# Fricker Oliver
# v
# Public Prosecutor and another appeal and another matter

## [2010] SGHC 239

High Court — Magistrate's Appeals Nos 232 of 2010/01 and 232 of 2010/02; Criminal Motion No 32 of 2010
V K Rajah JA
10, 13, 18 August 2010

***Criminal Procedure and Sentencing*** *— Appeal — Adducing fresh evidence — Prosecution adducing evidence of previous conviction of accused in Switzerland — Whether evidence relevant and material — Whether weight should be given to fresh evidence*

***Criminal Procedure and Sentencing*** *— Sentencing — Appeals — Accused gaining access to protected place by cutting hole in perimeter fence using wire-cutter — Whether two months' imprisonment sentence manifestly inadequate*

***Criminal Procedure and Sentencing*** *— Sentencing — Benchmark sentences — Accused entering protected place for purpose of committing further offence — Whether custodial threshold crossed — Starting point for imprisonment term for offence of entering protected place for purpose of committing further offence — Protected Areas and Protected Places Act (Cap 256, 1985 Rev Ed)*

***Criminal Procedure and Sentencing*** *— Sentencing — Principles — Consecutive imprisonment terms for vandalism charge and trespass charge — Whether one transaction rule applied*

**Facts**

The accused ("the Accused"), a Swiss national, and his accomplice broke into the premises of SMRT Ltd's Changi Depot ("the SMRT Changi Depot") by cutting a hole in the fence surrounding the depot with a wire-cutter and spray-painted the words "McKoy Banos" on the sides of two train carriages. For their actions, the Accused was charged with committing the offences of vandalism under the Vandalism Act (Cap 341, 1985 Rev Ed) ("the vandalism charge") and entering a protected place ("the trespass charge") under the Protected Areas and Protected Places Act (Cap 256, 1985 Rev Ed) ("the PAPPA") in furtherance of a common intention. The Accused pleaded guilty to those charges before the district judge and agreed to have a second charge of vandalism in respect of the cutting of the fence taken into consideration for the purposes of sentencing. The district judge convicted and sentenced the Accused to three months' imprisonment and three strokes of caning for the vandalism charge and two months' imprisonment for the trespass charge, which sentences were to run consecutively.

Both the Accused and the Prosecution appealed against the district judge's sentencing decision ("the Appeals"). The Accused contended that the "one transaction rule" ought to apply so that the terms of imprisonment should run concurrently while the Prosecution argued that the sentence in respect of the

trespass charge was manifestly inadequate. On appeal, the Prosecution also filed a criminal motion to admit additional evidence of a previous conviction of the Accused in Switzerland by way of an "Extract from the Swiss Criminal Records Registry" ("the Swiss Extract").

**Held, dismissing the appeal and allowing the cross-appeal:**

(1) An offender's foreign antecedents were relevant to showing whether an offence was a manifestation of the offender's continuing disobedience of the law, thereby meriting an enhanced sentence justified on the basis of specific deterrence, general deterrence and protection of the public: at [19].

(2) The Prosecution's application to admit the Swiss Extract was allowed. The Swiss Extract was relevant and material to the Appeals as it revealed that the Accused had, in fact, one previous conviction for multiple incidents of property damage. Since the accuracy of the evidence was not challenged, the test of materiality and credibility had also been met: at [20].

(3) No real weight was attached to the Swiss Extract in the court's decision on the Appeals. No court was compelled to assign any weight to an offender's previous convictions if they did not constitute a reasonable basis on which to infer that an offender might re-offend. Due to the lack of details in the Swiss Extract, the court was not persuaded that the Prosecution had clearly established that it constituted a reasonable basis for an inference of recidivism on the Accused's part, albeit no credit should be given to the Accused on the basis that he had an antecedent-free record: at [21] and [22].

(4) The one transaction rule had not been offended. While the offences followed each other closely, they were neither a necessary consequence nor a corollary of each other. The offences were factually and conceptually different. In any event, the key consideration was the overall proportionality of the aggregate sentence having regard to the heinousness of the offences committed. The totality principle and the one transaction rule were, at the end of the day, important but not inflexible guiding principles to ensure that multiple offending by a wrongdoer was proportionately punished: at [25] and [26].

(5) There were no rigid linear relationships between offending and sentencing. However, offences that affected public services or facilities and offences which caused public disquiet ordinarily attracted severer sentencing: at [26].

(6) The sentencing precedents cited did not indicate that the courts had made a conscious sentencing distinction between offences involving protected areas and offences involving protected places: at [29], [31] and [36].

(7) The unique scheme of protection that Parliament had conferred on protected places and areas indicated that any intrusion into either a protected place or area ought never to be dismissed lightly: at [32] and [33].

(8) Any area or place gazetted as "protected" under the PAPPA was an important area that merited high security and protection, and it was not for the courts to determine whether one protected area (or place) was deserving of more protection than another. Any entry into any such location always had the

potential to compromise public security and ought to be taken very seriously: at [34].

(9) The legal consequences that flowed from the designation of a location as a "protected place" as compared with its designation as a "protected area" were different. It was only when a person in a protected area failed to comply with the directions regulating conduct in that area that an offence was committed whereas any unauthorised entry into a protected place was an offence. It was incontrovertible that protected places had been statutorily assessed to require a greater level of protection than protected areas. However, this said nothing about the relative seriousness of an offence involving a protected place as compared to one involving a protected area: at [35] and [36].

(10) A fine was clearly inappropriate when an offender entered a protected place by design. The custodial threshold for an offence under the PAPPA was clearly crossed whenever an intruder entered a protected place for the purpose of committing a further offence. The severity of the custodial sentence would then depend on factors such as the circumstances under which he had obtained entry into the protected place, as well as the nature of the offence which he had intended to commit within the protected place. The starting point for an offender who entered into a protected place for the purpose of committing an offence ought to be a term of three months' imprisonment: at [37].

(11) The Accused's act of vandalism was perversely intended to make and leave a substantial indelible mark on the general public's consciousness. Taking into consideration the fact that the Accused had used a wire-cutter to cut a hole in the perimeter fence to gain access to the SMRT Changi Depot, the sentence of two months' imprisonment imposed by the district judge for the trespass charge was manifestly inadequate and was enhanced to a sentence of four months' imprisonment: at [39].

[Observation: Sentences would always be determined by the nature of the offence and the circumstances pertaining to the offence, and not the nationality or identity of the offender. Foreign offenders would ordinarily receive from the courts the same sentence that a Singaporean offender would for a similar offence committed in similar circumstances. However, foreign offenders who were in Singapore for the sole purpose of committing crime could expect more severe sentencing: at [1] and [2].]

**Case(s) referred to**

*ADF v PP* [2010] 1 SLR 874 (refd)

*Mohammad Zam bin Abdul Rashid v PP* [2007] 2 SLR(R) 410; [2007] 2 SLR 410 (folld)

*PP v Firdaus bin Abdullah* [2010] 3 SLR 225 (refd)

*PP v Fricker Oliver* [2010] SGDC 289 (refd)

*PP v Law Aik Meng* [2007] 2 SLR(R) 814; [2007] 2 SLR 814 (folld)

*PP v Lee Cheow Loong Charles* [2008] 4 SLR(R) 961; [2008] 4 SLR 961 (refd)

*PP v Lim Ah Heng* [1999] 1 SLR(R) 105; [1999] 1 SLR 827 (folld)

*PP v Low Kam Hing* District Arrest Case No 8649 of 1998 (folld)

*PP v Md Mahbubul Hoque Md Sirajul Hoque* [2009] SGDC 317 (refd)

*PP v Md Nurul Hoque Safique Sarkar* District Arrest Case No 53551 of 2008 and others (refd)

*PP v NF* [2006] 4 SLR(R) 849; [2006] 4 SLR 849 (folld)

*PP v Pang Tsae Diau* District Arrest Case No 52882 of 2004 (refd)

*PP v Yaimung Thitida* Magistrate's Arrest Case No 2739 of 2006 and others (refd)

*PP v Zaw Naing* Magistrate's Arrest Case No 2747 of 2006 and others (refd)

*R v Postiglione* (1991) 24 NSWLR 584 (folld)

*R v Wilson (Simon Tyler)* [2010] 1 Cr App R(S) 11 (folld)

*Sim Yeow Seng v PP* [1995] 2 SLR(R) 466; [1995] 3 SLR 44 (folld)

*Tan Kay Beng v PP* [2006] 4 SLR(R) 10; [2006] 4 SLR 10 (refd)

*V Murugesan v PP* [2006] 1 SLR(R) 388; [2006] 1 SLR 388 (refd)

**Legislation referred to**

Penal Code (Cap 224, 2008 Rev Ed) s 34

Protected Areas and Protected Places Act (Cap 256, 1985 Rev Ed) ss 4(1), 5(1), 7 (consd);
ss 4, 4(2), 5, 8, 10(1), 10(2)

Protected Places Ordinance (Ordinance 18 of 1948)

Vandalism Act (Cap 341, 1985 Rev Ed) s 3

*Kang Yu Hsien Derek (Rodyk & Davidson LLP) for the appellant in Magistrate's Appeal No 232 of 2010/01 and the respondent in Magistrate's Appeal No 232 of 2010/02, and the respondent in Criminal Motion No 32 of 2010;*
*Kan Shuk Weng and Kevin Yong (Attorney-General's Chambers) for the respondent in Magistrate's Appeal No 232 of 2010/01 and the appellant in Magistrate's Appeal No 232 of 2010/02, and the applicant in Criminal Motion No 32 of 2010.*

18 August 2010

**V K Rajah JA:**

**Preliminary remarks**

1 Foreigners who visit or work in Singapore are accorded many rights, privileges, as well as courtesies by law. In return, all that is asked of them is that they respect and observe the law. Those who think that certain laws are out of step with more "progressive" legal systems are, of course, entitled to their views. However, even if these individuals question the ambit or application of a law, they must still comply with it. If and when foreigners contravene any laws, they cannot expect or claim special privileges or exemptions on the basis of their nationality or status as a foreigner.

2 While the courts have no say in whether an individual ought to be charged and the type of offences that may be preferred against him, the courts have the sole constitutional remit to decide on the guilt and sentencing of all individuals who violate the laws of Singapore. It is a settled

judicial precept that foreign offenders will ordinarily receive from the courts the same sentence that a Singaporean offender would for a similar offence committed in similar circumstances – *the sentence meted out will neither be more lenient nor harsher*. Sentences will always be determined by the nature of the offence and the circumstances pertaining to the offence, and not the nationality or identity of the offender. I should add, at this juncture, that there is, nevertheless, one genre of foreign offenders who can expect more severe sentencing – foreigners who are in Singapore for the sole purpose of committing crime.

3 The laws of Singapore proscribing vandalism are indeed severe. However, needless to say, these are the very laws that are largely responsible for a clean and graffiti-free environment, not to mention a low incidence of crime involving damage to public property and services. While some may regard graffiti as a stimulating and liberating activity that adds colour, spice and variety to a staid environment, many more in Singapore think otherwise. It is fair to say that in some countries, public transportation has been blighted by graffiti on an enormous and sometimes uncontrollable scale. This sort of behaviour, which I am confident does not resonate with the majority of the Singaporean public, must not be allowed to take root here. Individuals who intend to engage in similar acts here for their own self-indulgent gratification and self-aggrandisement must understand that this is an area of offending that – apart from the real damage and serious inconvenience caused – is often offensive to the sensibilities of the general public. As far as the courts are concerned, the parliamentary policy that undergirds the Vandalism Act (Cap 341, 1985 Rev Ed) leaves no room for ambiguity. Vandalism, it is clear, merits a sentencing response that has, in the sentencing equation, a significant element of general deterrence.

**The facts**

4 The accused in the present case ("the Accused"), together with an accomplice ("the Accomplice") who is still at large, committed offences under the Vandalism Act and the Protected Areas and Protected Places Act (Cap 256, 1985 Rev Ed) ("the PAPPA"). He pleaded guilty in the District Court to one charge of vandalism committed in furtherance of a common intention (punishable under s 3 of the Vandalism Act read with s 34 of the Penal Code (Cap 224, 2008 Rev Ed)) (*viz*, District Arrest Case No 24677 of 2010 ("the graffiti charge")) and one charge of entering a protected place committed in furtherance of a common intention (punishable under s 5(1) read with s 7 of the PAPPA read with s 34 of the Penal Code) (*viz*, Magistrate's Arrest Case No 2548 of 2010 ("the trespass charge")). He also agreed to have a second charge of vandalism committed in furtherance of a common intention (punishable under s 3 of the Vandalism Act read with s 34 of the Penal Code) (*viz*, District Arrest Case No 24676 of 2010 ("the fence-cutting charge")) taken into consideration for the purposes of sentencing.

5 The Accused and the Accomplice had, in short, broken into the premises of SMRT Ltd's Changi Depot ("the SMRT Changi Depot") – a "protected place" for the purposes of the PAPPA – and had strikingly painted the words "McKoy Banos" on the sides of two train carriages. As the material facts have been admirably summarised in the grounds of decision (see *Public Prosecutor v Fricker Oliver* [2010] SGDC 289 ("the GD")) of the district judge ("the District Judge") I shall repeat them here in so far as they are no longer disputed (at [1]–[2] and [4]–[9]):

> 1 The [A]ccused pleaded guilty to the following two charges:
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> (a) **DAC 24677/2010** [*ie*, the graffiti charge] – one count of vandalism (s 3 [of the] Vandalism Act …) by spraying paint on two Mass Rapid Transit ('MRT') train carriages. This is an offence punishable with a fine of up to $2,000 and/or imprisonment of up to 3 years. As paint was used, s 3 prescribes mandatory caning of a minimum of 3 strokes, up to a maximum of 8 strokes.
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> (b) **MAC 2548/2010** [*ie*, the trespass charge] – one count of entering a protected place (s 5(1) [read with] s 7 [of the PAPPA] involving entering the [S]MRT Changi Depot located at 105 Changi Road. This is an offence punishable with a fine of up to $1,000 and/or imprisonment of up to 2 years.
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> 2 The [A]ccused admitted a third charge in **DAC 24676/2010** [*ie*, the fence-cutting charge] under s 3 of the Vandalism Act involving cutting the fence of the [S]MRT Changi Depot within which the vandalised trains were located. He consented to have this charge taken into consideration for the purpose of sentencing. All 3 charges were committed with an accomplice, one Lloyd Dane Alexander [*ie*, the Accomplice], in furtherance of their common intention.
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> …
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> 4 The facts in support of the charges are set out in the Statement of Facts ('SOF') which were admitted without qualification by the [A]ccused. I propose to only highlight a few salient facts. Together with the [A]ccomplice, he had cut the perimeter fence surrounding SMRT Ltd's ('SMRT') Changi Depot at around midnight on 17 May 2010. They then proceeded to vandalise two MRT train carriages with spray paint on both sides bearing the words 'McKoy Banos'.
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> 5 The [A]ccused was working in Singapore from October 2008 to the time of the offences as an IT consultant. He became friends with the [A]ccomplice when they met in Australia in 1997. The [A]ccomplice was planning to travel to Singapore for 3 days from 15 May 2010 and had arranged to stay with the [A]ccused at his apartment at The Sail, located within the Central Business District. Prior to the commission of the offences, the [A]ccused and the [A]ccomplice had been in contact. The [A]ccomplice had made arrangements to purchase 'Ironlak' spray paint cans from a paint supplier in Singapore, whom he had contacted by email on 30 March 2010.
> …

> 6 Just before collecting their spray paint cans in the afternoon of 16 May 2010, the [A]ccused was asked by the [A]ccomplice if spraying graffiti on trains was legal in Singapore. The [A]ccused replied that it was not. They then proceeded to take the MRT to survey the SMRT Changi Depot at about 5 pm. As it began to rain, they left for dinner at Lau Pa Sat in the Central Business District where they had some alcoholic drinks. They then returned to the [A]ccused's apartment nearby at The Sail to pick up a wire-cutter before proceeding to the SMRT Changi Depot to carry out their plan.
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> 7 Upon their arrival at the SMRT Changi Depot perimeter, they passed by the crash gate which carried a large red sign clearly indicating that they were at a protected place and unauthorised entry was prohibited. They kept observation and then picked a suitable location to cut a 1 m by 0.5 m hole in the fence using the wire- cutter [*sic*] that the [A]ccused had brought along.
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> 8 After the [A]ccused and [the] [A]ccomplice entered the SMRT premises through the hole in the fence, they moved to the 2 nearest train carriages and began spraying graffiti on either side of these carriages. The [A]ccused worked on one side while the [A]ccomplice worked on the other. The [Accused and the Accomplice] took some photographs of the spray-painted train carriages and they then managed to leave the premises undetected through the gap in the fence. The [A]ccused discarded the wire[-]cutter in a drain along the way after leaving the scene.
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> 9 Upon returning to the [A]ccused's apartment, the [A]ccomplice showed the [A]ccused the photographs he had taken of the spray-painted carriages. The [A]ccused went to work in the morning of 17 May 2010. The next day, the duo left for a pre-arranged holiday in Hong Kong.
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> [bold in original]

## The decision of the District Judge

6 After considering the submissions of the Prosecution and counsel for the Accused, Mr Derek Kang ("Mr Kang"), and the mitigating factors, the District Judge determined that a deterrent sentence was called for because "graffiti is considered a serious offence" and the Accused had "deliberately chose[n] … to break into a protected place in order to do so" (at [13] of the GD). He also took into account the fact that the offences had been carefully pre-arranged. Disagreeing with Mr Kang's submission that the various offences were part of the same transaction, he held that they were clearly distinct offences. He reasoned (at [39]–[42] of the GD):

> 39 In the present case, the offences the [A]ccused had pleaded guilty to were clearly distinct. The first offence (unlawful entry into the SMRT Changi Depot) which he had pleaded guilty to was a necessary precursor of the second (ie. vandalism). It would have been physically impossible for the [Accused] to commit the second offence had he not committed the first. Although broadly speaking it could be said that the first offence was part and parcel of the second, this went further than merely facilitating the commission of the second offence. It was a *planned* break-in, without which the second offence would have been impossible.

> 40 In precedents where the 'one transaction' rule has been held to apply, the offences in question were almost invariably committed spontaneously, without formal planning or premeditation. Thus they were appropriately characterised as having 'flowed' in the course of a single transaction. In [*V Murugesan v PP* [2006] 1 SLR(R) 388], the Court of Appeal had also acknowledged (at para 35) that 'the "one transaction rule" is not a rigid rule and should be applied sensibly'. It is essentially a restatement of the totality principle, to ensure appropriate aggregate custodial sentences are passed. The court retains the overall discretion to determine whether the various sentences passed ought to be consecutive or concurrent.
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> 41 These views were amplified by the Honourable the Chief Justice Chan Sek Keong recently in *PP v Firdaus bin Abdullah* [2010] SGHC 86. Reiterating his observations in *PP v Lee Cheow Loong Charles* [2008] 4 SLR(R) 961, Chan CJ noted in *Firdaus bin Abdullah* thus (at para 24):
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> > [E]ach of those groups of offences were distinct and separate, both factually and conceptually, from the other groups of offences, because each group was in itself serious, and more importantly did not necessarily or inevitably flow from the other groups of offences. There was present an element of control with respect to some of the offences which were committed serially and were committed separately from the others. Thus, there was no basis for the application of the 'one transaction' rule in such a situation.
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> 42 The above observations were apposite. The [A]ccused in the present case had been convicted in respect of two distinct offences under separate pieces of legislation, each serving different objectives. Each of the offences was serious in itself. Critically, the second offence did not 'necessarily or inevitably flow' from the first; if it could be said to 'flow' at all, it was only because it was consciously intended to be so. There was a conscious plan, or 'element of control', in that the initial offence(s) would have to be committed in order that the second could come to pass. The second offence would have been a physical impossibility unless the initial two offences, including the unlawful entry offence, had been committed first as a *sine qua non*.
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> 43 Adopting the Honourable the Chief Justice's reasoning in *Firdaus bin Abdullah* (at para 36), the [Accused] need not have committed the second offence if he did not want to commit it. The pivotal point was that the offences were *planned* to take place sequentially. Hence there was every justification for me to exercise my discretion to order the sentences to run consecutively, bearing in mind that the aggregate sentence should not be crushing or disproportionate to the gravity of the offences.
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> [emphasis in original]

7 After considering the sentencing precedents cited by counsel the District Judge held that the "precedents cited … were of limited help" (the GD at [44]) and that the instant offences were "probably *sui generis*" (the GD at [45]). He further observed that as far as he was aware, "this was the first known conviction of an accused who had deliberately set out to cut a fence surrounding a protected place in order to vandalise property" (the

GD at [45]). He subsequently sentenced the Accused to three months' imprisonment and three strokes of caning for the vandalism charge and two months' imprisonment for the trespass charge. It should be pointed out, at this juncture, that caning was and remains mandatory (pursuant to s 3 of the Vandalism Act) and that the Accused was aware of this when he entered his plea of guilt. The District Judge then directed that the sentences were to run consecutively. This resulted in an aggregate imprisonment term of five months in addition to caning.

**The appeals**

8 Both the Accused (in Magistrate's Appeal No 232 of 2010/01 ("the Accused's Appeal")) and the Prosecution (in Magistrate's Appeal No 232 of 2010/02 ("the Prosecution's Appeal")) have appealed against the District Judge's decision on sentencing. For convenience, the Accused's Appeal and the Prosecution's Appeal collectively will be referred to as "the Appeals", where appropriate. The Accused contended, in the main, that the terms of imprisonment ought to run concurrently rather than consecutively and that the aggregate term of imprisonment imposed was therefore "crushing and disproportionate". The Prosecution, on the other hand, argued that the aggregate imprisonment term was too low as the sentence meted out in respect of the trespass charge was manifestly inadequate. The Prosecution also filed an application in Criminal Motion No 32 of 2010 ("the Criminal Motion") to be allowed to admit additional evidence relating to a past conviction of the Accused in Switzerland.

9 The first hearing of the Appeals and the Criminal Motion took place on 10 August 2010. After hearing the submissions of the Prosecution and Mr Kang, I adjourned the hearing for the Accused to file an affidavit in response to the Prosecution's application in the Criminal Motion. The second hearing of the Appeals and the Criminal Motion took place on 13 August 2010. After hearing the submissions of the Prosecution and Mr Kang, I allowed the Prosecution's application in the Criminal Motion to admit additional evidence, and directed both the parties to file further written submissions by 12.00pm on 16 August 2010. Both parties have complied with this direction.

10 Before setting out (a) my reasons for allowing the Prosecution's application in the Criminal Motion to admit additional evidence and considering the significance of the additional evidence admitted, and (b) considering the merits of the Appeals, I will make some broad observations on the Accused's offending behaviour.

**Broad observations**

11 This is plainly a case where the offending behaviour is not just an act of crass vandalism, but one accompanied by a planned break-in into a protected place. It is therefore difficult to blithely dismiss this offending

episode as merely an incident involving young men having silly irresponsible fun while figuratively (or, in this case, literally) "painting the town red". Their conduct was nothing short of audacious and intemperate. *This was a stunt that was plainly designed to attract international notoriety to a pair of irresponsible attention-seeking individuals without regard to the inconvenience and damage their actions would cause.*

12 Both the Accused and the Accomplice knew that vandalism in Singapore attracts a stiff punishment. They both knew that graffiti in Singapore – particularly with regard to public transportation – is practically non-existent and would not be welcomed. Perhaps it is these very considerations that challenged, excited and motivated them to act as they did. They undoubtedly expected to be able to eventually bask in the notoriety that their unprecedented actions would inevitably receive. After they committed the offences, they were immensely pleased with themselves. Proud of their "handiwork", they took a number of photographs and then went off together to Hong Kong for a planned holiday before the Accused returned to Singapore.

13 Clearly, the Accused cannot be considered as having had a momentary lapse of judgment. A disquieting amount of preparation and deliberation had undoubtedly taken place prior to the commission of the offences. The Accused was plainly involved in the planning of the offences from an early stage. While Mr Kang attempted, at the hearing before me, to cast the Accomplice as the main culprit, it seems to me that the Accused was far from being a passive onlooker. He collected the spray paint from the supplier together with his accomplice. He was a willing and active participant in every sense. He was involved in scouting and assessing the site. He brought the wire-cutter from his home to the SMRT Changi Depot. He even painted one side of the train carriages. As a consequence of the conduct of his (and the Accomplice's) actions, the train had to be taken out of service for two days and the losses incurred by SMRT from the break in and act of vandalism were not insubstantial. On the plus side, as the District Judge noted, he had fully cooperated with the authorities once he was apprehended and had displayed a readiness to make reparations (see the GD at [49]). This, nevertheless, must be balanced by the consideration that he did not voluntarily surrender himself to the authorities.

14 Having made the foregoing observations, I will now set out my reasons for allowing the Prosecution's application in the Criminal Motion to admit additional evidence and consider the significance of the additional evidence admitted, before considering the merits of the Appeals.

**The additional evidence**

***The Criminal Motion***

15 On 25 June 2010, after the Accused pleaded guilty to the graffiti charge and the trespass charge, Mr Kang informed the District Judge in mitigation that, *inter alia*, the Accused was a first-time offender. This was immediately disputed by the Prosecution as it had information that the Accused had a past conviction for property damage in Switzerland. The Prosecution, however, did not then have documentary evidence to establish its allegation. The District Judge therefore – quite rightly I would add – did not deal with this point. However, prior to the hearing of the Appeals, the Prosecution obtained a document entitled "Extract from the Swiss Criminal Records Registry" ("the Swiss Extract"), which contained details of the previous conviction of the Accused, and on 3 August 2010, applied by way of the Criminal Motion to adduce further evidence of the previous conviction of the Accused.

16 The Swiss Extract, which is a single-page document, is notable for its poverty of information. All that it states is that on 15 May 2001, the Accused was convicted in the Kulm District Court for "*property damage (multiple incidents)*" [emphasis added] with a timeframe – which presumably is the period during which the offences were committed – *viz*, 1 June 1998 to 3 May 1999, being provided. For convenience, that previous conviction of the Accused will be referred to hereafter as "the 2001 conviction". Apropos the 2001 conviction, the Accused was fined 3,000 Swiss francs and sentenced to two years' probation with a "conditionally executable" jail sentence of four months.

17 The Prosecution's position was that the adduction of the evidence in the form of the Swiss Extract would allow this court to have a complete record of all the relevant facts in disposing of the Appeals. It further submitted that the Swiss Extract is a relevant and material piece of evidence from a credible source which rebutted the Accused's claim in mitigation that he was a first-time offender – thereby satisfying the test of materiality and credibility laid down by the Court of Appeal in *Mohammad Zam bin Abdul Rashid v PP* [2007] 2 SLR(R) 410 ("*Mohammad Zam*") at [6].

18 In response, Mr Kang argued that Swiss law differentiates between two kinds of documents from the Swiss Criminal Records Registry: (a) a "personal excerpt" of a criminal record that can only be applied for by the accused person; and (b) a "governmental excerpt" of a criminal record that can be received by any law enforcement authority. Under Swiss law, verdicts which contain conditionally executable custodial sentences are deleted automatically from the Swiss Criminal Records Registry after ten years. A sentence would not be revealed in the personal excerpt if two-thirds of the period required for the deletion (*viz*, ten years in this case) has elapsed. Indeed, the personal excerpt of the Accused currently does not

reflect the 2001 conviction. In May 2011, the 2001 conviction will be irretrievably deleted and the Accused's governmental excerpt will not even reflect that conviction. Thus, Mr Kang submitted, since the previous conviction had already been deleted in so far as the Accused's personal excerpt was concerned and almost ten years has lapsed since the 2001 conviction, the Swiss Extract is not material and should not be admitted as fresh evidence on appeal.

19 It is trite that an offender's antecedents are relevant to show whether the instant offence before the court is a manifestation of the offender's continuing disobedience of the law (see *Sim Yeow Seng v PP* [1995] 2 SLR(R) 466 at [8]–[9]). Enhanced sentences for repeat offenders are justified on the basis of specific deterrence, general deterrence and protection of the public (see *Tan Kay Beng v PP* [2006] 4 SLR(R) 10 at [14]). That the antecedents are from a foreign jurisdiction should not present additional difficulty, if they are clear. In the recent case of *R v Wilson (Simon Tyler)* [2010] 1 Cr App R(S) 11, previous convictions in Australia for offences including rape and causing grievous bodily harm to an elderly female victim and murder of another elderly female victim were taken into consideration by the English Court of Appeal for the purposes of sentencing the accused person who had pleaded guilty to charges of attempted rape, wounding with intent and causing an elderly lady to engage in sexual activity without her consent. In the case of *R v Postiglione* (1991) 24 NSWLR 584, the New South Wales Court of Criminal Appeal held (at 591) that "evidence of previous convictions in another country may be taken into account when passing sentence". It also appears to be the settled practice here that previous foreign convictions, especially for similar offences, are relevant to demonstrate the offender's continuing disregard for the law and propensity to reoffend (see the extract from *Public Prosecutor v Low Kam Hing* District Arrest Case No 8649 of 1998 set out in Kow Keng Siong, *Sentencing Principles in Singapore* (Academy Publishing, 2009) at para 21.175).

20 The Swiss Extract reveals that contrary to the Accused's claim in mitigation that he is a first-time offender, he has, in fact, one conviction for multiple incidents of property damage, albeit he was convicted almost ten years ago in Switzerland. Therefore, it is relevant and material to the Appeals. Since the accuracy of the evidence was not challenged, I found that the test of materiality and credibility laid down in *Mohammad Zam* ([17] *supra*) had been met, and admitted the Swiss Extract into evidence.

***The significance of the additional evidence***

21 The fact that I allowed the Swiss Extract to be admitted did not mean that I would attach any real weight to it in my decision on the Appeals. On its face, the Swiss Extract is a bare record of a conviction for "property damage" without sufficient details of the number, nature and circumstances

of the offences committed in Switzerland. Without these essential details, it is not possible to ascertain if those offences are indeed similar to the present offences so as to justify a longer sentence on the basis of specific deterrence (see *PP v NF* [2006] 4 SLR(R) 849 ("*NF*") at [69]). Another relevant consideration is the length of time between the previous conviction and the present offences, since a "substantial gap between one conviction and another may be testament to a genuine effort to amend wanton ways" (see *NF* at [72]). No court is compelled to assign any weight to an offender's previous convictions if they do not constitute a reasonable basis on which to infer that an offender might re-offend (see *NF* at [68]).

22 After careful consideration, I have to conclude that because of the lack of details in the Swiss Extract, I am not persuaded that the Prosecution has clearly established that it constitutes a reasonable basis for an inference of recidivism on the Accused's part. That said, no credit should be given to the Accused on the basis that he has an antecedent-free record (which, as apparent from the Swiss Extract, he does not have).

23 I will now consider the Appeals, starting with the Accused's Appeal.

## The Appeals

### *The Accused's Appeal*

24 Mr Kang submitted that the decision by the District Judge to sentence the Accused to a cumulative period of incarceration of five months was manifestly excessive, as this was a matter that required the application of the "one transaction rule". The one transaction rule states that where two or more offences are committed in the course of a single transaction, all sentences imposed for those offences should be concurrent rather than consecutive. It was contended on behalf of the Accused that, in this episode, there was "unity in time, place and continuity of action" and "no separate decision to commit" each of the offences. Therefore, the terms of imprisonment meted out to the Accused should have been ordered to run concurrently rather than consecutively.

25 The Prosecution, on the other hand, maintained that the offences were distinct and that the Accused could "control the commission of both offences individually and separately". I agree with the District Judge's reasoning in the passage from the GD set out at [6] above, and determine that the one transaction rule has not been offended. While the offences followed each other closely, they were neither a necessary consequence nor a corollary of each other. The offences that were committed were factually and conceptually different. In any event, the key consideration in a case such as the present is the overall proportionality of the aggregate sentence having regard to the heinousness of the offences committed.

26 The crux of the Appeals lies in the issue of whether the aggregate term of imprisonment meted out by the District Judge was manifestly excessive or inadequate. The nexus between the totality principle and the one transaction rule, as well as their relationship with the principle of proportionality has been dealt with in *PP v Law Aik Meng* [2007] 2 SLR(R) 814 ("*Law Aik Meng*") at [51]–[60]. The totality principle and the one transaction rule are, at the end of the day, important but not inflexible guiding principles to ensure that multiple offending by a wrongdoer is proportionately punished. There are no rigid linear relationships between offending and sentencing (see *ADF v PP* [2010] 1 SLR 874 at [146]). What is, however, settled sentencing practice is that offences affecting public services or facilities and offences which cause public disquiet ordinarily attract severer sentencing (see *Law Aik Meng* at [24(d)] and [25(c)]). For now, I will leave unanswered the question of whether the aggregate term of imprisonment meted out by the District Judge was manifestly excessive or inadequate, but will return to it after considering the submissions on the Prosecution's Appeal, to which I now turn.

***The Prosecution's Appeal***

27 The Prosecution submitted that the sentence of two months' imprisonment for the trespass charge was manifestly inadequate, taking into account comparable sentencing precedents. The gist of its argument was that offences under s 5(1) read with s 7 of the PAPPA involving a "protected place" are more serious than offences under s 4(1) read with s 7 of the PAPPA involving a "protected area", with the former attracting in practice a custodial sentence of between two and nine months' imprisonment, while the ordinary punishment for the latter being either a fine of $1,000 or two months' imprisonment.

28 Mr Kang argued that the PAPPA itself does not support the Prosecution's attempt to draw a distinction between offences involving "protected areas" and offences involving "protected places". Section 7 of the PAPPA, which stipulates the penalty for a failure to abide by the provisions of s 4 (dealing with protected areas) and s 5 (dealing with protected places), does not draw a distinction between the two sections. This, he suggested, militates against the suggestion that Parliament had intended that an offence involving a "protected place" is to be treated as more serious than one involving a "protected area", all else being equal.

29 In my view, the sentencing precedents cited do not indicate that the courts have to date made a conscious sentencing distinction between offences involving protected areas and offences involving protected places as contended by the Prosecution. *Public Prosecutor v Pang Tsae Diau* District Arrest Case No 52882 of 2004 was a case involving unauthorised entry into a protected place in which the offender received a sentence of two months' imprisonment for an offence under the PAPPA. This was the exact

same punishment that was meted out to some offenders in unreported cases in the Subordinate Courts involving protected areas (see, *eg*, *Public Prosecutor v Yaimung Thitida* Magistrate's Arrest Case No 2739 of 2006 and others and *Public Prosecutor v Zaw Naing* Magistrate's Arrest Case No 2747 of 2006 and others).

30 In *Public Prosecutor v Md Nurul Hoque Safique Sarkar* District Arrest Case No 53551 of 2008 and others, a case which involved charges of entering a protected place and immigration offences, one of the principal offenders, Md Mahbubul Hoque Md Sirajul Hoque ("MMH"), was sentenced to eight months' imprisonment for each of the PAPPA charges he faced while his fellow principal offenders were sentenced to six months' imprisonment and nine months' imprisonment respectively for each of the same charges they faced. In imposing the sentence of eight months' imprisonment on MMH for each of the PAPPA charges he faced, it would appear that the district judge did not rely on any perceived difference in seriousness between offences involving intrusion into a protected place as opposed to a protected area. Instead, her focus seemed to be on the fact that the case involved a planned exploitation of the ability to secure access to a protected place as part of a commercial venture for personal profit in which MMH had repeatedly seriously abused his position as a seasonal airport pass holder and assisted in the unlawful departure of 14 immigration offenders, seriously compromising in the process the security of the airport and thwarting the immigration control put in place (see the grounds of decision in relation to MMH's conviction and sentence for his immigration offences in *Public Prosecutor v Md Mahbubul Hoque Md Sirajul Hoque* [2009] SGDC 317 at [20]–[22]).

31 The lower courts have not previously analysed the objectives and policy reasons underpinning the PAPPA, and, more crucially, the differences between the relevant sections. I shall now undertake such an analysis. The legislative objective of the PAPPA can only be properly understood by examining its legislative history, its statutory architecture, as well as the details of the scheme of protection that Parliament has conferred on protected areas and protected places in Singapore. The roots of the PAPPA can be traced to the Protected Places Ordinance (Ordinance 18 of 1948) ("the PPO"), which dealt solely with protected places and did not have any provision for protected areas. In 1955, the Legislative Assembly of the Colony of Singapore ("the Legislative Assembly") consolidated the provisions of the PPO into the Protected Places and Areas Bill ("the Bill"), and added a new provision dealing with protected areas. The objective of the Bill (which was subsequently enacted), in the words of the then Attorney-General, was as follows (*Singapore Legislative Assembly Debates, Official Report* (22 September 1955) vol 1 at col 774 (Mr C H Butterfield, Attorney-General)):

> [T]his Bill is designed to make permanent the provisions of the [PPO] which was enacted in 1948, and, in addition, to provide for the *protection of areas in which special measures are required to control the activities of persons in those areas*. [emphasis added]

32 I turn next to the unique scheme of protection that Parliament has conferred on protected places and areas. The decision to deem a location either a protected place or area now lies with the Minister of Home Affairs ("the Minister") pursuant to ss 4(1) and 5(1) of the PAPPA. Special status under the PAPPA will be granted by the Minister if he is satisfied that it is "necessary or expedient" (*per* ss 4(1) and 5(1) of the PAPPA) that the location ought to receive special protection. Accordingly, any intrusion into either a protected place or area ought never to be dismissed lightly. As Yong Pung How CJ perceptively noted in *PP v Lim Ah Heng* [1999] 1 SLR(R) 105 at [11]:

> Even on a cursory reading of the provisions in PAPPA, it was clear that Parliament regarded any breach of s 5 as a serious act. This was evidenced by the statutory powers given to authorised personnel to remove trespassers from protected places (s 5(3)) as well as to arrest them (s 9). Further, s 9 provided that persons who attempted to enter or who were in a protected place and who failed to stop after being challenged three times by an authorised officer to do so could be arrested by force, such force if necessary extending to the voluntary causing of death. Offenders could also be prosecuted under s 7, and be liable upon conviction to a fine of $1,000 or to imprisonment for a term of two years or both.

33 Apart from Yong CJ's observations on the PAPPA, it also bears emphasising that s 8 of the PAPPA provides that every offence under the PAPPA is "*seizable and non-bailable for the purposes of the law for the time being in force relating to criminal procedure*" [emphasis added]. The purpose of this section is to allow law enforcement authorities to detain without a warrant persons who are suspected of having intruded into a protected place or area, in order to immediately ascertain whether public security has been compromised and if so how. Furthermore, s 10(1) of the PAPPA allows the Minister to provide for any special measures necessary for the protection of any protected area or place, including measures which may involve danger to the life of any intruder, and s 10(2) further denies any person compensation in respect of injury or even death caused by these measures to any intruder. Given that protection of these locations is "necessary or expedient", it is not surprising that such extraordinary powers of protection, apprehension and detention have been conferred.

34 Undoubtedly, any area or place gazetted as "protected" under the PAPPA is an important area that merits high security and protection, and it is not for the courts to determine whether one protected area (or place) is deserving of more protection than another. Any entry into any such location always has the potential to compromise public security and ought to be taken very seriously. However, it must also be noted that there is

indeed a difference between the *degree of protection* conferred on protected places as compared with that conferred on protected areas. In so far as *protected areas* are concerned, Parliament has only provided for the following in s 4(1):

> If as respects any area it appears to the Minister to be necessary or expedient that special measures should be taken to control the movements and conduct of persons therein he may by order declare that area to be a protected area for the purposes of this Act.

However, in relation to *protected places*, the PAPPA more stringently stipulates the following in s 5(1):

> If as respects any premises it appears to the Minister to be necessary or expedient that special precautions should be taken to prevent the entry therein of unauthorised persons, he may by order declare the premises to be a protected place for the purposes of this Act; *and so long as the order is in force no person shall be in those premises unless he is in possession of a pass-card or permit issued by such authority or person as may be specified in the order, or has received the permission of an authorised officer on duty at those premises to enter those premises*. [emphasis added]

35 Plainly, there are indeed significant differences (as reflected in the italicised portion of s 5(1), which is set out in the previous paragraph) between the legal consequences that flow from the designation of a location as a "protected place" as compared with its designation as a "protected area". The mere fact that a person has intruded into a protected area does not immediately result in the commission of an offence. Section 4 of the PAPPA is only contravened when a person in a protected area fails to comply with directions given in accordance with s 4(2) of the PAPPA for the purpose of regulating movement and conduct in that protected area. In stark contrast, s 5(1) of the PAPPA makes *any unauthorised entry* into a protected place an offence. It is therefore incontrovertible that protected places have been statutorily assessed to require a greater level of protection.

36 However, although the PAPPA provides for a higher level of protection for protected places as compared to protected areas, this says nothing about the relative seriousness of an offence involving a protected place as compared to one involving a protected area. Indeed, any comparison is akin to comparing apples and oranges, since an offence involving an unauthorised entry into a protected place has no equivalent in relation to a protected area. It is only when a person in a protected area fails to comply with the directions regulating conduct in that area that an offence is committed. Accordingly, the existing sentencing precedents relating to protected areas are really of little assistance in the present case.

37 The maximum punishment for an unauthorised entry into a protected place and a protected area is, as laid down by s 7 of the PAPPA, a fine of $1,000 or a term of imprisonment of two years, or both. Given the higher level of protection accorded to a protected place by the PAPPA, a

fine is clearly inappropriate when an offender enters a protected place, not by accident, but by design. I am satisfied that the custodial threshold for an offence under the PAPPA is clearly crossed whenever an intruder enters a protected place *for the purpose of committing a further offence*. The severity of the custodial sentence would then depend on factors such as the circumstances under which he had obtained entry into the protected place, as well as the nature of the offence which he intended to commit within the protected place. Given the security considerations involved in the statutory scheme to protect vital installations and the concept of ordinal proportionality, the starting point for an offender who enters into a protected place for the purpose of committing an offence ought to be a term of three months' imprisonment. Whether this should be further adjusted would, in every case, depend on the presence of relevant mitigating or aggravating sentencing considerations.

***Decision of this court on the Appeals***

38 For the reasons set out at [25] above, I am of the view that the District Judge was not wrong to order the terms of imprisonment that he imposed to run consecutively rather than concurrently. Returning to the crucial question I had left off earlier, I find that the aggregate term of imprisonment imposed by the District Judge was neither excessive nor "crushing and disproportionate" as contended by Mr Kang. On the contrary, I determine that the sentence imposed for the trespass charge is manifestly inadequate.

39 In this case, the Accused entered into the SMRT Changi Depot with the illegitimate objective of committing an act of vandalism. As mentioned above at [11]–[13], this was no ordinary act of vandalism. *It was perversely intended to make and leave a sensational indelible mark on the general public's consciousness*. This is more than sufficient to justify the imposition of a custodial sentence on him. Taking into consideration the disturbing fact that the Accused had used a wire-cutter to cut a hole in the perimeter fence in order to gain access to the SMRT Changi Depot, resulting in the preference of the fence-cutting charge against him, I am of the view that the sentence of two months' imprisonment which the District Judge imposed on him was manifestly *inadequate*. The starting point for a custodial sentence of three months' imprisonment ought to be enhanced. I will therefore set aside the sentence imposed by the District Judge and impose a sentence of *four months' imprisonment* for the trespass charge.

**Conclusion**

40 The conduct of the Accused in cutting through a fence surrounding a "protected place" to facilitate the commission of an act of vandalism, which was calculated to bring to its authors instant international notoriety, must be unequivocally deplored. It is conduct which is entirely unacceptable in

Singapore, regardless of the artistic merit (or lack thereof) of the graffiti. Future like-minded offenders must also be firmly deterred from being tempted into copycat offending. For these reasons, in addition to those provided earlier, the sentences imposed below do not, in my view, adequately convey all the relevant sentencing considerations.

41 In the result, the Accused's Appeal is dismissed and the Prosecution's Appeal is allowed. The Accused will now have to serve an aggregate sentence of seven months' imprisonment in addition to the mandatory minimum of three strokes of the cane stipulated in s 3 of the Vandalism Act. I am also minded to observe that had the Prosecution appealed against the sentence of imprisonment in respect of the graffiti charge, I would have been inclined to increase the term of imprisonment that the Accused had received in the light of the several prevailing aggravating considerations. In these circumstances, the Accused should count himself fortunate that he has not received his just deserts in full.

Reported by Kenneth Wong, Kong Man Er and Zhuo Wenzhao.