IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA 75

Criminal Appeal No 2 of 2019

Between

Roszaidi bin Osman

… *Appellant*

And

Public Prosecutor

… *Respondent*

In the matter of Criminal Case No 11 of 2018

Between

Public Prosecutor

And

Roszaidi bin Osman

JUDGMENT

[Criminal Law — Statutory offences — Misuse of Drugs Act]
[Criminal Law — Special exceptions — Diminished responsibility — Misuse of Drugs Act]

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Roszaidi bin Osman
v
Public Prosecutor

[2022] SGCA 75

Court of Appeal — Criminal Appeal No 2 of 2019
Sundaresh Menon CJ, Andrew Phang Boon Leong JCA, Judith Prakash JCA, Steven Chong JCA and Belinda Ang Saw Ean JCA
12 April 2022

1 December 2022 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the majority consisting of Judith Prakash JCA, Belinda Ang Saw Ean JCA and himself):

Introduction

1 The accused, Mr Roszaidi bin Osman ("Roszaidi"), was charged with trafficking in a controlled drug under s 5(1)(*a*) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the MDA") by handing two packets containing not less than 32.54g of diamorphine ("the Drugs") to his wife, Ms Azidah binte Zainal ("Azidah"). Roszaidi was convicted by a judge of the General Division of the High Court ("the Judge") and accordingly sentenced to death. His conviction was upheld by this court in *Mohammad Azli bin Mohammad Salleh v Public Prosecutor and another appeal and other matters* [2020] 1 SLR 1374 ("*Azli*"). In his appeal against his sentence, however, Roszaidi sought to have his capital sentence reduced to imprisonment for life under the alternative sentencing regime in s 33B(1)(*b*) of the MDA. When the matter was remitted to

the Judge, the Judge held that Roszaidi was not eligible for the alternative sentencing regime (see *Public Prosecutor v Roszaidi bin Osman* [2021] SGHC 22 ("the Remittal Judgment")). This is Roszaidi's appeal against the Judge's decision.

2 The alternative sentencing regime in s 33B(1)(*b*) of the MDA is available only if the two conjunctive requirements in s 33B(3)(*a*) and s 33B(3)(*b*) are met. In *Azli* (at [28]), we held that Roszaidi was a courier within the meaning of s 33B(3)(*a*) of the MDA, and this is now common ground between the parties. Accordingly, whether Roszaidi ought to be re-sentenced to life imprisonment turns on whether the requirements set out in s 33B(3)(*b*) of the MDA are satisfied. Under the three-limb test set out by this court in *Nagaenthran a/l K Dharmalingam v Public Prosecutor and another appeal* [2019] 2 SLR 216 ("*Nagaenthran*") at [21] ("the *Nagaenthran* test"), Roszaidi must establish the following cumulative requirements on a balance of probabilities in order to satisfy s 33B(3)(*b*):

(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) third, that the abnormality of mind substantially impaired his mental responsibility for his acts and omissions in relation to his offence ("the Third Limb").

Version No 2: 29 Dec 2022 (18:05 hrs)

3 It is not in dispute between the parties that the First Limb is satisfied as Roszaidi was suffering from major depressive disorder ("MDD") and substance use disorder ("SUD") at the material time. This was also common ground between the two psychiatric experts who examined Roszaidi and gave expert evidence in the proceedings, namely: the Prosecution's expert, Dr Bharat Saluja ("Dr Saluja"), and the Defence's expert, Dr Jacob Rajesh ("Dr Rajesh"). The issues in this appeal therefore pertain only to the Second and Third Limbs of the *Nagaenthran* test.

4 In our judgment, both the Second Limb and the Third Limb are satisfied in Roszaidi's case. The Second Limb is satisfied by Roszaidi's MDD and his SUD, which operated together in a "synergistic" manner at the time of the offence (a term used by Dr Rajesh, which is explained at [39] and [69] below). As for the Third Limb, we are satisfied that Roszaidi's mental responsibility for his acts and omissions in relation to his offence was indeed substantially impaired by the combination of his MDD and SUD at the material time. We set out the applicable legal principles and explain our reasons in full below. Where relevant, we also make reference to the dissenting judgment of Andrew Phang Boon Leong JCA and Steven Chong JCA ("the Minority Judgment").

Facts

5 We begin with the relevant facts pertaining to Roszaidi's abnormalities of mind, and the background to the present appeal. It will be observed that the facts set out below span a long period of time and include a relatively granular chronology of the relevant events in Roszaidi's life. These can be divided into four stages: (a) his drug consumption from a very young age; (b) his drug-related treatments and criminal records; (c) the events occurring after his release from prison; and (d) the circumstances surrounding his commission of the

Version No 2: 29 Dec 2022 (18:05 hrs)

present offence. Such a full chronology of the salient events is necessary, in our view, in order to appreciate the degree and impact of Roszaidi's abnormalities of mind, and the context within which the present offence must be viewed. For the avoidance of doubt, we sometimes refer to "diamorphine" and "methamphetamine" as "heroin" and "ice" respectively, these being their street names and/or how Roszaidi referred to them.

Roszaidi's drug consumption from a young age

6 Roszaidi's exposure to drugs began very early in his life. He started consuming cannabis at the young age of 10 with his friends, using the money given to him by his mother and grandmother for buying food, to buy cannabis instead.

7 The age at which Roszaidi began consuming other drugs is not consistently recorded in the experts' reports. Dr Saluja's first report dated 13 November 2015 ("Dr Saluja's 1st Report") recorded that Roszaidi began consuming heroin, erimin and dormicum from the age of 17. In contrast, Dr Rajesh's second report dated 27 February 2020 ("Dr Rajesh's 2nd Report") records that Roszaidi started using heroin when he was just 12 years old; his father was a regular heroin user, and he would smoke heroin taken from his father's stocks at home. He smoked heroin about three times a week with his friends. Dr Rajesh also records that Roszaidi started consuming erimin and dormicum tablets from the age of 12, and he consumed these once or twice a week. However, nothing turns on this difference because on *either* account, it is clear that Roszaidi was a heavy user of drugs from a young age.

Version No 2: 29 Dec 2022 (18:05 hrs)

Roszaidi's drug-related treatments and criminal records

8 A perusal of Roszaidi's treatment records at the Drug Rehabilitation Centre ("DRC") and his criminal records reveals that he was subsequently plagued by drug-related problems for most of his adult life. These criminal records were tendered by the Prosecution on 26 April 2022, upon our request and without objection from either party.

9 On 1 March 1990, when Roszaidi was around 18 years old, he was ordered to undergo treatment at the DRC for six months on account of his drug consumption. On 28 May 1990, he was placed under drug supervision for 24 months. On 26 June 1990, he was again ordered to undergo treatment at the DRC for six months. On 14 June 1991, when he was around 19 years old, he was again placed under drug supervision for 24 months. On 24 January 1992, when Roszaidi was around 20 years old, he was yet again ordered to undergo treatment at the DRC for six months. And on 16 January 1995, when Roszaidi was around 23 years old, he was once again placed under drug supervision for 24 months.

10 Just over a week later in the same year, on 24 January 1995, Roszaidi was convicted on a charge of unauthorised possession of a controlled drug and sentenced to six months' imprisonment. A few months later, on 24 July 1995, he was again ordered to undergo treatment at the DRC for six months.

11 On 16 July 1997, when Roszaidi was around 25 years old, he was placed under drug supervision for 24 months. On 4 October 1997, he was ordered to undergo treatment at the DRC for six months for his consumption of morphine. In 1999, when Roszaidi was around 27 years old, he started injecting heroin. This went on until 2006 (see [13] below).

Version No 2: 29 Dec 2022 (18:05 hrs)

12 On 23 February 2000, when Roszaidi was around 28 years old, he was convicted on another charge of unauthorised possession of a controlled drug (morphine), as well as a charge of smoking, self-administering or consuming morphine. For these two offences, he was sentenced to two years' imprisonment and five years and three weeks' imprisonment respectively, both to run concurrently. A further charge of consumption of cannabinol derivatives was taken into consideration.

13 On 28 July 2003, when Roszaidi was around 31 years old, he was placed under drug supervision for 24 months for his consumption of morphine. In 2006, when Roszaidi was around 34 years old, he stopped *injecting* heroin when he had to undergo an operation. He went to the Institute of Mental Health ("IMH")'s addiction department for the "Subutex" (or buprenorphine) programme. However, even then, he continued to *smoke* heroin regularly. The longest period for which Roszaidi had held a job until this point was three years from 2003 to 2006, when he was between the ages of 31 and 34. During this time, he worked as a Production Officer in Jurong Island.

14 On 2 February 2007, when Roszaidi was around 35 years old, he was convicted of trafficking in a controlled drug (buprenorphine) and sentenced to five years' imprisonment with five strokes of the cane. He was also convicted of smoking, self-administering or consuming buprenorphine and was sentenced to seven years and six months' imprisonment with six strokes of the cane. These two sentences ran concurrently. Two further charges were taken into consideration: one charge of trafficking in buprenorphine, and one charge of smoking, self-administering or consuming buprenorphine. It is likely that it was when Roszaidi was serving this imprisonment term that he became acquainted with one "Is Cangeh". In Roszaidi's third long statement dated 17 October 2015

Version No 2: 29 Dec 2022 (18:05 hrs)

("Roszaidi's 3rd Long Statement"), he stated that he "saw [Is Cangeh] in prison when [he] was serving [the] sentence for [his] Subutex trafficking offence".

15 After his release from prison in 2011, Dr Rajesh's 2nd Report records that Roszaidi "stayed away from drugs for 1 year until 2012, when he was arrested for possession of heroin". It is likely that this period of abstinence from drugs in fact ended before the end of 2011, given that – on 3 December 2011, when Roszaidi was around 39 years old – he was placed under drug supervision for 24 months for his consumption of buprenorphine. Some months later, on 24 August 2012 (when Roszaidi was around 40 years old), he was convicted on a charge of being in unauthorised possession of diamorphine and was sentenced to three years' imprisonment.

16 In 2014, while Roszaidi was in prison, his father passed away.

Events occurring after Roszaidi's release from prison in 2014

17 Sometime in 2014, when Roszaidi was around 42 years old, he was released from prison. Thereafter, he worked at a chemical company for a few months under the prison's Work Release Scheme. Sometime in 2015, Roszaidi changed jobs and began working at a flour company. While the date of this change in employment cannot be ascertained with precision based on the materials presently before us, it can be surmised that he began working at the flour company in November or December 2014 or in early 2015, given that he stated that he had worked for the company that had contracted him out to the flour company for "nearly 6 months", and he quit this job in May 2015.

18 It is not clear precisely when Roszaidi *began* consuming drugs again after his release from prison in 2014. Dr Saluja's 1st Report records that

Version No 2: 29 Dec 2022 (18:05 hrs)

Roszaidi's longest period of remaining drug-free in the community (meaning other than when he was in prison) was for about one and a half years prior to his last relapse. This would have brought him to about five months before his arrest in October 2015 for the offence with which we are presently concerned. Based on this, Roszaidi would have resumed consuming drugs in or around May 2015. Dr Rajesh's 2nd Report corroborates this to the extent that it records that Roszaidi's longest period of abstinence from drugs was "slightly more than a year after his release from prison in 2014", but differs from Dr Saluja's account in stating that Roszaidi *relapsed* into drug use around February 2015 when he resumed smoking heroin, and that it was the *escalation* of his drug use which took place in May 2015 following the passing of his mother and grandmother.

19 Notwithstanding this point of uncertainty, it can be taken that Roszaidi largely abstained from consuming drugs for a year or more immediately after his release from prison in 2014, but *either resumed or escalated* his drug consumption in May 2015. In May 2015, Roszaidi suffered two bereavements: his grandmother passed away, and his mother passed away two weeks later. Roszaidi's grandmother and mother had raised him, and he lived with them at the time of their passing. It is possible that he resumed his drug consumption earlier, in February 2015, a few months before they passed. However, in this connection, it bears highlighting that prior to the passing of Roszaidi's mother, it seems that she suffered from a period of serious illness. It was noted in Dr Rajesh's 2nd Report that Roszaidi's mother "used to have regular dialysis for her kidney issues prior to her passing away" from kidney failure.

20 Shortly after these bereavements, Roszaidi quit his job at the flour company. Both experts diagnosed that Roszaidi started to suffer from depression at or around this time. Indeed, it is uncontested that the bereavements

Version No 2: 29 Dec 2022 (18:05 hrs)

triggered his MDD. Dr Saluja's 1st Report noted that Roszaidi had been depressed since around April or May 2015 and that his depression was "triggered by" the death of his mother and his grandmother, while Dr Rajesh's 2nd Report opined that the "onset" of Roszaidi's MDD was in May 2015 after these bereavements. After Roszaidi suffered these bereavements, his rate of drug consumption (of heroin, methamphetamine and dormicum) escalated. Importantly, although only Dr Rajesh recorded this as an *escalation* (in his 2nd Report), the *fact* of this escalation in May 2015 is common ground between the experts in so far as Dr Saluja's 1st Report recorded that Roszaidi's drug consumption *resumed* in May 2015, which in turn would necessarily have entailed an even sharper escalation in his rate of consumption from a base of *no consumption*. Roszaidi also stated that he resumed smoking cannabis in May 2015 and would then smoke cannabis whenever he felt like it.

21 In July 2015, Roszaidi began delivering drugs for Is Cangeh. From that point until his arrest, he completed five or six jobs for Is Cangeh. He told Dr Saluja that he "never bought heroin" because he "never had money to buy for [him]self (for [the] last 5 months)". Instead, as he explained in his second long statement dated 16 October 2015 ("Roszaidi's 2nd Long Statement") and in his testimony at trial, he took various drugs from the consignments that he delivered for Is Cangeh for his personal consumption and to feed his drug addiction. This was corroborated by Dr Rajesh, both in his third report dated 31 August 2020 ("Dr Rajesh's 3rd Report") and in his testimony at the remittal hearing. It was not disputed that Roszaidi did not have the means to afford his escalating drug consumption after the onset of his MDD and that he obtained his supply (or at least a significant part thereof) from the drugs he was to deliver for Is Cangeh.

Version No 2: 29 Dec 2022 (18:05 hrs)

Circumstances surrounding the commission of the offence

22 On 6 October 2015, at or around noon, Roszaidi was shopping at the Jurong Point shopping mall ("Jurong Point") with Azidah and their daughter. He had brought with him a red pouch containing a packet of heroin and approximately 50g of ice, as well as utensils for smoking both. He went into a toilet to smoke some of the heroin for about half an hour while Azidah and their daughter were elsewhere in Jurong Point. While he was at Jurong Point, Roszaidi received a call from Is Cangeh who told him to stand by for a job later that day.

23 Roszaidi left Jurong Point with Azidah and their daughter at around 2.00pm. They then travelled to his younger brother's house, where they spent time with Roszaidi's younger brother and his family. At around 6.00pm, Roszaidi received a further call from Is Cangeh instructing him to go to Jurong West Avenue 2, locate a lorry with a "Tiong Nam" logo and collect the Drugs. Roszaidi then called his friend, one Mr Mohammad Azli bin Mohammad Salleh ("Azli"), to pick him up and drive him around for the job, as he had done on previous occasions.

24 Sometime before 7.00pm that evening, Azli picked Roszaidi up from his younger brother's house and Roszaidi told Azidah that he needed to "go out for a while". Roszaidi told Azli to drive to Jurong West Avenue 2. While inside the car with Azli, Roszaidi smoked heroin for the second time that day. On the way to their destination, one Mr Muhammad Mirwazy bin Adam ("Mirwazy") called Roszaidi asking for some methamphetamine. Roszaidi arranged to pick Mirwazy up from the Pioneer MRT station on the way to Jurong West Avenue 2. After picking Mirwazy up, Roszaidi and Mirwazy took turns to

Version No 2: 29 Dec 2022 (18:05 hrs)

smoke methamphetamine inside Azli's car. Roszaidi himself smoked "more than 10 puffs" of methamphetamine.

25 Sometime after 7.00pm, Roszaidi, Azli and Mirwazy arrived at Jurong West Avenue 2. While looking out for the lorry with the "Tiong Nam" logo, Roszaidi received a call from "someone", not Is Cangeh, instructing him to go to the Shell petrol station beside Jurong Point. The group did so, only for Roszaidi to later be told by Is Cangeh to return to their previous location. The group duly did so and, there, they found the lorry in question. After confirming with Is Cangeh that this indeed was the vehicle from which the drugs were to be collected, Roszaidi told Is Cangeh to tell the lorry driver to "drive forward a bit". The lorry then drove past Azli's car and Roszaidi told Azli to follow it. The group followed the lorry for some distance before both vehicles stopped. Roszaidi then alighted from Azli's car and collected two packets of diamorphine (*ie*, the Drugs) and three packets of methamphetamine in a red plastic bag from one Mr Aishamudin bin Jamaludin ("Aishamudin") and one Mr Suhaizam bin Khariri ("Suhaizam"), who were waiting in the cabin of the lorry. For the avoidance of doubt, as the offence that Roszaidi was convicted of only involves the two packets of diamorphine, any reference in this judgment to "the Drugs" should be understood to refer only to the diamorphine. While it is not clear precisely what time the collection of the Drugs took place, it seems this would have been around or shortly after 9.30pm.

26 After returning to the car and inspecting the consignment of drugs he had just collected, Roszaidi realised that the drugs seemed of a larger quantity than he expected, and he called Is Cangeh to ask why there was so much heroin and ice in the consignment ("the Phone Call"). Is Cangeh told him to hold on to the drugs for a while and to complete the delivery.

Version No 2: 29 Dec 2022 (18:05 hrs)

27 Roszaidi then directed Azli to drive off and they dropped Mirwazy off at the JCube shopping mall. After waiting for some time for a call from the person to whom he was meant to deliver the drug consignment, Roszaidi decided to call Azidah, who was still at Roszaidi's younger brother's house with their daughter. Roszaidi told Azidah that he needed her to "come down to take something" from him, without telling her that he was handing her drugs, and told her to bring along a plastic bag. Roszaidi then told Azli to drive to Jurong West Street 91, where Azidah would be waiting. On the way there, Roszaidi removed the Drugs and two of the packets of methamphetamine from the red plastic bag and placed them in a "Starmart" plastic bag. When Roszaidi and Azli reached Jurong West Street 91, Azidah was waiting along the road with a yellow paper bag. Roszaidi wound down the car window, took the yellow paper bag from Azidah, placed the "Starmart" plastic bag inside the yellow paper bag, and handed it back to her through the car window. This took place at around 10.22pm. This transfer of the Drugs to Azidah forms the *actus reus* of the drug trafficking offence of which Roszaidi was convicted.

28 Azidah then returned to Roszaidi's younger brother's house, while Roszaidi and Azli drove off. Shortly thereafter, Roszaidi, Azli and Azidah were arrested by Central Narcotics Bureau ("CNB") officers. At the time of his arrest, Roszaidi was 43 years old.

Procedural history

29 The procedural history of this matter has been outlined in broad strokes at the outset of our judgment. However, we set this out in further detail here because this has a bearing on how arguments were developed, and evidence was adduced, in these proceedings.

Version No 2: 29 Dec 2022 (18:05 hrs)

30 Roszaidi was convicted by the Judge of drug trafficking under s 5(1)(*a*) of the MDA on 21 January 2019. As the issue of whether Roszaidi qualified for the alternative sentencing regime in s 33B(1)(*b*) of the MDA was not raised at trial, the Judge sentenced him to the mandatory death penalty pursuant to s 33 of the MDA (see the Remittal Judgment at [1]; see also *Azli* at [25] and [34]).

31 On 25 January 2019, Roszaidi filed his Notice of Appeal against both conviction and sentence in Criminal Appeal No 2 of 2019 ("CCA 2/2019"). This appeal, together with Azli's appeal against his conviction and sentence, formed the subject of our judgment in *Azli*. Before the appeals were heard, on 26 August 2019, Roszaidi filed Criminal Motion No 17 of 2019 ("CM 17") seeking leave to rely on a further ground in his appeal against his sentence – namely, that he was eligible for the alternative sentencing regime under s 33B(1)(*b*) and should therefore be re-sentenced to life imprisonment.

32 After CM 17 was filed, but prior to the hearing of the appeals, we directed the parties to adduce additional evidence in the form of psychiatric reports (based only on the existing evidence and medical notes) addressing each of the three limbs of the *Nagaenthran* test (see *Azli* at [35]). We did so because the court considered at the time that the evidence that would have been relevant for the consideration of the issues under s 33B(3) – and in particular, the psychiatric evidence which would be crucial under s 33B(3)(*b*) – was "uneven to say the least" (see *Azli* at [25]). That observation as to the state of the evidence pertaining to the three limbs of the *Nagaenthran* test was not surprising simply because that issue had not been live at the trial. Dr Saluja, who was the only witness to give expert evidence on Roszaidi's mental state, had not been directed to this issue *at all*. In response to our directions that further evidence be adduced, Dr Saluja produced his second report dated 10 October 2019

Version No 2: 29 Dec 2022 (18:05 hrs)

("Dr Saluja's 2nd Report"), his third report dated 1 November 2019 ("Dr Saluja's 3rd Report") and his fourth report dated 19 November 2019 ("Dr Saluja's 4th Report"). Roszaidi was also given leave to tender an expert report in reply and this led to the production of Dr Rajesh's first report dated 16 December 2019 ("Dr Rajesh's 1st Report"). Dr Saluja then tendered his fifth report, dated 14 January 2020 ("Dr Saluja's 5th Report"), in reply to Dr Rajesh's 1st Report (see *Azli* at [36]–[38]).

33 It is pertinent to make some observations as to how and why we came to allow further evidence to be led. After all, it might arguably have been open to us to have held that, having failed to raise the issue at trial, it was too late in the day for Roszaidi to do so on appeal. Simply put, however, the irreversibility of the death penalty weighs heavily against such an arid and technical approach. We allowed further evidence to be led in order to determine whether the point was a hopeless contrivance being raised at a late stage in order to muddy the waters, or whether it warranted a closer look. In considering this issue, it has to be stated that it was not lost on us that the application was being raised late in the day. But we also specifically noted in *Azli* at [33] that we thought there might have been a "misjudgment or oversight" by Roszaidi's former counsel in not pursuing this aspect of the evidence at trial; and we were satisfied that Roszaidi's counsel on appeal had filed CM 17 "in good faith and not in abuse of process". It is critically important that these nuances not be forgotten or overlooked in the context of litigation that has run over the course of several years.

34 We heard the appeals on 17 February 2020. On 23 April 2020, we dismissed Roszaidi's appeal against conviction (see *Azli* at [11]–[20]). However, as regards Roszaidi's appeal against sentence, we observed that the

Version No 2: 29 Dec 2022 (18:05 hrs)

various psychiatric reports produced by Dr Saluja and Dr Rajesh revealed a disagreement between the two experts as to whether and how the Second and Third Limbs of the *Nagaenthran* test were or could be satisfied, for the purposes of the alternative sentencing regime in s 33B of the MDA. We concluded that it would not have been satisfactory to have decided this aspect of Roszaidi's appeal given the state of the evidence then before us. In short, we were satisfied that the matter warranted a closer look and we therefore allowed CM 17 and remitted the matter to the Judge for additional evidence to be taken pursuant to s 392(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC") on the following questions, which correspond to the three limbs of the *Nagaenthran* test (see *Azli* at [39]–[40]):

> (a) What precisely were the abnormalities of mind that Roszaidi was suffering from at the material time?
>
> (b) Do the relevant abnormalities arise from a condition of arrested or retarded development of mind, or any inherent causes, and/or are they induced by disease or injury?
>
> (c) Did the relevant abnormalities substantially impair Roszaidi's mental responsibility for his acts and omissions?

35 We also directed the Defence to obtain a further report from Dr Rajesh taking into account his interviews with Roszaidi (see *Azli* at [41]). This led to the production of Dr Rajesh's 2nd Report (dated 27 February 2020) and Dr Rajesh's 3rd Report (dated 31 August 2020). Both experts also gave oral evidence at the remittal hearing before the Judge on 12 October 2020.

36 We digress momentarily to observe that the Minority Judgment takes substantial issue with the fact that Roszaidi did not raise the issue of re-sentencing at trial or at least earlier in these proceedings. Indeed, this constitutes

Version No 2: 29 Dec 2022 (18:05 hrs)

an important framing device through which the minority suggests the present appeal should be examined, and which seems to contribute to its conclusion that Roszaidi generally failed to adduce sufficient evidence to avail himself of s 33B(3)(*b*) of the MDA (see the Minority Judgment at [239]–[244]). With respect, we cannot agree, for reasons that are canvassed more fully later in this judgment. Having disposed of CM 17 as we did, and having allowed the further evidence to be adduced, it would be inappropriate to then hold it against Roszaidi that the issue was not raised earlier. We therefore consider all of the evidence on the footing that it was appropriately raised and is not to be disregarded or even discounted for not having been raised at the trial. In our judgment, any other approach would improperly undermine the orders we made in disposing of CM 17 as we did.

37 Having regard to the further evidence adduced on the remitted questions, the Judge held on 1 February 2021 that Roszaidi did not satisfy the requirements in s 33B(3)(*b*) and consequently could not avail himself of the alternative sentencing regime in s 33B(1)(*b*) of the MDA.

Decision below

38 We now summarise the Judge's reasoning in the Remittal Judgment.

39 The Judge first noted that Dr Saluja and Dr Rajesh agreed that Roszaidi suffered from two recognised mental disorders at the time of his commission of the offence – MDD and SUD – and that it was undisputed that both disorders were "abnormalities of mind" for the purposes of the First Limb of the *Nagaenthran* test (see the Remittal Judgment at [7]). The Judge also noted that both experts agreed that Roszaidi's *MDD* was an abnormality of mind that arose from an inherent cause, and accordingly found that the Second Limb was

Version No 2: 29 Dec 2022 (18:05 hrs)

satisfied in so far as Roszaidi's MDD was concerned (see the Remittal Judgment at [8]). However, the Judge found that there was nothing to show that Roszaidi's *SUD* had arisen from any inherent cause, rejecting Dr Rajesh's opinion that Roszaidi's MDD had formed the "underlying substrate" for his SUD and that the two conditions had operated in a "synergistic" manner (which we refer to as Dr Rajesh's "Synergy Claim"). The Judge therefore concluded that Roszaidi's SUD did not satisfy the Second Limb (see the Remittal Judgment at [8]–[9]).

40 As only Roszaidi's MDD satisfied the First and Second Limbs of the *Nagaenthran* test, the question considered by the Judge at the Third Limb was whether Roszaidi's *MDD* had substantially impaired his mental responsibility for his acts and omissions in relation to his offence. The Judge answered this question in the negative. Here, as in his analysis of the Second Limb, the Judge preferred Dr Saluja's evidence and rejected Dr Rajesh's. The Judge took the view that Roszaidi had made a "reasoned choice" and "conscious decision" to continue trafficking for Is Cangeh because he believed that its risks were outweighed by its rewards. The Judge also held that Roszaidi's ability to execute the tasks that Is Cangeh required of him evidenced his ability to think in a "logical and organised manner". Accordingly, the Judge concluded that there was insufficient evidence to show that Roszaidi's MDD had substantially impaired his mental responsibility (see the Remittal Judgment at [12], [19] and [21]).

The parties' cases on appeal

41 In respect of the Second Limb, the parties disagree only on whether Roszaidi's *SUD* satisfies this limb. Roszaidi's case before the Judge was premised on Dr Rajesh's Synergy Claim: that his SUD and MDD operated together in a "synergistic" manner to exacerbate his overall mental state, and

Version No 2: 29 Dec 2022 (18:05 hrs)

that his MDD was the "underlying substrate" for his escalating drug abuse. In other words, given that both experts accepted that his MDD arose from an inherent cause, and given that his escalating drug abuse flowed from his MDD, Roszaidi argues that his SUD similarly arose from an inherent cause. In his oral submissions before us, counsel for Roszaidi, Mr Eugene Thuraisingam ("Mr Thuraisingam"), maintained the same position. Roszaidi's written submissions also emphasised that SUD is a recognised psychiatric condition, and that Roszaidi's substantial and long-term drug use wrought permanent damage on his mind such that the mental abnormalities attendant upon SUD arose from an inherent cause. This stands in contrast with the effects of temporary and self-induced drug intoxication, which Roszaidi acknowledges would clearly not satisfy the Second Limb. For similar reasons, Roszaidi argued in his written submissions that his SUD could also have been said to have been induced by disease or injury.

42 In response, the Prosecution relies on Dr Saluja's assessment that Roszaidi's SUD did not arise from any of the prescribed aetiologies under the Second Limb. The Prosecution challenges Dr Rajesh's Synergy Claim on the ground that Roszaidi's history of substance abuse began long before he started exhibiting symptoms of MDD, and that his SUD therefore arose prior to and independently from his MDD. The Prosecution further submits that Roszaidi's MDD was unlikely to have added to his inability to resist drug-seeking behaviour. However, the Deputy Public Prosecutor, Mr Hay Hung Chun ("Mr Hay"), acknowledged in his oral submissions that Dr Saluja had not identified a reason for his conclusion that Roszaidi's SUD allegedly failed to satisfy the Second Limb. We digress to observe that on this basis alone, Dr Saluja's evidence on this issue should be viewed with considerable anxiety.

Version No 2: 29 Dec 2022 (18:05 hrs)

43 In respect of the Third Limb, Roszaidi submits that the "significant" abnormality of mind that substantially impaired his mental responsibility was his reduced willpower to resist taking drugs, due largely to his SUD which in turn was exacerbated by his MDD. He argues that the combined effect of his MDD and SUD so substantially undermined his ability to resist drug-taking that it compelled him to continue trafficking in drugs to feed his own addiction. Roszaidi additionally maintains his submission below that his rational judgment was impaired at the time of the offence. He argues that such impairment is evidenced by: (a) his panic, fear and confusion at the material time; (b) his irrational decision to implicate his innocent wife by passing the Drugs to her while he tried to decide what to do next; and (c) the fact that he was under the influence of drugs at the time of the offence, which would have exacerbated his impaired judgment arising from his MDD and/or SUD.

44 The Prosecution's written submissions concentrate on the issue of whether Roszaidi's *rational judgment* was impaired at the material time. The Prosecution argues that Roszaidi retained higher-level cognitive abilities at the time of the offence, including the ability to plan, organise and coordinate things between different people. The Prosecution further argues that Roszaidi did not exhibit any significant change in behaviour compared to previous instances of offending (when there was no evidence that he had MDD), and indeed exercised rational judgment to act in a "consistently goal-oriented manner" before, during and after the commission of the offence. This submission was based on Dr Saluja's observation that Roszaidi had consumed and trafficked in drugs in the past before the onset of his MDD. The Prosecution therefore submits that Roszaidi's MDD did not contribute to his commission of the offence, and that at all material times, Roszaidi was "more than capable of assessing the risks and

Version No 2: 29 Dec 2022 (18:05 hrs)

rewards involved in the criminal act he intended to undertake, reason out his decision, and carry out his plan".

45 In his oral submissions, Mr Hay also argued that Roszaidi's *impulse control* was not sufficiently impaired so as to fulfil the Third Limb. Mr Hay stressed that: (a) Dr Saluja had diagnosed Roszaidi's MDD to be "on the lowest [end of the] spectrum"; (b) Roszaidi was able to direct operations in picking up the drugs on the day of the offence; and (c) Roszaidi had the presence of mind to hand over the Drugs to Azidah for safekeeping because he thought it was dangerous for him to carry them around. Mr Hay submitted that these were indicators that Roszaidi's MDD was "not affecting him such that it could be said that it substantially impaired his responsibilities for his act".

Issues to be determined

46 In these circumstances, two broad issues arise for our determination in this appeal:

(a) First, whether the Second Limb of the *Nagaenthran* test is satisfied by Roszaidi's MDD *and* his SUD operating together.

(b) Second, whether the relevant abnormalities of mind substantially impaired Roszaidi's mental responsibility for his acts and omissions in relation to his offence, such that the Third Limb of the *Nagaenthran* test is satisfied.

47 Before we turn to address each of these issues, we first set out our general observations regarding the expert evidence adduced by Dr Saluja and Dr Rajesh. This expert evidence, as will be seen, assumed considerable importance in the present case.

Version No 2: 29 Dec 2022 (18:05 hrs)

General observations on the expert evidence

48 Both the Judge's decision and the Prosecution's case are premised on a reliance on Dr Saluja's views and a rejection of those of Dr Rajesh. The Minority Judgment also makes much of Dr Saluja's 1st Report, which it regards as "crucial" (see the Minority Judgment at [205] and [220]) and, indeed, "the *key*" report [emphasis in original] (see the Minority Judgment at [227]). In our judgment, this fails to consider the serious shortcomings of Dr Saluja's expert evidence and, consequently, its limited utility in assisting this court with answering the questions before us in this appeal.

49 We begin with Dr Saluja's 1st Report. It is important to bear in mind precisely *when* and *for what purpose* this report was prepared, having regard to the relevant procedural history, which we have recounted above. Dr Saluja's 1st Report, dated 13 November 2015, was prepared with reference to (among other sources of information) his interviews with Roszaidi on 26 and 27 October 2015 and 11 November 2015, shortly after Roszaidi's arrest on 6 October 2015, as well as other contemporaneous medical notes and reports. Dr Saluja's original terms of reference are not in the record, but based on the medical opinion and recommendations he gave in this report, Dr Saluja's initial assessment appears to have been focused on addressing three points: *diagnosing* Roszaidi with SUD and MDD; ascertaining that Roszaidi was *not of unsound mind* and that his *depressive symptoms* were not a contributory factor to the alleged offence; and determining that Roszaidi was *fit to plead*.

50 Dr Saluja's 1st Report was prepared for the purposes of Roszaidi's trial before the Judge, long before the issue of re-sentencing under s 33B(1)(*b*) of the MDA was raised in CM 17. At the time this report was prepared, the question of whether Roszaidi satisfied the conditions for the alternative sentencing

Version No 2: 29 Dec 2022 (18:05 hrs)

regime was *not yet in issue* (see also [30]–[31] above), and it was directed at addressing a different set of issues from those relevant to s 33B(3)(*b*) of the MDA. Consequently, Dr Saluja's 1st Report would not, and indeed could not, have considered and addressed the specific issues that were relevant to the remittal and, in particular, the crucial questions before us of whether Roszaidi's mental responsibility was substantially impaired by his abnormalities of mind arising from the prescribed aetiologies. Here, a distinction therefore needs to be drawn between the *factual reliability* of Dr Saluja's 1st Report, in terms of recording the background facts that were told to him by Roszaidi in the aftermath of his arrest, and the *analytical weight* that should be accorded to its *conclusions*. The fact that Dr Saluja's 1st Report was prepared with reference to his contemporaneous interviews with Roszaidi shortly after his arrest might mean that it recorded more candid responses from Roszaidi regarding matters such as his drug consumption history. But this does not mean that Dr Saluja's *assessment of whether Roszaidi's mental responsibility was substantially impaired at the material time* should *also* be accorded greater weight on this ground (as the Minority Judgment appears to do at, for example, [220]–[221], [226]–[227] and [268]–[269]). In our judgment, no reliance can or should be placed on the fact that Dr Saluja examined Roszaidi shortly after his arrest in 2015 for the purposes of answering this latter question. This fact is simply not relevant to that inquiry, especially because Dr Saluja was *not at that time considering or addressing these questions* to begin with.

51 Even more troubling is the fact that, even though Dr Saluja was given an opportunity to address the three limbs of the *Nagaenthran* test in his 2nd to 5th Reports, which were prepared after we specifically directed the parties to address those issues in *Azli*, he added little of value to his initial analysis for the purposes of s 33B of the MDA, and essentially maintained his earlier overall

Version No 2: 29 Dec 2022 (18:05 hrs)

assessment that Roszaidi's mental condition did not contribute to his offence. These subsequent reports were each only a page long and were utterly lacking in rigour and substantiation. We illustrate this by setting out the relevant excerpts of Dr Saluja's 2nd and 3rd Reports, where he made no demonstrable attempt to properly consider the specific questions posed to him or to substantiate the reasons for his opinions:

> Dr Saluja's 2nd Report
>
> …
>
> This is in reference to your instructions regarding the above named person [*ie*, Roszaidi] asking to provide a supplementary report addressing the following:
>
> 1. Whether his 'mental and behavioural disorder due to dependence of multiple substances' amounted to abnormality of mind:
>
> [A)] Mental and Behavioural Disorder due to dependence of multiple substances is a classifiable mental disorder under the category F10-F19 Mental and behavioural disorders due to psychoactive substance use as per ICD-10 Classification of Mental and Behavioural Disorders.
>
> 2. If so, whether this abnormality of mind (1) arose from a condition of arrested or retarded development of mind; (2) arose from any inherent causes; or (3) was induced by disease or injury:
>
> [A)] *No. Mental and Behavioural Disorder due to dependence of multiple substances did not arise from a condition of arrested or retarded development of mind or from any inherent cause or by disease or injury.*
>
> 3. If so, whether this abnormality of mind substantially impaired his mental responsibility for his acts and omissions in relation to his offence in the present case
>
> [A)] *Not applicable as answer to Question 2 was No.*

Version No 2: 29 Dec 2022 (18:05 hrs)

> Dr Saluja's 3rd Report
>
> …
>
> 1. Whether the applicant's [MDD] or a combination of his [MDD] and substance dependence amounted to an abnormality of mind, and if [so], whether such abnormality of mind (i) arose from a condition of arrested or retarded development of mind; (ii) arose from an inherent cause; or (iii) was induced by disease or injury
>
> A) As stated in my previous reports, Ro[s]zaidi has diagnoses of Depressive Disorder and mental and behavioural disorder due to dependence of multiple substances. It amounted to abnormality of mind. As stated in my first psychiatry report, Ro[s]zaidi's depressive disorder was precipitated by loss of loved ones and in addition, he has a genetic predisposition for mood disorder with a family history of depressive disorder in his mother and schizophrenia in his younger sister and maternal cousin. *His mental disorder arose from an inherent cause. His abnormality of mind did not arise from arrested or retarded development of mind. It was not induced by disease or injury.*
>
> 2. In any case, whether the applicant's [MDD] or substance dependence, or a combination of the two, substantially impaired his mental responsibility for his acts and omissions in relation to the offence in the present case.
>
> A) *No, his mental disorders did not substantially impair his mental responsibility for his acts and omissions in relation to the offence in the present case.*
>
> [emphasis in original omitted; emphasis added in italics]

52 Dr Saluja's 4th and 5th Reports suffered from similar as well as other shortcomings, which we deal with in more detail at [142] below. We also note that no further reports were produced by Dr Saluja for the specific purposes of the remittal hearing.

53 Placing weight on Dr Saluja's reports would therefore be, with respect, problematic. Dr Saluja began in his 1st Report by addressing his mind to the distinct issues of unsoundness of mind and fitness to plead; he had little to say

Version No 2: 29 Dec 2022 (18:05 hrs)

regarding the new issues that arose when s 33B of the MDA was put in issue by CM 17, and which are central to the present appeal; and he seemed to have carried the conclusions he reached in relation to his earlier analysis over to the later inquiry he was required to undertake following CM 17, even though the relevant questions and thresholds were *fundamentally different*. There is the additional difficulty that all Dr Saluja did in these reports was to present his conclusions. An expert report, whether tendered for the Prosecution or for the Defence, that states conclusions without reasons, and which cannot be probed or evaluated, is simply of no value *as expert evidence*: see *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 at [85] and *Public Prosecutor v Chia Kee Chen and another appeal* [2018] 2 SLR 249 at [118]–[119]. This renders it untenable to rely on any of Dr Saluja's reports for the purposes of answering the questions before us in this appeal.

54 Dr Rajesh's reports, in contrast, were *all* directed at addressing the limbs of the *Nagaenthran* test: Dr Rajesh's 1st Report was produced in response to our directions before hearing the appeals in *Azli*, and Dr Rajesh's 2nd and 3rd Reports were produced for the purpose of the remittal hearing, to address the issues that we remitted to the Judge (see [32]–[35] above). Moreover, although Dr Rajesh's 1st Report was prepared primarily based on Dr Saluja's 1st to 4th Reports and testimony at trial, Dr Rajesh's 2nd Report was also prepared with reference to four interviews with Roszaidi that he conducted in October and November 2019 and the statements given by Roszaidi to the police after his arrest. Thereafter, Dr Rajesh's 3rd Report was prepared with reference to further interviews he conducted with Roszaidi, his wife and his brother in August 2020. Although these interviews took place four years after the commission of the offence, they had the advantage of being *targeted at addressing the remitted questions*. In the circumstances, it seems clear to us that Dr Rajesh's analysis of

Version No 2: 29 Dec 2022 (18:05 hrs)

the facts presents a more complete, more targeted and, ultimately, more relevant view than Dr Saluja's.

55 It must also be borne in mind that *because* Dr Rajesh first personally examined Roszaidi only in October 2019, he could not possibly have made any firm findings on, or any concrete diagnosis of, Roszaidi's condition at the material time in 2015. Dr Rajesh's reports could only consider, as they did, whether what he knew about Roszaidi's state at the material times was consistent with the themes and findings identified in the literature. Dr Rajesh's approach in this regard thus cannot be held against either him or Roszaidi. On the other hand, in a sense, Dr Rajesh had *more* sources of information about Roszaidi to rely on in preparing his reports than Dr Saluja did. He had the benefit of the information recorded in Dr Saluja's 1st Report and the other contemporaneous evidence, such as the hospital discharge summaries and case notes for Roszaidi, as well as the statements given by Roszaidi after his arrest (for the purposes of Dr Rajesh's 2nd Report). These were then *supplemented* by Dr Rajesh's own interviews with Roszaidi, his wife and his brother in 2019 and 2020.

56 With that in mind, we turn to address the first issue outlined at [46(a)] above: whether the Second Limb of the *Nagaenthran* test is satisfied in the present case.

The Second Limb of the *Nagaenthran* test

The applicable principles

57 At the Second Limb of the *Nagaenthran* test, the question that arises for the court's determination is whether the relevant abnormality of mind: (a) arose from a condition of arrested or retarded development of mind; (b) arose from

Version No 2: 29 Dec 2022 (18:05 hrs)

any inherent causes; or (c) was induced by disease or injury. This is largely a matter for expert evidence (see *Nagaenthran* at [32]). The onus lies on the accused person to identify which of the prescribed aetiologies is applicable in his case (see *Iskandar bin Rahmat v Public Prosecutor and other matters* [2017] 1 SLR 505 ("*Iskandar*") at [89]). Of these three aetiologies, the one principally in issue is the second – whether the abnormality of mind in question arose from an *inherent cause*.

58 It has been held that these prescribed aetiologies ought to be read restrictively rather than extensively (see *Nagaenthran* at [31]). However, to understand precisely what such an approach entails, it is useful to consider what kinds of abnormalities of mind would *not* be regarded as falling within the scope of these aetiologies. In *Nagaenthran* at [31], we held that Parliament had not intended for s 33B(3)(*b*) of the MDA to apply to accused persons suffering from "*transient or even self-induced illnesses* that have no firm basis in an *established psychiatric condition*" [emphasis added] that arose from one or more of these three aetiologies. In this regard, we noted that in introducing s 33B(3)(*b*), the Minister had stated that it was "not [their] intention to extend this to those who do not suffer from a recognised and proven psychiatric condition" (*Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89 ("14 November 2012 Debates") at p 1236 (K Shanmugam, Minister for Foreign Affairs and Minister for Law ("Mr Shanmugam"))).

59 The background to the introduction of s 2(1) of the Homicide Act 1957 (c 11) (UK) is also instructive, as the wording of the prescribed aetiologies in that provision (in the context of homicide) is identical to that in s 33B(3)(*b*) of the MDA. As we observed in *Iskandar* at [85] and [87] (and *Nagaenthran* at [30]), at the Second Reading of the relevant Bill, the English Home Secretary

Version No 2: 29 Dec 2022 (18:05 hrs)

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* (see House of Commons, *Parliamentary Debates* (15 November 1956) vol 560). In the same vein, as we noted in *Iskandar* at [87] and *Nagaenthran* at [30], the purpose behind the reference to these specific aetiologies in s 304A of the Criminal Code (Qld) (again in the context of homicide) was described by the Queensland Court of Criminal Appeal in *R v Whitworth* [1989] 1 Qd R 437 ("*R v Whitworth*") at 451–452 in the following terms (*per* Derrington J):

> 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, jealously, 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***. … At the same time, the tenets of construction which have their basis in reasonableness, common sense and justice would lean against a construction which would deny the defence to a person who kills while in the prescribed state of abnormality of mind ***caused by the effect of stresses which he cannot tolerate through no fault of his own***. … Consequently there is the need to approach the construction of that part of the section relating to causes with a view to determine whether the words are intended to accommodate this class of case while excluding the former class of cases referred to above where, it would seem clear, the defence does not run.
>
> [emphasis added in italics and bold italics]

60 In our judgment, what emerges from this is that the primary concern underlying the restrictive reading of the aetiologies prescribed in the Second

Version No 2: 29 Dec 2022 (18:05 hrs)

Limb is the need to limit the application of s 33B(3)(*b*) of the MDA to accused persons suffering from *recognised and established psychiatric conditions*, and to *exclude abnormalities of the mind that arise from other sources* such as heightened states of emotion or intoxication *that are not beyond the accused person's control*. Indeed, as reflected in the unanimous view of this court in *Iskandar* at [89], the wording of the prescribed aetiologies appears "wide enough to include most recognised medical conditions".

Whether the Second Limb is satisfied by Roszaidi's MDD and SUD operating together

61 With these principles in mind, we turn to consider whether the Second Limb is satisfied on the facts of the present case. Given that it is undisputed that Roszaidi's MDD arose from an inherent cause, what remains to be decided is whether the Second Limb is satisfied by Roszaidi's MDD *and* his SUD operating together. In the circumstances of the present case, this turns on whether Dr Rajesh's Synergy Claim – that Roszaidi's MDD and SUD operated in a "synergistic" manner – ought to be accepted, such that they both arose from the same inherent cause.

62 The Judge preferred Dr Saluja's evidence in this regard and rejected Dr Rajesh's Synergy Claim. The Judge found that there was "no evidence" that Roszaidi's MDD and SUD had operated in such a synergistic manner or that the existence of Roszaidi's SUD was contingent on his MDD, noting that Roszaidi had a "long-standing history of dependence on multiple substances" but only started exhibiting symptoms of MDD around seven months before his arrest (see the Remittal Judgment at [8]–[9]). We observe that this seems to misunderstand Roszaidi's primary argument. His case is not that his SUD was contingent on or brought about by his MDD. On the contrary, his case is that

Version No 2: 29 Dec 2022 (18:05 hrs)

when his MDD set in, it significantly *exacerbated* the gravity and effects of his SUD in a way that made it wholly artificial and indeed impossible to segregate the two.

63 It is well established that "[a]n appellate court will be slow to criticise without good reason a trial court's findings on expert evidence". However, if the appellate court "entertains doubts as to whether the evidence has been satisfactorily sifted or assessed by the trial court", it may "embark on its own critical evaluation of the evidence focussing on obvious errors of fact and/or deficiencies in the reasoning process". It bears emphasis that evidence "must invariably be sifted, weighed and evaluated in the context of the factual matrix and in particular, the objective facts" (*Sakthivel Punithavathi v Public Prosecutor* [2007] 2 SLR(R) 983 at [74] and [76]). In our view, the Judge erred in holding that the Second Limb was not satisfied, as Dr Rajesh's Synergy Claim is borne out on the evidence before us. In other words, Roszaidi's MDD formed the "underlying substrate" for exacerbating his SUD and the two recognised psychiatric conditions operated in a "synergistic" manner to affect Roszaidi's mental state. We elaborate on this view with reference to the evidence of each expert on the severity of Roszaidi's MDD and its impact on his SUD, as well as with reference to the objective facts.

Dr Saluja's evidence

64 With regard to the *severity* of Roszaidi's MDD, Dr Saluja opined that Roszaidi's MDD was mild, and that the symptoms of a mild depressive episode were "not significant enough to … significantly disturb one's functioning". We are unable to accept this assessment.

Version No 2: 29 Dec 2022 (18:05 hrs)

65 We note at the outset that Dr Saluja's opinion on this point was raised for the first time during his *examination-in-chief at the remittal hearing*. As explained at [51] above, Dr Saluja was given ample opportunity to address this point fully in his 2nd to 5th Reports, which were all prepared after we specifically directed the parties to adduce additional psychiatric evidence addressing the three limbs of the *Nagaenthran* test. However, notwithstanding this, these further reports by Dr Saluja were of limited utility for the reasons set out at [51]–[53] above, and in none of them did he venture to state – much less substantiate – his assessment of the severity of Roszaidi's MDD. Dr Saluja also did not produce any further reports for the specific purposes of the remittal hearing.

66 More fundamentally, the problem with Dr Saluja's assessment is that it was expressly based on the fact that Roszaidi only exhibited four to five symptoms in the diagnostic manual *International Statistical Classification of Diseases and Related Health Problems: 10th revision* (World Health Organization, 5th Ed, 2016) ("ICD-10"), and at least four symptoms were needed for a patient to qualify for a depressive episode. Based on the *general* qualifiers for the diagnosis of MDD, Dr Saluja then concluded that Roszaidi's depressive symptoms were not a contributory factor to the alleged offence because "even in the mild depressive episode category, the symptoms are not significant enough to … significantly disturb one's functioning", and "generally, the effects of mild depressive symptoms are mild, when people are able to function to some extent".

67 Turning to the *impact* of Roszaidi's MDD on his SUD. Dr Saluja opined that Roszaidi's MDD did not affect his will to resist the urge to consume and traffic drugs; only his SUD did. In his words, Roszaidi's "[i]nability to resist

Version No 2: 29 Dec 2022 (18:05 hrs)

using drugs [was] a part of [his] drug dependence, not part of [a] depressive episode". On this basis, Dr Saluja took the position that Roszaidi's MDD *did not even contribute* to his ability or inability to resist drug-seeking behaviour. In coming to this view, Dr Saluja failed to take into account the *interaction* between the two disorders – an omission that is particularly glaring in view of Dr Saluja's *own* observations. Dr Saluja's clinical notes dated 26 October 2015 ("Dr Saluja's Clinical Notes") recorded that Roszaidi was depressed after his loved ones passed away in May 2015 and so he "just took [drugs] whenever [he] felt low". Similarly, Dr Saluja's 1st Report recorded that Roszaidi had been "feeling stressed and depressed" for the past seven months since his bereavements, and that he subsequently lost his job which "added to his financial problems". *Against this background, he consumed dormicum, heroin and ice to "reduce his stress"*. This, in essence, was part of the Synergy Claim, which – though reflected in Dr Saluja's Clinical Notes and 1st Report – was nonetheless rejected by him without a clear or sensible explanation. Dr Saluja's stated position that Roszaidi's MDD did not affect his ability to resist drug-seeking behaviour is also factually contradicted by the *escalation* in Roszaidi's drug consumption around and after the onset of his MDD in May 2015 (see [20] above). Indeed, the inference that Roszaidi's MDD went hand-in-hand with his SUD arises even more strongly from Dr Saluja's own account that Roszaidi's drug consumption *resumed* in or around May 2015 after a relatively long period of remaining drug-free in the community, instead of just *escalating* at that time from an already existing level of consumption (see [18] above). The synergistic operation of Roszaidi's MDD and SUD is thus reflected not only in Dr Rajesh's expert evidence (which we come to next), but also indirectly in *Dr Saluja's own evidence*, as well as in the objective facts which are – so far as material – not disputed by either expert.

Version No 2: 29 Dec 2022 (18:05 hrs)

68 Indeed, the only part of Dr Saluja's analysis of the severity and impact of Roszaidi's MDD which focused specifically on *Roszaidi* was his reasoning that Roszaidi "ha[d] been in prison several times for consumption and trafficking in the past" but that there was no evidence to suggest that he had had depressive episodes at that earlier time. The Judge adopted similar reasoning at [9] of the Remittal Judgment. However, with respect, this is a *non sequitur*. This reasoning rests on the false and baseless assumption that, in order for Roszaidi's MDD – which, we reiterate, surfaced *in May 2015* – to have been relevant to his SUD in so far as we are concerned with the *present offence*, *all of his previous drug-related offences* must also have been explainable by reference to earlier depressive episodes. This is self-evidently wrong. Even if Roszaidi had been consuming drugs for many years before the onset of his MDD, this says nothing about whether the latter *aggravated* his drug dependence or inability to resist drug-seeking behaviour following the two bereavements in May 2015. Dr Saluja's evidence on this point is thus premised on general historical observations that fail to consider and address the factual reality of the specific case presently before us, and is also severely compromised by his failure to acknowledge and, therefore, to address the synergistic effect of Roszaidi's MDD and SUD in combination. For similar reasons, we also regard the Judge's reasons for rejecting the Synergy Claim as unpersuasive on their face.

Dr Rajesh's evidence

69 We turn to Dr Rajesh's evidence. Dr Rajesh did not expressly comment on the severity of Roszaidi's MDD, and was not asked to comment on the "quantitative" analysis adopted by Dr Saluja in assessing the severity of Roszaidi's MDD. However, he did not downplay the severity or impact of the MDD, either on Roszaidi's mental state generally or on Roszaidi's SUD. Dr Rajesh took the view that Roszaidi's MDD *aggravated his SUD* and that, as

Version No 2: 29 Dec 2022 (18:05 hrs)

a result, the two conditions operated in a "synergistic" manner making it impossible and unrealistic to consider each on its own (in other words, the Synergy Claim). In Dr Rajesh's 1st and 2nd Reports, he opined that Roszaidi's "multiple substance abuse [was] exacerbated in the context of his underlying [MDD] in the few months prior to the offence", noting that it was common for depressed people to consume drugs as a form of self-medication for their depressive symptoms – a phenomenon described in the psychiatric scientific literature as a "dual diagnosis". This was elaborated on in Dr Rajesh's examination-in-chief at the remittal hearing, where he stated that Roszaidi's MDD was "the underlying substrate for his escalating drug abuse" and he specifically noted that Roszaidi was using drugs on a daily basis to cope with his depression. His MDD and SUD thus played a "synergistic role" and "contributed to each other at the material time". We digress to note that this was precisely in line with Dr Saluja's evidence that Roszaidi would take drugs "whenever [he] felt low" after the bereavements.

70 Dr Rajesh pointed to clinical literature to substantiate his opinions on the relationship between MDD and SUD. Whereas Dr Saluja simply asserted that *only* Roszaidi's SUD (and not his MDD) contributed to his inability to resist drug-seeking behaviour (see [67] above), Dr Rajesh referred to a scientific paper published in *JAMA Psychiatry* (a peer-reviewed medical journal published by the American Medical Association) in January 2016 which had found "[s]ignificant associations" between MDD and 12-month drug use disorders (Bridget F Grant, *et al*, "Epidemiology of *DSM-5* Drug Use Disorder: Results From the National Epidemiologic Survey on Alcohol and Related Conditions-III" (2016) 73(1) JAMA Psychiatry 39).

Version No 2: 29 Dec 2022 (18:05 hrs)

71 Critically, Dr Rajesh's Synergy Claim is borne out by the objective facts. Roszaidi had largely abstained from drugs for over a year after his release from prison in 2014, but it is common ground between the experts that Roszaidi's drug consumption either *recommenced* or *escalated* after he suffered the two bereavements in May 2015 that triggered his MDD (see [18]–[20] above). Against this factual background, as well as the interviews Dr Rajesh had conducted with Roszaidi (see [54] above), Dr Rajesh's 2nd Report noted that Roszaidi began "consuming drugs excessively as a means of coping with his symptoms of depression" at the time. Similarly, Dr Rajesh's 3rd Report recorded that Roszaidi's consumption of drugs increased following these two bereavements, that "ice and heroin improved his mood and gave him energy", and that "the combination of cannabis and heroin used to make him feel good and made him forget the pain of the past". During his cross-examination, Dr Rajesh elaborated on his point regarding drug consumption as a form of self-medication for symptoms of depression, in relation to Roszaidi specifically, by stating that "the drugs were being used to … cope with these symptoms of depression because he never sought treatment from a psychiatrist or a psychologist". Dr Rajesh's Synergy Claim thus not only coheres with the general scientific literature, but is also grounded in the specific factual circumstances of Roszaidi's case. This reinforces our view (stated at [55] above) that Dr Rajesh did in fact consider – as far as was possible, given that he was only able to examine Roszaidi years after the event – the *specific* circumstances of Roszaidi's case in drawing his conclusions on how the *general* themes and findings derived from the scientific literature would apply to Roszaidi.

Further observations

72 We note at this juncture that the *degree* of escalation in Roszaidi's drug consumption, following the two bereavements and the onset of his MDD in May

Version No 2: 29 Dec 2022 (18:05 hrs)

2015, is not in evidence. This was acknowledged by Mr Thuraisingam at the hearing of the appeal. Nevertheless, we do not think that this weighs against Roszaidi in the present case.

73 It is important to highlight that Roszaidi's rate of drug consumption was *not a live issue at trial*. Indeed, as we have noted at [30]–[31] above, the question of whether Roszaidi satisfied the conditions for re-sentencing under s 33B(1)(*b*) of the MDA was not raised at trial and was only put in issue by and after the disposal of CM 17. In the remitted proceedings below, both the Judge and the parties appear to have proceeded on the basis that the scope of the remittal would effectively be confined to the *psychiatric evidence*. In remitting the matter to the Judge, we noted that "the evidence that would have been relevant for the consideration of the issues under s 33B(3) – particularly, the psychiatric evidence which would be crucial under s 33B(3)(*b*) – was uneven", and that the case would be remitted to the Judge "for further psychiatric evidence to be taken" (*Azli* at [25]; see also *Azli* at [32], stating that there was "good reason to take additional psychiatric evidence" on Roszaidi's mental state at the time of the offence). Although, at [40] of *Azli*, we referred more broadly to the questions being remitted to the Judge "for additional evidence to be taken pursuant to s 392(1) of the CPC", the preceding discussion had centred around the psychiatric reports produced by Dr Saluja and Dr Rajesh leading up to the hearing of that appeal. When submissions were later made to the Judge on the preliminary issue of the scope of the remitted inquiry, Mr Thuraisingam submitted on Roszaidi's behalf that the Judge should permit evidence to be taken not only from Dr Saluja and Dr Rajesh, but also from Roszaidi himself, and his wife and younger brother. However, the Judge directed that Dr Saluja and Dr Rajesh's evidence would be heard first, and the court "may give further directions" after hearing that expert evidence. In the event, no such directions

Version No 2: 29 Dec 2022 (18:05 hrs)

were given or sought on the calling of these lay witnesses, including Roszaidi himself.

74 In these circumstances, it seems to us that Roszaidi did not have the opportunity to give direct evidence on his rate of drug consumption when this became a live issue. It appears that Roszaidi initially took the position that he did wish to give evidence, even though this point was not pursued further after the Judge's initial direction that the expert evidence would be heard first with further directions to follow. We are therefore bound to consider the issue of Roszaidi's escalating drug consumption on the basis of the expert evidence before us, and we do not hold against Roszaidi the absence of his direct evidence on the *degree* of escalation in his drug consumption following the bereavements. We add that any doubt when assessing the evidence as a whole in this context should in fairness be resolved in Roszaidi's favour, because he had initially expressed a desire, but ultimately had no opportunity, to give evidence that might have turned out to be relevant to the remitted issues.

75 In this regard, we should highlight some important points of difference between our views and those of the minority. From [233]–[241] of the Minority Judgment, it will be seen that the minority essentially takes issue with Roszaidi's evidential case on three points. First, that Roszaidi has not adduced evidence of the *degree* of escalation of his drug use following the onset of his MDD in May 2015. Second, that, even if he had adduced evidence to prove the escalation in his drug use following the onset of his MDD, he has failed to establish a causal link between such escalation and his MDD. Third, that the dearth of evidence as to these issues is largely a consequence of the manner and stage at which Roszaidi sought to rely on the alternative sentencing regime under s 33B(3)(*b*) of the MDA.

Version No 2: 29 Dec 2022 (18:05 hrs)

76 With respect, we do not agree with any of these objections for three reasons.

(a) First, as stated above, although Mr Thuraisingam did not pursue Roszaidi's intention to testify at the remittal hearing after Dr Saluja and Dr Rajesh had given their evidence, Roszaidi did initially take the position that he wished to give evidence. We do not think it appropriate – particularly in a capital case – to hold against Roszaidi his counsel's and the Judge's failure to return to the issue.

(b) Second, *in any event*, we do not agree with the minority's view that there is insufficient evidence to establish Roszaidi's escalated drug use, the degree of such escalation and that this was connected to the onset of his MDD. On the one hand, based on Dr Saluja's 1st Report (on which the minority relies substantially in arriving at its conclusions), Roszaidi was *drug-free* for around a year and a half before he started consuming drugs again in May 2015 (see [18] above). That he went from *no consumption* back to consumption after remaining off drugs for this relatively substantial period is *patently evidence of escalation*. An increase from a nil to positive position is, quite simply, escalation. On the other hand, if we instead rely on Dr Rajesh's 2nd Report, we see that Roszaidi's consumption *increased* in May 2015 after the bereavements even though his consumption started earlier in February 2015. So this, too, is evidence of escalation. At [236]–[237] of the Minority Judgment, the minority seems to require Roszaidi to establish that his consumption *restarted* only after the bereavements. However, with respect, we cannot agree. Roszaidi's task is to prove that his drug use *escalated* after the onset of his MDD such that it can be said that both his SUD and his MDD arose from the same inherent cause (meaning the Synergy Claim)

Version No 2: 29 Dec 2022 (18:05 hrs)

so as to satisfy the Second Limb of the *Nagaenthran* test (see [62] above). He does not need to establish that his drug use only *restarted* after the bereavements.

(c) Third, Roszaidi need only prove on a balance of probabilities that the *escalation* in his consumption, be it an escalation from *no* consumption on Dr Saluja's evidence or from *some* consumption on Dr Rajesh's, was *caused by* his MDD. On either expert's account, such escalation coincided with the bereavements. In our judgment, this objective fact coheres with and strengthens Dr Rajesh's view as to the synergistic operation of the two disorders affecting Roszaidi, and the absence of evidence of the *degree* of escalation does not then *undermine* this in the circumstances of this case. In any event, the fact of the escalation would shift the evidential burden back to the Prosecution to disprove the connection. That the escalation in Roszaidi's drug use and the bereavements were temporally aligned, even on Dr Saluja's account, should not and cannot be written off as mere coincidence or happenstance just because Roszaidi had been a drug user for most of his life (an analytical approach implicitly taken by the minority: see [238] of the Minority Judgment). This is particularly so when viewed against the backdrop of the relatively long drug-free period Roszaidi managed to maintain after being released from prison in 2014.

Thus, for these reasons, the minority's evidential concerns do not affect our conclusions in respect of the Second Limb of the *Nagaenthran* test.

77 Before setting out our conclusions on the Second Limb, however, we make a final observation. At the hearing before us, Mr Thuraisingam accepted that there was no other evidence of how Roszaidi's MDD manifested other than

Version No 2: 29 Dec 2022 (18:05 hrs)

his escalated drug consumption, because this issue was not taken up at the trial. However, what is in our view material is that there *was* ample evidence of this escalated drug consumption and this fact is accepted by the court. Given that the focus of the analysis under the Second Limb in this case is on the impact of Roszaidi's MDD *on his SUD*, and that escalated drug consumption is the key manifestation of Roszaidi's MDD that we are concerned with in the present context, the fact that other manifestations were not fully explored does not seem to us to be pertinent and so makes no difference to our conclusion on this point.

Conclusion on the Second Limb

78 For the reasons set out above, we are satisfied that Roszaidi's MDD and SUD operated together in a "synergistic" manner, and that his MDD formed the "underlying substrate" for his SUD such that it accounted for the intensity at which his SUD operated at the time of the offence. Both Dr Saluja and Dr Rajesh recognise, in substance, that Roszaidi used drugs to cope with the depressive symptoms triggered by the passing of his mother and grandmother; and, further, this is borne out by the fact that the escalation in Roszaidi's drug consumption in the months before the offence dovetailed with the onset of his MDD following these bereavements. In the circumstances of the present case, the evidence indicates that Roszaidi's MDD and SUD were inextricably intertwined at the material time, such that it would be impractical and artificial to attempt to ascertain the aetiology of Roszaidi's SUD in isolation from his MDD.

79 Accordingly, we hold that the Judge erred in rejecting Dr Rajesh's Synergy Claim and finding, on that basis, that the Second Limb was not satisfied. Given that it is undisputed that Roszaidi's *MDD* arose from an inherent cause, this leads us to the conclusion that Roszaidi's SUD *also* arose

Version No 2: 29 Dec 2022 (18:05 hrs)

from an inherent cause. Although neither expert gave evidence that Roszaidi's SUD *itself* arose from any of the prescribed aetiologies in s 33B(3)(*b*) of the MDA, the *interaction* between Roszaidi's MDD and SUD in the circumstances of the present case allows us to conclude that the Second Limb is satisfied by *both conditions operating together* at the material time.

80 Our decision in respect of the Second Limb is similar to that arrived at in *Phua Han Chuan Jeffery v Public Prosecutor* [2016] 3 SLR 706 ("*Jeffery Phua*"). There, the applicant had been convicted and sentenced to death for importing diamorphine, and applied to be re-sentenced under s 33B(1)(*b*) of the MDA. As in the present case, the key issue in dispute was whether the applicant suffered from an abnormality of mind that substantially impaired his mental responsibility for his act of committing the offence, as required under s 33B(3)(*b*). Choo Han Teck J found that he did, and accordingly allowed the application (see *Jeffery Phua* at [19]). What is relevant for present purposes is that Choo J took cognisance of the fact that the applicant suffered from *both* persistent depressive disorder (which "clearly constitute[d] an abnormality of mind arising from an 'inherent cause'") and SUD (in that case, ketamine dependence). Choo J noted, on the evidence before him, that there was "a correlation between the applicant's [k]etamine [d]ependence and his [p]ersistent [d]epressive [d]isorder"; indeed, both experts had reported that "the applicant had related to them … how he had resorted to ketamine in order to self-medicate his chronic low mood and poor esteem, as the substance numbed him physically and emotionally". On this basis, Choo J was satisfied that the applicant was, "in the *totality of circumstances* owing to his conditions of [p]ersistent [d]epressive [d]isorder *and* [k]etamine [d]ependence, suffering from an abnormality of mind whether arising from an inherent cause or induced by disease or injury" [emphasis added] (see *Jeffery Phua* at [4]). The facts of the present case are

Version No 2: 29 Dec 2022 (18:05 hrs)

similar in so far as Roszaidi resorted to various drugs to "self-medicate" for his symptoms of MDD, such that there was a "correlation" between his MDD and his SUD and the two conditions *together* satisfy the Second Limb.

81 We stress that our decision on the Second Limb is that it is satisfied, in the circumstances of the present case, by Roszaidi's MDD *and* his SUD *operating together*. In the light of our analysis and conclusions above, it is unnecessary for us to address the question of whether SUD *per se* may satisfy the Second Limb, and we leave that question open. This is a question that would benefit from further consideration and definitive clarification in an appropriate future case (in this regard, see, for example, Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Singapore* (LexisNexis, 2022) ("*Criminal Law in Singapore*") at paras 25.47–25.48 and 26.35–26.38).

82 Our conclusion on the Second Limb also has important further implications for the rest of our analysis in respect of s 33B(3)(*b*) of the MDA. Had we rejected the Synergy Claim, the inquiry under the Third Limb of the *Nagaenthran* test would have been focused on whether Roszaidi's MDD *alone* substantially impaired his mental responsibility for his acts in relation to his offence. This was the inquiry to which the Judge applied his mind (see [10], [14] and especially [21] of the Remittal Judgment). However, our acceptance of the Synergy Claim means that we now proceed on a *fundamentally different premise*. Given that we have held that the Second Limb is satisfied by Roszaidi's MDD *and* SUD operating together, the question that arises for our determination under the Third Limb is whether the *combination* of Roszaidi's MDD and his SUD substantially impaired his mental responsibility for his acts in relation to his offence at the material time. It is to this crucial question that we now turn.

Version No 2: 29 Dec 2022 (18:05 hrs)

The Third Limb of the *Nagaenthran* test

83 We turn to the Third Limb of the *Nagaenthran* test, where the court must determine whether Roszaidi's abnormalities of mind substantially impaired his mental responsibility for his acts and omissions in relation to his offence. Two main questions arise in relation to the Third Limb in the present case:

(a) First, what precisely does a *substantial impairment* of *mental responsibility* require, in the specific context of re-sentencing for *drug trafficking* (under s 5(1) of the MDA) or *drug importation* (under s 7 of the MDA) under s 33B of the MDA?

(b) Second, on the evidence presently before the court, has Roszaidi *discharged his burden* of proving a substantial impairment of mental responsibility in relation to his drug trafficking offence?

84 Before delving into each of these questions, we briefly summarise three key propositions underlying our judgment on the Third Limb.

(a) The *first* key proposition is that, by s 33B of the MDA, Parliament has enacted a special sentencing regime for the class of drug offenders who satisfy the requirements stipulated therein. In doing so, Parliament intended for the courts' approach to be informed by the law on diminished responsibility as a partial defence to murder. Both the language of the provision and the relevant case law make clear that what an accused person must establish is a *substantial impairment* of his mental responsibility for his acts and omissions in relation to the offence. This does *not* require a total impairment of mental responsibility; nor does it require the impairment to rise to the level of either unsoundness of mind or automatism. Further, although the concept of diminished

Version No 2: 29 Dec 2022 (18:05 hrs)

responsibility operates in a functionally similar way both in the context of s 33B and as a partial defence to murder, there will inevitably be a subtle difference of emphasis in its *application* in these two different contexts, stemming from the nature of the relevant offences.

(b) The *second* key proposition is that it is essential to have regard to the role of the accused person's abnormalities of mind not only in relation to the *specific acts* constituting the primary offence with which the accused person is charged, but also in relation to the *broader question* of what led him to carry out those acts and to commit that offence. This is important so as not to artificially ignore the reality of what affected the accused person's mental responsibility for his particular acts and omissions in relation to the offence.

(c) The *third* key proposition is that whether or not the Third Limb of the *Nagaenthran* test is satisfied is primarily a *question of fact* for the *court* to decide.

85 With these broad points in mind, we turn to consider the first of the two questions set out at [83] above – that is, what precisely a substantial impairment of mental responsibility requires in the context of s 33B(3)(*b*) of the MDA.

The applicable principles

The legislative landscape

86 We begin with the text of s 33B(3)(*b*) of the MDA, which requires the accused person to prove that 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

Version No 2: 29 Dec 2022 (18:05 hrs)

> ***substantially impaired*** *his* ***mental responsibility*** *for his acts and omissions in relation to the offence* under section 5(1) or 7.
>
> [emphasis added in italics and bold italics]

87 On the express terms of the provision, only a *substantial* impairment of mental responsibility is required. In this regard, s 33B(3)(*b*) can usefully be contrasted with s 84 of the Penal Code 1871 (2020 Rev Ed) ("the Penal Code"), which provides for the general defence of unsoundness of mind in the following terms:

> **Act of person of unsound mind**
>
> **84.**—(1) Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is —
>
> (*a*) *incapable* of knowing the nature of the act;
>
> (*b*) *incapable* of knowing that what he is doing is wrong; or
>
> (*c*) *completely deprived* of any power to control his actions.
>
> (2) Subsection (1)(*b*) applies only if the person is incapable of knowing that his act —
>
> (*a*) is wrong by the ordinary standards of reasonable and honest persons; and
>
> (*b*) is wrong as contrary to law.
>
> [emphasis added]

88 Section 84 of the Penal Code is not the provision in issue in the present appeal. Nevertheless, it provides a useful frame of reference for two reasons. First, it identifies the three aspects of mental unsoundness that, at the minimum, should be considered in assessing an impairment of the accused person's mental responsibility. We return to this point at [105] below. Second, the language of s 84 of the Penal Code, which refers to the accused person being "incapable" of knowing the nature of his act and that it was wrong and being "completely deprived" of power to control his actions, provides a clear contrast with the

Version No 2: 29 Dec 2022 (18:05 hrs)

language of s 33B(3)(*b*), which requires only that the accused person's mental responsibility (as assessed by reference to these three aspects of mental unsoundness) was "*substantially* impaired" [emphasis added].

89 A comparison should also be undertaken between s 33B(3)(*b*) and diminished responsibility as a partial defence to murder, as set out in Exception 7 to s 300 of the Penal Code (Cap 224, 2008 Rev Ed) (as was in force before 1 January 2020). This provided as follows:

> **When culpable homicide is not murder**
>
> …
>
> *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.
>
> [emphasis added]

90 As this court observed in *Nagaenthran* at [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 s 300 of the Penal Code, as it then provided. Indeed, this court observed in *Rosman bin Abdullah v Public Prosecutor* [2017] 1 SLR 10 ("*Rosman bin Abdullah*") at [46] that s 33B(3)(*b*) "is, in substance, a reproduction of what is the doctrine of diminished responsibility to a charge of murder pursuant to Exception 7 to s 300 of the Penal Code … [though] s 33B(3)(*b*) must be read and applied within the context of s 33B in general and s 33B(3) in particular" [emphasis in original omitted].

91 On 1 January 2020, the amendments introduced by the Criminal Law Reform Act 2019 (Act 15 of 2019) came into force, which fleshed out the three

Version No 2: 29 Dec 2022 (18:05 hrs)

specific dimensions of mental responsibility discussed above. Exception 7 to s 300 of the Penal Code presently provides as follows:

> **When culpable homicide is not murder**
>
> …
>
> *Exception* 7.—Culpable homicide is not murder if at the time of the acts or omissions causing the death concerned, the offender was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development or any inherent causes or induced by disease or injury) as substantially —
>
> (*a*) impaired the offender's capacity —
>
> (i) to know the nature of the acts or omissions in causing the death or in being a party to causing the death; or
>
> (ii) to know whether such acts or omissions are wrong; or
>
> (*b*) impaired the offender's power to control his acts or omissions in causing the death or being a party to causing the death.
>
> Paragraph (*a*)(ii) of the above exception applies only if, at the time of the acts or omissions causing the death concerned, there was a substantial impairment of the offender's capacity to know that the acts or omissions —
>
> (*a*) are wrong by the ordinary standards of reasonable and honest persons; and
>
> (*b*) are wrong as contrary to law.

92 Importantly, like s 33B(3)(*b*) of the MDA, Exception 7 to s 300 of the Penal Code refers to the offender's mental responsibility for his acts or omissions in relation to the offence being "substantially impaired". It is for this reason that we held in *Nagaenthran* at [21] that the three-limb test applicable under Exception 7, which we have outlined at [2] above, "ought equally to apply in the context of s 33B(3)(*b*)". The Judge made observations to the same effect at [5] of the Remittal Judgment.

Version No 2: 29 Dec 2022 (18:05 hrs)

93 Beyond the similarity in their wording, the two provisions also operate in a *functionally similar* manner. Under Exception 7 to s 300 of the Penal Code, diminished responsibility is a partial defence to murder, such that – although the *actus reus* and *mens rea* are made out – the accused person is instead convicted of culpable homicide not amounting to murder, which carries a sentence of imprisonment rather than the death penalty. Under s 33B(3)(*b*) of the MDA, diminished responsibility is one of the two conditions for mandatory re-sentencing which, if satisfied, entitle the accused person to be sentenced to life imprisonment instead of to the death penalty.

94 Many of the principles relevant to the concept of a substantial impairment in this context are thus derived from the law on diminished responsibility as a defence to murder. In the *application* of these principles, however, there will inevitably be a subtle but important difference of emphasis, stemming from the *nature of the offences* to which the concept of diminished responsibility applies under Exception 7 to s 300 of the Penal Code and under s 33B(3)(*b*) of the MDA respectively. We elaborate.

95 In *Ahmed Salim v Public Prosecutor* [2022] 1 SLR 1110 ("*Ahmed Salim*"), this court dealt with the question of whether the fact that a murder was premeditated precluded the accused person in that case from availing himself of the partial defence of diminished responsibility in Exception 7 to s 300 of the Penal Code. In that context, a distinction was drawn between the accused person's *execution* of a murder on the one hand, and his prior *decision* to commit the murder on the other. We held that, even where an accused person executes a murder in accordance with a premeditated plan, diminished responsibility might nevertheless be made out if he is able to prove, on a balance of probabilities, that his mental disorder "substantially impaired his ability to make

Version No 2: 29 Dec 2022 (18:05 hrs)

rational or logical decisions, and this disorder caused him to decide to kill the victim". In such cases, although the accused person might premeditate his actions to follow through on the decision to kill "under a veneer of rationality", and "to that extent has control over his conscious and deliberate actions", that prior decision to kill would *itself* be "the product of a disordered mind, which is not functioning rationally" (see *Ahmed Salim* at [38] and [50]).

96 In our judgment, the distinction between the *execution* of an offence and the prior *decision* to commit that offence is likely to assume even greater significance in the context of s 33B(3)(*b*) of the MDA. In this regard, the nature of the different types of offences to which Exception 7 to s 300 of the Penal Code and s 33B(3)(*b*) respectively apply is key. Whereas many culpable homicides may, as the Parliamentary debates recognise, take place in the heat of the moment, drug trafficking and importation offences under ss 5(1) and 7 of the MDA will almost invariably require some degree of planning and premeditation. In this context, the court must therefore pay particular attention to what influenced the accused person's *decision* to commit the offence, and whether this decision was itself a product of the accused person's decision-making faculties being substantially impaired. This may be especially important where the underlying abnormality of mind in issue is of such a nature as to distort the accused person's *ability to make decisions*, as would be the case with disorders like SUD, which may make the acquisition of drugs for consumption his overriding preoccupation and the central focus of his life. Having regard to the *particular nature* of the impairments caused by these kinds of disorders, such a decision would, in our judgment, be correctly characterised as "the product of a disordered mind" (*per Ahmed Salim* at [38]).

Version No 2: 29 Dec 2022 (18:05 hrs)

97 This approach does not, in our view, depart from the legislative intent behind s 33B(3)(*b*) of the MDA as evinced in the relevant Parliamentary debates. At the Second Reading of the Misuse of Drugs (Amendment) Bill (Bill No 27/2012), Mr Christopher de Souza ("Mr de Souza") drew a distinction between killing and drug trafficking and suggested that the scope of diminished responsibility should be narrower in relation to the latter (*Singapore Parliamentary Debates, Official Report* (12 November 2012) vol 89 ("12 November 2012 Debates") at p 1118 (Christopher de Souza, Member of Parliament)):

> …
>
> We need to pause and realise that a distinction must be drawn between diminished responsibility in the context of murder as opposed to drug trafficking. Killing can be a spontaneous act, especially for non-premeditated cases. *Drug trafficking, on the other hand, is often rational and calculated. It is seldom spontaneous.*
>
> My view is that *the more rational, calculated or pre-meditated the nature of the crime, the less scope there should be for considerations for mental disability or any other such forms of diminished responsibility*. Why? Because there is an increased likelihood that the trafficker has internally weighed the cost-benefit analysis of the crime. Correlatively, *it is my hope that the Courts should be very strict in interpreting such provisions*, or risk opening the backdoor for the offender to escape harsh punishment notwithstanding his or her understanding of the consequences of the crime.
>
> …
>
> [emphasis added]

98 Importantly, however, the Minister's response to Mr de Souza's comments was to emphasise that the applicable legal principles in assessing whether diminished responsibility was made out remained the same *notwithstanding* the "highly purposive and coordinated" nature of drug trafficking. The Minister also stressed that "[g]enuine cases of mental

Version No 2: 29 Dec 2022 (18:05 hrs)

disability" would be recognised under s 33B(3)(*b*), in contradistinction to mere errors of judgment which would not afford a defence (14 November 2012 Debates at p 1235 (Mr Shanmugam)):

> …
>
> 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[6]. Our view is that the law has been set out and commonsensical judgments have to be made on the facts. ***Genuine cases of mental disability are recognised****, while, errors of judgements 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 in italics and bold italics]

99 We also consider the following remarks made by the then-Deputy Prime Minister and Minister for Home Affairs in respect of s 33B(3)(*b*) (14 November 2012 Debates at p 1242 (Teo Chee Hean, Deputy Prime Minister and Minister for Home Affairs ("DPM Teo"))):

> … [L]et me speak about the sentencing discretion for the death penalty for drug couriers with an abnormality of mind which satisfies the diminished responsibility test. While there is strong support for the mandatory death penalty, *there is also a legitimate concern that it may be applied without sufficient regard for those accused persons who might be suffering from an abnormality of mind.*
>
> The policy intent is for this exception to operate in a measured and narrowly defined way. ***We want to take this into account, where an accused can show that he has such an abnormality of mind that it substantially impairs his mental responsibility for his acts in relation to his offences.*** *Such cases are worthy of special consideration.* However, in Mr de Souza's words, we do not want to

Version No 2: 29 Dec 2022 (18:05 hrs)

> inadvertently "open the backdoor for the offender to escape harsh punishment notwithstanding his or her understanding of the consequence of the crime".
>
> We do not want the application of the mandatory death penalty in such cases to call into question the appropriateness of applying the mandatory death penalty regime on traffickers in general. But we do not want to open the doors wide. Otherwise, we would have undermined our strict penalty regime and its deterrence value. And as Mr Shanmugam has pointed out, we might even encourage drug syndicates to recruit more couriers who think they can easily escape the gallows *by claiming any condition without* ***medical evidence***.
>
> …
>
> [emphasis added in italics and bold italics]

100 This does not detract from the position we have set out above. No doubt s 33B(3)(*b*) should operate in "a measured and narrowly defined way" and should not "open the doors wide" to cases of abuse. But it is clear from DPM Teo's remarks that the very purpose of s 33B(3)(*b*) was to provide an exception to the mandatory death penalty for those accused persons who could prove with medical evidence that they suffered from such abnormalities of mind that substantially impaired their mental responsibility for their acts in relation to their offences, and whose cases would consequently be "worthy of special consideration" (assuming that they were also able to satisfy the conditions set out in s 33B(3)(*a*)). This takes us back to the wording of s 33B(3)(*b*) itself, and to the principles that may be derived from diminished responsibility as a defence to murder in *interpreting* and *applying* that wording in the context of drug trafficking and importation. The principles themselves remain the same, and the concept of diminished responsibility is neither narrower nor broader in the context of s 33B(3)(*b*) than in the context of murder – it is simply applied with *due sensitivity to the particular context* of drug trafficking and importation offences. As we have explained at [94] above, the difference is one of emphasis in the *application* of these principles, which is necessary to take into account

Version No 2: 29 Dec 2022 (18:05 hrs)

the differences in the *nature of the offences* which s 33B(3)(*b*) of the MDA and Exception 7 to s 300 of the Penal Code are respectively meant to address.

101 Before we turn to consider the relevant legal principles in greater detail, we make a brief comment regarding the applicability of the analysis above to the version of the MDA presently in force. Section 33B of the Misuse of Drugs Act 1973 (2020 Rev Ed) ("the 2020 Revised Edition of the MDA") is identical in all material respects to s 33B of the version of the MDA that we have considered above. In particular, the wording of s 33B(3)(*b*) of the 2020 Revised Edition of the MDA is *in pari materia* with that set out at [86] above. It follows from this that, although the 2020 Revised Edition of the MDA is not directly before us in this appeal, our views on s 33B(3)(*b*) of the MDA as expressed in this judgment would apply equally to s 33B(3)(*b*) as it presently stands.

Key legal principles and distinctions to be drawn

102 We now set out the key legal principles that are relevant to diminished responsibility under s 33B(3)(*b*) of the MDA, drawing from the existing case law on both s 33B(3)(*b*) and Exception 7 to s 300 of the Penal Code. These can be divided into four broad groups.

103 The ***first*** group of principles relates to the *nature of the inquiry* that the court is to undertake at the Third Limb of the *Nagaenthran* test for re-sentencing under s 33B(3)(*b*). What 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", and while medical evidence will be important in determining the presence and/or extent of the relevant impairment, "whether an accused [person]'s mental responsibility was substantially impaired is ultimately a *question of fact* that is to be *decided by the court based on all the*

Version No 2: 29 Dec 2022 (18:05 hrs)

evidence before it" [emphasis added]: *Nagaenthran* at [33] and *Ong Pang Siew v Public Prosecutor* [2011] 1 SLR 606 ("*Ong Pang Siew*") at [64]. In this regard, the analysis at the Third Limb of the *Nagaenthran* test differs from that at the Second Limb, which (as we noted at [57] above) is largely a matter for expert evidence.

104 ***Second***, as to the *relationship between the abnormality of mind and the accused person's acts and omissions*, the accused person's abnormality of mind need not be *the cause* of his offending. Instead, the question is whether the abnormality of mind "had an *influence*" [emphasis in original] on his commission of the relevant acts: see *Nagaenthran* at [33], citing *Jeffery Phua* at [16].

105 The ***third*** group of principles relates to the relevant *aspects of impairment*. As we have noted above, s 33B(3)(*b*) requires the accused person to show that his abnormalities of mind "substantially impaired his *mental responsibility* for his acts and omissions in relation to the offence" [emphasis added]. There are at least three specific aspects or dimensions of mental responsibility that are typically relevant in this regard. These are derived from s 84 of the Penal Code and Exception 7 to s 300 of the Penal Code (as presently worded) (see [87]–[88] and [90]–[92] above), and have been applied by the courts in the context of s 33B(3)(*b*) of the MDA (see, for instance, *Jeffery Phua* at [15] and *Nagaenthran* at [25]–[26]), albeit not in the precise terms set out below. They are the following:

(a) the accused person's capacity to perceive his acts or omissions and know their nature (which we label "basic cognitive ability");

Version No 2: 29 Dec 2022 (18:05 hrs)

(b) his capacity to know and appreciate whether those acts or omissions are wrong, in the sense of being both contrary to the ordinary standards of reasonable and honest persons and contrary to law (which we label "moral and legal cognition"); and

(c) his ability to exercise his will to control his actions such that he acts in accordance with what he knows to be right or wrong (which we label "control").

106 In this case, there is no dispute that Roszaidi had basic cognitive ability and moral and legal cognition, in the sense that he knew what he was doing and that it was wrong and contrary to the law. The sole issue in respect of the Third Limb of the *Nagaenthran* test pertains to the third aspect – control. It is therefore this element of control that is of crucial importance in the present appeal.

107 These three specific dimensions of mental responsibility are "not … exhaustive of the mind's activities in *all* its aspects" [emphasis in original] (*Nagaenthran* at [25]). As we explained in *Ahmed Salim* at [35], "[t]he categories of factors that may impair mental responsibility are not closed and it is, in principle, open to an accused person to contend that there was substantial impairment by reference to other categories of mental capability and responsibility". These aspects of mental responsibility are simply "likely to be the most relevant and oft-used tools" because they help to focus the inquiry on the "critical question" of whether the abnormality of mind in question substantially impaired the accused person's mental responsibility (see *Nagaenthran* at [25]). Nevertheless, for the purposes of the present appeal, we do not think it necessary to look beyond these three specific aspects of mental responsibility.

Version No 2: 29 Dec 2022 (18:05 hrs)

108 We pause here to note that various Parliamentary statements refer to the requisite impairment under s 33B(3)(*b*) as impairing the accused person's "appreciation of the gravity of the act" (see 12 November 2012 Debates at p 1088 (Tan Kheng Boon Eugene, Nominated Member of Parliament); see also the statements made by DPM Teo in the Ministerial Statements on "Enhancing our Drug Control Framework and Review of Death Penalty" and "Changes to Application of Mandatory Death Penalty to Homicide Offences" (*Singapore Parliamentary Debates, Official Report* (9 July 2012) ("9 July 2012 Debates") vol 89 at pp 264–265 and 270)) and impairing the accused person's "understanding of the consequences of the crime" (see [97] and [99] above). To the extent that these statements might be relied on for the proposition that either the impairment of the accused person's *basic cognitive ability and moral and legal cognition*, or the impairment of his *rationality*, are more important in the analysis than the impairment of his *ability to exercise his will to control his actions*, we reject this. There is nothing in the wording of s 33B(3)(*b*) to limit the court's assessment of mental responsibility to these two aspects or to suggest that they are more important, and control has been specifically included in both s 84 of the Penal Code and Exception 7 to s 300 of the Penal Code (see [87]–[92] above). The element of control as an aspect of mental responsibility should therefore not be downplayed, nor should its scope be unduly narrowed. We nonetheless deal with the relevance of *rationality* in greater detail at [113]–[129] below.

109 The ***fourth*** group of principles concerns the meaning of "*substantial*" in relation to the relevant impairment. This is "a question of degree, to be tested against and ascertained from all the evidence of each individual case" (*Chua Hwa Soon Jimmy v Public Prosecutor* [1998] 1 SLR(R) 601 ("*Jimmy Chua*") at [31]). What is required is that the impairment of the accused person's mental

Version No 2: 29 Dec 2022 (18:05 hrs)

responsibility must be "*real and material*" [emphasis added], as opposed to "trivial or minimal" (*Nagaenthran* at [33]). Notably, the impairment need not be *total*: in *Jimmy Chua* at [31], Yong Pung How CJ cited with approval the English court's direction to the jury recorded in *R v Lloyd* [1967] 1 QB 175 ("*R v Lloyd*") at 178–179 that "[s]ubstantial does not mean total, that is to say the mental responsibility need not be totally impaired, so to speak, destroyed altogether". The impairment also need not rise to the level of *unsoundness of mind* for the purposes of s 84 of the Penal Code, as set out at [87] above (see *Nagaenthran* at [33]) – or, for that matter, to the level of *automatism*. Such levels of impairment would, as was pointed out to the Prosecution at the hearing of the appeal, extinguish the accused person's *criminal liability* in relation to the offence altogether, either by negating the *mens rea* or *actus reus* of the offence or by allowing the accused person to rely on the complete defence under s 84 of the Penal Code.

110 In this regard, although a distinction is drawn between situations where the accused person *cannot* resist his impulse to do something and situations where the accused person simply *does not* resist such an impulse (see *Ahmed Salim* at [37], citing *Jimmy Chua* at [32]), it is important to note that the accused person need not show that he was *completely unable* to resist that impulse. In this regard, the following passage from the English Court of Criminal Appeal's decision in *R v Byrne* [1960] 2 QB 396 ("*Byrne*") at 404–405 – which was cited by this court in *Jimmy Chua* at [32] – is instructive:

> Inability to exercise will power to control physical acts, provided that it is due to abnormality of mind from one of the causes specified in the parenthesis in the subsection is, in our view, sufficient to entitle the accused to the benefit of the section; *difficulty in controlling his physical acts depending on the degree of difficulty, may be*. It is for the jury to decide on the whole of the evidence whether such inability or difficulty has, not as a matter of scientific certainty but on the balance of probabilities,

Version No 2: 29 Dec 2022 (18:05 hrs)

> been established, and *in the case of difficulty whether the difficulty is so great as to amount in their view to a substantial impairment of the accused's mental responsibility for his acts*. …
>
> [emphasis added]

111 Thus, while an accused person's *inability* to exercise willpower to control his physical acts *would* suffice, his *difficulty* in controlling his physical acts *may* suffice depending on the *degree* of difficulty faced by him in controlling his physical acts. The question is "whether the difficulty is so great as to amount … to a substantial impairment of the accused's mental responsibility for his acts" (*Byrne* at 405). The distinction is therefore not so clear-cut as to mean that an accused person who *might* have been able to resist his impulses will *automatically* fall outside the scope of s 33B(3)(*b*). Instead, the test ultimately ought to be whether the accused person's ability to resist doing what he did was *sufficiently* impaired. In our judgment, this is not inconsistent with this court's holding at [52] of *Ahmed Salim* that diminished responsibility would not be made out in a situation where the accused person *chose not to* resist committing the offence, in contrast to a situation where he was *unable to* resist committing the offence. The position was clear on the facts of that case in that the accused person admitted that he decided to continue choking the victim because he was afraid that she would report him to the authorities if she survived (see *Ahmed Salim* at [59]). It will be necessary in each case for the accused person to show that his ability to resist doing what he did in the circumstances was *sufficiently* impaired.

112 Drawing together the various threads derived from the principles and authorities that we have referred to, the question before us in the present case ought to be framed in the following terms: Did Roszaidi's abnormalities of mind have a *real and material* (as opposed to trivial or minimal) *effect or influence* on his *ability to exercise control over his actions*, and specifically to act in

Version No 2: 29 Dec 2022 (18:05 hrs)

accordance with what he knew to be right? This is the central question in this appeal.

The relevance of rationality

113 Before we turn to that central question, we elaborate on the role and relevance of *rationality* in the analysis we have set out above. Rationality may be relevant to both the second aspect and the third aspect of mental responsibility. However, it is, in our judgment, unhelpful to introduce rationality as a *label* or *touchstone* to guide the overall analysis of impairment.

114 The second aspect of mental responsibility – namely, moral and legal cognition – has been framed in the case law in terms of the accused person's "ability to form a *rational judgment* as to whether an act is right or wrong" [emphasis added]: *Byrne* at 403, followed in *Public Prosecutor v Wang Zhijian and another appeal* [2014] SGCA 58 ("*Wang Zhijian*") at [67] and in *Ahmed Salim* at [35]. However, it is important to bear in mind that the focus of the inquiry with regard to this second aspect of mental responsibility is on the accused person's *capacity to distinguish right from wrong*, and not on the accused person's rationality *per se*. The question is not whether the accused person was thinking and acting logically. Rather, the specific inquiry here is whether the accused person was able to distinguish right from wrong on an *objective* (or rational) basis, rather than on a *subjective* (and likely irrational) basis. That the focus of the inquiry is on an objective assessment of right and wrong is made clear by the fact that both s 84 of the Penal Code and Exception 7 to s 300 of the Penal Code (as presently worded) require the accused person to know that his acts or omissions are both "wrong by the ordinary standards of reasonable and honest persons" and "wrong as contrary to law". Rationality is

Version No 2: 29 Dec 2022 (18:05 hrs)

thus a subset of that inquiry as to how the court should gauge the accused person's understanding of right and wrong.

115 The relevance of rationality to the third aspect of mental responsibility – namely, control – is also not straightforward. As was done in *Ahmed Salim*, a distinction may sometimes need to be drawn between *deciding* to commit the offence and following through with *executing* that decision (see [95]–[96] above). In this connection, this court explained in *Ahmed Salim* that even an accused person who commits a *premeditated* murder may nevertheless be able to prove that his abnormality of mind had substantially impaired his mental responsibility by proving on a balance of probabilities that that it "impaired his *rationality in coming to the decision* to commit the murder" [emphasis in original] (*Ahmed Salim* at [38]) – or, put slightly differently, his "ability to make rational or logical decisions" (*Ahmed Salim* at [50]) – and this disorder was a "but for" cause of his *decision* to kill the victim (see *Ahmed Salim* at [51]). On this basis, we held that although the accused person may have "control over his conscious and deliberate actions" to the extent that he knows what he is doing, and may thus premeditate his actions "under a veneer of rationality", these actions are to carry out a decision that is "the product of a disordered mind, which is not functioning rationally". In these circumstances (*Ahmed Salim* at [38] and [50]):

> … the court in assessing the rationality of the accused person's actions and *the extent to which it may be said that these were actions indeed* ***within his control*** *must take into account that the actions* ***flowed from a decision that was the product of his disordered mind***.
>
> [emphasis added in italics and bold italics]

116 We add that, should the accused person be able to explain the contradiction between the apparent rationality of his actions and his "disordered

Version No 2: 29 Dec 2022 (18:05 hrs)

mind" from which the prior decision to carry out those actions flowed, this would no doubt assist him in showing that the Third Limb is satisfied in his case. But an accused person's failure to directly address and explain this contradiction should not *preclude* the court from finding, on *all the evidence before it*, that this threshold is met. This is particularly so in cases like the present, where the accused person has not even been cross-examined on, or otherwise given an opportunity to explain, the seeming contradiction because of the way in which the procedural history of the matter has unfolded.

117 The key point is this. If the accused person's *decision* to commit the offence is one in respect of which his mental responsibility was materially and relevantly impaired, such that this decision was in truth "the product of a disordered mind" which was not functioning rationally in the first place, his seeming rationality while *following through* with that anterior decision – in the sense that he may know what he is doing, and to that extent can be said to be carrying out seemingly conscious and deliberate actions – will not necessarily displace the availability of s 33B(3)(*b*) of the MDA. Whether the accused person's mental responsibility is indeed substantially impaired in a given case is, as we have already noted, ultimately a question of fact to be decided by the court based on all the evidence before it (see [103] above). In our judgment, and contrary to how our view has been characterised at [255] of the Minority Judgment, this will entail consideration of all the circumstances, including those pertaining to the execution of the offence (which are dealt with at, among other places, [175]–[196] below).

118 The foregoing discussion may be better understood when seen in the context of murder, and applied in the English case of *R v Brennan* [2015] 1 WLR 2060 ("*Brennan*") and in this court's decision in *G Krishnasamy*

Version No 2: 29 Dec 2022 (18:05 hrs)

Naidu v Public Prosecutor [2006] 4 SLR(R) 874 ("*Krishnasamy*"), both of which we referred to in *Ahmed Salim*.

119 In *Brennan*, the premeditated nature of the murder was reflected in the fact that the accused person had, among other things, typed a note on his computer setting out his intended plan of stabbing the victim, brought three knives and two hammers to the apartment that he planned to use as the murder location, and invited the victim to the apartment in order to kill the victim. The expert witness for the Defence (whose assessment was in line with that of the Prosecution's expert witness) testified that, while the accused person's mental disorder had caused him to lose rationality in respect of *deciding* to kill the victim – this being a consequence of his abnormal and out-of-control belief system and illogical thought process – he nonetheless maintained the rationality needed to *plan and execute* that irrational decision. On appeal, the English Court of Appeal substituted the charge of murder with that of manslaughter (see *Ahmed Salim* at [39], [42] and [43]). Having regard to *Brennan*, we went on to hold that an accused person who commits a premeditated murder may nevertheless be able to prove that his mental disorder substantially impaired his rationality and/or self-control in coming to the decision to commit the offending act, and that in such circumstances, this would not be displaced by the fact that the accused person retained rationality and self-control to the extent of being able to carry out the disordered decision (*Ahmed Salim* at [44]).

120 Similarly, in *Krishnasamy*, the accused person had premeditated the murder by (among other things) purchasing a chopper from a hardware shop and using this instead of a knife because his wife had not died after he had stabbed her with a knife on a previous occasion. He also chose a particular morning to go to his wife's workplace armed with the chopper because he knew

Version No 2: 29 Dec 2022 (18:05 hrs)

his wife was working the early shift that day and he was on good terms with the security guard who he knew would be on duty. On appeal, this court found that the accused person had sufficiently proved that the morbid jealousy that he suffered from at the time of the offence had substantially impaired his mental responsibility for the murder, having regard to the expert evidence that this mental disorder "resulted in him believing that his wife was unfaithful and further believing that the only way to end his personal sufferings inflicted upon him supposedly by his spouse was to kill her" (see *Ahmed Salim* at [45]–[47]). Thus, in *Ahmed Salim*, we observed that the accused person's disorder in *Krishnasamy* had "substantially impaired his ability to make rational decisions, and caused him to make abnormal and disordered decisions", and that although he "retained sufficient rationality and control to execute that decision", his actions in doing so were "merely flowing from his decision to kill that was a product of his mental disorder" (*Ahmed Salim* at [48]–[49]).

121 The principle set out at [117] above is, of course, subject to limitations. Importantly, other than showing that the relevant disorder was a "but for" cause of his decision to kill the victim, the accused person must prove on a balance of probabilities that, in executing his intention to murder, he had "no realistic moment of rationality and self-control that would have enabled him to resile from that intention or plan" (see *Ahmed Salim* at [52]). As we explained in *Ahmed Salim* at [37], the fact that an accused person takes deliberate steps towards the execution of the premeditated plan, despite having moments of rational control when he is able to resist the impulse to carry out his actions but nonetheless proceeds, suggests a conscious choice made with presence of mind, and this points away from a loss of self-control. The accused person's failure to resile from such an intention despite having the opportunity and occasion to do so might show that he *chose* not to resist committing the offence, instead of

Version No 2: 29 Dec 2022 (18:05 hrs)

having been *unable* to resist it (see *Ahmed Salim* at [52], applying the distinction drawn in *Jimmy Chua* at [32]), though this must also be read with our analysis of this distinction at [110]–[111] above.

122 In our judgment, the points set out above are essential to ensure that the court does not overlook the need for a full and thorough investigation of what transpired simply because the accused person appears to be able to make rational or logical decisions, such as by taking steps to avoid detection or to conceal his illicit activities. This is so because the accused person's abnormality of mind need not affect *every* aspect of his life, but only the aspect that is *relevant to the commission of the offence*. Furthermore, it bears emphasis that there is no requirement, even in the defence of unsoundness of mind under s 84 of the Penal Code, that *all* the aspects of mental responsibility must be impaired. It is only necessary for an accused person to establish a substantial impairment in respect of any *one* of these aspects. Accordingly, an accused person who knows that what he is doing is wrong, but is unable to control his actions such that he acts in accordance with what he knows to be right, would still be able to invoke the *complete* defence of unsoundness of mind. The position in relation to the partial defence of diminished responsibility under Exception 7 to s 300 of the Penal Code and, correspondingly, re-sentencing on the ground of diminished responsibility s 33B(3)(*b*) of the MDA, is not and indeed cannot be more onerous than this.

123 It follows that an accused person may be rational enough to know what he is doing, that it is wrong, that severe consequences would follow the commission of the offence, and that he should take steps to mitigate the risks of engaging in such activities, *and yet* have his ability to *control* his actions in relation to the offence sufficiently impaired. In other words, despite knowing

Version No 2: 29 Dec 2022 (18:05 hrs)

all these things, he may still find it *sufficiently difficult to resist the urge to commit the acts and omissions in relation to the offence*. There is, in our view, no basis for suggesting that this position does or should not apply simply because the offence in question is one of drug trafficking or importation under ss 5(1) or 7 of the MDA.

124 Indeed, although the distinction between *deciding* to commit the offence and following through with *executing* that decision was expressly articulated in respect of the offence of murder in *Ahmed Salim*, at least two other older decisions of our courts in relation to the offence of *drug importation* can also be understood within this framework.

125 The first is *Jeffery Phua*, the facts of which we outlined at [80] above. In arriving at his conclusion that the applicant's persistent depressive disorder and SUD (in that case, ketamine dependence) had substantially impaired his mental responsibility for his commission of the offence, Choo J noted the expert evidence that the applicant's psychiatric conditions had "influenced *the way that he thought about things* and the way that he had behaved" [emphasis added], and that as a result of both of these conditions, "the applicant focused on getting his immediate needs met, while disregarding future consequences of his actions", such that (in the words of the expert) the applicant's decisions would have been "based on an impaired brain making stupid decisions". This led Choo J to take the view that the applicant's "ability in decision-making and impulse control would have been impaired throughout the entire two-week period from when he first agreed to import the drugs to his actual commission of the offence" (*Jeffery Phua* at [15]). Choo J's remarks at [17] of *Jeffery Phua* are also instructive:

Version No 2: 29 Dec 2022 (18:05 hrs)

> … If the applicant were a person free of the illness and addiction that afflicted him, and had carried out the offence of illegally importing diamorphine, he would have no mitigation to save him from the mandatory death sentence for no rational person would have knowingly or intentionally committed what is clearly a serious offence. He must have done it for financial gain, and was thus prepared for the risks. Section 33B(1)(*b*) is not intended for such a person. … [In the relevant Parliamentary debates,] the Minister said that under s 33B(1)(*b*), "[g]enuine cases of mental disability are recognised, while, errors of judgment will not afford a defence". That has always been the position of the criminal law. *The present case is, however,* ***not a case where the applicant had made a mere error of judgment***. The applicant here was suffering from a mental disability as ascertained by the experts. In the present case, *I am satisfied, from the facts and medical evidence of his [p]ersistent [d]epressive [d]isorder and [k]etamine [d]ependence, that the applicant was* ***probably incapable of resisting any internal rationality that might have dissuaded him from committing the offence***.
>
> [emphasis added in italics and bold italics]

126 Read in its context, we take Choo J's finding that the applicant in *Jeffery Phua* was "probably incapable of resisting any internal rationality that might have dissuaded him from committing the offence" to mean that the applicant was incapable of resisting the *urge to commit the offence* due to the combination of his mental disorders. The analysis and decision in *Jeffery Phua* can thus be understood within the framework we have set out above.

127 So too is our more recent decision in *Nagaenthran* consistent with this framework. In that case, the appellant had also been convicted and sentenced to death for importing diamorphine, and applied to be re-sentenced under s 33B(1)(*b*) of the MDA. The High Court judge below found that no operative abnormality of mind was established because the appellant did not suffer from any alcohol use disorder at the time of the offence, and his mild attention deficit hyperactivity disorder condition of the inattentive subtype and his borderline intellectual functioning did not amount to abnormalities of mind for the

Version No 2: 29 Dec 2022 (18:05 hrs)

purposes of the First Limb of s 33B(3)(*b*) (see *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2017] SGHC 222 at [45]–[77]). The High Court judge had also found that the Second Limb was not satisfied on the facts. But even leaving aside the First Limb and the Second Limb, we held on appeal that the appellant would face "insurmountable difficulties" in establishing the Third Limb given the evidence before us in that case (*Nagaenthran* at [34]). We observed that the appellant's acts evidenced a "deliberate, purposeful and calculated decision" on his part (to transport the drugs) "in the hope that the endeavour would pay off, despite the obvious risks that the appellant himself had appreciated", and that he had "considered the risks, balanced it against the reward he had hoped he would get, and decided to take the chance" (*Nagaenthran* at [40]). At [41] of *Nagaenthran*, we concluded as follows:

> [Counsel for the appellant] 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 …, "[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.
>
> [emphasis in original in italics; emphasis added in bold italics]

128 The situation we dealt with in *Nagaenthran* was therefore one where the accused person was held to have made a *deliberate, purposeful and calculated decision* to commit the offence based on a misguided or erroneous assessment of the risks and benefits involved. As we stated in the quotation set out above,

Version No 2: 29 Dec 2022 (18:05 hrs)

even if the accused person's *ability to assess risk* was impaired, this would not amount to an impairment of his mental responsibility where he "fully knew and intended to act as he did", even if he might have been more prone to engaging in risky behaviour. This is quite different from a situation where the accused person's *very ability to make deliberate, purposeful and calculated decisions* in deciding to commit the acts giving rise to the offence is *itself* substantially impaired by his abnormality of mind. In such a situation, it cannot be said that the accused person's decision was "the working of a criminal mind", as was found to be the case in *Nagaenthran*. Instead, it is more accurately characterised as "the product of a disordered mind" falling within the scope of our analysis in *Ahmed Salim*.

129 Furthermore, our reasoning in *Nagaenthran* is consistent with an approach that, in assessing whether the third aspect of mental responsibility relating to control has been substantially impaired, carefully considers not only the accused person's rationality in *executing* his decision to commit the offence, but also his anterior *decision* to commit the offence. This is because it is at this prior decision-making stage that the accused person's ability to make deliberate, purposeful and calculated decisions, and to assess the risks and countervailing benefits associated with the criminal conduct in question, will assume key importance.

Whether Roszaidi's mental responsibility was substantially impaired

Framing the inquiry

130 We now turn to consider whether s 33B(3)(*b*) of the MDA is satisfied in the present case, applying the legal principles we have set out above. We preface

Version No 2: 29 Dec 2022 (18:05 hrs)

this by reiterating three of the relevant principles guiding our *assessment of the material* before us.

(a) First, with regard to the *burden of proof*, the burden lies on the accused person to prove on a balance of probabilities that his mental responsibility for his acts and omissions in relation to his offence was substantially impaired (see *Nagaenthran* at [21]).

(b) Second, with regard to the *threshold for appellate intervention*, we recognise that the role of the appellate court is not to reassess the evidence in the same way that a trial judge would. Notwithstanding this, the appellate court is entitled to consider (among other things): (i) whether the verdict of the judge below is "wrong in law and therefore unreasonable"; and (ii) whether the judge's decision is inconsistent with the material objective evidence on record, bearing in mind that an appellate court is in as good a position to draw the necessary inferences of fact from the circumstances of the case (*Pram Nair v Public Prosecutor* [2017] 2 SLR 1015 at [55]).

(c) Third, with regard to the *significance of expert medical evidence*, while medical evidence is important in determining the presence and/or extent of impairment, the inquiry under the Third Limb is ultimately a question of fact that is to be decided by the court based on all the evidence before it (see [103] above). This weighs against a *further* remittal to the Judge for additional psychiatric evidence to be taken in the present case.

131 As stated at [112] above, the relevant inquiry in respect of the Third Limb can be framed as follows: Did Roszaidi's abnormalities of mind have a

Version No 2: 29 Dec 2022 (18:05 hrs)

real and material (as opposed to trivial or minimal) *effect or influence* on his *ability to exercise control over his actions*, and specifically to act in accordance with what he knew to be right?

132 Before considering this central question, it is helpful to first answer an anterior question: what precisely were Roszaidi's relevant "acts and omissions in relation to the offence" of drug trafficking under s 5(1)(*a*) of the MDA? As framed in the charge against him, Roszaidi's *specific act of trafficking* was his act of giving the two packets containing the Drugs to Azidah (see [1] above; see also *Azli* at [20]). But to view this specific act in isolation would, in our view, artificially ignore the reality of what Roszaidi was in fact doing. There is nothing in the evidence to indicate that, when Roszaidi embarked on the acts that constituted the commission of this offence, he intended to traffic in the Drugs by delivering them to Azidah. On the contrary, it was to assist Is Cangeh; but then, faced with a situation where Is Cangeh's instructions were not immediately forthcoming, he handed the Drugs to Azidah. It is therefore necessary to consider whether Roszaidi's mental responsibility for both his *specific act of giving the Drugs to Azidah* and his *prior decision to traffic in the Drugs* were substantially impaired by his MDD and SUD.

133 We also note that Roszaidi's case is that his MDD *and* SUD, operating *together* in a synergistic manner, substantially impaired his mental responsibility. This was made clear in Mr Thuraisingam's submissions before us at the hearing of the appeal, and this also flows from our conclusions above on the Synergy Claim and the Second Limb (see [82] above). Accordingly, as we have already alluded to at [81] above, we express no view on whether either Roszaidi's MDD or his SUD *alone* would have sufficed to establish the requisite

Version No 2: 29 Dec 2022 (18:05 hrs)

substantial impairment, as this question does not arise for our determination in the present case.

The expert evidence on the Third Limb

134 With those points in mind, we turn to consider the expert evidence of Dr Saluja and Dr Rajesh to the extent that this is relevant to the Third Limb.

135 As we have noted at [39] above, there are two key points of *agreement* between Dr Saluja and Dr Rajesh. The first is that Roszaidi suffered from both MDD and SUD – two *recognised mental disorders* – at the material time, and the second is that both his MDD and his SUD satisfied the First Limb of the *Nagaenthran* test. We have also accepted Dr Rajesh's Synergy Claim, and rejected Dr Saluja's contrary opinion, in arriving at our conclusion that the Second Limb of the *Nagaenthran* test is satisfied by Roszaidi's MDD and SUD operating together at the material time (see [78]–[79] above).

136 With regard to the Third Limb, Dr Saluja and Dr Rajesh differ fundamentally in their approach to analysing whether Roszaidi's mental responsibility was substantially impaired by his MDD and his SUD at the material time. In outline, the differences between the experts are as follows:

(a) First, Dr Saluja's assessment on the Third Limb was premised on his view that the Second Limb was not satisfied by Roszaidi's SUD *in combination with his MDD*. Dr Saluja therefore focused only on the question of whether Roszaidi's mental responsibility was substantially impaired by his *MDD*.

(b) Second, Dr Rajesh's analysis of mental responsibility was both *more holistic* and *more nuanced* than that undertaken by Dr Saluja. In

Version No 2: 29 Dec 2022 (18:05 hrs)

> his reports, Dr Saluja focused almost exclusively on the first two aspects of mental responsibility – namely, basic cognitive ability and moral and legal cognition – even though these aspects of mental responsibility were not in issue at all. His reports did not squarely address the third aspect of *control*, which – as we have said at [106] above – is critical in the present case. It was only *at the remittal hearing* that Dr Saluja addressed the issue of Roszaidi's ability to exercise his will to control his actions; but even then, Dr Saluja's evidence on this aspect focused on Roszaidi's ability to exercise "rational judgment" and complex brain functions. In contrast, in analysing the impairment of this aspect of Roszaidi's mental responsibility, Dr Rajesh looked beyond the seeming rationality of Roszaidi's decision to traffic drugs and his actions flowing from this decision, and also considered whether Roszaidi's *decision-making processes* had *themselves* been impaired by his mental state.

137 It will be apparent from our analysis thus far that we prefer Dr Rajesh's evidence in respect of the Third Limb to that given by Dr Saluja. We now proceed to evaluate the experts' evidence on the Third Limb in greater detail.

(1) The utility of Dr Saluja's evidence on the Third Limb

138 We begin by considering the general utility of Dr Saluja's evidence on the Third Limb in the light of our conclusions on the Second Limb. As we have noted at [136(a)] above, Dr Saluja's analysis on whether Roszaidi's mental responsibility was substantially impaired focused on the impairment caused by Roszaidi's *MDD*, and he disregarded Roszaidi's SUD and the "synergistic" effect of both conditions operating together for the purposes of his assessment on the Third Limb. In Dr Saluja's 1st Report, he had concluded that the Third Limb was not satisfied by Roszaidi's MDD, on the basis that Roszaidi's

Version No 2: 29 Dec 2022 (18:05 hrs)

depressive symptoms did not contribute to the commission of the offence. He subsequently maintained this position even in his later reports.

139 However, we have rejected Dr Saluja's opinion on the Second Limb on the basis that Roszaidi's MDD and SUD did in fact operate together in a "synergistic" manner and were inextricably intertwined at the material time (see [78] above). It follows that Dr Saluja's opinion on the Third Limb should *also* be accorded little to no weight, because he never considered the effect of the *synergistic combination* of Roszaidi's SUD and MDD on his mental responsibility, and his evidence would therefore not address this key question. As we have stated at [82] above, our acceptance of the Synergy Claim means that our analysis of the Third Limb proceeds on a fundamentally different premise from the inquiry undertaken by Dr Saluja and by the Judge below. Once Dr Saluja's evidence is viewed in this light, it becomes clear that *only Dr Rajesh's evidence* directly addresses the issues relevant to the remittal and this appeal, particularly the severity of Roszaidi's mental disorders and their consequent impact on the impairment of his mental responsibility.

(2) Evaluating the experts' approaches to analysing the impairment of Roszaidi's mental responsibility

140 Even looking beyond the limitations on the general utility of Dr Saluja's evidence on the Third Limb and evaluating this evidence on its own terms, Dr Saluja's approach to analysing the impairment of Roszaidi's mental responsibility for the purposes of the Third Limb was inherently flawed (for reasons we elaborate on below) and therefore entirely unhelpful in addressing the central question framed at [112] above: namely, whether Roszaidi's abnormalities of mind had a real and material effect or influence on his ability to exercise *control* over his actions (this being the third aspect of mental

Version No 2: 29 Dec 2022 (18:05 hrs)

responsibility) in the present case. In our judgment, Dr Saluja's evidence on the Third Limb is utterly weak and can be displaced altogether.

141 The Judge found that, although Dr Saluja's reports were "brief" and "his medical conclusions lacked explanation at times", Dr Saluja was "well-able to defend and justify his views during cross-examination", and "the gaps in Dr Saluja's medical reports were not so detrimental to his credibility as to render his evidence unreliable as a whole" (see the Remittal Judgment at [18]). With respect, we disagree with this assessment. As we have noted at [51] above, Dr Saluja's reports were consistently sparse and largely unreasoned. The most substantive report Dr Saluja produced was his 1st Report, which was four pages long and – as we have explained at [50] above – was directed at answering a *different set of questions* from those relevant to the present proceedings. Dr Saluja's 2nd and 3rd Reports, the relevant portions of which are reproduced at [51] above, both simply stated his conclusions without any explanation or analysis. In particular, Dr Saluja's 3rd Report merely asserted that Roszaidi's mental disorders "did not substantially impair his mental responsibility for his acts and omissions in relation to the offence in the present case", without providing any explanation for this assessment until he was specifically prompted to do so in his subsequent reports.

142 When Dr Saluja eventually explained his reasons for concluding in his reports that Roszaidi's mental responsibility was not substantially impaired, these reasons were essentially that Roszaidi still understood the nature of his acts and knew that his acts were contrary to the law – in other words, the first two aspects of mental responsibility. It is evident that the analysis in his reports was limited to considering *only* these first two aspects of mental responsibility and *never squarely addressed the question of whether his ability to control his*

Version No 2: 29 Dec 2022 (18:05 hrs)

will was compromised. In this regard, it is useful to set out the following extracts from Dr Saluja's 4th and 5th Reports in full:

> Dr Saluja's 4th Report
>
> …
>
> 1. Further elaborate, on your assessment on why Roszaidi's mental disorder did not substantially impair his mental responsibility for his acts & omissions to the offence, in regards to your answer [in Dr Saluja's 3rd Report, as set out at the end of [141] above].
>
> A. Roszaidi's mental disorders did not substantially impair his mental responsibility for his acts and omissions in relation to the offence in the present case *because it did not substantially impair his capacity to understand the nature of his acts. He knew that his acts were contrary to the law.*
>
> [emphasis added]
>
> Dr Saluja's 5th Report
>
> …
>
> In my opinion, these disorders did not substantially impair Roszaidi's responsibility for his acts and omissions in relation to the offence in the present case.
>
> My reasons for the above opinion are as follows:
>
> 1. It is inferred from the interviews that *Roszaidi knew he was transporting illicit substances in Singapore*. He stated, 'I knew it was heroin'. *Hence, he knew the nature of the offence.*
>
> 2. *It is also inferred that he knew what he did was wrong and unlawful.* He stated, 'I don't have guts to take too much drugs …', 'one time, I threw it away when I realized it was too much'.
>
> 3. With regards to current offence, he stated that 'I was scared, so I thought it is better to pass it on to my wife'. This statement was in context of him realizing that he was being pursued by the police.
>
> [emphasis in original omitted; emphasis added in italics]

Version No 2: 29 Dec 2022 (18:05 hrs)

143 Notwithstanding this, the Judge rejected the Defence's submission that Dr Saluja had failed to undertake a holistic assessment of Roszaidi's conduct. The Judge held that, on the contrary, Dr Saluja had looked at matters "longitudinally" in arriving at a view on whether Roszaidi's judgment had been impaired at the material time, as Dr Saluja "had even considered Roszaidi's psychiatric history and history of substance abuse in arriving at a view on whether Roszaidi's judgment had been impaired at the material time" and had "explored the motivations behind Roszaidi's decisions". On this basis, the Judge concluded that Dr Saluja had gone "beyond merely ascertaining Roszaidi's capacity to understand the nature of his acts and to differentiate right from wrong" (see the Remittal Judgment at [18]).

144 However, Dr Saluja can hardly be said to have carried out a "longitudinal" analysis. In fact, he proceeded on a plainly erroneous assumption that Roszaidi's MDD should be viewed in isolation from his SUD, for the purposes of the *present* inquiry into Roszaidi's impairment of mental responsibility. This was largely unsupported by any reasons, save that Roszaidi's MDD had not contributed to his *past* drug-related offences and his long history of drug abuse beginning earlier in his life. This seemed to suggest that because Roszaidi had displayed symptoms of SUD in the past before the onset of his MDD, Roszaidi's SUD in the period leading up to the offence could not have been affected by his MDD. As we have already noted at [68] above, this is illogical because it is a *non sequitur*. The central issue is whether, during this period, Roszaidi's SUD was *exacerbated* by his MDD. More importantly, Dr Saluja's evidence wholly failed to address the factual reality of *Roszaidi*'s specific case, including the coincidence of the onset of Roszaidi's MDD with the escalation in his drug consumption, and failed to consider the impact of Roszaidi's MDD and SUD *operating together* in a "synergistic" manner in

Version No 2: 29 Dec 2022 (18:05 hrs)

assessing the impairment of Roszaidi's mental responsibility (see also [68] above).

145 Aside from this, as we have explained at [113]–[129] above, the inquiry into the rationality or otherwise of Roszaidi's judgment is not the central issue in this case. The key question is instead whether Roszaidi's abnormalities of mind had a real and material effect or influence on his ability to exercise *control* over his actions (see [112] and [131] above). To the extent that Dr Saluja touched on this aspect of mental responsibility, his views were based on an *unduly limited and narrow conception of control*. In Dr Saluja's 5th Report, he stated that he concurred with Dr Rajesh's view that both MDD and SUD "can impair one's rational judgment and impulse control and their concurrence can have an exponential effect", though he emphasised that this "cannot be generalized". Significantly, Dr Saluja did not explain why, on the facts, he disagreed with Dr Rajesh's conclusion in as much as it applied to Roszaidi. All he said was that Dr Rajesh had not substantiated this. But we have accepted Dr Rajesh's Synergy Claim for the reasons already explained, and Roszaidi's situation must therefore be assessed in the light of the fact that the two conditions operated synergistically and impacted Roszaidi in a cumulative way (see [78] and [82] above). During his examination-in-chief at the remittal hearing, Dr Saluja stated that he would "just stick with [Dr Rajesh's] point of rational judgment", which Dr Saluja said had to be impaired in order for Roszaidi's mental disorders to "contribute to the offence". Dr Saluja identified this as the key point of difference between the two experts. Nevertheless, it is important to look beyond the label of "rational judgment" in and of itself and to consider precisely what Dr Saluja meant by this. In this regard, it is revealing that Dr Saluja characterised Roszaidi's decision to traffic in drugs as a "choice", *as opposed to* an "irrational judgment":

Version No 2: 29 Dec 2022 (18:05 hrs)

Examination-in-chief of Dr Saluja

A: …

> So in order to – for a mental disorder to contribute to the offences, we need to have a effect which is significant enough to impair one's ability to – I think I'll just stick with Dr Rajesh Jacob's point of rational judgment because the rest I think we do not have any difference and that's the only point we can discuss. So for making a judgment, we need to understand a situation, think about pros and cons, and then come up with a decision. *So if a person is drug trafficking, so the person is doing it for money or also using the trafficked drug for own consumption. That's the – and despite 1 knowing that, you know, or what are the consequences persisting with it.* ***So that's a choice, not a irrational judgment.*** *So he knows what he's doing, he knows what are the consequences and then people can make choices. Choices could be right, choices could be bad, but we all have right to make choices. So I –* ***I think it's all about choice rather than depression as illness affecting one's judgment****.*

…

Cross-examination of Dr Saluja

…

Q: … You agree he's got a drug dependence, correct?

A: Yah, yah, he has got drug dependence, yes.

Q: He needs his drugs every day, correct?

A: Yes.

Q: And –

A: That's what he told me.

Q: And at that – at the time of his arrest, he was suffering from major depressive disorder [*ie*, MDD], correct?

A: Mild depressive episode, major depressive disorder, yes.

Q: And I put to you and that's why he could not resist the urge to traffic so that he will get his drugs. Agree or disagree?

A: ***This is a matter of choice.*** That's what I was saying previously.

Version No 2: 29 Dec 2022 (18:05 hrs)

…

[emphasis added in italics and bold italics]

146 This, in our judgment, completely misses the point. When Dr Saluja insisted that Roszaidi's decision to participate in drug trafficking was "a matter of choice", it is evident from what he said in his examination-in-chief that he meant that Roszaidi had basic cognitive ability, and moral and legal cognition. Dr Saluja completely failed even to consider the element of *control*. Nor, for that matter, did he expressly consider or explain whether and how Roszaidi's ability to *exercise* such choice over his actions might have been affected by his mental disorders.

147 A further point raised by Dr Saluja to support his view that Roszaidi's mental disorder did not severely impact him or substantially impair his mental responsibility was that the *nature* of trafficking activities involved complex tasks engaging various higher cognitive and executive brain functions (such as coordination and organisation) which Roszaidi was able to exercise. We set out Dr Saluja's testimony on this point in full:

Examination-in-chief of Dr Saluja

A: … So then we look at the decision-making at the time of alleged offences. *So this act of trafficking requires multiple functions in the brain. We need to plan, we need to execute it and we need to follow certain – understand command from others.* And then, you know, so there's multiple things happening. So someone who's waiting for a call, someone who has planned it, someone who's arranged for it, driver to – drive him around, someone who knows where he would get the drugs from, how to get there, so this is all exhibited functions in the brain. I mean *it's not a simple task. It's a complex task involving a lot of people and – your ability to organise all those things. So clearly shows that is what the brain is functioning in a very organised manner, not just internally but also involving the external agencies. It requires a lot of attention and concentration, requires a*

Version No 2: 29 Dec 2022 (18:05 hrs)

> *lot of focus*, requires a lot of courage. So I think *this is for anyone who is disorganised or severely impacted by a mental disorder is going to be extremely difficult task to actually do for anyone.*
>
> …
>
> Cross-examination of Dr Saluja
>
> Q: So would you agree with me that in your – all your reports, you base it on his abili – you say that he – his responsibility is not impaired because he knew the difference between right and wrong, correct?
>
> A: That's one part of it, Your Honour.
>
> …
>
> Other part is this ability to perform a function.
>
> …
>
> *[Roszaidi] had the cognitive ability, that means he was able to plan, he was able to organise, he was able to coordinate things between different people which requires higher executive functions in the brain.* And people with – if he was severely depressed, that could have been impaired. *But it clearly shows that his ability to perform these functions didn't get impaired by this depressive episode.*
>
> Q: Okay. First point I want to make is that that is not in your report, correct?
>
> A: That's correct. But I – I gave the evidence just now.
>
> Q: Yes, Doctor. Let's go a step at a time. *You have not mentioned any of that in your reports, correct?*
>
> A: *That's correct, yah.*
>
> [emphasis added]

148 It should first be noted that, as pointed out by the Defence in the quotation set out above, this was a *new point* which Dr Saluja acknowledged was not included in his reports. More fundamentally, Dr Saluja's emphasis on the complex brain functions required to execute trafficking tasks unduly focuses on Roszaidi's apparent rationality in *executing* his decision to traffic, as distinct

Version No 2: 29 Dec 2022 (18:05 hrs)

from his coming to that decision in the first place. It therefore overlooks the critical anterior question of whether Roszaidi had an impaired ability to resist the urge to do whatever he needed to do in order to seek and obtain a supply of drugs.

149 It is crucial to note that, elsewhere in his evidence, Dr Saluja *unreservedly accepted* that Roszaidi's life at the material time *revolved around his need to procure drugs to feed his drug habit.* For instance, although Dr Saluja's 1st Report had noted that Roszaidi married Azidah in 2014 and had a child with her (and thus acknowledged that Roszaidi had a life outside drugs), Dr Saluja recognised in his testimony at the remittal hearing that Roszaidi was "focussed only on drug seeking and drug related activities" and was "engaged in … not many other activities", such that his "*main focus* was drugs" [emphasis added] at the material time. He also observed that Roszaidi was using various drugs which had different effects on his brain, that he was using them "pretty much every day and not engaging in any other activity", and that "[t]hat was *the focus of his life*" [emphasis added]. Dr Saluja went on to acknowledge that for "someone who is dependent on drugs, *their activities resolve* [*sic*] *around consuming and possessing drugs* and [Roszaidi's] behaviours was exhibiting that majority of the times he was just trying to get money and focusing on drugs", such that "drug and related activities … [were] the major part of his life for [the] past few months" before the offence. Those few months before the offence were critical because that was the period when Roszaidi's MDD and SUD operated synergistically to affect his overall mental state and exacerbate his need for drugs to feed his escalating rate of consumption. Yet, because of the position he took on the Synergy Claim and the Second Limb, Dr Saluja failed to consider the implications of these observations in the analysis of

Version No 2: 29 Dec 2022 (18:05 hrs)

whether Roszaidi's mental responsibility was substantially impaired at the Third Limb of the *Nagaenthran* test.

150 Ultimately, even under cross-examination, Dr Saluja offered few reasons for his assessment in respect of the Third Limb. Indeed, when it was put to him that he had not considered whether Roszaidi's mental illness contributed in any way to his offending, Dr Saluja simply stated that "[his] *impression* was that it did not contribute" [emphasis added] to Roszaidi's offending. When he was pressed further on where in his reports he had considered this issue, Dr Saluja acknowledged that *no reasons were stated in his reports*, and stated (rather unhelpfully) that this assessment was "based on [his] kind of understanding from the interviews and the mental state examination and the collated history and the medical notes". This is simply an unacceptable basis on which to provide, much less to accept, expert evidence on an issue of central importance in the present case, where the life of an accused person is at stake.

151 During his cross-examination, Dr Saluja's attention was also drawn to Dr Rajesh's opinion that Roszaidi's MDD and SUD, operating together in a synergistic manner, led him to "[focus] on the immediate short-term benefits, rather than weigh and focus on the long-term adverse consequences of trafficking drugs". Dr Saluja disagreed with this opinion on the ground that Roszaidi's drug trafficking and procurement activities took place repeatedly "across months", and therefore Roszaidi could not be said to have focused on "immediate short-term" benefits over longer-term consequences.

152 However, leaving aside the fact that Dr Saluja did not explain why "short-term" considerations should be defined in this way, this analysis fundamentally misapprehends the point. The impairment of Roszaidi's ability to control his immediate actions could have (and in fact may well have)

Version No 2: 29 Dec 2022 (18:05 hrs)

persisted to various degrees for a long period of years, and have recurred at times over the course of that period. The fact that Roszaidi was seeking instant or short-term gratification from the consumption of drugs is *entirely consistent* with the fact that, because of his SUD, this was a state he had been in for a protracted period of time. Indeed, as Dr Saluja himself put it, Roszaidi's life over many years had "revolved … around drugs" and *in the last few months*, "trying to get money and focusing on drugs … [were] the major part of his life". Viewed in this light, the approach suggested by Dr Saluja above artificially and arbitrarily limits the cut-off for "short-term" considerations, and ignores the fact that these short-term considerations could be operative in a recurrent way over a longer period. It would also lead to the conclusion that a person suffering a momentary or short-lived impairment of control would be better able to avail himself of s 33B(3)(*b*) of the MDA than someone who had a longstanding condition. There is simply nothing to support this approach. In our view, the fact that Roszaidi had a long history of drug abuse and dependence does not detract from the *heightened intensity* of his particular focus on getting drugs in the critical few months before his arrest, following the onset of his MDD. To put it another way, his chronic dependence on drugs had evidently given way to a sharpened fixation in those months.

153 We therefore find Dr Saluja's evidence on the Third Limb wholly unsatisfactory. Dr Saluja's assessment was premised on an unduly narrow conception of control as an aspect of mental responsibility; his characterisation of Roszaidi's decision to traffic as a "choice" was unsubstantiated and circular; his emphasis on the complex brain functions associated with trafficking placed too much weight on Roszaidi's seeming rationality in *executing* his previously formed decision to traffic; and he completely misunderstood or altogether missed the key point about Roszaidi's case, that because of his psychiatric

Version No 2: 29 Dec 2022 (18:05 hrs)

conditions he was overwhelmingly focused on the short-term imperative of getting his supply of drugs.

154 We much prefer Dr Rajesh's evidence. The Judge's finding that Dr Rajesh's evidence was not persuasive seems to have been chiefly based on his view (following Dr Saluja's) that Roszaidi had made a reasoned *choice* to traffic in the Drugs and, more generally, displayed a capacity for rational thinking and rational judgment (see the Remittal Judgment at [12]–[16]). However, it will be clear from our analysis above that we do not regard either or both of these as affording a sound basis for disregarding Dr Rajesh's evidence.

155 Compared to Dr Saluja's reports, Dr Rajesh's reports were better reasoned, and he was able to point to clinical literature to substantiate his opinions. We give some examples to explain this.

156 Dr Saluja's 5th Report stated that the effect of MDD and SUD together "cannot be generalized" and that Dr Rajesh had "written a general comment and … not substantiated it by any evidence in this particular case". We disagree with this. In our view, Dr Rajesh adopted a more holistic assessment than Dr Saluja's, and specifically took into account the effect of the *specific combination* of Roszaidi's MDD and SUD on matters such as *his decision-making process*. In both Dr Rajesh's 1st Report and Dr Rajesh's 2nd Report, he opined that the "synergistic" interaction between Roszaidi's MDD and his "comorbid drug abuse" that he had identified based on the literature was what had led to Roszaidi committing the offence by "focussing on the immediate short-term benefits, rather than weigh[ing] and focus[ing] on the long-term adverse consequences of trafficking drugs". During his cross-examination, Dr Rajesh explained that the "immediate short-term benefits" referred to here

Version No 2: 29 Dec 2022 (18:05 hrs)

were the temporary high and the relief from withdrawal symptoms afforded by drug consumption. Roszaidi's focus on these benefits was, as we have noted, borne out by the reality of Roszaidi's life and drug consumption patterns after the onset of his MDD, which overlaid his SUD. Thus, Dr Rajesh's analysis engaged with the important distinction between Roszaidi's arriving at the anterior *decision* to commit the acts in question and his subsequent actions in *executing* that decision. Dr Rajesh also commented on how the link between drug consumption and depression would have been operative in relation to *Roszaidi specifically*, given that Roszaidi never sought medical treatment for his MDD (see [71] above).

157 We turn to Dr Rajesh's clarification at the remittal hearing that, although his 1st and 2nd Reports referred to Roszaidi's MDD causing an "impairment of rational judgment" *and* "difficulties in impulse control", it was "more of an impairment of rational judgment rather than impulse control". Ultimately, the issue before the court in respect of the Third Limb is whether Roszaidi's *mental responsibility* for his acts in relation to the offence was *substantially impaired* by his abnormalities of mind; and, as we have emphasised at [112] above, the key question in this regard is whether Roszaidi's abnormalities of mind had a real and material effect or influence on his ability to exercise *control* over his actions, and specifically to act in accordance with what he knew to be right. Nevertheless, the label "impulse control", much like the label "rational judgment", is not in itself conclusive. Dr Rajesh's evidence on this point must be considered in its context. When Dr Rajesh elaborated on this part of his testimony, he explained that "because [Roszaidi] was … actually under the influence of drugs at that material point of time, so *it's difficult to delineate exactly the impulse control issues … at that point*" [emphasis added]. Subsequently, under cross-examination, Dr Rajesh reiterated that "the loss of

Version No 2: 29 Dec 2022 (18:05 hrs)

impulse control *could be explained on the basis of [Roszaidi] taking drugs on that day* because when you have impulsivity, you tend to take drugs" [emphasis added]. Dr Rajesh therefore was not expressing the view that Roszaidi's psychiatric conditions *did not impair* his impulse control. Instead, Dr Rajesh emphasised the link between Roszaidi's MDD on the one hand, and the impairment of his *rational judgment* on the other, in part because this also encompassed his impulse control (as we explain below), and in part because the impairment of Roszaidi's *impulse control* at the time of the offence might also have been affected by his *drug consumption* on the day of the offence, rather than solely by his psychiatric conditions. We return to the significance of Roszaidi's drug consumption on the day of the offence at [192] below. Further, as explained at [172]–[173] below, there is no doubt in our view that, behind the labels, Dr Rajesh did consider the element of *control* (as we have defined it at [105(c)] above) in his analysis of rational judgment.

158 For these reasons, in considering whether the Third Limb is satisfied in Roszaidi's case, we place no reliance on the opinions of Dr Saluja and instead prefer the evidence of Dr Rajesh.

Answering the central question

159 We turn to the central inquiry in this case: whether Roszaidi's MDD and SUD had a *real and material* (as opposed to trivial or minimal) *effect or influence* on his *ability to exercise control over his actions*, and specifically to act in accordance with what he knew to be right, so as to substantially impair his mental responsibility for his acts in relation to the offence for the purposes of s 33B(3)(*b*) of the MDA. As explained at [132] above, it is necessary to consider Roszaidi's mental responsibility for both his *act of giving the Drugs to Azidah* (this being the specific act of trafficking with which he was charged)

Version No 2: 29 Dec 2022 (18:05 hrs)

and his *prior decision to traffic in the Drugs* (which provides crucial background with which that specific act of trafficking is inextricably intertwined, and against which it is therefore to be assessed). We deal with each of these points separately.

160 Before we do so, it is important to recall Roszaidi's long history of drug abuse and dependence on multiple substances in order to fully understand the impact of his MDD and SUD on his mental state. To this end, we return to the granular chronology of events that we set out at [5]–[21] above, which covered Roszaidi's drug consumption from a young age, his drug-related treatments and criminal records, and the events occurring after his release from prison in the critical few months leading up to his commission of the present offence. To put this chronology of events in perspective, out of the 25 years preceding Roszaidi's arrest for the present offence – from March 1990 (when he was 18 years old) to 6 October 2015 – he had, on our estimate, spent up to around *18 years* either in prison for drug-related offences or under supervision or undergoing treatment for drug abuse. This includes *four distinct periods of incarceration*: the first for six months for drug possession (see [10] above); the second for five years and three weeks for drug possession and consumption (see [12] above); the third for seven years and six months for drug trafficking (in buprenorphine) and drug consumption (see [14] above); and the fourth for three years for drug possession (see [15] above). Two of these four periods were, as Dr Saluja noted, "LT1 and LT2 sentences", meaning long-term sentences. This period of 18 years also includes *five separate occasions on which Roszaidi was sent to the DRC for treatment*, a point also noted by both Dr Saluja and Dr Rajesh.

Version No 2: 29 Dec 2022 (18:05 hrs)

161 This time estimate is necessarily inexact because the precise dates on which Roszaidi's terms of imprisonment and supervision began and ended are not in evidence. Nevertheless, what emerges from this factual background is that Roszaidi's drug consumption began when he was a child, persisted into his teenage years, and continued to afflict him throughout most of his adult life. It is in this broader context that the impact of Roszaidi's MDD and SUD, and his acts and omissions in relation to the present offence, must be viewed.

(1) What influenced Roszaidi's decision to traffic drugs at the material time?

(A) EXPLANATIONS PROVIDED BY ROSZAIDI

162 As noted at [21] above, Roszaidi began delivering drugs for Is Cangeh in July 2015. In his statements to the police and in his interviews with the experts, Roszaidi provided various explanations for this decision to traffic drugs. Two explanations feature prominently:

(a) First, that he needed drugs from Is Cangeh for his own consumption. This was alluded to as early as Roszaidi's 2nd Long Statement, where he referred to his "ration" from a drug consignment and to "help[ing] himself" to various drugs for his own consumption without Is Cangeh's knowledge, and this was also maintained by Roszaidi at trial. Roszaidi also stated, in his fifth long statement dated 19 July 2016 ("Roszaidi's 5th Long Statement"), that he was "caught in the trap of drugs" and "could not think straight" when he decided to do this job for Is Cangeh.

(b) Second, that he needed more money to support Azidah and their daughter, as he had financial problems and did not have any skills to

Version No 2: 29 Dec 2022 (18:05 hrs)

> earn enough money from another job, whereas trafficking was an "easy job" that offered him $300–$400 for each collection and delivery of heroin and ice.

163 The first of these explanations is particularly significant in the present case. That Roszaidi's decision to traffic was significantly influenced by his need to obtain drugs for his own consumption is corroborated by what was recorded by *both* experts. Dr Saluja's 1st Report noted that Roszaidi had stated that he did not have to buy methamphetamine and heroin as he "just took … as much as he wanted from the packets that he used to traffic". Similarly, Dr Rajesh's 3rd Report noted that Roszaidi was "smoking heroin and ice daily in 2015 and used to take heroin and ice for his own consumption from the packets received by him which he delivered to others subsequently". He therefore "never paid for the drugs he used to consume", as (apart from the small amounts provided by Is Cangeh for his consumption) he would also steal from the packets. Indeed, the Prosecution also accepted at the hearing before us that Roszaidi's trafficking activities were his *main source of drugs* to feed his drug habit.

164 Roszaidi also gave the following explanations for several more specific decisions he made in the lead-up to the present offence:

> (a) For each job that he undertook for Is Cangeh, he did not ask about the quantity of drugs he was collecting because Is Cangeh was his friend and he trusted him.
>
> (b) On the day of the offence, he told Is Cangeh that he did not want to take on the job but was "forced" to do so by Is Cangeh. He eventually agreed to help because he was "confused and scared [he would] be framed".

Version No 2: 29 Dec 2022 (18:05 hrs)

(c) Even after realising that the amount of drugs he had collected for this job was much greater than the amount he had dealt with on previous occasions, he did not throw away the drugs in the consignment (as he had done once in the past) because he was afraid that Is Cangeh would send "his people" to harm him and/or his family if he threw the drugs away again.

165 The fact that this had the appearance of forming something of a patchwork of explanations provided by Roszaidi for his decision to traffic drugs for Is Cangeh does not, in our view, render the individual explanations unreliable, whether taken separately or together. This is because the various explanations are *reconcilable and coherent*. We return to this point at [178] below, after considering the impact of Roszaidi's MDD and SUD in combination on his decision to traffic drugs.

(B) THE IMPACT OF ROSZAIDI'S MDD AND SUD

166 We now consider the impact of Roszaidi's MDD and SUD on his mental state at the material time.

167 The evidence indicates that the impact of Roszaidi's *MDD* was twofold: (a) it caused him to cease work (and thereby also cut off his primary source of financial support), and (b) it caused him to escalate his drug consumption. As we have considered the impact of Roszaidi's MDD on his SUD (which is the second of these two points) at length in the course of our analysis on the Second Limb, we focus on the former point in this section, though – as will be seen – these two aspects of the impact of Roszaidi's MDD cannot be viewed in isolation from one another.

Version No 2: 29 Dec 2022 (18:05 hrs)

168 The impact of Roszaidi's MDD on his ability to work emerges most clearly from Dr Rajesh's evidence. Dr Rajesh's 2nd Report noted that, after Roszaidi's grandmother and mother passed away in May 2015, his MDD began, and he "had no interest in his work". Thereafter, due to his depressive symptoms, he quit his job and started "escalating his drug use". During his cross-examination, Dr Rajesh maintained the position that "the reason for [Roszaidi] quitting the job [at the flour company] was because of his depressed state of mind". Dr Saluja's evidence is also consistent with this. Although Dr Saluja did not comment specifically on the impact of Roszaidi's MDD on his ability to hold down gainful employment, Dr Saluja did note that an individual with mild depressive episodes (which in his view described Roszaidi, based on his assessment that Roszaidi exhibited four to five symptoms in ICD-10) would have "*some difficulty in continuing with ordinary work* and social activities but will probably not stay [*sic*] to function completely" [emphasis added]. It is worth noting that ICD-10 (at para F32.1) states that if four *or more* symptoms are present (such that the depressive episode is of "moderate" severity under ICD-10), the patient is likely to have "*great difficulty* in continuing with ordinary activities" [emphasis added]. However, as Dr Saluja was not questioned on this, we leave this to one side, save to note again the unsatisfactory nature of Dr Saluja's evidence upon which the case against Roszaidi rests.

169 This twofold impact of Roszaidi's MDD is also consistent with the objective facts. Roszaidi quit his job with the flour company and stopped working shortly after his grandmother and mother passed away in May 2015, which coincided with the onset of his MDD.

Version No 2: 29 Dec 2022 (18:05 hrs)

170 Turning to Roszaidi's *SUD*, it bears emphasis that Roszaidi was not merely a heavy drug user. He was diagnosed by both experts with SUD, a *recognised mental disorder* which was aggravated by his MDD. In our judgment, the impact of Roszaidi's SUD on his decision-making was highly significant as the evidence shows that, in the critical few months before his commission of the offence, procuring and consuming drugs was Roszaidi's *central and overriding preoccupation*. This much is not disputed even by Dr Saluja, who described consuming drugs as "the focus of [Roszaidi's] life" and observed that "[h]e was focussed only on drug seeking and drug related activities" (see [149] above).

171 Indeed, Dr Saluja even accepted during his cross-examination at the remittal hearing that Roszaidi's drug dependence "affect[ed] his will to resist getting the drugs" and his ability to "resist the will to take drugs". This is a key point as it goes directly towards establishing that Roszaidi's SUD (exacerbated by his MDD) had a *real and material effect or influence* on his *ability to exercise control over his actions* in relation to his offence, which (as we have stated at [112] above) is the central question in this appeal. If it is accepted that Roszaidi's SUD materially affected his ability to resist drug-seeking behaviour, and that Roszaidi's decision to traffic drugs for Is Cangeh was materially influenced by the supply of drugs that this offered him (as noted at [162(a)] above), then it *must follow* that Roszaidi's mental responsibility in deciding to traffic drugs for Is Cangeh was substantially impaired by the combination of his MDD and SUD. Yet, this point was not addressed by the Judge in the Remittal Judgment, presumably because the Judge proceeded on the basis that *only Roszaidi's MDD* was relevant to the analysis under the Third Limb and that his MDD had not contributed to his ability to resist drug-seeking behaviour (see [9] and [21] of the Remittal Judgment). As we have explained, we reject that

Version No 2: 29 Dec 2022 (18:05 hrs)

approach. In our view, the distinction drawn in the Minority Judgment (at [260], [277], [280] and [282]) between Roszaidi's will to resist drug *consumption* on the one hand, and his will to resist his acts of drug *trafficking* on the other, is similarly unpersuasive. Given that Roszaidi's decision to traffic was significantly influenced by his need to obtain drugs for his own consumption (as we have noted at [163] above), such a bright-line distinction seems to us to be artificial and unsustainable in the circumstances of this case.

172 In view of the shortcomings of Dr Saluja's evidence on the Third Limb which we have summarised at [139] and [153] above, Dr Rajesh's assessment of the impact of Roszaidi's MDD and SUD assumes key importance. Dr Rajesh's opinion was that Roszaidi's decision to take up drug trafficking for Is Cangeh was influenced by a *combination* of his loss of employment and financial issues, and the prospect of obtaining drugs for his own heavy consumption free of cost. The Prosecution sought to characterise this decision to take on a new job and obtain a "fringe benefit" therefrom as a "rational judgment" on Roszaidi's part. However, Dr Rajesh maintained that although this might *appear* to be rational from the perspective of an objective onlooker, Roszaidi's "decision-making at that time was impaired because of his mental state". Dr Rajesh went on to explain that this was *not* a rational judgment because there was "a strong overlap between [Roszaidi's] depression and his drug use", and that one of Roszaidi's motivations for trafficking drugs for Is Cangeh was to obtain drugs for his own consumption and to counteract his withdrawal symptoms. This, Dr Rajesh said, demonstrated an "impairment of … judgment" because Roszaidi was "taking the … easier way out to feed his drug habit". It is clear from this that although Dr Rajesh labelled this as an impairment of Roszaidi's "judgment", the substance of the point he was making was that Roszaidi's overriding fixation on procuring drugs caused him to take

Version No 2: 29 Dec 2022 (18:05 hrs)

the "easier way out" to feed his drug habit. It seems to us that Dr Rajesh termed this an impairment of judgment because, plainly, the correct thing for Roszaidi to do would have been to not feed his drug habit, to resist his urge to consume drugs, and to face and fight the physical and mental struggles this would entail.

173 But the framing of Roszaidi's underlying impairment in terms of rational judgment does not displace the real nature of this impairment, which in this context was the interference with his ability to *exercise control* over his actions by reason of his *overwhelming need to obtain and consume drugs*. In line with this, as we have noted at [151] and [156] above, Dr Rajesh had also opined in his reports that the "synergistic" combination of Roszaidi's MDD and SUD led him to "[focus] on the immediate short-term benefits, rather than weigh and focus on the long-term adverse consequences of trafficking drugs". He maintained under cross-examination that Roszaidi was "more focused on the short-term benefits rather than the long-term consequences of getting caught with these drugs", and this "caused an impairment of his judgment at the material time". These short-term benefits were the temporary high from drug consumption and the relief from his withdrawal symptoms. Although Dr Saluja disagreed with this opinion, he did so for reasons that we have rejected at [151]–[153] above.

174 Thus, it was the *combination* of Roszaidi's MDD and his SUD which substantially impaired his ability to resist doing what he did. His MDD undermined his ability to work and to support the drug habit that he had had over the course of most of his life, and subsequently led him to turn to other sources of supply, in particular by trafficking in drugs for Is Cangeh as he was paid in kind and would also steal from the drug consignments for his own consumption. His MDD also aggravated his SUD, which in turn drove him to

Version No 2: 29 Dec 2022 (18:05 hrs)

prioritise securing a supply of drugs to feed his addiction as his overriding preoccupation.

(C) THE PROPER CHARACTERISATION OF ROSZAIDI'S DECISION TO TRAFFIC DRUGS

175 This brings us to the question of how Roszaidi's decision to traffic drugs for Is Cangeh should be characterised in the circumstances, bearing in mind the facts and evidence set out above.

176 The Judge characterised Roszaidi's decision to "under[take] the dangerous activity of trafficking simply so that he could consume the drugs that he was asked to deliver" as a "reasoned choice" that was "the consequence of an exercise of rational judgment on Roszaidi's part", having "believed that its risks were outweighed by its rewards" (see the Remittal Judgment at [12]). In this regard, the Judge's analysis appeared to be largely influenced by Dr Saluja's opinion that Roszaidi's inability to resist the urge to traffic so that he could get his drugs was a matter of "choice" (see [145] above). On this basis, the Judge likened Roszaidi's case to that of *Nagaenthran*, in that both involved an appellant whose rational judgment was not impaired because he had "simply taken a calculated risk which, contrary to his expectations, had materialised" (see the Remittal Judgment at [20]).

177 We are unable to accept the Judge's characterisation of Roszaidi's decision to traffic. In our judgment, this decision was *not* a reasoned choice or the consequence of rational judgment, but rather "the product of a disordered mind" (to adopt the language used in *Ahmed Salim* at [38]), caused by the overriding force of his SUD when it was exacerbated by his MDD. These mental disorders impaired his ability to control his actions to the extent that his *overriding preoccupation* at the relevant time was *procuring and consuming*

Version No 2: 29 Dec 2022 (18:05 hrs)

drugs, particularly after May 2015 when his drug consumption escalated following the passing of his grandmother and mother and he ceased his employment with the flour company. In effect, the situation reached a point where Roszaidi's life mainly revolved around searching for drugs to feed his drug addiction and to avoid suffering withdrawal symptoms. Both Dr Rajesh and Dr Saluja in substance agreed that this described Roszaidi's state at this time (see [170]–[173] above). Notably, *neither expert – not even Dr Saluja –* has suggested that, in the critical few months leading up to the offence, Roszaidi was in a state to *resist* the urge to consume the amount of drugs that he did, and that he could have continued working in some form of gainful employment other than trafficking for Is Cangeh to feed this urge. In these circumstances, Roszaidi's decision cannot meaningfully be described as a "choice" or the product of an "exercise of rational judgment" on his part.

178 We return here to the point we alluded to at [165] above. The picture of Roszaidi that emerges clearly from the various sources of evidence is of a person who had a very long history of drug abuse, beginning when he was a child and continuing through most of his life. He failed the Primary School Leaving Examination thrice, left school after his Secondary Two year, and dropped out after completing only one year of training at the Vocational and Industrial Training Board. In the 25 years from the time he was 18 years old until his arrest for the present offence, he spent up to as much as 18 years either in prison for drug-related offences or undergoing supervision or treatment for drug abuse (see [160] above). In the year or so leading up to the offence, he had been released from prison with only a low level of educational qualifications and few skills that would assist him in finding gainful employment. He nonetheless made a go of life and started work, but then suffered a series of bereavements in quick succession, became depressed, and increasingly turned to escalating

Version No 2: 29 Dec 2022 (18:05 hrs)

drug consumption as a form of self-medication. His depression coincided with and led to his ceasing work, by making it difficult for him to hold down employment. At the same time, he was preoccupied with the need to procure drugs for his own consumption, to feed his aggravated drug dependency following the onset of his MDD. All these considerations came together in the form of his decision to perform various drug trafficking "jobs" for Is Cangeh, whose work offered Roszaidi the prospect of *both* financial support and a source of drugs for his own consumption. In view of the escalation in Roszaidi's rate of drug consumption by this point, it would have been critical for him to be able to obtain supplies that he did not need to pay for. Roszaidi's financial motivations for becoming involved in drug trafficking were thus *closely intertwined* with his addiction-related motivations. In this regard, it should also be borne in mind that Roszaidi's addiction-related motivations need not be *the cause* of his decision to traffic drugs, let alone the sole or dominant cause. All that is required is that Roszaidi's MDD and SUD must have *had an influence* on his decision to traffic (see [104] above).

179 In our judgment, *Nagaenthran* can be distinguished on this basis. In *Nagaenthran*, we observed that the accused person's "vastly different and irreconcilable accounts" of why he had committed the offence of drug importation "did not aid his case at all" (see *Nagaenthran* at [35] and [37]). There, the accused person had provided three different accounts: first, that he was in need of money; second, that he was coerced under duress by one "King" who had threatened to harm his girlfriend; and third, that he had acted out of a misguided sense of gang loyalty. On appeal, we upheld the High Court judge's finding that the defence of duress was not established, and that the explanation based on gang loyalty should be rejected as an afterthought as it only emerged some seven years after the accused person was arrested for the offence. What

Version No 2: 29 Dec 2022 (18:05 hrs)

remained was the accused person's explanation that he had delivered the drugs because he was in need of money, which was also consistent with his original account of the reason for his offending that he had provided in his contemporaneous statement (see *Nagaenthran* at [35]–[37]). Unlike in the present case, the accused person's motivation in *Nagaenthran* thus seems to have been predominantly monetary; he was not also driven by the urge to obtain drugs to feed his own addiction. Our holding in *Nagaenthran* that the accused person had merely made an error of judgment by "[taking] a calculated risk which, contrary to his expectations, materialised" (*Nagaenthran* at [41]) must thus be viewed in this context. As we went on to note, the accused person there *fully knew and intended* to act as he did. His mistake lay in assessing the risks of getting caught or even those inherent in the operation (see *Nagaenthran* at [41]). That is a wholly different case from the present where, by reason of his recognised psychiatric disorders, Roszaidi's ability to resist doing what he did was significantly impaired and compromised.

180 This court's decision in *Rosman bin Abdullah* can also be distinguished on similar grounds. In that case, the accused person had explained in one of his statements that he had decided to embark on his criminal behaviour because he was "desperate in repaying 'Mayday' the debt" and "[had] no choice but to do the Heroin run". "Mayday" was an individual who had asked the accused person to source for heroin, and the accused person had helped Mayday arrange a heroin deal and pack the drugs because he owed Mayday money after a failed deal to buy methamphetamine (see *Rosman bin Abdullah* at [15]). The court held that this statement by the accused person showed that he had "weigh[ed] the costs and benefits of embarking on this criminal conduct and made the conscious and informed decision to do so, notwithstanding that he was fully apprised of the consequences of his actions". The court also noted specifically

Version No 2: 29 Dec 2022 (18:05 hrs)

that the debt which the accused person owed to Mayday "did not arise as a result, for example, of the [accused person] having to satiate his drug addiction" but was as a result of the botched methamphetamine deal that he had made with Mayday previously (see *Rosman bin Abdullah* at [56]). There is a very material difference between an accused person who feels compelled to perform a criminal act to repay a debt that arose out of another criminal act, and an accused person who, by reason of a pair of recognised psychiatric conditions, has been seized by an overpowering need to feed his craving for drugs.

181 The fact that Roszaidi may have been able to exercise the complex brain functions associated with trafficking also does not support the Judge's characterisation of Roszaidi's decision to traffic. The Judge agreed with Dr Saluja's view that Roszaidi's ability to execute the tasks that Is Cangeh required of him evidenced his ability to think in a logical and organised manner (see the Remittal Judgment at [19]; see also [147] above). However, as we have explained at [148] above, this assessment fundamentally fails to appreciate the distinction between Roszaidi's apparent rationality in *executing* his decision to traffic, and the tainted or impaired way in which the underlying *decision* to traffic was itself arrived at.

182 Here, we also consider the significance of the fact (alluded to at [164(c)] above) that, on one previous occasion, Roszaidi threw away the consignment of drugs that he was meant to deliver for Is Cangeh. When Is Cangeh offered Roszaidi the prospect of working for him, he assured Roszaidi that the amount of drugs involved would not attract the death penalty, though he never told Roszaidi how much drugs he was to collect for each job and Roszaidi did not ask. However, on that particular occasion – which was "probably the third occasion" or so on which Roszaidi carried out a job for Is Cangeh – Roszaidi

Version No 2: 29 Dec 2022 (18:05 hrs)

sensed that the amount of drugs in the consignment was "a lot" and "more than the previous occasions". Feeling "cheated and scared", he "threw the drugs along the roadside" before calling Is Cangeh and refusing to complete the job. As a result, Is Cangeh later informed him that a sum of $8,000 would be deducted from his payments to account for the cost of the drugs thrown away. Yet, Roszaidi continued working for Is Cangeh, because Is Cangeh "assured [him] that such thing would never happen again" and because Roszaidi "need[ed] *barang* from [Is Cangeh] for [his] own consumption". This suggests to us that, even after this incident which illustrated the very real possibility of Roszaidi being made to deliver an amount of drugs that would attract the death penalty, he remained unable to overcome his urge to consume drugs and to participate in drug trafficking as a means of obtaining those drugs, seemingly hoping that Is Cangeh would be good for his word.

183 For these reasons, we hold that the element of control in relation to Roszaidi's mental responsibility for his decision to traffic was indeed substantially impaired by the combination of his MDD and his SUD.

(2) What influenced Roszaidi's specific act of giving the Drugs to Azidah?

184 We finally consider Roszaidi's act of giving the Drugs to Azidah on 6 October 2015, which was the specific act of trafficking which formed the subject of his drug trafficking charge under s 5(1)(*a*) of the MDA.

185 Before we address the question of what influenced Roszaidi's act of handing the Drugs to Azidah, we set out a more detailed timeline of the key events that we have outlined at [22]–[28] above. After collecting the Drugs at approximately 9.30pm, from 9.38pm to 9.45pm, Roszaidi called Is Cangeh at least three times and Is Cangeh called him back once at 9.53pm. At 9.55pm,

Version No 2: 29 Dec 2022 (18:05 hrs)

Roszaidi called Azidah. Roszaidi then called Is Cangeh once more at 9.58pm. Some minutes after 10.00pm, Roszaidi met Azidah and passed her the Drugs. Roszaidi was arrested at around 10.23pm.

186 We turn first to Roszaidi's own account of why he handed the Drugs to Azidah. In Roszaidi's 2nd Long Statement, he stated that when he saw the large amount of drugs in the consignment he had collected, he was "already feeling panicky and could not think much". His "mind was focused on finishing [his] job" of passing the drugs to "someone who would call [him] later", as Is Cangeh had instructed him to do. However, a while later, he called Is Cangeh again but Is Cangeh did not pick up. He "felt that [he had] been holding on to the heroin and [methamphetamine] for too long". It was at this point that he decided to call Azidah to ask her to "take the drugs first and keep [them] with her" at his late mother's house, as he "thought it was safer than [him] carrying the drugs and driving around Singapore like that". Similarly, in Roszaidi's 3rd Long Statement, he explained that he "did not want to carry so many drugs around when [he was] outside". A secondary reason for Roszaidi's actions appears to have been that he was afraid to throw the Drugs away due to his fear that he and/or his family might be harmed by Is Cangeh (see also [164(c)] above). This account was maintained by Roszaidi at trial: when asked why he did not throw the drugs away as he had done on one previous occasion, he explained that he was "in a panic state" and "[i]n the panic, [he did] not know what to do" so he "just put [the Drugs] in the car" after collecting them. He was afraid that if he threw the Drugs away, Is Cangeh "would ask his gang to beat [him] up", though he noted that this was "just … [his] assumption".

187 We next consider the impact of Roszaidi's MDD and SUD on his mental state in relation to his act of giving the Drugs to Azidah. In our judgment, this

Version No 2: 29 Dec 2022 (18:05 hrs)

act is more likely than not to have been materially influenced by Roszaidi's MDD and SUD, both *directly* (in that these abnormalities of mind impaired his decision-making processes and judgment, and led him to overestimate the threat of harm posed by Is Cangeh) and *indirectly* (in that these impairments may have been heightened by the fact that Roszaidi was also under the influence of drugs at the time of the offence). We elaborate.

188 With regard to the *direct* influence of Roszaidi's MDD and SUD, we regard Roszaidi's act as the product of his *severely impaired decision-making* under extreme circumstances of fear and pressure. Although Azidah was aware that Roszaidi was involved in assisting Is Cangeh with delivering heroin to individuals in Singapore, and would sometimes accompany Roszaidi "as a wife" when he went to collect drugs for delivery, Roszaidi said he did not even tell Azidah that he was going to hand her drugs. Roszaidi's actions which incriminated his innocent wife (who was also heavily pregnant at the time) and his execution of that decision are, in our judgment, not the acts of someone able, without substantial impairment, to exercise control over his actions (and specifically to act in accordance with what he knew to be right). As Dr Rajesh explained, Roszaidi's act of asking Azidah to take the Drugs from him was "an impulsive and irrational decision" which showed that he was not "thinking through … the consequences".

189 This inference is irresistible when it is borne in mind that, based on the timeline set out at [185] above, a short period of around *25 minutes* elapsed between Roszaidi collecting the Drugs (at around 9.30pm) and him calling Azidah (at 9.55pm). During this short period, he called Is Cangeh at least three times while awaiting instructions on what to do with the Drugs (see [185]–[186] above). In Roszaidi's state of panic, this felt to him "like an hour". We also note

Version No 2: 29 Dec 2022 (18:05 hrs)

that the evidence before us does not support any inference that Roszaidi had any "realistic moment of rationality and self-control" which would have allowed him to resile from his impulsive decision to give the Drugs to Azidah. Instead, in our view, the impairment of Roszaidi's decision-making *continued to be operative* when he made the decision to incriminate Azidah and thereafter executed that decision.

190 Roszaidi's fear of being harmed by Is Cangeh if he threw the Drugs away (as noted at [164(c)] and [186] above) should also be viewed in the context of his MDD. In this connection, we disagree with the Judge's view that Roszaidi's fear of the threat that Is Cangeh posed to his safety was necessarily "the result of rational thinking on his part" (see the Remittal Judgment at [13]). Although Is Cangeh was a member of a gang when they met, Roszaidi did not know if Is Cangeh was still a gang member during the period leading up to the offence. Notably, no threats of harm appear to have actually been made by Is Cangeh against Roszaidi. As Roszaidi himself acknowledged in his 2nd Long Statement, Is Cangeh "ha[d] not threaten[ed] [him] before", and "was just fed-up when [he] threw away the drugs on [a previous] occasion" (an incident we considered at [182] above). Instead, as Dr Rajesh explained, this fear of harm may have been linked to the anxiety and paranoia attributable to Roszaidi's underlying mental condition of MDD, as his depressive state of mind may have led him to "overestimate the dangers" and may have contributed to his feelings of fear and panic. Thus, while it may be that it was "not *illogical* for Roszaidi to assume that Is Cangeh would react more strongly – perhaps even with physical violence – if Roszaidi were to throw his consignment away for the second time" [emphasis added] (as the Judge concluded at [13] of the Remittal Judgment), the fact that there appears to have been *no factual basis* for this assumption suggests to us that Roszaidi's fear in this case is more aptly

Version No 2: 29 Dec 2022 (18:05 hrs)

understood as an *indicium* of his panicked state of mind than "the result of rational thinking".

191 In our judgment, therefore, Roszaidi's mental responsibility for his specific act of handing the Drugs to Azidah was *directly* and substantially impaired by his abnormalities of mind.

192 With regard to the *indirect* influence of Roszaidi's MDD and SUD, the extent of Roszaidi's drug dependence and consumption on the day of the offence must also be taken into account. Roszaidi had consumed various drugs (including heroin and methamphetamine) earlier that day (see [22] and [24] above). At the time of his arrest, Roszaidi "smoke[d] heroin every 10 minutes and there [was] no limit to the amount of heroin [he] smoke[d]"; he would smoke heroin "as and when [he] had the urge and … [was] heavily addicted to heroin". Similarly, there was "no limit to how many times" he smoked "*air batu*" (or methamphetamine) and he would do so whenever he wanted. When his urine was tested on 9 October 2015, three days after his arrest, "over-range" levels of cannabis and benzodiazepines were recorded, as well as a rate of 1,838.0ng/ml of amphetamine which far exceeded the cut-off of 500ng/ml. This provides a flavour of the severity of Roszaidi's SUD at the time of the offence and how much drugs this led Roszaidi to consume on the day of his arrest. These drugs are likely to have *further heightened* the impairments to Roszaidi's decision-making processes and mental responsibility that he would already have suffered as a direct consequence of his MDD and SUD.

193 With these points in mind, we turn to the question of how Roszaidi's act of giving the Drugs to Azidah ought to be characterised. The Prosecution sought to characterise it as evidence of Roszaidi's "clear rational judgment", in that Roszaidi did this because he did not want to get caught and rationally assessed

Version No 2: 29 Dec 2022 (18:05 hrs)

that this would be safer than the alternative of him continuing to carry the drugs around. Similarly, the Judge rejected Dr Rajesh's opinion (as set out at the end of [188] above) and found that Roszaidi's decision to give the drugs to Azidah was itself not so "extraordinarily absurd" as to demonstrate that Roszaidi was suffering from "impaired rational judgment". The Judge considered that it was "equally plausible" that Roszaidi had passed the Drugs to Azidah because (a) he assumed that Azidah would not get caught, or (b) he mistakenly believed that she would get a lighter sentence because she was pregnant (see the Remittal Judgment at [15]).

194 We disagree with this characterisation. In our judgment, the Judge's finding on this point was wholly speculative and was not grounded in the evidence of *either* expert. The only evidence relied on by the Judge in support of this analysis was Roszaidi's statement that he thought it was "safer" for the Drugs to be kept by Azidah than for him to carry them while driving around Singapore (see [186] above). This was a thin and insufficient basis on which to conclude that Roszaidi's ability to exercise his will to control his actions was not impaired, or that his actions were rational or calculated. Indeed, to reach this conclusion on the sparse evidence on which the Judge relied, one essentially needs to set off on the footing that Roszaidi's act of giving the Drugs to Azidah *was carried out by a rational person*. Not only is this circular, it also implicitly examines the circumstances of this case through a detached and *rational* lens, instead of doing so from the perspective of Roszaidi himself or even a person like him, with his conditions and in his shoes. The obvious problem with such an approach is that it presumes the conclusion to the very question the Judge needed to answer – that question being whether Roszaidi *was in fact rational* when he gave the Drugs to Azidah. This approach also fails to engage with the critical question of whether Roszaidi's ability to exercise his will, to control his

Version No 2: 29 Dec 2022 (18:05 hrs)

actions such that he acted in accordance with what he knew to be right or wrong, was substantially impaired. In our judgment, viewing Roszaidi's act of giving the Drugs to Azidah in its context, the more plausible and compelling characterisation of this is that Roszaidi acted *impulsively and irrationally* in a moment of panic, thereby demonstrating the *impairment* of his decision-making rather than evincing any such decision-making process itself.

195 Contrary to what the Judge found (see [20] of the Remittal Judgment), this was not a case where Roszaidi had simply "underestimated the risks involved in delivering the Drugs and passing the Drugs to Azidah" and had "wilfully chosen to take those risks in order to reap a reward". The Judge's characterisation of Roszaidi's actions is simply not borne out by the surrounding circumstances and facts. It is wholly unclear what, if any, "reward" Roszaidi stood to gain from passing the Drugs to Azidah. The only conceivable "reward" was perhaps Roszaidi being able to evade or at least delay capture himself. This, however, presupposes that he anticipated imminent capture at the time but nonetheless *chose* to delay this even though this would have come at the expense of putting his pregnant wife at grave risk *alongside himself*. A fuller assessment of the situation points to an inescapable fact that demolishes the idea of this being a *rational* action. Roszaidi had already committed the primary offence of trafficking by being in possession of the Drugs for the purpose of trafficking (see s 5(2) of the MDA) when he took delivery of them on Is Cangeh's instructions. By implicating Azidah, he was doing nothing to shift or reduce his own liability, while also bringing her into this mess. If Roszaidi felt afraid of being found with the Drugs because he sensed or feared that he was or might be under some form of surveillance, then heading straight to his wife and passing her the Drugs cannot be seen other than as an utterly irrational act on his part. In these circumstances, we are unable to see how Roszaidi can be said to have

Version No 2: 29 Dec 2022 (18:05 hrs)

deliberately chosen to take a risk in order to reap any reward. In any event, the apparent rationality of taking steps to avoid being caught with the Drugs says nothing about whether Roszaidi's *decision-making process*, whether in coming to the decision to traffic drugs for Is Cangeh that day or in deciding to pass the Drugs to Azidah, was *in fact* impaired by the combination of his MDD and SUD.

196 We are therefore satisfied that the element of control in relation to Roszaidi's mental responsibility for the *specific act of trafficking which constituted the offence* was also substantially impaired by his MDD and SUD.

Conclusion

197 We conclude by reiterating the relevant inquiry in respect of the Third Limb once more: Did Roszaidi's abnormalities of mind have a *real and material* (as opposed to trivial or minimal) *effect or influence* on his *ability to exercise control over his actions*, and specifically to act in accordance with what he knew to be right?

198 On our analysis, this question must be answered in the affirmative. In view of our conclusion that the Second Limb is satisfied by Roszaidi's MDD and his SUD operating together, the inquiry at the Third Limb must be directed to the compounded effect of *both* these recognised psychiatric disorders operating *together*. Having regard to the evidence before us, we are satisfied that the combination of Roszaidi's MDD and SUD had a *real and material*, and not a trivial or minimal, effect on his ability to resist the urge to procure and consume drugs, and consequently on his decision to traffic drugs for Is Cangeh as a means of obtaining those drugs, given that his MDD had also affected his ability to hold down gainful employment. We are also satisfied that Roszaidi's

Version No 2: 29 Dec 2022 (18:05 hrs)

MDD and SUD had a real and material influence on his specific act of giving the Drugs to Azidah, which formed the subject of his drug trafficking charge.

199 We are therefore amply satisfied, on a balance of probabilities, that Roszaidi's MDD and SUD, operating together, substantially impaired his mental responsibility for his acts in relation to the drug trafficking offence with which he was charged. It bears emphasis that Roszaidi need not prove that *all three* specific aspects of mental responsibility set out at [105] above were substantially impaired; it is sufficient for him to do so in respect of *one* aspect (see also [122] above). Thus, even though the first two aspects of mental responsibility (namely, basic cognitive ability and moral and legal cognition) are not in issue in this appeal, because it is clear on the evidence before the court that Roszaidi knew what he was doing and that it was wrong, it suffices for him to show that the third aspect of mental responsibility – namely, his ability to exercise his will to *control* his actions such that he acted in accordance with what he knew to be right – was substantially impaired.

Version No 2: 29 Dec 2022 (18:05 hrs)

200 For the foregoing reasons, we allow the appeal on the ground that all the requirements of s 33B(3)(*b*) of the MDA are satisfied in the present case. Accordingly, we set aside the death penalty imposed by the Judge and re-sentence Roszaidi to imprisonment for life under s 33B(1)(*b*) of the MDA.

Sundaresh Menon
Chief Justice

Judith Prakash
Justice of the Court of Appeal

Belinda Ang Saw Ean
Justice of the Court of Appeal

Version No 2: 29 Dec 2022 (18:05 hrs)

Andrew Phang Boon Leong JCA (delivering the judgment of the minority on behalf of Steven Chong JCA and himself):

201 This appeal was brought by the accused, Roszaidi, against the Judge's refusal to reduce his capital sentence for drug trafficking to life imprisonment under s 33B(1)(*b*) of the MDA. To successfully invoke this provision, Roszaidi had to prove that he was a courier within the meaning of s 33B(3)(*a*) of the MDA *and* that *at the time of the offence*, 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 within the meaning of s 33B(3)(*b*) of the MDA ("s 33B(3)(*b*)"). The Judge was not satisfied that Roszaidi fulfilled s 33B(3)(*b*). What should be highlighted here is that Roszaidi only invoked the provision *almost four years after the offence* and more significantly only after he was convicted and sentenced to death. As we will elaborate below, the time and manner in which Roszaidi sought to rely on s 33B(3)(*b*), occasioned evidential gaps in his belated efforts to establish that he was suffering from such abnormality of mind *at the time of the offence*.

202 The majority of this court, comprising Sundaresh Menon CJ, Judith Prakash JCA and Belinda Ang Saw Ean JCA, disagreed with the decision of the Judge and has allowed the appeal. With respect, we are unable to agree with the decision of the majority ("the Majority Judgment") and set out our reasons as follows.

203 The full procedural history of this appeal has been set out at [29]–[37] above. Briefly, for context, Roszaidi was convicted for trafficking in diamorphine and sentenced to death on 21 January 2019. Where necessary, we

Version No 2: 29 Dec 2022 (18:05 hrs)

shall refer to this initial set of proceedings before the Judge as the "trial". Roszaidi's conviction was upheld on appeal (see the decision of this court in *Azli* at [20]). However, with regard to sentencing, this court remitted the following issue to the Judge for *further evidence* to be taken: whether Roszaidi was suffering from such abnormality of mind as substantially impaired his mental responsibility within the meaning of s 33B(3)(*b*). To place this court's direction in its proper context, this was because Roszaidi only raised s 33B(3)(*b*) some seven months after he filed his appeal against conviction and sentence. That the issue was remitted to the Judge is in itself an acknowledgment that the state of the evidence was unsatisfactory. At the remittal hearing, the Judge answered this question in the negative and upheld the death sentence. This appeal only concerns the Judge's decision with respect to the remittal hearing.

Departures from the Majority Judgment

204 Roszaidi's drug consumption history and drug-related antecedents, the factual circumstances surrounding the offence, and summaries of the decision below and parties' cases on appeal have been set out in the Majority Judgment. Unless otherwise indicated, we adopt these sections of the Majority Judgment. To set the context for our analysis, it suffices to highlight salient points of divergence from the Majority Judgment which we expand on subsequently.

205 First, we disagree with the majority on the weight to be placed on each of the expert's evidence. The Majority Judgment dismisses Dr Saluja's evidence as having limited utility in relation to the issues in this appeal (see [48] and [140] above). In contrast, we regard Dr Saluja's 1st Report as the crucial one, not least because Dr Saluja's interviews with Roszaidi were contemporaneous with the offence. We remain of this view notwithstanding Dr Saluja's 1st Report having been issued before reliance was placed on

Version No 2: 29 Dec 2022 (18:05 hrs)

s 33B(3)(*b*) (bearing in mind the fact that a person's (here, Roszaidi's) mental state is (and ought to be) viewed holistically as an organic whole and cannot be analysed in slices (an approach adopted by the majority)). On the contrary, Dr Rajesh's evidence, which the Majority Judgment accepts, comprises general propositions and assertions and is not grounded in sufficient attention to the particular circumstances of the offence. It also cannot be gainsaid that Dr Rajesh's reports were issued *after* Roszaidi was convicted and sentenced to death.

206 Second, and following closely from the preceding point, we reject Dr Rajesh's central thesis – that Roszaidi's MDD and SUD acted synergistically to exacerbate one another (*ie*, the Synergy Claim). The Synergy Claim, which the majority agrees with, is the foundation of Roszaidi's case in respect of the Second and Third Limbs of the *Nagaenthran* test. The crux of the Synergy Claim is the existence of a *causal link* between Roszaidi's MDD and his allegedly escalating drug consumption after the bereavements in May 2015. In our view, Roszaidi has *not* adduced *sufficient evidence* to prove such a causal link. At the risk of stating the obvious, Roszaidi bears the burden of proof under s 33B(3)(*b*) of the MDA.

207 Third, unlike the majority (and as already mentioned at [205] above), we prefer to assess a person's mental state holistically and to recognise the link between rationality and volitional control. While these are certainly distinct mental attributes, we find it artificial and unsatisfactory to sever one from the other and to view each in isolation. In so far as Roszaidi trafficked the Drugs to his wife to *evade* detection by the authorities, this was an entirely *rational* decision that reduces the scope for any argument that his *volition* was relevantly

Version No 2: 29 Dec 2022 (18:05 hrs)

impaired and compounds the grave evidential deficiencies in his case, which we now turn to.

208 Fourth, contrary to the majority's conclusion, in our view, Roszaidi failed to adduce sufficient evidence to establish volitional impairment of a degree sufficient to substantially impair his mental responsibility under the Third Limb. Even taking Roszaidi's case at its highest, in that the Synergy Claim is established, there is no evidence as to the *degree* to which his craving for drugs escalated in order to satisfy s 33B(3)(*b*). Evidence of the severity of his MDD, which may be a proxy for the degree to which his drug use escalated, is equally lacking. More fundamentally, however, we disagree with the majority's emphasis on the reasons for Roszaidi's decision to traffic in the drugs for Is Cangeh on 6 October 2015. This ignores his motivation(s) for the *actus reus* of the offence – the act of passing the Drugs to Azidah – and overlooks the *legal significance* of the moments of rationality and self-control in which he could have resiled from the intention or plan to deliver the drugs for Is Cangeh on the night of 6 October 2015 but did not. It follows that we decline to characterise Roszaidi's specific decision to traffic the Drugs to his wife as being impulsive and irrational (see [194] above).

The expert evidence

209 We find it useful to begin with an overview of the expert evidence and our general observations in relation thereto.

Points of agreement and difference

210 The Prosecution's expert, Dr Saluja, is a Consultant Psychiatrist who formerly worked for the forensic department at the IMH and, at the time of the remittal hearing, was the head of the Young Persons Mental Health Services for

Version No 2: 29 Dec 2022 (18:05 hrs)

Monash Health in Melbourne. The Defence's expert, Dr Rajesh, is a Senior Consultant Psychiatrist in Promises (Winslow) Clinic and a Senior Consultant Psychiatrist in the Singapore Prison Service since October 2015.

211 The experts agree that Roszaidi suffers from two mental disorders under the diagnostic manual ICD-10: MDD and SUD. The experts agree that both disorders satisfy the First Limb. In relation to Roszaidi's SUD, Dr Saluja opined that Roszaidi had a "long-standing history of dependence on multiple substances". In his oral testimony, he clarified that Roszaidi was dependent on several substances including opioids (*eg*, heroin), stimulants and sedative hypnotics (or "sleeping tablets" in normal parlance). We now turn to set out the areas of disagreement between the experts.

212 The ***first*** point of departure between the experts is whether Roszaidi's MDD *aggravated* his SUD. Dr Rajesh answered this question in the affirmative. His view was that Roszaidi's MDD formed the "underlying substrate for his escalating drug abuse" and that the two disorders had operated "synergistic[ally]" (*ie*, the Synergy Claim) to exacerbate Roszaidi's overall mental state. Dr Saluja disagreed with Dr Rajesh's Synergy Claim. Dr Saluja opined that Roszaidi's depressive episode did not contribute to his impaired will to resist consuming drugs. He highlighted that although Roszaidi had been consuming drugs for "pretty much all his life, right from age 10", there is no evidence that he suffered from MDD until 2015.

213 The ***second*** difference between the experts is whether Roszaidi's SUD arose from one of the aetiologies required to satisfy the Second Limb. For the avoidance of doubt, both Dr Rajesh and Dr Saluja agreed that Roszaidi's MDD arose from an inherent cause, thereby satisfying the Second Limb. However, as for Roszaidi's SUD, Dr Saluja's 2nd Report states that this did not arise from

Version No 2: 29 Dec 2022 (18:05 hrs)

any prescribed causes in s 33B(3)(*b*). Dr Saluja did not express any reason to support this view. Curiously, in his three reports, Dr Rajesh did not expressly object to Dr Saluja's view that Roszaidi's SUD failed the Second Limb. Even further, when Dr Rajesh took the stand at the remittal hearing, he said that he and Dr Saluja *did not differ* on whether the Second Limb was satisfied. However, upon closer inspection, Dr Rajesh's Synergy Claim posits that Roszaidi's MDD formed the "*underlying substrate*" [emphasis added] for his escalating drug abuse. The question that flows from this observation is this: if the Synergy Claim is accepted, can Roszaidi's SUD be regarded as arising from the same underlying aetiology as his MDD, such that both disorders satisfy the Second Limb? We analyse this question at [234]–[238] below. We therefore do not think that Dr Saluja and Dr Rajesh were *ad idem* on whether Roszaidi's SUD satisfied the Second Limb.

214 ***Third***, the experts differed on whether the Third Limb was satisfied.

215 As we shall see, the crux of this appeal is whether Roszaidi's impaired ability to control his impulse to consume drugs influenced the commission of the offence to an extent that substantially impaired his mental responsibility. However, as Dr Saluja opined that Roszaidi's SUD did not even satisfy the Second Limb, his reports focused on the question of whether Roszaidi's MDD impaired his rational judgment. Dr Saluja answered this question in the negative for these three reasons:

> (a) First, Roszaidi's MDD was of ***mild*** severity. It did not substantially impair his capacity to understand the nature of his acts. He knew that his acts were wrong and contrary to the law;

Version No 2: 29 Dec 2022 (18:05 hrs)

(b) Second, despite his MDD, Roszaidi was able to exercise "multiple functions in the brain" such as planning, executing a plan and understanding instructions from others at the time of the offence. Given that Roszaidi's brain had been "functioning in a very organised manner, not just internally but also involving the external agencies", it was unlikely that Roszaidi's MDD had had a significant impact on his cognitive ability at the material time; and

(c) Third, Dr Saluja observed that Roszaidi had consumed and trafficked drugs previously before he suffered from MDD. He therefore opined that Roszaidi's MDD had not contributed to the offence.

216 While his reports were focused on the effects of Roszaidi's MDD, when questioned on whether Roszaidi was unable to resist the urge to traffic in drugs, Dr Saluja testified that this was a matter of choice for Roszaidi.

217 Dr Rajesh reached the opposite conclusion to Dr Saluja. He opined that Roszaidi's rational judgment and impulse control were impaired, as can be seen from:

(a) Roszaidi's apparent focus on the short-term benefits of trafficking drugs over the long-term consequences of being caught. On the witness stand, he clarified that by "short-term benefits" he meant the high from consuming drugs and relief from withdrawal symptoms;

(b) Roszaidi's overestimation of the threat posed to him and his family's safety by Is Cangeh if he did not traffic in the Drugs. In particular, Roszaidi had felt panicky on the day of the offence due, in part, to his depressive state of mind and a concomitant lack of clarity of thinking; and

Version No 2: 29 Dec 2022 (18:05 hrs)

(c) Roszaidi's decision to incriminate his then pregnant wife by asking her to keep the Drugs on his behalf.

218 For completeness, Dr Rajesh initially stated in his reports that Roszaidi's mental disorders impaired both his rational judgment and *impulse control*. However, on the witness stand, Dr Rajesh clarified that Roszaidi's disorders caused "*more* of an impairment of *rational judgment* ***rather than*** *impulse control*" [emphasis added in italics and bold italics].

Some important general observations

219 As the expert evidence plays an important role in the present appeal, it would be appropriate to set out some general observations that will be relevant when we consider this evidence in more granular detail below.

220 We note, first, that Dr Saluja had interviewed Roszaidi *personally* on 26, 27 October and 11 November 2015, roughly *a month* after he had been charged on 9 October 2015 for the alleged offence (which resulted in Dr Saluja's 1st Report dated 13 November 2015, which as we shall see is a *crucial* one). In addition to the opportunity to assess Roszaidi in a face-to-face session that was very close in time to the commission of the offence, it is very likely that Roszaidi's responses would (in the nature of things) also have been far more candid. This is an important point when we assess the points of difference in the reports by Dr Saluja on the one hand and Dr Rajesh on the other (the details of which were set out in the preceding part of this judgment). In this latter regard, we note that Dr Rajesh's 1st Report was *not* based on any face-to-face session with Roszaidi *and* was also rendered, on 16 December 2019, *more than four years after* Roszaidi had been charged for the alleged offence. Whilst it is true that Dr Rajesh's 2nd Report dated 27 February 2020 was based on his face-to-

Version No 2: 29 Dec 2022 (18:05 hrs)

face interviews with Roszaidi, and his 3rd Report dated 31 August 2020 was based on similar interviews with Roszaidi as well as with Roszaidi's wife and brother, there was (as we shall see) little by way of anything new to the existing narrative that was embodied in the psychiatric reports that had hitherto been produced. Further, Dr Rajesh only interviewed Roszaidi on 22, 29 October, 7 November 2019 and 11 August 2020. This was more than four years after the commission of the offence.

221 Indeed, a close perusal of all the reports demonstrates that Dr Rajesh's 1st Report was in fact based, in the main, on Dr Saluja's 1st to 4th Reports as well as the testimony of Dr Saluja during the trial. This is not surprising as the reliance on s 33B(3)(*b*) for the purposes of the alternative sentencing regime was only sought via CM 17 which was heard together with Roszaidi's substantive appeal in CCA 2/2019 on 17 February 2020. And, Roszaidi had, on 18 September 2019, only sought permission to file a psychiatrist report *in reply* to a supplementary report by Dr Saluja (*ie*, Dr Saluja's 2nd Report) and leave was accordingly granted on 2 October 2019. It bears noting the observations of this court in *Rosman bin Abdullah* at [6] that "all applicants pursuant to the re-sentencing procedure under s 33B ***must*** indicate whether they intend to rely upon s 33B(2) or s 33B(3) of the MDA – or both provisions – ***at first instance***" [emphasis added in bold italics]. Indeed, this would – potentially at least – be to the advantage of the accused as the issue together with all related and relevant psychiatric evidence could be raised as well as tested much earlier on. Be that as it may, as just alluded to, it is understandable why Dr Rajesh had to rely on Dr Saluja's reports as well as his evidence as the foundational material for his 1st Report. However, that Dr Rajesh's 1st Report is based substantively on Dr Saluja's 1st to 4th Reports and testimony at the trial also means that to the extent that Dr Saluja's reports and/or evidence are persuasive in showing that

Version No 2: 29 Dec 2022 (18:05 hrs)

Roszaidi's volitional control was not so impaired as to diminish his mental responsibility, this would simultaneously detract from the persuasiveness of the Synergy Claim, which underlies Roszaidi's case for diminished responsibility, in Dr Rajesh's 1st Report and/or evidence (and, as alluded to at [220] above, Dr Rajesh's 2nd and 3rd Reports do little to strengthen the Synergy Claim).

222 We also note that in so far as Dr Saluja's 1st Report was focused on Roszaidi's fitness to plead and did not directly address the elements of diminished responsibility under s 33B(3)(*b*), it remains relevant to the latter issue. One's mental state is (and ought to be) viewed holistically as an organic whole and cannot be analysed in slices (which, with respect, is the approach adopted by the majority in this case when pointing to the fact that Dr Saluja's 1st Report was directed at a different set of questions and not the elements of diminished responsibility under s 33B(3)(*b*) (see [50] above)). If there were indications of diminished responsibility when Dr Saluja interviewed Roszaidi on 26, 27 October and 11 November 2015, this would have been recorded as an observation, even if not directed at the specific question of substantial impairment of mental responsibility for the purposes of s 33B(3)(*b*).

223 Secondly, it is also of the first importance to note that the *mere assertion* of *general* propositions without reference to the specific facts as well as context is unhelpful. Hence, whilst the *general* proposition that Roszaidi's SUD and MDD *might* act in a synergistic manner might be attractive in *theory*, in order to succeed in the context of the present appeal, it *must* have *an* ***evidential basis*** (absent which any submission would otherwise be "a circular opinion" (see *R v Whitworth* at 449 (*per* Thomas J)). A granular analysis of both facts as well as context is thus imperative and this would – in the context of the present case – entail a close analysis of Roszaidi's objective conduct not only on the day of the

Version No 2: 29 Dec 2022 (18:05 hrs)

alleged offence but also during the periods prior to that day (see also *David Augustus Walton v The Queen* [1978] AC 788 ("*Walton v The Queen*") at 793F–H). In so far as the period prior to the alleged offence is concerned, the critical period would appear to be the time he was first diagnosed as having MDD (*ie*, from the time his grandmother and mother had passed on) to the time of the offence. Put simply, if he cannot prove that the onset of his MDD *aggravated* his SUD to such an extent as to induce a loss of volitional control that *substantially* impaired his mental responsibility, Dr Rajesh's Synergy Claim would be bereft or devoid of any evidential basis whatsoever and would simply be a hypothesis. Returning to the issue of a holistic analysis from a temporal perspective, this is what psychiatrists generally and Dr Saluja in particular (during his oral testimony) refer to as a *longitudinal* analysis. Even from a layperson's perspective, this is both logical as well as replete with common sense and will therefore be the approach we adopt when analysing the relevant reports as well as objective evidence below.

224 Thirdly, it is also important to note that the relative brevity of Dr Saluja's further or subsequent reports (a point that appeared to be emphasised by the majority of this court at [141] above) must be read in context – particularly in light of his substantive initial report based on his face-to-face sessions with Roszaidi shortly after he was charged (as noted above) as well as his testimony during the remittal hearing where he elaborated on his reports. In the latter regard, Mr Thuraisingam had the opportunity to, and did in fact, put Dr Saluja's views through the rigour of cross-examination. For instance, Mr Thuraisingam put it to Dr Saluja that the only reason for which Dr Saluja claimed that Roszaidi's mental responsibility was not substantially impaired was Roszaidi's ability to tell right from wrong, and that Dr Saluja had not considered whether Roszaidi's mental illness contributed to his offending. But Dr Saluja stressed

Version No 2: 29 Dec 2022 (18:05 hrs)

that the "[o]ther part is this ability to perform a function". He explained that Roszaidi was "able to plan, ... able to organise, ... able to coordinate things between different people ... [and that] if he was severely depressed, that could have been impaired". The fact that Dr Rajesh's reports were more sizeable in *quantity* must (as we shall see) be read in the context of their *qualitative* strength (especially when taking his testimony during the remittal hearing into account). Put simply, it is the latter – and not the former – that is of the first importance. For example, the articles which Dr Rajesh appended to his 1st Report are informative but not really related to the specific issues of this case.

225 The articles appended to Dr Rajesh's 1st Report warrant some discussion. Bridget F Grant, *et al*, "Epidemiology of *DSM-5* Drug Use Disorder: Results From the National Epidemiologic Survey on Alcohol and Related Conditions-III" (2016) 73(1) JAMA Psychiatry 39 was specifically referenced by Dr Rajesh in arriving at the Synergy Claim (in his *1st* Report at para 17). This article argues (at p 2 (this is a page reference to the author manuscript)) that there is "the need for additional studies to understand the broad relationships [of such a disorder] in more detail" (see also at p 9). Yan Leykin *et al*, "Decision-Making and Depressive Symptomatology" (2011) 35 Cognitive Therapy Research 333 examined 125 participants and arrived at the following conclusion, usefully summarised in the Abstract of the article, as follows (at p 333): "The results suggest that those with more depressive symptoms make decisions that are less likely to further their interests." The authors conclude the article by stating (at p 340) that "[b]ad choices may also generate feelings of guilt for past failures, and support the feeling of hopelessness, as depressed individuals see themselves as being unable to make a positive impact on their future", that "[r]ecognizing their difficulty with making decisions, they are likely to turn to avoidance of decisions as a coping

Version No 2: 29 Dec 2022 (18:05 hrs)

strategy", and that "[t]his tendency is likely to lead to further missed opportunities, disappointments, and more negative outcomes overall". Nevertheless, they also argue (*ibid*) that their article "has shown that the ability to make sound decisions is not lost, as it can be brought back with a relatively simple manipulation, suggesting that teaching decision-making techniques in treatment and encouraging their use may be particularly productive for depressed individuals". Roszaidi's profile is consistent with some of these observations but it is also the case (as we shall see below) that he was not deprived of his ability to make sound decisions – and this was so, *even without any* form of treatment referred to by the authors. Once again, the *degree of severity* of those symptoms lies at the heart of the present case and granular recourse to, as well as analysis of, the relevant objective evidence is crucial. Finally, in Emmanuelle Corruble *et al*, "Understanding impulsivity in severe depression? A psychometrical contribution" (2003) 27 Progress in Neuro-Psychopharmacology & Biological Psychiatry 829, the focus is on the association between depression and suicidality (with impulsivity being one of the main facets of the latter (reference may also be made to the "Diagnostic and Statistical Manual of Mental Disorders", Fifth Edition ("DSM-V") at pp 164 and 362, as well as at p 544 (suicide risk in relation to substance-related and addictive disorders)). It is relevant to note, in this regard, that Roszaidi *disavowed* all suicidal feelings – a point that is confirmed at para 7 of Dr Rajesh's 3rd Report. We pause to note, parenthetically, that if Roszaidi *had*, in fact, displayed suicidal feelings and tendencies, this might have well cast a different light as well as perspective on the *degree* of his MDD and consequently, the extent to which his drug dependency was aggravated (see also [269] below).

Version No 2: 29 Dec 2022 (18:05 hrs)

226 The *general* themes embodied in the articles referred to in the preceding paragraph are to be contrasted with Dr Saluja's *actual examination* of Roszaidi, and his conclusion, *drawn from such examination*, that although Roszaidi did in fact suffer from MDD, his "depressive symptoms were *not a contributory factor* to the alleged offence" [emphasis added] (Dr Saluja's 1st Report at para 24, which he reiterated during his testimony at trial). The following observations by Dr Saluja in his 5th Report are particularly apposite:

> I *concur with* [Dr Rajesh's] views [*sic*] point that both depressive disorder and substance use disorder can impair one's rational judgment *and* impulse control and their concurrence *can* have an exponential effect, **however, it cannot be generalized**. [Dr Rajesh] *has written a* ***general*** *comment* ***and he has not substantiated it by any evidence in this particular case***.
>
> [emphasis in bold in original; emphasis added in italics, bold italics and underlined bold italics]

In our view, the observations just quoted are *directly on point*, and we will return to them in due course.

227 We also pause to emphasise – in a related vein – that Dr Saluja's *1st Report*, which we have already observed to be the *key* report (see [220] above) was, in fact, *substantive* in nature and also formed (together with his subsequent reports) the *basis* for *Dr Rajesh's* 1st Report in which the Synergy Claim was made. This is an important point because, as we have already noted at [221] above, to the extent that Dr Saluja's reports and/or evidence are persuasive in showing that Roszaidi's volitional control was not so impaired as to diminish his mental responsibility, this would simultaneously detract from the persuasiveness of Dr Rajesh's Synergy Claim.

228 Fourthly, as we shall see below, the main focus of the present appeal centres not so much on Roszaidi's cognitive capacity (in particular, his ability

Version No 2: 29 Dec 2022 (18:05 hrs)

to distinguish right from wrong as well as legal actions from illegal ones) but rather, on his ability to *control* his actions (*viz*, his *impulse control*). It is *undisputed* that Roszaidi knew that the offence was legally and morally wrong, and that he understood the nature of his actions. Rather, the main thrust of Mr Thuraisingam's argument (also noted briefly above) is that it was a *synergistic combination* of Roszaidi's drug dependence *and* his MDD that impaired his *ability to resist* the need to *traffic* in the drugs concerned in order to feed his allegedly escalated drug addiction. Put simply, this particular argument is that he could not help himself in focusing on the short-term benefits resulting from his drug dependency. This point is also closely linked to the second point above inasmuch as such an argument *must be tested against the objective evidence (in particular, Roszaidi's objective conduct)*. However, in so far as Roszaidi's *rationality,* as an exercise of his cognitive capacity, sheds light on the state of his *volitional* impairment, we set out some views below on the relationship between these two concepts (although, as we shall see, this is strictly unnecessary for the purposes of this appeal).

Issues to be determined

229 In the light of the foregoing, and the parties' cases on appeal as summarised in the Majority Judgment (see [41]–[45] above), the following issues arise:

(a) Whether Roszaidi's SUD arose from a condition of arrested or retarded development of mind or any inherent causes or was induced by disease or injury (*ie*, the Second Limb).

(b) Whether Roszaidi's MDD and/or SUD substantially impaired his mental responsibility for the commission of the offence (*ie*, the Third Limb)?

Version No 2: 29 Dec 2022 (18:05 hrs)

Whether Roszaidi's SUD arose from one of the recognised aetiologies in the Second Limb

230 Under the Second Limb, an accused person must prove that his abnormality of mind: (a) arose from a condition of arrested or retarded development of mind; (b) arose from any inherent causes; or (c) was induced by disease or injury (see s 33B(3)(*b*)). These causes prescribed in s 33B(3)(*b*) ought to be read restrictively (*ie*, to the exclusion of other causes like intoxication) (see *Nagaenthran* at [30]). This limb precludes offenders from invoking s 33B(1)(*b*) of the MDA if they are suffering from "transient or even self-induced illnesses" that have no firm basis in an established psychiatric condition arising from the aetiologies specified in s 33B(3)(*b*) (see *Nagaenthran* at [31]). The Second Limb is largely to be determined on expert evidence (see *Nagaenthran* at [32]).

231 Further, in *Iskandar*, this court held that, even if a condition is recognised in diagnostic manuals such as the DSM-V or ICD-10, the onus remains on the accused to identify which of the prescribed causes in s 33B(3)(*b*) is applicable (at [89]).

232 The central issue under the Second Limb is whether the Judge's rejection of Dr Rajesh's Synergy Claim should be overturned. If we accept the Synergy Claim, as the majority does, both mental disorders would be rooted in the same inherent cause such that they, together, fall within the ambit of the aetiologies specified in s 33B(3)(*b*). This is Roszaidi's primary case under the Second Limb.

233 The Judge rejected the Synergy Claim because of Dr Saluja's observation that Roszaidi had been using drugs for "pretty much all his life,

Version No 2: 29 Dec 2022 (18:05 hrs)

right from age 10", but had not been depressed all these years. He accepted Dr Saluja's view that Roszaidi's MDD was therefore not an "additive factor" to his difficulty or inability to resist drug-seeking behaviour.

234 Given the Judge's observation that Roszaidi has been a drug addict "pretty much all his life", in order to make good the Synergy Claim, Roszaidi must first adduce evidence to establish a causal link between his MDD and his escalated drug dependence (assuming for the moment that such escalation has been proved). In this regard, it is important to bear in mind Dr Saluja's evidence that when drug addicts consume drugs, over time, they will develop tolerance and will progressively use "more drugs to have the similar effect". Drug addicts will therefore experience a natural escalation of consumption. However, such "escalation" is due only to the drug addict's SUD. In other words, escalation of drug dependence *per se* absent a causal link between MDD and SUD, does not advance the Synergy Claim. For this reason, it is necessary for Roszaidi to adduce evidence on the *degree* of his drug dependence escalation after the onset of his MDD. Mr Thuraisingam accepted that this was not done. This distinction is crucial because Roszaidi's SUD must be shown to have arisen from the same underlying aetiology as his MDD, such that both disorders can satisfy the Second Limb.

235 In our view, it is not sufficient to merely establish that Roszaidi was suffering from MDD and SUD at the same time. After all, the Synergy Claim is premised on MDD and SUD operating synergistically which caused Roszaidi to increase his dependence on drugs in the sense that his central focus or obsession *thereafter* was to procure and consume *more* drugs. According to Roszaidi, one of the reasons for his decision to traffic drugs (as stated in his 5th Long Statement dated 19 July 2016, almost a year after his arrest, and at the trial

Version No 2: 29 Dec 2022 (18:05 hrs)

in 2018) was so that he could help himself to Is Cangeh's drugs to feed his own addiction. Roszaidi's MDD can be traced to his two bereavements in May 2015. However, he only agreed to traffic drugs for Is Cangeh in July 2015. Clearly, between May and July 2015, no evidence was offered by Roszaidi that the escalation of his drug abuse had started with the onset of MDD in May 2015 since he only started to traffic drugs for Is Cangeh some two or three months later. Besides (and as importantly), there is no evidence as to how he was able to source for additional drugs and how he could have afforded his escalated drug abuse *prior* to his decision to work for Is Cangeh. Put simply, there is no evidence of any escalation in consumption and, even assuming that there was, there is no evidence of any causal link between Roszaidi's MDD and SUD. It bears reiterating that all that the expert reports state is that Roszaidi was suffering from both MDD and SUD, with no specific evidence which would establish that his MDD and SUD were in fact operating synergistically.

236 Granted, the expert reports suggest that drugs helped Roszaidi to cope with some depressive symptoms. However, this does not take his case very far. This is because it is one thing to say that drugs had the effect of managing some depressive symptoms (*eg*, when Roszaidi was feeling "low" or "stressed"), but another to say that his MDD had the *actual* effect of *escalating* his SUD (such escalation being central to the Synergy Claim). This latter point brings us back full circle to the fundamental point already made and which centres on the absence of relevant evidence. Whether there was actual escalation of Roszaidi's SUD would have depended on factors including, in large part, the *severity* of his MDD and the depressive symptoms he experienced. As we explain subsequently, there is, however, insufficient evidence on the intensity of Roszaidi's depressive symptoms at the time of the offence (and, at any time after May 2015, for that matter) to prove that his MDD was severe (see

Version No 2: 29 Dec 2022 (18:05 hrs)

[265]−[271] below). We would also observe that, conceivably, the incidental advantage of numbing some depressive symptoms adds little, if anything, to a drug addict's rate of consumption or craving for drugs. We reiterate that, on Dr Rajesh's own record in his 2nd Report, Roszaidi seems to have resumed drug consumption since February 2015 (*ie*, three months before the bereavements; see the Majority Judgment at [18]) and has used drugs from a young age. In this context, the fact that Dr Rajesh maintained the Synergy Claim advanced in his 1st Report despite acknowledging in his 2nd Report that Roszaidi had resumed his drug use before the onset of his MDD, *coupled with* the lack of any evidence shedding light on the degree to which Roszaidi's drug consumption increased after the onset of his MDD, are major impediments to establishing the Synergy Claim.

237 We also do not regard Dr Saluja's observation in his 1st Report that Roszaidi resumed drug consumption around May 2015 as evidence that Roszaidi's drug use escalated after the bereavements. As the Majority Judgment recognised at [18], it is not clear when precisely Roszaidi resumed drug consumption following his release from prison in 2014 and it is *possible* that, *per* Dr Rajesh's 2nd Report, this happened as early as February 2015 (*ie*, before the bereavements). Unless Roszaidi proves that he resumed drug consumption only *after* his bereavements, which he has not, Dr Saluja's observation does not change our conclusion.

238 In our view, this gap in the evidence exposes the reality that Roszaidi, like any other serious drug addict, needed to find a source to feed his drug addiction. In short, there is nothing exceptional for drug addicts like Roszaidi to traffic in drugs in order to feed their addiction, escalated or otherwise. As was

Version No 2: 29 Dec 2022 (18:05 hrs)

rightly observed by the Judge, Roszaidi was a serious drug addict long before the onset of MDD in May 2015.

239 We are constrained to examine the issue based on the state of the evidence before this court. In this connection, it is necessary for us to observe that this state of the evidence is, in large part, due to the manner and stage at which Roszaidi sought to rely on the alternative sentencing regime under s 33B(3)(*b*). By the time Roszaidi decided to invoke s 33B(3)(*b*), nearly *four years* had passed since his arrest and, more significantly, it was Roszaidi's prerogative to decide whether and when he wished to invoke the alternative sentencing regime under s 33B(3)(*b*). That said, Roszaidi must also accept the consequences of incomplete or unsatisfactory evidence, in particular, the absence of any evidence to establish the causal link between his MDD and alleged escalated drug consumption, should he decide to raise it late in the day. We should add that it is strictly irrelevant that this state of the evidence was due to the fact that the alternative sentencing regime under s 33B(3)(*b*) was not a live issue at the trial. That cannot be held against the Prosecution. It is equally immaterial to as whether Roszaidi was at fault in failing or omitting to raise s 33B(3)(*b*) at the trial. In that respect, the evidence is what it is before us and this court's task remains the same, *ie*, to determine whether the state of the evidence before the court is such as to enable Roszaidi to discharge his burden of proof under s 33B(3)(*b*). In short, the fact that Roszaidi elected not to invoke s 33B(3)(*b*) at the trial cannot in any way lessen his burden of proof. If he fails to so discharge his burden of proof, as we have found to be the case, it really does not matter whether he bears any fault in failing to raise it earlier.

240 The question of whether an accused person was suffering from an abnormality of mind as substantially impaired his mental responsibility *at the*

Version No 2: 29 Dec 2022 (18:05 hrs)

time of the offence is one which is not only quintessentially fact-sensitive but one which would depend on the contemporaneous examination of the accused person's mental state at the time of the offence. Here, Roszaidi decided, presumably on his counsel's advice, to raise the issue on 26 August 2019 when he filed CM 17.

241 Following this court's decision to remit the matter to the Judge for additional evidence to be taken pursuant to s 392(1) of the CPC to address the three limbs of the *Nagaenthran* test, Roszaidi did initially seek the Judge's leave to adduce oral evidence from himself, his wife and brother. The Judge directed that Roszaidi's application be deferred until after hearing Dr Saluja and Dr Rajesh's evidence, at which time, the court "may give further directions". However, at the end of the remittal hearing on 12 October 2020, Roszaidi did not seek directions to adduce oral evidence and consequently no such directions were given after the expert evidence was heard. As such, the Judge did not deny Roszaidi's application to adduce oral evidence. In this sense, it may not be entirely accurate to state that "Roszaidi did not have the opportunity to give direct evidence on his rate of drug consumption when this became a live issue" (see the Majority Judgment at [74]). Roszaidi was evidently content to rely on the expert reports filed by Dr Rajesh. More significantly, we observe that it is not even Roszaidi's case that he was planning to provide evidence about his escalated drug consumption and the degree of that escalation had he testified at the remittal hearing and that he was somehow not afforded the opportunity to do so. As the evidence relating to his alleged escalated drug consumption and the degree of that escalation is key to Dr Rajesh's Synergy Claim, it follows that its undeniable absence is fatal to the Synergy Claim.

Version No 2: 29 Dec 2022 (18:05 hrs)

242 That having been said, we cannot overstate the importance of indicating one's reliance on s 33B(2) and/or s 33B(3) at first instance, so that all relevant evidence is placed before the court. This is a point we have mentioned above at [221] (in relation to *Rosman bin Abdullah* at [6]), but bears elaborating. It is in the interest of persons charged with capital drug-related offences to adduce evidence to substantiate their reliance on the alternative sentencing regime especially in relation to matters where a proper and contemporaneous examination of the accused person's alleged state of "mental impairment" is crucial. In our view, it is neither inconsistent nor unprincipled for an accused person to disclose his (intended) reliance on s 33B(3)(*b*) at the trial *alongside* any defence he may have in respect of liability. In a slightly different context but also in relation to the alternative sentencing regime, where the issue at the sentencing stage was whether the accused was a courier under s 33B(2)(*a*) and/or 33B(3)(*a*), the majority of this court in *Public Prosecutor v Chum Tat Suan and another* [2015] 1 SLR 834 ("*Chum Tat Suan*") (comprising Tay Yong Kwang J and Woo Bih Li J (as they then were)) stated that even if an accused person's primary defence against liability (*eg*, that he did not know of the existence of the article containing the controlled drugs) is inconsistent with his position under s 33B (*eg*, that he was a mere courier who knew of the existence of the article), "he is to elect what his evidence will be, as all the evidence should be given at the same trial" and not withhold such evidence until the sentencing stage (at [79]). The majority observed that "[t]his is not putting him in an invidious position. Before the recent amendments to the MDA, an accused person already had to elect whether or not to give evidence and, if so, what evidence to give" (at [80]). The majority also noted that the inconsistency may not even arise if the accused's position is that he was an "unknowing courier" (at [78]).

Version No 2: 29 Dec 2022 (18:05 hrs)

243 If, as was stated by the majority of this court in *Chum Tat Suan* at [77]–[81], that a person accused of drug trafficking should provide evidence at the trial that his role was limited to that of a courier, we would have thought that it would be *a fortiori* that relevant evidence should be provided in the case where the accused person intends to establish that his *responsibility, if any, was diminished* at the time of the offence under s 33B(3)(*b*) since reliance on diminished responsibility is not only fact-sensitive but also concerns a situation where the evidence is particularly *time-sensitive*. Choo J, in *Public Prosecutor v Chum Tat Suan* [2015] 4 SLR 591 at [10], likewise emphasised the need for accused persons to disclose their reliance on diminished responsibility under s 33B(3)(*b*) "at the outset". We should add that there appears to be even less scope for inconsistency between a claim of diminished responsibility and the typical defences run by persons accused of drug trafficking or importation under ss 5(1) and 7 of the MDA. We gratefully adopt the succinct summary by Chao Hick Tin JA (as he then was) of these defences in *Chum Tat Suan* (at [23]–[25]):

> 23 Typically, a person accused of the offence of drug trafficking or importation under ss 5(1) and 7 of the MDA respectively will claim at trial that he had (a) no knowledge of the existence of the controlled drugs or (b) no knowledge of the true nature of the contents of the article that he was told to traffic (Chen Siyuan, "Singapore's New Discretionary Death Penalty for Drug Couriers (2014) 18(3) International Journal of Evidence & Proof 260 at 264 ("*Chen*")).
>
> 24 Under the defence of no knowledge of the existence of the controlled drugs, the accused person generally makes one of the following two claims:
>
> > (a) that he did not know of the existence of the article containing the controlled drugs, or
> >
> > (b) that he knew of the article but thought that the contents were something other than drugs.
>
> 25 Under the defence of no knowledge of the true nature of the contents of the article, the accused person generally admits to knowing that he was carrying drugs but claims that he was told that the drugs were not controlled drugs. For clarity, I shall

Version No 2: 29 Dec 2022 (18:05 hrs)

> refer generally to these three broad defences going towards conviction as the "primary defence".

244 We do not think that evidence of diminished responsibility will generally imply knowledge of the existence of controlled drugs in the article concerned, or the true nature of the contents of the article containing the controlled drugs. Such evidence also will not ordinarily contradict a defence of lack of intention to traffic, which Roszaidi attempted to run in the appeal against his conviction (see *Azli* at [11]).

245 We therefore reject Roszaidi's primary case that the synergistic combination of his MDD and SUD satisfies the Second Limb. In any event, as we will explain under the Third Limb below, our decision will be no different even if we were minded to accept the Synergy Claim.

246 Roszaidi's alternative case under the Second Limb is that SUD *per se* arises from one of the aetiologies recognised in s 33B(3)(*b*) of the MDA. However, like the majority (see [81] above), we prefer to leave this question to a later case. As mentioned, even if the Synergy Claim were accepted, we are not persuaded that the Third Limb is satisfied.

Whether Roszaidi's impulse control and/or rational judgment was impaired sufficiently as to substantially impair his mental responsibility under the Third Limb

247 We now arrive at another important part of the appeal – whether Roszaidi's mental disorders impaired his impulse control and/or rational judgment to a sufficient extent so as to substantially impair his mental responsibility. Even taking Roszaidi's case at its highest, *ie*, that his MDD and SUD operated synergistically, we do not accept that the Third Limb is satisfied.

Version No 2: 29 Dec 2022 (18:05 hrs)

The applicable principles

248 In *Jimmy Chua*, Yong Pung How CJ observed that the determination of whether impairment of mental responsibility was substantial would involve a question of degree, to be tested against and ascertained from all the evidence of each individual case (at [31]). He found *R v Lloyd* at 178–179 insightful for marking out the extremities of the scale which the court has to work within:

> [Y]our own common sense will tell you what [substantial] means. This far I will go. Substantial does not mean total, that is to say the mental responsibility need not be totally impaired, so to speak, destroyed altogether. At the other end of the scale substantial does not mean trivial or minimal. It is something in between and Parliament has left it to you … to say on the evidence: was the mental responsibility impaired, and if so, was it substantially impaired?

249 More recently, in *Nagaenthran*, we held that to prove "substantial impairment" of mental responsibility under the third limb, the impairment must be "real and material" but need not rise to the level of complete incapacity as required for unsoundness of mind under s 84 of the Penal Code (see also the Majority Judgment at [109]). A trivial or minimal impairment will not suffice. However, the accused's abnormality of mind need not have been a cause of his offending conduct. Instead, the question is whether the abnormality of mind had an "***influence***" [emphasis added in bold italics] on his or her actions (see *Nagaenthran* at [33]). As we noted in *Ahmed Salim*, the categories of factors that may impair mental responsibility are not closed (at [35]). There are typically three ways in which a psychiatric condition may substantially impair a person's mental responsibility: (a) where it affects the person's perception of physical acts and matters; (b) where it hinders the person's ability to form a rational judgment as to whether an act is right or wrong; and (c) where it undermines the person's ability to exercise his will to control physical acts in accordance with that rational judgment.

Version No 2: 29 Dec 2022 (18:05 hrs)

250 As recognised by the majority (at [84] and [103] above), the inquiry under the Third Limb is largely a question of common sense to be decided by the trial judge as a finder of fact (see *Nagaenthran* at [33]), citing the decision of this court in *Ong Pang Siew* at [64]. Sundaresh Menon CJ emphasised that while medical evidence is 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 (see *Nagaenthran* at [33], citing the decision of this court in *Zailani bin Ahmad v Public Prosecutor* [2005] 1 SLR(R) 356 ("*Zailani*") at [52]). The substantial impairment must result in a disordered mind (*eg*, one that is *not functioning rationally*) (see the decision of this court in *Ahmed Salim* at [38] and [48]–[50]).

251 In this context, it is timely to highlight that it is *the accused* who bears the legal burden of proving on the balance of probabilities that his or her mental responsibility was substantially impaired at the time of the offence (see s 33B(3) of the MDA). Save in exceptional cases, accused persons would be wise to support the medical evidence disclosing an abnormality of mind by descending into the *particular circumstances* in which the offence was committed in order to demonstrate *how* the relevant disorder had contributed to the commission of the offence. General observations of certain mental impairments suffered by the accused over the course of his lifetime, for example, are not necessarily helpful in shedding light on *the particular circumstances* surrounding the offence against which he must mount his case. As this court held in *Zainul Abidin bin Malik v Public Prosecutor* [1996] 1 SLR(R) 140 ("*Zainul*") at [29] (citing the Privy Council decision of *Walton v The Queen* at 793F–H), albeit in relation to Exception 7 to s 300 of the Penal Code, the court must "consider not only the medical evidence adduced but also all the other facts in arriving at its decision".

Version No 2: 29 Dec 2022 (18:05 hrs)

Even where such medical opinion is unchallenged, trial judges would be perfectly entitled to reject or differ from the opinions of the medical men, if there are other facts on which they could do so (see the decision of this court in *Sek Kim Wah v Public Prosecutor* [1987] SLR(R) 371 ("*Sek Kim Wah*") at [33]; see also Christopher De Souza, "Diminished Responsibility: A Less Vindicatory Excuse than Provocation" (2005) 17 SAcLJ 793 at para 11). While the views in *Sek Kim Wah* were expressed in relation to the First Limb, we see no reason that they should not apply equally to the Third Limb. The holistic nature of the inquiry under the Third Limb demands such attention to the facts and the requisite threshold is generally not crossed simply by referring to broad observations by medical experts which, on closer examination, do not cohere with the objective circumstances surrounding the offence. In this connection, an accused person should be expected to testify in relation to the issue of diminished responsibility under s 33B(3)(*b*) to give factual ballast to the psychiatric evidence led in his defence (and *cf* the Majority Judgment at [116] above). After all, the accused person would obviously have personal knowledge of his or her actions at the material time (see also s 108 of the Evidence Act 1893 (2020 Rev Ed)).

252 Further, where the abnormality of mind is one which affects the accused's self-control, the court should distinguish between a person who "did not resist his impulse" and one who "could not resist his impulse" (see *Jimmy Chua* at [32]). Yong CJ noted that this distinction was *incapable* of scientific proof which left the court free to make its own finding. In this regard, he drew insight from the following passage in the seminal English decision of *Byrne* at 404:

> Inability to exercise will power to control physical acts, provided that it is due to abnormality of mind from one of the causes specified in the parenthesis of the subsection, is … sufficient to

Version No 2: 29 Dec 2022 (18:05 hrs)

> entitle the accused to the benefit of the section; difficulty in controlling his physical acts depending on the degree of difficulty, may be. It is for the jury to decide on the whole of the evidence whether such inability or difficulty has, not as a matter of scientific certainty but on the balance of probabilities, been established, and in the case of difficulty whether the difficulty is so great as to amount in their view to a substantial impairment of the accused's mental responsibility for his acts.

253 In this regard, we think that rationality and volitional control are inextricably linked. By rationality, we refer not solely to the ability to understand the nature of one's actions and the ability to distinguish right from wrong. These are merely pre-requisites to rationality. What we refer to is the making of calculated and logical decisions. And, if an accused person's conduct when seen in the objective circumstances demonstrates rationality in the sense just described, it *weakens* the argument that the accused acted instead out of a lack of volitional control (see also [289] below). The stronger inference is that the accused *did* not, rather than *could* not, resist his impulses such that it cannot be said that his self-control was substantially impaired. This analysis appears to find support in *Wang Zhijian*, an appeal concerning diminished responsibility for murder. There, the court accepted expert evidence to the effect that the accused's calculated behaviour (*ie*, instructing another victim and tricking that victim to close her eyes) was *more consistent* with the accused possessing self-control than having lost self-control (at [76]). *Jimmy Chua*, another murder case, also buttresses our view on the relationship between rationality and volitional control. There, the court concluded that the appellant could have restrained himself from performing the killings even if he was commanded by a voice. The court, having close regard to the circumstances of the offence (see [30] and [33]), disbelieved the appellant's contention that he *could not* control his actions because the appellant still had rationality of thought (at [33]). He had the ***presence of mind*** to try and tie the deceased up when assaulted; to avoid electrocution by using the telephone cord instead of pulling the plug; to look for

Version No 2: 29 Dec 2022 (18:05 hrs)

the keys to make his escape; to put on his boots before leaving the crime scene; and to dispose of his bloodied clothes. His ***behaviour immediately after the murder*** was also inconsistent with a person who claimed to be out of control (see also *Ahmed Salim* at [37]; *R v Douane Brown* [2019] EWCA Crim 2317 at [4], [8] and [13]; *R v Osborne* [2010] EWCA Crim 547 at [19] and [36]; *R v Michael James Quinn (No 2)* [2016] NSWSC 1244 at [307]–[312]).

254 It is certainly possible for one to appear outwardly rational while also having an internally disordered mind that *inter alia* suffers a substantial lack of volitional control. For instance, *Ahmed Salim* explains (at [42]–[44]) that *Brennan* was a case in which the accused person's rationality in forming the decision to kill was impaired, and the English Court of Appeal held that his rationality in being able to *carry out the disordered decision* did not displace a finding of diminished responsibility. In such cases, the accused will not possess rationality in the full sense of the word used in [253] above, ***and***, *especially in the context of* ***drug trafficking***, which is ordinarily a highly purposive and coordinated activity (see [290] below), the accused should squarely address the contradiction between apparent rationality and internal disorder and explain why the latter should be believed (such explanation, as we shall see, is lacking in this case).

255 For example, in the context of murder, *Ahmed Salim* laid down the principle that diminished responsibility *may* be established even where the murder is premeditated if an accused person is able to prove on a balance of probabilities that his mental disorder "substantially impaired his ability to make rational or logical decisions, and this disorder caused him to decide to kill the victim". Even though his premeditated actions to follow through on that decision are done under a "veneer of rationality" (*ie*, where there is some

Version No 2: 29 Dec 2022 (18:05 hrs)

apparent rationality), the decision to kill is the "product and acting out of the disordered mind" (at [1] and [50]). We emphasise, however, that this is narrowly limited to only circumstances where the accused can show that: (a) first, but for his abnormality of mind, he would not have made that decision; *and* (b) second, he had *no realistic* ***moment*** *of rationality and self-control* that would have enabled him to resile from that intention or plan (at [51]–[52]). These two requirements are *conjunctive*. If the accused did indeed have a realistic moment in which he *could have* resiled from the decision to commit an offence but simply *chose not to do so*, then any *effect on his self-control* caused by his abnormality of the mind cannot be said to be of an extent that *substantially impaired* his mental responsibility. In such a situation where an accused, despite a given moment of clarity of thinking, nevertheless chose not to resile from his intention or plan to commit the offence and executed it for whatever reason, the full (and by no means diminished) mental responsibility for the acts and omissions in relation to his offence must be borne by him. Stated thus, *Ahmed Salim* does *not* endorse an approach that focuses *solely* on the *decision* to commit an offence while putting aside the particular circumstances surrounding the *execution* of such decision (an approach which the majority in the present case has placed much emphasis on and which, indeed, appeared to be a central theme in its understanding of the relevance of rationality (see, for example, [96], [117], [123] and [148] above)).

Alleged impairment of Roszaidi's ability to control the impulse to consume drugs

256 Under the Third Limb, Roszaidi's argument, in a nutshell, is that the *synergistic* effect of his MDD and SUD impaired his ability to control his impulse to consume drugs to an extent sufficient to substantially impair his mental responsibility for his trafficking offence. This submission rests on

Version No 2: 29 Dec 2022 (18:05 hrs)

Dr Rajesh's opinion that Roszaidi's two disorders led him to focus on the immediate short-term benefits of obtaining drugs to consume at the expense of the long-term adverse consequences of trafficking drugs. Roszaidi stresses that following the two bereavements, his drug use escalated (the extent of which is unclear) and he quit his job at the flour company ("the Flour Job") (see the Majority Judgment at [17]). To buttress his case, Roszaidi also points to: (a) his own evidence that he had trafficked in drugs for Is Cangeh in order to satisfy his drug addiction and because he was "caught in the trap" of drugs; and (b) the fact that he is a life-long drug addict whose "main focus" in life was to consume drugs.

257 We think it will be useful to begin analysing the abovementioned factors from the general to the particular. In this spirit, we will: (a) start by understanding the nature of Roszaidi's disorders and unpacking the evidence (if any) of the intensity with which they operated at the material time; (b) then evaluate Roszaidi's evidence as to why he began delivering drugs for Is Cangeh; and (c) conclude by scrutinising the circumstances surrounding the offence.

Nature of the disorders

258 We begin by ascertaining the severity of Roszaidi's SUD and will, in the course of doing so, address the severity of his MDD.

259 While Dr Rajesh did not flesh out the nature of Roszaidi's SUD or the degree to which Roszaidi's ability to resist drug consumption was impaired, Dr Saluja's evidence is more illuminating. Dr Saluja accepts that Roszaidi's "main focus" at the material time was on drug-seeking and that "majority of the times he was just trying to get money and focusing on drugs". The relevant portions of Dr Saluja's oral testimony read as follows:

Version No 2: 29 Dec 2022 (18:05 hrs)

Examination-in-chief at remittal hearing

Q: … your diagnosis of Mr Roszaidi suffering from mental and behavioural disorder due to dependence of multiple substances. Could you inform the Court how serious was this disorder?

A: Your Honour, this category is not defined on the basis of severity. … So which I think was adequately qualify for this diagnosis because he had developed tolerance, that means he was progressively using more drugs to have the similar effect. He was *focussed only on drug seeking and drug related activities. He was not engaged in any---not many other activities. So his* ***main focus*** *was drugs*. … So he was using substances which had differential effects on the brain, not somewhat depressants and others were stimulants. And---and he was using it *pretty much every day and not engaging in any other activity. That was the* ***focus of his life***. So hence, my conclusion that he was dependent on multiple substances.

Cross-examination at remittal hearing

Q: Yes. At least that is this part, you're saying earlier in your examination-in-chief that his entire focus the whole day was only on drugs, correct?

A: No, I didn't say the whole day. What I was saying was that someone who is dependent on drugs, their activities resolve around consuming and possessing drugs and his behaviours was exhibiting that ***majority*** *of the times he was just trying to get money and focusing on drugs*. So it's drug and related activities that was the major part of his life for past few months.

Q: Yes, I agree with you completely. So then why is it wrong for Dr Rajesh to have said that he was focusing on the immediate short term benefits?

A: The---now the question is what's immediate and what is short term and how we see it longitudinally. … It's happened for so many years so it's---so we're not talking about immediate short term, we're talking about a person whose *life has* ***revolved*** *on---around drugs*.

[emphasis added in italics and bold italics]

260 We must therefore reckon with the reality that Roszaidi was a heavy consumer of drugs with reduced willpower to resist the impulse to *consume*

Version No 2: 29 Dec 2022 (18:05 hrs)

drugs. However, in our view, this is both not an answer to the proper punishment to be meted out following his conviction for drug *trafficking* and is insufficient in the circumstances of this case to pass muster under s 33B(3)(*b*). The determinative question is whether Roszaidi has adduced enough evidence to prove that his impaired impulse control in relation to his need to consume drugs sufficiently influenced his decision to traffic the Drugs to his wife, so as to substantially impair his mental responsibility. We find that Roszaidi has *not* done so. Our reasons are as follows.

261 First, while Dr Saluja did make some general observations on the nature of Roszaidi's pre-occupation with drug-seeking activities, it should not be overlooked that the evidence revealed that Roszaidi appeared to have a life outside of drugs.

262 For one, Roszaidi was able to maintain familial relationships and engage in social activities that did not involve drugs. As the respondent points out, on the morning of the day of his arrest, Roszaidi was shopping at Jurong Point with his wife and daughter. At about 2pm the same day, he "wanted to go visit [his] younger brother at his house together with [his] wife and [his] daughter". Roszaidi, his wife and his daughter then "spent time with [his] younger brother and his family". However, it is worth noting that he admitted to consuming drugs while at Jurong Point with his family.

263 Further, after his release from prison in 2014 and before the May 2015 bereavements, Roszaidi was gainfully employed. He was initially working in a chemical company under the prison's Work Release Scheme before transitioning to the Flour Job. It is also noteworthy that Roszaidi *quit* the Flour Job of his own volition in May 2015. It is not his case that he was incapable of

Version No 2: 29 Dec 2022 (18:05 hrs)

working due to his disorders, nor is there evidence to support any such contention.

264 Second, even assuming that Roszaidi's MDD is a rough proxy for the extent to which his SUD was aggravated, Dr Rajesh's evidence on the nature and intensity of Roszaidi's depression is brief. Granted, Dr Rajesh's 3rd Report states that Roszaidi was "more withdrawn and less talkative" and had reduced libido. He also records that Roszaidi had:

> … exhibited symptoms of depressed mood, poor sleep, feelings of low self-esteem, felt like a failure with feelings of guilty of being unable to look after his mother, with feelings of worthlessness and reported having lost interest in his daily activities. He also reported poor appetite.

It is, however, critical to bear in mind that Dr Rajesh made this observation some four years after Roszaidi's arrest and, more significantly, after he was sentenced to death following his conviction. As such, in our view, these observations could hardly represent Roszaidi's state of mind *at the time of the offence*. No attempt was made by Dr Rajesh to explain whether Roszaidi's exhibited symptoms were caused or contributed by the fact that by then, he was facing the death penalty. Dr Rajesh further notes that Roszaidi "did not report any suicidal ideation and did not give any history of suicide attempts".

265 However, without further information on the intensity of these symptoms *at the time of the offence*, this cannot suffice to prove that Roszaidi's MDD was severe. As Dr Saluja clarified, "MDD" is a category obtained from the DSM-V. It can be further sub-divided by severity and a patient with MDD may suffer mild depressive *episodes*. Indeed, DSM-V indicates that depending on how many symptoms are observable or the degree to which these symptoms worsen, the severity of MDD may vary (see DSM-V at pp 162–163). It also

Version No 2: 29 Dec 2022 (18:05 hrs)

states that individuals with MDD may experience "milder episodes" (see DSM-V at p 163). What amounts to a mild depressive episode is defined in ICD-10, which states that the number *and* severity of symptoms determines whether a depressive episode is mild, moderate or severe (see ICD-10 at para F32). In a severe depressive episode, the symptoms are "marked and distressing" and "suicidal thoughts and acts are common" (see ICD-10 at para F32.3; see also DSM-V at p 164). As to what the duration of an "episode" is, ICD-10 states that this "varies from a few weeks to many months" (see ICD-10 at para F33). Thus, not all instances of MDD are of equal intensity, and even victims of MDD may experience *mild* episodes.

266 Even assuming henceforth that the severity of Roszaidi's depressive *disorder* and *episode* (at the time of the offence) are equivalent, as the distinction between these concepts was not deemed material by either expert, evidence from Dr Rajesh as to the intensity of Roszaidi's symptoms *at the time of the offence* is lacking. On the other hand, Dr Saluja opined, by way of elaboration in his oral testimony, that Roszaidi's MDD was only of a ***mild*** severity – see [268] below. Besides, it is accepted that Roszaidi did not, at any material time, exhibit suicidal thoughts or acts (see [225] above). Roszaidi's counsel, Mr Thuraisingam, is also unable to demonstrate how the objective circumstances bear out the severity of Roszaidi's MDD. Rather, Mr Thuraisingam admits that there is no evidence of how Roszaidi's MDD manifested besides escalated drug consumption. Even as to the degree to which Roszaidi's drug consumption escalated (taking his case at its highest), his counsel conceded that evidence was not led on this issue (see [234] above). This is not surprising because, as noted above (at [220]), Dr Rajesh's 1st Report, in which the Synergy Claim was made, took as its starting point (and, indeed, foundation) Dr Saluja's 1st Report. As already noted at [223] above,

Version No 2: 29 Dec 2022 (18:05 hrs)

Dr Rajesh's reports comprised mere ***general*** propositions as well as assertions. For example, in his 1st Report, Dr Rajesh concludes (at para 20) by merely stating what is, in essence, the Synergy Claim (with a reference to Roszaidi's testimony that he needed the supply of drugs to satisfy his addiction and that he regretted doing this because his wife was implicated as a result, which reference is no more than a neutral statement of Roszaidi's drug dependency and his remorse at involving his wife as well). And in his 2nd Report dated 27 February 2020, Dr Rajesh concluded as follows (at para 36):

> It is also *well known* that major depressive disorder *can* cause impairment of rational judgment and *can* lead to difficulties in impulse control. The defendant's comorbid drug abuse *played a synergistic role* at the material time which led him committing the alleged offences, *by focussing on the immediate short-term benefits, rather than weigh and focus on the long-term adverse consequences of trafficking drugs*. The defendant was *also scared* of being harmed by Is if he threw away the drugs as he did on one previous occasion *and was also worried* about harm being caused to his family by Is. Due to this, he continued to hold on to the bundles *and even got his pregnant wife to come and collect the drugs from him for temporary safe keeping*.
>
> [emphasis added]

It is clear that Dr Rajesh's conclusion (as just quoted) is an assertion of what is required to be undergirded by relevant evidence. Indeed, the ostensible reasons he gives only underscore *Roszaidi's appreciation of the nature and consequences of his offence* and, more specifically, point to *other reasons* for his conduct that centre on *self-preservation* (see also [276] below) as well as his *fear of reprisal* from Is Cangeh (see also [279] below), *none* of which supports his case and which (on the contrary, as we point out below) point in the *opposite* direction.

267 This brings us neatly to Dr Saluja's reports in general and his clinical view on the effect of Roszaidi's MDD in particular. However, before

Version No 2: 29 Dec 2022 (18:05 hrs)

proceeding to consider these reports, it is also important at this juncture to underscore the fact that Roszaidi's case was premised on *the Synergy Claim*. Indeed, during oral submissions before this court, Mr Thuraisingam recognised that Roszaidi's SUD alone may not be sufficient to establish the requisite mental impairment.

> Phang JCA: So what do you say in a nutshell is your case?
>
> Thuraisingam: It's the MDD. I think what is *significant* here is *the depressive disorder* ***as well***, you see. ***If it was substance disorder, it may not be so easy to satisfy***. I mean, if it's substance use disorder in itself.
>
> [emphasis added in italics and bold italics]

268 Turning now to Dr Saluja's reports as well as his testimony in court, it should be noted that it was *Dr Saluja* who had first diagnosed Roszaidi's MDD approximately a month after Roszaidi had been charged, and he was clearly of the view that although Roszaidi did in fact suffer from MDD, his "depressive symptoms were *not a contributory factor* to the alleged offence" [emphasis added] (Dr Saluja's 1st Report at para 24; see also [226] above). It is important to note that this view was arrived at in the context of Dr Saluja's diagnosis of Roszaidi's SUD in the same Report. Put simply, Dr Saluja, being conscious of Roszaidi's co-morbidity in relation to both SUD and MDD, did not think that his MDD played a role in the commission of the offence of trafficking. He maintained this view under cross-examination and stressed that trafficking in drugs was a *choice* for Roszaidi. On a significant note, in contrast to Dr Rajesh's views, Dr Saluja opined, by way of elaboration in his oral testimony, that Roszaidi's MDD was only of a ***mild*** severity. Dr Saluja took this position because Roszaidi only exhibited four to five symptoms of depression when the DSM-V and ICD-10 required the presence of *at least* four to five symptoms in order to justify a diagnosis of MDD or a major depressive episode. Simply put,

Version No 2: 29 Dec 2022 (18:05 hrs)

Roszaidi *barely* met the requirements to be diagnosed with MDD. Indeed, as Dr Saluja explained at trial:

> In fact, I think *we have to be* ***quite generous*** to [m]ake a diagnosis of major depressive disorder. So this was *just based on the verbatim of the patient and the observations*. So I think ***even this*** *diagnosis is* ***quite generous*** *in that sense. If you use a different manual,* ***he may not even qualify*** *for a diagnostic category as such*. So it's a guideline, so we'll just follow those guidelines and make clinical judgment whether this person is suffering from a depressive disorder or not. *So the conclusion is, yes, depressive episode* ***but*** *of* ***mild*** *severity*.
>
> [emphasis added in italics and bold italics]

269 We find that Dr Saluja's evidence is credible on its face, especially given his contemporaneous assessment of Roszaidi and thus, minimally, places the evidential burden on Roszaidi to prove that his MDD was not merely of a "mild severity". Roszaidi failed to meet that evidential, and ultimately, the legal burden of proof. Dr Saluja based his diagnosis of Roszaidi's MDD on these symptoms: "[a] depressed mood, ... [b] disturbed sleep, [c] guilty thoughts (of not being able to take care of his deceased mother), [d] loss of appetite and [e] loss of weight". Consistent with Dr Saluja's testimony, the two diagnostic manuals indeed prescribe that minimally four to five symptoms are required to establish MDD or a major depressive episode. For the latter, ICD-10 states that four or more symptoms indicate a *moderate* depressive episode. A severe depressive episode without psychotic symptoms is one in which, among other factors, several symptoms are "marked and distressing" and suicidal thoughts are common (see ICD-10 at para F32.2). In a similar vein, for MDD, DSM-V requires among other things five or more symptoms, from a list of nine symptoms, to be present during the same two-week period and represent a change from previous functioning (see DSM-V at p 163). The symptoms identified in DSM-V include psychomotor agitation or retardation nearly every day (observable by others) and recurrent thoughts of death and suicidal ideation

Version No 2: 29 Dec 2022 (18:05 hrs)

(see DSM-V at pp 160–161). It bears repeating that Roszaidi disavowed any suicidal thoughts or acts (see [264] above). In the premises, we are unable to find sufficient evidence showing that Roszaidi's MDD was severe. Not only does Roszaidi only present the *minimum* number of symptoms to qualify for a diagnosis of MDD, Dr Rajesh's expert evidence does not flesh out the intensity of these symptoms.

270 Dr Saluja also pointed out in his oral evidence that, having regard to Roszaidi's overall conduct on the night of 6 October 2015, the latter demonstrated "higher executive functions in the brain" and "cognitive ability" that would otherwise have been impaired by MDD had it been severe. As we elaborate on later (see [285] below), once Is Cangeh contacted Roszaidi to undertake the job, he was able to formulate a plan to collect the Drugs and organise and coordinate with multiple persons to execute that plan. Dr Saluja thus based his assessment of the severity of Roszaidi's MDD on the objective circumstances surrounding the offence.

271 While Dr Rajesh's 3rd Report discloses a few more symptoms than Dr Saluja's 1st Report (*viz*, reduced libido, low self-esteem and losing interest in daily activities (see [264] above)) all of which were observed several years after his arrest and, more importantly, after he was sentenced to death, we explained earlier that Dr Rajesh did not explore the intensity of these symptoms. There is therefore strictly no evidence to contradict Dr Saluja's evidence that Roszaidi's MDD is of *mild* severity.

272 In addition, *even if* Roszaidi's MDD was not mild, what is directly relevant to this appeal is the extent to which his MDD aggravated his SUD. However, and as noted at [266] above, Roszaidi's counsel admits that there is *no evidence as to the degree to which Roszaidi's depression exacerbated his*

Version No 2: 29 Dec 2022 (18:05 hrs)

craving for drugs. It follows that Roszaidi fails to prove that it was his impaired impulse control in relation to his need to consume drugs that sufficiently influenced his decision to *traffic* the Drugs to his wife, so as to substantially impair his mental responsibility which, as we set out at [260] above, is the crux of this part of the present appeal (*viz*, in relation to the Third Limb). The significance of this deficiency is thrown into sharp relief when we consider that Roszaidi previously threw away a drug consignment he was supposed to deliver for Is Cangeh because he felt it was too heavy. Roszaidi revealed during investigations that this was probably supposed to be his third job for Is Cangeh since being enlisted in July 2015. In other words, three to four months prior to the offence, Roszaidi still had the willpower to *overcome* his impulse to consume drugs (and to participate in trafficking). This factor, when combined with the paucity of evidence on the extent to which Roszaidi's MDD aggravated his SUD, is fatal to his case on appeal.

273 In short, this is *not* an exceptional case where the expert evidence on the nature of the accused's disorders is on its face sufficient so as to establish, on a balance of probabilities, that the accused's mental responsibility was substantially impaired. Rather, the crux of Roszaidi's case – the *extent* to which his MDD exacerbated his SUD – is ***evidentially deficient***. In our view, Roszaidi has not proven that his MDD aggravated his SUD to a degree sufficient to satisfy s 33B(3)(*b*).

Roszaidi's evidence on why he agreed to deliver drugs for Is Cangeh

274 Roszaidi next relies on the fact that he testified at the trial that he had trafficked in drugs for Is Cangeh in order to satisfy his drug addiction and because he was "caught in the trap" of drugs.

Version No 2: 29 Dec 2022 (18:05 hrs)

275 With respect, we do not think Roszaidi's own testimony takes his case under the Third Limb very far.

276 Crucially, we are of the view that the analysis in the Third Limb should be focused on Roszaidi's mental responsibility for the *actus reus* of the offence. As this court noted in *Took Leng How v Public Prosecutor* [2006] 2 SLR(R) 70 at [58], what is sought to be established is the accused's state of mind *at the time of the offence*. In this regard, the offence for which Roszaidi was convicted is trafficking in the Drugs to his wife. As we explore in greater detail below (see [283]), the transfer of the Drugs to his wife appears to have been motivated by *self-preservation*. After collecting the Drugs from Aishamudin and Suhaizam, Roszaidi hatched an alternative plan to offload the Drugs to his wife for safekeeping as he was nervous about driving around Singapore with such a large quantity of drugs. When Roszaidi's offending conduct is viewed in its proper context, he has not demonstrated why his impaired impulse control influenced the *actus reus* of the offence to a sufficient degree as to satisfy s 33B(3)(*b*). On the contrary, his acts of self-preservation demonstrate the opposite – that he was acting rationally and was very much in control of his actions in relation to the offence that he was committing. In this regard, we also note Roszaidi's locational awareness as well as his awareness of the weight of the Drugs (which ultimately led to his transfer of the Drugs to his wife) (see also [282] below).

277 Stated thus, we do not see how Roszaidi's *trafficking* of the Drugs could relate to his impaired impulse control in relation to his drug *consumption*. Significantly, the act of *trafficking* by *passing the Drugs to his wife* is ***clearly distinct*** from any alleged impaired impulse control in relation to his drug *consumption* – however trivial (or significant) such impairment might have been at the material time. Assuming that Roszaidi accepted and carried out the

Version No 2: 29 Dec 2022 (18:05 hrs)

instruction to *collect* the drugs on 6 October 2015 at least in part so as to feed his personal drug *consumption*, this does not necessarily explain why he had *passed the Drugs to his wife*. It is incumbent upon Roszaidi to establish the nexus between his trafficking of the Drugs and his alleged impaired impulse control in relation to his drug consumption. In our judgment, he fails to do so. Even if we were prepared to take a step back from the *actus reus* of the offence and consider the broader question of why Roszaidi found himself in the situation in which he trafficked in the Drugs, Roszaidi has not adduced sufficient evidence to prove the extent to which his impaired impulse control influenced his decision to traffic in drugs.

278 Roszaidi proffered two reasons as to why he agreed to traffic drugs on behalf of Is Cangeh in July 2015. Significantly, in the statements *more contemporaneous with* the offence, Roszaidi cited *monetary remuneration* as the reason for working for Is Cangeh. In his 2nd Long Statement dated 16 October 2015 at para 29, Roszaidi explained that he began working for Is Cangeh in order to earn money. He did not mention that he wanted to siphon off a portion of Is Cangeh's drugs to feed his addiction. In that statement, Roszaidi explained that he needed more money *to support his wife and daughter*. He lamented that he did "not have any qualified skills to get a job that earn[ed] enough money for [him] and [his] family". For completing the job which formed the subject matter of the offence, Roszaidi was supposed to receive $300. It bears emphasising that he had quit the Flour Job in May 2015. It is thus plausible that *monetary remuneration* was *at the forefront* of Roszaidi's mind. Although Roszaidi did mention that he helped himself to drugs for his own consumption without Is Cangeh's knowledge in para 31 ("I also help myself to those heroin and [ice] for my own consumption") of his 2nd Long Statement, he appears to have mentioned this as *a side benefit* of working for

Version No 2: 29 Dec 2022 (18:05 hrs)

Is Cangeh. In that very statement, where Roszaidi *specifically* explains why he began trafficking for Is Cangeh, Roszaidi only cites the fact that he needed *more income*. In this connection, the only motive for the offence recorded in Dr Saluja's Clinical Notes of his *contemporaneous* examination of Roszaidi on 26 October 2015 relates to *money*. Only in Roszaidi's 5th Long Statement dated 19 July 2016 (almost a year later) at para 65, and in his oral testimony at the trial, did Roszaidi claim that he "was caught in the trap of drugs when [he] decided to do this job for 'Is'" and that he trafficked in drugs in order to "satisfy [his] drug addiction". However, if Roszaidi's drug addiction had indeed influenced his decision to traffic in drugs for Is Cangeh, it is puzzling that he would have waited until July 2016 to make this connection explicit.

279 Further, if we move away from Roszaidi's decision to *begin* trafficking in drugs for Is Cangeh, and focus instead on why he agreed to follow through with the job on 6 October 2015 despite his anxiety over the quantity of the consignment, another motivation assumes significance – *Roszaidi's fear of reprisal* from Is Cangeh for disobeying orders to deliver the Drugs. In Roszaidi's statements *contemporaneous with* the offence (*ie*, recorded in October 2015), including his cautioned statement dated 9 October 2015, Roszaidi stated that his fear of Is Cangeh harming him or his family, or framing him, led him to agree to deliver the drugs for Is Cangeh. In his examination-in-chief at the trial, when Roszaidi was asked *specifically* why he did not dispose of the Drugs, Roszaidi again explained that he did not dare to do so out of fear for what Is Cangeh would do in retaliation. In this regard, the Judge noted that Roszaidi's fear of Is Cangeh was not an overestimation. This is because Roszaidi believed that Is Cangeh was "a '369' gang member", and that Is Cangeh had been "fed up" the first time that Roszaidi disposed of a drug

Version No 2: 29 Dec 2022 (18:05 hrs)

consignment and refused to complete the delivery to Is Cangeh's customers. We see no reason to disturb this finding of fact made by the Judge.

280 Pulling these threads together, it seems to us that several reasons were in play on 6 October 2015 which eventually led him to traffic the Drugs to his wife. We do not dispute that his impaired will to resist drug-*consumption* was a factor in this equation. However, that it was a factor does not, to our minds, suffice to bring Roszaidi within the ambit of s 33B(3)(*b*). The Third Limb involves a moral question of the degree to which Roszaidi remained mentally culpable for his actions (see *Criminal Law in Singapore* at paras 26.41 and 26.44 as well as the decision of this court in *Quek Hock Lye v Public Prosecutor* [2015] 2 SLR 563 at [36]). The *extent* to which his mental disorders influenced his decision to commit the offence must therefore establish *substantial* impairment of his mental responsibility. However, given *the multitude of reasons* leading Roszaidi to commit the offence ***and*** the ambiguity as to the extent to which Roszaidi's MDD aggravated his SUD, the degree to which Roszaidi's impaired impulse control influenced: (a) his decision to work for Is Cangeh in July 2015; (b) the specific decision to deliver the two packets of heroin and three packets of ice which he collected on 6 October 2015 to Is Cangeh's customers; and (c) as mentioned at [276] and elaborated on below, the commission of the *actus reus* of the offence (*viz*, trafficking in the Drugs to Azidah), remains unclear. This is another reason for upholding the Judge's conclusion that Roszaidi cannot avail himself of the alternative sentencing regime.

The circumstances of the offence

281 Finally, in our judgment, the particular circumstances of the commission of the offence cements our analysis thus far that Roszaidi has failed to adduce

Version No 2: 29 Dec 2022 (18:05 hrs)

sufficient evidence of his impaired impulse control having substantially impaired his mental responsibility. To reiterate, the thrust of Roszaidi's case is that the synergistic effect of his MDD and SUD impaired his impulse control to an extent sufficient to substantially impair his mental responsibility. This submission rests on Dr Rajesh's opinion that Roszaidi's two disorders led him to focus on the immediate short-term benefits of obtaining drugs to consume and not weigh the long-term adverse consequences of trafficking drugs.

282 It may well be that on 6 October 2015 when Roszaidi agreed to traffic the Drugs for Is Cangeh, the plan was for him to deliver the Drugs to various customers as directed by Is Cangeh. That said, the fact remains that Roszaidi was eventually charged and convicted for trafficking the Drugs to his wife, Azidah, and thus his invocation of s 33B(3)(*b*) must necessarily be examined with reference to the very offence for which he was convicted. The circumstances surrounding the commission of the offence suggest that Roszaidi trafficked the Drugs to Azidah *with intentionality and to achieve a calculated end – self-preservation*. Accordingly, it is incumbent on Roszaidi to prove why his deliberate and apparently rational act of handing the Drugs to his wife for safekeeping was sufficiently influenced by his impaired will to resist drug consumption. In our view, Roszaidi has failed to do so on the balance of probabilities.

283 The following sequence of events on the night of 6 October 2015 suggests that Roszaidi's act of trafficking to his wife was done in the naked pursuit of *self-preservation*:

> (a) After collecting the Drugs, Roszaidi initiated the Phone Call with Is Cangeh to confront him on why the Drugs were "so many". In his first long statement dated 14 October 2015 ("Roszaidi's 1st Long

Version No 2: 29 Dec 2022 (18:05 hrs)

Statement"), Roszaidi also records being scared due to the quantity of heroin in his possession. It is not disputed that Roszaidi knew that the offence was legally and morally wrong and that he understood the nature of his actions (see [106] above). In fact, it is clear to us that Roszaidi was rational enough to recognise that the consequences are different depending on the weight of the drugs being trafficked. However, as discussed above at [279], Roszaidi decided to follow through with the job, in part, due to his fear of Is Cangeh. In particular, when Roszaidi collected the Drugs and felt their weight, he was reminded of the first time he had disposed of drugs he had collected because they were too heavy and Is Cangeh's reaction following his disposal of the said drugs. He feared that Is Cangeh would harm him and his family if he repeated the same mistake.

(b) Roszaidi wanted to complete the job quickly so as to get the Drugs and methamphetamine off his person. He recorded in his 2nd Long Statement that his mind was "focused on finishing [his] job which is to pass the heroin and air-batu to someone who would call [him]". However, after the Phone Call, Is Cangeh did not revert with further instructions. In his 1st Long Statement, Roszaidi said that he "felt *scared* because [he] *don't feel good* holding on to so much heroin and air-batu" [emphasis added]. Similarly, in his 3rd Long Statement dated 17 October 2015, Roszaidi said he "did not want to carry so many drugs around when [he was] outside". Roszaidi therefore devised an alternative plan to offload the Drugs to Azidah. Dr Saluja's 5th Report suggests that Roszaidi wanted to rid himself of the Drugs as he realised that he was being pursued by the police. That Roszaidi was able to

Version No 2: 29 Dec 2022 (18:05 hrs)

problem-solve and remain goal-oriented in these circumstances speaks to his lucidity.

Roszaidi arranged with Azidah to meet her and told her to bring along a plastic bag. He intended to pass the Drugs to her but did not tell her that he was handing her drugs. When they met, Roszaidi told her to bring the Drugs up to the apartment (see *Azli* at [6]). By that time, the Drugs were already in his possession. He was thus faced with a choice of either keeping it in his possession or handing it over to Azidah for safekeeping having ruled out disposal of the Drugs. Like the Judge, we accept the possibility that there is a logical explanation for Roszaidi's decision to hand the Drugs to Azidah: he "thought it was safer than [him] carrying the drugs and driving around Singapore". As the Judge explained, it was reasonable for Roszaidi to think that keeping the Drugs at home would lower the risk of the Drugs being discovered (see Remittal Judgment at [15]). It appears that Roszaidi acted to avoid detection by the CNB, rather than to implicate his wife.

284 In these circumstances, we fail to see how Roszaidi was, as Dr Rajesh opined, focused on the short-term benefit of obtaining a drug high at the expense of appreciating the long-term adverse consequences of trafficking when he passed the Drugs to his wife. On the contrary, Roszaidi's commission of the *actus reus* appears to have been guided by his fear of the legal repercussions of trafficking in drugs. However, we do not need to make a definitive finding of fact in this regard since it is Roszaidi who bears the burden of proving that his impaired ability to control his impulse to consume drugs influenced his decision to traffic to a sufficient degree so as to substantially impair his mental responsibility for the present offence. The short point is that he has not discharged his burden of proof.

Version No 2: 29 Dec 2022 (18:05 hrs)

285 While the appeal may be disposed of on the basis that Roszaidi failed to discharge his legal burden, it is also the case that the objective circumstances belie Roszaidi's rationality, and that this rationality undermines his claims of impaired impulse control. This stems from the relationship between rationality and volitional control articulated at [253] above. Apart from the fact that Roszaidi acted out of self-preservation in the immediate circumstances of the offence, other background factors point away from a mind so disordered by a volitional impairment as to satisfy s 33B(3)(*b*). For instance, Roszaidi appeared to have some system in place, by the date of the offence, to traffic in drugs for Is Cangeh. He stated that whenever he had a "job", he would call Azli to drive him around because "[he] knew that he has a car". The night of 6 October 2015 was no exception. Roszaidi would pay Azli about $100 (a fraction of the $300 Roszaidi was supposed to receive from Is Cangeh for performing the job on 6 October 2015) and sometimes paid for the petrol too. However, while Roszaidi said in his 1st Long Statement that his arrangement with Azli started in "mid 2015", he later testified on the stand that the two only met in September 2015 (see also *Azli* at [104]). Nonetheless, the point remains that Roszaidi appeared to have devised a system for trafficking by 6 October 2015 (see also *Azli* at [110]). In addition, Roszaidi was coordinating actions with various persons on the night of the offence. He directed Azli to pick up Mirwazy from Pioneer MRT station *en route* to collect the drugs. Mirwazy wanted some ice, and Roszaidi intended to pass him some once he collected Is Cangeh's drugs. Roszaidi also liaised *via* phone with Is Cangeh to verify that he was approaching the correct lorry and to link up with two men in the lorry to collect the Drugs, *on top of* directing Azli where to drive. After all of this, Roszaidi also had the presence of mind to hand over the Drugs to Azidah. As Dr Saluja testified, the events of 6 October 2015 constituted a "complex task involving a lot of people" and Roszaidi's ability to organise these moving parts indicates that his brain

Version No 2: 29 Dec 2022 (18:05 hrs)

was "functioning in a very organised manner, not just internally but also involving the external agencies". Collecting the Drugs and then trafficking them to his wife was thus a series of rational and calculated actions (see [276] and [283] above). Such rationality reduces the scope for any argument that he was influenced by a volitional impairment to an extent sufficient to satisfy s 33B(3)(*b*).

286 Therefore, this case stands apart from *Jeffery Phua*. In that case, Choo J (who, incidentally, was also the judge below in the present case) recognised that the applicant's impaired *impulse control* and decision-making ability influenced the commission of the offence (at [15]). The learned judge accepted that even if the applicant knew what he was doing was wrong and risky, the applicant may still have lacked the will to resist the commission of the offence because his persistent depressive disorder and ketamine dependence caused him to be "focused on getting his immediate needs met, while disregarding future consequences of his actions" (at [15]). As for whether the applicant's impairment to mental responsibility was substantial, Choo J answered this in the affirmative. He was satisfied "from the ***facts*** and ***medical evidence*** ... that the applicant was probably incapable of resisting any internal rationality that might have dissuaded him from committing the offence" [emphasis added in bold italics] (at [17]). Indeed, he found that there were several occasions on which the applicant concerned was "hoping to end his life" (at [4]). The learned judge also noted (at [9]) an incident when the applicant "was very agitated and had punched" his sister. Choo J also appeared to accept the clarification by the expert psychiatrist for the applicant during cross-examination that "the key mental impairment that affected the applicant's mental responsibility for his acts [was] with respect to his ability to make rational judgment and decisions" (see also *Ahmed Salim* at [38] and [48]–[50] as well as [250] above). Further, Choo J

Version No 2: 29 Dec 2022 (18:05 hrs)

did not accord much weight to the applicant's statements that suggested that he had in fact weighed the consequences of his actions inasmuch as he had not only entered into an agreement to perform a service for monetary remuneration but was also aware of the consequences of his actions (except that, in this instance, he thought that what he was carrying was not a drug that carried capital punishment) (at [13]–[14]). In contrast, as explained above at [284], when we view the experts' medical evidence alongside the objective facts of the present case, Roszaidi has not proved that impaired volitional control influenced his offending conduct and substantially impaired his mental responsibility, much less that he was *incapable* of resisting his urge to consume drugs. He was also rational and knew precisely what he was doing and did in fact have regard to needs other than his drug dependency as well as both the immediate and future consequences of his actions. Here, unlike *Jeffrey Phua*, Roszaidi's counsel acknowledged that there was no manifestation of his MDD besides his escalated drug consumption at best – see [266] above.

287 We also note that when Parliament enacted s 33B of the MDA, it intended the alternative sentencing regime to operate in a "measured and narrowly defined way". If the exception was too wide, "we would have undermined our strict penalty regime and its deterrence value" (see 14 November 2012 Debates at p 1242 (DPM Teo)). In a similar vein, the Minister for Foreign Affairs and Minister for Law, Mr Shanmugam, referred more than once to the need to avoid the "*de facto* abolition" of the death penalty (see 14 November 2012 Debates at p 1230) as well as the "need to be careful about making the exception so wide that the rule itself is seriously qualified" (see 14 Nov 2012 Debates at p 1232). To this end, DPM Teo had earlier referred – more than once – to the conditions embodied now in s 33B of the MDA (*viz*, that the accused had only played the role of a courier and that he had either

Version No 2: 29 Dec 2022 (18:05 hrs)

cooperated with the CNB in a substantive way or had a mental disability that substantially impaired his mental responsibility) as "specific, tightly-defined" ones (see 9 July 2012 Debates at pp 261, 264 and 271), and this reference is also made by Mr Shanmugam (see 9 July 2012 Debates at p 268).

288 DPM Teo also endorsed Mr de Souza's point that the exception should not be read expansively such as to "open the backdoor for the offender to escape harsh punishment notwithstanding his or her ***understanding of the consequence of the crime***" [emphasis added in bold italics] (see 14 November 2012 Debates at p 1242). In a similar vein, Mr Shanmugam stressed that under s 33B(1)(*b*) of the MDA, "[g]enuine cases of mental disability are recognised, while, ***errors of judgments*** will not afford a defence" [emphasis added in bold italics] (see 14 November 2012 Debates at p 1235). Indeed, the need to ensure that the exception is tightly controlled also applies to its *application* and, in the context of the present appeal, to *the Third Limb* (which is, by its very nature, both fact-specific as well as context-specific). Whilst there was sympathy for the accused, this could not outweigh the much more extensive policy considerations. As Mr Shanmugam put it (see 9 July 2012 Debates at pp 277–278):

> I think if we focus on any one individual, a powerful case can emotionally be made out for saving a life. For saving lives, powerful cases can always be made out. It is more difficult if you want to balance that against the reality. Fifteen grams of heroin feeds 300 addicts for a week. Somebody who peddles that, and usually they peddle much more than that, is bringing death, or at least a life of ruin, to a large number of people. Let us say instead of 15 grams it is 100 grams – work it out for yourself how many thousands of people that is.
>
> What is never in the headlines is the number of lives that have been lost, the number of children who are orphaned either literally or through their parents being in jail, the amount of sadness and impact on the social fabric of society that those who are on the ground see every day. The headlines never focus

Version No 2: 29 Dec 2022 (18:05 hrs)

> on the victims of crime. If you look at it – the number of people who are impacted and how tough you need to be to try and save the society as a whole – then you need to send out a clear and consistent message. And the clear and consistent message is that if you deal in drugs in a quantity that is enough to support 300 people or more, then you face the death penalty. That has been the message we have been giving.

289 Moving from the more general spirit as well as approach underlying s 33B of the MDA, the *specific* purpose that appears to underlie s 33B(3)(*b*) in particular also suggests the potential contexts in which an accused might avail himself or herself of the doctrine of diminished responsibility in relation to offences with regard to *drug trafficking* (as opposed to the offence of *murder* (which was the *original context* in which the doctrine of diminished responsibility was introduced statutorily)). Indeed, the situations in relation to drug trafficking on the one hand and murder on the other are – more often than not – quite different. In so far as the latter (*ie*, murder) is concerned, the actual *actus reus* of the offence comprises act(s) that take place within a relatively short space of time. There is little time for the accused to react whilst he or she is committing the actual killing. In contrast, in so far as drug trafficking offences are concerned, there is usually a series of acts that must be committed across a span of time. It is therefore easier to ascertain whether or not the accused acted in a manner that demonstrated that their mental responsibility for the act of drug trafficking was substantially impaired within the meaning of s 33B(3)(*b*). For example, conduct that demonstrates organisation and/or evasion and/or opportunism would, in the nature of things, be the very *antithesis* of conduct that was generated by a lack of control (see also [253] above). It will be immediately seen that Roszaidi's various acts as well as the accompanying mental states lay within the province of the *former* rather than the latter. He was well aware of the offence that he was committing and, *in addition to* satisfying his drug dependence, he was also committing the act of drug trafficking for a

Version No 2: 29 Dec 2022 (18:05 hrs)

variety of *other* reasons. His conduct *during* the time of the offence itself also demonstrated a person who was able to take evasive action in the hope of escaping criminal liability (here, by passing off the Drugs to his wife because he felt that the drugs which he collected were too heavy and it was safer to pass the Drugs to her for safekeeping while waiting for delivery instructions from Is Cangeh). That he expressed remorse for involving her in criminal liability more than once bears testimony to this.

290 The relevant Parliamentary debates also support this analysis. We note, first, that DPM Teo specifically referred to s 33B(3)(*b*) as encompassing a situation where the accused "has a mental disability which *substantially impairs* ***his appreciation of the gravity of the act***" [emphasis added in bold italics] (see 9 July 2012 Debates at pp 264, 265 and 270). Indeed, this particular reference is repeated by Mr Shanmugam as well (see 9 July 2012 at pp 268 and 270). It also bears reiterating DPM Teo's endorsement of Mr de Souza's point (see also [288] above) that the exception should not be read expansively such as to "open the backdoor for the offender to escape harsh punishment notwithstanding his or her ***understanding of the consequence of the crime***" [emphasis added in bold italics] (see 14 November 2012 Debates at p 1242). This particular point is no mere exercise in semantics – it embodies the concept of whether or not the accused concerned appreciated the gravity of his act (here, the acts constituting drug trafficking). Mere personal motivations are legally irrelevant. That is why the doctrine of diminished responsibility works most appropriately in situations involving murder, where the killing is a one-time act and where the accused concerned might be so mentally impaired that he or she truly did not appreciate precisely what he was doing (although he or she might possibly have been conscious of the *literal act* of killing itself). And that is why in many situations involving the charge of murder, conduct demonstrating presence of mind and/or

Version No 2: 29 Dec 2022 (18:05 hrs)

organisation prevents the accused from availing himself or herself of the defence of diminished responsibility (see, for example, this court's decisions in *Mohd Sulaiman v Public Prosecutor* [1994] 2 SLR(R) 528 at [36]; *Zainul* at [31]; *Tengku Jonaris Badlishah v Public Prosecutor* [1999] 1 SLR(R) 800 at [64] and [65]; *Zailani* at [63] and [67]; *Muhammad bin Kadar and another v Public Prosecutor* [2011] 3 SLR 1205 at [136]; and *Wang Zhijian* at [74] and [79]; as well as the High Court decision of *Public Prosecutor v Khoo Kwee Hock Leslie* [2019] SGHC 215 at [160]). Put simply, the mental abnormality must have resulted in a disordered mind that lacked the requisite capacity to make a rational decision (see also [250] and [286] above) *such that* the abnormality of mind *substantially impaired his or her* ***mental responsibility*** for his or her acts. Looked at in this light, the following observations by Mr de Souza – in relation to *drug trafficking* – are particularly apposite and stand in sharp contrast to the situation with regard to the offence of murder just mentioned (see 12 November 2012 Debates at p 1118):

> A final point, Mr Speaker, I would like to make concerns the criterion of mental disability. I agree that no man or woman should be punished if he or she did not have the mental capacity to appreciate the consequence of his or her crime. But, if loose interpretations of mental disability are allowed, a legal case may boil down to a fight between the psychiatrist for the prosecution against that for the defence, with the judge being forced to weigh one psychiatrist's assessment over the other's.
>
> *We need to pause and realise that a distinction must be drawn between diminished responsibility in the context of murder as opposed to drug trafficking. Killing can be a spontaneous act, especially for non-premeditated cases. Drug trafficking, on the other hand, is often rational and calculated. It is seldom spontaneous.*
>
> My view is that *the more rational, calculated or pre-meditated the nature of the crime, the less scope there should be for considerations for mental disability or any other such forms of diminished responsibility. Why? Because there is an increased likelihood that the trafficker has internally weighed the cost-benefit analysis of the crime. Correlatively, it is my hope that the*

Version No 2: 29 Dec 2022 (18:05 hrs)

> *Courts should be very strict in interpreting such provisions, or risk opening the backdoor for the offender to escape harsh punishment notwithstanding his or her understanding of the consequences of the crime.*
>
> [emphasis added]

Indeed, it is significant, in our view, that Mr Shanmugam observed, in a subsequent sitting of Parliament (a couple of days later), thus (see 14 November 2012 Debates at p 1235):

> 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]

DPM Teo's observations also bear quoting (see 14 November 2012 Debates at p 1142):

> But before I do so, let me speak about the sentencing discretion for the death penalty for drug couriers with an abnormality of mind which satisfies the diminished responsibility test. While there is strong support for the mandatory death penalty, there is also a legitimate concern that it may be applied without sufficient regard for those accused persons who might be suffering from an abnormality of mind.
>
> The policy intent is for this exception to operate in *a measured and narrowly defined way*. We want to take this into account, where an accused can show that he has such an abnormality of mind that it substantially impairs his mental responsibility for his acts in relation to his offences. Such cases are worthy of special consideration. *However, in Mr de Souza's words, we do not want to inadvertently 'open the backdoor for the offender to escape harsh punishment notwithstanding his or her understanding of the consequence of the crime'.*
>
> We do not want the application of the mandatory death penalty in such cases to call into question the appropriateness of applying the mandatory death penalty regime on traffickers in general. But we do not want to open the doors wide. Otherwise, we would have undermined our strict penalty regime and its deterrence value. And as Mr Shanmugam has pointed out, we

Version No 2: 29 Dec 2022 (18:05 hrs)

> might even encourage drug syndicates to recruit more couriers who think they can easily escape the gallows by claiming any condition without medical evidence.
>
> [emphasis added]

291 Just to be clear, it is not our view that Parliament was suggesting that the standard to assess diminished responsibility should be narrower or stricter under s 33B(3)(*b*) in comparison to murder (see the Majority Judgment at [100] and [108]). What Parliament was stating, which we agree with, is the recognition that given the obvious differences in the *nature* of these two crimes, by definition, it will be quite difficult to make out diminished responsibility for drug trafficking.

292 Further, while DPM Teo and Mr Shanmugam have emphasised the importance of the accused's cognitive capacity (*ie*, understanding the gravity and consequences of the crime) in the inquiry of diminished responsibility under s 33B(3)(*b*), this is not to say that volitional impairment is unimportant under the Third Limb. However, the weight Parliament places on cognitive capacity supports, at least indirectly, the importance that we place on *rationality* at [253]–[255] above. Because for the accused to think rationally in the manner described at [253], he or she must first understand the nature of the intended crime and its wrongfulness. In our analysis, cognitive capacity, rationality and volitional impairment should not be attributes viewed *in silos* when an accused person seeks to rely on s 33B(3)(*b*).

293 What situations, then, might s 33B(3)(*b*) of the MDA possibly cover? It might, as in the case of *Jeffrey Phua*, cover an accused who is "probably incapable of resisting any internal rationality that might have dissuaded him from committing the offence" (at [17]). While *incapability* need not be proved for the purposes of diminished responsibility, it is clear, though, that an accused

Version No 2: 29 Dec 2022 (18:05 hrs)

would have to manifest highly unusual symptoms and/or conduct as well as also prove, on a balance of probabilities, that he or she was truly hindered (owing to the mental impairment generated by an abnormality of mind) in making rational judgments and decisions that would not result merely from reflex actions. It is clear that the factual matrix that might support such a situation would have to be rather extreme and that this is consistent with not only the legislative intent as set out above but also the fact that in many cases where the doctrine of diminished responsibility was *successfully* raised in the context of *murder*, the accused persons concerned were suffering from such an abnormality of mind that they truly did not appreciate what they were doing.

294 It seems to us that *another* possible situation that would come within the purview of s 33B(3)(*b*) is one where the accused's intelligence quotient ("IQ") was so low as to substantially impair his or her mental responsibility in so far as the offence was concerned. This was clearly within the contemplation of Parliament. For example, in response to questions as to how low IQ would be dealt with, Mr Shanmugam responded as follows (see 14 November 2012 Debates at p 1235):

> The position is that sufficiently low IQ will constitute an abnormality of mind. As to what level of IQ is sufficiently low, cases have focused on the mental retardation threshold. Whether medical science will move further and whether Courts will accept that, I think that is really not something where I want to pre-empt any development.

Indeed, Mr Shanmugam proceeded, during another sitting of Parliament, to elaborate on the decision of this court in *Public Prosecutor v Rozman bin Jusoh and another* [1995] 2 SLR(R) 879 in the context of the issue of the effect of low IQ and in response to a query by a Member of Parliament, Ms Sylvia Lim (see 14 November 2012 Debates at pp 1245–1246 and 1248–1249). And more

Version No 2: 29 Dec 2022 (18:05 hrs)

recently, this issue was raised (albeit unsuccessfully based on the precise facts and circumstances of the case) in *Nagaenthran*.

295 From the totality of the circumstances at the material time (especially the facts that Roszaidi himself felt that the drugs he collected was too heavy and subsequently trafficked the Drugs to his wife) it appears that he had, at the bare minimum, those moments of *rationality* ***and*** *self-control* during which he could have resiled from the intention or plan to deliver the drugs for Is Cangeh. His exercise of self-control and his capacity to reason are indicated by his *deliberate action and reasoned decision* to pass the Drugs to his wife as he realised he was being pursued by the police, *instead of* insisting on executing the initial plan that night *in the manner instructed by* Is Cangeh. Unfortunately for Roszaidi, this led him to commit the very same offence of *trafficking* (albeit for a different act compared to that originally envisioned by Is Cangeh). Seen in that light, it is clear to us that Roszaidi has not proved why this is *not* a case of an error of judgment but one in which his *ability* to resist the impulse to consume drugs was weakened to such an extent that his mental responsibility for the offence was substantially impaired. On the contrary, Roszaidi undertook a weighing of the costs and benefits of engaging in trafficking and had made the conscious and informed decision to do so (see *Rosman bin Abdullah* at [56]). In these circumstances, Roszaidi cannot avail himself of s 33B(3)(*b*).

Impairment of rational judgment

296 Roszaidi additionally submits that his impaired rational judgment satisfies the Third Limb because he: (a) panicked, was scared and confused when he realised that the drugs he had collected were too heavy; (b) made the irrational decision to implicate his innocent wife by passing the Drugs to her;

Version No 2: 29 Dec 2022 (18:05 hrs)

and (c) was under the influence of drugs at the material time, which would have exacerbated his impaired judgment.

297 However, we see no reason to disturb the Judge's finding that Roszaidi was thinking in a "logical and organised manner" at the material time and that his mental responsibility was hence not substantially impaired. The fact that Azidah subsequently became implicated was, in our view, the *unintended* consequence of Roszaidi's deliberate decision to avoid detection by the CNB. Roszaidi's acts should not be viewed with the benefit of hindsight as it would otherwise obscure the real reason for his decision to pass the Drugs to Azidah. In short, this was Roszaidi's Plan B but it did not work out as he had hoped for or planned, *ie*, it was plainly an erroneous assessment of the risks. This is not dissimilar to his decision not to throw away the Drugs when he became concerned about their weight. He weighed the consequences either way and decided that the best option was for him not to throw away the Drugs but to pass them to his wife for safekeeping.

298 Further, as the respondent submits, Roszaidi liaised with Is Cangeh on the collection of the drugs, directed Azli to drive from location to location, located the lorry from which to collect the drugs, and arranged with his wife to meet up so as to pass her some drugs for safekeeping. In addition, as noted at [282]–[283] above, not only was Roszaidi coordinating operations among multiple individuals, he had the presence of mind to realise that the drugs which he collected were too heavy as well as to formulate and execute a plan to offload the Drugs to his wife to minimise his exposure to criminal liability. These objective circumstances do not, in our view, reveal an impairment of rational judgment which is sufficient to avail Roszaidi of recourse to s 33B(3)(*b*).

Version No 2: 29 Dec 2022 (18:05 hrs)

Conclusion

299 For all the foregoing reasons, we would have dismissed the appeal.

Andrew Phang Boon Leong
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Eugene Singarajah Thuraisingam, Johannes Hadi (Eugene Thuraisingam LLP), Shobna Chandran and Thaddaeus Aaron Tan Yong Zhong (Tan Rajah & Cheah) for the appellant;
Hay Hung Chun and Zhou Yang (Attorney-General's Chambers) for the respondent.

Version No 2: 29 Dec 2022 (18:05 hrs)