SANTANASAMY MUTHIAH

v.

PP

Federal Court, Putrajaya
Nallini Pathmanathan, Rhodzariah Bujang, Abu Bakar Jais FCJJ
[Criminal Appeal No: 05(M)-146-08-2022(W)]
4 October 2024

Criminal Procedure: *Sentencing — Multiple sentences of whipping — Whether judge in course of sentencing an accused had power to direct that multiple sentences of whipping be imposed concurrently — Whether principle of proportionality applicable in law in relation to whipping — Whether sentences of whipping should be executed consecutively and not concurrently*

The appellant was charged together with two others on a single charge of trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'), as well as two separate charges of drug possession under s 12(2) of the DDA punishable under s 39A of the DDA; and under s 6 of the DDA with common intention under s 34 of the Penal Code. The appellant was convicted on all three charges and was sentenced to death on the first charge of trafficking, 11 years imprisonment and 10 strokes of the cane on the second charge under s 12(2) of the DDA. In respect of the third charge under s 6 of the DDA, the appellant was sentenced to 2 years imprisonment from the date of arrest, and this sentence of imprisonment was ordered to run concurrently with the sentence of imprisonment for the second offence. The Court of Appeal, upon appeal by the appellant on the first charge of trafficking only, affirmed the death sentence that was imposed and as a result of which the appellant appealed to the Federal Court. The prosecution, at the hearing before the Federal Court, preferred a lesser charge of possession in substitution of the first charge of trafficking, and the appellant then pleaded guilty to the said lesser charge. Consequent thereto, the conviction under s 39B(1)(a) of the DDA was substituted with a conviction under s 12(2) of the DDA punishable under s 39A of the DDA. The appellant was accordingly sentenced to 9 years' imprisonment from the date of arrest, to run concurrently with the sentence for the second and third charges, and as mandatorily required, 10 strokes of the cane. Counsel for the appellant sought to move the court to order that the sentence of whipping for the first and second charges to run concurrently. The prosecution objected to the same on the ground that it was long established that whipping could not be executed concurrently. The sole issue that arose for determination was whether a Judge in the course of sentencing an accused had the power to direct that multiple sentences of whipping be imposed concurrently.

Held (ordering the sentences of whipping to be executed consecutively instead of concurrently):

Per Abu Bakar Jais FCJ (Majority):

(1) There were no statutory provisions in Malaysia that indicated whether the sentences of whipping should be carried out concurrently or consecutively. Even s 288(5) of the CPC at best, only mentioned the maximum strokes for whipping was 24 for adults and 10 for youthful offenders. There was no explanation as to whether whipping should be executed concurrently or consecutively. The said provision merely indicated that for whipping, the maximum number to be whipped cumulatively, was 24. Whipping therefore should not be concurrent as whatever effect physically or mentally in that sense on the person being whipped had in a certain way been considered by that limitation. The historical development of s 288 of the CPC did not throw any light on whether whipping for multiple offences should be executed concurrently or consecutively. (paras 5-8)

(2) On the authorities, and on the issue of whether sentences of whipping could be ordered concurrently, it had been held that such sentences could only be handed consecutively and not concurrently; that there was no law supporting an order for sentences of whipping to be executed concurrently; and that concurrent sentences for whipping would amount to a heavier penalty. (paras 10, 14, 18, 19, 20 & 21)

(3) The principle of statutory interpretation that the Legislature had not intended for caning to be executed concurrently since it had not been so provided, as opposed to imprisonment, was a well-entrenched proposition not only in Singapore but also in Malaysia. If Parliament intended that sentences of whipping could be ordered concurrently, similar to the punishment for imprisonment, it would have passed legislation to that effect. The instant case was one where the functions of the Legislature, Executive and Judiciary should be fully appreciated and the separation of the same recognised and respected. In the premises, it was not appropriate for the court to encroach on the power of the Legislature and rule that sentences of whipping should be carried out concurrently. Hence, sentences of whipping should be executed consecutively and not concurrently. (paras 23 & 35)

Per Nallini Pathmanathan FCJ (Dissenting):

(4) Under art 5(1) of the Federal Constitution ('Constitution'), the right to life and liberty was subject to the proviso that such rights might be taken away in accordance with the law. In consonance with this, the nature and types of offences and attribution of blame, as well as the imposition of punishment were determined by the State vide Parliament. To ensure that the punishment meted out was fair, the principal of proportionality was engaged and served to act as a constraint on punishment. (paras 55-56)

(5) Punishment to be imposed must be fair in terms of procedure and substance, and such fairness was a fundamental right under art 8 of the Constitution which articulated this element through the doctrine of proportionality. The CPC played an essential role in the enforcement and protection of the fundamental rights in the Constitution and therefore should be interpreted in a manner that was consistent with or construed harmoniously with the Constitution. (paras 58, 59, 62 & 64)

(6) In relation to sentencing, the element of fairness was housed in the principle that the severity of the sentence should not exceed the guilt or offence, and was expressed through the doctrine of proportionality. It therefore followed that when construing the provisions of the CPC to ascertain whether the sentence of whipping could, or could not, be executed concurrently, this element of fairness and proportionality was to be considered and applied as an inherent condition or necessity. (para 67)

(7) The applicable tests to give effect to the doctrine of proportionality in the CPC were the 'one transaction rule' and 'totality principle'. (para 68)

(8) The absence of any provision in the CPC relating to whipping that precluded or ousted judicial power to determine whether multiple mandatory sentences of whipping could be imposed concurrently or consecutively, lent weight to the interpretation that judicial power and discretion in relation to punishment were not fettered by or within the CPC. As such, concurrent sentencing in relation to whipping ought not to be outside the purview of the court's powers of sentencing. (para 71)

(9) Inference by absence was not an ideal mode of discerning Parliamentary intent, all the more so when the inference from the absence of a statutory provision would result in the imposition of a sentence of whipping causing grave bodily injury even where the circumstances might warrant imposing concurrent sentencing, by reason of the one transaction rule or the totality principle. (para 78)

(10) The prohibition of concurrent sentencing should be expressly provided for, because it was in effect, expressly ousting the doctrine of proportionality and established principles of law, ie the 'one transaction rule'. Any intention to oust the application or development of Malaysian common law must be clear. It was imperative therefore in the course of statutory interpretation, that the drawing of inferences from the absence of a provision in a statute be exercised with considerable care and caution. Such preclusion of the doctrine of proportionality that housed the fundamental requirement for fairness, was not a construction or interpretation that was consonant with arts 5(1) and 8 of the Constitution. (paras 83-85)

(11) The prosecution's argument that because there was no express provision, the courts could not therefore impose concurrent sentences with regards to whipping, was without merit and not consonant with the requirements of

fairness and the Articles relating to fairness and proportionality under the Constitution. (para 86)

(12) Where there was absence of express provision, Parliament must legislate in accordance with the spirit and object of the Constitution. Legislation should be interpreted so as to respect the rights of the offender notwithstanding that his rights were restricted. Where there was ambiguity in the construction of a statute, an interpretation that favoured the offender should be adopted. An interpretation that precluded injustice and/or absurdity should be adopted by the courts and it was incumbent on the courts when interpreting Parliamentary intent to do so in light of the overarching provisions in the Constitution. (paras 89-93)

(13) The ambiguity in this instance arose from the fact that while terms of imprisonment were expressly allowed to be imposed concurrently, there was silence in relation to whipping. On the other hand, whipping was not imposed in the absence of imprisonment. Whipping must be treated separately from terms of imprisonment in relation to whether those sentences could be imposed concurrently or consecutively. Accordingly, while the CPC was silent on whipping, the principle of constitutional supremacy should be applied by the court in interpreting the CPC in favour of the offender so as to comply with arts 5(1) and 8 of the Constitution. Imposing concurrent whipping sentences would better reflect the principle of proportionality. (paras 94-95)

(14) Section 288 of the CPC did not expressly take away the ability of a Judge to exercise his discretion under his judicial powers of sentencing using long established principles namely, the 'one transaction rule' and the 'totality principle'. Hence there was nothing to preclude a Judge from providing for the mandatory sentences for different offences within one transaction to run concurrently. (para 105)

(15) In the absence of any statutory provision to the contrary, it was perfectly in order for the courts to rely on and apply both the 'one transaction rule' as well as the 'totality principle' to determine whether a sentence applied concurrently or consecutively. There was no reason to justify different treatment for sentences of imprisonment and whipping simply because they took different forms. (para 112)

(16) On the facts, despite there being three charges, the actual offences of possession related to different drugs that were found in the appellant's home on one occasion. Hence the instant case was a suitable case to apply the 'one transaction rule' in respect of the term of imprisonment and the additional whipping sentence. Alternatively, applying the 'totality principle', it was equally evident that the quantum of drugs found in the appellant's possession did not warrant the imposition of two consecutive sentences of whipping. Applying the doctrine of proportionality as reflected in the 'totality principle', it followed that the imposition of consecutive sentences of whipping would amount to the infliction of punishment that was excessive and disproportionate to the offence. (paras 132-133)

(17) The High Court should not have ordered the whipping under the second charge. The said sentence contravened s 289 of the CPC and was therefore an illegal order. The fact that the death sentence imposed for the first charge of trafficking had been reduced to one of possession, did not alter this fact as the illegality occurred in the High Court at the point of time when the appellant was sentenced on the second charge. In the circumstances, the removal of the sentence of whipping for the second charge was warranted. (paras 139-142)

Case(s) referred to:

Ah Thian v. Government Of Malaysia [1976] 1 MLRA 410 (refd)

Alma Nudo Atenza v. PP & Another Appeal [2019] 3 MLRA 1 (refd)

Azman Morni v. PP [2009] 5 MLRA 769 (not folld)

Datuk Bandar Kuala Lumpur v. Perbadanan Pengurusan Trellises & Ors And Other Appeals [2023] 4 MLRA 114 (refd)

Eco-Sud & Ors v. Minister Of Environment [2024] UKPC 19 (refd)

Emperor v. Veerappa [1937] AIR Rangoon 310 (refd)

Goldring Timothy Nicolas v. PP [2013] 3 SLR 487 (refd)

Hough v. Windus [1884] 12 QBD 224 (refd)

Iswahyudi Haji Nurhidayat v. PP [2010] 5 MLRA 873 (refd)

JE David v. SPA De Silva [1934] AC 106 (refd)

K Venkata Reddy v. The Inspector General Of Prisons, Andhra Pradesh, Hyderabad & Another [1982] 1 MLJ (Crl) 617(refd)

KE v. Eng Gyaung 12 Cr LJ 465 (refd)

King Emperor v. Yenkataswamy AIR [1937] Rangoon 286 (refd)

Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v. Muziadi Mukhtar [2019] 6 MLRA 307 (refd)

PP v. Chan Chuan [1991] 1 SLR(R) 14(refd)

PP v. Mohamad Ramadzan Mohd Yusof [2021] MLRHU 1236 (folld)

PP v. Peter Ting Chiong King [1984] 1 MLRH 596 (folld)

R v. Gilbert [1975] 1 WLR 1012 (refd)

R v. McCool [2018] UKSC 23 (refd)

R v. Secretary Of State For The Home Department, Ex Parte Pierson [1997] 3 WLR 492; [1998] AC 539 (refd)

Sunil Batra v. Delhi Administration [1978] AIR 1675, [1979] SCR (1) 392 (refd)

Tebin Mostapa v. Hulba-Danyal Balia & Anor [2020] 4 MLRA 394 (refd)

Walsh v. Secretary Of State For India [1863] 10 HLC 367 *(refd)*

Yuen Ye Ming v. PP [2020] SGCA 80 (refd)

Legislation referred to:

Criminal Justice Administration Act 1914 (Cap 58) [UK], s 36(2)

Criminal Procedure Code [Brunei], s 257(5)

Criminal Procedure Code 2010 [Sing], s 397

Criminal Procedure Code, ss 282(d), 286, 287, 288(1), (5), 289, 290, 291, 292(1)

Dangerous Drugs Act 1952, ss 6, 12(2), 39A, 39B(1)(a)

Federal Constitution, arts 5(1), 8

Penal Code, s 34

Prison Regulations 2000, reg 134

Straits Settlements Penal Code Ordinance 1871 [UK], s 278

Other(s) referred to:

Amanda Clift-Matthews, *Aggregated Caning And The Risk Of Double Or Disproportionate Punishments* (2021) 33 SAcLJ 1205, para 6.

De Officio Bk q, Chapter 25, s 89

Counsel:

For the appellant: Afifuddin Ahmad Hafifi (Muhammad Amirrul Jamaluddin with him); M/s Salehuddin Saidin & Associates

For the respondent: Mohd Dusuki Mokhtar (Mohd Fairuz Johari & Noorhisham Mohd Jaafar with him); AG's Chambers

JUDGMENT

Abu Bakar Jais FCJ (Majority):

Introduction

[1] Of importance to note in this case is the sole issue of whether sentences of whipping could be executed concurrently or only consecutively in the event such sentences are given in respect of more than one.

Relevant Facts

[2] When the appellant appeared before us for the appeal, the prosecution informed that they would not proceed with the charge on trafficking of drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). The appellant had been convicted by the High Court for this charge and sentenced to death. Subsequently, the Court of Appeal had dismissed the appellant's appeal for this conviction. Instead, the prosecution informed us that they would offer the appellant the lesser charge of possession of the drug on two separate charges. First, under s 12(2) of the DDA punishable under s 39A of the DDA and the other under s 6 of the DDA with common intention under s 34 of the Penal Code.

[3] The appellant then pleaded guilty to the charge for possession of the drug. We then ordered that the conviction under s 39B(1)(a) of the DDA be set aside and substituted with a conviction under s 12(2) of the DDA punishable under s 39A of the DDA. We then imposed a sentence of 9 years imprisonment from the date of arrest, to run concurrently with the sentence for the second and third charges, and as mandatorily required, 10 strokes of the cane in respect of the two charges for possession.

[4] The appellant's counsel then urged this court to order that the sentences of whipping for the first charge and the second charge to run concurrently. The learned Deputy Public Prosecutor objected, submitting it is long established that whipping could not be executed concurrently.

No Statutory Provisions

[5] First, there are no statutory provisions in Malaysia that indicate whether the sentences of whipping should be carried out concurrently or consecutively. However, several points are stipulated with regard to the sentence of whipping in the Criminal Procedure Code ("CPC"). For example, s 286 of the CPC speaks of the designated place for execution of the same, timing (s 287 CPC), method (s 288 CPC), prohibitions in certain cases (s 289 CPC), requirement of a medical officer's certificate (s 290 CPC), and procedures when whipping cannot be inflicted (s 291 CPC).

[6] Even s 288(5) of the CPC, at best, is the provision that only mentions the maximum strokes for whipping is 24 for adults and ten strokes for youthful offenders. It still does not explain whether the whipping should be executed concurrently or consecutively. This provision states as follows:

> When a person is convicted at one trial of any two or more distinct offences any two or more of which are legally punishable by whipping, the combined sentences of whipping awarded by the Court for any such offences shall not, anything in any written law to the contrary notwithstanding, exceed a total number of twenty-four strokes in the case of adults and ten strokes in the case of youthful offenders.

[7] First, the above provision indicates that for whipping, the maximum number to be whipped cumulatively is 24. It could not be more than this. There is no such limitation for the sentences for imprisonment. No statutory provisions exist to say that imprisonment must not be more than a certain duration cumulatively. Therefore, in my view, whipping should not be concurrent as whatever effect physically or mentally in that sense on the person being whipped has in a certain way been considered by that limitation. This is not the same position as imprisonment. As stated, there is no such limitation for the sentences of imprisonment cumulatively. That is why the sentences could be executed concurrently for imprisonment depending on what the courts consider just.

[8] Second, even if one attempts to look at the history of s 288 of the CPC, one would not be enlightened in trying to ascertain whether it ought to be performed concurrently or consecutively for whipping. The predecessor of the present statutory provision stems from the CPC enacted in 1900. This later was subsequently re-enacted and refined and became the CPCs of 1902 and 1903. The Code underwent further modifications and enhancements, culminating in the CPC [FMS Cap 6]. Regrettably, again the historical development of s 288 of the CPC does not throw any light on the issue of the whether whipping for multiple offences should be executed concurrently or consecutively.

[9] That is the position in Malaysia as far as the statutory provisions are concerned. One might then ask, what about decided cases? Is there any case law that has determined the issue?

Reported Cases

[10] One such case law on the issue is the decision handed by Muniandy Kannyappan JC (as he then was) at the High Court ("HC") in *PP v. Mohamad Ramadzan Mohd Yusof* [2021] MLRHU 1236. This case concerns an appeal against sentences on drug offences. Together with the sentences of imprisonment, the appellant had been sentenced to whipping of ten strokes for the first offence, and for the second offence he was meted out the punishment of three strokes. The essence of the appeal involved the contention that the sentences should run concurrently instead of consecutively, including for whipping.

[11] Nonetheless, on sentences of whipping, the learned JC was unequivocal in saying:

> As for the sentences of whipping, the law dictates that they are to be consecutive. (See s 288(5) CPC as well as case of *PP v. Peter Ting Chiong King* [1984] 1 MLRH 596; *Yuen Ye Ming v. PP* [2020] SGCA 80).

[12] Thus, this is a clear case law denoting that it should be consecutive for the sentences of whipping. But what about the two reported cases referred by the learned JC also as authority to rule that whipping should be consecutive? The first as noted above is *PP v. Peter Ting Chiong King* [1984] 1 MLRH 596 and the second, *Yuen Ye Ming v. PP* [2020] SGCA 80.

[13] *Peter Ting* is another HC case where Chong Siew Fai J (as His Lordship then was) delivered the judgment in Sibu and where an appeal was heard from the Sessions Court ("SC"). The issue in this particular case is also whether the sentences of whipping could be ordered concurrently. The HC decided such sentences could only be handed consecutively and not concurrently. In this regard, the HC decided there is no law supporting the decision of the SC to order the sentences of whipping to be executed concurrently.

[14] Further, it is interesting to note that Chong Siew Fai J was of the view that to order concurrent sentences for whipping would amount to a heavier penalty. This is seen in the headnote of this case as follows:

> Held: (allowing the Deputy Public Prosecutor's appeal):
>
> (1) To order concurrent sentences of whipping was to impose a heavier punishment through a mode of execution not legally provided, which was unauthorised by law. The order of concurrent execution of the five strokes of the rattan was set aside.

[15] In this regard, the learned judge approvingly referred to the case of *Emperor v. Veerappa* [1937] AIR Rangoon 310 for his reasoning. This case in turn states:

> As pointed out by Twomey J in 6 LBR 22 (*Emperor v. Eng Gyaung* 12 Cr LJ 465) the word "concurrent" properly applies only to sentences of imprisonment. **If it were applied to sentences of whipping the literal meaning would be that the prisoner was to be flogged by two operators simultaneously.**
>
> [Emphasis Added]

[16] Hence, although it may be highly debatable that concurrent sentences for whipping is indeed a more severe penalty, at least that is the perception and understanding of the HC at Sibu in that case above.

[17] The HC reinforced its decision by saying:

> [5] See also *Emperor v. Yenkataswamy* [1937] AIR Rangoon 286 where the same Judge again expressed the same view. I am inclined to agree with the construction on the concurrent sentences of whipping in those cases.
>
> [6] More recent Indian or English authorities on the issue appear to be lacking. This, however, may not be surprising since the sentence of whipping was abolished in England in 1948 and in India in 1955.

The Position In Singapore

[18] The second case, *Yuen Ye Ming (supra)* is a Singapore Court of Appeal case where Sundaresh Menon CJ, Judith Prakash JA and Tay Yong Kwang JA sat regarding the conviction and sentence on drug offences. The questions of law proposed to this court include Question 2 ie, whether a sentence of caning could be imposed as a concurrent sentence to another sentence of caning.

[19] First, it was decided that this question is not of public interest. Meaning there is no substantive or real importance for it to be answered by the court in the interest of the public. This is how the court elaborated it through Tay Yong Kwang JA:

> 22 Question 2 is also not a question of law of public interest. In *Mohammad Faizal* CA (at [22]), we held that "where the law has been authoritatively laid down and there is no conflict of authority, the court will, in the interests of finality, guard the exercise of its discretion (to grant leave) most jealously", referencing the decision in *M V Balakrishnan v. Public Prosecutor*

> [1998] 2 SLR(R) 846. **In this regard, the High Court's decision in *Public Prosecutor v. Chan Chuan and* Another [1991] 1 SLR(R) 14 ("***Chan Chuan***") states expressly that sentences of caning cannot be imposed as concurrent sentences. Punch Coomaraswamy J observed that the provisions in the then Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("CPC 1985") did not provide for such a possibility.** He also placed emphasis on the language of s 230 of the CPC 1985, the substance of which is now embodied in s 328 of the CPC. The said s 230 provided that:
>
> > When a person is convicted at one trial of any two or more distinct offences any two or more of which are legally punishable by caning the combined sentence of caning awarded by the court for any such offences shall not, anything in any Act to the contrary notwithstanding, exceed a total number of 24 strokes in the case of adults or 10 strokes in the case of youthful offenders.
>
> [Emphasis Added]

[20] Thus, based on the passage above, where there are consistently authoritative and uncontradicted decided cases on a particular point, it shall not be opened for the same to be reviewed in the name of public interest. In the context of Malaysia too, there are decided cases indicating that when it comes to whipping, the order has always been for the same to be executed consecutively. On the other hand, there have not been cases allowing for the same to be ordered concurrently.

[21] Second, following the above passage too, sentences of caning could not be imposed as concurrent sentences as there is clear jurisprudence on this point. Meaning for caning, it could not be executed concurrently because there are clear authorities saying this could not be done. There are also decided cases giving cogent reasons in Malaysia as mentioned in this judgment why the sentences of whipping should not run concurrently.

[22] In the Singapore case cited above, the court went further to emphatically rule that caning could not be meted concurrently, as indicated by the following words:

> 26 ... we see no reason to revisit the High Court decision in *Chan Chuan ([22] supra)*. To reiterate the reasoning of the High Court in that case, **if Parliament had intended to make available the power to impose concurrent sentences of caning, this power would have been provided for as in the case of imprisonment terms. This view has been reflected clearly and consistently in the courts' sentencing practice and Parliament has not sought to change or to correct it by statutory amendment over these past decades although many major changes to the CPC have been made.** Therefore, to invoke s 6 of the CPC for the purpose of introducing a non-statutory power relating to caning which Parliament has seen fit all these years not to incorporate into the CPC would be to contradict Parliament's intention. The principle of proportionality must take reference from the legislative intent of Parliament. Where Parliament has expressed its intention clearly in the form of mandatory caning or a mandatory number of strokes while setting only the specified limit

> of 24 strokes for adult offenders in s 328 of the CPC, it is impermissible for the court to qualify or even to nullify such intention by the subtle use of non-statutory powers in a supposed quest for proportionality.
>
> [Emphasis Added]

Statutory Interpretation

[23] In my view, as seen above, the principle of statutory interpretation that the Legislature had not intended for caning to be executed concurrently since it has not been so provided, as opposed to imprisonment, is a well-entrenched proposition not only in Singapore but also in Malaysia. Therefore, accordingly, what needs to be done is:

(a) to see the relevant statutory provision, whether it stipulates that it can be meted concurrently; and

(b) to compare it with the statutory provision that indicates it can be concurrent eg, for imprisonment.

[24] Based on the above, there can be no dispute in Malaysia that there is no written law that allows for whipping or caning to be ordered concurrently. On the other hand, there is a statutory provision that allows imprisonment to be executed in that manner ie, our own s 292(1) of the CPC that states as follows:

> When a person who is an escaped convict or is undergoing a sentence of imprisonment is sentenced to imprisonment, such imprisonment shall commence either immediately or at the expiration of the imprisonment to which he has been previously sentenced, as the Court awarding the sentence may direct.

[25] At least the Malaysian case of *Peter Ting (supra)* alluded to earlier had concluded that the above provision permits sentences of imprisonment to be executed concurrently. It is also common knowledge that the courts in Malaysia had in numerous cases ordered imprisonment sentences to run concurrently and would continue to do so. However, as explained, there are no statutory provisions in Malaysia allowing for the same in respect of whipping.

[26] In this regard, the judgment of our learned brother, Vernon Ong FCJ in the Federal Court case of *Tebin Mostapa v. Hulba-Danyal Balia & Anor* [2020] 4 MLRA 394 is relevant and where the recognition and function of Parliament and the relationship with the Judiciary are explained as follows:

> The word 'approval' is in general use and is well understood. There is absent the words 'approval in writing'. Applying the first and most elementary rule of construction, it is to be assumed that the words and phrases are used in their ordinary meaning. Parliament had deemed it fit not to provide for words 'approval in writing'. The intention of Parliament is made clearer if s 12 is contrasted with other provisions in EA 1990 which specifically stipulate for certain acts to be done in writing. **The duty of the court is limited to interpreting the words used by the Legislature and it has no power to fill the**

> **gaps disclosed. To do so would be to usurp the function of the Legislature. It is not for the court to fill the gaps by inserting or adding the words 'in writing' to the words 'approval of the State Authority' in s 12**. Given the word 'approval' its plain and ordinary meaning, the approval envisaged in s 12 can be in the form of an implied approval or express approval; implied as can be gathered from the facts and circumstances, or express as in writing.
>
> [Emphasis Added]

[27] Neither is there any statutory provision in Singapore permitting whipping or caning to be ordered concurrently. In fact, that is the same position in Brunei, although the courts there had allowed for sentences of whipping to run concurrently.

[28] One such case is the Brunei Court of Appeal's decision in the case of *Azman Morni v. PP* [2009] 5 MLRA 769, where Power P, Mortimer JCA and Davies JCA delivered the judgment. In this case the court heard an appeal against the decision of the lower court on a criminal matter. In this case, what was ordered by the lower court in respect of whipping was as follows:

(a) 1st charge – scratching the complainant's car – 2 strokes;

(b) 2nd charge – denting the front bonnet of the complainant's car with a barbell – 2 strokes;

(c) 3rd charge – punching the windscreen of the complainant's car and cracking it – 2 strokes;

(d) 6th charge – slashing the complainant's cheek and stabbing at her hands with a pair of scissors – 4 strokes and

(e) 9th charge – breaking glass bottle over the complainant's head – 6 strokes.

[29] On the above sentences, the Brunei Court of Appeal decided after reducing the number of strokes and said as follows:

> ... order all the sentences of whipping to be non-cumulative making four strokes in all.

[30] That word non-cumulative above must mean the sentences for whipping were ordered to be concurrent. With respect, I could not find any reasons given in this reported case, why the sentences of whipping were given concurrently. I also could not find any statutory provisions in Brunei referred to in this case indicating such sentences could be ordered concurrently.

[31] Besides, in Brunei there is also a limit of 24 strokes cumulatively for whipping as provided by s 257(5) of the Brunei CPC, similar to our s 288(5) CPC. I have alluded to this provision in para 7 earlier, and my explanation why this provision applies differently with imprisonment shall similarly stand.

[32] However, in another case of the Brunei Court of Appeal, *Iswahyudi Haji Nurhidayat v. PP* [2010] 5 MLRA 873 the sentences of whipping were ordered to run consecutively.

[33] There is another issue not directly related to the core issue as highlighted earlier that needs to be addressed. This is in relation to the submission of the *amicus curiae*, Tan Sri Shafee Abdullah. He contended that the HC erred as it could not order whipping since the appellant had been sentenced to death by the same HC. Section 289 of the CPC was referred for this submission as this statutory provision does not allow whipping when the accused had been sentenced to death in one trial.

[34] On this submission, with respect, I am of the view it is no longer relevant since the prosecution as mentioned earlier, had indicated that they are not proceeding with the charge on trafficking that carries the death penalty. As explained, we then took the position that no death penalty should be meted out and replaced it with the sentences of imprisonment and whipping. Essentially, what was ordered by the HC then in respect of this submission by the *amicus curiae* is no longer a live issue as the sentence of death can no longer stand.

Conclusion

[35] In my judgment there are sufficient reported cases as explained earlier both in Malaysia and Singapore giving reasons why whipping should not be executed concurrently. As in Singapore, if it is the intention of our Parliament that sentences of whipping could be ordered concurrently similarly as the punishment for imprisonment, that august house would have passed the legislation to that effect. Instead, for decades, this was not done indicating quite clearly that whipping should be meted out consecutively and not concurrently. I also take it, this is a case where the functions of the three branches – Legislature, Executive and Judiciary should be fully appreciated and the separation of the same be accordingly recognised and respected. In this regard, the Legislature has chosen it fit not to provide for sentences of whipping to be concurrent. Therefore, being a member of the Judiciary and confining myself only to the issue in this case, I do not think it would be appropriate to encroach on the power of the Legislature and rule that for sentences of whipping, the courts could order the same to be carried out concurrently. Hence, for the sake of clarity, I conclude that the sentences of whipping should be executed consecutively and not concurrently.

[36] I understand that my learned sister, Rhodzariah Bujang FCJ also agrees with my reasoning above that the sentences of whipping could not be executed concurrently.

Nallini Pathmanathan FCJ (Dissenting):

Introduction

[37] The sole issue in this appeal is whether a judge in the course of sentencing an accused has the power to direct that multiple sentences of whipping be imposed concurrently. In other words, whether the multiple sentences of whipping may be executed in one session, such that the additional sentences of whipping in respect of other offences, are deemed to have been executed simultaneously in the course of that single execution of whipping.

[38] This matter is of public interest because it affects all offenders in relation to the imposition of sentences of whipping.

[39] The application of concurrent sentencing is accepted in relation to imprisonment. The "one transaction rule" and the "totality principle" allow for, and support its application. However, concurrency in relation to whipping, which is always ancillary to a sentence of imprisonment, has not been accepted in this jurisdiction. The reasons for this are examined in the course of this judgment.

[40] This single issue rests on and raises weightier questions in the field of punishment in criminal law, more particularly in relation to sentencing, where the core principle of proportionality lies at the heart of the law. As the Roman philosopher Cicero famously wrote: "... take care that the punishment does not exceed the guilt" (*De Officio* Bk q, ch 25 s 89).

[41] This principle of proportionality is recognised and upheld in the Federal Constitution under arts 5(1) and 8. These articles guarantee fairness in State action and in the law, as an inherent requirement. And fairness manifests itself in the form of the requirement for proportionality.

[42] The present case brings to the fore the issue of whether the principle of proportionality is applicable in law in relation to whipping. The crucial issue is whether by reason of the principle, that punishment ought to be commensurate with the crime, whether a judge may in the course of sentencing apply the principle of proportionality to determine in any particular case where there are multiple sentences, whether such sentences may be executed concurrently or not.

Salient Facts

[43] The accused, Santanasamy Muthiah, was charged together with two other accused persons for a single charge of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') as well as two separate charges of drug possession, one under s 12(2) of the DDA punishable under s 39A of the DDA, and the other under s 6 of the DDA with common intention under s 34 of the Penal Code. All these charges were preferred pursuant to a single series of events. Santanasamy was found to have substances suspected to be heroin

on his person when stopped by the police when he was on his motorcycle near his home. This did not comprise the subject matter of any charge against him. He was then immediately escorted to his home where different drugs were found in different parts of the house. Subsequently, the prosecution preferred three different charges against Santanasamy only in relation to the drugs found in the house. It is therefore evident that these charges all arise as a consequence of a single event.

[44] Ultimately the first charge was for trafficking dangerous drugs namely 85.03g of methamphetamine, the second charge was for the possession of dangerous drugs namely 10.13g of methamphetamine, and the third charge was also for the possession of dangerous drugs namely 7.48g of cannabis. The accused was convicted under all three charges.

[45] Santanasamy was sentenced as follows:

(i) For the first charge of drug trafficking, the accused was sentenced to death;

(ii) For the second charge under s 12(2) of the DDA , he was sentenced to 11 years imprisonment[1] and 10 strokes of the cane; and

(iii) For the third charge under s 6 of the DDA, he was sentenced to 2 years imprisonment from the date of arrest, this sentence of imprisonment to run concurrently with the sentence of imprisonment for the second offence.

[46] The accused appealed only in respect of the first charge for drug trafficking. The Court of Appeal affirmed the death sentence as a result of which he appealed to the Federal Court.

[47] At the hearing before us on 1 July 2024, the prosecution informed the court that they agreed to prefer the lesser charge of possession in substitution of the first charge of trafficking. Santanasamy chose to plead guilty to the lesser charge, as a consequence of which we ordered that the conviction under s 39B(1)(a) of the DDA be substituted with a conviction under s 12(2) of the DDA punishable under s 39A of the DDA.

[48] We then imposed a sentence of 9 years imprisonment from the date of arrest, to run concurrently with the sentence for the second and third charges, and as mandatorily required, 10 strokes of the cane.

[49] Learned counsel for the accused sought to move the court to order that the sentences of whipping for the first charge and the second charge run concurrently, in much the same manner as the term of imprisonment. This was opposed by the learned Public Prosecutor on the grounds that whipping could not be executed concurrently and that this has been the position in this jurisdiction.

[50] We invited *amicus curiae* to assist us on this issue, namely two senior counsel who were present in court on a different matter. Both Tan Sri Shafee Abdullah and Dato' Dusuki Mokhtar to their credit acquiesced readily to our request and agreed to submit on the issue before us. Dato' Dusuki Mokhtar subsequently appeared for the prosecution. Their submissions proved to be of considerable use and we thank them for their invaluable assistance.

Analysis

[51] The starting point of my analysis on whether multiple sentences of whipping may or may not be carried out concurrently is the Federal Constitution, as stated at the outset. The Federal Constitution which is the supreme law of the land prescribes constitutional supremacy rather than parliamentary sovereignty (see *Ah Thian v. Government Of Malaysia* [1976] 1 MLRA 410 per Suffian LP). Accordingly, when construing or interpreting legislation it is important to bear in mind that all legislation is subject to the provisions of the Federal Constitution and should be interpreted in a manner that is consonant with the provisions of the same.

[52] In the instant case, there is no question of the constitutionality or otherwise, of any of the provisions of the CPC. It simply does not arise. The sole issue relates to the proper interpretation of the provisions in the CPC relating to whether parliamentary intent allows for sentences of whipping which are consequent upon imprisonment, to run concurrently or not.

[53] There is no question or issue of either an encroachment or usurpation of parliamentary powers.

[54] I now turn to the provisions of the Federal Constitution which are relevant in relation to this issue. At the outset, reference was made to arts 5(1) and 8 which encapsulate, amongst others, the principle of proportionality.

Article 5(1) Federal Constitution

[55] In art 5(1), the right to life and liberty is subject to the proviso that such rights may be taken away in accordance with the law. In consonance with this, the State vide Parliament determines the nature and types of offences and the attribution of blame, as well as the imposition of punishment.

[56] In the context of punishment, this means that State punishment which the State is bound to impose, and which impinges on the rights of individuals, is to that extent lawful. Nonetheless, the imposition of such punishment is not completely unrestrained or unhindered, but carries with it the essential requirement of fairness between the interference with a human right and the sentence. Fairness in turn manifests itself through the principle of proportionality. In order to ensure that punishment meted out is fair, the principle of proportionality is engaged and serves to act as a constraint on punishment.

[57] Authority for this proposition is to be found in the seminal case of *Alma Nudo Atenza v. PP & Another Appeal* [2019] 3 MLRA 1 ('*Alma Nudo*'), where Richard Malanjum CJ held:

> "[109] Accordingly, art 5(1) which guarantees that a person shall not be deprived of his life or personal liberty (read in the widest sense) **save in accordance with law envisages a State action that is fair both in point of procedure and substance.** In the context of a criminal case, the article enshrines an accused's constitutional right to receive a fair trial by an impartial tribunal and to have a just decision on the facts. (See: *Lee Kwan Woh (supra)* at para [18])."
>
> [Emphasis Added]

[58] This statement is equally applicable to the imposition of punishment by the State. It means that the punishment to be imposed must be fair in terms of procedure and substance. Fairness therefore comprises a core facet of the law, including punishment and therefore sentencing.

[59] Such fairness is expressed as a fundamental right in art 8 which articulates this element through the doctrine of proportionality.

Article 8 Federal Constitution

[60] The importance of, and requirement for proportionality, as entrenched in art 8 of the Federal Constitution, is also explained in *Alma Nudo*, which is authority for the proposition that the requirement of substantial fairness is guaranteed under art 8:

> "Article 8 And The Doctrine Of Proportionality
>
> [117] When interpreting other provisions in the FC, the courts must do so in light of the humanising and all-pervading provision of art 8(1). (See: *Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia* [2006] 2 MLRA 396 at para [8], approved in *Badan Peguam Malaysia v. Kerajaan Malaysia* [2007] 2 MLRA 847 at para [86]; *Lee Kwan Woh (supra)* at para [12]). Article 8(1) guarantees fairness in all forms of State action. (See: *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLRA 186). The essence of the article was aptly summarised in *Lee Kwan Woh (supra)* at para [12]:
>
> > **The effect of art 8(1) is to ensure that legislative, administrative and judicial action is objectively fair. It also houses within it the doctrine of proportionality which is the test to be used when determining whether any form of state action (executive, legislative or judicial) is arbitrary or excessive** when it is asserted that a fundamental right is alleged to have been infringed."
>
> [Emphasis Added]

[61] The doctrine of proportionality is therefore an inherent requirement to be considered when construing legislation.

The Criminal Procedure Code ('CPC')

[62] The CPC is legislation that serves the purpose of ensuring that procedures exist for the investigation, inquiry, trial and punishment of offences so as to ensure that these matters do not violate the fundamental rights of individuals. Fundamental rights are not lost on imprisonment but subsist *albeit* in restricted form (see *Sunil Batra v. Delhi Administration* [1978] AIR 1675, [1979] SCR (1) 392, AIR [1978] Supreme Court 1675, Supreme Court of India).

[63] According to *Black's Law Dictionary*, criminal procedure is: "the rules governing the mechanisms under which crimes are investigated, prosecuted, adjudicated, and punished" and "includes the protection of accused persons' constitutional rights".

[64] Criminal procedure is a cornerstone of the criminal justice system. In this jurisdiction, the CPC serves to ensure that justice is served fairly and according to the law, while protecting individuals' rights to due process and equal protection under the law. It therefore plays an essential role in the enforcement and protection of the fundamental rights protected in the Federal Constitution. It establishes the necessary procedures to ensure amongst others that punishment is lawful and fair, namely commensurate with the offence. Therefore, it is important that the interpretation of the CPC is in a manner that is consistent with, or construed harmoniously with the Constitution, ensuring that its provisions are applied in a manner that upholds legislative intent as well as fundamental rights (*albeit* somewhat restricted).

[65] It is self-evident that the CPC should be construed in the spirit, and in consonance with, the Federal Constitution. In the context of the instant case, the constitutional obligation requiring that State action is fair, both procedurally and in substance, as provided for in arts 5(1) and 8 of the Federal Constitution, is a condition or obligation that has to be considered when formulating and interpreting legislation.

[66] Here the relevant legislation is the CPC. Therefore, this inherent obligation is equally applicable to the CPC. This in turn means that the fundamental requirement of fairness as expressed in the principle of proportionality is an inherent necessity when construing the provisions of the CPC, including those provisions relating to sentencing.

[67] In relation to sentencing, the element of fairness is housed in the principle that the severity of the sentence should not exceed the guilt or offence, and is expressed through the doctrine of proportionality. It therefore follows that when construing the provisions of the CPC to ascertain whether the sentence of whipping can, or cannot, be executed concurrently, this element of fairness and proportionality is to be considered and applied as an inherent condition or necessity.

How Do The Courts Give Effect To The Doctrine Of Proportionality In The CPC?

[68] The test is the "one transaction rule" and the "totality principle", explained in brief as follows:

(a) the former, ie, the "one transaction rule" guides a court's assessment as to whether an offender should be doubly punished for offences that have been committed simultaneously or close together in time; while

(b) the latter ie, the "totality principle" reminds judges to consider whether the global sentence imposed remains proportionate to the offender's overall criminal behaviour.

[69] The common law position which has been wholly adopted in Malaysia ensures by the use of these guiding principles that the sentences issued for multiple offences are proportionate. And so, it has always been judicial power that determines whether or not multiple sentences of imprisonment should be served at the same time or cumulatively.

[70] Given such comprehensive doctrines and principles comprising the foundation for the interpretation of the CPC, it is of importance to emphasise that there is nothing in the relevant provisions of the CPC relating to whipping, that precludes or ousts judicial power to determine whether multiple mandatory sentences of whipping may be imposed concurrently or consecutively.

[71] The absence of any such preclusion provision lends further weight to the interpretation that judicial power and discretion in relation to punishment are not fettered by or within the CPC. As such, concurrent sentencing in relation to whipping ought not to be outside the purview of the courts' powers of sentencing.

Interpreting Parliament's Intention In The Absence Of Words In The CPC Specifying Whether Whipping Should Be Concurrent Or Consecutive

[72] The application of the doctrine of proportionality under the provisions of the CPC in relation to the imposition of punishment or sentencing, is found in the use of concurrent or consecutive terms of imprisonment. There is express provision for the use of such modes of sentencing for imprisonment in s 282(d). There is no such statutory provision expressly specifying the use of concurrent or consecutive sentencing in relation to whipping.

[73] By reason of the absence of such a provision in relation to whipping, the prosecution submits that since there is no express provision legislated by Parliament allowing for the imposition of concurrent whipping, there can be no such exercise of power by the courts to impose concurrent sentences of whipping in multiple offences.

[74] As such, the general position adopted has been to disallow any such use of concurrent sentencing for the purposes of whipping, the rationale being, if there is no express provision in relation to whipping, then it is effectively precluded or prohibited. By adopting this form of rationale, the doctrine of proportionality is effectively ruled out or barred from application in relation to whipping.

[75] Their rationale is that in the absence of such express words, the Parliamentary intent is clear – namely that there is no intention to provide for concurrent sentencing and as such the courts cannot exercise their powers of sentencing to allow for such. The prosecution relied on two cases from Singapore namely *PP v. Chan Chuan* [1991] 1 SLR(R) 14 ('*Chan Chuan*'), a decision of the High Court of Singapore as well as *Yuen Ye Ming v. PP* at para 26 ('*Yuen*') to support the said rationale.

[76] In *Chan Chuan*, it was held that in the absence of any special provision in the Singaporean CPC permitting concurrent sentences of whipping, it must mean that all strokes imposed on an offender at any one time must be aggregated up to a maximum of 24 strokes:

> "My view that the sentences for caning for two or more distinct offences resulting in convictions at one trial do not merge but instead aggregate is supported by s 17 of the CPC. Section 17 enables a court in convictions in identical circumstances to direct the sentences of imprisonment to run concurrently. **Where the Legislature has made provision for concurrence or merger with regard to sentences of imprisonment but is silent on caning except to impose a limit of 24 strokes, it can only mean that subject to the specified maximum, the number of strokes for one offence shall be aggregated to the number of strokes for another**."
>
> [Emphasis Added]

[77] And in *Yuen Ye Ming*, the Singapore Court of Appeal in hearing an application for leave to appeal held that the express provision in the CPC in Singapore for the imposition of concurrent sentences of imprisonment combined with the absence of a similar provision for whipping, demonstrated a positive parliamentary intent that sentences of whipping must be ordered as consecutive sentences.

[78] The prosecution relied on these cases to support their position that the only inference to be drawn from the absence of an express provision allowing for concurrent whipping is that the court is constrained to impose only consecutive sentences of whipping. In other words, the prosecution's position is that the court's sentencing powers in relation to concurrent sentences of whipping are effectively ousted or restricted by the absence of an express provision allowing for such sentencing. I do not, with respect, find this proposition persuasive because inference by absence is not the ideal mode of discerning Parliamentary intent. This is all the more so when the inference from the absence of a statutory provision will result in the imposition of a sentence of whipping causing grave

bodily injury, even where the circumstances may warrant imposing concurrent sentencing, by reason of the one transaction rule or the totality principle. In other words, the doctrine of proportionality which requires a balance between the offence and the punishment is not considered at all.

[79] For example, consider a case where drugs are found in the possession of the accused person in the course of one event or incident. Charges may well be preferred (as in the instant case) by way of separate charges or by way of a single charge notwithstanding that the discovery of the drugs was in the course of one incident. Where several charges are preferred, as opposed to one, the accused on conviction is then subject to multiple sentences of whipping additional to the term of imprisonment. If the accused had been preferred with a single charge, there would be one sentence of whipping additional to the term of imprisonment. The anomaly is clear.

[80] While the problem of the anomaly does not arise with respect to the terms of imprisonment imposed, by reason of the fact that the courts may have resorted to the "one transaction rule" and the "totality principle" so as to give effect to the doctrine of proportionality, the same considerations are, as submitted by the prosecution, not available to the accused in relation to the sentences of whipping. Again, the anomaly relating to the discrepancy between the terms of imprisonment and whipping is, with respect, inexplicable and legally incoherent.

[81] It is also argued by the prosecution that the existence of a provision for concurrent sentencing in terms of imprisonment but the absence of a similarly specific provision for whipping warrants the irresistible inference that Parliament intended that only imprisonment could run concurrently but whipping could not. This is inference from absence.

[82] It can equally be argued that:

(a) the absence of any form of prohibition, express or implied against the use of concurrent orders for whipping, allows for the court to turn to the principles of common law, relating to whether sentences should run concurrently or consecutively – namely, the "one transaction rule" and the "totality principle";

(b) if indeed it was Parliament's intention to provide no room for concurrent sentencing with regards to whipping, it should have been expressly provided for. Put another way, if it was indeed Parliament's intention to prohibit the concurrent operation of a sentence relating to whipping, it would have been expressly provided for;

(c) if the intent of Parliament was to encroach upon judicial powers of sentencing, which must include whipping, then this would be expressly provided for; and

(d) given that the Federal Constitution in arts 5(1) and 8 require that the doctrine of proportionality is applied in the construction of legislation, the correct statutory interpretation to be applied in relation to sentencing including whipping is that the court retains its powers of sentencing so as to ensure that the punishment meted out is commensurate with the offence.

[83] In other words, the prohibition of concurrent sentencing should be expressly provided for, because it is, in effect, expressly ousting the doctrine of proportionality and established principles of law (ie, the "one transaction rule") which have been in existence and applied by the courts, for decades. Any intention to oust the application or development of Malaysian common law must be clear. See *Goldring Timothy Nicolas v. PP* [2013] 3 SLR 487 at para 51:

> A crucial axiom that underlies my reasoning is the fundamental presumption of statutory interpretation that Parliament would not have removed rights pre-existing in common law if there was no express provision or clearly evinced intention to that effect.

[84] It is therefore imperative that in the course of statutory interpretation, the drawing of inferences from the absence of a provision in a statute be exercised with considerable care and caution. It ought to be ensured that anomalies as specified above do not arise. This is why the tenets of proportionality are entrenched in the Constitution and have to be adhered to.

[85] The question that then arises is whether such preclusion of the doctrine of proportionality, that houses the fundamental requirement for fairness, is a construction or interpretation that is consonant with arts 5(1) and 8 of the Federal Constitution. The answer, rationally, is no.

[86] As such, the argument by the prosecution that because there is no express provision, and therefore the courts cannot impose concurrent sentences with regards to whipping, lacks merit. More significantly, it is not consonant with the requirements of fairness and therefore the articles in relation to fairness and proportionality under the Federal Constitution.

Statutory Interpretation

- Presumption Of Adherence To The Rule Of Law

- Presumption Against Intending Injustice Or Absurdity

[87] Underlying all statutory interpretation generally is the requirement that there is adherence to the rule of law. In Malaysia the rule of law is embedded in the Federal Constitution. The Federal Constitution in Part II contains fundamental rights. In *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v. Muziadi Mukhtar* [2019] 6 MLRA 307, Mohd Zawawi Salleh FCJ held in relation to statutory interpretation as follows:

> "[84] Further, a well-established principle of statutory interpretation is that Parliament is presumed not to have intended to limit fundamental rights, unless it indicates this intention in clear terms."

[88] See also *Alma Nudo* where it was held:

> "[101] "Law", as defined in art 160(2) of the Federal Constitution read with s 66 of the Interpretation Acts 1948 and 1967, includes the common law of England. The concept of rule of law forms part of the common law of England. The "law" in art 5(1) and in other fundamental liberties provisions in the FC must therefore be in tandem with the concept of rule of law and NOT rule by law. (See: *Lee Kwan Woh (supra)* at para [16]; *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2012] 6 MLRA 375 at para [17])."

[89] Even in the United Kingdom where there is no written constitution, the courts are presumed to interpret legislation on the basis that the rule of law is adhered to. See *R v. Secretary Of State For The Home Department, Ex Parte Pierson* [1997] 3 WLR 492; [1998] AC 539:

> Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural. I therefore approach the problem in the present case on this basis.

[90] The Malaysian equivalent of that presumption is where there is an absence of express provision, Parliament must legislate in accordance with the spirit and object of the Federal Constitution.

[91] It also is a principle of statutory interpretation that the courts should adopt an interpretation which precludes injustice and/or absurdity. As stated in *Maxwell on The Interpretation of Statutes*, 12th edn by P St J Langan:

> Whenever the language of the legislature admits of two constructions and, if construed in one way, would lead to obvious injustice, the courts act upon the view that such a result could not have been intended, unless the intention to bring it about has been manifested in plain words. (*Smith v. Great Western Ry* [1877] 3 App Cas 165) "If the court is to avoid a statutory result that flouts common sense and justice, it must do so not by disregarding the statute or overriding it but by interpreting it in accordance with the judicially presumed parliamentary concern for common sense and justice." (*Re Maryon-Wilson's Will Trusts* [1968] Ch 268, per Ungoed-Thomas J at pg 282).

[92] In this jurisdiction, unlike the United Kingdom which is governed by Parliamentary sovereignty, it is more so incumbent on the courts when interpreting Parliamentary intent that they do so in light of the overarching provisions in the Federal Constitution, which is supreme.

[93] Finally, legislation should be interpreted, if possible, so as to respect the rights of the offender notwithstanding that his rights are restricted. If there is any ambiguity in the construction of the statute, an interpretation which favours the offender should be adopted (see *Walsh v. Secretary Of State For India*

[1863] 10 HLC 367, *Hough v. Windus* [1884] 12 QBD 224, and *JE David v. SPA De Silva* [1934] AC 106). Although these cases are civil matters, they deal with general principles of statutory interpretation in relation to legislation. If anything, these principles are even more relevant in relation to criminal matter.

[94] In the instant case, the ambiguity arises from the fact that while terms of imprisonment are expressly allowed to be imposed concurrently, there is silence in relation to whipping. On the other hand, whipping is not imposed in the absence of imprisonment, as will be discussed later on in this judgment. Therefore, is it clear beyond doubt that whipping must be treated separately from terms of imprisonment in relation to whether these sentences can be imposed concurrently or consecutively.

[95] Accordingly, while the CPC is silent on whipping, the court should, applying the principle of constitutional supremacy, interpret the CPC in favour of the offender so as to comply with arts 5(1) and 8 of the Federal Constitution. Imposing concurrent whipping sentences would better reflect the principle of proportionality.

Case Law In Other Jurisdictions

[96] The Singaporean case law relied on by the prosecution is of persuasive value. It is not binding. In particular, the Singaporean Court of Appeal in considering the present question in *Yuen Ye Ming* had to assess whether the matter was of public interest in deciding whether to grant leave for the said matter to be heard under their s 397 of the CPC. In short, it was an application for leave to appeal to the Singaporean Court of Appeal. This is entirely different from the present case which is a full criminal appeal and requires full scrutiny. *Yuen Ye Ming* being a leave matter means that it was not given the use to verify the originality of this document via e-FILING portal level of scrutiny that is accorded to a full criminal appeal. In any case, as I have stated at the outset, this matter is of public interest because the decision on whether sentences of whipping can be concurrent will have ramifications for all offenders.

[97] Like Singapore, the CPC in Brunei is in *pari materia* with the provisions of our CPC. It is worthy of note that in Brunei, the courts have adopted the practice of imposing concurrent sentences of whipping in line with the imposition of terms of imprisonment. Put another way, they treat the sentence of whipping as being inextricable from the term of imprisonment.

Whipping As A Punishment

[98] It is worthy of note that whipping in the CPC is a mode of punishment that is meted out in conjunction with, or in addition to imprisonment to male adult offenders, save for some offences relating to juveniles. It is not meted out alone, or independently of a term of imprisonment. Put another way, it does not subsist as a sole form of punishment but can only be imposed in conjunction with imprisonment.

[99] It ensues therefore that whipping is, or ought to be considered as, punishment that is inextricably linked to or conjoined with, the punishment of imprisonment. It ought not to be severed from, and considered in isolation of imprisonment under the CPC, because it does not appear as a sole punishment that is capable of subsisting independently, for the purposes of the imposition of a punishment.

[100] As such, if indeed it is indivisible or inextricable from imprisonment under the provisions of the CPC then:

(a) provisions of the CPC applicable to the punishment of sentencing ought to be equally applicable to whipping;

(b) there should not be a severance of the punishment of whipping from the punishment of imprisonment because the former (nearly always mandatory under the relevant criminal statute), is always imposed in addition to imprisonment;

(c) accordingly whipping should not be considered a separate and isolated form of punishment that is unconnected or discrete from imprisonment, that warrants separate application of the law; and

(d) the provisions relating to imprisonment are therefore applicable to whipping, as whipping cannot subsist in isolation. Moreover, there is no express provision precluding concurrency in relation to whipping under the CPC.

[101] When whipping is construed in the CPC in this context, it is evident that the doctrine of proportionality in the form of concurrent sentencing which is applicable to terms of imprisonment ought also to be available in the context of the additional punishment of whipping.

Do The Statutory Provisions For The Maximum Number Of Strokes In Section 288(1) And (5) Of The CPC Preclude The Imposition Of Concurrent Sentencing For Whipping?

[102] For the accused, learned counsel submitted that the CPC does not specify whether whipping sentences should be imposed concurrently or consecutively. Although s 288(5) of the CPC stipulates a maximum number of strokes, he submitted that it does not prescribe the mode of execution of sentences of whipping. And where the law is silent on the mode, the court is then at liberty to exercise its discretion based on principles of justice, equality and in line with principles of sentencing within the framework of the Federal Constitution.

[103] The prosecution, on the other hand, relied on s 288(1) and (5) of the CPC to submit that this meant that whipping sentences could, and had, to be carried out consecutively, but not concurrently. They further relied on s 291 CPC as well as reg 134 of the Prison Regulations 2000 which stipulate that where for medical reasons, whipping cannot further proceed, to submit that there were

adequate safeguards in terms of the maximum number of strokes as well as consideration for the accused's bodily condition to allow for whipping to be carried out consecutively but not concurrently.

[104] In my view these statutory provisions merely provide for a statutory maximum number of strokes – it is apparent from the language used that it is a cap that such a provision is made for.

[105] This is to be distinguished from the question of an appropriate sentence or a proportionate sentence to be meted out. These statutory provisions do not purport to oust or take away the discretion of the trial judge under established legal principles such as the "one transaction rule" and the "totality principle". As there is no such ouster, it ought not to be construed so as to preclude a judge from handing down a sentence which encompasses a concurrent sentence in relation to whipping. Even if there was such an ouster clause, it would still be subject to the provisions of the Federal Constitution.

[106] There is a distinction between prescribing a maximum number of strokes by way of statute, and prohibiting the exercise of a judge's discretion to provide that whipping for two or multiple offences/charges should run concurrently. They are two disparate matters. The former deals with what it describes literally – namely that no sentence can exceed 24 strokes. However, that in no way, expressly or impliedly addresses or deals with the latter, namely judicial power to mete out punishment concurrently or consecutively.

[107] The ability of a judge to exercise his discretion under his judicial powers of sentencing using long established principles, namely the "one transaction rule" and the "totality principle", is not expressly taken away or prohibited by s 288. Therefore, there is nothing to preclude a judge from applying those principles and providing for the mandatory sentences for different offences within one transaction to run concurrently.

The Evolution Of Section 288 Of The CPC

[108] I turn to the history of whipping to comprehend the roots and evolution of this form of punishment in this jurisdiction. Whipping as it is known today takes its roots from the English common law.[2] During the period of colonisation, it was left largely to the judges' discretion – save that the maximum number of strokes that could be imposed for multiple offences following a trial was 24. And that remains the status of the statutory provisions relating to whipping until today.

[109] Section 288 of the CPC subsists from earlier times when whipping was used as a punishment during the colonial history of the country – and where the penalty under the common law or earliest statutes was discretionary, and gave the power to the judge to determine the number of strokes to be given subject to a maximum of 24. That is the underlying basis for the maximum of 24.

[110] It is therefore not legally rational or coherent to utilise that provision to argue that Parliament intended, by reason of the imposition of a maximum, to prohibit or preclude concurrent sentencing. The roots of the statutory provision have grown from a completely different prescription under the law for meting out whipping – namely at the discretion of the judge. So the maximum was there to ensure that judges did not indiscriminately or disproportionately hand down a sentence of more than 24 strokes notwithstanding the fact that multiple distinct offences had been committed.

[111] This still left the issue of whether the punishment for the several offences was to be meted out concurrently or consecutively, to the judge based on the principles of the "one transaction rule" and secondly subject to the "totality principle".

[112] It is therefore erroneous to utilise this particular statutory provision as a basis to ascertain Parliamentary intent in relation to whether sentences of whipping were to run concurrently or consecutively. In the absence of any statutory provision to the contrary, it is perfectly in order for the courts to rely on, and apply, both the "one transaction rule" as well as the "totality principle" to determine whether a sentence applies concurrently or consecutively. There is no reason to justify different treatment for sentences of imprisonment and whipping simply because they take different forms.

[113] Before I turn to the case law, I consider the historical reasons for the evolution of concurrent sentencing.

What Is The Reason For The Default Position At Common Law Being Concurrent Sentencing?[3]

[114] Under the common law, concurrent terms of imprisonment are the default position adopted by the courts in the United Kingdom. The reason for this is that historically, sentences of imprisonment imposed during a single session of the court or "quarter session" were deemed to take effect on the first day of that session (see *R v. Gilbert* [1975] 1 WLR 1012). This was to ensure that an accused person was not punished or sentenced twice by reason of the several charges against him being heard by different judges at different times.

[115] Equally, to guard against the converse position, orders of sentencing to run consecutively developed along with the concurrent imposition of sentences. Again, this was to ensure that the offender received his full punishment in instances where there were multiple distinct charges preferred, where a concurrent sentence would not achieve the object of punishing the offender appropriately.

[116] Therefore, it would be incorrect to preclude the default common law position as it now subsists in Malaysia under the "one transaction rule" *albeit* in relation to imprisonment or whipping. It was after all the default common law position which gave rise to the "one transaction rule".

The Current Position On Case Law Relating To Consecutive Whipping − A Misapprehension Of Indian Case Law?

[117] On the prevailing position set down by case law, learned counsel for the accused submitted that the leading Malaysian case that dictated the rule that whipping sentences were to be imposed consecutively instead of concurrently was the High Court decision, *PP v. Peter Ting Chiong King* [1984] 1 MLRH 596 ('*Peter Ting*'). All other cases in Malaysia followed the position in *Peter Ting*. Alternatively, it was submitted that *Peter Ting* is not binding on the Federal Court under the principle of *stare decisis*. *Amicus curiae*, Shafee Abdullah adopted and bolstered the position put forward by counsel for the accused namely, that the reasoning in the case of *Peter Ting* was flawed, and urged the court to correct the state of the law.

[118] *Peter Ting* relied entirely on an Indian case, *King Emperor v. Yenkataswamy* AIR [1937] Rangoon 286 at 367-368 ('*Yenkataswamy*') as its basis to impose consecutive sentences of whipping. This was then a part of India. At the time of the decision of *Yenkataswamy* in India, whipping was an additional or substitute sentence for the punishment of imprisonment. In 1955, India abolished the punishment of whipping.

[119] Therefore, the starting point for the analysis of the rationale that while sentences of imprisonment can be concurrent, but whipping cannot, is the decision of the High Court in *Peter Ting*. In *Yenkataswamy*, the court found that concurrent sentences of whipping could not be ordered because:

(i) India's Whipping Act 1909 permitted only one sentence of whipping to be imposed on a single occasion, no matter how many offences had been committed. In other words, notwithstanding that a person might have committed several offences carrying the punishment of whipping, only one sentence of whipping could be ordered. This in effect meant that it was not permissible to cumulatively add all the sentences of whipping, and impose the total number of strokes on the accused on that single occasion. This is even more limiting than issuing a concurrent sentence;

(ii) it therefore followed that as no more than a single whipping could be ordered on a single occasion, there was no question of concurrent whipping. It was not required, because India's Whipping Act 1909 in itself provided the safeguard in terms of only one sentence of whipping. One sentence of whipping can only mean that despite several sentences which might entail whipping as well, only one of those sentences could be ordered against the accused;

(iii) that is entirely different from suggesting that concurrent sentences are prohibited or precluded. On the contrary, to read the case that way, with the greatest respect, amounts to a misreading

of *Yenkataswamy*. To that extent the case is not and cannot be authority for the proposition that concurrent sentencing is prohibited or not allowed. The correct reading of the case is that as India's Whipping Act 1909 only allowed for a single sentence of whipping, the issue of concurrent sentences did not arise;

(iv) however, Spargo J who, in 1937, decided the case went on to deal with the temporal aspects of whipping by saying *inter alia*:

> It is clear then that double sentences of whipping are illegal and concurrent sentences of whipping are illegal for this reason and also because as pointed by Twomey J in *KE v. Eng Gyaung* the word concurrent properly applies only to sentences of imprisonment.

[120] *Yenkataswamy* was relied upon in *Peter Ting*. However, the decision only cited the second part of the reasoning in *Yenkataswamy*, namely that the word "concurrent" could only properly apply to terms of imprisonment. The fact that the court in *Yenkataswamy* held that even consecutive terms of imprisonment were prohibited or barred, was ignored. This in turn was because there could be only one sentence of whipping on a single occasion.

[121] In this jurisdiction, there is no such bar as in India's Whipping Act 1909. It is not in dispute that whipping can be ordered for more than one offence in a single sitting. By applying *Yenkataswamy* in part, the court in *Peter Ting*, with respect, did not consider the ratio of the case as well as the rationale within the context of India's Whipping Act 1909. To reiterate, India's Whipping Act 1909 in itself, provided a safeguard against the concept of either consecutive or concurrent whipping because no more than one sentence could be imposed in one sitting no matter how many offences had been committed.

How Is The Term "Concurrent" To Be Construed Under The CPC?

[122] The second limb of reasoning in *Peter Ting*, adopting the reasoning of Twomey J in *KE v. Eng Gyaung* was that a concurrent sentence of whipping meant that two operators performed the whipping on the offender simultaneously such that the offender received all the sets of strokes at the same time.

[123] This, with respect, amounts to a literal reading of the word 'concurrent', leading to an absurd conclusion. It effectively means that the offender is bound to receive double the pain and suffering in one sitting − which is a literal extrapolation of the term 'concurrent' in relation to imprisonment. It shows that at the time it was not possible to even envisage that the concepts of time and the physicality of whipping have parallels − just that one is temporal and one is in the physical realm.

[124] Tan Sri Shafee Abdullah submitting as *amicus curiae* vividly put it this way − a concurrent sentence of whipping does not mean two operators whipping the convicted person at the same time. He submitted that, that would certainly be an absurd punishment.

[125] The notion of two operators performing the whipping on the offender is difficult, if not impossible, to perform from a practical perspective. This is because each operator would stand on either side of the offender holding canes in their righthands to execute the whipping. But the result would be that the left half of the offender's person would not be whipped because it would require a left-handed person to reach that side of the offender.

[126] Parliament does not legislate to produce an absurd result. See *R v. McCool* [2018] UKSC 23 which was cited by the Privy Council in *Eco-Sud & Ors v. Minister Of Environment* [2024] UKPC 19. At para 73, the Privy Council said "In that respect, absurdity is given a very wide meaning, covering, amongst other things, unworkability, impracticality, inconvenience, anomaly or illogicality." So the use of 'concurrent' in the literal sense espoused in *KE v. Eng Gyaung* and adapted in *Peter Ting* to prelude concurrency does, with respect, lead to an absurd result.

[127] For the avoidance of doubt, I make it clear that when the court orders more than one sentence of whipping to be carried out concurrently, this means that the two sentences would merge. The lower number of strokes would be subsumed by the higher, such that the higher number of strokes is the only sentence that is imposed on the convicted person.

[128] *Amicus curiae* also drew this court's attention to the Indian case of *K Venkata Reddy v. The Inspector General Of Prisons, Andhra Pradesh, Hyderabad & Another* [1982] 1 MLJ (Crl) 617 which clarified the meaning of the word "concurrent", as follows:

> The word concurrent means, meeting in the same point: running, coming, acting, or existing together, coinciding; accompanying "concurrently" means, agreeing (See *Chambers Twentieth Century Dictionary*, New Edition, 1972, p 270). When two sentences are directed to run concurrently, it means: they run together. A prisoner that is directed to undergo two sentences concurrently has to undergo both the sentences only once for the duration of that period of concurrence.

[129] *Amicus curiae* submitted that the said definition makes it clear that concurrent sentencing does not mean that multiple punishments are to be administered simultaneously, but that the punishment is to be carried out once. In other words, the sentences merge, in much the same manner as terms of imprisonment. He further submitted that this ensures that individuals are not subjected to redundant or excessive penalties, allowing for a more streamlined and humane approach to sentencing.

[130] As such, the term 'concurrent' in *Peter Ting* was, with respect, misunderstood. This ought not to be perpetuated further.

Conclusion

[131] I find for the reasons above that there is no legally sound rationale justifying why sentences of whipping cannot be imposed so as to run concurrently. This is ultimately a matter for the court's discretion as part of its powers and duty to impose punishment. I have addressed the issue of why the refusal to recognise the existence of this judicial power in relation to sentencing offends, if not transgresses arts 5(1) and 8 of the Federal Constitution. On the contrary there is every reason to import the principle of fairness and thereby proportionality enshrined in those articles when construing the provisions of the CPC. The continued reliance on *Peter Ting* is not warranted for the reasons stated above.

Applying The Law In This Appeal

[132] In this appeal it is clear that the charges of possession (as amended) against Santanasamy relate back to a single series of events which occurred on 14 February 2018. The various drugs were all found in the same house. Accordingly, despite there being three charges, the actual offences of possession relate to different drugs found in Santanasamy's home on one occasion. This is therefore a suitable case for the court to apply the "one transaction rule" in respect of the term of imprisonment and the additional whipping sentence.

[133] Alternatively applying the "totality principle", it is equally evident that the quantum of drugs found in his possession does not warrant the imposition of two consecutive sentences of whipping. Applying the doctrine of proportionality as reflected in the "totality principle", it follows that to impose consecutive sentences of whipping would amount to the infliction of punishment that is excessive and disproportionate to the offence.

[134] I therefore order that the conviction under s 39B(1)(a) of the DDA be substituted with a conviction under s 12(2) of the DDA punishable under s 39A of the DDA. The sentence imposed is a sentence of 9 years imprisonment from the date of arrest, to run concurrently with the sentence of imprisonment for the second charge above, and 10 strokes of the cane, to also run concurrently with the sentence of whipping for the second charge.

The Alternative Submission Of *Amicus Curiae* – The Order For Whipping Amounts To An Illegality In Respect Of The Second Charge

[135] Alternative to the issue of concurrency in whipping, *amicus curiae* brought to the court's attention another reason why Santanasamy ought not to be whipped consecutively. He submitted that the High Court in the present case breached s 289 of the CPC which provides that a man sentenced to death cannot be further sentenced to whipping in one trial for another charge.

[136] In this case, the sentence for the first charge of drug trafficking was death by hanging, while the sentence for the second charge of drug possession was

imprisonment and whipping, and for the third charge of drug possession, the sentence was imprisonment. *Amicus curiae* submitted that the High Court order in respect of the second charge is a nullity and void *ab initio* in light of s 289 of the CPC. This section prohibits whipping in respect of males who are sentenced to death. As Santanasamy was initially sentenced to death by the High Court which was upheld by the Court of Appeal, it was not open to the court to further sentence him to be whipped in respect of the second charge. By doing so, an illegality had been perpetrated.

[137] The *amicus curiae* further submitted that since such an illegality subsisted at the material time, namely the point at which Santanasamy was sentenced in respect of the second charge in the High Court, this court could not allow such an illegal order to stand.

[138] The prosecution did not address this issue.

[139] In essence, the error occurred when the High Court sentenced Santanasamy to whipping on the second charge. This is because the imposition of the whipping contravened s 289 of the CPC. The second charge however is not the subject matter of appeal here. As such, the sentence of whipping in respect of the second charge remains on record. However, it is an illegal order as it contravenes s 289 of the CPC in that the High Court should not have ordered the whipping under the second charge. It was submitted that as it was an illegality on record, this court was bound to correct the same.

[140] The two options presented to this court were firstly, for this court to remove the sentence of whipping on the second charge, even though the second charge is not the subject matter of the present appeal, or alternatively to exercise revisionary powers in respect of the High Court order by removing the same. In short, the term of imprisonment imposed for the second charge stands, but the whipping is to be removed, as it is an illegality.

[141] In my view, there are merits in the *amicus curiae*'s submissions on this point as there is a clear illegality perpetrated against Santanasamy. See *Datuk Bandar Kuala Lumpur v. Perbadanan Pengurusan Trellises & Ors And Other Appeals* [2023] 4 MLRA 114 paras 547 and 548 where the court held as follows:

> [547] This transitions to an important point, namely that the courts do not condone contraventions of the law, be it under the FT Act or any other law. The fact that a material issue was not disclosed by the parties does not preclude this court, upon becoming appraised of the issue, whether from its own research or it having been pointed out by the parties, to raise and rule on the same, at any stage of the proceedings, particularly where it relates to a possible contravention of the law.
>
> [548] This is an established position of law, particularly in relation to illegality. Illegality encompasses contraventions of statute. This is particularly pertinent in the case of planning cases, where the court's supervisory role in relation to judicial review is to ascertain whether acts or omissions have occurred outside the purview of the relevant statute. The duty of disclosure is of fundamental

importance because it goes to the root of the court's ability to exercise its supervisory function. See *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors And Other Appeals* [1996] 2 MLRA 563; *R (on the application of Quark Fishing Ltd) v. Secretary of State for Foreign and Commonwealth Affairs* [2002] All ER (D) 450 and *R (on the application of Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin).

[142] The fact that the death sentence imposed for the first charge of drug trafficking has been reduced to one of possession does not alter this fact, as the illegality occurred in the High Court at the point of time when Santanasamy was sentenced on the second charge. In these circumstances, I am satisfied that this is a sound reason in accordance with the law to remove the sentence of whipping for the second charge, and I so order.

[143] Therefore, in summary I conclude that:

(a) the courts possess the judicial power to order that sentences of whipping may run concurrently in accordance with the law on the subject, in relation to terms of imprisonment, namely the "one transaction rule" and "the totality principle";

(b) in the instant case, applying these principles, I order that the strokes imposed for the reduced first charge and the second charge run concurrently. This means that the two sentences of whipping, like the terms of imprisonment merge, such that the whipping is only carried out once; and

(c) alternatively, I order that Santanasamy only receive strokes in respect of the reduced first charge of possession and not for the second charge as the imposition of whipping for the second charge contravened s 289 of the CPC.

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[1] From the date of arrest (14 February 2018).

[2] It has no autochthonous equivalent – the syariah provision is administered completely differently without the level of cruelty, suffering and pain seen in whipping under the CPC and the Penal Code.

It has been outlawed in the UK since 1948. It reached its heights in the 1800s and later became an exclusively statutory penalty for a limited number of offences in 1914 (see Criminal Justice Administration Act [1914] (c 58) UK s 36(2)).

See also the Straits Settlement Penal Code Ordinance 4 of 1871, s 278 from which the current section was used. Under this Ordinance it remained for the judge to determine on a discretionary basis what the sentence was and whether it was to run concurrently or consecutively.

[3] See "*Aggregated Caning and the Risk of Double or Disproportionate Punishments*" by Amanda Clift-Matthews (2021) 33 SAcLJ 1205 at para 6.