IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2025] SGCA 8

Court of Appeal / Criminal Motion No 48 of 2024

Between

Azuin bin Mohd Tap

… *Applicant*

And

Public Prosecutor

… *Respondent*

EX TEMPORE JUDGMENT

[Criminal Procedure and Sentencing — Appeal — Adducing fresh evidence — Fresh expert evidence — Whether fresh expert evidence relevant to appeal]
[Criminal Procedure and Sentencing — Appeal — Criminal motions seeking to adduce fresh evidence to aid appeal — Abuse of process — Expert shopping after decision below]

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Azuin bin Mohd Tap
v
Public Prosecutor

[2025] SGCA 8

Court of Appeal — Criminal Motion No 48 of 2024
Sundaresh Menon CJ, Tay Yong Kwang JCA and Steven Chong JCA
27 February 2025

27 February 2025

Steven Chong JCA (delivering the judgment of the court *ex tempore*):

Introduction

1 The applicant was convicted by a Judge of the General Division of the High Court (the "Judge") on a capital charge of drug trafficking and sentenced to the mandatory death penalty: see *Public Prosecutor v Hashim bin Ismail and others* [2023] SGHC 165 (the "GD"). Before the Judge, the applicant did not dispute the charge, and instead focused his efforts on bringing himself within one of the alternative sentencing regimes under s 33B(1) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) (the "MDA").

2 Although it was not disputed that the applicant's involvement was limited to that of a courier, the applicant was not issued a certificate of substantive assistance by the Public Prosecutor. As such, the sole issue before the Judge was whether the applicant suffered from diminished responsibility to

come within s 33B(1)(*b*) read with s 33B(3) of the MDA. The Judge found that the applicant did not suffer from diminished responsibility.

3 The applicant has filed an appeal against the Judge's rejection of his case on diminished responsibility in CA/CCA 6/2022. In the application before us, the applicant seeks leave from this court to adduce further evidence to support his appeal. This takes the form of two new psychiatric reports from different experts than the one whom he had relied on before the Judge.

4 Having carefully considered the arguments raised by the applicant, we dismiss the application. The primary reason for our decision is that the expert evidence which the applicant seeks to adduce is not material to the appeal. But a more general concern we have is that the applicant seems to us to be essentially engaging in "expert shopping" to lay the groundwork for running new and even inconsistent lines of argument on appeal from the case he had advanced before the Judge. We have on previous occasions cautioned against the abuse of the process of the court, even in the context of criminal proceedings where the stakes are understandably higher: see, for example, *Miya Manik v Public Prosecutor and another matter* [2021] 2 SLR 1169 ("*Miya Manik*") at [1]. We take this opportunity to make clear that expert shopping of the kind which seems to us to have been mounted in this case is squarely on the list of conduct that amounts to an abuse of process.

Background facts

5 It is necessary for us to briefly outline the proceedings below in order to situate the application in its proper context as they form the relevant background for our decision.

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6 To establish the defence of diminished responsibility, the applicant had to satisfy the Judge that (a) he suffered from an abnormality of mind; (b) his abnormality of mind was caused by one of the three specified aetiologies of (i) a condition of arrested or retarded development of mind, (ii) inherent cause, or (iii) disease or injury; and (c) the abnormality of mind substantially impaired his mental responsibility for his acts and omissions in relation to the offence: GD at [60], citing *Nagaenthran a/l K Dharmalingam v Public Prosecutor and another appeal* [2019] 2 SLR 216 at [21].

7 Before the Judge, the dispute over the applicant's defence of diminished responsibility centred around the conflicting expert evidence of Dr Kenneth Koh ("Dr Koh"), who gave evidence for the Prosecution, and Dr Julia Lam ("Dr Lam"), who was the applicant's expert.

8 It was common ground between Dr Koh and Dr Lam that the applicant suffered from opioid use disorder and stimulant use disorder. Where the experts diverged was on the issue of whether the applicant also suffered from persistent depressive disorder. While Dr Lam answered this in the affirmative, Dr Koh disagreed.

9 The applicant's case before the Judge was, therefore, that it was a *combination* of the three conditions of persistent depressive disorder, opioid use disorder and stimulant use disorder that caused a substantial impairment of his mental responsibility. Given this, the Judge observed that while Dr Koh and Dr Lam agreed that the applicant suffered from opioid use disorder and stimulant use disorder, it was not suggested by Dr Lam or the applicant that these two disorders by themselves caused the applicant's mental responsibility to be substantially impaired. The Judge thus noted that the applicant's case stood or fell on his ability to establish that he suffered from persistent depressive

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disorder: GD at [67]. Having reviewed Dr Lam's expert report, the oral testimony of both Dr Lam and Dr Koh (especially the questions posed by the applicant's counsel to both experts), as well as the parties' submissions before the Judge, we are satisfied that the Judge was correct in his assessment that to succeed in the case he mounted at trial, the applicant needed to persuade the court to find that he also suffered from persistent depressive disorder.

10 The Judge preferred Dr Koh's evidence over that of Dr Lam and found that the applicant did not suffer from persistent depressive disorder at the material time: GD at [79]. His main reason for doing so was that he disbelieved the factual account that the applicant and his sister had provided to Dr Lam which formed the underlying basis of Dr Lam's opinion: GD at [75].

11 More specifically, as Dr Koh noted in his second report in response to Dr Lam's report, the cause for the experts' difference in opinion was that the accounts given by the applicant and his sister to Dr Lam were "in sharp contrast" to that which they had previously told Dr Koh: GD at [66]. Although the applicant and his sister "reported chronic depression as a result of [the applicant's] adverse life circumstances" to Dr Lam, Dr Koh had been told shortly after the applicant's arrest by the applicant that "everything [was] ok", which was supported by his sister's report that the applicant's behaviour was "essentially normal": GD at [65], [68] and [71]. In these circumstances, the Judge observed, rightly, that only one of the factual accounts that had been provided to the experts could have been true: GD at [72]. The Judge ultimately found that the applicant and his sister had lied to Dr Lam about the applicant's mental condition and symptoms, and placed no weight on Dr Lam's evidence as a result: GD at [75].

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12 Although the Judge's finding that the applicant did not suffer from persistent depressive disorder was dispositive, the Judge went on to hold, for completeness, that there had been no substantial impairment of the applicant's mental responsibility in any event. Even if the applicant had suffered from persistent depressive disorder as he claimed, there was no evidence linking this condition to his decision to commit the offence. Among other things, the applicant had given evidence that he had been involved in drug trafficking as it was lucrative, and that he would not take part in drug trafficking if the amount of money involved was small. Since the applicant had the capacity to evaluate the risk and reward of drug trafficking in order to decide whether to accept or reject a drug delivery assignment, his mental responsibility was not substantially impaired: GD at [82].

The further evidence sought to be adduced

13 In this application, the applicant seeks leave to adduce two new expert reports to aid his appeal. The first report is a psychiatric report by Dr Jacob Rajesh ("Dr Rajesh"). The second report is a neuropsychological assessment report by Ms Low Yung Ling ("Ms Low"). The two reports are somewhat related or interlinked as Dr Rajesh had referred the applicant to Ms Low for the purpose of assessing the applicant's intellectual functioning.

14 The major contents of each report can be summarised as follows:

(a) In Dr Rajesh's report, he expresses the opinion that the applicant suffered from an abnormality of mind at the time of the offence in the form of moderate opioid use disorder, and that this condition substantially impaired the applicant's mental responsibility as it caused the applicant to have a preoccupation with procuring drugs that led to him resorting to drug trafficking to feed his own addiction. However,

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Dr Rajesh acknowledges that the applicant's opioid use disorder did not arise from one of the three recognised aetiologies under s 33B(3)(*b*) of the MDA. This is a critical point.

(b) In Ms Low's report, she expresses the view that while the applicant is of generally low intelligence, he does not meet the criteria for a diagnosis of any intellectual disability or disorder.

Our decision

15 It is well-established that the admission of further evidence on appeal is governed by the three conditions laid down in *Ladd v Marshall* [1954] 1 WLR 1489 ("*Ladd v Marshall*"). First, the evidence must not have been available in that it could not have been obtained with reasonable diligence for use in the lower court (the "non-availability" condition). Second, the evidence must be material in the sense that it would probably have an important influence on the result of the case, although it need not be decisive (the "materiality" condition). Third, the evidence must be reliable, as in apparently credible, although it need not be incontrovertible (the "reliability" condition): *Soh Meiyun v Public Prosecutor* [2014] 3 SLR 299 at [14]; *Dzulkarnain bin Khamis v Public Prosecutor and another appeal and another matter* [2023] 1 SLR 1398 ("*Dzulkarnain*") at [53].

16 The *Ladd v Marshall* conditions are, however, not applied in their full rigour in the present context of applications in criminal matters made by an accused person: *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2019] 2 SLR 341 ("*AnAn*") at [50]. Thus, in *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544, we held that in this context, the first condition of non-availability was "less paramount" than the other two conditions and should be applied in an attenuated way (at [43]–[49]). But as we

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subsequently clarified in *Miya Manik*, this does not mean that the non-availability condition is to be completely dispensed with; rather, the correct approach is to assess the non-availability condition holistically in the light of the other two conditions of materiality and reliability (at [32]).

17 In our judgment, the insurmountable difficulty that the applicant faces in this application lies in the immateriality of the two expert reports he seeks to adduce. Both experts accept in their reports that at least one of the three limbs of diminished responsibility is not made out. Their evidence therefore can have *no* influence on the applicant's appeal against the Judge's decision.

18 We say this because as far as Dr Rajesh's report is concerned, unlike Dr Lam, Dr Rajesh has only diagnosed the applicant with opioid use disorder and not persistent depressive disorder. The critical point, as we have noted, is that Dr Rajesh expressly accepts in his report that the applicant's opioid use disorder did not arise from any of the three recognised causes of an abnormality of mind specified in s 33B(3)(*b*) of the MDA (see [14(a)] above). This means that to the extent that the applicant intends to rely *solely* on opioid use disorder to establish the defence of diminished responsibility on appeal, we do not think that there is any reasonable prospect of success given that his own expert accepts that one of the three limbs of the defence is not fulfilled.

19 Turning to Ms Low's report, the same problem presents itself, albeit in relation to a different limb of diminished responsibility. As Ms Low concludes in her report that the applicant does not meet the criteria to be diagnosed with an intellectual disability or disorder, the supposed low level of intellectual functioning of the applicant which Ms Low opines on does not amount to an abnormality of mind for the purposes of diminished responsibility.

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20 The court does not have the power to apply the alternative sentencing regime based on diminished responsibility under s 33B(1)(*b*) of the MDA unless all the limbs of the defence of diminished responsibility set out in s 33B(3)(*b*) of the MDA are fulfilled. Since Dr Rajesh and Ms Low both concede, whether expressly or by implication, that at least one limb of diminished responsibility is not made out, their evidence cannot assist the applicant on appeal and thus do not meet the materiality condition. We dismiss the application on this basis alone.

Observations on the applicant's attempt at "expert shopping"

21 While this suffices to dispose of the application, we take the opportunity to make some observations on the applicant's case on appeal and, more generally, expert shopping after trial for the purpose of developing not only new but inconsistent arguments on appeal than those advanced at first instance.

22 As we have mentioned, the applicant's case before the Judge was based on the confluence of three medical conditions of which persistent depressive disorder was a necessary part, as it was not suggested that the other two conditions could have caused substantial impairment of the applicant's mental responsibility by themselves (see [9] above). It was thus an underlying assumption of the applicant's case at the trial that persistent depressive disorder was the effective cause of his alleged substantial impairment of mental responsibility. Indeed, this assumption was clear in the examination-in-chief of Dr Lam when the applicant's counsel only referred to the alleged persistent depressive disorder when seeking Dr Lam's opinion on the issue of substantial impairment:

> Q Okay. Let me just---last question. I bring you to the legislation on this point. Okay? The requirements on

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> when someone is charged as cour---on---under Section 33B. It says that if:
>
> [Reads] "he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in relation to the offence under section 5(1) or 7."
>
> Okay? I know that's a mouthful, but in your professional opinion, *did this depressive disorder substantially impair [the applicant's] mental responsibility for the actions of this offence?*
>
> A Okay. I am aware of this legislation and I handle similar cases before as well. So in this particular case, *I think his depressive disorder would have substantially impair his thinking*, that he didn't think about the consequences of his behaviour.
>
> Q Alright. Thank you, your---Doctor.
>
> Aw: I have nothing further, Your Honour.
>
> [emphasis added]

23 An even clearer example of this premise emerged subsequently in the Prosecution's cross-examination of Dr Lam, where Dr Lam conceded that the applicant's case on diminished responsibility turned on a finding of persistent depressive disorder:

> Q Now, I would like to come to your conclusion. *Essentially, we need to show---you need to show the link from the condition he suffered from, right? You say he's got [persistent depressive disorder] and that this [persistent depressive disorder] somehow impaired his judgement [sic] in committing the current offence, right?*
>
> A *Correct.*
>
> Q *Before he qualifies for diminished responsibility. Would you not agree?*
>
> A *That's correct.*
>
> [emphasis added]

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24 Similarly, when it came to Dr Koh's oral evidence, the applicant's counsel did not put to Dr Koh in cross-examination that the applicant's opioid use disorder and/or stimulant use disorder could have caused substantial impairment of the applicant's mental responsibility by themselves. In fact, quite the contrary occurred, as a heavy emphasis was placed on the applicant's alleged persistent depressive disorder:

> Q I put it to you that [the applicant] suffered from abnormality of mind that impaired his mental responsibility.
>
> A I disagree.
>
> Q I put it to you that [the applicant] had PDD, persistent depressive disorder.
>
> A I disagree.
>
> Q I put it to you that the [opioid] use disorder, the stimulant use disorder and [persistent depressive disorder] influenced the way he behaved.
>
> A I disagree.
>
> Q And I put it to you that *as a result of the two disorders above*, his mind was impaired.
>
> A Your Honour, again, it's a---it's a complex question. So I will take my time to answer. I---I agree that his state of intoxication may have impaired his state of mind at that point in time to some small degree. But I disagree that he has [persistent depressive disorder]. Therefore, I cannot say that both conditions combined together impaired his judgment.
>
> Q But wasn't that Dr Lam's report that *the combination of these three* led to---never mind. It's---
>
> Aw: I'll leave it for submissions, Your Honour.
>
> [emphasis added]

25 However, on appeal and especially in his written submissions for this application, the applicant seems to us to have sought to decouple his case on diminished responsibility from persistent depressive disorder to run a new

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argument that his opioid use disorder *alone* was an abnormality of mind which caused a substantial impairment of his mental responsibility. It seems to us that Dr Rajesh's report is intended to support this significant shift in the applicant's case. Leaving aside that Dr Rajesh's report does not even assist the applicant given Dr Rajesh's concession that the applicant's opioid use disorder did not arise from a recognised cause, the only link of relevance that the applicant can draw between Dr Rajesh's report and his appeal relates not to anything that the Judge decided, but an entirely new hypothesis that contradicts an assumption that his case below was built upon.

26 The same can broadly be said for Ms Low's report. Before the Judge, the applicant sought to attack Dr Koh's evidence on the basis that Dr Koh had not spent as much time as Dr Lam in assessing the applicant. The Judge rejected this as he considered the real question to be "whether Dr Koh had spent an adequate amount of time and made an adequate level of inquiry to arrive at his assessment", which he answered in the affirmative: GD at [76]. It appears that, having sighted the GD and failing to discredit Dr Koh's evidence based on a relative comparison to Dr Lam, the applicant and his counsel now seek to introduce a new line of attack by arguing that the applicant did not comprehend what was happening during Dr Koh's assessment of him due to his supposed low intelligence. It is relatively clear to us that Ms Low's report is intended to support this new approach, as there would otherwise be no point in the applicant adducing a report that makes no diagnosis of an abnormality of mind. However, no criticism along this line was ever suggested to Dr Koh in cross-examination. This is important because Ms Low could not possibly provide any evidence on the process by which Dr Koh came to his conclusions. Only Dr Koh could have commented on this and he should have been confronted on this issue at the trial.

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27 In our view, this case is a quintessential example of expert shopping. Indeed, we think that this is expert shopping of the most egregious form. It is simply impermissible for a litigant to run a case and lead expert evidence that is built specifically on one premise at first instance and, when that case fails, run a different case founded on an inconsistent premise and seek to adduce fresh evidence to support that change in position. The reason is obvious. There would be no end to litigation if the appellate process is allowed to be used as a rewind button for a litigant to engage in trial and error of different permutations of his or her case. We have on many occasions emphasised the importance of finality in litigation, including in the context of criminal proceedings: *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135 at [1], [47] and [50]; *Syed Suhail bin Syed Zin v Public Prosecutor* [2021] 1 SLR 159 at [1]–[2]; *Public Prosecutor v Pang Chie Wei and other matters* [2022] 1 SLR 452 at [7]–[12]. Expert shopping of the kind in this case strikes at the heart of the principle of finality.

28 We observe that we are not alone in taking this view. In the decision of the English Court of Appeal in *R v Foy* [2020] EWCA Crim 270, the appellant had obtained an expert opinion before trial on the defence of diminished responsibility but opted not to pursue the defence at the trial as the expert evidence did not support such a defence. After he was convicted of murder at the trial, the appellant sought to adduce on appeal the evidence of a different expert whose report did support a case of diminished responsibility. The court rejected this in short order (at [53] and [60]):

> 53 … If there was dissatisfaction or dismay at the time with the conclusion of Dr Isaac before trial then it was open to them at that time to raise funds to seek to commission a further report at that stage: and doubtless an adjournment, if needed, would have been granted for that purpose. *But it is not, in our opinion, acceptable to wait upon the outcome of the trial: and then, and only then, when the defence of lack of intent was disproved and the appellant convicted, seek to resurrect a*

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> *defence of diminished responsibility by commissioning a fresh psychiatric report from a different psychiatrist. …*
>
> …
>
> 60 This is not a case where a potential defence of diminished responsibility was overlooked. This is not a case where there was any legal error or oversight. This is not a case where the instructed expert, of acknowledged expertise, has overlooked or misunderstood relevant information or did not have access to relevant information. This is not a case where the expert failed diligently to examine the relevant materials or failed to reach a proper conclusion reasonably open to him. This is not a case where important new facts or materials or other developments have emerged since trial. *In truth, this case is, in its fundamentals, a case where, following conviction, an attempt has been made to instruct a new expert with a view to securing – as has happened – an opinion on diminished responsibility different from that of the previous expert instructed before trial. It is, bluntly, expert shopping.*
>
> [emphasis added]

29 To be clear, we do not mean to say that it is impermissible for an accused person to run a *new* defence on appeal altogether: *Mohd Suief bin Ismail v Public Prosecutor* [2016] 2 SLR 893 ("*Mohd Suief*") at [25]. In *Iskandar bin Rahmat v Public Prosecutor and other matters* [2017] 1 SLR 505, we allowed the appellant to rely on diminished responsibility for the first time on appeal, and while we also allowed the admission of new psychiatric evidence, we made clear then that this was "highly unsatisfactory" and that we may "reject such drip-feed applications in the future" (at [67]). Nor are we even saying that it is impermissible *per se* for an accused person to run an *inconsistent* defence on appeal. That was the situation we were presented with in *Mohd Suief*, where we did consider a "wholly inconsistent" defence raised by the accused on appeal (at [34]–[35]), although the swift rejection that followed would attest to the inherent perils of running a case on appeal that is contrary to the evidence led at the trial.

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30 What we *do* say is that it would require quite exceptional circumstances to convince the court that a party should not only be allowed to do a *volte-face* but adduce new expert evidence from a different expert than before in support of this. Indeed, we alluded to this in *Mohd Suief*, although not in relation to expert evidence specifically (at [25]–[26]):

> 25 … [There is] an extremely important (and closely related) point which ought to be emphasised – in ascertaining whether or not an alternative defence raised by an accused person for the first time on appeal ought to be considered, the appellate court ***will have regard only to the evidence which had been led at the trial itself*** in order to ascertain whether ***that defence*** was ***reasonably available on the evidence*** before the court ***at the trial***. The importance of this point cannot be overstated. Let us elaborate.
>
> 26 Indeed, whilst the courts afford maximum flexibility to accused persons in establishing their respective defences (particularly in capital cases), this does not mean that they can "reserve" arguments that they can resort to on appeal. It is incumbent that *all* parties proffer *all* the arguments which they wish to rely upon at the trial itself. … However, no system is perfect and hence it is possible that there could be *alternative defences* that could *also* have been reasonably available and therefore relied upon by the accused person based upon *the evidence adduced* ***at the trial itself***. In fairness to the accused person, he or she should *not* be precluded from raising such an alternative defence *on appeal* if it was ***reasonably available on the evidence*** before the court ***at the trial itself***. …
>
> [emphasis in original]

31 In *AnAn*, we identified two rationales for the *Ladd v Marshall* conditions that govern admission of fresh evidence on appeal: (a) first, the interest of finality in litigation; and (b) second, the integrity of the litigation process and the soundness of the resulting judgment that requires the parties to advance their entire case at trial rather than warehousing points for appeal (at [23]–[24]). It is manifest that expert shopping contradicts both of these rationales. The decision of a first instance court is not an invitation for an unsuccessful party to see what gaps or problems have been identified in the evidence of his or her expert and

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to go out in search of new expert evidence to patch the holes in his or her case. The non-availability condition makes clear that such conduct is precisely what the *Ladd v Marshall* principles are intended to discourage.

32 An application to adduce further evidence can be dismissed on the ground that it amounts to an abuse of process: *Dzulkarnain* at [69]; *Nagaenthran a/l K Dharmalingam v Attorney-General and another matter* [2022] 2 SLR 211 at [45]. It has not been necessary to rely on this in the present case given our conclusion above that the expert reports of Dr Rajesh and Ms Low are immaterial to the appeal. But in a future case, expert shopping could doom such applications on the basis that it is an abuse of the appellate process to turn an appeal into a second trial: see, for example, *JWR Pte Ltd v Edmond Pereira Law Corp and another* [2020] 2 SLR 744 at [32]; *UJN v UJO* [2021] SGCA 18 at [7]; *General Hotel Management (Singapore) Pte Ltd and another v The Wave Studio Pte Ltd and others* [2023] 1 SLR 1317 at [31]–[33].

33 Finally, in the course of the oral arguments, counsel for the applicant, Ms Debby Lim, suggested that the applicant had not abandoned his case on persistent depressive disorder for his appeal. If that is true, it makes no difference at all to our decision for two reasons. First, the existence of the applicant's opioid use disorder and stimulant use disorder were not contested below and the learned DPP, Mr Anandan Bala, confirmed before us that the Prosecution has no intention to contest this at the appeal. The additional evidence is therefore wholly unnecessary and immaterial. This leads to the second reason, which is that the material issue on appeal remains whether the applicant suffered from persistent depressive disorder at the time of the offence. This was not made out below and the additional evidence says nothing at all about this critical issue.

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Conclusion

34 For the reasons we have given, we dismiss the application.

Sundaresh Menon
Chief Justice

Tay Yong Kwang
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Aw Wee Chong Nicholas (Imperial Law LLC), Wong Li-Yen Dew (Dew Chambers) and Lim Hui Li Debby (Dentons Rodyk & Davidson LLP) for the applicant;
Anandan Bala, Tan Wee Hao and Jotham Tay (Attorney-General's Chambers) for the respondent.

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