

ASSESSMENT OF MITIGATORY WEIGHT OF AN ACCUSED PERSON'S GUILTY PLEA

A Post-Terence Ng Empirical Study and Practical Suggestions

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There are three possible justifications for treating an accused person's guilty plea as a mitigating factor. The Singapore High Court in 2006 preferred that only one of the justifications is relevant in assessing the mitigatory weight of a guilty plea. In the 2017 case of *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449, the Singapore Court of Appeal departed from that position and held that all three justifications may be relevant. This article shares the findings of an empirical study done to assess the extent to which the Singapore courts have since followed the latter position, and offers some practical suggestions moving forward.

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I. Introduction

1 An accused person who is charged by the Prosecution with committing an offence has two options to pursue. He can either elect to plead guilty or claim trial to the charge. To what extent is the accused's decision to plead guilty a relevant mitigating factor in deciding the appropriate punishment to be imposed on him? How does the accused's plea of guilt justify a sentencing discount, that is, the accused being sentenced to a less harsh

¹ I am extremely grateful to Fu Journe Hahn for his painstaking research assistance in my carrying out of the empirical study reported in this article. All errors however are mine alone.

punishment than he otherwise deserves if he had not chosen to plead guilty?

2 There are three possible justifications for treating an accused person's plea of guilt as a mitigating factor.² First, the accused's decision to plead guilty may be evidence of his genuine remorse, and therefore he need not be punished as harshly as he should be if he had disputed committing the offence ("Justification 1"). Second, the accused's guilty plea spares the victim of the offence the ordeal of testifying against the accused at trial, which often requires the victim to relive traumatic experiences. Thus, some credit is accorded to the accused in the form of a sentencing discount ("Justification 2"). Third, by the accused electing to plead guilty, the relevant investigation agency, the Prosecution, and the courts save the time and costs needed to prepare for and go through the trial. This conserves precious public resources, and credit is given to the accused in the form of a sentencing discount ("Justification 3").

3 In 2006, the High Court in the case of *Angliss Singapore Pte Ltd v Public Prosecutor*³ ("*Angliss*") considered the issue in some depth, and surmised that in Singapore, Justification 1 is the only relevant justification for treating an accused person's guilty plea as a mitigating factor. The upshot of this is that in a case where the accused pleaded guilty, in deciding whether, and if so, the extent to which the plea of guilt is a mitigating factor, the court will focus on whether the guilty plea is evidence of genuine remorse. In practice then, the Prosecution and the court pay particular attention to the strength of the evidence against the accused. This is because if the Prosecution's evidence against the accused is very strong such that a conviction is virtually certain had the accused's case proceeded to trial, then a fair inference to be made is that the accused had pleaded guilty only because he had no other better choice, and not because he was genuinely remorseful for committing the offence. Consequently, in such a

2 See, for example, *R v Millberry* [2003] 1 WLR 546 at [27]–[28] and *Hessell v R* [2011] 1 NZLR 607 at [45]–[56].

3 [2006] 4 SLR(R) 653. See also *Public Prosecutor v NF* [2006] 4 SLR(R) 849 at [57], and *Public Prosecutor v UI* [2008] 4 SLR(R) 500 at [71].

case, the court would accord minimal or no mitigatory weight to the plea of guilt.

4 Slightly more than a decade later in 2017, the Court of Appeal in the case of *Ng Kean Meng Terence v Public Prosecutor*⁴ (“Terence Ng”) had occasion to reconsider this issue as part of its effort to formulate a sentencing framework for the offence of rape. In essence, it departed from the approach taken in *Angliss*, holding that in Singapore *all three of the above justifications are relevant in assessing the extent to which an accused person’s guilty plea in a particular case is a mitigating factor*. After referring to the three justifications (which the court termed the “Millberry justifications”)⁵ and noting the position taken by the High Court in *Angliss*,⁶ the apex court proceeded to explain that:⁷

69 We think the principle of the matter is this. The criminal law exists not only to punish and deter undesirable conduct, but also to (a) help the victims of crime; (b) ensure that those suspected of crimes are dealt with fairly, justly and with a minimum of delay; and (c) to achieve its aims in as economical, efficient and effective a manner as possible ... The utilitarian approach properly reflects the contributions that a guilty plea makes to the attainment of these wider purposes of the law ...

...

71 *In assessing the proper mitigatory weight to be given to a plea of guilt, the sentencing court should have regard to the three Millberry ... justifications ... and consider the matter together with all the other offender-specific factors in calibrating the sentence to fit the facts of the case ...*

[emphasis in original omitted, emphasis added]

5 As an aside, the Court of Appeal added that in cases that are particularly grave and heinous, sentencing considerations such as retribution, general deterrence and protection of the public may assume such significant importance that even taking

4 [2017] 2 SLR 449.

5 So named after the case of *R v Millberry* [2003] 1 WLR 546 (see para 2 and n 1 above).

6 *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 at [66]–[67].

7 *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 at [69] and [71].

into account all three justifications *vis-à-vis* a guilty plea, the guilty plea may only warrant a minimal sentencing discount.⁸

6 It has been more than five years since the Court of Appeal in *Terence Ng* took the position that courts should have regard to all three justifications. This author carried out a short empirical study to assess the extent to which the first instance and appellate courts in Singapore have applied this new position. The rest of this article details the method and key findings of the study and offers some observations and practical suggestions in the light of these findings. In the main, the data gathered reveals a trend which may give rise to the perception or concern that the courts in Singapore are still applying the *Angliss* approach instead of the revised approach taken in *Terence Ng*. Particularly, although theoretically speaking Justification 3 should generally be relevant in almost every case where an accused person elects to plead guilty, it was found that there are not many cases where the courts had explicit regard to that justification in assessing the mitigatory weight of a guilty plea.

II. Methodology of study

7 This study looked at every case where a written judgment was issued by either the Magistrates' Court, the District Court, or the High Court (including, after 2 January 2021, the General Division of the High Court) in Singapore between 1 June 2017 and 31 May 2022 (both dates inclusive) involving an accused person pleading guilty to one or more offences. Such cases include first-instance and appellate sentencing decisions.

8 The starting date of 1 June 2017 was selected for being shortly after the written judgment for *Terence Ng* was issued (on 12 May 2017), while 31 May 2022 was selected as the ending date marking exactly five years from 1 June 2017.

8 *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 at [71].

9 There are 119 such judgments from the Magistrates' Court, 733 from the District Court, and 130 from the High Court. Hence, in total, this study analysed 982 written judgments.

10 Written judgments issued by the Court of Appeal for cases involving an accused person pleading guilty were not included in this study. This is because in the same five-year period there were only a small handful of such judgments (fewer than 20) and almost all of them simply recorded brief remarks delivered *ex tempore*. This meant that these judgments cannot be expected to include detailed accounts of all the relevant sentencing considerations.

11 To be sure, during the five-year period, there were numerous cases where the court had sentenced offenders who pleaded guilty to their offences, and which no written grounds of decision were issued. As the court's full grounds of reasoning in these cases are not readily available, these cases were not included in this study. Be that as it may, there is no reason to think that that materially changes any of the takeaways from this study.

12 Furthermore, for a number of the cases covered in this study, the first-instance decision may not have been affirmed in its entirety by the appellate court. Such cases were not excluded because the aim of the study was to ascertain the extent to which *both* first-instance *and* appellate courts have abided by the position adopted in *Terence Ng*.

13 For each case covered in this study, the written judgment was perused to ascertain how the court had dealt with the accused's plea of guilt in its reasoning to derive the appropriate sentence. Specific attention was paid to whether the court had applied, or at the very least alluded to, one or more of the three justifications in assessing how much mitigatory weight was to be given to the guilty plea, and this includes instances where the court had simply referred to the abovementioned paragraphs in *Terence Ng*.⁹ For example, a court will be taken to have considered Justification 1 if it had in some way linked the accused's guilty

9 See para 4 above.

plea to either his level of remorse or to the strength of the Prosecution's evidence against the accused (or to both).¹⁰ A court will be taken to have considered Justification 2 if it had examined whether the accused's decision to plead guilty had spared the victim the ordeal of testifying at trial,¹¹ and Justification 3 if it had considered whether the accused's plea of guilt saved public resources and expenses.¹²

III. Key findings

14 A preliminary finding is that in 283 of the 982 cases, the court did not expressly refer to the accused's guilty plea in its reasoning.¹³

15 Accordingly, there were 699 cases where the court did explicitly consider the accused's guilty plea in its reasoning. The key findings in respect of these 699 cases are summarised in the following table.¹⁴

10 See, for example, *Public Prosecutor v Ong Jun Hao* [2021] SGDC 24 at [6] and *Public Prosecutor v Abdul Qayyum Bin Abdul Malik* [2021] SGDC 89 at [37].

11 See, for example, *Public Prosecutor v Muhammad Alif bin Ab Rahim* [2021] SGHC 115 at [29] and [37].

12 See, for example, *Public Prosecutor v Ng Wei Long* [2019] SGMC 78 at [91] and *Ng Soon Kim v Public Prosecutor* [2020] 3 SLR 1097 at [17].

13 See, for example, *Public Prosecutor v Soo Hon Siong* [2017] SGMC 73, *Public Prosecutor v Mohamad Rasul Bin Abdul Kadir* [2021] SGDC 260 and *Prakash s/o Manikam v Public Prosecutor* [2020] SGHC 6. For these cases, there were generally legitimate reasons for the court not considering the accused's guilty plea.

14 A fuller breakdown as well as further details of the cases are on file with the author.

Table 1: Breakdown of how the courts have treated the three justifications in the 699 cases where the court did explicitly consider the accused's guilty plea in sentencing

Approach taken by court in cases where court did explicitly consider the accused's guilty plea in its reasoning	Number of cases	Percentage of cases
Did not mention or allude specifically to any of the three justifications in determining the extent to which the guilty plea was mitigatory	291	41.6%
Applied or alluded <i>only</i> to Justification 1 (remorse-based justification)	249	35.6%
Applied or alluded to Justification 1 and Justification 2 and/or Justification 3	93	13.3%
Applied or alluded to Justification 2 (spared victim from trauma justification)	57	8.2%
Applied or alluded to Justification 3 (saved public resources and expenses justification)	126	18.0%

IV. Discussion

16 A brief note should first be made about the finding in relation to Justification 2. Out of the cases where the court did explicitly consider the accused's guilty plea in assessing the appropriate sentence to be meted out, Justification 2 was applied or alluded to in only 8.2% of them. However, that finding is wholly explicable and not concerning. This is because Justification 2 is very context-specific. It can be relevant only in cases where it would clearly be traumatic for the victim to testify in court against the accused. This would generally be in cases involving offences of a sexual nature.¹⁵

17 Justification 3, on the other hand, is nowhere as context-specific. Conceptually, it should be relevant in most cases where

15 But see *Public Prosecutor v Rachel Ann Fernandez* [2020] SGDC 50, a case involving the accused pleading guilty to an offence of cheating where the victim was an elderly person, and the court at [32] applied Justification 2.

an accused person elects to plead guilty, given that there would generally be at least some public resources saved by virtue of the matter not having to be resolved through a trial. Yet, out of the cases where the court did explicitly consider the accused's guilty plea in assessing the appropriate punishment, Justification 3 was applied or alluded to in only 18.0% of them.

18 In comparison, in almost twice the number of such cases (that is, 35.6%), the court applied or alluded to *only* Justification 1. This may reasonably give rise to the appearance that post-*Terence Ng*, there are more cases in which the court is still applying the *Angliss* approach, which, as noted above, accepted the position that Justification 1 is the sole relevant justification for treating a plea of guilt as a mitigating factor in Singapore. As a corollary, one may further start to wonder in how many of the 291 (41.6%) cases where the court had considered the accused's guilty plea but without expressly referring to any of the justifications, the court had actually also applied the *Angliss* approach instead of the *Terence Ng* position (albeit without expressly alluding to Justification 1 in its written grounds of decision).

19 The following one or more reasons *may* explain why the courts, in various cases post-*Terence Ng*, still appear to apply the *Angliss* approach:

(a) The new position taken in *Terence Ng* may not have been brought to the court's attention.

(b) It was not clear to the court whether the position taken in *Terence Ng* on the mitigating value of a guilty plea was intended by the Court of Appeal there to extend to cases where the *Terence Ng* sentencing framework was not applicable (that framework was formulated for the offence of rape under s 375(1)(b) of the Penal Code¹⁶).

(c) It was not clear to the court whether Justification 1 and Justification 3 are actually different or overlapping utilitarian considerations, in that *vis-à-vis* Justification 1, the accused's remorse justifies a sentencing discount

16 Cap 224, 2008 Rev Ed.

really because that would contribute to savings in public resources, and in that sense, to accord a guilty plea mitigatory weight based on both justifications would amount to double counting.¹⁷

(d) The court was apprised and aware of the need to consider Justification 3 and had in fact applied that justification, but concluded that on the facts of the case the mitigatory weight based on Justification 3 was negligible, and therefore there was no need to explicitly mention its analysis apropos that justification. Such cases may include those where the court took the view that there were minimal public resources saved by reason of the accused's decision to plead guilty, as well as cases where the weight that needs to be accorded to other sentencing objectives (such as deterrence, incapacitation, retribution or rehabilitation) was so dominant or overwhelming that there was no real value in referring to Justification 3.¹⁸

(e) The court, as a matter of principle, disagreed with the relevance of Justification 3 (or put another way, the court preferred the approach taken in *Angliss*) and therefore there was no need to make explicit reference to Justification 3. Such disagreement may stem from:¹⁹

(i) taking the view that Justification 3 (and for that matter, Justification 2) is based on extrinsic utilitarian considerations that bear no relationship with the sentencing objectives of incapacitation, deterrence, rehabilitation and retribution; or

(ii) the concern that according greater mitigatory weight to a guilty plea by reason of Justification 3 may result in the unintended

17 This impression may have arisen from the points made in *Angliss Singapore Pte Ltd v Public Prosecutor* [2006] 4 SLR(R) 653 at [77].

18 See, for example, *Public Prosecutor v Kong Peng Yee* [2018] 2 SLR 295 and *Public Prosecutor v ASR* [2019] 1 SLR 941. See also para 5 above.

19 For a helpful discussion of other possible reasons, see *Angliss Singapore Pte Ltd v Public Prosecutor* [2006] 4 SLR(R) 653 at [59]–[64].

consequence of pressuring more accused persons who are factually innocent to plead guilty.²⁰

(f) The court did in fact apply Justification 3 in assessing the appropriate mitigatory weight of the guilty plea, but simply did not think there was a need to elucidate its reasoning in such detail.

20 A proper examination of whether the *Angliss* or the *Terence Ng* approach is more appropriate for Singapore will require at least a full-length article on its own. Assuming for now that the latter is the applicable approach in Singapore, it suffices for some passing observations to be offered. First, in respect of whether the *Terence Ng* position on guilty pleas applies in cases where the *Terence Ng* sentencing framework is not applicable and more generally in cases involving non-sexual offences, it is submitted that from a conceptual standpoint there is absolutely no reason why the *Terence Ng* position should be constrained in that manner. Regardless of the nature of the offence, a guilty plea which avoids the need for a full-blown trial would save at least some public resources. As a result, the principle of Justification 3 should apply to virtually every case involving a guilty plea by an accused person (the exact mitigatory weight to be afforded would, of course, still depend on the specific facts of the case). This is affirmed by the fact that there have been multiple High Court cases post-*Terence Ng* where the court, in dealing with various other offences, had adopted (in entirety) the *Terence Ng* position on the mitigatory weight of a plea of guilt.²¹

21 Second, as to whether Justification 1 and Justification 3 are conceptually different, it is submitted that their respective basis for justifying a sentencing discount is sufficiently separate and distinct.²² In relation to Justification 1, mitigatory weight is given to a guilty plea presumably because when the plea

20 *Hessell v R* [2011] 1 NZLR 607 at [46]–[49] and [72]. See also *Angliss Singapore Pte Ltd v Public Prosecutor* [2006] 4 SLR(R) 653 at [68].

21 See, for example, *Logachev Vladislav v Public Prosecutor* [2018] 4 SLR 609 at [67]–[68], *Gan Chai Bee Anne v Public Prosecutor* [2019] 4 SLR 838 at [73], *Wu Zhi Yong v Public Prosecutor* [2022] 4 SLR 587 at [48], and *Sue Chang v Public Prosecutor* [2022] SGHC 176 at [105].

22 See *Logachev Vladislav v Public Prosecutor* [2018] 4 SLR 609 at [67].

evidences an accused person's genuine contrition, the accused ought not to be punished so severely given that there is less need to effect retribution or specific deterrence on the accused, and the prospects of rehabilitating the accused are higher.²³ In contrast, for Justification 3, a sentencing discount is given as a form of practical credit to the accused, in the light of the fact that his decision to plead guilty saved valuable public resources.²⁴

22 This is an important point because under the *Angliss* approach where Justification 1 is the only salient consideration, if the totality of evidence reveals that the accused is not actually genuinely remorseful, then no mitigatory weight should be given for his plea of guilt. But under the *Terence Ng* approach where all three justifications are relevant considerations, even in a case where the evidence shows that the accused may not be genuinely remorseful, ordinarily at least some credit should still be given to the accused for having saved precious public resources. The Court of Appeal in the case of *Chang Kar Meng v Public Prosecutor*,²⁵ a case decided very shortly before *Terence Ng*, made the exact same point albeit in the context of Justification 2.

23 Third, insofar as a court had considered Justification 3 but for the particular reasons suggested at para 19(d)–(e) above took the view that there was no need in its written judgment to explicitly articulate how it had applied that justification, it is respectfully submitted that for precisely the points highlighted in the previous paragraph, it would conduce towards greater transparency and coherence if the court expressly explained its position on Justification 3. If the court's conclusion is that on the facts of the case at hand ultimately negligible mitigatory weight should be accorded, it is worth explaining, not least to the accused, why that was so. If mitigatory weight was accorded but in the final analysis that was overwhelmed by the need to achieve significant deterrence, retribution, incapacitation or some other sentencing objective, that could be expressly stated. And if the

23 Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 6th Ed, 2015) at pp 181–182.

24 See para 2 above.

25 [2017] 2 SLR 68 at [47]. See also *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 at [68].

court as a matter of principle disagrees that Justification 3 should be a relevant consideration, that should similarly be made clear.

24 Fourth, it is admittedly not illegitimate for a court to apply the *Terence Ng* position without seeing the need to explicitly make that clear in its written grounds of decision. In the Magistrate’s Appeal case of *Logachev Vladislav v Public Prosecutor*,²⁶ one of the accused’s points of contention was that in the first-instance sentencing court’s written grounds of decision, the District Court had merely stated in a “one-liner” that the accused’s guilty plea was one of the mitigating factors in his favour, and in the final paragraph of the judgment added that it had balanced all the relevant mitigating factors against the seriousness of the accused’s offending.²⁷ The accused argued that it was thus unclear whether the District Court had given enough consideration to and placed any weight on his guilty plea. The High Court was not at all impressed by this argument. It held that what the District Court had stated was enough, and that it was not clear what more the District Court could have said about the mitigating factors.²⁸

25 In this regard, there is certainly no rule under Singapore law that a court must expressly state in its written grounds every granular detail of its reasoning in arriving at a verdict. Instead, the general rule is that the particularity required of a judge will depend on the circumstances of the case before him and the nature of the decision he is giving.²⁹ That said, in this author’s respectful view, given that any sentencing discount accorded to the accused by dint of an application of Justification 3 is credit due to the accused for preserving valuable public resources, it would lead to a greater degree of fairness to the accused if it is made clear to him that Justification 3 had been applied by the sentencing court. This point applies as much to cases which applied or alluded only to Justification 1, as it does to cases

26 [2018] 4 SLR 609.

27 *Public Prosecutor v Egorov Andrei and Logachev Vladislav* [2017] SGDC 141 at [28] and [31].

28 *Logachev Vladislav v Public Prosecutor* [2018] 4 SLR 609 at [104].

29 *Thong Ah Fat v Public Prosecutor* [2012] 1 SLR 676 at [41].

which explicitly considered the accused's guilty plea but did not mention or allude specifically to any of the three justifications.

V. Practical suggestions

26 This article concludes with a few practical suggestions moving forward. For one, it may be helpful for defence counsel when raising an accused person's guilty plea as a mitigating factor to draw the court's attention specifically to the relevant paragraphs in *Terence Ng* wherein the Court of Appeal held that all three justifications should be considered. It may also be useful to refer the court to the various High Court cases that have held that the *Terence Ng* approach is applicable outside of cases where the *Terence Ng* sentencing framework (for the offence of rape) applies.³⁰

27 For another, the appellate courts may wish to find opportunities to reiterate and reinforce the general applicability of the *Terence Ng* position. To further dis-entrench the *Angliss* position in Singapore, these courts may consider going even further to issue guidelines on sentencing discounts for guilty pleas, which peg and specify presumptive quantum of discount to the stage of proceedings at which the accused confirms his decision to plead guilty.³¹ This makes sense because as a rough rule of thumb, the earlier an accused person elects to plead guilty, the more public resources will be saved. Such guidelines will hence encourage more conceptual adherence to the *Terence Ng* position.

28 It is acknowledged that the Court of Appeal in *Terence Ng* had rejected adopting guidelines which set prescribed sentencing discounts based on the timelines of an accused person's guilty

30 See n 20 above.

31 For a similar suggestion, see Deputy AG Hri Kumar Nair SC, "Opening Address at Criminal Law Conference 2019 – Towards a More Efficient and Just Criminal Process" (7 March 2019) at para 31 <https://www.agc.gov.sg/docs/default-source/newsroom-documents/speeches/clc-2019_7-mar-2019_opening-address-by-dag-hri.pdf> (accessed 20 December 2022).

plea.³² Nevertheless, that stance was taken without the benefit of data on how first-instance and appellate courts would react to the position taken in *Terence Ng vis-à-vis* the mitigatory weight of a guilty plea. Crucially, what the Court of Appeal there had rejected was *specifically* the guidelines on reduction in sentence for a guilty plea issued by the United Kingdom Sentencing Guidelines Council which came into force on 1 June 2017. But guidelines on sentencing discounts based on the timelines of a guilty plea need *not* be in the same form or rigidity as that of the English version. There could be prescribed starting point sentencing discounts (on a sliding scale) which courts are given broad discretion to calibrate based on various other specified factors.

32 *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 at [70]. See also *Hessell v R* [2011] 1 NZLR 607.