Muhammad Ridzuan bin Mohd Ali *v* Attorney-General
[2014] SGHC 179

Case Number	: Originating Summons No 348 of 2014
Decision Date	: 12 September 2014
Tribunal/Court	: High Court
Coram	: Tay Yong Kwang J
Counsel Name(s)	: Masih James Bahadur (James Masih & Company), Rajan Supramaniam (Hilborne Law LLC) and Dr Chuang Wei Ping (WP Chuang & Co) for the applicant; Francis Ng and Ailene Chou (Attorney-General's Chambers) for the respondent.
Parties	: MUHAMMAD RIDZUAN BIN MOHD ALI — ATTORNEY-GENERAL

Administrative Law – Judicial Review

Constitutional Law – Equality before the Law

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 131 of 2014 was dismissed by the Court of Appeal on 5 October 2015. See [2015] SGCA 53.]

12 September 2014

Tay Yong Kwang J:

Introduction

1 This is an application by Muhammad Ridzuan bin Mohd Ali ("the Applicant") for leave to commence judicial review proceedings against the Public Prosecutor ("PP"). This application arose out of the PP's decision not to grant the Applicant a certificate of substantive assistance pursuant to s 33B(2)(*b*) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"). As a result, the Applicant sought leave to apply for the following orders:

(a) a declaration that the PP had acted in bad faith in not granting the Applicant a certificate under s 33B(2)(*b*) of the MDA;

(b) a mandatory order for the PP to grant the Applicant a certificate under s 33B(2)(*b*) of the MDA;

(c) an order for the case to be remitted to the trial judge to re-consider and pass the appropriate sentence under s 33B(1) of the MDA; and

(d) that the stay of execution granted by the Court of Appeal continue until the final determination of this application.

The Attorney-General ("the AG") opposed the application.

2 As I was the trial judge in the criminal trial involving the Applicant and his co-accused, I instructed the registry to ask both parties in this case before the date of hearing whether they had any objections to me hearing this application. Both parties had no objections. At the hearing on 17

July 2014, I dismissed this application. The Applicant has appealed to the Court of Appeal against my decision.

The facts

The offence

3 The background facts to the Applicant's drug trafficking convictions have been set out in both the first instance judgment (see *Public Prosecutor v Abdul Haleem bin Abdul Karim and another* [2013] 3 SLR 734 ("*PP v Abdul Haleem*")) and the Court of Appeal's judgment in respect of the Applicant's appeal against conviction (see *Muhammad Ridzuan bin Md Ali v Public Prosecutor and other matters* [2014] 3 SLR 721 ("*Muhammad Ridzuan v PP*")). I will therefore set out only such background facts as are necessary for giving the context for this application.

4 The Applicant and Abdul Haleem bin Abdul Karim ("Abdul Haleem") previously worked as bouncers in the same night club. They had known each other for about a year prior to the date of their arrest. Initially, the Applicant befriended one Rosli in Johor Bahru, who wanted to know if the Applicant was interested in trafficking drugs. Subsequently, one Afad, who identified himself as Rosli's friend, called the Applicant to see if he was interested in purchasing heroin.

5 The Applicant asked Abdul Haleem if he was interested in selling heroin together as partners and they subsequently agreed to purchase one "ball" of heroin to repack and sell. The arrangement was for the Applicant to deal with the supplier and provide the capital to purchase the heroin. Both of them would then repack the heroin together and look for customers. The profit would then be split equally. The Applicant did not tell Abdul Haleem about the source of heroin or when the heroin would be delivered.

6 On 4 May 2010, the Applicant agreed to purchase one "ball" of heroin from Afad for $7,000. Afad told the Applicant to wait for a phone call from one Gemuk, who would then tell him when he could collect the heroin from a jockey (*ie*, a courier). On 5 May 2010 at about 2.00pm, Gemuk called the Applicant and informed him that a jockey would be delivering half a "ball" of heroin that day and the other half subsequently. The Applicant passed $7,000 in cash to Abdul Haleem and instructed him to collect half a "ball" of heroin from the jockey as instructed by Gemuk.

7 After Abdul Haleem collected the half "ball" of heroin, he returned to the Applicant's flat where they proceeded to repack the heroin into 20 small plastic sachets, each containing about eight grams of heroin. There was a small amount of heroin left over which they intended to repack after receiving the other half "ball" of heroin.

8 At about 5.00pm on 6 May 2010, Gemuk called the Applicant and informed him to prepare to collect the remaining half "ball" of heroin. During the trial, there was a dispute as to whether the Applicant was specifically informed by Gemuk that they would be receiving additional bundles of heroin. Nothing turns on that dispute in the present leave application. It is undisputed that Abdul Haleem eventually met the jockey and received additional bundles of heroin over and above the remaining half "ball" of heroin that they had purchased. The additional bundles of heroin were intended to be handed over to other persons. After collecting the bundles of heroin from the jockey, Abdul Haleem returned to the Applicant's flat where they were both arrested by officers from the Central Narcotics Bureau ("CNB").

The conviction

9 At the conclusion of the criminal trial, I convicted both the Applicant and Abdul Haleem on two charges of trafficking in diamorphine under s 5(1)(*a*) of the MDA read with s 34 of the Penal Code (Cap 224, 2008 Rev Ed). The first charge ("the first charge") involved not less than 72.50g of diamorphine and was thus a capital charge punishable under s 33, or alternatively, s 33B of the MDA. The subject matter of the capital charge was the heroin found in the additional seven bundles that Abdul Haleem had collected from the jockey on 6 May 2010.

10 The second charge ("the second charge") involved not more than 14.99g of diamorphine and was thus a non-capital charge punishable with a minimum sentence of 20 years' imprisonment and 15 strokes of the cane and a maximum sentence of 30 years' imprisonment or imprisonment for life and 15 strokes of the cane. The subject matter of the second charge was the heroin found in the one bundle that Abdul Haleem had collected from the jockey and in the 21 plastic sachets that had been repacked by both the Applicant and Abdul Haleem.

The sentence

11 While both the Applicant and Abdul Haleem were arrested on 6 May 2010, the trial only commenced on 18 February 2013. This is significant as the date of commencement of the new s 33B of the MDA was 1 January 2013. In this regard, s 27(1) of the Misuse of Drugs (Amendment) Act 2012 (No 30 of 2012) states that:

> Where, *on or after* the appointed day [*ie*, 1 January 2013], a person is convicted of a relevant offence committed *before* that day, he may be sentenced in accordance with section 33B of the [MDA] if the court determines that the requirements referred to in that section are satisfied.
>
> [emphasis added]

Therefore, having convicted both the Applicant and Abdul Haleem on the first charge (*ie*, the capital charge), I had to deal with the issue of whether they could avail themselves of the alternative sentencing regime pursuant to s 33B(1)(*a*) of the MDA. After reviewing the evidence and hearing the parties' arguments, I found that both the Applicant and Abdul Haleem satisfied the requirements under either ss 33B(2)(*a*)(ii) or 33B(2)(*a*)(iii) of the MDA as it was their uncontroverted evidence that they planned to sell only the one "ball" of heroin that they had purchased, which was the subject matter of the second charge (*ie*, the non-capital charge). In relation to the seven bundles of heroin which were the subject matter of the first charge, I accepted their evidence that they had received the bundles for the sole purpose of handing them over to other customers of the drug supplier. They were therefore "couriers" for the purposes of s 33B(2)(*a*), a convenient term that was used in the Parliamentary debates on the legislative amendments to the MDA but which does not appear in the section.

12 Abdul Haleem also satisfied s 33B(2)(*b*) of the MDA as the PP certified that he had substantively assisted the CNB in disrupting drug trafficking activities within or outside Singapore. Exercising the discretion under s 33B(1)(*a*) of the MDA, I sentenced Abdul Haleem to life imprisonment and to receive the minimum 15 strokes of the cane for the first charge. As the Applicant could not fulfil all the requirements in s 33B(2), he was given the mandatory death sentence as the PP did not issue him the certificate under s 33B(2)(*b*) of the MDA.

13 In relation to the second charge (*ie*, the non-capital charge), I sentenced both Abdul Haleem and the Applicant to the mandatory minimum sentence of 20 years' imprisonment and 15 strokes of the cane, with Abdul Haleem being subject to a maximum of 24 strokes. With regard to the Applicant, I further ordered that he was not to undergo any caning as long as the conviction and sentence for

the first charge stood.

The appeal

14 The Applicant appealed against his conviction and sentence in respect of the first charge (*ie*, the capital charge). At the hearing of the appeal on 27 January 2014, three different matters were before the Court of Appeal:

(a) Criminal Motion No 69 of 2013 ("CM 69/2013"), which was an application for leave by the Applicant to amend his petition of appeal to include two additional grounds of appeal;

(b) Criminal Appeal No 3 of 2013 ("CCA 3/2013"), which was the substantive appeal against the Applicant's conviction and sentence in relation to the first charge; and

(c) Criminal Motion No 68 of 2013 ("CM 68/2013"), which was an application to challenge the PP's decision not to issue a certificate of substantive assistance to the Applicant pursuant to s 33B(2)(*b*) of the MDA.

15 The prosecution did not object to the amendments to the petition of appeal and CM 69/2013 was allowed accordingly. In relation to CCA 3/2013, the appeal was dismissed and the Applicant's conviction on the first charge was upheld. The Court of Appeal dismissed CM 68/2013 on the basis that the Applicant had adopted the wrong procedure. It was held that the proper forum to decide the matters in CM 68/2013 was the High Court and not the Court of Appeal (*Muhammad Ridzuan v PP* at [102]). The Applicant was directed to file a fresh application for a mandatory order, if any, in the High Court within two months, *ie*, by 26 April 2014.

The present application

16 In accordance with the directions of the Court of Appeal, the Applicant filed the present application on 15 April 2014. The orders sought by the Applicant have been set out at [1] above.

The parties' arguments

17 At the outset, I note that both parties accepted that the subject matter in the present application is susceptible to judicial review and that the Applicant has sufficient interest in the matter. [note: 1] The main dispute is in relation to the issue of whether the material before the court discloses an arguable or *prima facie* case of reasonable suspicion in favour of granting the remedies sought by the Applicant.

The Applicant's arguments

18 The Applicant has relied on six different, but slightly overlapping, grounds to support his application for leave to be granted. These grounds were relied upon to try to establish a *prima facie* case of the PP having acted in bad faith and in breach of the equal protection clause in Art 12 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution").

19 First, the Applicant argued that both Abdul Haleem and he had, for all intents and purposes, participated in the same criminal conduct. [note: 2] Therefore, it would not be right for only Abdul Haleem to be given a reprieve under s 33B(1)(*a*) of the MDA. It was argued that the Applicant was thereby prejudiced by the PP's decision not to grant him a certificate of substantive assistance.

20 Second, the Applicant highlighted that both Abdul Haleem and he were found to be "couriers" pursuant to s 33B(2)(*a*) of the MDA. [note: 3] Therefore, given that the PP had granted Abdul Haleem the certificate of substantive assistance, the Applicant should also be granted the same. It was further argued that the failure to accord the Applicant equal treatment amounted to a violation of Art 12 of the Constitution.

21 Third, it was argued that the Applicant had given the same information as Abdul Haleem and yet only Abdul Haleem was granted the certificate of substantive assistance by the PP. [note: 4] The Applicant submitted that in the event of the PP justifying the different treatment on the basis that the Applicant and Abdul Haleem had provided dissimilar levels of assistance, the PP would have to produce evidence in support of such a proposition as a person's life was at stake. The Applicant further argued that he was not approached during or after the trial to provide assistance to the CNB. [note: 5] In this regard, it was submitted that he should not be penalised for not having assisted the CNB when he had no opportunity to do so to begin with. The Applicant further argued that no fair and proper procedure was followed prior to the decision being made by the PP. [note: 6] On this basis, given that the matter involved a person's life, it was submitted that the PP had acted in bad faith. The Applicant also relied on the High Court decision of *Public Prosecutor v Chum Tat Suan* [2014] 1 SLR 336 ("*PP v Chum Tat Suan*") to support his proposition that an accused cannot be expected to provide information to assist the CNB *before* the end of the trial. [note: 7] It was submitted that the accused should only be expected to assist the CNB *after* the trial so as not to prejudice his defence at trial.

22 Fourth, it was highlighted that the facts and circumstances under which Abdul HaleHHaleem and the Applicant were arrested were the same and they had practically participated in the same criminal activity. [note: 8] On this basis, it was submitted that the unequal treatment of Abdul Haleem and the Applicant by the PP amounted to a violation of Art 12 of the Constitution. The Applicant also referred to s 33B(4) of the MDA in support of the proposition that the PP's decision may be challenged on the ground of bad faith. In this respect, it was argued that there was sufficient evidence before the court to prove that the PP made the decision in bad faith.

23 Fifth, it was submitted that in order for the PP to make a proper determination under s 33B(2)(*b*) of the MDA, he would have to conduct a proper and formal investigation into the matter. [note: 9] The Applicant reiterated that he was not invited to provide any information to the CNB before, during, or after the trial. Therefore, it was submitted that the PP could not have made a proper determination under s 33B(2)(*b*) of the MDA due to the lack of a proper procedure.

The AG's arguments

24 At the outset, the AG raised two procedural objections to the orders sought by the Applicant. The Court of Appeal decision of *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1 ("*Vellama v AG*") was cited by the AG for the proposition that O 53 r 1 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) only requires leave to be obtained in relation to an application for *prerogative* orders. [note: 10] In this regard, an applicant who wishes to obtain a prerogative order *and* a declaration should first obtain leave to make an application for a prerogative order. After leave has been granted, the applicant may then proceed to apply for a declaration alongside the prerogative order. It was therefore submitted that the inclusion of the prayer for a declaration in the present leave application was procedurally wrong in so far as leave was only required for the mandatory order.

25 It was also submitted that the framing of the mandatory order in the present application was flawed as the High Court does not have the power to direct the PP to exercise his discretion in a *particular* manner. [note: 11] Therefore, the PP cannot be ordered to grant a certificate to the Applicant as that would amount to substituting the court's decision for the PP's decision. [note: 12]

26 The AG also relied on the concept of non-justiciability in support of the proposition that the PP's decision should only be reviewed on narrow grounds. [note: 13] It was contended that operational considerations may be compromised in the event that such determinations are subjected to "untrammelled judicial scrutiny". [note: 14] The AG also submitted that the determination of whether to grant a certificate of substantive assistance necessarily involves a multi-faceted inquiry, where a multitude of extra-legal factors have to be taken into account by the PP. [note: 15] The scope of review over such decisions should therefore be confined to the narrow grounds of bad faith, malice and unconstitutionality.

27 The AG also submitted that the Applicant had failed to establish an arguable or *prima facie* case of reasonable suspicion in favour of granting the remedies sought. [note: 16] There was no evidence to suggest that the PP had made the determination for an extraneous purpose or out of preconceived bias against the Applicant. There was also no evidence to suggest that the PP's decision was wholly arbitrary or capricious.

28 In response to the Applicant's argument that he had been unfairly discriminated against, the AG submitted that the equal protection clause in Art 12 of the Constitution does not require equality in outcome. [note: 17] In the absence of *prima facie* evidence to the contrary, the inference must be that the PP had arrived at different outcomes for Abdul Haleem and the Applicant on the basis of relevant considerations. [note: 18] The AG also argued that the Applicant and Abdul Haleem did *not* give the same information to the CNB. It was submitted that in any event, the Applicant has not produced any evidence to suggest that the decision-making process only involved a simplistic and one-dimensional exercise in comparing the statements given by both parties. [note: 19]

29 Finally, the AG rejected the Applicant's allegation that there was no ample opportunity for him to provide assistance to the CNB. It was highlighted that the Applicant was legally represented and had every opportunity to provide information to the authorities. [note: 20] The AG also submitted that there was no duty on the part of the PP or the law enforcement agencies to either invite or compel the accused to provide information that may assist in disrupting drug trafficking activities. [note: 21]

The decision

The procedural objections

30 The AG's procedural objection with regard to the inclusion of the prayer for a declaration at this stage of the leave proceedings was broadly similar to that raised in the earlier decision of *Cheong Chun Yin v Attorney-General* [2014] SGHC 124 ("*Cheong Chun Yin v AG*"). As in that case, the AG cited the Court of Appeal decision of *Vellama v AG* in support of the proposition that an application for declaratory relief should only be made after leave to apply for the prerogative order has been granted.

31 As I observed in *Cheong Chun Yin v AG* (at [27]), it appears to me that the Court of Appeal in *Vellama v AG* was merely stating that a party cannot apply for "freestanding declaratory relief"

pursuant to O 53 given that it is "essentially an order relating to the grant of prerogative orders" (at [53]). In this regard, before a party is able to obtain a declaration under O 53, leave to make an application for a prerogative order must first be obtained.

32 In my view, there is no procedural impediment to prevent the applicant from including the application for declaratory relief at the leave stage, as the declaration is sought alongside leave for other prerogative orders. This does not fall foul of the rule against applying for "freestanding declaratory relief" under O 53, as was held by the Court of Appeal in *Vellama v AG* (at [53]). In fact, this approach enables the applicant to place his entire case before the court at the outset, thus enabling the court to be better apprised of the complete scope of remedies sought by the applicant. Therefore, the Applicant cannot be faulted for including the application for a declaration in the leave application for a mandatory order.

33 With regard to the AG's objection to the framing of the mandatory order, I agree that the court should not be directing the PP to exercise his discretion in a *particular* manner, such as to order the PP to grant the Applicant a certificate of substantive assistance. The court should not, in the exercise of its supervisory jurisdiction, be substituting its decision for that of the original decision-maker.

34 At the hearing before me, counsel for the Applicant, Mr Masih, clarified that the Applicant was only asking the PP to *reconsider* the matter. Mr Masih accepted that in the event where the PP, after reconsideration, maintains his original decision not to grant the certificate of substantive assistance, the Applicant will have no further recourse. Therefore, while it is accepted that the prayer for the mandatory order could have been framed more accurately, I proceeded on the basis that the Applicant was merely seeking a reconsideration of the PP's decision, as opposed to an order directing the PP to grant the certificate of substantive assistance.

Leave to commence judicial review proceedings

35 The principles governing the grant of leave to commence judicial review proceedings are well settled. With reference to the Court of Appeal decision of *Jeyaretnam Kenneth Andrew v Attorney-General* [2014] 1 SLR 345, the three requirements which have to be satisfied before leave can be granted for the court to consider the prerogative orders sought by the applicant are as follows (at [5]):

(a) the subject matter of the complaint must be susceptible to judicial review;

(b) the applicant must have a sufficient interest in the matter; and

(c) the material before the court must disclose an arguable or *prima facie* case of reasonable suspicion in favour of granting the remedies sought by the applicant.

36 As mentioned at [17] above, both parties do not dispute that the subject matter of the present application is susceptible to judicial review and that the Applicant has sufficient interest in the matter. Therefore, I need only to deal with the third issue of whether the material placed before me discloses an arguable or *prima facie* case of reasonable suspicion in favour of granting the remedies sought by the Applicant. With this in mind, I will proceed to address the arguments raised by both parties.

The scope of review

37 In ascertaining the scope of review applicable to the PP's determination as to whether any person has substantively assisted the CNB in disrupting drug trafficking activities within or outside Singapore, it would be apposite to refer to s 33B(4) of the MDA, which states as follows:

> The determination of whether or not any person has substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities shall be at the *sole discretion* of the Public Prosecutor and no action or proceeding shall lie against the Public Prosecutor in relation to any such determination *unless it is proved to the court that the determination was done in bad faith or with malice*.
>
> [emphasis added]

In this regard, Parliament has carefully delineated the scope of review to that of bad faith or malice.

38 Beyond that, in considering the issue of prosecutorial discretion, the Court of Appeal in *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 ("*Ramalingam v AG*") also observed at [41] that:

> ... an exercise of an *executive decision-making power*, even one with a constitutional status, cannot be allowed to override a fundamental liberty enshrined in the Constitution.
>
> [emphasis added]

Therefore, the PP's determination pursuant to s 33B(2)(*b*) of the MDA would clearly be subject to review on the ground of unconstitutionality. This was also alluded to by the Minister for Law, Mr K Shanmugam, in the second reading of the Misuse of Drugs (Amendment) Bill 2012 (No 27 of 2012) ("the MDA Amendment Bill"), reproduced in *Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89 (K Shanmugam, Minister for Foreign Affairs and Minister for Law):

> ... And take into account the fact that the Public Prosecutor's discretion is not unfettered. It is subject to judicial review, either on bad faith or malice, which is expressly provided for, and of course, *unconstitutionality*, which goes without saying.
>
> [emphasis added]

39 In any event, I note that the Applicant has not argued for a greater scope of review beyond the grounds of bad faith, malice or unconstitutionality. The Applicant's case was based essentially on the following propositions:

> (a) the PP had acted in bad faith; and
>
> (b) the Applicant was discriminated against and this amounted to a violation of Art 12 of the Constitution.

40 At this juncture, it is acknowledged that the Applicant has, in his written submissions, also raised the argument that the sentence of death was wrong and therefore in breach of Art 9(1) of the Constitution. [note: 22] This argument was, however, not developed beyond that. More importantly, it appeared to be based entirely on the assertion that there had been an unequal treatment of the Applicant which would have amounted to a violation of Art 12 of the Constitution in the first place. In other words, if the Applicant is unable to establish a *prima facie* breach of Art 12, the argument based on Art 9(1) will necessarily fail.

The alleged violation of Art 12 of the Constitution

41 The substance of the Applicant's arguments in relation to the alleged violation of the equal protection clause in Art 12 of the Constitution was based on the following propositions:

(a) both the Applicant and Abdul Haleem had engaged in the same criminal conduct ("the first argument"); [note: 23]

(b) both parties had provided the same information to the CNB ("the second argument"); [note: 24] and

(c) both parties were found to be "couriers" under s 33B(2)(*a*) of the MDA ("the third argument"). [note: 25]

Therefore, the fact that the PP only granted Abdul Haleem, and not the Applicant, a certificate of substantive assistance under s 33B(2)(*b*) of the MDA would amount to a violation of Art 12 of the Constitution.

42 For the avoidance of doubt, the Applicant is not challenging the validity or constitutionality of the alternative sentencing regime under s 33B of the MDA. As I observed in *Cheong Chun Yin v AG* at [36], an executive act may be unconstitutional if it amounts to intentional and arbitrary discrimination (see *Eng Foong Ho and others v Attorney-General* [2009] 2 SLR(R) 542). In this regard, arbitrariness implies the lack of any rationality (see *Public Prosecutor v Ang Soon Huat* [1990] 2 SLR(R) 246 at [23]).

43 Apart from that, the Court of Appeal also made the following observations in *Ramalingam v AG* at [61]:

> The Privy Council stated in *Ong Ah Chuan* at [35] that "[e]quality before the law and equal protection of the law require[d] that like should be compared with like". We recognise this as a general principle under Art 12(1) that *applies to all acts of state, whether legislative or executive*. ...
>
> [emphasis added]

It was further held this would also apply to the exercise of prosecutorial power as it was merely a facet of executive power. In my view, the PP's determination pursuant to s 33B(2)(*b*) of the MDA, being the exercise of an executive decision-making power, would also be subject to the above-mentioned principle.

44 It is trite that the Applicant bears the burden of establishing a *prima facie* breach of the equal protection clause in Art 12 of the Constitution. On the facts of the present case, this burden has not been discharged. The Applicant has failed to provide any evidence that the PP had deliberately or arbitrarily discriminated against him in deciding not to grant him the certificate of substantive assistance. The difference in outcome between the Applicant and Abdul Haleem is not sufficient to constitute *prima facie* evidence of there being a breach of Art 12 of the Constitution. In fact, it bears noting that the Applicant has not adduced any evidence to support his assertion that he provided the same level of assistance as Abdul Haleem. While the Applicant has made the repeated assertion that the factual situation was the *same* and that any difference in outcome would amount to a violation of Art 12 of the Constitution, as will be seen below, many of the similarities raised have no relevance

whatsoever to the PP's determination under s 33B(2)(*b*) of the MDA.

45 In relation to the first argument, I am unable to appreciate the relevance of a person's criminal conduct to the determination of whether he has substantively assisted the CNB. They are clearly distinct considerations which involve separate timeframes. One concerns the conduct of the accused *prior* to being arrested while the other concerns his conduct *after* being arrested. While it was recognised by the Court of Appeal in *Ramalingam v AG* (at [24]) that criminal conduct was a relevant consideration in the exercise of prosecutorial discretion, that could not apply to the PP's decision whether or not to grant the certificate of substantive assistance. In this regard, it would be apposite to refer to the statutory wording of s 33B(2)(*b*) of the MDA, reproduced as follows:

> ... the Public Prosecutor certifies to any court that, in his determination, the person has *substantively assisted* the Central Narcotics Bureau in *disrupting drug trafficking activities within or outside Singapore*.
>
> [emphasis added]

Nowhere in s 33B(2)(*b*) does it mention that the criminal conduct of the person is a relevant factor in determining whether he or she has substantively assisted the CNB.

46 In fact, the Applicant appears to concede this point in his reply submissions: [note: 26]

> The Respondent has submitted that relative culpability in the commission of an offence is *irrelevant* to a substantive assistance determination. *We cannot agree more.* What the Applicant is saying is that the circumstances of both accused were similar and thus the information they could have provided for "substantive assistance" was also similar. ...
>
> [original emphasis omitted; emphasis added in italics]

This was confirmed by Mr Masih at the hearing before me. Mr Masih clarified that he had intended to submit that Abdul Haleem could not have given more information than the Applicant as the arrangement was for the Applicant to be the contact point.

47 This effectively leads to the second argument, where it was alleged that the Applicant should also be granted the certificate of substantive assistance as both Abdul Haleem and the Applicant had provided the same information to the CNB. [note: 27] After Mr Masih's clarification, it appears that the Applicant's case was not confined to both Abdul Haleem and the Applicant providing the *same* information. Instead, the substance of the argument was that given the Applicant's greater involvement in dealing with the drug supplier, Abdul Haleem could not have provided *more* information than the Applicant. In this regard, Mr Masih submitted that since the Applicant did not get a certificate while Abdul Haleem did, there must have been bad faith.

48 The Applicant has failed to provide any evidence to support his assertion that he had either provided the *same* or even *more* information as compared to Abdul Haleem. To begin with, the fact that the Applicant could have given more information than Abdul Haleem says nothing about whether the Applicant did in fact provide the information to the relevant authorities. Further, without delving too much into the background facts of the offence, I note that the Applicant's knowledge pertains largely to the dealings that he had with Rosli, Afad and Gemuk (see [4], [6] and [8] above). Abdul Haleem, on the other hand, was the party responsible for meeting the jockey to physically receive the bundles of heroin (see [6]–[8] above). It is undisputed that the Applicant did not accompany Abdul Haleem on both occasions when he met the jockey. Therefore, without making further conjecture as

to what information Abdul Haleem could have provided to the CNB, I am unable to accept Mr Masih's argument that the Applicant must necessarily know more than Abdul Haleem.

49 Further, the Parliamentary intent behind the introduction of the "substantive assistance" condition under s 33B(2) of the MDA is to enhance the operational effectiveness of the CNB. This can be gleaned from the speech by the Deputy Prime Minister and Minister for Home Affairs, Mr Teo Chee Hean, at the second reading of the MDA Amendment Bill, reproduced in *Singapore Parliamentary Debates, Official Report* (12 November 2012) vol 89 (Teo Chee Hean, Deputy Prime Minister and Minister for Home Affairs):

> The aim of the "substantive assistance" condition is to *enhance the operational effectiveness of the CNB, by allowing investigators to reach higher into the hierarchy of drug syndicates*. "Substantive assistance" in disrupting drug trafficking activities may include, for example, the provision of information leading to the arrest or detention or prosecution of any person involved in any drug trafficking activity. *Assistance which does not enhance the enforcement effectiveness of the CNB will not be sufficient.* ...
>
> [emphasis added]

This was also alluded to by the Minister for Law, as reflected in *Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89 (K Shanmugam, Minister for Foreign Affairs and Minister for Law):

> *The issue is not what we can do to help couriers avoid capital punishment.* It is about what we can do to enhance the effectiveness of the Act in a non-capricious and fair way without affecting our underlying fight against drugs. Discretionary sentencing for those who offer substantive assistance is the approach we have taken. *For those who cannot offer substantive assistance, then the position is as it is now.*
>
> [emphasis added]

50 In this regard, I accept the AG's submission that the determination of whether a person has substantively assisted the CNB involves a multi-faceted inquiry, which may include a multitude of extra-legal factors, such as: [note: 28]

(a) the upstream and downstream effects of any information provided;

(b) the operational value of any information provided to existing intelligence; and

(c) the veracity of any information provided when counterchecked against other intelligence sources.

The overarching question will inevitably be whether the operational effectiveness of the CNB has been enhanced. This is largely a value judgment which necessarily entails a certain degree of subjectivity. In this regard, the court should be careful not to substitute its own judgment for the PP's judgment. Realistically speaking, the PP is much better placed to assess the operational value of the assistance provided by the accused. Hence the grounds of review have been confined to bad faith, malice and unconstitutionality.

51 If the PP is made to justify his decision in court on every occasion where bare and unsubstantiated allegations are made by accused persons, the operational effectiveness of the CNB

will likely be hampered. In fact, one of the primary reasons behind vesting this power in the PP, as opposed to the courts, is the need to safeguard the confidentiality of operational information. This was emphasised by the Minister for Law, as reflected in *Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89 (K Shanmugam, Minister for Foreign Affairs and Minister for Law):

> ... An additional important consideration is *protecting the confidentiality of operational information*.
>
> ...
>
> Ms Lim suggested that if there are concerns about confidentiality, why not have it *in camera*, although I am not quite sure she used that phrase. The real point is this. Just imagine the scenario. In a case, the defendant argues that he rendered substantial assistance – it is CNB's fault for not dismantling some organisation overseas, it is something which CNB did or did not do, what intelligence agencies and officers did and did not do. And you put the officers on the stand and cross-examine them on their methods, their sources, their thinking. Ask yourself whether that is the best way of dealing with this question. Is that helpful?
>
> Again, is there a risk? Obviously if you give such powers, there is a risk. But which is the bigger risk? This is something you have to ask yourself. *If, over a period of time, the entire modus operandi of the CNB is effectively in the public domain, does it do us any good?*
>
> [emphasis added]

Therefore, the courts should be mindful not to scrutinise each and every aspect of the PP's decision as there exists a real risk of the CNB's operations being compromised. Adopting an overly intrusive approach towards the review of the PP's discretion would be going against clear Parliamentary intent that the decision-making power be vested in the PP and not the courts. In the same light, although the AG has produced the statements given by Abdul Haleem and the Applicant, I am of the view that it is not the court's role to compare and scrutinise those statements. In fact, there appears to be little utility in going through a superficial comparison of the statements given by both parties. As mentioned above, the decision-making process necessarily involves a multi-faceted inquiry where a multitude of factors have to be taken into account by the PP. Such extra-legal and operational considerations cannot be gleaned from a superficial comparison of the statements alone.

52 I will now address the Applicant's third argument. In brief, it was submitted that both Abdul Haleem and the Applicant should be granted the certificate of substantive assistance as both parties were found to be "couriers" pursuant to s 33B(2)(*a*) of the MDA.

53 As I had emphasised in *PP v Abdul Haleem* (at [60]), the alternative sentencing option in s 33B(1)(*a*) of the MDA can only be considered if the *conjunctive* requirements in ss 33B(2)(*a*) and 33B(2)(*b*) are met. A distinction has to be drawn between the two requirements. Section 33B(2)(*a*) involves the court making a finding of fact, on a balance of probabilities, as to whether the accused person is a "courier". This can be contrasted with s 33B(2)(*b*), where the PP has to determine in his sole discretion whether the person had substantively assisted the CNB. The court may find that the person is a "courier" and the PP may, in the exercise of his discretion, decide *not* to grant the certificate of substantive assistance, as in the present case. Apart from the grounds of bad faith, malice and unconstitutionality, the PP's decision not to grant the certificate is legally unassailable.

54 The subject matters of the two requirements are different and they are clearly not dependent on each other. Satisfaction of one requirement in s 33B(2) does not necessarily lead to satisfaction of

the other. Therefore, I am unable to accept the Applicant's argument that the PP should grant both Abdul Haleem and him the certificate of substantive assistance on the sole basis that both have been found to be "couriers" under s 33B(2)(*a*) of the MDA.

55 In conclusion, the Applicant has failed to provide any evidence to establish a *prima facie* breach of the equal protection clause in Art 12 of the Constitution. As explained at [40] above, the Applicant's argument in relation to Art 9(1) also fails in its entirety.

The alleged bad faith on the part of the PP

56 Apart from the ground of unconstitutionality, the Applicant has also challenged the PP's decision not to grant him a certificate of substantive assistance on the ground of bad faith. In this regard, the arguments concerning the alleged discriminatory treatment of the Applicant have also been relied upon in support of the proposition that the PP had acted in bad faith. As I have already dealt with those arguments above, there is no need to restate them here again.

57 At the outset, I note that the Applicant and the AG have different views on what amounts to bad faith. The AG submitted that bad faith may be established in the following circumstances:

(a) where the power is exercised for an extraneous or improper purpose (see *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [149] and *Teng Fuh Holdings Pte Ltd v Collector of Land Revenue* [2006] 3 SLR(R) 507);

(b) where there is preconceived bias against the accused person; and

(c) where the decision is made in a wholly arbitrary or capricious fashion (see *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 at [83]).

58 The Applicant disagreed with the AG's submissions and argued that a different understanding of bad faith ought to be applied to s 33B(4) of the MDA. It was submitted that a distinction ought to be drawn between bad faith and malice. The Applicant argued that in the present context, the concept of bad faith should include the following considerations: [note: 29]

(a) taking into account improper considerations;

(b) not considering appropriate facts and circumstances;

(c) not following any proper procedure thus leading to a miscarriage of justice; or

(d) any combination of the factors above.

59 I am unable to accept the Applicant's argument that a different understanding, or even lower threshold, of bad faith ought to be applicable to s 33B(4) of the MDA. While it is accepted that the scope of review over the exercise of executive decision-making power is likely to vary depending on the subject matter at stake, that does not necessarily mean that a different concept of bad faith has to be applied depending on the circumstances of each case.

60 More importantly, s 33B(4) of the MDA was enacted for the purpose of circumscribing the scope of review that could be undertaken by the courts. This can be contrasted with other executive or administrative decisions that may be reviewed more intensively, such as on *Wednesbury* grounds. From this perspective, the Applicant's argument appears to be no more than a backdoor attempt to

introduce a more intrusive review through a modified concept of bad faith. This goes against the clear Parliamentary intent behind the enactment of s 33B(4) of the MDA.

61 Further, as explained at [50] above, the decision whether a person has substantively assisted the CNB necessarily involves extra-legal and operational considerations which the courts are not in a position to deal with. It must be recognised that the PP is much better placed to assess the operational value of the assistance provided by the accused. It is for this reason that the PP's discretion can only be challenged on the grounds of bad faith, malice and unconstitutionality.

62 Returning to the facts in the present case, the Applicant has not produced any evidence to establish a *prima facie* case of the PP exercising his discretion in bad faith for an improper purpose. The arguments that were based on the alleged discriminatory treatment of the Applicant have already been dealt with above. It is not the law that a convicted person can come to court to allege bad faith and/or malice and then leave it to the PP to justify to the court that there was absence of bad faith and malice. The burden is on the Applicant here to make good his assertions.

63 The Applicant has also relied on the fact that he was not approached before, during or after the trial to provide assistance to the CNB. It was alleged that no proper procedure was adopted and the PP had failed to conduct a formal investigation prior to arriving at his decision not to grant the Applicant the certificate of substantive assistance. [note: 30]

64 It is difficult to accept the Applicant's argument that he was not given ample opportunity to assist the CNB. Section 33B of the MDA came into operation on 1 January 2013, which was prior to the commencement of the trial on 18 February 2013. It is also undisputed that the Applicant was represented by defence counsel. Therefore, it is highly improbable that the Applicant was left completely in the dark with regard to the alternative sentencing regime under s 33B of the MDA.

65 I was informed by Mr Masih that the CNB has adopted the practice of highlighting s 33B of the MDA to accused persons. Mr Francis Ng, who appeared on behalf of the AG, was not able to confirm that this is the CNB's practice. In any case, the MDA does not impose any legal duty on the part of the PP or the law enforcement agencies to expressly invite the accused to provide information in order to avail himself of the alternative sentencing regime under s 33B(1)(*a*) of the MDA.

66 I also note that s 258 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed), the provision which governs the admissibility of an accused's statement, was amended in line with the introduction of s 33B of the MDA. It expressly states that a statement which is otherwise admissible will not be rendered inadmissible merely because the accused was informed in writing by a person in authority of the circumstances in s 33B of the MDA under which life imprisonment may be imposed in lieu of the death penalty.

67 Apart from that, the Applicant also relied on the recent High Court decision of *PP v Chum Tat Suan* in support of the proposition that the accused cannot be expected to provide information to assist the CNB *before* the end of the trial. The Applicant argued that information can only be provided *after* the trial in order not to prejudice the accused's defence at trial. [note: 31]

68 There are two separate issues here. The first is in relation to the accused being allowed to adduce further evidence *after* having been convicted in order to establish that he falls within the scope of s 33B(2)(*a*) of the MDA. This was the issue that was highlighted in *PP v Chum Tat Suan*. This question does not arise in the present case as the Applicant was found to have satisfied the requirements in s 33B(2)(*a*) of the MDA.

69 The second issue is in relation to the accused giving information to the CNB in order to satisfy the requirement of having provided substantive assistance in disrupting drug trafficking activities within or outside Singapore. In this respect, I find it hard to accept the Applicant's argument that an accused person should only be expected to provide information *after* the conclusion of the trial. The scheme of the section does not lead to such a conclusion. It is up to an accused person to decide whether and when he wishes to extend any information to the CNB. If he chooses to withhold the information until rather late, he cannot then complain if the information has been rendered worthless due to the passage of time and the PP subsequently makes the determination that the accused has not substantively assisted the CNB. It would therefore be in the accused's best interests to provide information as early as possible during the course of the investigations if he wishes to avail himself of the alternative sentencing regime under s 33B of the MDA. This incentive to "come clean" was also alluded to in the Parliamentary debates.

70 For trials that take place under the new scheme in the MDA, while an accused person has the freedom to choose whether and when he assists the CNB, from a practical perspective, the latest time at which he could do so in order to avail himself of the alternative sentencing regime would be during the trial. As *PP v Chum Tat Suan* is currently awaiting decision by the Court of Appeal, I shall say no more about the case here.

71 I was also informed by Mr Masih that sometime between the hearing of CM 68/2013 before the Court of Appeal on 27 February 2014 and the hearing of the present application before me on 17 July 2014, the Applicant had given another statement to the investigating authorities. This was confirmed by Mr Francis Ng who stated that the CNB was looking into the information provided by the Applicant in his latest statement but that did not mean that the PP would be reconsidering the decision not to grant the Applicant a certificate of substantive assistance. As matters stand, the Applicant was considered by the PP not to be entitled to the certificate and the Applicant has not provided any evidence to establish a *prima facie* case of bad faith on the part of the PP.

The burden of proof and the presumption of constitutionality

72 In the final analysis, it bears emphasising once again that the burden rests on the Applicant to establish an arguable or *prima facie* case of reasonable suspicion in favour of granting the remedies sought. As I observed in *Cheong Chun Yin v AG* at [37], in view of the high constitutional office of the Attorney-General as the PP, the courts proceed on the basis that the PP exercises his powers in accordance with the law unless shown otherwise. The Applicant has not shown anything in this case that would displace this presumption of constitutionality and/or legality.

Conclusion

73 For the reasons set out above, I dismissed the application for leave to commence judicial review proceedings against the PP. The AG agreed graciously that both parties should bear their own costs. Accordingly, I made no order as to costs for this originating summons.

[note: 1] AG's Submissions dated 4 July 2014 at pp 6–7, paras 12–13; Applicant's Reply Submissions dated 10 July 2014 at p 2, paras 4–5.

[note: 2] Applicant's Submissions dated 3 July 2014 at p 8, para 16.

[note: 3] Applicant's Submissions dated 3 July 2014 at p 8, paras 17–18.

[note: 4] Applicant's Submissions dated 3 July 2014 at p 9, para 19.

[note: 5] Applicant's Submissions dated 3 July 2014 at p 10, para 21.

[note: 6] Applicant's Submissions dated 3 July 2014 at p 10, para 22.

[note: 7] Applicant's Submissions dated 3 July 2014 at pp 10–11, para 23.

[note: 8] Applicant's Submissions dated 3 July 2014 at pp 11–12, para 24.

[note: 9] Applicant's Submissions dated 3 July 2014 at pp 14–15, para 29.

[note: 10] AG's Submissions dated 4 July 2014 at p 7, para 15.

[note: 11] AG's Submissions dated 4 July 2014 at p 8, para 16.

[note: 12] AG's Submissions dated 4 July 2014 at pp 13–14, para 26.

[note: 13] AG's Submissions dated 4 July 2014 at pp 9–11, paras 19–20.

[note: 14] AG's Submissions dated 4 July 2014 at p 11, para 21.

[note: 15] AG's Submissions dated 4 July 2014 at pp 12–13, paras 23–25.

[note: 16] AG's Submissions dated 4 July 2014 at pp 14–15, para 29.

[note: 17] AG's Submissions dated 4 July 2014 at p 20, para 39.

[note: 18] AG's Submissions dated 4 July 2014 at pp 20–21, para 40.

[note: 19] AG's Submissions dated 4 July 2014 at p 24, para 45.

[note: 20] AG's Submissions dated 4 July 2014 at p 26, para 50.

[note: 21] AG's Submissions dated 4 July 2014 at pp 26–27, paras 51–52.

[note: 22] Applicant's Submissions dated 3 July 2014 at pp 11–12, para 24.

[note: 23] Applicant's Submissions dated 3 July 2014 at pp 8, 11–12, paras 16, 24.

[note: 24] Applicant's Submissions dated 3 July 2014 at p 9, para 19.

[note: 25] Applicant's Submissions dated 3 July 2014 at p 8, para 17.

[note: 26] Applicant's Reply Submissions dated 10 July 2014 at p 12, para 35.

[note: 27] Applicant's Submissions dated 3 July 2014 at p 9, para 19.

[note: 28] AG's Submissions dated 4 July 2014 at p 12, para 23.

[note: 29] Applicant's Reply Submissions dated 10 July 2014 at p 11, para 32.

[note: 30] Applicant's Submissions dated 3 July 2014 at pp 14–15, para 29.

[note: 31] Applicant's Submissions dated 3 July 2014 at pp 10–11, para 23.

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