(2017) 29 SAcLJ 294
(Published on e-First 27 March 2017)

Comment

UNFORESEEN CONSEQUENCES: DIFFICULTIES IN PUNISHING THE FOREIGN ABETMENT OF SINGAPORE DRUG OFFENCES

Section 13(*aa*) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed)

Section 13(*aa*) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) criminalises the abetment of any offence under the Act, notwithstanding that the abetment took place outside of Singapore. This article examines the offence of "foreign abetment" under s 13(*aa*), and argues that the present sentencing regime for the offence is irrational and should be amended.

TOO Xing Ji*
LLB (Hons) (National University of Singapore);
Advocate and Solicitor (Singapore);
Lawyer at Bachoo Mohan Singh Law Practice (Singapore).

I. Introduction

1 Section 13(*aa*) of the Misuse of Drugs Act[1] ("the Act") criminalises the abetment of any offence under the Act, notwithstanding that the abetment took place outside of Singapore. This article examines the offence of "foreign abetment"[2] under s 13(*aa*) of the Act, and argues that the present sentencing regime for the offence is irrational and should be amended because:

* The author acted for the accused in *K Saravanan Kuppusamy v Public Prosecutor* [2016] 5 SLR 88 at the sentencing hearing before the District Court (*Public Prosecutor v K Saravanan Kuppusamy* [2016] SGDC 87), and at the subsequent appeal before the High Court. He wishes to thank Mr Bachoo Mohan Singh, Mr Ervin Tan, Mr Benny Tan, Prof Michael Hor and the anonymous referee for their invaluable comments and feedback on earlier drafts of this article. The viewpoints in this article, and any errors and omissions however, are solely those of the author's.

1 Cap 185, 2008 Rev Ed.

2 Unless the context suggests otherwise, the phrase "foreign abetment" will be used to denote the specific crime enacted under s 13(*aa*) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed), *ie*, the abetment from overseas of an offence under the Act committed within Singapore.

(a) The present punishment regime (two to ten years' jail; $4,000 to $40,000 fine; or both) bears no direct correlation with the punishment of the underlying principal offence, unlike "local abetment"[3] punishable under s 12 of the Act, which attracts the same punishment as the principal offence abetted.

(b) The range is lower at the top end than the maximum punishment that may, and in many cases, *must*, be imposed for certain principal offences, and is higher at the bottom end than the maximum sentence that may be imposed for other principal offences.

(c) Consequently, the abettor may receive a punishment that is markedly different from the punishment inflicted on the principal offender. Such a punishment may, in certain circumstances, be disproportionate to the culpability of the abettor.

(d) Furthermore, an abettor who abets an offence from overseas, could receive a punishment that is very different from an abettor who abets the same offence from within Singapore, with the only material difference being where the abetment took place. In the absence of a sound policy reason for such a legal distinction, the differentiation may well offend the constitutional protection of equality under Art 12 of the Constitution of the Republic of Singapore[4] ("Constitution").

II. Overview of the law

2 The substantive law of abetment under the Act is governed by ss 12 and 13:

> **Abetments and attempts punishable as offences**
>
> **12.** Any person who abets the commission of or who attempts to commit or does any act preparatory to, or in furtherance of, the commission of any offence under this Act shall be guilty of that offence and shall be liable on conviction to the punishment provided for that offence.
>
> …

3 Similarly, the phrase "local abetment" will be used to denote the s 12 offence, *ie*, the abetment from within Singapore of an offence under the Misuse of Drugs Act (Cap 185, 2008 Rev Ed).

4 1999 Rev Ed.

Abetting or procuring commission of offences outside Singapore

13. It shall be an offence for a person —

(*a*) to aid, abet, counsel or procure the commission in any place outside Singapore of an offence punishable under a corresponding law in force in that place;

(*aa*) to aid, abet, counsel or procure the commission of any offence under this Act within Singapore, notwithstanding that all or any of the acts constituting the aiding, abetment, counselling or procurement were done outside Singapore; or

(*b*) to do an act preparatory to, or in furtherance of, an act outside Singapore which if committed in Singapore would constitute an offence under this Act.

3 "*Corresponding law*" under s 13(*a*) is further defined under s 2 of the Act:

'corresponding law' means a law stated in a certificate purporting to be issued by or on behalf of the government of a country outside Singapore to be a law providing for the control and regulation in that country of —

(*a*) the production, supply, use, export and import of drugs and other substances in accordance with the provisions of the Single Convention on Narcotic Drugs signed at New York on 30th March 1961; or

(*b*) the production, supply, use, export and import of dangerous or otherwise harmful drugs in pursuance of any treaty, convention or other agreement or arrangement to which the government of that country and the Government of Singapore are for the time being parties;

4 The word "abet" is not defined under the Act. However, s 2(1) of the Interpretation Act[5] states that in every written law enacted before or after 28 December 1965 (which would include the Act), unless there is something in the subject or context inconsistent with such construction or unless it is therein otherwise expressly provided, "'abet', with its grammatical variations and cognate expressions, has the same meaning as in the Penal Code (Cap 224)".

5 The issue of whether "abet" under the Act has the same meaning as "abet" under the Penal Code has been settled by the High Court and the Court of Appeal in at least two cases under the Act: *Govindarajulu*

5 Cap 1, 2002 Rev Ed.

Murali v Public Prosecutor[6] and *Chai Chien Wei Kelvin v Public Prosecutor*.[7]

6 Sections 107 and 108 of the Penal Code[8] define abetment as follows:[9]

> **Abetment of the doing of a thing**
>
> **107.** A person abets the doing of a thing who —
>
> (*a*) instigates any person to do that thing;
>
> (*b*) engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or
>
> (*c*) intentionally aids, by any act or illegal omission, the doing of that thing.
>
> …
>
> **Abettor**
>
> **108.** A person abets an offence who abets either the commission of an offence, or the commission of an act which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.
>
> …

7 Whether an act of abetment falls under s 12, or the various subsections of s 13, depends primarily on three things:

(a) where the abetment or preparatory act took place;[10]

(b) the jurisdiction of the principal offence;[11] and

---

6 [1994] 2 SLR(R) 398.

7 [1998] 3 SLR(R) 619.

8 Cap 224, 2008 Rev Ed.

9 For the sake of brevity, the explanations and illustrations under the Penal Code (Cap 224, 2008 Rev Ed) have not been reproduced here. Readers seeking to better understand the concept of "abetment" are invited to study the explanations and illustrations therein.

10 Section 12 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) encompasses abetment, attempts and preparatory acts, ss 13(*a*) and 13(*aa*) deal with abetment, while s 13(*b*) addresses preparatory acts.

11 Sections 12 and 13(*aa*) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) target the abetment of all principal offences under the Act; s 13(*a*) targets foreign principal offences; curiously, s 13(*b*) targets principal acts committed overseas which are not offences either in Singapore or where they were committed, but rather, would have been offences under the Act had they been committed in Singapore.

(c) where the principal offence or principal act complained of was committed.[12]

8 The different permutations which constitute criminal acts are:

(a) the abetment took place in Singapore; the principal offence is Singaporean; the location where the principal offence committed is irrelevant – s 12;

(b) the abetment took place in Singapore; the principal offence is foreign; the principal offence was committed overseas – ss 13(*a*);

(c) the abetment took place overseas; the principal offence is Singaporean; the principal offence was committed in Singapore – s 13(*aa*); and

(d) the preparatory act took place in Singapore; the principal act is not an offence, but would have been an offence if committed in Singapore; the principal act was committed overseas – s 13(*b*).

Offence	Location of Abetment / Preparatory Act	Jurisdiction of Principal Offence / Act Complained of	Location of Principal Offence / Act Complained of
Section 12	Singapore	Singapore	Anywhere
Section 13(*a*)	Singapore	Foreign	Overseas
Section 13(*aa*)	Overseas	Singapore	Singapore
Section 13(*b*)	Singapore	Not an offence, but would have been one if it had been done in Singapore	Overseas

Figure 1: Permutations of abetment under the Misuse of Drugs Act

12 Sections 13(*a*) and 13(*b*) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) carry the legal requirement that the principal offence or acts complained of be committed overseas; s 13(*aa*) mandates that the principal offence be committed within Singapore.

9 The somewhat arcane differences would well have been academic, but for the fact that the different provisions carry vastly different punishments. A person convicted under s 12 is liable to receive the full range of punishments under the Act, ranging from a maximum fine of $1,000, to the mandatory death penalty; on the other hand, a person convicted under s 13 faces a specific punishment of two to ten years' jail; $4,000 to $40,000 fine; or both.

III. Legislative history

10 Section 13(*aa*) is a relatively new provision of the Act. It was introduced via s 6 of the Misuse of Drugs (Amendment) Act 2012,[13] which was passed by Parliament on 14 November 2012, assented to by the President on 7 December 2012, and came into force on 1 January 2013. The section was innocuously tucked among a host of other significant amendments, the most prominent of which being the statutory exceptions for the mandatory death penalty under s 33B (more popularly referred to in criminal practice as the "courier exception").

11 Possibly because most of the Honourable Members were focusing their attention on the courier exception, s 13(*aa*) attracted very few comments during its introduction. The only reference to it during the second reading of the Misuse of Drugs (Amendment) Bill[14] were the following brief words by Asst Prof Tan Kheng Boon Eugene (Nominated Member):[15]

> Clause 4 of the Bill introduces a new offence of criminalising the organisation of drug gatherings, with heavier penalties for those who organise gatherings involving the young and vulnerable. *The extra-territorial reach that clause 6 seeks to provide is also necessary given that offences under the MDA often have an extra-territorial element. So these two clauses I do not think would impose significant difficulty.* [emphasis added]

12 The Explanatory Statement for cl 6 of the Misuse of Drugs (Amendment) Bill was essentially a word-for-word restatement of the clause:

> Clause 6 amends section 13 by making it an offence for any person to aid, abet, counsel or procure the commission of any offence under the Act within Singapore, notwithstanding that all or any of the acts constituting the aiding, abetment, counselling or procurement were done outside Singapore.

13 Act 30 of 2012.

14 Bill No 27/2012.

15 *Singapore Parliamentary Debates, Official Report* (12 November 2012) vol 89 (Asst Prof Tan Kheng Boon Eugene (Nominated Member)).

13 Despite its rather quiet introduction, the reach of s 13(*aa*) was anything but limited. For the first time since the inception of the Act and its precursor legislation, foreign acts of abetment of local drug offences were criminalised in Singapore.

IV. Lacuna in the law

14 The content of s 13(*aa*), as well as the timing of its introduction, suggests that it was specifically formulated to overcome the Court of Appeal's decision dated 4 April 2012 in *Yong Vui Kong v Public Prosecutor*[16] ("*Yong Vui Kong*").

15 In *Yong Vui Kong*, the issue arose as to whether one Chia, in instigating the accused, Yong, in Johor Bahru, Malaysia to transport controlled drugs to Singapore, had committed the offence of abetment under either ss 12 or 13 of the Act.

16 The court ultimately held that s 12 of the Act only applied to an abetment *within* Singapore of an offence committed within Singapore.[17] This was premised on the established rule of statutory interpretation that a domestic statute has no extraterritorial effect unless it is expressed to have such effect, and that in the absence of such express provision, acts committed outside the jurisdiction are presumed not to constitute an offence under the relevant domestic statute even if they would have amounted to an offence under that statute had they been committed within the jurisdiction.[18]

17 In respect of the then s 13 of the Act, the court looked into its legislative history, and held that the section was meant to target acts of abetment *within* Singapore of the commission in a place outside Singapore of an offence under a corresponding law in force in that place.[19] The court arrived at this holding by delving into the legislative history of the section.

18 The earliest incarnation of s 13 of the Act was s 32A of the Straits Settlements Deleterious Drugs Ordinance[20] ("DDO"), which was

16 [2012] 2 SLR 872.

17 Strictly speaking, s 12 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) applies to the abetment within Singapore of *any* offence under the Act, not all of which need to be committed within Singapore, *eg*, s 8A – consumption of drug outside Singapore by citizen or permanent resident. The reported judgment does not disclose whether this point was canvassed before the Court of Appeal.

18 *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872 at [41] and [42].

19 *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872 at [44].

20 No 124.

introduced by s 8 of the Deleterious Drugs Amendment Ordinance 1925.[21] Section 32A of the DDO provided as follows:

> Any person *who in the Colony* aids, abets, counsels or procures the commission in any place outside the Colony of any offence punishable under the provisions of any corresponding law in force in that place or *does any act preparatory to, or in furtherance of*, any act which if committed in the Colony would constitute an offence against this Ordinance, shall be guilty of an offence against this Ordinance. [emphasis added]

19 Of particular note to the court, was that s 32A of the DDO expressly provided that only acts of abetment committed "*in* the Colony" [emphasis added] of principal offences outside the Colony would be an offence. The court also referred to the then Attorney-General's speech in the Legislative Council when s 32A was introduced into the DDO to confirm their interpretation:[22]

> Clause 8 is new. That provides for the punishment of abetment of a crime in regard to deleterious drugs committed in the Colony or against the law in some other country. *That is one of the new provisions at Home. It is rather an innovation to* ***make it a crime in one place*** *if you abet the transgression of the law* ***of another country***, but the deleterious drugs question is so international in character that it has been thought necessary that a provision of this sort should be inserted. [emphasis added by the court]

20 Whilst the phrase "in the Colony" (or its equivalent when Singapore became independent) was deleted when the earliest predecessor of the Act was enacted in 1973, no explanation was given. The court held that this deletion was insufficient evidence that Parliament intended to alter the effect of the then equivalent of s 32A of the DDO (*viz*, s 11 of the 1973 Act) because the 1973 Act was, *inter alia*, a consolidating Act.[23] Section 32A of the DDO was ultimately split into two limbs, *ie*, ss 13(*a*) and 13(*b*) of the Act.

21 The court was further fortified in its decision by the 2008 amendments to the Penal Code,[24] which were introduced to address the kind of abetment that Chia was alleged to have carried out with respect to the offence committed by Yong. The logical implication of Parliament having to pass s 108B, was that prior to its enactment, local courts did not have criminal jurisdiction over foreign acts of abetment. Section 108B of the Penal Code, which came into operation on 1 February 2008, provides as follows:

---

21 No 6 of 1925.

22 *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872 at [44].

23 *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872 at [44].

24 Cap 224, 1985 Rev Ed.

> **Abetment outside Singapore of an offence in Singapore**
>
> **108B.** A person abets an offence within the meaning of this Code who abets an offence committed in Singapore notwithstanding that any or all of the acts constituting the abetment were done outside Singapore.

22 As Chia's alleged instigation of Yong took place prior to the coming into force of s 108B of the Penal Code, the section did not apply to Chia. While the court left as open the question of whether s 108B of the Penal Code would apply to the abetment of offences under the Act, the amendments to the Act since then have rendered the issue moot.

V. What punishment to apply?

23 Unfortunately, Nominated Member Tan's parliamentary prediction that the introduction of s 13(*aa*) would not impose any significant difficulty was overly optimistic. One issue which ultimately surfaced was: "*How should an offender under s 13(*aa*) of the Act be punished?*"

24 Under s 12 of the Act, a person who commits "local abetment", is legislatively deemed to be guilty of the principal offence, and liable to the punishment for that offence.

25 Punishments for the various drug offences under the Act are generally governed by the Second Schedule, as provided for under s 33(1):

> **Punishment for offences**
>
> **33.** —(1) Except as provided in subsection (4), (4A), (4B) or (4C) or under section 33A, the Second Schedule shall have effect, in accordance with subsections (2) and (3), with respect to the way in which offences under this Act are punishable on conviction.

26 The Second Schedule has an express section, setting out the punishment for an offence under s 13 of the Act:

Section creating offence	General nature of offence	Punishment
13	Abetting or procuring the commission outside Singapore of an offence punishable under a corresponding law.	Maximum 10 years or $40,000 or both; Minimum 2 years or $4,000 or both.

27 The question then arose: should the punishment scheme of s 12 of the Act be interpreted to include acts of foreign abetment under s 13(*aa*) of the Act, *ie*, the same punishment as the principal offence, or should the specific punishment set out under the Second Schedule apply, *ie*, two to ten years' jail; $4,000 to $40,000 fine; or both?

28 At first blush, Parliament's intention appeared simply to have been to extend extraterritorially, the reach of s 12 in the light of *Yong Vui Kong*, and no statements were advanced to suggest that the new offence would be punished any differently from s 12. The description of "*General nature of offence*" under the Second Schedule would appear to militate against applying the Second Schedule's specific punishment to s 13(*aa*); the description of the offence is clearly that of s 13(*a*), and the punishment prescribed therein was already present prior to the 2012 amendments which introduced s 13(*aa*). That punishment regime was specifically tailored for the "innovative" crime of locally abetting the transgression of foreign drug laws, as encapsulated in ss 13(*a*) and 13(*b*).[25] It bears repeating that s 13(*aa*) is of a different lineage from the other limbs of s 13, and is in effect, a different offence with different elements to those of ss 13(*a*) and 13(*b*).

29 On the other hand, one could argue that Parliament's intention to punish the new offence differently could be inferred from its siting of the new law under s 13 as opposed to s 12. Further, the "*Section creating offence*" is a simple and unequivocal "13" which arguably includes all its subsections, as opposed to say "8(*a*)" for the offence of possession, and "8(*b*)" for the consumption of drugs, which can also be found in the Second Schedule. In addition, despite the description of the offence being that of s 13(*a*), the punishment in the Second Schedule arguably also applied to s 13(*b*) of the Act prior to the 2012 amendments. The latter observation, however, is purely conjecture, as this author has not been able to find any written grounds of decision, reported or otherwise, of anyone being successfully convicted and punished under s 13(*b*) of the Act, or indeed, s 13(*a*). While this author stands to be corrected, the

25 When s 32A of the Deleterious Drugs Ordinance (No 124) (SS) (*ie*, the legislative precursor of ss 13(*a*) and 13(*b*)) was first introduced, it was punishable under the general penalty section of the Ordinance with a fine of $5,000 and/or jail of up to five years. For context, importation, possession and consumption were then punishable with a maximum fine of $10,000, and the sale of drugs with a maximum sentence of $5,000 fine and/or six months' jail for a first offender, and a maximum sentence of $10,000 fine and/or 12 months' jail for a repeat offender. Somewhere along the line, Parliament amended the section's punishment to its present regime. This author has not been able to find out when and why such an amendment was adopted. The point may well be worth pursuing by any interested legal historian.

dearth of written decisions is probably reflective of the lack of prosecutions under the section.

30 It is somewhat ironic, therefore, that the first reported decision to deal with sentencing under s 13 of the Act should concern its newest limb, s 13(*aa*), *ie*, the abetment from overseas of a Singapore drug offence committed in Singapore (simultaneously underscoring the fact that s 13(*aa*) bears little relation to its fellow s 13 brethren).

VI. The curious case of K Saravanan Kuppusamy

31 In *K Saravanan Kuppusamy v Public Prosecutor*[26] ("*Kuppusamy*"), the central issue before the court was: "How should an accused person convicted under s 13(*aa*) be punished?" The facts of *Kuppusamy* are somewhat curious. The accused, Kuppusamy, was charged with instigating one Kannan Reti, to import into Singapore, 10.38g of diamorphine, by "instructing him to deliver the said drug to an unknown person". On 1 August 2014, Kannan Reti rode as a pillion rider on a motorbike into Singapore, and was duly arrested at the Tuas Checkpoint after the drugs were discovered pursuant to a random check. The person who ferried Kannan Reti across was given a discharge not amounting to an acquittal.

32 On 8 September 2014, more than a month after Kannan Reti had been arrested, Kuppusamy was stopped while entering Singapore by car. This was because one of the passengers in his car, one Tika Pesik, was separately wanted by the Central Narcotics Bureau ("CNB") for a capital drug offence. The accused was taken in by CNB for further investigations. The next day, he was produced in court, and charged with abetting Kannan Reti to import drugs into Singapore. The accused denied the allegations against him, and the matter was fixed for trial under the criminal case disclosure conference regime.

33 The State initially took the position that the accused was liable to face the same punishment as the principal offender. Under the original charge framed by CNB (prior to the drugs being analysed by the Health Sciences Authority), the accused was liable to be sentenced to death if convicted. After the precise quantity of drugs had been determined (10.38g), the punishment was amended by the Prosecution to 20 to 30 years' imprisonment, *ie*, the corresponding punishment for importation of between 10–15g of diamorphine.

26 [2016] 5 SLR 88.

34 Subsequently, however, the Prosecution's position was that a charge under s 13(*aa*) of the Act was punishable with a fine of $4,000 to $40,000 and/or two to ten years' imprisonment. For obvious reasons, the Defence was not inclined to argue to the contrary.

35 Meanwhile, in respect of the principal offender, Kannan Reti, the Prosecution had exercised their discretion, and reduced his charge from importation of 10.38g of diamorphine to importation of 9.99g of the drug, bringing Kannan Reti within the lowest punishment range for the importation of diamorphine (five to 30 years' jail; five to 15 strokes).

36 On 25 February 2016, at Kannan Reti's hearing to take his guilty plea (which was heard before a different District Judge from Kuppusamy's), the Prosecution prevailed upon the District Court to sentence Kannan Reti to six years' jail and five strokes of the cane, a punishment that was extremely lenient when measured against the amount of drugs imported, and far below the sentencing guidelines previously prescribed by the High Court in *Vasentha d/o Joseph v Public Prosecutor*.[27]

37 The main reason for the Prosecution's position, as candidly admitted by the Prosecution, was that the Prosecution was of the opinion that Kannan Reti was "less culpable" than Kuppusamy, and that the Prosecution would eventually be seeking a prison term of seven to eight years for Kuppusamy; Kannan Reti should therefore receive a lighter prison sentence than Kuppusamy, to reflect their respective culpabilities. It should be noted that at the time Kannan Reti pleaded guilty, Kuppusamy's matter was still fixed for trial, and it was not certain that he would have been convicted. The District Court hearing Kannan Reti's matter was persuaded by the Prosecution's submissions, and sentenced Kannan Reti to six years' jail and five strokes of the cane. Unsurprisingly, neither Kannan Reti nor the Prosecution filed an appeal against the sentence.

38 About ten days before Kuppusamy's trial was to start on 21 March 2016, he indicated to the court and the Prosecution that he was going to plead guilty instead. At his sentencing hearing, the Prosecution argued for a seven to eight years' prison term, advancing the same argument that Kuppusamy, as the instigator, was more culpable than Kannan Reti, and should be punished more severely. The Prosecution also submitted that the offence was syndicated (despite this alleged fact being absent in the statement of facts admitted by the accused), and argued that it be held as an aggravating factor against Kuppusamy.

27 [2015] 5 SLR 122.

39 Kuppusamy, through his counsel, argued that the punishment regimes for both Kuppusamy and Kannan Reti were totally different. Simply based on their respective legislatively prescribed punishments, Kuppusamy was guilty of a less serious offence. Applying the principle of parity, Kuppusamy should be sentenced to the lower end of his sentencing range, as was the case with Kannan Reti (who had received six years' jail out of a possible range of five to 30, and the minimum number of strokes). The accused also objected to the suggestion that the offence was syndicated, as it was never admitted in the statement of facts. He further denied that he was more culpable than Kannan Reti, arguing that he was merely a messenger, passing instructions to Kannan Reti. Finally, the accused raised his plea of guilt in the face of the Prosecution's bare evidence against him as a mitigating factor. The Prosecution's case, had the matter gone to trial, would have been premised entirely on Kannan Reti's word against Kuppusamy's; Kuppusamy's DNA was not present on any of the drugs seized.

40 The District Judge agreed with the Prosecution that Kuppusamy was more culpable and deserving of a harsher prison sentence. The court held that the prescribed punishment range was not the dominant factor in sentencing. The District Judge further agreed that the offence was syndicated, and dismissed all of the mitigating factors raised by Kuppusamy. He was sentenced to seven years' jail by the court. Kuppusamy appealed.

VII. The appeal

41 At the appeal, the High Court proceeded on the basis that the Second Schedule's s 13 punishment range was the correct punishment regime for the accused. It should be noted that this issue was not in dispute before the court.

42 The appeal was ultimately allowed on the basis that because the punishment prescribed for Kuppusamy under the Second Schedule was so markedly different from that prescribed for Kannan Reti's offence of importation, a direct calibration between the two sentences in terms of absolute prison lengths could not be done.[28] The court noted that s 13(*aa*) targeted the foreign abetment of *all* offences under the Act, including those punishable with a simple $1,000 fine, all the way to the mandatory death penalty. Within that range, Kannan Reti's appropriate sentence, which the court held should have been 15 years and 11 strokes, while serious, was not the worst possible.[29] The court also dismissed the

28 *K Saravanan Kuppusamy v Public Prosecutor* [2016] 5 SLR 88 at [14].
29 *K Saravanan Kuppusamy v Public Prosecutor* [2016] 5 SLR 88 at [25].

alleged aggravating factor of syndication, as that fact had not been proved against the accused beyond a reasonable doubt.[30] Consequently, the court pegged the starting point of Kuppusamy's sentence at five to six years, and also taking into account his plea of guilt, which the court held furthered the administration of justice, reduced it to four and a half years.[31]

VIII. Irrationality of the present sentencing regime

43 In the course of his judgment, the Honourable Chief Justice touched upon the present sentencing regime for the offence of foreign abetment under s 13(*aa*):[32]

> Where an offender is charged under s 13(*aa*) of the Act, the punishment prescribed by s 33(1) read with the Second Schedule of the Act, ranges from a *minimum* of two years' imprisonment or $4,000 fine or both to a *maximum* of ten years' imprisonment or $40,000 fine or both. The prescribed range of punishments covers the abetment of any of a broad range of offences under the Act which in turn attract an extremely broad range of punishments. At one end of the spectrum, the Act prescribes the imposition of the death penalty for the underlying offence and in certain limited circumstances, life imprisonment as an alternative to the death penalty. Further down that end of the spectrum are those offences that are punishable with a term of imprisonment of between 20 and 30 years and accompanied by a minimum of 15 strokes of the cane. At the other end of the spectrum, there are offences that carry a maximum punishment of one month's imprisonment and/or $1,000 fine (see for example, an offence under s 40B(4)(*a*) of the Act for failing to submit to the taking of photographs, finger impressions, particulars and body samples). **It is thus evident that the range of punishments prescribed for the offence under s 13(*aa*) is lower at the top end than the maximum punishment that may, and in many cases, *must*, be imposed for certain primary offences; and is higher at the bottom end than the maximum sentence that may be imposed for other primary offences. In my judgment, this militates against the possibility of finding a direct co-relation between the punishments prescribed for the abetment offence under s 13(*aa*) with those prescribed for the corresponding primary offence.** [emphasis in original in italics, emphasis added in bold]

44 The High Court's observation lays bare the present irrationality of the sentencing scheme for foreign abetment. The punishment prescribed is both too lenient for the abetment of the most egregious

30 *K Saravanan Kuppusamy v Public Prosecutor* [2016] 5 SLR 88 at [28].
31 *K Saravanan Kuppusamy v Public Prosecutor* [2016] 5 SLR 88 at [29]–[30].
32 *K Saravanan Kuppusamy v Public Prosecutor* [2016] 5 SLR 88 at [2].

principal offences, and too harsh for the abetment of the most minor of principal offences, so much so that one cannot draw a direct correlation between the punishment prescribed and the underlying principal offence.

45 The obvious reason why the prescribed punishment is ill-equipped to deal with the offence of foreign abetment can be deduced from its legislative history. The present punishment was designed to deal with the novel (so novel that it has *never* been prosecuted) crime of abetting from within Singapore, a foreign drug offence as encapsulated in ss 13(*a*) and 13(*b*); section 13(*aa*) on the other hand was introduced in response to the court's holding in *Yong Vui Kong* that s 12 of the Act applied only to abetment *within* Singapore of offences under the Act, and to extend the offence of abetment of Singapore drug offences extraterritorially. In that sense, s 13(*aa*) has more in common with s 12 (the offence of local abetment) than it does with either ss 13(*a*) or 13(*b*) which deal with the abetment of offences punishable under foreign law.

46 Two salient features distinguish the abetment of foreign drug offences from the abetment of local drug offences:

(a) Parliament has no control over how foreign drug offenders are punished; and

(b) the main harm, when the principal offence is committed overseas, is ultimately inflicted upon the place where the offence was committed, as opposed to Singapore; the converse is true when the principal offence is committed in Singapore, or falls under Singapore's criminal jurisdiction.

47 Consequently, when legislating on the appropriate punishment for the abetment of foreign drug offences, it is understandable why Parliament would be hesitant to simply prescribe that the same punishment for the foreign principal offence be imposed; such a regime would run the risk of the potentially embarrassing situation in which the punishment prescribed under the foreign drug law may be wholly incompatible with the Singapore legal position on how such offences are to be punished, and the follow-up question of whether such an incompatible position should nevertheless be upheld. The lesser of two evils as adopted by the Singapore legislature was to impose a specific range of punishment which it deemed appropriate to the particular offence of abetting the transgression of foreign laws, bearing in mind that the bulk of the ultimate harm will not be felt by Singapore. Strictly speaking, absurdity could still arise under ss 13(*a*) or 13(*b*) when a principal offender is punished overseas while the abettor is punished differently in Singapore. Presumably, however, the Singapore courts would likely still take into account the punishment meted out to the

principal offender in the foreign country, but will not be strictly bound by it.

48 On the other hand, it is well within Parliament's power to control and make consistent the sentencing regime for the abetment of Singapore drug offences, irrespective of where the abetment was performed. Any objections that such a law would violate international comity ignores the fact that the existing regime fares no better. The legal position could also be justified on the policy ground that the ultimate fallout from the principal offence will be felt by Singapore.[33]

49 While the issue was not live in *Kuppusamy*, because of the position the Prosecution had taken, and the fact that the punishment for importation was harsher than that prescribed for s 13(*aa*), one would imagine that an accused charged with the foreign abetment of a principal offence at the bottom end of the scale, *ie*, anything punishable with less than two years' imprisonment and/or $4,000 fine, would contest the legality of the present sentencing regime. In the absence of any sound policy reasons justifying the differentiation of punishment based simply on where the abetment was committed, an accused could well mount a constitutional challenge that the existing provision offends the equal protection of the law enshrined under Art 12 of the Constitution, by leading evidence that it has operated unfairly and arbitrarily.

50 More importantly, an irrational punishment scheme undermines the purpose of sentencing. If the punishment does not fit the crime, the well-accepted functions of sentencing, *eg*, deterrence, retribution, rehabilitation and protection, *etc*, will be thwarted. Trying to find an appropriate sentence within a scheme that is irrational would simply be a case of attempting to treat the symptoms and not the cause.

51 In fact, one could reasonably imagine that (a) the present irrational punishment scheme, and (b) the difficulty of accepting that Kuppusamy, who in the Prosecution's view, was more culpable than Kannan Reti, would receive a shorter prison sentence, were partly the reasons why the Prosecution took the unusual position which it did with regards to Kannan Reti's sentencing.

IX. The case for legislative reform

52 Given the present statutory structure of foreign abetment being inextricably embedded under s 13, and the High Court's implicit

33 More commonly referred to as the "effects doctrine".

acceptance that the punishment range of two to ten years and/or a $4,000 to $40,000 fine applies, the lower courts' hands are essentially tied. Even if the matter is referred to the Court of Appeal (an extremely long and rare process), there is no guarantee that the court would be in a position to rewrite the statute in a coherent fashion. As s 13(*aa*) was introduced by way of legislation, it is fitting that any remedy for this irrational sentencing regime should also be done through Parliament.[34]

53 The simplest solution would be to extract s 13(*aa*) from s 13 and locate it under s 12, together with the necessary words to bring it under the same punishment regime, similar to what has been accomplished by s 108B of the Penal Code.

54 It should be noted, however, that the punishment regime for abetment under the Penal Code is somewhat more nuanced than s 12 of the Act, with different punishments being prescribed depending on whether or not the principal offence was successfully carried out, whether the principal offence is punishable by death or imprisonment, the number of persons abetted, *etc*.[35] If legislative amendments are to be undertaken, it would be an opportune time to consider whether the punishment for abetment under the Act should be brought in line with the Penal Code's scheme.

55 Another issue for consideration, which has not been the focus of the present article, would be the harmonisation of the language of abetment under the Act and the Penal Code. The choice of "aid, abet, counsel or procure" in the Act as set out in ss 13(*a*) and 13(*aa*) owes its origins to the relevant English provision, namely, s 8 of the Accessories and Abettors Act 1861.[36] On the other hand, abetment under the Penal Code, descended from a colonial statute first applied in India, includes abetment by conspiracy, which is alien to English law.[37] Since the word "abet" under the Act has been interpreted by our courts to fully encompass the meaning of the word as set out in the Penal Code (including abetment by conspiracy),[38] what is to be made of the words "aid", "counsel" and "procure"?

---

34 An earlier draft of this article was forwarded to the Ministry of Law for its comments. The Ministry of Law then forwarded the draft to the Ministry of Home Affairs. In a written reply, the Ministry of Home Affairs has stated that it is currently working with the relevant agencies to assess the need for legislative review.

35 See ss 109–120 of the Penal Code (Cap 224, 2008 Rev Ed).

36 c 94.

37 See *Er Joo Nguang v Public Prosecutor* [2000] 1 SLR(R) 756.

38 See *Chai Chien Wei Kelvin v Public Prosecutor* [1998] 3 SLR(R) 619.

56 Then, there is also the issue of why s 13(*aa*) should contain an additional element that the principal offence be committed in Singapore, which element is absent from s 12. Parliament may wish to consider whether it would be desirable to make consistent the law by either dropping or mandating the element in both provisions.

57 Finally, there is the curious offence of s 13(*b*) itself. Quite apart from the lack of prosecutions, one wonders at the principle behind criminalising the preparatory acts even by non-citizens of actions which are committed in foreign countries that are not offences in the first place, especially when the harm, if any, is unlikely to be felt in Singapore. The reach of this provision, should the State decide to prosecute, is extraordinary. By way of example, a person who operates a recreational marijuana business in a jurisdiction that has legalised the drug comes to Singapore as a tourist. When he attempts to board his return flight home to presumably continue running his business, or even replies to a business e-mail while in Singapore, he would be liable under s 13(*b*) of the Act, irrespective of his nationality. At what point does the function of the criminal law move beyond the protection of Singapore's residents, to become international moral policing?

X. Conclusion

58 The present law with regards to abetment under the Act is clearly unsatisfactory. Legislative reform is needed to address the situation. The State, with its vast resources and personnel, together with the relevant stakeholders, should seriously consider undertaking the necessary study to find the appropriate answers, which this author does not pretend to know.

59 Lest it be said that this is simply an academic exercise in anxiety and there is no urgency for reform, the curious case of *Kuppusamy* is a living example of what can go wrong when our punishment schemes are irrational.