THE JUDICIAL DUTY TO GIVE REASONED DECISIONS

Thong Ah Fat v Public Prosecutor [2011] SGCA 65

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Overview of the decision

The accused was charged under the Misuse of Drugs Act after being found with 142.41 grams of diamorphine at the Woodlands Checkpoint. The High Court Judge found the accused guilty and sentenced him to death in a brief judgment of five paragraphs. The Court of Appeal, however, ordered a retrial as it was of the view that the Judge’s reasoning was “unclear” and the “judicial duty to give reasoned decisions” was not discharged.

Although it may seem like a basic legal principle that a judge has a judicial duty to give reasoned decisions, it would appear that Thong Ah Fat is the first local case to explore this duty in some detail. We hope to build upon the Court of Appeal’s analysis as follows: (i) the criterion to determine when reasons ought to be given; (ii) how the reasons should be expressed; (iii) the scope and depth of reasoning required; (iv) what justice and fairness entail; and (v) the duty to give reasons exists equally in civil proceedings.

Criterion to determine when reasons ought to be given

This is the first (threshold) question that must be answered. The overriding principle is to strike a balance between having some explanation and unduly burdening courts which may result in increased costs and delays. Although the Singapore Judiciary can be said to be generally efficient in dealing with its caseload in recent years, the correct approach as identified by the Court of Appeal to be applied in all situations is to have a “standard of explanation which corresponds to the requirements of the case”. Thus, where the decision is extremely straightforward or where the matter pertains to certain types of interlocutory applications with a procedural focus, reasons will probably not be necessary.

How the reasons should be expressed

In cases where reasons ought to be given, the Court of Appeal said that, as a general guide, the statement of reasons should be set out in the following structure: first, the statement ought to set out in summary form all the key relevant evidence; second, the statement should briefly set out the parties’ opposing stances and both the primary and inferential facts found by the judge; third, the statement should examine the relevant evidence and the facts found with a view to explaining the final outcome on each material issue; and fourth, the judge has to explain how the final conclusion was arrived at.
What is apparent from this set of guidelines is that it only pertains to matters of evidence and fact-finding. It is not clear what stopped the Court of Appeal to go a step further to include guidelines relating to how legal authorities should be cited and marshalled in decisions. To reach a verdict, a judge must necessarily apply a set of legal premises to a set of factual premises. If the legal premises are neglected (i.e., not clearly explained), the reasoning process is compromised as well, and a reasoned decision becomes impossible due to lack of completeness. One has to proceed then, with the assumption that *Thong Ah Fat* only provides guidelines for reasoned conclusions *vis-à-vis* fact-finding, and not *vis-à-vis* legal propositions used to support the verdict.9

**Scope and depth of reasoning required**

As one would expect, the Court of Appeal refrained from formulating a fixed rule of universal application.10 However, it did establish three factors which a judge should consider in determining the scope and depth of reasons required.11

First, due regard must be had to the judge’s list of hearings. The underlying concern is that judicial time should, as far as possible, be used effectively and efficiently. Second, the duty to give reasons is not important only when there is a right of appeal; indeed, the inability to alter the decision may make it all the more compelling for parties to understand how the decision was reached. Hence, reasons may be appropriate even when the judge is the final arbiter of the matter. Third, the nature of the matter before the judge also plays a role in determining the extent of reasons required. A straightforward matter may require fewer reasons and in certain cases, abbreviated oral judgments are acceptable;12 more complex or more significant decisions touching on public interests or resulting in changes to the law, for example, should contain more detailed reasons.

It is submitted that there may be a fourth factor13 that judges should consider, viz, whether the level of detail in the reasons given would better persuade the parties as to the legitimacy of the decision and thereby reduce the likelihood of pointless challenges. Singapore is not considered a litigious society (unlike the United States, for example) and (on one view at least) it is reasonable to suggest that well-reasoned decisions may actually reduce the number of appeals and thereby free up precious judicial time.14 Therefore, consistent with the overriding principle of balancing the need for reasons with unduly burdening the judicial machinery, it may be apposite to provide extensive reasons where it is evident to the judge that to do so would, based on the characteristics of the litigants, result in finality.15

**What justice and fairness entail**

It is suggested that the most important aspect of *Thong Ah Fat* is the Court of Appeal’s express recognition that a judicial decision in this day and age cannot be justified solely on the fact that it was made by a judge.16 On the contrary, it emphasised that “the legal cogency and coherence of a decision” must be demonstrably justifiable.17
The Court of Appeal made it abundantly clear that it was cognisant of the immutable principle that justice must not only be done, it must also be seen to be done.\textsuperscript{18} The immediate corollary is an express distancing from legal realism, or more specifically, the strain of legal realism espoused by the eminent Jerome Frank who is (infamously) caricatured as having proclaimed that “justice is what the judge ate for breakfast”.\textsuperscript{19} Indeed, moving further into the realm of legal theory (but closer to credible schools of legal theory), when assessed in greater detail, \textit{Thong Ah Fat} may herald the start of a trend towards a less positivistic approach towards law in Singapore.\textsuperscript{20} The tension between rule positivism and inherent morality within the law is one of the perennial debates that will probably never be resolved decisively.\textsuperscript{21} Notwithstanding that, one may posit that the Court of Appeal’s newfound emphasis on the justifiability of a decision, transparency, and natural justice\textsuperscript{22} is a small step towards loosening a strict rule positivism approach. That the innocuous-looking judgment in \textit{Thong Ah Fat} may warrant such an interpretation is premised on two arguments.

First, the Court of Appeal did not refer to any statute to support its finding of the existence of the duty to give reasons,\textsuperscript{23} and as noted earlier, the rationale, scope and extent of the duty was drawn virtually entirely from foreign common law jurisprudence. Unlike other duties to observe natural justice or give reasons imposed on tribunals by statute,\textsuperscript{24} the judicial duty expressed in \textit{Thong Ah Fat} is, if anything, founded in the common law and not on any strict legal positivistic rule.\textsuperscript{25} Second, if morality is defined loosely as a “higher good”, then the notions of justifiability of a decision, “open justice” or the transparency of a judicial system,\textsuperscript{26} and principles of natural justice all contain hints of morality. Insofar as the Court of Appeal referred to these notions as rationales for the judicial duty to give reasons, we suggest that there is an implicit recognition that there is a place for morality (broadly defined) within the Singapore legal system. This is accentuated further if one considers other normative reasons which have been expressed as supporting a general duty to give reasons. These include: respecting a litigant’s dignity;\textsuperscript{27} the need for fairness when fundamentally impacting a person’s right;\textsuperscript{28} and the importance of avoiding arbitrary, Kafkaesque decisions.\textsuperscript{29}

Duty to give reasons exists equally in civil proceedings

One final note is that although the duty to give reasons as established in \textit{Thong Ah Fat} was in the context of a criminal matter, there should not be any less of an obligation to give reasons in a civil matter. The authority of \textit{Flannery v Halifax Estate Agencies Ltd}\textsuperscript{30} cited by the Court of Appeal\textsuperscript{31} related to the quashing of a trial judge’s decision in a civil case to prefer the opinion of one expert witness over another without explanation. Indeed, the same overriding criteria of a balance between having some explanation and unduly burdening courts can apply equally in a civil context. An accused in a criminal trial, because of the grave nature of the consequences, should be convicted or acquitted on justifiable grounds. Likewise, a plaintiff or defendant in a civil matter is entitled to the same expectation that their legal and equitable rights be upheld on justifiable grounds. Thus, the judicial duty to give reasons is a duty that applies to all court proceedings.
3. Thong Ah Fat v Public Prosecutor [2011] SGCA 65 at [13] ("Thong Ah Fat"). Specifically, the Court of Appeal took issue with the lack of explanation as to: (a) whether the accused had knowledge of the drugs he possessed; (b) why the Judge did not believe the accused’s evidence; (c) the exact treatment of the accused’s cautioned statement, ie, whether an adverse inference was drawn and why; (d) whether one of the accused’s statement was a confession or admission; (e) why there was no reference to a previous delivery by the accused; and (f) why the accused’s six long statements were not set out in the judgment.

4. The Court of Appeal did not cite any local cases (instead, English and Australian cases were cited) when it set out the rationale, scope, and content of the judicial duty to give reasoned decisions, although Lai Wee Lian v Singapore Bus Service (1978) Ltd [1984] 1 AC 729 was cited (at [14]) for the proposition that the judicial duty to give reasoned decisions “is a duty which is inherent in our common law”. It would appear then that Thong Ah Fat is a modern statement of the law in this area, as opposed to a modern restatement of the law.


6. Thong Ah Fat at [30].
7. Thong Ah Fat at [32]-[33].
8. Thong Ah Fat at [34]-[37].
9. This is not to suggest that Thong Ah Fat was not concerned with the proper use of authorities, but rather it did not provide any guidance on this.
10. Thong Ah Fat at [41].
11. Thong Ah Fat at [43]-[46].
12. Oral judgments, in certain instances, may also be more appropriate for extra-judicial reasons.
13. We can also, tentatively, propose a fifth factor: whether producing an expedient decision (which, by definition, will be less expositional in setting out the factual (and legal) premises) is actually in the interests of the parties (in a criminal case, the accused).
14. See Mark Elliot, “Has the Common Law Duty to Give Reasons Come of Age Yet?” [2011] Public Law 56 at 61-15. On a more cynical view, of course, providing more reasons may achieve the opposite effect - ie, instead of making the trial judgment more appeal-proof, the more grounds a decision has, the more ways in which it can be appealed against. However, there is an important distinction to be drawn between detailed findings of fact and detailed expositions on the law: the former is much more difficult to assimilate on appeal.

15. It may be said, however, that such (seemingly) positivistic stances are largely confined to cases involving constitutional law and international law (both of which have peculiar attributes): see eg, Tan Seow Hon, “The Constitution as “Comforter” - An Assessment of the Safeguards in Singapore’s Constitutional System” [1995] Sing LR 104 at 125; Chen Siyuan, “The Relationship between International Law and Domestic Law” [2011] 23 SACLJ 350 at [5]-[9].
17. In this regard much ink has been spilled on Lord Diplock’s famous words in Ong Ah Chuan v PP [1981] AC 468 at [26] concerning whether “law” (as found in Article 9 of the Constitution (1985 Rev Ed)) includes principles of natural justice.
18. Perhaps an argument can be made too that in the same way that a court has inherent powers by virtue of the nature of its functions, a court also has inherent responsibilities, one of which is the duty to provide reasoned decisions.
19. See eg, s 24 International Arbitration Act (Cap. 143A) and art 31(2) UNCITRAL Model Law on International Commercial Arbitration 1985.
20. Unless, of course, one considers the judge’s power to recognise the common law as a positivistic rule of law.
21. Thong Ah Fat at [24].
24. R (on the application of Anufrijeva) v Secretary of State for the Home Department [2004] 1 AC 604 at [27].
25. Thong Ah Fat at [19].

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