IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2019] SGCA 37

Criminal Appeal No 50 of 2017

Between

Nagaenthran a/l K Dharmalingam

… *Appellant*

And

Public Prosecutor

… *Respondent*

Civil Appeal No 98 of 2018

Between

Nagaenthran a/l K Dharmalingam

… *Appellant*

And

Public Prosecutor

… *Respondent*

JUDGMENT

Version No 1: 27 Oct 2020 (22:41 hrs)

[Criminal Law] — [Statutory offences] — [Misuse of Drugs Act]

[Administrative Law] — [Judicial review] — [Ambit]

[Constitutional Law] — [Judicial Power]

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Nagaenthran a/l K Dharmalingam
v
Public Prosecutor and another appeal

[2019] SGCA 37

Court of Appeal — Criminal Appeal No 50 of 2017 and Civil Appeal No 98 of 2018
Sundaresh Menon CJ, Andrew Phang Boon Leong JA, Judith Prakash JA, Chao Hick Tin SJ and Belinda Ang Saw Ean J
24 January 2019

27 May 2019 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

1 On 14 November 2012, Parliament passed the Misuse of Drugs (Amendment) Act 2012 (No 30 of 2012) ("the Amendment Act"), which introduced s 33B of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"). The amendment brought about two significant changes to the legal framework governing the sentencing of certain groups of those convicted of drug trafficking. First, it conferred upon a court the discretion to sentence an offender convicted of a drug trafficking offence that would ordinarily attract the imposition of the mandatory death penalty, to life imprisonment instead *if* the offender's involvement in the offence was merely as a courier, as described in s 33B(2)(*a*), *and* the Public Prosecutor ("PP") had issued a certificate of substantive assistance under s 33B(2)(*b*) in respect of the offender. Second, it made it mandatory for the court to sentence an offender convicted of such an

offence to life imprisonment *if* the offender's involvement in the offence was merely as a courier, as described in s 33B(3)(*a*), *and* the offender was suffering from an abnormality of mind within the meaning of s 33B(3)(*b*).

2 The appellant in these appeals, Nagaenthran a/l K Dharmalingam, had been charged under s 7 of the MDA with importing not less than 42.72g of diamorphine on 22 April 2009. He was convicted after trial and his conviction was upheld by this court on appeal: see *Public Prosecutor v Nagaenthran a/l K Dharmalingam* [2011] 2 SLR 830 ("*Nagaenthran (Trial)*"); *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2011] 4 SLR 1156 ("*Nagaenthran (CA)*"). This was before the introduction of s 33B. The appellant was therefore sentenced to the mandatory death penalty which was applicable at the time.

3 In *Prabagaran a/l Srivijayan v Public Prosecutor and other matters* [2017] 1 SLR 173 ("*Prabagaran*"), a motion was filed by the appellant, among other applicants, challenging the constitutionality of various subsections of s 33B. We noted there, at [8], that execution of the mandatory death sentence that had been imposed on the appellant had been stayed in view of the fact that the Government was, at the time of the appellant's conviction and initial appeal, undertaking a review of the mandatory death penalty in relation to drug offences. That review eventually led to the enactment of the Amendment Act. Alongside the introduction of s 33B, the Amendment Act also provided a transitional framework for persons who had been convicted and sentenced to death under the MDA as it stood prior to the amendment, and had their appeal dismissed, to be resentenced under s 33B. The appellant accordingly filed Criminal Motion No 16 of 2015 ("CM 16") on 24 February 2015, seeking to be re-sentenced to life imprisonment under s 33B(1)(*b*) read with s 33B(3) of the MDA. It was common ground that the appellant met the requirements under s 33B(3)(*a*) in that he was found to be a mere courier. The matter was heard before

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a High Court judge ("the Judge") who dismissed CM 16 however, on the basis that the appellant was not suffering from an abnormality of mind within the meaning of s 33B(3)(*b*): see *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2017] SGHC 222 ("*Nagaenthran (Criminal Motion)*"). Criminal Appeal No 50 of 2017 ("CCA 50") is the appellant's appeal against the dismissal of CM 16.

4 Separately, on 10 December 2014, the PP had informed the court and the appellant's counsel at the time that he would not be issuing a certificate of substantive assistance under s 33B(2)(*b*) of the MDA in respect of the appellant ("the non-certification decision"). On 27 March 2015, the appellant filed Originating Summons No 272 of 2015 ("OS 272") seeking leave to commence judicial review proceedings against the PP's non-certification decision. This too was dismissed by the judge: see *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 ("*Nagaenthran (Judicial Review)*"). Civil Appeal No 98 of 2018 ("CA 98") is the appellant's appeal against the dismissal of OS 272.

Facts

The appellant's conviction

5 We do not propose to restate all the facts relating to the appellant's conviction. Much of this has been set out in *Nagaenthran (CA)* at [5]–[15] (reproduced in *Nagaenthran (Criminal Motion)* at [9]). Very briefly, after officers from the Central Narcotics Bureau ("CNB") apprehended the appellant on 22 April 2009 as he was entering Singapore from Malaysia at the Woodlands Checkpoint, the appellant stated quite unequivocally in his contemporaneous statements to the CNB officers that the bundle that was found strapped to his thigh contained heroin. When asked why the bundle had been strapped to his

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thigh, the appellant answered that a friend, who he called "King", had done this so that no one else would find it.

6 At trial however, the appellant denied having knowledge of the contents of the bundle. He claimed instead that King had only told him that the bundle contained "company spares" or "company product": see *Nagaenthran (Trial)* at [10]. The appellant also advanced another assertion in his defence – that he had delivered the bundle under duress with King having put him under pressure. According to this version of the appellant's case, King had slapped and punched the appellant when the latter tried to resist King's attempts to strap the bundle onto his thigh. King had allegedly also threatened to kill the appellant's girlfriend if he did not do as he was told and bring the bundle into Singapore: *Nagaenthran (Trial)* at [10]. Notably, however, these allegations were not in the contemporaneous statement he made after he was first arrested on 22 April 2009.

7 At the conclusion of the trial, on 22 November 2010, the appellant was found guilty and accordingly sentenced to death. The trial Judge made a number of findings including the following:

(a) The appellant's contemporaneous statements to the CNB officers had been provided voluntarily and recorded accurately: *Nagaenthran (Trial)* at [33].

(b) The appellant's allegations that King had assaulted him and threatened to kill his girlfriend if he did not deliver the drugs into Singapore were fabricated. He therefore failed to establish the defence of duress: *Nagaenthran (Trial)* at [18]–[19].

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(c) The appellant had actual knowledge of the contents of the bundle he had been tasked with delivering, namely, that it contained diamorphine: *Nagaenthran (Trial)* at [33]. This finding was based largely on the appellant's contemporaneous statement to the CNB officers, where he had stated unequivocally that the bundle strapped to his thigh contained heroin.

8 On appeal, we affirmed all of the aforementioned findings: see *Nagaenthran (CA)* at [18]–[19]. The mandatory death sentence was therefore upheld.

The appellant files CM 16

9 After his conviction, while awaiting execution of his sentence, the appellant was referred in March 2013 to Dr Kenneth Koh of the Institute of Mental Health for a forensic psychiatric evaluation. This was for the purpose of assessing the appellant's suitability for resentencing under s 33B(1)(*b*) read with s 33B(3) of the MDA. In his report dated 11 April 2013, Dr Koh noted the appellant's account that King had assaulted him and threatened to kill his girlfriend if he did not deliver the bundle of drugs into Singapore. Dr Koh took the view that the appellant "had no mental illness at the time of the offence" and was "not clinically mentally retarded". Dr Koh also acknowledged that the appellant's "borderline range of intelligence" might have caused him to be more susceptible than a person of normal intelligence to over-estimating the reality of King's alleged threat to kill his girlfriend. That said, Dr Koh concluded that the appellant's borderline range of intelligence "would not have diminished his ability to appreciate that the package that was taped to his thigh would most likely have contained drugs and that bringing this to Singapore was illegal".

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10 The appellant was subsequently referred to a psychiatrist in private practice, Dr Ung Eng Khean, for a psychiatric assessment in support of the appellant's re-sentencing application in CM 16. Dr Ung assessed the appellant on 19 April and 19 July 2016. In his report of 22 August 2016, Dr Ung noted the appellant's claim that he had lied to Dr Koh when the latter had assessed him in March 2013. The appellant's account to Dr Ung was that he had agreed to deliver the drugs for King, whom he referred to as his "boss", because he was desperate for money and felt compelled to obey King out of a mixture of loyalty, awe, fear and gratitude. The appellant did not mention that King had threatened to kill his girlfriend.

11 In the light of Dr Ung's 22 August 2016 report, Dr Koh referred the appellant to Dr Patricia Yap, principal clinical psychologist at the Institute of Mental Health, for a neuropsychological assessment to explore whether the appellant could have been suffering from Attention Deficit Hyperactivity Disorder ("ADHD"). Dr Yap assessed the appellant between November 2016 and January 2017, and issued a report dated 1 February 2017. What is relevant for the present purposes is the appellant's account to Dr Yap of the reasons for his offending. This took the form of his claim that he was a member of a gang, and that he had volunteered to transport the drugs on behalf of a fellow gang member who was reluctant to do so, and that he had done so out of a misguided sense of gang loyalty and gratitude to his "boss". He stressed that he had not been coerced into delivering the drugs; he had acted voluntarily. The appellant also recounted that he had reason to believe that the package he was tasked to carry contained drugs, and that he had known, at the time, of the death penalty for drug trafficking in Singapore. Nonetheless, although he did not know the specific quantity of drugs that would attract the death penalty, he did not think that the amount of drugs he was carrying was sufficient to attract it.

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12 Based on Dr Yap's 1 February 2017 report, as well as Dr Ung's 22 August 2016 report, Dr Koh himself prepared a report dated 7 February 2017, in which he concluded, among other things, that "[the appellant's] borderline intelligence and concurrent cognitive deficits may have contributed toward his misdirected loyalty and poor assessment of the risks in agreeing to carry out the offence".

Procedural history in relation to CA 98

13 The full procedural history relevant to CA 98 was set out by the Judge in *Nagaenthran (Judicial Review)* at [10]–[28]. For the present purposes, it is only necessary to highlight a few points.

14 After the amendments to the MDA came into effect on 1 January 2013, the appellant provided information to the PP, on 26 February 2013, by way of a voluntary statement for the purposes of allowing the PP to make a determination under s 33B(2)(*b*) of the MDA as to whether the appellant had substantively assisted the CNB in disrupting drug trafficking activities within or outside Singapore ("the first set of information"): *Nagaenthran (Judicial Review)* at [12]. It was common ground that the first set of information was not materially different to the information that the appellant had provided to the CNB officers in his contemporaneous statements at the time of his arrest in 2009.

15 On 22 July 2013, Attorney-General Steven Chong Horng Siong ("AG Chong"), who was the PP at the time, considered the first set of information, additional information pertaining to operational matters, and the views of the CNB to determine whether, based on the first set of information, the appellant had substantively assisted the CNB in disrupting drug trafficking activities within or outside Singapore. AG Chong determined that the appellant had *not*

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substantively assisted the CNB in disrupting drug trafficking activities within or outside Singapore. The appellant was duly informed of the non-certification decision in August 2013: *Nagaenthran (Judicial Review)* at [13]. For the avoidance of doubt, we digress to explain that the non-certification decision that was the subject of OS 272 was made after the appellant furnished a second set of information in November 2013.

16 On separate occasions in November 2013, March 2015 and September 2015, the appellant provided the second, third and fourth sets of information respectively, each of which, we are given to understand, contained some new information not previously contained in the other. These sets of information were separately considered, together with additional information pertaining to operational matters, and the views of the CNB in relation to whether, based on the relevant set of information, the appellant had substantively assisted the CNB in disrupting drug trafficking activities within or outside Singapore. None of these sets of information, however, gave rise to the outcome the appellant sought, which was the issuance of a certificate of substantive assistance pursuant to s 33B(2)(*b*) of the MDA.

Issues to be determined

CCA 50

17 The Judge found that the appellant was not suffering from an abnormality of mind within the meaning of s 33B(3)(*b*) of the MDA (see [3] above). The issues that arise in CCA 50 correspond with the three cumulative requirements that the appellant would have to satisfy in order to be able to rely on the defence under s 33B(3)(*b*), namely:

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(a) whether the appellant was suffering from an abnormality of mind;

(b) if he was, whether the abnormality of mind: (i) arose from a condition of arrested or retarded development of mind; (ii) arose from any inherent causes; or (iii) was induced by disease or injury; and

(c) if (a) and (b) are answered affirmatively, whether the abnormality of mind substantially impaired his mental responsibility for his acts and omissions in relation to his offence.

CA 98

18 In CA 98, the appellant pursues his application for leave to commence judicial review proceedings against the PP's non-certification decision on the grounds that: (i) the PP did not take into account relevant considerations in arriving at his non-certification decision, and (ii) the PP arrived at his non-certification decision in the absence of a necessary precedent fact. First, however, the appellant had to show that s 33B(4) of the MDA did not preclude judicial review of the PP's non-certification decision under s 33B(2)(*b*) on those grounds. Accordingly, the issues in CA 98 were as follows:

(a) First, whether s 33B(4) of the MDA precluded judicial review of the PP's non-certification decision under s 33B(2)(*b*) on grounds other than bad faith or malice.

(b) Second, and only if the answer to (a) is in the negative, whether the appellant has made out a *prima facie* case of reasonable suspicion that the PP, in arriving at his non-certification decision: (i) failed to take into account relevant considerations; and (ii) acted in the absence of a necessary precedent fact.

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CCA 50

19 We first deal with CCA 50. Section 33B(3)(*b*) of the MDA makes it mandatory for a court to sentence an offender convicted on a capital drug charge to life imprisonment where the offender can demonstrate that he suffered from an illness of the mind as described in the provision. Section 33B(3)(*b*) provides as follows:

> **Discretion of court not to impose sentence of death in certain circumstances**
>
> **33B.**— …
>
> (3) The requirements referred to in subsection (1)(*b*) are that the person convicted proves, on a balance of probabilities, that —
>
> …
>
> (*b*) he 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 relation to the offence under section 5(1) or 7.

20 The material words of s 33B(3)(*b*) that describe the relevant illness of mind are identical to those found in Exception 7 to the offence of murder in s 300 of the Penal Code (Cap 224, 2008 Rev Ed) ("the Penal Code"): see *Rosman bin Abdullah v Public Prosecutor* [2017] 1 SLR 10 at [46]. Exception 7 provides as follows:

> *Exception* 7.—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.

21 It stands to reason, as the Judge correctly noted (see *Nagaenthran (Criminal Motion)* at [36]), that the three-limb test that applies under

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Exception 7 (see *Iskandar bin Rahmat v Public Prosecutor and other matters* [2017] 1 SLR 505 ("*Iskandar*") at [79], citing *Ong Pang Siew v Public Prosecutor* [2011] 1 SLR 606 ("*Ong Pang Siew*") at [58] and *Public Prosecutor v Wang Zhijian* [2014] SGCA 58 at [50]) ought equally to apply in the context of s 33B(3)(*b*) of the MDA. Under this three-limb test, the appellant may be re-sentenced to life imprisonment, only if he is able to establish the following cumulative requirements on a balance of probabilities:

(a) first, that he was suffering from an abnormality of mind ("the first limb");

(b) second, that the abnormality of mind: (i) arose from a condition of arrested or retarded development of mind; (ii) arose from any inherent causes; or (iii) was induced by disease or injury ("the second limb"); and

(c) the abnormality of mind substantially impaired his mental responsibility for his acts and omissions in relation to his offence ("the third limb").

The first limb

22 We have stated in *Iskandar* (at [80]), that whilst the second limb (otherwise known as the aetiology or root cause of the abnormality) is a matter largely to be determined based on expert evidence, this is not the case with the first and third limbs, which are to be determined by the trial judge as matters of fact (see also, the decisions of this court in *Chua Hwa Soon Jimmy v Public Prosecutor* [1998] 1 SLR(R) 601 ("*Chua Jimmy*") at [21], *Zailani bin Ahmad v Public Prosecutor* [2005] 1 SLR(R) 356 at [51] and *Ong Pang Siew* at [59]; and the decision of the High Court in *Public Prosecutor v Juminem and another* [2005] 4 SLR(R) 536 ("*Juminem*") at [5]).

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23 In this context, what constitutes an 'abnormality of mind' under the first limb has been set out by Lord Parker CJ, delivering the judgment of the English Court of Criminal Appeal decision in *Regina v Byrne* [1960] 2 QB 396 ("*Byrne*") (at 403) as follows:

> 'Abnormality of mind,' … means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise the will power to control physical acts in accordance with that rational judgment.

24 It is evident from that formulation that the nature of the inquiry as to whether there is an abnormality of mind is, necessarily, fact-sensitive and predicated on what the reasonable man would term as abnormal in all the circumstances. This, in turn, is typically analysed in terms of three aspects of the mind's activities: the capacity to understand events, judge the rightness or wrongness of one's actions, and exercise self-control: see Stanley Yeo, Neil Morgan, and Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (LexisNexis, 3rd Ed, 2018) at para 27.13.

25 The respondent submits that an abnormality of mind in this context is established *only* if an offender is able to show that the abnormality in question falls within one of the aforementioned three aspects of the mind's activities, namely, the capacity to understand events, judge the rightness or wrongness of one's actions, and exercise self-control. In our judgment, however, that is not the correct reading of that passage in *Byrne*. Instead, we consider that Lord Parker's formulation of an abnormality of mind is intended to be sufficiently wide to encompass "the mind's activities *in all its aspects*". Of course, these would include and to a large extent, consist of the mind's capacity to understand events, judge right from wrong, and exercise self-control. However, we do not

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consider that these indicia are exhaustive of the mind's activities in *all* its aspects. These will undoubtedly be helpful to guide and focus the inquiry on answering the critical question of whether the abnormality of mind in question had substantially impaired the offender's mental responsibility for his acts and omissions in relation to his offence. And they are likely to be the most relevant and oft-used tools because they lead quite neatly to that critical question.

26 In short, the offender's capacity to understand events, judge right from wrong and exercise self-control will inevitably be quite accurate proxies of the extent of an offender's ability to exercise his will power to control his physical acts. That is not to say, however, that there can be no other indicia or aspects of the mind's activities that might have a bearing on the ultimate question of whether the offender's mental responsibility for his acts was substantially impaired. In our judgment, an offender may, as a matter of principle, succeed in bringing himself within s 33B(3)(*b*) of the MDA even if he were unable to pigeonhole the abnormality of mind he relies upon into one of the aforementioned three aspects of the mind's activities in Lord Parker's formulation, provided, he can show that his mental responsibility for his acts was substantially impaired as a result of this.

27 We take this opportunity to emphasise two further points on the analysis under the first limb of s 33B(3)(*b*). The first is that past cases will have little precedential value when it comes to establishing whether a particular medical condition is an abnormality of mind within the meaning of the first limb. This, we think, must be the case, because it is for the court as the trier of fact to ascertain, on the totality of the specific facts before it, whether the offender was labouring under such an abnormality of mind. The judge as trier of fact might very well find assistance in the medical evidence. We stress, however, that the

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question is ultimately one for the finder of fact to answer, having regard to all the surrounding circumstances of the offender's conduct and his offence.

28 This segues into the second point, which is that the opinion of a medical professional on whether a particular condition is an abnormality of mind, whilst oftentimes useful, is not necessarily dispositive of the *legal* inquiry into whether an abnormality of mind has been established under the first limb. This is self-evident, but worth repeating nonetheless. It is trite that the verdict as to abnormality of mind must be founded on *all* the evidence, which evidence *includes* medical opinion: *Sek Kim Wah v Public Prosecutor* [1987] SLR(R) 371 ("*Sek Kim Wah*") at [33]. In *Chua Jimmy* at [28], this Court adopted the approach in the Privy Council case of *David Augustus Walton v The Queen* [1978] AC 788 ("*Walton*"), in which Lord Keith stated at 793:

> [U]pon an issue of diminished responsibility the jury are entitled and indeed bound to consider not only the medical evidence but evidence upon the whole facts and circumstances of the case. These include the nature of the killing, the conduct of the defendant before, at the time of and after it and any history of mental abnormality … what the jury are essentially seeking to ascertain is whether at the time of the killing the defendant was suffering from a state of mind bordering on but not amounting to insanity. That task is to be approached in a broad common sense way.

29 The surrounding circumstances of the case, which include the nature of the killing, the conduct of the accused before, at the time of and after the offence, and any history of mental abnormality, may lead to the rejection of the medical evidence on whether the accused suffered from an abnormality of mind. Thus, in *Walton*, although the Prosecution did not lead medical evidence to challenge the medical evidence led by the accused, the Privy Council decided that the jury were entitled to conclude, as they did, that the defence of diminished responsibility had not been made out. Amongst other reasons, their Lordships considered the evidence as to the conduct of the accused before, during and after

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the killing, including a number of conflicting statements about it made by him to the police and to the psychiatrist who interviewed him after the offence (at 794). Further, the medical evidence may also be cast in doubt or rejected entirely where the factual basis upon which the medical opinion is premised is rejected at trial: see *R v Morgan, Ex parte Attorney-General* [1987] 2 Qd R 627 at 646, referring to *R v Wallace* [1982] Qd R 265. This approach to the treatment of the medical evidence is plainly sensible because in the final analysis, whether an abnormality of mind has been established depends on whether, having regard to all the facts of a given case, the accused person's state of mind was so different from that of ordinary human beings that the reasonable man would term it abnormal.

The second limb

30 In respect of the second limb of the three-limb test under s 33B(3)(*b*), it might at first blush seem from the text of that provision that the words in parenthesis, from which the second limb of the test emanates, are meant to be extensive rather than restrictive. Those words are "(whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury)". But, as we concluded in *Iskandar*, the words in parenthesis (there, in the context of Exception 7), ought to be read in a *restrictive* sense rather than an *extensive* one. In particular, we noted (at [85]) that at the second reading of the English Homicide Bill, which introduced the abnormality of mind defence under s 2(1) of the English Homicide Act 1957 (Cap 11) (the English equivalent of Exception 7), the Home Secretary stressed that the defence was only intended to cover those grave forms of abnormality of mind that might substantially impair responsibility, and was not intended to provide a defence to persons who were merely hot-tempered, or who, while otherwise normal, might commit murder in a sudden excess of rage or jealousy. Indeed,

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in the Queensland Court of Criminal Appeal decision of *R v Whitworth* [1989] 1 Qd R 437, Derrington J described the purpose behind the second limb as follows (see *Iskandar* at [87]):

> The purpose of the reference by the legislation to these specific causes of the relevant abnormality of mind is to exclude other sources, such as intoxication, degeneration of control due to lack of self-discipline, simple transient, extravagant loss of control due to temper, jealousy, attitudes derived from upbringing and so on. The feature which has most exercised the attention of the courts on this subject is *the necessity to avoid the extension of the defence to the occasion where there is an abnormality of mind to the required degree and producing the required impairment, but where it is due only to personal characteristics which are not outside the control of the accused and which do not come within the nominated causes*. … [emphasis added]

31 We recognise that what was said in *Iskandar* concerning the rationale for treating the second limb as restrictive rather than extensive was said in the context of the defence of diminished responsibility to murder. But in our judgment, that applies with equal force in the context of s 33B(3)(*b*) of the MDA. We are satisfied that Parliament did not intend for s 33B(3)(*b*) to apply to offenders suffering from transient or even self-induced illnesses that have no firm basis in an established psychiatric condition that arose from an arrested or retarded development of mind, any inherent root cause, or was induced by disease or injury. We note in this regard that in introducing s 33B(3)(*b*) of the MDA, the Minister for Law, Mr K Shanmugam, in *Singapore Parliamentary Debates*, *Official Report* (14 November 2012) vol 89 stated that "[i]t [was] not our intention to extend this to those who do not suffer from a recognised and proven psychiatric condition." The Minister further elaborated:

> On the second exception on diminished responsibility, some Members spoke on this.
>
> The law in this area has recently been set out by the Court of Appeal in *Ong Pang Siew v. PP* [2011] 1 SLR 60. Our view is the law has been set out and commonsensical judgments have to

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> be made on the facts. *Genuine cases of mental disability are recognised, while, errors of judgments will not afford a defence.* And the law is also capable of taking into account the progress of medical science in understanding mental conditions.
>
> Mr Christopher de Souza said the law must be interpreted strictly in its application to drug trafficking. Drug trafficking is a highly purposive and coordinated activity. *The legal principles remain the same, however, in assessing whether diminished responsibility is made out.*
>
> [emphasis added]

32 As we have already noted, this will largely be a matter for expert evidence and in that regard, we would also reiterate what we said in *Iskandar* (at [89]) about expert witnesses having, "on top of diagnosing whether the accused person was suffering from a recognised mental condition, [to] identify which prescribed cause, if any, in their opinion gave rise to the accused's abnormality of mind".

The third limb

33 At its heart, the third limb of s 33B(3)(*b*) of the MDA is concerned with the connection between the offender's abnormality of mind and his mental responsibility for his acts or omissions in relation to the offence. The plain words of s 33B(3)(*b*) of the MDA require that the offender's abnormality of mind be of such an extent as to have substantially impaired his mental responsibility for his acts or omissions in relation to the offence. As we have said in *Ong Pang Siew* (at [64]), what in fact amounts to a substantial impairment of mental responsibility is largely a question of commonsense to be decided by the trial judge as the finder of fact. It is especially the case in this context that while medical evidence would be important in determining the presence and/or extent of impairment, whether an accused's mental responsibility was substantially impaired is ultimately a question of fact that is to be decided by the court based on all the evidence before it: *Zailani bin Ahmad*

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v Public Prosecutor [2005] 1 SLR(R) 356 (at [52]), cited in *Ong Pang Siew* (at [64]). Substantial impairment in this context does not require total impairment; but nor would trivial or minimal impairment suffice. What is required is an impairment of the mental state that is real and material but which need not rise to the level of amounting to the defence of unsoundness of mind under s 84 of the Penal Code: see *Juminem* at [30]. Further, the requirement of substantial impairment does not entail that the offender's abnormality of mind must be the *cause* of his offending. Instead, the question is whether the abnormality of mind had an *influence* on the offender's actions: *Phua Han Chuan Jeffery v Public Prosecutor* [2016] 3 SLR 706 at [16].

Our decision

34 Leaving aside the first and second limbs of s 33B(3)(*b*), which would also have to be established for the appellant to succeed in CCA 50, as we indicated to counsel for the appellant, Mr Eugene Thuraisingam, in the course of the oral arguments, it was plain to us that the appellant would face insurmountable difficulties in establishing the third limb, given the evidence in this case. Specifically, we were unable to accept, even if we were to assume in his favour, that the appellant suffered from an abnormality of mind within the meaning of s 33B(3)(*b*), this had the effect of substantially impairing his mental responsibility for his acts.

35 The Judge, in fact, found that the appellant had not established the third limb, making the same assumptions in his favour in respect of the first two limbs: *Nagaenthran (Criminal Motion)* at [87]. It is evident that the Judge (at [88]) was particularly troubled by the fact that the appellant had, at various points in time, provided vastly different and irreconcilable accounts of why he had committed the offence:

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> 88 The [appellant] has, at various points in time from his arrest till now, furnished vastly distinct accounts of why he had committed the offence:
>
> (a) When the [appellant] was first arrested, he admitted in his contemporaneous statement that he knew that the Bundle contained heroin which he was delivering for King. He also stated that he had to deliver the heroin as he owed King money and was promised another RM500 after delivery. There was no mention of any threat made by King towards the [appellant's] girlfriend if he had refused to make the delivery (see [9] above).
>
> (b) During trial, the [appellant] denied knowledge of the contents of the Bundle, insisting that he was told that it contained "company products". The [appellant] then claimed that he had made the delivery under duress – King had assaulted him and threatened to kill his girlfriend unless he made the delivery (see [9] above). The [appellant] repeated this account to Dr Koh when he was examined in [*sic*] on 14 and 21 March 2013.
>
> (c) When the [appellant] was examined by Dr Ung on 19 April and 19 July 2016, he claimed that he had lied to Dr Koh. He had agreed to deliver the heroin for King because he was desperate for money, having owed a loanshark money. He was also motivated to obey King by a mixture of loyalty, awe, fear and gratitude. While he claimed that King possessed a gun, he omitted any mention of any threat to his girlfriend.
>
> (d) When the [appellant] was examined by Dr Yap in the period from November 2016 to January 2017, he claimed that he belonged to a gang and had volunteered to deliver the Bundle on behalf of a fellow gang member who was reluctant to do so. He explained that he did so out of his loyalty to the gang and his gratitude to his gang leader, who had provided him with emotional and financial support. He emphasised that he was not coerced into performing the delivery.

36 In *Nagaenthran (CA)* at [33], we upheld the Judge's finding that the defence of duress was not established. We also agree with the Judge's rejection of the appellant's alternative account (see *Nagaenthran (Criminal Motion)* at [91]), namely, that he had transported the bundle out of a misguided sense of gang loyalty. This account has all the marks of being an afterthought, since it

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only emerged in late 2016. Consequently, the Judge was left, in his own words, with "no factual basis on which to make any … finding of substantial impairment": *Nagaenthran (Criminal Motion)* at [87].

37 In our judgment, the appellant's vacillation between various accounts of why he had committed the offence – from being in desperate need of money, to being coerced under duress by King (an account that we flatly rejected in *Nagaenthran (CA)*), to acting out of a misguided sense of gang loyalty – did not aid his case at all. Most importantly, the subsequent accounts contradicted the original account of the reason for his offending which he had provided in his contemporaneous statement to the CNB officers. This was that he had delivered the bundle, which he knew contained diamorphine, because he was in need of money:

> Q1) What is this? (Pointing to a zip lock Bag consisting of 1 big packet of white granular substance, Crushed Newspaper & yellow Tape)
>
> A1) *Heroin.*
>
> Q2) Whom does it belong to?
>
> A2) It belongs to my Chinese friend who goes by the name of king who strapped it on my left thigh.
>
> Q3) *Why did he strapped it on your left Thigh?*
>
> A3) He Strapped it on my left thigh is *because it was for my safety and no one will find it.*
>
> Q4) Whom is it to be delivered to?
>
> A4) It is to be delivered to one Chinese recipient who will be driving a dark blue Camry and he will be meeting me in front of [the] 7-11 store at Woodlands Transit.
>
> *Q5) Why do you have to deliver the Heroin?*
>
> *A5) I have to deliver [the] Heroin is because I owe king money & he promised to pass me another five hundred dollars after my delivery.*
>
> [emphasis added]

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38 This statement was found to have been accurately recorded and given voluntarily (*Nagaenthran (Trial)* at [33]). It was corroborated by the fact that the drugs were subsequently found to be diamorphine, the street name of which is heroin. It was also against the appellant's interest and there is no reason to think it was not true. Furthermore, in his submissions, Mr Thuraisingam accepted that the appellant was neither labouring under a threat from King nor acting out of a misguided sense of loyalty to his gang. In other words, he proceeded on what was the original account of the reason for the appellant's offending – that the appellant had committed the offence because he needed money. Mr Thuraisingam nonetheless submitted that the appellant's mental responsibility for his acts in relation to the offence was substantially impaired. To that end, Mr Thuraisingam submitted that this was so because the appellant's internal rationality and *ability to assess the relevant risks* appropriately were impaired. Mr Thuraisingam relied on the following aspects of the expert evidence in support of his thesis:

(a) First, Dr Koh, in his 7 February 2017 report (at [12] above), had concluded, among other things, that "[the appellant's] borderline intelligence and concurrent cognitive deficits may have contributed toward his misdirected loyalty and poor assessment of the risks in agreeing to carry out the offence". Dr Koh had also testified that the appellant would have been impaired in his internal rationality and more specifically, his ability to appropriately assess the risks of his actions, thereby causing him to focus on his immediate needs at the expense of considering the future consequences of his actions:

> Q Now, when you say that his executive functioning skills were impaired, that is also an abnormality of the mind, correct?
>
> A Yes.

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Q And you have agreed that this abnormality of the mind affects decision-making, correct?

A It is---it is part of decision-making.

Q Yes. It affects judgement, correct?

A Yes.

Q It affects---it affects assess---the individual's ability to assess risks, correct?

A Yes.

Q For example, someone whose judgement is impaired, based on this abnormality of the mind, may have a poor assessment of what is risky and what is not, correct?

A Yes.

Q This person who has this abnormality of mind, which impairs the judgement, impairs his assessment of risk, may disregard future consequences of his immediate actions, correct?

A It may, yes.

Q And may lead him to focus on immediate needs as opposed to his long-term goals, correct?

A Yes.

Q He may not have internal rationality because his judgement is impaired, correct?

A He may have reduced, but probably not "no".

Q And he may have no internal rationality in relation to his assessment of risks, correct?

A Again, I would not use the word "no". I might say "impaired".

Q Impaired, yes.

A Yes, slightly reduced.

Q Yes. You would say impaired, correct?

A Yes.

(b) Secondly, Dr Ung's report of 22 August 2016 (at [10] above) had concluded that "the synergistic effect of [the appellant's severe alcohol

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> use disorder, severe attention deficit hyperactivity disorder (combined type), and borderline intellectual functioning] significantly affected his judgment, decision making and impulse control leading up to his arrest. There was a total preoccupation with the short and immediate term with little regard of the long-term consequences of his action."

39 In our judgment, Mr Thuraisingam's submission on this point must fail. We begin with the narrative provided by the appellant in his contemporaneous statement to the CNB officers at the time he was first arrested.

40 The Judge held from that account (see [37] above) that the appellant's mental responsibility for his offence could not have been substantially impaired. This was because the appellant clearly understood the nature of his acts and did not lose his sense of judgment of the rightness or wrongness of what he was doing. We agree. To begin with, the appellant was unequivocal in identifying the contents of the bundle as diamorphine or heroin. It was also evident that he knew that it was unlawful for him to be transporting the drugs. That was why he candidly admitted concealing the bundle by strapping it to his left thigh and then attempting to conceal this under the large pair of trousers he wore; he said that this was done for his own safety so that no one would find the bundle. Most pertinently, despite knowing the unlawfulness of his acts, he nonetheless undertook the criminal endeavour so as to enable him to pay off some part of his debt to King and receive a further sum of $500 from King after the delivery. This evidenced a deliberate, purposeful and calculated decision on the part of the appellant in the hope that the endeavour would pay off, despite the obvious risks that the appellant himself had appreciated. The appellant had considered the risks, balanced it against the reward he had hoped he would get, and decided to take the chance.

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41 Mr Thuraisingam eventually conceded that this was a case of a poor assessment of the risks on the appellant's part. But, as the Minister stated in *Singapore Parliamentary Debates*, *Official Reports* (14 November 2012) vol 89 ([31] *supra*), "[g]enuine cases of mental disability are recognised [under s 33B(3)(*b*) of the MDA], while, errors of judgment will not afford a defence." To put it quite bluntly, this was the working of a criminal mind, weighing the risks and countervailing benefits associated with the criminal conduct in question. The appellant in the end took a calculated risk which, contrary to his expectations, materialised. Even if we accepted that his ability to *assess risk* was impaired, on no basis could this amount to an impairment of his *mental responsibility* for his acts. He fully knew and intended to act as he did. His alleged deficiency in assessing risks might have made him more prone to engage in risky behaviour; that, however, does not in any way diminish his culpability.

42 We therefore dismiss the appeal in CCA 50.

CA 98

Whether s 33B(4) ousts the supervisory jurisdiction of the courts other than on grounds of bad faith, malice and unconstitutionality

43 We turn to CA 98. The first issue centres on the respondent's contention that the court's general power of judicial review has been excluded, or at least, confined, by s 33B(2)(*b*) read with s 33B(4) of the MDA. The respondent submits that these provisions have the effect of ousting the court's power of judicial review, over the PP's determination under s 33B(2)(*b*) as to whether an offender had substantively assisted the CNB in disrupting drug trafficking activities save and except on the grounds of bad faith or malice, which are the grounds expressly provided for under s 33B(4). The respondent also accepts that, in line with what we have held in *Muhammad Ridzuan bin Mohd Ali v*

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Attorney-General [2015] 5 SLR 1222 ("*Ridzuan*") (at [35]), s 33B(4) does not preclude challenging the PP's determination under s 33B(2)(*b*) where that determination contravenes constitutional protections and rights (for example, where a discriminatory determination is made that results in an offender being deprived of his right to equality under the law and the equal protection of the law under Article 12 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Singapore Constitution")). In short, the respondent's position is that aside from the grounds of bad faith, malice and unconstitutionality, the supervisory jurisdiction of the courts over the PP's determination under s 33B(2)(*b*) of the MDA is excluded by s 33B(4). The relevance of this can be seen in the fact that the crux of the appellant's case does not rest on allegations of malice or bad faith on the part of the PP.

44 We begin by noting that, until the decision of the High Court in *Nagaenthran (Judicial Review)*, the question of whether s 33B(4) of the MDA had the effect of ousting all grounds of judicial review except bad faith, malice and unconstitutionality had been left open by the courts: see *Ridzuan* (at [76]); *Prabagaran* (at [98]); and *Abdul Kahar bin Othman v Public Prosecutor* [2018] 2 SLR 1394 (at [57]).

45 Ouster clauses (also variously known as privative, preclusive, finality or exclusion clauses) are statutory provisions which *prima facie* prohibit judicial review of the exercise of the discretionary powers to which they relate: *Per Ah Seng Robin and another v Housing and Development Board and another* [2016] 1 SLR 1020 ("*Robin Per*") at [63], citing Mark Elliot *et al*, *Beatson, Matthews and Elliott's Administrative Law: Text and Materials* (Oxford University Press, 4th Ed, 2011) at para 15.6.1. Such clauses may be worded differently, but properly construed, their broad import is clear: they seek to oust the court's jurisdiction to exercise the power of judicial review: *Robin Per* at [63], citing

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Matthew Groves & H P Lee, *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) at p 346.

46 In a constitutional system of governance such as Singapore's, the courts are ordinarily vested with the power to adjudicate upon all disputes. As we observed in *Tan Seet Eng v Attorney-General and another matter* [2016] 1 SLR 779 ("*Tan Seet Eng*") at [47], judicial review forms a part of this power to adjudicate, and concerns that area of law where the courts review the legality of government actions:

> … In the normal course of events, all controversies, whether of fact or of law, are resolved by the courts. This work is done in accordance with the applicable rules of adjectival and substantive law, and it is the function of the courts to determine what the facts are and also to apply the relevant rules of substantive law to those facts. Judicial review concerns an area of law in which the courts review the lawfulness of acts undertaken by other branches of the government.

47 It is crucial here to differentiate between clauses that oust or exclude the court's jurisdiction or authority to act in a matter, and clauses that immunise parties from suit or liability. Parliament may from time to time enact statutory immunity clauses, some of which have been considered by our courts. In *South East Enterprises (Singapore) Pte Ltd v Hean Nerng Holdings Pte Ltd* [2013] 2 SLR 908, we had occasion to consider s 68(2) of the Subordinate Courts Act (Cap 321, 1999 Rev Ed), the precursor to the current s 68(2) of the State Courts Act (Cap 321, 2007 Rev Ed). In essence, s 68(2) of the Subordinate Courts Act provided that no officer of a subordinate court charged with the duty of executing any mandatory process of the subordinate court shall be sued for the execution of his duty unless he knowingly acted in excess of the authority conferred upon him by the mandatory process. We held in that case (at [56]) that s 68(2) of the Subordinate Courts Act had the effect of protecting a bailiff from excessive seizure claims unless the bailiff had knowingly acted in excess

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of his authority. Separately, in *Estate of Lee Rui Feng Dominique Sarron, deceased v Najib Hanuk bin Muhammad Jalal and others* [2016] 4 SLR 438 ("*Dominique Sarron Lee*"), the High Court considered s 14(1) of the Government Proceedings Act (Cap 121, 1985 Rev Ed), and held (at [41]–[42]) that it had the effect of protecting a member of the Singapore Armed Forces ("SAF") from liability in tort for causing death or personal injury to another member of the SAF where certain conditions were fulfilled. However, even where those conditions were fulfilled, the wrongdoing member would not be exempted from liability in tort where his act or omission was not connected with the execution of his duties as a member of the SAF.

48 Like ouster clauses, immunity clauses may be worded differently. Unlike ouster clauses however, they do not exclude the courts' jurisdiction or authority to act in a matter. This is apparent from both s 68(2) of the Subordinate Courts Act and s 14(1) of the Government Proceedings Act, both of which only protect an identified class of persons from suit under certain conditions. Nothing in those provisions purports to exclude the jurisdiction of the courts to deal with any class of matters.

49 In *Rosli bin Dahlan v Tan Sri Abdul Gani bin Patail & Ors* [2014] 11 MLJ 481 ("*Rosli bin Dahlan*"), the Kuala Lumpur High Court had to consider whether prosecutors enjoyed absolute immunity from suit in relation to the exercise of their functions (see [78]). The Court noted (at [88], citing *Henry v British Columbia (Attorney General)* [2012] BCJ No 1965, 2012 BCSC 1401 at [20]) that there are policy reasons why Parliament would want to confer upon prosecutors a broad immunity from suit in relation to the discharge of their functions. First, such immunity encourages public trust in the fairness and impartiality of those who act and exercise discretion in bringing and conducting criminal prosecutions. Second, the threat of personal liability for tortious

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conduct would have a chilling effect on the prosecutor's exercise of discretion. Third, to permit civil suits against prosecutors would invite a flood of litigation that would deflect a prosecutor's energies from the discharge of his public duties; and it would open the door to unmeritorious claims that might have the effect of threatening prosecutorial independence. As against these considerations are concerns that private individuals ought not to be denied a remedy where they have been, for example, maliciously prosecuted. In the result, a balance is struck where prosecutors do enjoy a broad immunity from suit in respect of the carrying out of their functions, but this is not absolute (at [95]). The Court then went on to consider statutory immunity clauses in various other pieces of legislation, and concluded (at [106]) that "whenever the Legislature provided for statutory immunity from legal proceedings for public officers, it has always come with a rider, and that rider was the requirement of good faith in the exercise of that public officer's powers or discretion. The shield was never an absolute one."

50 It follows from this brief review that statutory immunity clauses share certain characteristics. First, they are exceptional in that they preclude claims being brought against certain classes of persons under prescribed conditions where ordinarily, such persons might otherwise be subject to some liability. Second, statutory immunity clauses commonly seek to protect persons carrying out public functions. It is on account of the responsibilities that burden the exercise of such public functions and the desire not to hinder their discharge that such immunity clauses are commonly justified. Thus, as was noted in *Rosli bin Dahlan* (see [49] above), immunity from suit may be justified in order to safeguard the ability of prosecutors to exercise their prosecutorial discretion independently without fear of liability. Similarly, in the context of s 14(1) of the Government Proceedings Act (see [47] above), the High Court in *Dominique*

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Sarron Lee observed (at [51]) that the immunity granted to members of the SAF was justified by the need to ensure that they would not be burdened by the prospect of legal action when training, and ultimately to safeguard the effectiveness of the SAF's training as well as its operations. Third, and as a corollary to this, such immunity generally would not extend to the misuse or abuse of the public function in question; nor would the immunity typically apply where its beneficiary exceeded the proper ambit of the functions of his office. Thus, it was held that prosecutorial immunity would not extend to protect against claims for malicious, deliberate or injurious wrongdoing: *Rosli bin Dahlan* at [98]; similarly, a bailiff's immunity against excessive seizure claims would not apply where the bailiff *knowingly* acted in excess of his authority; and a member of the SAF would not be exempted from liability in tort for causing death or personal injury to another member where his act or omission was not connected with the execution of his duties as a member of the SAF.

51 In that light, we turn to consider the true nature and interpretation of s 33B(4). The respondent contends that it is an ouster clause. We disagree. On its face, s 33B(4) does not purport to exclude the jurisdiction of the courts to supervise the legality of the PP's determination under s 33B(2)(*b*) of the MDA. What it does do, is to immunise the PP from suit save on the stated grounds. In other words, an offender who is aggrieved by the PP's determination that he had not provided substantive assistance to the CNB in disrupting drug trafficking activities cannot take the PP to task by way of proceedings in court except where he can establish that the PP's determination in that respect was made in bad faith, with malice or perhaps unconstitutionally. We note here that these exceptions to the immunity granted under s 33B(4) are consistent with our earlier observations, that the immunities granted to persons exercising a public function do not typically extend to protecting them from liability for abusing or

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exceeding the functions of their office. Further, in our judgment, nothing in s 33B(2)(*b*) excludes the usual grounds of judicial review, such as illegality, irrationality and procedural impropriety (see *Tan Seet Eng* at [62]), on the basis of which the court may examine the *legality* of the PP's determination, as opposed to its *merits*. We elaborate.

Distinguishing the inquiries and conditions under s 33B(2)

52 We begin by observing that as far as s 33B(2) and s 33B(4) are concerned, one should distinguish between, on the one hand, the *conditions* that must be cumulatively fulfilled under s 33B(2) for the court's sentencing discretion to be engaged under s 33B(1)(*a*), and on the other, the *inquiries* that must be undertaken to determine whether those conditions have been established. It is useful here to set out the relevant portions of s 33B of the MDA in full:

> **Discretion of court not to impose sentence of death in certain circumstances**
>
> **33B.**—(1) Where a person commits or attempts to commit an offence under section 5(1) or 7, being an offence punishable with death under the sixth column of the Second Schedule, and he is convicted thereof, the court —
>
> > (*a*) may, if the person satisfies the requirements of subsection (2), instead of imposing the death penalty, sentence the person to imprisonment for life and, if the person is sentenced to life imprisonment, he shall also be sentenced to caning of not less than 15 strokes; …
> >
> > …
>
> (2) The requirements referred to in subsection (1)(*a*) are as follows:
>
> > (*a*) the person convicted proves, on a balance of probabilities, that his involvement in the offence under section 5(1) or 7 was restricted —
> >
> > > (i) to transporting, sending or delivering a controlled drug;

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> (ii) to offering to transport, send or deliver a controlled drug;
>
> (iii) to doing or offering to do any act preparatory to or for the purpose of his transporting, sending or delivering a controlled drug; or
>
> (iv) to any combination of activities in sub-paragraphs (i), (ii) and (iii); and
>
> (*b*) 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.
>
> …
>
> (4) 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.

53 The starting point is s 33B(1)(*a*), which provides that the court "*may*" sentence an offender convicted of a capital drug offence to life imprisonment instead, provided that the specified conditions in s 33B(2) are met. By virtue of s 33B(1)(*a*) therefore, the court is given the sentencing discretion to impose a sentence of life imprisonment where the conditions under subsection (2) are met.

54 Section 33B(2) of the MDA, in turn, specifies the two conditions that must be met before the court's sentencing discretion under s 33B(1)(*a*) is engaged. The first of these, which is found in s 33B(2)(*a*), is a finding of fact that the offender in question was, essentially, a courier. The second of these, which is found in s 33B(2)(*b*), is the *existence* of a certificate of substantive assistance issued by the PP. As far as the sentencing court is concerned, its discretion under s 33B(1)(*a*) to sentence an offender to life imprisonment *in lieu*

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of the death penalty is only engaged when *both* of the aforementioned *conditions* are met.

55 The two *conditions* that we have referred to above must be distinguished from the specific *inquiry* that is to be carried out in order to determine whether each of those conditions has been met in any given case. Under s 33B(2)(*a*), while the relevant *condition* is a finding that the offender in question merely acted as a courier, that condition depends on an *inquiry* as to whether the offender's actions were confined to any of the acts under s 33B(2)(*a*)(i)–(iv). Under s 33B(2)(*b*), while the *condition* is the existence of the certificate of substantive assistance issued by the PP, the *inquiry* in question is that which leads to a determination by the PP that the offender had provided substantive assistance to the CNB in disrupting drug trafficking activities within or outside Singapore. There are two aspects to this: first, that the offender had provided substantive assistance to the CNB; ***and*** second that such assistance resulted in the specified outcome, namely, the disruption of drug trafficking activities whether here or elsewhere.

56 Seen in this light, we are satisfied that on a true construction of the provision, s 33B(4) is directed to the *inquiry* (meaning the process by which the PP arrives at his decision) rather than the question underlying the fulfilment of the condition under s 33B(2)(*b*) (meaning the question whether the offender had in fact substantively assisted the CNB and whether this had resulted in disrupting drug trafficking activities). We say the question *underlying* the fulfilment of the condition because the actual condition in question is the *existence* of the certificate of substantive assistance issued by the PP. Under s 33B(2)(*b*), the PP will issue the certificate of substantive assistance in respect of an offender where, *in the PP's determination*, that offender has substantively assisted the CNB in disrupting drug trafficking activities. Section 33B(4) makes

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specific reference to the *PP's determination* as to whether the offender in question had substantively assisted the CNB in disrupting drug trafficking activities. And in relation to this determination, there are two key aspects to s 33B(4): (i) it shall be made solely by the PP; and (ii) no action or proceeding shall lie against the PP in respect of any such determination unless it is proved to the court that the determination was done in bad faith or with malice.

57 The reason s 33B(4) provides for both these aspects becomes evident when one considers the nature of the *inquiry* that is implicated under s 33B(2)(*b*). As we have already noted, this is the inquiry into whether the offender had provided substantive assistance to the CNB in disrupting drug trafficking activities within or outside Singapore. It will be appreciated immediately that there is a stark difference between the nature of this inquiry and that under s 33B(2)(*a*). While the court is entirely capable of answering the inquiry as to whether the offender's actions were confined to any of the acts specified in s 33B(2)(*a*)(i)–(iv), which is a narrow question of fact suitable for judicial determination, the same cannot be said of the court's ability to answer the inquiry embedded in s 33B(2)(*b*). The obstacle here is not simply an issue of having to safeguard from disclosure confidential information and otherwise inadmissible evidence including intelligence and other operational details of the CNB, which might jeopardise the CNB's effectiveness if published, although that, in itself, is no doubt a very significant concern: see *Ridzuan* (at [66]), *Prabagaran* (at [52]).

58 Equally important is the fact that at least the second part of the inquiry under s 33B(2)(*b*) (namely, whether the offender's assistance had the specified outcome in terms of disrupting drug trafficking activities within or outside Singapore) contemplates an assessment of these activities that transcends the disruption of particular and individual operations and instead, entails a wide

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ranging assessment that goes beyond our geographic boundaries, would likely require the consideration of at least some materials that do not meet the definition of admissible evidence, and that would likely entail the weighing of considerations and trade-offs that are outside our institutional competence, which, in the final analysis, is directed to the resolution of particular controversies. In essence, the courts are simply ill-equipped and ill-placed to undertake such an inquiry. At that level of abstraction, there are no manageable judicial standards against which a court would be able to make an appropriate assessment. It is, to put it simply, an inquiry that a court is not in a position to properly answer. As we observed in *Prabagaran* (at [67]), "the inquiry as to whether there has been disruption to the drug trade within and/or outside Singapore is an operational one that is dependent on CNB's … intelligence and wider considerations, which may not be appropriate *or even possible to determine in court*" [emphasis added].

The nature of the judicial function

59 It is apposite here to restate the nature of the judicial function, and from there to examine why the merits of PP's determination under s 33B(2)(*b*) of the MDA is not one that is capable of being adjudicated upon by a court of law. The judicial function "is premised on the existence of a controversy either between a State and one or more of its subjects, or between two or more subjects of a State…[and which] entails the courts making a finding on the facts as they stand, applying the relevant law to those facts and determining the rights and obligations of the parties concerned for the purposes of governing their relationship for the future": *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947 ("*Faizal*") (at [27]). What follows from this is that, at its core, the judicial process requires clear legal standards against which facts can be analysed and found, and rights and obligations be ascertained.

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60 Once this is appreciated, it will become apparent that there exist issues of such a nature that render them unamenable to being resolved through the judicial process, because of a lack of manageable judicial standards against which a court would be able to arrive at a decision.

61 In a somewhat different context, a similar point was noted by Lord Wilberforce (with whom the rest of their Lordships agreed) in the decision of the House of Lords in *Buttes Gas and Oil Co v Hammer* [1982] AC 888 ("*Buttes Gas*"). That dispute arose out of contested rights to oil concessions off the coast of Abu Musa, an island in the Arabian Gulf. At the time, Buttes Gas and Oil Co had obtained the right to exploit the oil deposits there by virtue of a decree dated December 1969 of the Ruler of Sharjah, an Arab emirate. Occidental Petroleum Corporation on the other hand, had obtained its concessions from Umm al Qaiwain, a neighbouring emirate, in November 1969. The Ruler of Sharjah's decree extended the emirate's territorial sea from 3 to 12 miles, thus impinging upon part of Occidental's concessions. Occidental's Dr Armand Hammer subsequently alleged publicly that Buttes Gas had conspired with the Ruler of Sharjah to fraudulently backdate the decree so as to undermine Occidental's rights to its concessions. In response, Buttes Gas initiated proceedings alleging slander. In defence, Dr Hammer pleaded justification, and further counterclaimed for damages on the basis of the alleged conspiracy between Buttes Gas and the Ruler of Sharjah. In support of its justification defence as well as its counterclaim in conspiracy, Occidental pleaded the same facts, namely, that the Ruler of Sharjah and others, whom Occidental could not then particularise, had wrongfully and fraudulently conspired to cheat and defraud Occidental, and further or alternatively, to cause and procure Her Majesty's Government and others to act unlawfully to the injury of Occidental. Buttes Gas responded by applying to strike out the aforementioned parts of Occidental's

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pleadings relating to the justification defence as well as the conspiracy counterclaim on the ground that the pleaded matters were acts of state and hence, non-justiciable.

62 The House of Lords had to consider several issues, including whether the Court of Appeal was correct in refusing Buttes Gas's striking out application. In holding that the issues raised in Occidental's pleadings were incapable of being entertained by the court, Lord Wilberforce started out by framing "the essential question" in terms of whether there exists a general principle of law that the courts will not adjudicate upon the transactions of foreign sovereign states (at 931). Pertinently, Lord Wilberforce stated that "it seems desirable to consider this principle, if existing, not as a variety of 'act of state' but one for judicial restraint or abstention". He opined (at 932) that the principle has long existed in English law, and was not a principle of discretion but a principle of law "inherent in the very nature of the judicial process". In his view, if Occidental's justification defence and counterclaim in conspiracy as pleaded were to be heard by the court, the court would have to deal with issues that would include whether Occidental had acquired, in November 1969, a vested right to explore the seabed at a location within 12 miles from the coast of Abu Musa, an issue which itself would turn on the question of which state had sovereignty over Abu Musa in the first place. And if Occidental did acquire such a right, the court would then have to consider whether Occidental had subsequently been deprived of its right by the actions of sovereigns such as the Ruler of Sharjah, and inquire into the Ruler's motives for backdating the decree, if proved (at 937). In the final analysis, Lord Wilberforce stated (at 938) that:

> [these issues] have only to be stated to compel the conclusion that these are not issues upon which a municipal court can pass. *Leaving aside all possibility of embarrassment in our foreign relations …* there are—to follow the Fifth Circuit Court of Appeals—*no judicial or manageable standards by which to*

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> *judge these issues, or to adopt another phrase …, the court would be in a judicial no-man's land*: the court would be asked to review transactions in which four sovereign states were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were "unlawful" under international law. [emphasis added]

63 Subsequently, the UK Supreme Court in *Shergill v Khaira* [2014] 3 WLR 1 noted (at [40], *per* Lord Neuberger, Lord Sumption and Lord Hodge (with whom Lord Mance and Lord Clarke agreed)) that Lord Wilberforce's reference to judicial and manageable standards by which issues are judged was derived from the decision of the Fifth Circuit Court of Appeals in the United States litigation between the same parties on substantially the same issues. That in turn was based on the celebrated decision of the United States Supreme Court in *Underhill v Hernandez* (1897) 168 US 250 concerning the act of state doctrine. But the Fifth Circuit Court of Appeals regarded the issues as non-justiciable not because judges in municipal courts were incapable of determining questions of international law. Rather, as the Supreme Court bluntly observed, the issues raised in *Buttes Gas* "w[ere] non-justiciable because [they were] political". To begin with, the court would be "trespass[ing] on the proper province of the executive, as the organ of the state charged with the conduct of foreign relations". This was a concern rooted in the doctrine of the separation of powers. But the Supreme Court went on to note that the entire dispute arose out of the way in which four sovereign states had settled the issue of international law "by a mixture of diplomacy, political pressure and force in a manner adverse to the interests of Occidental Petroleum". Occidental's case in court would involve the court "assessing decisions and acts of sovereign states which [unlike those of private parties] had not been governed by law but by power politics". This concern proceeds from an even more fundamental premise that goes beyond any doctrine of "self-imposed judicial restraint" (see

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Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Academy Publishing, 2012) ("*Thio Li-ann*") at para 10.219) and extends to taking due regard of the inherent limitations of litigation and the judicial process. We accept that the facts presented in *Buttes Gas* were far removed from those in the present case but, in our judgment, the underlying principle is equally applicable.

64 Indeed, similar concerns with the lack of manageable judicial standards featured in the much more closely analogous context of assessing the value of police intelligence to police operations. In *Carnduff v Rock* [2001] 1 WLR 1786 ("*Carnduff*"), a registered police informer brought an action against a police inspector and his chief constable to recover payment for information provided to the police. He claimed that specific information and assistance he had provided had resulted in the arrest and prosecution of certain persons involved in the illegal drugs trade. The Court of Appeal struck out the claim (Waller LJ dissenting), holding that a fair trial of the issues arising from the pleadings would necessarily require the police to disclose sensitive information that ought in the public interest to remain confidential to the police. While confidentiality concerns were the principal reason underlying the Court of Appeal's decision, Laws LJ in his judgment was also palpably perturbed by the futility of having the court assess the value to police operations of the intelligence the informant had provided (at [33]):

> If the disputes which they generate were to be resolved fairly by reference to the relevant evidence … the court would be required to examine in detail the operational methods of the police as they related to the particular investigation in question; to look into the detailed circumstances of the plaintiff's discussions with police officers; *to conduct a close perusal of such information as the plaintiff provided, to assess its quality; to compare that information with other relevant information in the hands of the police, very possibly including material coming from or relating to other informers, and so also to assess and contrast*

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> *the degree of trust reposed by the police in one informer rather than another; and to make judgments about the information's usefulness*, and not only the use in fact made of it (and thus, *notionally at least, to put itself in the shoes of a competent police force so as to decide what such a force would or should have done*). [emphasis added]

65 We would observe that, the question in *Carnduff* related to the relationship between specific information and its value to a *specific* police operation. The problem is greatly exacerbated where the question is whether an offender had provided substantive assistance in disrupting drug trafficking activities *in general, whether in or outside Singapore*: see further our observations at [58] above. This raises issues that simply cannot be resolved by a court of law using the methods, tools or standards that are properly at its disposal.

66 Our view that the inquiry under s 33B(2)(*b*) of the MDA is not one a court is capable of addressing, at least in part because of the operational facets that are implicated, is supported by the relevant legislative debates. In response to concerns raised that there should be greater judicial discretion in the application of the death penalty, the Minister for Law stated (see *Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89:

> Next, on the issue of who decides cooperation and by what criteria. The Bill provides for the Public Prosecutor to assess whether the courier has substantively assisted CNB.
>
> I think Ms Sylvia Lim, Mr Pritam Singh, Mrs Chiam and Ms Faizah Jamal have concerns here. Their view is: it is an issue of life and death – the discretion should lie with the courts to decide on cooperation.
>
> First, the cooperation mechanism is neither novel nor unusual. Other jurisdictions, like the US and UK, have similar provisions, operated by prosecutors, to recognise cooperation for the purposes of sentencing. …
>
> The Courts decide questions of guilt and culpability. ***As for the operational value of assistance provided by the accused,***

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> ***the Public Prosecutor is better placed to decide***. The Public Prosecutor is independent and at the same time, works closely with law enforcement agencies and ***has a good understanding of operational concerns***. An additional important consideration is protecting the confidentiality of operational information.
>
> The very phrase ***"substantive assistance" is an operational question and turns on the operational parameters and demands of each case***. Too precise a definition may limit and hamper the operational latitude of the Public Prosecutor, as well as the CNB. It may also discourage couriers from offering useful assistance which falls outside of the statutory definition.
>
> 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?
>
> [emphasis in original; emphasis added in bold italics]

Our judgment

67 In our judgment, the effect of s 33B(4) is to vest the responsibility for making the relevant inquiry under s 33B(2)(*b*) in the PP and then to immunise the PP from suit in respect of such a determination save as narrowly excepted. Further, we consider that it was entirely logical for Parliament to proceed in this way. This is because Parliament intended the inquiry under s 33B(2)(*b*) to be determined solely by the PP and not by the court, in light of the fact that the inquiry in question is not one that can be appropriately undertaken by the court for all the reasons we have already rehearsed, and which are rehearsed also in the legislative debates that we have excerpted in the previous paragraph. And as for the wide, though not absolute, immunity granted to the PP in respect of his determination, this too is entirely logical because without this, an aggrieved

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offender might be tempted to bring suit against the PP challenging his determination that the offender had not substantively assisted the CNB in disrupting drug trafficking activities, and thereby attempt to force the court into the unviable position of having to determine an issue that it is inherently not capable of determining. At the same time, the bad faith, malice and unconstitutionality exceptions to the immunity granted by s 33B(4) serve to safeguard against abuse and ensures that the PP "operate[s] the system with integrity": *Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89. Moreover, these are questions directed not at the merits of the PP's determination, but at the limited question of the propriety of the PP's conduct and this would typically give rise to the sort of issue that the court would be well-placed to address.

68 It becomes evident when seen in this light, that the provisions in question before us do not in any way oust the court's power of judicial review over the legality of executive actions, including those of the PP.

69 Before turning to the disposal of the merits of the appeal, we make some further observations. First, we had opined in *Ridzuan* (at [72]) that it would be unsatisfactory if the PP's determination under s 33B(2)(*b*) was indeed unreviewable by the courts even if, for the sake of argument, it could be shown that, although not constituting bad faith or malice, the PP had, for example, disregarded relevant considerations and/or failed to take relevant considerations into account:

> Before we move away from this issue of bad faith, we need to address the proposition made by the Appellant that where the PP has taken into account irrelevant considerations and has instead failed to take into account relevant considerations, that would constitute bad faith. On the authorities that we have just alluded to, this proposition is erroneous. *However, does it mean that where it has been shown that the PP has disregarded*

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> *relevant considerations and/or failed to take relevant consideration into account, the aggrieved drug trafficker is without remedy?* We would first observe that such a situation does not arise in the present case. The relevant considerations taken into account by the PP have been set out at [60] and [64] above and nothing was advanced by or on behalf of the Appellant to suggest that this was in any way erroneous. Having said that, *if such a situation were to arise in a case and it is substantiated that relevant considerations were disregarded or irrelevant considerations were considered by the PP in coming to his decision, intuitively it seems inconceivable that the aggrieved person would be left without a remedy and that the decision of the PP should nevertheless stand.* … [emphasis added]

70 These observations seem especially compelling where the determination in question may have a bearing on the life of an accused person.

71 Secondly, the respondent submitted that this was ultimately a matter of construing the legislative intent underlying any provision said to have that effect. We do not need to reach a final decision on this because of the view we have taken on the true construction, purport and effect of s 33B(4), but we observe that the court's power of judicial review, which is a core aspect of the judicial power and function, would not ordinarily be capable of being excluded by ordinary legislation such as the MDA. This follows inevitably from Singapore's system of constitutional governance, where the Singapore Constitution is the supreme law of the land, as stated in Article 4:

> This Constitution is the supreme law of the Republic of Singapore and any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

72 As Chan Sek Keong CJ noted in *Faizal* ([59] *supra* at [15]), "Art 4 reinforces the principle that the Singapore parliament may not enact a law, and the Singapore government may not do an act, which is inconsistent with the principle of the separation of powers to the extent to which that principle is

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embodied in the Singapore Constitution". The separation of powers, in turn, is embodied in the Singapore Constitution by virtue of Article 23 (which vests the executive authority in the President and the Cabinet), Article 38 (which vests the legislative power in the President and Parliament) and Article 93 (which vests the judicial power in a system of courts). Article 93 provides as follows:

> The judicial power of Singapore shall be vested in a Supreme Court and in such subordinate courts as may be provided by any written law for the time being in force.

73 We have referenced (at [59] above) Chan CJ's holding in *Faizal* (at [27]), that "the judicial function is premised on the existence of a controversy either between a State and one or more of its subjects, or between two or more subjects of a State…[and which] entails the courts making a finding on the facts as they stand, applying the relevant law to those facts and determining the rights and obligations of the parties concerned for the purposes of governing their relationship for the future". It follows from the nature of the judicial function, as well as the fact that the State's judicial power is vested in the Supreme Court under Article 93 of the Singapore Constitution, that "there will (or should) be few, if any, legal disputes between the State and the people from which the judicial power is excluded": *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 at [31]. In particular, any society that prides itself in being governed by the rule of law, as our society does, must hold steadfastly to the principle that "[a]ll power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power": *Chng Suan Tze v Minister for Home Affairs and others and other appeals* [1988] 2 SLR(R) 525 ("*Chng Suan Tze*") at [86].

74 The point is not purely theoretical. In the course of the arguments, we invited counsel for the respondent to clarify whether he maintained that the

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court would be powerless to act if it could be shown that the PP had considered matters that were irrelevant. His response that he did maintain that position, was simply untenable, as we told him. If the respondent's submission on the effect of s 33B(4) were accepted, then to the extent that this ousted the court's power of judicial review, s 33B(4) would be constitutionally suspect for being in violation of Article 93 of the Singapore Constitution as well as the principle of the separation of powers: see *Thio Li-ann* at para 10.218; and Chan Sek Keong, "Judicial Review – From Angst to Empathy: A Lecture to Singapore Management University Second Year Law Students" (2010) 22 SAcLJ 469 at para 19. That said, the point really is moot, since we have already held that s 33B(4) of the MDA does not have this effect of ousting the power of the courts to review the *legality* as opposed to the *merits* of the PP's determination under s 33B(2)(*b*).

Whether leave for judicial review ought to be granted

75 Having held that s 33B(4) of the MDA does not preclude judicial review of the PP's non-certification decision under s 33B(2)(*b*) on any of the usual grounds of judicial review (see [51] above), it remains for us to consider the appellant's case on its merits. At its core, the appellant seeks leave to commence judicial review of the PP's non-certification decision on two grounds:

(a) first, that there is a *prima facie* case of reasonable suspicion that the PP failed to take into account relevant considerations in coming to his non-certification decision; and

(b) second, that there is a *prima facie* case of reasonable suspicion that the PP's non-certification decision was made in the absence of a precedent fact.

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76 As the Judge correctly noted, the requirement at the leave stage is for the appellant to adduce material that discloses an arguable or *prima facie* case of reasonable suspicion in favour of granting the remedies the appellant seeks. This is, undoubtedly, "a very low threshold": *Chan Hiang Leng Colin and others v Minister for Information and the Arts* [1996] 1 SLR(R) 294 at [22]. Nonetheless, the leave requirement to commence judicial review is intended to serve as a means of filtering out groundless or hopeless cases at an early stage, so as to prevent wastage of judicial time and to protect public bodies from harassment (whether intentional or otherwise) that might arise from a need to delay implementing decisions, where the legality of such decisions is being challenged: *Public Service Commission v Lai Swee Lin Linda* [2001] 1 SLR(R) 133 at [23].

Failure to take into account relevant considerations

77 It is common ground that the information the appellant had provided to the CNB in his contemporaneous statements in 2009 was the same as the first set of information (see [14] above). The appellant submits that due to the time-sensitive nature of the information he had given to the CNB in 2009, the information had become stale by the time the PP considered it in 2013. On this basis, it was submitted that he was prejudiced because he could not conceivably have been in a position to render substantive assistance to the CNB in 2013. The appellant submits, therefore, that when AG Chong was considering, in 2013 (see [15] above), whether the appellant had rendered substantive assistance, he ought to have considered the effect of the appellant's information, as provided in his contemporaneous statements to the CNB shortly after his arrest, on the disruption of drug trafficking activities at the material time (meaning, in 2009); it was submitted that there was no evidence that AG Chong considered the appellant's information in that manner.

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78 In our judgment, the appellant's case on this point fails. To begin with, it is apparent that the appellant's entire case on appeal hinges on the allegation that there is a lack of evidence showing that the PP had taken into account the relevant considerations in arriving at his non-certification decision. But this approach reverses the burden of proof and cannot suffice for a party who has to satisfy its burden of adducing evidence to show a *prima facie* case of reasonable suspicion that what the party alleges is right.

79 Next, it may be noted that when the Amendment Act introduced the transitional framework for persons who had been convicted and sentenced to death under the previous version of the MDA, to be resentenced in accordance with s 33B, no obligation was imposed on the PP to consider retrospectively the effect of the information provided by such offenders on the disruption of drug trafficking activities. In any event, we were prepared to take the appellant's case at its highest and proceed on the basis that the PP ought to have considered the information provided by the appellant in 2009 and its effect on the disruption of drug trafficking operations then. Even so, however, the appellant fails because he has not adduced a shred of evidence to support his case that there is a *prima facie* case of reasonable suspicion that the PP had failed to consider the effect of the appellant's information provided in his contemporaneous statements on the disruption of drug trafficking activities at that time. On the contrary, the respondent deposed to the following in the affidavit dated 30 October 2017 that was filed on his behalf:

> 6. On 26 February 2013, the Central Narcotics Bureau ("CNB") received information from the [appellant] ("the first set of information"), provided in a voluntary statement, for purposes of the Public Prosecutor ("PP") making a determination, pursuant to s 33B(2)(*b*) of the MDA, as to whether the [appellant] had substantively assisted the CNB in disrupting drug trafficking activities within or outside Singapore.

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> 7. The following (collectively, "the first set of material") was subsequently submitted to the then-PP, Attorney-General Steven Chong Horng Siong ("AG Chong"), for his consideration:
>
> (a) the first set of information;
>
> (b) information pertaining to operational matters; and
>
> (c) the views of the CNB in relation to whether, based on the first set of information, the [appellant] had substantively assisted the CNB in disrupting drug trafficking activities within or outside Singapore.
>
> 8. On 22 July 2013, AG Chong determined, *after having considered the first set of material, that the [appellant] had not substantively assisted the CNB in disrupting drug trafficking activities within or outside Singapore*.
>
> [emphasis added]

80 As can be seen from paragraph 8 of the respondent's 30 October 2017 affidavit, the PP had considered all the relevant material and arrived at the conclusion that "the appellant had not substantively assisted the CNB in disrupting drug trafficking activities within or outside Singapore". This, in our judgment, is a complete statement unto itself, not limited in time, that is capable of encapsulating the fact that the PP had indeed considered the effect of the appellant's information on the disruption of drug trafficking activities shortly after the time of his arrest in 2009. The appellant has not adduced any evidence to show why this was not the case. We therefore hold that the appellant has not made out a *prima facie* case of reasonable suspicion that the PP had not taken into account relevant considerations in arriving at his non-certification decision.

81 It is not necessary for us to consider how the PP subsequently dealt with the second, third and fourth sets of information. This is because the appellant's case on appeal is that the PP had failed to take into account the effect of the information, provided by the appellant to the CNB in his contemporaneous statements, on the disruption of drug trafficking activities in 2009. That

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information, as was common ground, is the same as the first set of information. The subsequent sets of information were all different from the first set of information, and thus, could not have been acted upon by the CNB in 2009.

Absence of precedent fact

82 We turn to the appellant's next ground. The precedent fact principle of review applies where the relevant legislation envisages that the exercise of an executive power depends upon the establishment of an objective precedent fact. If this principle of review applies, then it is for the court, if there be a challenge by way of judicial review, to decide whether the precedent requirement has been satisfied: see *R v Secretary of State for the Home Department, ex p Khawaja* [1984] AC 74 at 108–109, *per* Lord Scarman, cited in *Chng Suan Tze* (at [110]).

83 *Chng Suan Tze* in relevant part held as follows:

(a) The court's function in judicial review depends on whether a precedent fact is involved. Where there is none, the scope of review is limited to *Wednesbury* principles (see *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223); where, however, a precedent fact issue arises, the scope of review extends to deciding whether the evidence justifies the decision (at [108]).

(b) Whether the exercise of a particular executive power is subject to any precedent fact depends on the construction of the legislation that creates that power. An executive power may be subject to the requirement that it be exercised based on objective facts, but Parliament could also entrust all the relevant decisions to some other decision-

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maker. If this was the case, then the scope of judicial review would be limited to *Wednesbury* principles (at [108]).

(c) The President's discretion under s 8(1) and the Minister's discretion under s 10 of the Internal Security Act (Cap 143, 1985 Rev Ed) fell outside the precedent fact category, as s 8(1) provided that it was for the President to be satisfied that detention was necessary in order to prevent a detainee from acting prejudicially to national security, and s 10 gave the Minister the power to make revocation orders where the public interest so necessitated (at [117]).

(d) Apart from the construction of the words used, which stress that the relevant determinations of facts were reposed in the executive, Parliament could not have intended for the courts to decide on the evidence whether a detainee was *likely* to act in a manner prejudicial to Singapore's national security; the judicial process is unsuitable for reaching such decisions (at [118]).

84 In our judgment, the appellant's case on this point must fail as well. This is because the PP's role in respect of s 33B(2)(*b*) is to make a *determination*; that determination is not a matter of the exercise of executive discretion. Once the PP determines that an offender has provided substantive assistance that has disrupted drug trafficking activities within the meaning of s 33B(2)(*b*), then the PP is bound to issue the appropriate certificate: see *Prabagaran* at [65]. But what the PP has the discretion to decide is as to the sort of inquiries he should make and the sort of information he should consider in coming to that determination. In that sense, this is simply *not* a situation involving the exercise of an executive discretion that requires a precedent fact to be established in the first place.

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85 The crucial words of s 33B(2)(*b*) of the MDA are 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].

86 The words "in his determination" in s 33B(2)(*b*) are important. They demonstrate that Parliament had intended for the PP to be the decision-maker in answering the question of whether an offender has substantively assisted the CNB in disrupting drug-trafficking activities. This view is further confirmed by s 33B(4), which provides that the PP's determination under s 33B(2)(*b*) shall be at the sole discretion of the PP (at [56] above). As we have stated above (at [84]), that discretion pertains to the PP's decision as to the sorts of inquiries and information he would need in coming to his determination under s 33B(2)(*b*). Finally, we note, though the point was not directly taken by the appellant, that Parliament's decision to entrust the PP with discretion over such matters and with the power to make the determination in question does not violate Article 93 of the Singapore Constitution. This is because of the lack of manageable judicial standards in assessing whether the substantive assistance provided by an offender to the CNB can be said to have disrupted drug trafficking activities locally and/or overseas, as a result of which, that determination under s 33B(2)(*b*) would not constitute something that can properly be considered to be the exercise of a core judicial function to begin with.

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Conclusion

87 In the circumstances, we dismiss both CCA 50 and CA 98.

Sundaresh Menon Chief Justice	Andrew Phang Boon Leong Judge of Appeal	Judith Prakash Judge of Appeal

Chao Hick Tin Senior Judge	Belinda Ang Saw Ean Judge

Eugene Singarajah Thuraisingam, Suang Wijaya and Johannes Hadi (Eugene Thuraisingam LLP) for the appellant in both appeals;
Wong Woon Kwong and Tan Wee Hao (Attorney-General's Chambers) for the respondent in CCA 50 of 2017;
Francis Ng SC, Randeep Singh Koonar, Elaine Liew, Senthilkumaran Sabapathy and Andre Chong (Attorney-General's Chambers) for the respondent in CA 98 of 2018.

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