriate. In *Low Meng Chay*, Yong Pung How CJ held that where it is unambiguously clear that an offender cannot pay a fine, the fine should not be imposed even though the court would have preferred to impose a fine rather than a short term of imprisonment (at [13]). In such circumstances, the court should recognise the reality that the offender will inevitably be imprisoned and calibrate the appropriate term of

imprisonment from that perspective, instead of from the perspective of an imprisonment term being a penalty for defaulting on payment of a fine (*Jolovan Wham* at [57]). Similarly, in *Yap Ah Lai v Public Prosecutor* [2014] 3 SLR 180 ("*Yap Ah Lai*"), the High Court observed that fines should not generally be imposed where these are beyond the means of the offender to pay; default terms of imprisonment are meant to punish the non-payment of a fine and not to serve as a substitute form of punishment for the primary offence (at [18], [57(a)]). Consistent with this, an in-default sentence must run consecutively with any other imprisonment terms (including other in-default sentences) to which the offender may be sentenced under s 319(1)(*b*)(v) of the CPC.

22 Against this backdrop, I find that the DJ erred in imposing fines, rather than custodial sentences, on the appellant for her offences under the TCASA. Principally, the DJ accorded insufficient weight to the fact that the Prosecution unequivocally accepted that the appellant was unable to pay the global fine it sought, which, I note, was the sum eventually imposed by the DJ.[34] Whilst the DJ considered that parties did not provide "clear evidence regarding the [appellant's] financial situation" to the court,[35] I find that any lack of evidence must be understood in light of the common position adopted by parties. In this particular circumstance, it is overly onerous to demand that the offender adduce further evidence of her inability to pay a potential fine.

23 I stress that my finding above is predicated on the unique facts of the present case. It does not stand for the wider proposition that an offender who proffers a bare assertion that he is impecunious and unable to pay a potential

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34 ROP p 144 (HSA Prosecution's Sentencing Submissions dated 31 May 2022 at para 6).

35 GD at [44] (ROP at p 116).

fine must invariably be sentenced to imprisonment, as compared to fines. Nor does it allow an offender to elect to serve a custodial sentence, in place of a fine. Indeed, the exceptional nature of the present case furnishes a basis to distinguish *Takaaki Masui v Public Prosecutor and another appeal and other matters* [2021] 4 SLR 160 ("*Takaaki (HC)*"), which was relied upon by the DJ and the Prosecution. In *Takaaki (HC)*, the High Court declined to impose imprisonment in place of fines it meted out on the offenders on the basis that the Defence did not adduce "any evidence [to show] that [the offenders] will not be able to afford the fines" (at [317]). There was, however, no evidence that the Prosecution accepted the position advanced by the Defence in *Takaaki (HC)*.

24 The foregoing is dispositive of whether the appellant ought to have been sentenced to imprisonment (rather than fines) for her offences under the TCASA. Nevertheless, for completeness, I deal briefly with some of the appellant's remaining contentions. I do not consider the fact that the appellant was remanded or represented by counsel acting pro bono to assist her case. These are neutral factors that do not, in and of themselves, show that an offender is unable to pay a potential fine. Offenders may be remanded for a multitude of reasons and there is no evidence that the appellant was remanded because of her impecuniosity. Going further, in so far as bail is posted by someone other than a suspected offender, and this individual may decline to post bail for reasons other than the offender's indigence, the inference that an offender cannot afford to pay a fine because she is remanded is not, in and of itself, a strong one. Similarly, there are many reasons an offender may be represented by pro bono counsel. I do not consider this fact to show that an offender is unable to pay the fines meted out on her.

25 I note also that the DJ opined that his decision to impose fines and in-default sentences on the appellant did not "necessarily put [her] at any

disadvantage" as he "would not have been minded to impose the nominal imprisonment terms sought by the Defence".[36] Whilst I do not understand the DJ to be conflating ordinary and in-default imprisonment terms, I highlight that whether the appellant was better or worse off for receiving in-default imprisonment sentences is, to my mind, an irrelevant consideration. An in-default imprisonment term "is not to be taken as a proxy for the punishment imposed for the original offence". It serves a distinct purpose, namely, to deter an offender from evading payment of the fine (*Yap Ah Lai* at [18], [22]).

26 Finally, in light of my findings above, the issue of whether the in-default sentences imposed by the DJ are manifestly excessive is moot. I nevertheless make one observation. I do not consider it appropriate to calibrate an in-default sentence with reference to a precise mathematical ratio. For one, *Takaaki (CA)* does not stand for the proposition that $100,000 in unpaid fines broadly translates to an in-default imprisonment term of one month. Neither does it permit the extrapolation of such a proposition. The Court of Appeal did not confront the issue of how in-default sentences correlate to unpaid fines. Furthermore, sentencing is not a mathematical exercise and the purpose of an in-default sentence, namely to deter an offender from evading payment of the fine (*Yap Ah Lai* at [18]), suggests that the court should have regard to the personal circumstances of the offender in determining the length of an in-default sentence.

The imprisonment terms to be imposed on the appellant for her offences under the TCASA

27 I now turn to the imprisonment terms to be meted out on the appellant for her offences under the TCASA. I am unable to accept the appellant's

[36] GD at [44] (ROP p 116).

submission that an imprisonment term imposed as a consequence of an offender's inability to pay a fine must not exceed an in-default imprisonment term imposed for the same offence.[37] As I alluded to earlier, an ordinary imprisonment term and an in-default imprisonment sentence serve different purposes. The former punishes an offender for committing the predicate offence whilst the latter seeks to deter an offender from evading a fine (see [26] above). It follows that there is no logical reason why an in-default imprisonment term should act as an upper limit on an ordinary sentence of imprisonment. On a more practical level, the two forms of imprisonment terms are mutually exclusive. It is only after a court sets aside a fine and the accompanying in-default imprisonment term that the imprisonment term to be imposed in respect of the predicate offence becomes a live question. Yet a first-instance court sentencing an indigent offender to imprisonment does not have an in-default imprisonment term at its disposal for use as a yardstick; this diminishes the utility of the appellant's submission.

28 In calibrating the imprisonment term to be imposed on an offender by reason of her inability to pay a fine, the court must be alive to the reality that the custodial sentence is imposed because of the offender's indigence and not because the egregiousness of the offence independently calls for a custodial sentence. In my view, this acts as a moderating influence on the length of the custodial sentence to be meted out on such an offender.

29 With this in mind, and having regard to the number of infringing articles subject of the appellant's offences under the TCASA, the appellant's period of offending (approximately four months), the charges taken into consideration for

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[37] AWS at paras 28–45; Appellant's Further Written Submissions dated 31 October 2022 at para 17.

the purpose of sentencing, and the fact that the appellant took steps to conceal the items subject of the 8th, 9th and 13th Charges within the relevant vehicles, I impose the following sentences on the appellant:

Charge	**Sentence**
21st Charge	One week's imprisonment
8th Charge	One week's imprisonment
9th Charge	Two weeks' imprisonment
15th Charge	One week's imprisonment
16th Charge	One week's imprisonment
13th Charge	Two weeks' imprisonment

30 I order the sentences pertaining to the 9th and 13th Charges to run consecutively with the imprisonment terms the DJ imposed in respect of the Trafficking Charge and the Possession Charge.

Conclusion

31 For the above reasons, I allow the appeal. The fines imposed by the DJ in respect of the appellant's offences under the TCASA are set aside and substituted with the imprisonment terms set out at [29] above. The appellant's global sentence is hence five years', ten months' and four weeks' imprisonment.

Vincent Hoong
Judge of the High Court

Suang Wijaya and Shirin Chew (Eugene Thuraisingam LLP) for the appellant;
Deputy Attorney-General Tai Wei Shyong SC and Ruth Teng (Attorney-General's Chambers) for the respondent.