

**The “Ten or Life” Perplexity in Section 304(a) of the
Penal Code – An analysis of the Case Law on point**

by Christopher de Souza

12 July 2006



**Advocates & Solicitors
SINGAPORE**

Main Office: 168 Robinson Road #25-01

Capital Tower Singapore 068912

Tel: +65 6 220 0666 Fax: +65 6 224 8505

The “Ten or Life” Perplexity in Section 304(a) of the Penal Code – An analysis of the Case Law on point

Andrew Ashworth argues that there are four rationales behind punishment: retribution, rehabilitation, deterrence and isolation.¹ The New Zealanders have added a fifth – restorative justice.² While each rationale advocates punishment for different aims, there is the underlying assumption that the punishment meted must be commensurate with the culpability of the offender. In short, the judge must be given adequate discretion to match the offender’s blameworthiness with an accurate sentence.

It can be argued that the scope for such judicial discretion, or leeway, is absent in section 304(a) of the Penal Code, Chapter 224.³ The length of the sentence under s 304(a) is an imprisonment term of (a) up to ten years or (b) life. The quantum difference between life imprisonment and ten years is considerable in light of the *Abdul Nasir bin Amer Hamsah* case where it was decided that life imprisonment was imprisonment for the length of the offender’s natural life.⁴ The significance of the judge’s inability to sentence between ten years and life is sharpened when the offender is suffering from a mental illness, qualifies for the partial defence of diminished responsibility, and has a reasonable prospect of recovery after ten years’ of treatment. In such a case, a sentence of ten years’ imprisonment would be too short and life imprisonment excessive. With the backdrop set, this article has three aims.

Firstly, it will attempt to show that the ‘ten or life’ choice almost guarantees that judges will “under-punish” young offenders where the judge is convinced that ten years’ imprisonment is insufficient but life imprisonment too long. The late Justice Lai Kew Chai’s decision in *Tan Kei Loon Allan* illustrates how the Courts have deliberately chosen to be less harsh when sentencing young offenders under s 304(a) since life imprisonment translates into a longer sentence for a young offender than it would for an older offender.⁵

Secondly, it will be argued that the logical step is to reform s 304(a) to allow for a sentence of up to 20 years or life imprisonment.

¹ Maguire, Morgan & Reiner, “The Oxford Handbook of Criminology” (Second Edition); Chapter 30, Professor A. Ashworth.

² Morris, Maxwell & Robertson, “Giving Victims a Voice: a New Zealand Experiment,” 1993 Howard Journal Criminal Justice, 32:304. A. Ashworth, “Victim Impact Statements and Sentencing” 1993 Criminal Law Review, 776-787.

³ Section 304(a) of the Penal Code, Chapter 224, states: “Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for life, or imprisonment for a term which may extend to 10 years, and shall also be liable to fine or to caning, if the act by which death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death.”

⁴ *PP v Abdul Nasir bin Amer Hamsah* [1997] 3 SLR 643.

⁵ *PP v Tan Kei Loon Allen* [1999] 2 SLR 288. The late Justice Lai Kew Chai delivered the judgment of the Court of Appeal.

Thirdly, it will be argued that Justice V K Rajah's judgment in *PP v Chee Cheong Hin Constance* was wholly correct in its emphasis that to properly and fairly sentence offenders whose medical condition might potentially be reversed through medical attention and/or with the passage of time, the courts should be conferred the discretion to impose a sentence band with appropriate minimum and maximum sentences tied to periodical medical assessments and reviews.⁶ Such a sentence band does not currently exist in section 304(a) of the Penal Code.

Tan Kei Loon Allan & Abdul Nasir

Before the decision in *Abdul Nasir bin Amer Hamsah*, a prisoner sentenced to life imprisonment would serve a sentence of 20 years, with the possibility that his sentence might be commuted by one-third for good behaviour. In *Abdul Nasir*, the Court of Appeal ruled that a sentence of life imprisonment was not properly subject to Prisons Regulations relating to the remission of sentences. In particular, the Court of Appeal stated that it was not possible to pay lip service to life imprisonment as meaning the remaining natural life of the prisoner, and yet maintain that it was purely an administrative discretion to equate it with 20 years for purposes of remission in the absence of some clear law empowering the executive to do so.

The *Tan Kei Loon Allan* case involved a young offender who had been convicted under s 304(a) of the Penal Code. The Court of Appeal had to apply its mind to what an appropriate sentence would be for the offender – in essence, it had to deal with the perplexing option of sentencing him up to ten years or life imprisonment, and nothing in between. The Court held that while an accused person who was convicted prior to the *Abdul Nasir* decision and sentenced to life imprisonment would serve a maximum sentence of 20 years, with a potential remission commuting his sentence to one of 13 years and 4 months, an accused person who was convicted after the *Abdul Nasir* decision would have to serve a minimum of 20 years' imprisonment, at which point his release would be within the discretion of a Life Imprisonment Review Board.

Therefore, the minimum period of incarceration is now six years and eight months longer, whilst the maximum period of incarceration, previously 20 years, is now the remainder of the prisoner's natural life. Of equal importance is the fact that under the old position, his release after 20 years would have been guaranteed, but a prisoner sentenced for life in respect of a crime committed after *Abdul Nasir* has no assurance of such.

In light of the net effect of this new formula of calculating life imprisonment, the Court of Appeal in *Tan Kei Loon Allan* stressed that the courts must now exercise caution before committing a young offender to life imprisonment. It held that contrary to traditional reasoning, in similar cases involving a youthful offender on the one hand and an older offender in the other, the youthful offender sentenced to life imprisonment would now be

⁶ *PP v Chee Cheong Hin Constance* [2006] 2 SLR 707. This judgment addresses the issue of the offender's sentence. V K Rajah J's preceding judgment, reported at [2006] 2 SLR 24, concentrates on the issue of the offender's culpability.

subject to a longer period of incarceration than an older offender, assuming they both lived to the same age.⁷

Thus, the *Tan Kei Loon Allan* decision exposed the unnecessary rigidity of the 'up to ten years or life and nothing in between' option in section 304(a). As the Court of Appeal rightly put it:

"In serious cases the court must choose between the two options for a weighty sentence: ten years or life imprisonment... In a situation in which the court is desirous of a sentence greater than ten years, but feels that a sentence of life imprisonment is excessive, we have no choice but to come down, however reluctantly, on the side of leniency. Otherwise, the punishment imposed would significantly exceed the offender's culpability. It would, in our view, be wrong to adopt an approach in which the court would prefer an excessive sentence to an inadequate one."⁸

In essence, the *Tan Kei Loon Allen* decision highlighted the effect of *Abdul Nasir's* life imprisonment formula on section 304(a) of the Penal Code – which effect was a huge sentencing gap between ten years and life imprisonment, without any judicial means to bridge it.

Amending s 304(a) such that it allows a sentence of up to 20 years' imprisonment or life

It is logical that a Court must be given adequate discretion to match the offender's blameworthiness with an accurate sentence. The Court of Appeal in *Tan Kei Loon Allan* stated in clear terms that s 304(a), as it appears in its current form, prevents the Court from administering accurate sentences on offenders where the Court is of the view that the offender deserves more than ten years but less than life in prison. In light of this, it may augur well to consider giving the Courts a wider sentencing discretion for offenders convicted under s 304(a). Since the default minimum sentence for 'life imprisonment' seems to be twenty years without remission, an argument could be made for increasing the current ten year limit to twenty years. Naturally, the option 'or life imprisonment' should remain.

Such an amendment has three benefits.

1. Benefit 1

⁷ Please also see *PP v Norhisham bin Dahlan* [2004] 1 SLR 48 at paragraph 12 where the Court of Appeal paid heed to the guideline in *PP v Tan Kei Loon Allen* that it must be cautious in sentencing a young offender to life imprisonment since after *Abdul Nasir bin Amer Hamsah v PP*, a life sentence meant a sentence for the remainder of the prisoner's natural life.

⁸ [1999] 2 SLR 288 at paragraphs 39 & 40.

Firstly, it narrows the gap between a sentence of 10 years in prison and life imprisonment. Prior to *Abdul Nasir*, the effective choices would have been up to seven years' imprisonment (after remission) or about 13 years' imprisonment for a "life sentence" (after remission), a gap of about six years. Without remission, the gap would be ten years. Post *Abdul Nasir*, the gap is much wider. Even assuming a positive outcome after review by the Life Imprisonment Review Board, the gap between the sentencing options is between 7 and 20 years, more than double the old position. Assuming a negative outcome by the Review Board, or that the sentence was not commuted, the gap widens.⁹ If the current option of 'up to 10 years' is replaced with the option of 'up to 20 years' the net gap between a finite prison term, pronounced by the Court, and life imprisonment is reduced.

1.1 Benefit 2

The narrowing of the gap translates into the second benefit – the Court is better equipped to administer accurate sentences. Since the default minimum for life imprisonment is 20 years, the Court will possess the discretion to sentence up to the starting point of life imprisonment. Consequently, it will not be caught in the situation described in *Tan Kei Loon Allan* – where the Court is forced to administer a more lenient sentence because it thinks life imprisonment too excessive.

Giving the Courts the tools to administer accurate sentences is a pre-requisite of any of the rationales behind punishment. For example, an offender ought not to be overly deterred by a sentence that more than matches his culpability.¹⁰ Neither should a man's incarceration outlast his danger to society.¹¹

1.2 Benefit 3

Such an amendment will allow s 304(a) to complement s 304(b) in a manner much better than it does currently.¹² Apart from the *mens rea* element, the only difference between the two provisions is that the first attracts the possibility of life imprisonment. The benefit the

⁹ [1999] 2 SLR 288 at paragraph 39.

¹⁰ This is true where the deterrence is directed at "individual deterrence" rather than "general deterrence." For an understanding of deterrence, see generally, Walker, "Why Punish?" Oxford: Oxford University Press (1991).

¹¹ The incapacitative approach is to identify offenders or groups of offenders who are likely to do such harm in the future that special protective measures (conventionally, in the form of lengthy incarceration) should be taken against them. For a general understanding of incapacitative sentencing, see Maguire, Morgan & Reiner, "The Oxford Handbook of Criminology" (Second Edition); Chapter 30, Professor A. Ashworth. Also see von Hirsch & Ashworth, "Protective Sentencing under s 2(2)(b): the Criteria for Dangerousness," 1996 Criminal Law Review, 175 – 183.

¹² Section 304(b) of the Penal Code, Chapter 224, reads: "Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for a term which may extend to 10 years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death."

proposed amendment to s 304(a) brings is the reinforcement of the fact that s 304(b) is the less severe non-culpable-homicide limb. Section 304(b) retains its cap of ten years – ensuring the offender charged under the section receives a maximum of ten years – while s 304(a) is fine-tuned as the non-culpable-homicide limb which attracts the enhanced punishment of up to twenty years. Due to the current sentencing constraints in s 304(a), as expressed in *Tan Kei Loon Allan*, there is likely not to be any lengthy difference in the sentences administered to offenders charged under s 304(a) or s 304(b) in cases where the Court is of the view that life imprisonment is excessive yet ten years too short. In this regard, the proposed amendment will help ensure that s 304(a) does not overly duplicate s 304(b). The two provisions will provide unique sentencing options for the Court.

1.2.1 Offenders whose medical condition might potentially be reversed after ten years

The need for the proposed amendment is magnified by the precise prism of Justice V K Rajah's judgment in the recent case of *Constance Chee*. Writing *coda*, the Rajah J observed:

"The current position, where the courts are neither empowered nor endowed with any discretion whatsoever to customise or tailor their sentences in a manner that would be consistent with either the possible recovery or decline of the medical condition of an offender who is unwell, is far from satisfactory. Judges often have to choose between a rock and a hard place when resolving their colliding instincts in determining the appropriate sentence. Should the offender's medical condition stabilise without any real risk of a relapse it would be quite unjust for him or her to continue to be incarcerated after rehabilitation through medical attention when he or she no longer poses any further risk to the public upon a return to the community."¹³

Given that schizophrenia or other abnormalities of mind prompt the possible application of diminished responsibility, which partial excuse crystallizes culpability under s 304(a), Rajah J's observations are of direct relevance to this article.¹⁴ Currently, section 304(a) neither empowers nor endows the Court with any discretion whatsoever to customise or tailor its sentences in a manner that would be consistent with either the possible recovery or decline of the medical condition of an offender who is unwell, where such possibility of recovery occurs after ten years in prison.

¹³ [2006] 2 SLR 707 at paragraph 29.

¹⁴ Exception 7 to s 300 of the Penal Code, Chapter 224, reads: "Culpable homicide is not murder if the offender was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in causing the death or being a party to causing the death." The application of the exception 7 usually translates into the charge being reduced from s 302 to s 304(a) of the Penal Code – see *PP v Lim Hock Hin* [2002] 4 SLR 895, *PP v Ong Wee Teck* [2001] 3 SLR 479, *PP v Kwok Teng Soon* [2001] 4 SLR 576, *PP v Wee Eng Jong* (CC 21/2001), *PP v Aloysius Joshi Carilman* (CC 43/99), *PP v Lim Boon Chong Cyril* (CC 34/97), *PP v Lee Chee Seng* (CC 48/96) and *PP v Donald Peter Chandraraj* (CC 9/96), *PP v Dolah bin Omar* [2001] 4 SLR 302.

The amendment will cater for the situation where the judge is of the view that an offender's recovery will likely happen after ten years but before 20 years – the latter being the default minimum sentence of life imprisonment. The only limitation in the amendment is that the Court is left stranded where it is of the view that the offender may recover in 14 to 19 years' time. By then, the offender serving a 20 year sentence would have likely been released due to remission. Nonetheless, under the current wording of s 304(a) the accused in a similar situation will likely receive a less than adequate sentence of ten years or an overly harsh one of life in prison. Therefore, while not perfect, the proposed amendment still ensures a more accurate sentence.

Further Information

Should you have any further queries, please do not hesitate to contact the Litigation Department, Lee & Lee. The contact person is Quek Mong Hua. at DID: +65 65574611 /email: quekmonghua@leenlee.com.sg. You can also reach us by fax at +65 62219712.

Disclaimer: The copyright in this document is owned by Lee & Lee. No part of this document may be reproduced without our prior written permission. The provision of the information herein does not constitute our giving legal advice and should not form the basis of any decision as to a particular course of action. It is only intended to provide you with an indication of some of the potential legal issues which you should be aware of. You are strongly advised to seek specific, detailed legal advice in respect of the individual requirements and circumstances applicable to you. Lee & Lee will not have any liability to you if you use any information herein without first obtaining appropriate legal advice as to its suitability for your particular requirements. Please note also that the information herein is based on the laws of Singapore. The position in other jurisdictions may differ.