

## SENTENCING MENTALLY-DISORDERED OFFENDERS FOR CULPABLE HOMICIDE

1 Section 299 of the Penal Code (Cap 224) defines “culpable homicide” as an act done by one:

“... with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death ...”

Section 300 further defines the sub-set of cases which would amount to “murder”:

“Except in the cases hereinafter excepted culpable homicide is murder –

- (a) if the act by which the death is caused is done with the intention of causing death;
- (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
- (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
- (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.”

The relationship between s 299 and s 300 is highly complex, and many cases and academic pieces have been devoted to its consideration. This discussion focuses instead on the sentencing of mentally-disordered offenders who seek to rely on certain defences to murder.

### *Defences open to mentally-disordered offenders*

2 Two defences are potentially relevant to mentally-disordered accused persons. The first, a general exception which absolves the accused of all liability, is found in s 84 of the Penal Code (“the unsoundness of mind defence”):

“84. Nothing is an offence which is done by a person who, at the time of doing it, *by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.*” [emphasis added]

The second is a special exception to murder (“the diminished responsibility defence”), which absolves the accused of liability for murder but not for culpable homicide:

“Exception 7 (to s 300 of the Penal Code).

Culpable homicide is not murder if the offender was suffering from such *abnormality of mind* (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) *as substantially impaired his mental responsibility* for his acts and omissions in causing the death or being a party to causing the death.” [emphasis added]

3 Much criticism has been levelled at these defences. As the focus of this article is on sentencing, not on the substantive law, it will suffice to merely list a few. Firstly, these provisions are based on the Indian Penal Code, which was originally drafted in the 1800s, and they have not kept up with developments in the medical and psychiatric fields. Secondly, the distinction between “unsoundness of mind” and “abnormality of mind” is a rather artificial one, which ignores the fact that different degrees of affliction often shade into one another. It is not easy to categorise the many cases which come before the courts. They include delusory disorders, mania,<sup>1</sup> insane automatism, schizophrenia,<sup>2</sup> depression,<sup>3</sup> encephalitis<sup>4</sup> and brain damage from alcoholism.<sup>5</sup>

4 Thirdly, the drafting of these provisions leaves much to be desired, and there are several cases which have attempted to grapple with their interpretation. With regards to the unsoundness of mind defence, the court has to inquire into whether the condition is due to internal or external factors. This leads to rather capricious consequences; for example, a hyperglycaemic can be deemed to be of unsound mind, but not a hypoglycaemic. Section 84 also requires that the offender know that the act was “wrong or contrary to law”. It has been settled that “wrong” refers to “morally wrong”, but it is unclear whether the standard is a subjective or an objective one. Authorities also seem divided about whether the phrase should be read conjunctively or disjunctively.<sup>6</sup> But perhaps one of the

1 e.g. *Jusoh v PP* (1963) 29 MLJ 84.

2 e.g. *Neo Man Lee v PP* [1991] SLR 146, *PP v Carilman Aloysius Joshi* (CC No 43 of 1999, unreported judgment dated 4.10.1999), *PP v Ong Wee Teck* [2001] 3 SLR 479, *PP v Dolah bin Omar* [2001] 4 SLR 302.

3 e.g. *Tan Mui Choo & Another v PP* [1986] SLR 98, *PP v Chot Saik Kam* [1990] SLR 756

4 e.g. *Wong Mimi v PP* [1972-1974] SLR 73

5 e.g. *R v Tandy* The Times 23 December 1987

6 e.g. of conjunctive view: *Geron Ali v Emperor* AIR 1941 Cal 129, *Azro v PP* (1962) 28 MLJ 321; e.g. of disjunctive view: *Ashiruddin Ahmed v The King* (1949) 50 Cr LJ 255.

most serious flaws is the extreme narrowness of the unsoundness of mind defence, with the result that very few accused persons choose to plead this defence. As regards the diminished responsibility defence, uncertainty is added by the need to take a “broad brush approach”<sup>7</sup> for want of a reliable scientific method. Courts and law reform committees<sup>8</sup> have voiced the need for an overhaul of these defences; indeed, of the way in which the law deals with mentally-disordered offenders.

### *The sentencing regimes*

5 Short of a complete revamp of the substantive law, however, a small step can be taken in the form of a re-examination of the sentencing regimes and attitudes in sentencing. The present position is as follows. Flowing from the dichotomy between “unsoundness of mind” and “abnormality of mind” are two separate sentencing regimes. If the accused person successfully establishes the unsoundness of mind defence, s 315 of the Criminal Procedure Code (Cap 68) states that the court has no choice but to order that he be kept in “safe custody”, either in a hospital, prison or other suitable place:

“315. – (1) Whenever the finding states that the accused person committed the act alleged, the court before which the trial has been held *shall*, if that act would but for incapacity found have constituted an offence, *order that person to be kept in safe custody* in such place and manner as the court thinks fit and shall report the case for the orders of the Minister.

(2) The Minister may order that person to be confined in a mental hospital, prison or other suitable place of safe custody during the President’s pleasure.” [emphasis added]

6 If the accused person successfully relies on the diminished responsibility defence, the sentencing provision is s 304 of the Penal Code:

“304. Whoever commits culpable homicide not amounting to murder shall be punished —

(a) with imprisonment for life, or imprisonment for a term which may extend to 10 years, and shall also be liable to fine or to caning,

<sup>7</sup> e.g. *R v Byrne* [1960] 2 QB 396, *Cheng Swee Hin v PP* [1980-1981] SLR 116, *Tan Mui Choo v PP* [1986] SLR 98.

<sup>8</sup> e.g. Royal Commission on Capital Punishment (1953); Butler Committee *Mentally Abnormal Offenders* (1975); Criminal Law Revision Committee (Fourteenth Report 1980); *PP v Dolah bin Omar* [2001] 4 SLR 302.

if the act by which death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death; or

(b) with imprisonment for a term which may extend to 10 years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.”

The main issue in cases under s 304(a) is whether they merit the imposition of a life sentence, rather than a fixed-term sentence of up to ten years.

7 The implications of a life sentence should be noted. The starting point is *Abdul Nasir bin Amer Hasah v PP* [1997] 3 SLR 643, in which it was held that a sentence of life imprisonment entails incarceration for the remainder of the convicted person’s natural life, not imprisonment for twenty years. However, this is tempered by rule 119A of the Prisons Regulations, which provides that the Life Imprisonment Review Board will consider whether a person serving a sentence of life imprisonment is suitable for release, after he has served twenty years of his sentence, and at twelve-month intervals thereafter. The consequences of the ruling in *Abdul Nasir* were explored in *PP v Tan Kei Loon Allen* [1999] 2 SLR 288 at 296:

“In serious cases the court must choose between the two options for a weighty sentence: ten years or life imprisonment. Under the old position, the effective choices would be up to seven years’ imprisonment (after remission) or about 13 years’ imprisonment for a ‘life sentence’ (after remission), a gap of about six years. Without remission, the gap would be ten years. Now, the gap is very much wider. Even assuming a positive outcome after review by the Life Imprisonment Review Board, the gap between the sentencing options is between 7 and 20 years, more than double the old position. Assuming a negative outcome by the Review Board, or that the sentence was not commuted, the gap widens ...”

8 It is also suggested that some thought be given to the question why offenders who meet the requirements of the diminished responsibility defence are to be incarcerated under different conditions from those who qualify for the unsoundness of mind defence (the former in prisons, the latter in “safe custody” which can include places other than prisons). It is suggested that such a distinction is arbitrary. Firstly, it is difficult to draw a clean line between “unsoundness of mind” and “abnormality of mind”. Secondly, *all* mentally-disordered offenders need to receive treatment or care, and it should not be assumed that offenders who qualify for the diminished responsibility defence will respond better to a prison regime than any other regime.

9 It may also be appropriate at this juncture to point out that there do not seem to be any legal provisions on treatment – its forms, the frequency, even whether there is a legal obligation to treat mentally-disordered offenders if they can be treated.

### *Sentencing under s 304(a)*

10 A unique difficulty facing the judge in cases like these is expressed by Sir Rupert Cross:

“Having no idea of what it is like to be mentally abnormal, the judge cannot form even the roughest estimate of the difficulties experienced by someone found to have been suffering from [for example] diminished responsibility.”<sup>9</sup>

But the law has thrust on judges the role of sentencing mentally-disordered offenders, and in carrying out this role, they should remember that:

“It is essential to preserve the distinction between punitive and non-punitive detention at the theoretical level, however difficult it may be to make the distinction a practical reality.”<sup>10</sup>

This is an application of the maxim that justice should not only be done, but also be seen to be done. Professor Ashworth has noted that:

“The rule of law, in this context, means that judicial decisions should be taken openly and by reference to standards declared in advance.”<sup>11</sup>

It is for this reason that, despite the fact that most cases can easily be dealt with by reference to the applicable provisions, the courts, in sentencing mentally-disordered offenders for culpable homicide, should also articulate the relevant sentencing aims and principles which they deem applicable.

### *The relevant sentencing aims and general principles*

11 Not all the “traditional” theories of punishment – deterrence, rehabilitation, incapacitation and desert – are relevant in sentencing mentally-disordered offenders. In particular, the concept of deterrence – whether general or individual – has little value here. A “sane” person would not be deterred by sentences imposed on a mentally-disordered

9 Sir Rupert Cross, *The English Sentencing System* (2nd Edition, 1975) p 141.

10 *Ibid*, p 139.

11 Andrew Ashworth, *Sentencing and Criminal Justice* (2nd Edition, 1995) p 60.

offender because he would not think they had much in common. A mentally-disordered offender who qualifies for either defence would be unlikely to have sufficient control over his actions to be deterred by sentences imposed on another mentally-disordered offender or on himself.

12 Rehabilitative theory has given rise to laws which prescribe indeterminate sentences (whether in hospitals or prisons) so that a mentally-disordered offender will be released only when experts deem him “cured”. Incapacitative theory favours long custodial sentences for “dangerous” criminals in the name of societal protection; the term “dangerous” also includes mentally-disordered persons who are likely to re-offend. Apart from the issues of whether such offenders can be “cured” and whether the criteria for “dangerous” are sound, the key problem with such strategies is that they conflict with desert theory. This states that an offender should not be punished disproportionately to the gravity of his offence.

13 Different jurisdictions have deemed some of these aims more important than others. The few cases involving culpable homicide by mentally-disordered offenders, in which the courts articulated the sentencing aims they tried to achieve,<sup>12</sup> show that the Singapore courts seem more concerned with incapacitation and, to a lesser extent, with rehabilitation. For example:

- a In *Neo Man Lee v PP* [1991] SLR 146, the appellant suffered from chronic schizophrenia. The court upheld the life sentence because, one, the appellant would pose a danger to himself and to society if he suffered a relapse; and two, he would receive proper medical care while in prison.
- b In *PP v Carilman Aloysius Joshi* (CC No. 43 of 1999, unreported judgment dated 4.10.1999), the accused was schizophrenic and addicted to drugs and alcohol. The court imposed a life sentence mainly because the accused was dangerous during relapses and was apt to neglect his treatment programme due to his addictions. The court was also mindful of the fact that the accused required prolonged treatment.
- c In *PP v Ong Wee Teck* [2001] 3 SLR 479, the accused was schizophrenic. He had defaulted on his treatment and attacked another person previously. The court sentenced him to life imprisonment as he was a danger to himself and to the public.

<sup>12</sup> These aims were not clearly expressed in earlier cases like *PP v Chot Saik Kam* [1990] SLR 756.

14 Two general sentencing principles should be mentioned as they are directly relevant to a s 304(a) case. One, the principle of equal impact states that sentences should be calculated so as to impose an equal impact on offenders. Professor Ashworth highlights the case of an offender with a mental condition which may make custody more painful for him, as an example of one who may be harder hit by a long custodial sentence than an average person.<sup>13</sup>

15 Two, the principle of parsimony states that the least punishment which is sufficient should be imposed in each case. This is echoed in *PP v Tan Kei Loon Allen*:

“In a situation in which the court is desirous of a sentence greater than ten years, but feels that a sentence of life imprisonment is excessive, we have no choice but to come down, however reluctantly, on the side of leniency.”<sup>14</sup>

Section 304(a) unfortunately presents the court with a stark choice. In some instances,<sup>15</sup> the courts expressed the view that ten years’ imprisonment is inadequate, but found life imprisonment too harsh.

### *Principles governing the sentencing of mentally-disordered offenders*

#### The Hodgson factors

16 The starting point is *R v Hodgson* (1968) 52 Cr App R 113, which was cited in *Neo Man Lee v PP*:<sup>16</sup>

“When the following conditions are satisfied, a sentence of life imprisonment is in our opinion justified:

- (1) where the offence or offences are in themselves grave enough to require a very long sentence;
- (2) where it appears from the nature of the offences or from the defendant’s history that he is a person of unstable character likely to commit such offences in the future; and
- (3) where if the offences are committed the consequences to others may be specially injurious, as in the case of sexual offences or crimes of violence.”

13 *Sentencing and Criminal Justice* p 80

14 [1999] 2 SLR 288 at 297.

15 e.g. *PP v Carilman Aloysius Joshi* supra (footnote 2), *Dolah bin Omar v PP* [2001] 4 SLR 302. In these cases, the courts found themselves compelled to impose the life sentence.

16 [1991] SLR 146 at 148

It would seem however that these factors do not add much to a s 304(a) inquiry. With regards to the first factor, few offences can be said to be graver than culpable homicide. The third factor is also redundant, because culpable homicide is in itself a very violent crime. This leaves the second factor, which essentially places the offender's fate in the hands of a psychiatrist or other medical professional. Such an approach leans too much in favour of rehabilitation and incarceration, and such a leaning (as explained above) can bring with it great indeterminability and disproportion.

17 It is suggested that the *Hodgson* factors are not well-suited to a s 304(a) inquiry for two reasons. Firstly, the range of offences for which a life sentence can be imposed on a mentally-disordered offender in England is wider than in Singapore. In England, this can be done in cases involving, for example, manslaughter, serious wounding, rape, robbery, burglary and arson,<sup>17</sup> hence the need for an inquiry into factors (1) and (3) above. In Singapore, this reasoning is adopted only in the context of s 304(a) cases; hence there is no need for an inquiry into these factors. Secondly, in England, the *Hodgson* factors are applied not only to mentally-disordered persons, but to "sane" ones as well.<sup>18</sup> It may be interesting to note that *Hodgson* itself did not involve a mentally-disordered offender. The result is that, in England – where the test is also applied to "sane" persons – the inquiry provided for in factor (2) as to whether the offender is a "person of unstable character" is likely to be more meaningful. It would not go against common sense to postulate that a court (aided by a psychiatrist) is more likely to find a mentally-disordered offender of "unstable character" than a "sane" offender. It is submitted that, in a s 304(a) case, factor (2) does not take the court very far in its attempt to decide whether a mentally-disordered offender should be imprisoned for life.

#### Determinability of risk period

18 Another factor is the determinability of the period during which the offender poses a danger. It was said in *Attorney-General's Reference No. 32 of 1996 (Steven Alan Whittaker)* [1997] 1 Cr App R (S) 261 at 264:

“there should be good grounds for believing that the offender may remain a serious danger to the public for a period which cannot be reliably estimated at the date of sentence.” [emphasis added]

<sup>17</sup> Life imprisonment is prescribed by various statutes as the maximum sentence,

<sup>18</sup> e.g. *R v Headley* (1979) 1 Cr App R (S) 158, *R v Birch* (1987) 9 Cr App R (S) 509, *R v J* (1993) 14 Cr App R (S) 500, *Attorney-General's Reference No. 76 of 1996 (R v Baker)* [1997] 1 Cr App R (S) 81, *Attorney-General's Reference No. 14 of 1998 (R v McGregor)* [1999] 1 Cr App R (S) 205.

If the court can be relatively sure as to the period during which the offender will remain dangerous (taking into account proposals for treatment), then it should attempt to fix the sentence as close to the period as possible, perhaps allowing for an additional period for rehabilitation and to reflect desert. However, while this is possible in England (in which the courts can pass fixed term sentences of any length), it is not as simple in Singapore, because s 304(a) imposes a ten-year limit for fixed sentences. It is suggested that such a limit serves no useful purpose, and is in fact arbitrary. The section may perhaps be redrafted to this effect (changes in italics):

“304. Whoever commits culpable homicide not amounting to murder shall be punished –

(a) with imprisonment for *a term which may extend to life*, and shall also be liable to fine or to caning, if the act by which death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death ...”

19 It should be noted, however, that the very indeterminability of the length of a life sentence affords a different perspective. It was said in *R v Picker* (1970) 54 Cr App R 330 at 332 that “a life sentence can properly be imposed in mercy”. This was further elaborated in *R v Owen* (1980) 2 Cr App R (S) 45 at 47:

“A sentence of life imprisonment ... may ... be justified if there is, in addition, some indication that a prisoner may, with the passing of the years, ... overcome that mental abnormality. *Such a sentence holds out the hope that he may be released once it is determined that he can safely be re-admitted to the public.*” [emphasis added]

An offender may never be conclusively “cured”, but there is always the hope that he can *overcome* his condition and be deemed suitable for release. It is likely that this time could be earlier or later than expected.

### ***Room for reform: a brief comparison with the sentencing options in England***

20 As mentioned above, courts in Singapore can deal with a mentally-disordered offender in two ways:

- a If he qualifies for the unsoundness of mind defence, he must be placed in safe custody for a potentially indefinite period.
- b If he qualifies for the diminished responsibility defence to murder, he shall be sentenced:
  - i. For liability under the first and second limbs of s 299 of the Penal Code: to imprisonment for life or up to ten years and/or a fine or caning; or

- ii. For liability under the third limb of s 299: to imprisonment for up to ten years and/or a fine.

21 In contrast, courts in England can make a variety of orders with respect to mentally-disordered offenders, including, for example: psychiatric probation orders, guardianship orders, hospital orders, hospital and restriction orders and imprisonment for an indefinite period. Psychiatric probation orders can be made under s 3 of the Powers of Criminal Courts Act 1973. A report must be furnished by a qualified medical practitioner, and it should show that the offender's condition does not warrant a hospital or a guardianship order. The offender may be ordered to undergo treatment at a hospital or as an outpatient for up to a year. Guardianship orders place an offender under the guardianship of a local authority. As there is no comparable institution in Singapore, this option will not be discussed.

22 The courts' power to make hospital orders stems from s 37 of the Mental Health Act 1983. There are two main requirements. Firstly, two qualified practitioners (at least one of whom is approved under the Act) must testify that it is appropriate to detain the offender for treatment. In particular, the court must be satisfied that treatment is likely to alleviate or prevent a deterioration of the offender's condition ("the treatability requirement"). Secondly, a hospital must be willing to admit the offender. The period of detention is initially six months, then is renewable for another six months, and subsequently renewable for a year at a time.

23 Under s 41 of the Mental Health Act 1983, the court can make a combined hospital and restriction order. The requirements are as for a hospital order, with the added condition that at least one of the medical practitioners must have given oral testimony. The bottomline is that the court must be satisfied that a restriction order is necessary to protect the public from serious harm. Such an order can be for a fixed or indeterminate term.

24 As mentioned above, the court's power to impose a life sentence for various offences derives from the respective statutes, and the specific prerequisites for the exercise of this power are listed therein. The court may have no choice but to impose this sentence if the treatability requirement is not met, as is often the case with persons suffering from psychopathic disorders. Some general principles can be gleaned from the cases.<sup>19</sup> Life imprisonment should be imposed only if:

<sup>19</sup> David Thomas, *Current Sentencing Practice* (2001) Vol 2, Section F3.

- a The offender has a mental condition or personality defect which makes it probable that he will commit grave offences in future, or is considered dangerous to the public. A life sentence may be imposed even if his condition is unlikely to improve with treatment;
- b The offender has been convicted of a violent or sexual offence within the meaning of s 161 of the Powers of Criminal Courts (Sentencing) Act 2000; and
- c A determinate sentence proportionate to the gravity of the offence will not sufficiently protect the public.

25 Of course not every option will be feasible in the Singapore context. The range of offences for which these sentencing options can be considered in relation to mentally-disordered offenders is wider in England. It is very unlikely that a Singapore court will think that outpatient psychiatric treatment will suffice for a s 304(a) case. It would not hurt however to look to the English regime for ideas, and to consider the English experience so as to assess the desirability or otherwise of each option.

### *Conclusion*

26 The law on mentally-disordered offenders needs to be modernised and more sentencing options should be introduced; this is largely a role for Parliament. The courts, however, can do their part to clarify the law by articulating their aims in sentencing mentally-disordered offenders. One need not start from a “human rights” standpoint nor undertake a sociological examination of punishment to arrive at such conclusions. The impetus for change simply lies in the need to untie judges’ hands and to promote the transparency and objective standards which are essential components of the Rule of Law.

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