IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 217

Criminal Case No 48 of 2017

Between

Public Prosecutor

And

Adri Anton Kalangie

GROUNDS OF DECISION

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

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Public Prosecutor
v
Adri Anton Kalangie

[2017] SGHC 217

High Court — Criminal Case No 48 of 2017
Lee Seiu Kin J
17 July 2017

30 August 2017

Lee Seiu Kin J:

Introduction

1 The accused, Adri Anton Kalangie ("the Accused"), is a male Indonesian national who was 41 years old at the time of his arrest. He pleaded guilty to a single charge of importing not less than 249.99g of methamphetamine into Singapore under s 7 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the MDA"), which offence is punishable under s 33(1) of the MDA. On 17 July 2017, I accepted the Accused's plea of guilt and convicted him accordingly.

2 After hearing submissions on sentencing from both the Prosecution and Defence, I sentenced the Accused to 25 years' imprisonment, backdated to the date of his arrest, and 15 strokes of the cane. The Accused has appealed against the sentence and I now give the grounds of my decision.

Facts

Background

3 Sometime in 2008, the Accused was introduced by his friend, Tina, to a Nigerian man known to him as "Frank". Tina informed the Accused that Frank was a businessman who could provide him with a job. The Accused met with Frank twice around this period, but soon lost contact with Frank. It was not until 2013 that Frank called the Accused and offered him a job. The Accused accepted Frank's invitation to take a fully-paid flight to Guangzhou, China to learn more about this job.

4 Upon meeting Frank in Guangzhou, the Accused learned that Frank was part of a drug syndicate in the business of delivering illicit drugs from China to Indonesia. Frank then invited the Accused to work for him, and promised to pay him 10m Indonesian Rupiah (about S$1,000) per delivery. The Accused agreed to work for Frank.

5 Frank informed the Accused that the drug pellets intended for delivery would be swallowed or inserted into the rectum through the anus. The Accused practiced this method of ingestion after witnessing a demonstration by one of Frank's runners. He then began making deliveries for Frank by collecting consignments of "ice" from China, and delivering them to Jakarta, Indonesia. "Ice" is a street name for methamphetamine.

Facts pertaining to the offence

6 On 17 March 2016, while the Accused was in Guangzhou, Frank informed the Accused that there was a stock of "ice" ready for delivery to Jakarta. Frank had promised the Accused a remuneration of 16m Indonesian

Rupiah (about S$1,600) for the delivery. The Accused subsequently received 43 pellets of "ice" at the hotel room where he was staying. On 20 March 2016, he swallowed 29 pellets and inserted ten into his rectum. He also concealed three pellets in the pockets of a pair of Bermuda pants that he was wearing, and one pellet in his shoe. He then put on a pair of jeans over the Bermuda pants.

7 On 21 March 2016 at 1.30am, the Accused departed on a flight from Guangzhou to Singapore, planning to transit in Singapore en route to Jakarta. However, he missed his transit flight from Singapore to Jakarta. He remained in the Transit Hall of Changi Airport until 23 March 2016.

8 At about 5.30am on 23 March 2016, a customer service officer of the Changi Airport Group, Herdyka Hamka Bin Md Horip ("Herdyka"), approached the Accused to inform him not to smoke in the Transit Hall. In the course of his conversation with the Accused, Herdyka discovered that the Accused had missed his flight to Jakarta. He also asked the Accused if he was drunk. In response, the Accused claimed that a child had purchased alcohol for him. When Herdyka informed the Accused that a child would not be allowed to do so under the laws of Singapore, the Accused cried and apologized repeatedly, and said in Indonesian, "*Saya tahu yang saya salah*", "*Saya takut di pukulin*" and "*jangan pukulin saya*", which Herdyka understood to mean, "I know I'm wrong", "I am afraid to be beaten", and "don't beat me up".

9 Herdyka then accompanied the Accused to the transfer counter, where airport staff issued the Accused a new departure ticket at no cost for flight SQ 952, which was scheduled to depart for Jakarta on 23 March 2016 at 6.40am. Herdyka then escorted the accused to the departure gate. On the way to

the departure gate, the accused continued crying and repeating the same words in Indonesian.

10 As Herdyka and the Accused reached the departure gate, the Accused pulled Herdyka aside and said that he was in the wrong. Upon further questioning, the Accused admitted that he was in possession of drugs. When questioned where the drugs were, the Accused pointed to his shoe and his stomach. Herdyka then called for Police assistance, whereupon officers from the Airport Police Division and the Central Narcotics Bureau attended to the incident. The accused informed the police officers that there were drugs in his stomach. He also produced one pellet of "ice", marked A1, from his shoe, and revealed that he had other drugs which were either swallowed or inserted into his anus. At about 8.43am, the accused was arrested on suspicion of having committed a drug importation offence. He was then sent to Changi General Hospital ("CGH") for a medical examination.

11 A search was conducted on the Accused at CGH. Three pellets were recovered from the pocket of his Bermuda pants, and collectively marked A2. Following his admission into CGH, the accused underwent an X-ray, which revealed that there were 39 pellets within his rectum. No obvious leakage or rupture of the pellets was seen.

12 The Accused remained at CGH from 23 March 2016 to 4 April 2016. During this time, he excreted the 39 pellets into his diapers. The pellets were seized shortly after each excretion by CNB officers, and marked A3 to A22.

13 All exhibits recovered from the accused were subsequently sent to the Health Sciences Authority. Upon analysis, the 43 pellets were found to contain

not less than 275.44g of methamphetamine. In the event, the Prosecution proceeded with a charge in respect of 249.99g of methamphetamine.

The parties' submissions

The Prosecution's submissions

14 The Prosecution argued that the appropriate starting point was the decision of the Court of Appeal in *Suventher Shanmugam v Public Prosecutor* [2017] 2 SLR 115 ("*Suventher*"), which adopted the sentencing approach set out in *Vasentha d/o Joseph v Public Prosecutor* [2015] 5 SLR 122 ("*Vasentha*") (at [28]). On the strength of *Suventher*, the sentence for an offence of drug importation should be proportional to the quantity of drugs involved.

15 The Prosecution contended that the framework used in *Suventher* could be applied for methamphetamine. In *Suventher*, the court divided the sentence range into three roughly equal bands of quantities from 330g to 500g of cannabis (at [29]). The Prosecution contended that the range of 167g to 250g of methamphetamine could similarly be divided into three bands. Since the importation of 167g to 250g of methamphetamine attracted the same range of prescribed punishment as the importation of 330g to 500g of cannabis, the Prosecution submitted that a similar range of sentences for the importation of methamphetamine could be derived in the manner set out in the table below:

Sentence Band	Quantity of cannabis (based on *Suventher*)	Quantity of methamphetamine (proposed)	Imprisonment (years)	Caning
1	330 g – 380 g	167.00–192.99g	20–22	15 strokes
2	381 g – 430 g	193.00–216.99g	23–25	
3	431 g – 500g	217.00–250.00g	26–29	

16 The conviction, involving 249.99g of methamphetamine, fell within the highest band and the indicative range of the sentence was therefore 26–29 years, along with the mandatory 15 strokes of the cane.

17 As for the appropriate sentence within the indicative range of 26–29 years, the Prosecution argued that there should be an "uplift" from the starting point of 26 years in light of the following aggravating factors:

(a) The Accused was carrying a significant quantity of drugs estimated to be worth about $62,000.

(b) The Accused had concealed the drugs in a manner that was virtually impossible to detect via routine airport screening. His wrongdoing had only been fortuitously detected because he had missed his connecting flight.

(c) The drug pellets were well-designed to withstand leakage or rupture. The ingenuity of this method and the manner in which the drugs were concealed pointed to the involvement of a "sophisticated and well-organized criminal enterprise". The facts of this case showed the "extreme and desperate lengths that smugglers have resorted to in illicit drug transportation".

(d) The Accused had committed the offence for financial gain, and had acted out of "pure self-interest and greed".

18 Based on these aggravating factors, the Prosecution sought a sentence of at least 27 years' imprisonment with 15 strokes of the cane. In support of its position, the Prosecution tendered a table of precedents setting out three cases for drug trafficking or importation in which the Prosecution had similarly

exercised its discretion to proceed on non-capital charges despite the fact that the actual quantity of drugs attracted the death penalty. These cases had all been decided post-*Suventher*, with the offenders receiving sentences within a range of 25 to 27 years' imprisonment with 15 strokes of the cane.

The Defence's submissions

19 In oral submissions, the Defence urged me to consider that the Accused had committed the offence *before Suventher* was decided. At that time, "the benchmark was different" and offenders who had committed similar importation offences under the MDA had received sentences of about 21 years "on a regular basis". It was only in *Suventher* that the Court of Appeal clarified that the sentence should reflect the quantity of drugs trafficked or imported. Thus it was suggested that this court was not bound to follow the sentencing approach set out in *Suventher*. In this regard, the Defence referred to *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 ("*Hue An Li*"), where the High Court recognised that in certain circumstances, the courts might limit the retroactive effect of their pronouncements. It was argued that I should similarly take *Suventher* as only applying *prospectively* and not *retroactively*. Since the offence in question was committed before *Suventher* was decided, the sentencing framework in *Suventher* should be given less weight in determining the appropriate sentence.

20 The Defence argued that the relevant sentencing precedents were the cases of *Pham Duyen Quyen v Public Prosecutor* [2017] SGCA 39 ("*Pham Duyen Quyen*") and *Public Prosecutor v Nguyen Thi Tanh Hai* [2016] 3 SLR 347 (*"Nguyen Thi Tanh Hai*"). I note that the sentences in both these cases were meted out before *Suventher* was decided. In *Pham Duyen Quyen*, the accused had been charged with importing 3,037g of methamphetamine and had claimed

trial. She was sentenced at first instance to 24 years' imprisonment (see *Public Prosecutor v Pham Duyen Quyen* [2016] 5 SLR 1289 at [58]), which sentence was upheld on appeal. In *Nguyen Thi Tanh Hai*, the accused was charged with importing 2,041g of methamphetamine. She was sentenced to 23 years' imprisonment, including 12 months' imprisonment in lieu of caning.

21 Defence counsel also highlighted the following mitigating factors:

(a) The Accused was untraced.

(b) The Accused was deeply remorseful and had pleaded guilty at the earliest opportunity. He had rendered full cooperation to the police, and had provided CNB with all the information he knew about Frank.

(c) The drugs the Accused was carrying were intended for buyers in Indonesia and were never intended for the Singapore market.

(d) The Accused was a mere courier and his role was limited to carrying out acts in accordance with Frank's instructions.

(e) The Accused came from a poor family and had experienced difficulties securing a sufficiently well-paying job to support himself and his parents. Although the method in which the drugs were transported caused him pain, discomfort and negative effects on his health, he had taken up the job of a drug courier because he wanted to improve his financial situation and his parents' lives.

(f) The Accused was partly driven to commit the offence because of his fear of Frank.

22 The Defence also sought to distinguish the three cases highlighted by the Prosecution in its table of sentencing precedents as follows:

(a) In Criminal Case No 38 of 2017 (*Public Prosecutor v Tamil Alagan A/L Gunasekaran*) (hereinafter "CC 38 of 2017"), the Prosecution had highlighted that the accused was the directing mind behind a drug enterprise. The accused was sentenced to 27 years' imprisonment.

(b) In Criminal Case No 34 of 2017 (*Public Prosecutor v Jothiswaran A/L Arumugam*) (hereinafter "CC 34 of 2017"), the Prosecution had highlighted that the accused had "imported large quantities of drugs into Singapore, and was assisting a drug trafficking syndicate". He received a sentence of 25 years' imprisonment.

(c) In *Public Prosecutor v Hari Krishnan Selvan* [2017] SGHC 168 ("*Hari Krishnan Selvan*"), the Prosecution had submitted that the accused enlisted the help of one 'Nor' to aid him in trafficking the drugs. The accused was sentenced to 26 years' imprisonment.

23 In light of the mitigating factors and the sentencing precedents, the Defence sought a sentence of 20 years' imprisonment and 15 strokes of the cane in written submissions. In oral submissions, however, the Defence advanced an alternative position of 23 years' imprisonment and 15 strokes of the cane.

Decision and reasons

24 I was of the view that the appropriate sentence in this case was imprisonment of 25 years with 15 strokes of the cane. This sentence was based on my findings on the following issues, which I shall discuss in turn:

(a) Whether the framework in *Suventher* was applicable.

(b) On the premise that *Suventher* is applicable, what was the appropriate sentence in light of the aggravating and/or mitigating factors?

Whether the framework in* Suventher *was applicable

25 Since the offence in question was committed before *Suventher* was decided, whether or not the sentencing framework in *Suventher* was applicable depended on whether *Suventher* applied both retrospectively and prospectively, or only prospectively. If *Suventher* applied only prospectively, the sentence in this case would fall to be determined with reference to precedents decided pre-*Suventher*.

26 In arguing that *Suventher* should apply only prospectively, the Defence relied on the case of *Hue An Li*. There, the High Court held that the default position was that all judicial pronouncements are unbound by time, applying both retrospectively and prospectively (at [124]). However, an appellate court (*ie*, a High Court sitting in its appellate capacity and the Court of Appeal) had the discretion to restrict the retroactive effect of their pronouncements in exceptional circumstances (at [124]). This discretion was to be guided by four factors:

(a) The extent to which the law or legal principle concerned is entrenched. The more entrenched a legal principle is, the greater the need for overruling of that legal principle to be only prospective. This would be measured by: (1) the position of the courts in the hierarchy

that had adopted the legal principle; and (2) the number of cases that had cited the legal principle (*Hue An Li* at [124(a)]).

(b) The extent of the change to the law. The greater the change to the law, the greater the need for prospective overruling. This depends on whether the change to the law is in the nature of a "revolutionary abandonment of a legal position" on one hand, or an "evolutionary reframing of the law" on the other (*Hue An Li* at [124(b)]).

(c) The extent to which the change to the law is foreseeable. The less foreseeable a change to the law, the greater the need for prospective overruling. In *Hue An Li* it was suggested that whether a change is foreseeable might turn on whether there were past judicial pronouncements which had expressed dissatisfaction with the previous position of law before a change was instituted (*Hue An Li* at [124(c)]).

(d) The extent of reliance on the law or legal principle concerned. The greater the reliance on the law or legal principle being overruled, the greater the need for prospective overruling (*Hue An Li* at [124(d)]).

27 In submitting that *Suventher* should apply prospectively and not retroactively, the Defence argued that the previous position that sentences had been "at the lower end of the sentencing range" for similar drug importation offences under the MDA was "quite entrenched".

28 The Prosecution responded as follows: First, the pre-*Suventher* position was not particularly entrenched as there was no clear or established sentencing tariff before *Suventher*. There had been no authoritative judgment by the Court of Appeal on this matter. Secondly, prior to *Suventher*, there had already been

"clear and established case law" suggesting that the court should explore the full spectrum of possible sentences. Thus, *Suventher* did not represent a major change to the law, and to the extent that *Suventher* had changed the law, such change was foreseeable. Thirdly, the Accused in this case could not be said to have "relied" on the pre-*Suventher* position. He had imported a quantity of drugs which attracted the death penalty, and the "legitimate expectation" for such a crime was death.

29 Having considered the above arguments, I agreed with the Prosecution that the doctrine of prospective overruling was not applicable to *Suventher*. I begin by highlighting that the High Court in *Hue An Li* had held that it was for the *appellate courts* to decide whether to restrict the retroactive effect of *their own* pronouncements (at [124]):

> Our *appellate* courts (that is, our High Court sitting in its appellate capacity and our Court of Appeal) nevertheless have the discretion, in exceptional circumstances, to restrict the retroactive effect of ***their*** pronouncements. [emphasis in original in italics, emphasis added in bold italics]

30 It was clear from the above remarks that it is the court *making* the judicial pronouncement which may restrict the retroactive effect of that pronouncement. It was not for this court to decide whether or not to apply *Suventher* retroactively or only prospectively. Only the Court of Appeal, in deciding *Suventher*, could have decided this. Thus, the most fundamental problem with the argument that *Suventher* should not be applied retroactively was this: the Court of Appeal *itself* had not indicated that the guidelines it was pronouncing on should only apply prospectively. This was unlike *Chang Kar Meng v Public Prosecutor* [2017] 2 SLR 68, where the Court of Appeal expressly stated that its disapproval of the existing precedents for rape and

robbery as being too lenient would only apply prospectively, and not to the appellant in that case.

31 In any event, I agreed with the Prosecution that the four factors mentioned in *Hue An Li* militate against any suggestion that *Suventher* should apply only prospectively. I acknowledge that the court in *Suventher* had observed an "overall trend" of sentences being at the lower end of the range (at [25]), which may suggest that this more lenient sentencing approach was entrenched to some degree. However, some two years earlier in 2015, the court in *Vasentha* had already held that the quantity of drugs that an accused person is charged with importing should be indicative of the range of possible sentences (*Vasentha* at [44]). For that reason I was of the view that *Suventher* did not represent a major change in sentencing approach, and that the change brought about by *Suventher* was indeed foreseeable.

32 Finally, I agreed with the Prosecution that the Accused could not have "relied" on the cases that had been decided pre-*Suventher*, given that he had actually imported a quantity of drugs that would ordinarily attract the death penalty. In making this comment, I am conscious of the principle that the fact that a charge has been reduced from one which would have attracted the death penalty to one which does not attract the death penalty is not relevant to sentencing (*Suventher* at [36]). I would clarify that I do not rely on the fact that the accused imported a capital quantity of drugs to justify a higher sentence. However, given that the Accused had imported an amount of drugs which would ordinarily attract the death penalty, it did not lie in his mouth to argue that he had any legitimate expectation of receiving a more lenient sentence based on the pre-*Suventher* cases.

33 For the foregoing reasons, I did not agree that prospective overruling was applicable to the principles set out in *Suventher*. I saw no reason to depart from the sentencing framework set out in that case. I also agreed with the Prosecution that based on the quantity of methamphetamine involved in the present case, the appropriate indicative sentencing range was imprisonment of 26–29 years. This was my starting point for determining the appropriate sentence. The question that followed was whether there should be any adjustment in light of the aggravating and mitigating factors.

The appropriate sentence based on the aggravating and/or mitigating factors

34 In assessing the appropriate sentence, I considered the aggravating factors highlighted by the Prosecution (see [17] above). To start with, I did not think it appropriate to treat the "significant quantity of drugs" or their high market value of $62,000 as aggravating. To do this would amount to double-counting, since the quantity of the drugs had already been taken into consideration in determining the indicative sentencing range of 26–29 years. In this regard, I note the following remarks of the Court of Appeal in *Suventher* at [37]:

> When an accused person is charged in respect of a lower quantity of drugs instead of the actual quantity involved, that lower quantity, which in practice would be just below the death penalty limit, is already used to justify a sentence at the higher end of the sentencing range … To then use the actual quantity to justify a higher sentence within that range would appear to be creating an intermediate offence of sorts between trafficking or importing 330–500g of cannabis and trafficking or importing an amount in excess of the death penalty limit. We think that would not be right.

35 Apart from the quantity of the drugs, the Prosecution also highlighted evidence of the involvement of a "sophisticated and well-organized criminal enterprise". However, as noted by the court in *Vasentha*, drug syndicates are

often transnational criminal organisations with individuals playing many different roles in the chain of operations. It would be illogical to treat all of these players as equally culpable (at [39]). Although it was clear that the Accused in this case had operated as part of a syndicate, I did not think this was a significant aggravating factor insofar as there was nothing to suggest that the Accused occupied a particularly high or significant position in the supply chain.

36 I accept, however, that there were other aggravating factors present in this case. The lengths to which the Accused had gone to conceal the drugs and to avoid detection were a relevant consideration (*Vasentha* at [50]), as was the fact that the Accused had been motivated by financial gain in carrying out the offence (*Vasentha* at [51]).

37 Notwithstanding these aggravating factors, I was of the view that they were outweighed by the mitigating factors in this case. Indeed, the mitigating factors warranted a slight downward adjustment from the lower end of the indicative range of 26–29 years' imprisonment. In this regard, I noted the fact that the Accused had confessed his crime at the first opportunity. However, I was mindful that the accused had appeared drunk to Herdyka, and it was unclear whether he had confessed out of remorse, or as a result of his apparently disoriented state. That said, I also gave significant weight to the Accused's plea of guilt, which indicated remorse and which saved the court and law enforcement agencies time and resources. The Accused had also rendered fullest cooperation to the police, and had provided them with information about Frank and his company.

38 The sentence of 25 years' imprisonment imposed on the Accused was also consistent with the cases cited by the Prosecution in its table of precedents.

Although the offenders in CC 38 of 2017 and *Hari Krishnan Selvan* were sentenced to 27 and 26 years' imprisonment respectively, I agreed that these cases were distinguishable. As for CC 38 of 2017, the Prosecution itself had submitted that the offender was the "directing mind" of a drug enterprise. As for *Hari Krishnan Selvan*, the court had specifically noted the fact that the offender had recruited and paid two individuals to assist him in trafficking diamorphine (at [11]). Thus, the most relevant sentencing precedent from the Prosecution's table of precedents was CC 34 of 2017, where the accused had received a similar sentence of 25 year's imprisonment.

Lee Seiu Kin
Judge

April Phang and Shen Wanqin (Attorney-General's Chambers) for the prosecution;
Eugene Thuraisingam, Suang Widjaya (Eugene Thuraisignam LLP) and Lim Hui Li Debby (Shook Lin & Bok LLP) for the accused.