Dinesh Pillai a/l K Raja Retnam *v* Public Prosecutor
[2012] SGCA 49

Case Number	: Criminal Motion No 51 of 2012
Decision Date	: 29 August 2012
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Eugene Thuraisingam and Mervyn Cheong (Eugene Thuraisingam) for the applicant; Aedit Abdullah SC and Wong Woon Kwong (Attorney-General's Chambers) for the respondent.
Parties	: Dinesh Pillai a/l K Raja Retnam — Public Prosecutor

Criminal Law – Statutory Offences – Misuse of Drugs Act Constitutional Law – Attorney-General – Prosecutorial Discretion

[LawNet Editorial Note: The decision from which this application arose is reported at [2012] 2 SLR 903.]

29 August 2012

Chan Sek Keong CJ (delivering the grounds of decision of the court):

Introduction

1 This is an application by one Dinesh Pillai a/l K Raja Retnam ("the applicant") to set aside his conviction and sentence in *Dinesh Pillai a/l K Raja Retnam v Public Prosecutor* [2012] 2 SLR 903 ("*Dinesh Pillai CA*"). In *Dinesh Pillai CA*, this Court upheld his conviction by the High Court for the offence of importing into Singapore not less than 19.35 grammes of diamorphine without any authorisation under s 7 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the MDA"), an offence punishable with death under s 33 read with the Second Schedule to the MDA.

2 We dismissed this application at the conclusion of the hearing before us. We now give our reasons for dismissing it.

Facts

3 The detailed facts of the offence are set out in this Court's written judgment in *Dinesh Pillai CA*. For the purposes of the present application, the pertinent facts are as follows. The applicant is a 29-year-old Malaysian male who lived in Skudai, Malaysia. Sometime in November/December 2009, the applicant was introduced to a person called "Raja" who offered to pay the applicant to deliver food to a person called "Ah Boy" in Singapore. The applicant was not told what kind of food he would have to deliver and was told never to open the package of food to be delivered. Unemployed and in financial difficulty, the applicant agreed, despite suspecting that he would be delivering something other than food.

4 On 10 December 2009 and 14 December 2009, the applicant made two such deliveries of "food", without any mishap. The applicant was asked by Raja to make a third delivery to Ah Boy on 19 December 2009. This time, the applicant was arrested at Woodlands Immigration Checkpoint. He

was found to have kept in his motorcycle a red plastic bag ("the Red Plastic Bag") inside which were a brown paper-wrapped packet ("the Brown Packet"), a packet of curry and a packet of freshly cut chilli. The Brown Packet in the Red Plastic Bag was later found, on analysis by the Health Sciences Authority of Singapore, to contain not less than 19.35 grammes of diamorphine.

5 After his arrest, the applicant gave various statements to the Central Narcotics Bureau ("CNB") officers in which he was recorded as having (a) replied to a question by the investigator that the Brown Packet contained controlled drugs, and (b) admitted that he did not ask Raja what the Red Plastic Bag contained.

Procedural History

6 At the trial before the High Court, the trial judge ("the Judge") found on the evidence that the applicant had actual knowledge that he was carrying a controlled drug, but that he did not know what kind of controlled drug it was (see *Public Prosecutor v Dinesh Pillai a/l K Raja Retnam* [2011] SGHC 95 ("*Dinesh Pillai HC*") at [44]). The Judge further found that the presumption in s 18(2) of the MDA applied to the applicant's knowledge of the nature of the controlled drug. Section 18 of the MDA provides as follows:

> **Presumption of possession and knowledge of controlled drugs**
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> **18.**—(1) Any person who is proved to have had in his possession or custody or under his control —
>
> (a) anything containing a controlled drug;
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> …
>
> shall*, until the contrary* is proved, be presumed to have had that drug in his possession.
>
> (2) Any person who is proved or presumed to have had a controlled drug in his possession shall, *until the contrary* is proved, be presumed to have known the nature of that drug.
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> …
>
> [emphasis added]

7 In finding that the applicant had failed to rebut the presumption in s 18(2) of the MDA, the Judge stated (see *Dinesh Pillai HC* at [46]–[47]):

> 46 It is apparent from section 18 that the presumption of knowledge of the actual nature of the drug in section 18(2) applies only if that drug is proved, or presumed under section 18(1), to have been in the accused's possession. It is undisputed that [the Red Plastic Bag] was in [the applicant's] physical possession, and that it was subsequently found to contain a controlled drug, diamorphine. Accordingly, the section 18(2) presumption is triggered and until the contrary is proved by [the applicant] on a balance of probability, [the applicant] is presumed to have known the actual nature of the drug found in his possession, which was diamorphine or heroin.
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> 47 Given the totality of the evidence before me, I find that [the applicant] failed to rebut the presumption that he had knowledge of the actual nature of the drug found in his possession. He is therefore presumed under s 18(2) of the MDA to know that the controlled drug found in [the Brown Packet] was diamorphine or heroin.

8 On appeal to this Court, we affirmed the Judge's finding that the applicant had not rebutted the presumption that he knew the nature of the controlled drug which he was carrying. In *Dinesh Pillai CA*, we held at [20]–[21] as follows:

> 20 In our view, the crucial question in relation to the s 18(2) MDA presumption in this case is whether it can be rebutted or proved to the contrary by [the applicant] merely asserting that he did not know what was in the Brown Packet when: (a) he did not believe that the Brown Packet contained what Raja said it contained (*ie*, food); and (b) he had ample time and opportunity to open the Brown Packet to see what was inside it. This is not a case where [the applicant] reasonably believed that the Brown Packet contained some controlled drug other than diamorphine (*eg*, "ice", ecstasy, *etc*) and had good reason for such belief (compare, *eg*, *Khor Soon Lee v PP* [2011] 3 SLR 201 ("*Khor Soon Lee*"), where the Prosecution did not dispute the accused's evidence that he had no suspicion that the bundles found on him at the material time contained diamorphine as, when transporting similar bundles in the past, he had sometimes been told that the bundles contained erimin and ketamine and, at other times, had not been told of the contents of the bundles at all). In the present case, [the applicant] did not bother to take the simple step of peeping into the Brown Packet to see what it contained despite suspecting that it contained something illegal … If, for example, [the applicant] had testified that he had opened the Brown Packet and had seen some yellow substance which he had genuinely, but mistakenly, believed to be some food item, then that testimony might be evidence which the court could have considered to determine whether he had rebutted or disproved the s 18(2) MDA presumption.
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> 21 In our view, [the applicant] has failed to rebut the s 18(2) MDA presumption on a balance of probabilities because he turned a blind eye to what the Brown Packet contained despite suspecting that it contained something illegal. The factual distinction between this case and *Khor Soon Lee* is that in the latter case, the accused did not have any suspicion that he was carrying anything other than erimin and ketamine (which the court accepted). In contrast, in the present case, [the applicant] was aware that he was carrying something illegal, and he could easily have verified what that thing was by simply opening the Brown Packet. It was not enough for [the applicant] to take the position that he did not open the Brown Packet because he had been told not to do so. In using the expression "turning a blind eye" in this context, we do not mean to say that [the applicant] had actual knowledge that the Brown Packet contained diamorphine. In the context of s 18(2) of the MDA, it is not necessary for the Prosecution to prove wilful blindness as a means of proving actual knowledge on [the applicant's] part of the nature of the controlled drug in the Brown Packet as the Prosecution has no such burden. Instead, it is for [the applicant] to prove on a balance of probabilities that he did not know or could not reasonably be expected to have known that the Brown Packet contained diamorphine. In our view, [the applicant] has failed to rebut the s 18(2) MDA presumption by his mere general assertions that he did not know what was in the Brown Packet as: (a) the nature of the controlled drug in that packet could easily have been determined by simply opening the packet; and (b) there was no evidence to show that it was not reasonably expected of him, in the circumstances, to open the packet to see what was in it. In short, [the applicant] has failed to prove the contrary of what s 18(2) of the MDA presumes in the present case as he neglected or refused to take reasonable steps to find out what he was asked to deliver to Ah Boy on 19 December 2009 in circumstances where a reasonable person having the suspicions that he had would have taken steps to find out (*viz*, by simply opening the Brown Packet to see what was in it).

Issues before this Court

9 Before us, the applicant relied on the following grounds in support of his application:

(a) this Court erred in law in affirming the finding of the High Court in *Dinesh Pillai HC* that the applicant had not rebutted the presumption in s 18(2) of the MDA on a balance of probabilities;

(b) section 33 of the MDA is unconstitutional "as it allows for the prosecution to select the exact punishment to be inflicted upon an individual member of a class of offenders with the same legal guilt"; [note: 1] and

(c) the Public Prosecutor acted in bad faith in bringing a capital charge against the applicant based on irrelevant considerations.

10 With respect to ground (a), the applicant's counsel argued that the issue was whether the applicant had knowledge or did not have knowledge of the nature of the controlled drug in the Brown Packet, but this Court had affirmed the Judge's finding of knowledge on the ground that the applicant was careless, negligent or reckless in not checking the Brown Packet to find out what was in it. Counsel argued that this was a fundamental error as carelessness, negligence or recklessness is not knowledge and knowledge cannot be inferred from any one or all of these forms of conduct. Thus, when the applicant denied knowledge of what was in the Brown Packet, there was no reason for the Judge or this Court not to believe his testimony.

11 In our view, this argument was entirely misplaced. The material issue was not what he actually knew or did not know was in the Brown Packet. Since the Judge had found that the Red Plastic Bag was in the applicant's physical possession, and that it was subsequently found to contain a controlled drug (*ie*, diamorphine), s 18(2) of the MDA applied to presume that he knew the nature of the controlled drug – a presumption which he had to prove, on a balance of probabilities, to the contrary. Thus, the material issue was whether on the facts of the case, the applicant had proved the contrary of the presumption on a balance of probabilities. The Judge found, on the totality of the evidence, that the applicant had not proved the contrary of the presumption. We agreed and explained the basis of our decision in *Dinesh Pillai CA* at [20]–[21] (reproduced at [8] above). In our view, the presumption in s 18(2) of the MDA could not be rebutted if the accused made no effort to find out what he was bringing into Singapore in circumstances which would have alerted a reasonable person that he was being asked to do something illegal. In the circumstances of this case, the conveyance of food from Malaysia to Singapore to unknown persons for a disproportionate reward (here it was RM200 per trip) made no common sense except that what was being conveyed was something valuable and illegal, like controlled drugs.

12 Before us, counsel also argued that the Judge was wrong to have found that the applicant had actual knowledge that the Brown Packet contained a controlled drug because that finding was based on an affirmative statement allegedly made by the applicant in response to a question from the investigator that the Brown Packet contained "controlled drugs". In particular, the investigator had suggested to the applicant that the Brown Packet contained "controlled drugs" and recorded the applicant's reply as confirming the suggestion. In our view, this argument has no merit because the Judge, having heard the testimonies of both the applicant and the investigator, had found that the applicant did make such a statement voluntarily. In any event, this argument, even if it had some substance, would not have been sufficient to rebut the presumption in s 18(2) of the MDA. At the trial, the applicant testified that he was told that the Brown Packet contained "things" but that he did not ask what the "things" were. In our view, this would not have been sufficient to prove the contrary of the presumption when he was paid a large sum of money just to convey unknown "things" to an unknown recipient.

13 With respect to ground (b), counsel for the applicant argued that s 33 read with the Second Schedule to the MDA was unconstitutional, having regard to s 53 of the MDA. To understand this argument, it is necessary to consider the terms of these provisions. Section 33 of the MDA provides the punishments for offences as follows:

> **Punishment for offences**
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> **33.**—(1) Except as provided in subsection (4) or under section 33A, the Second Schedule shall have effect, in accordance with subsections (2) and (3), with respect to the way in which offences under this Act are punishable on conviction.
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> …

For present purposes, the Second Schedule provides that the punishments for unauthorised trafficking in more than 15 grammes of diamorphine is death, and in not less than 10 grammes and not more than 15 grammes, a maximum 30 years' imprisonment or imprisonment for life and 15 strokes of the cane, and a minimum 20 years' imprisonment and 15 strokes of the cane. Section 53 of the MDA provides as follows:

> **Jurisdiction of court**
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> **53**. A District Court or a Magistrate's Court shall have jurisdiction to hear and determine all proceedings under this Act and, notwithstanding anything to the contrary in the Criminal Procedure Code (Cap. 68), a District Court shall have power to impose the full penalty or punishment in respect of any offence provided by this Act except the punishment of death.

14 Counsel's argument was as follows. Since s 53 of the MDA conferred jurisdiction on the Subordinate Courts to try drug trafficking offences, it had the effect of empowering the Public Prosecutor to select the punishment that the court would impose on an offender. This is because if the Public Prosecutor brought a capital charge in the Subordinate Courts, he would be determining that the accused would not be sentenced to death should the accused be found guilty, but if the Public Prosecutor had brought a capital charge in the High Court, he would be determining that the accused be sentenced to death if found guilty. Such a power conferred on the Public Prosecutor (as part of the Executive) would intrude into the judicial power and infringe the principle of separation of powers implicit in the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution"). Counsel relied on the decision in *Mohammed Muktar Ali v The Queen* [1992] 2 AC 93 ("*Mohammed Muktar Ali*") where the Privy Council held that certain provisions of the Dangerous Drugs Act 1986 in Mauritius ("the MDDA") had violated the constitutional principle of separation of powers between the legislature, executive and judiciary by effectively allowing the executive branch to select the sentence of each individual offender, a function which was vested exclusively in the judiciary.

The decision in Mohammed Muktar Ali

15 In *Mohammed Muktar Ali*, the appellants were charged with importing heroin into Mauritius contrary to s 28(1)(*c*) of the MDDA, and were alleged to be drug traffickers. On the direction of the Director of Public Prosecutions of Mauritius ("the MDPP") the appellants were each tried in the Supreme Court before a judge sitting without a jury. The Court convicted them of the offence under s 28(1)(*c*) of the MDDA, found them to be traffickers, and sentenced them to suffer mandatory death pursuant to s 38(4) of the MDDA.

16 The relevant provisions of the MDDA are as follows:

28.—(1) Subject to section 38, every person who unlawfully –

…

(c) imports, causes to be imported, aids, abets, counsels or procures the importation of any drug specified in subsection (2) shall commit an offence and shall on conviction be liable to a fine which shall not exceed 200,000 rupees and to penal servitude for a term which shall not exceed 20 years.

...

(8) Any person who is charged with an offence under subsection (1)(*b*) or (1)(*c*) shall be tried before a judge without a jury, the Intermediate or the District Court at the discretion of the Director of Public Prosecutions.

…

38.—…

(4) Any person who is charged with an offence under section 28(1)(*c*) before a judge without a jury and who is found to be a trafficker in drugs shall be sentenced to death.

…

41. Notwithstanding any other enactment, the Intermediate Court shall have - (*a*) jurisdiction to inflict the penalties provided in this Act, other than section 38(4); ...

17 On appeal to the Privy Council, the appellants argued that these provisions of the MDDA violated the separation of the powers doctrine under the Constitution of Mauritius as it enabled the MDPP at his discretion to select the court before whom a person is to be tried for an offence under s 28(1)(*c*) of the MDDA, and effectively determine the punishment to be inflicted on the offender if he were convicted. The Privy Council accepted this argument. In *Mohammed Muktar Ali* at 101–104, the Privy Council said (*per* Lord Keith of Kinkel):

…

It is now necessary to turn to the question ... whether anything in section 38(4), having regard to the discretion available to [the MDPP], offends against the Constitution of Mauritius. The principle which is said to have been breached is that of the separation of the powers of the legislature, the executive and the judicial branches of government. [The MDPP] is an officer of the executive branch. The argument for [the appellants] is that the discretion available to him to select the court before whom a person is to be tried for an offence under section 28(1)(*c*), that person being alleged to be a trafficker in drugs, in effect enables [the MDPP] to select the penalty to be inflicted on that particular person. If he chooses trial before a judge without a jury, and conviction follows plus a finding of trafficking the sentence must be that of death. [Here, Lord Keith of Kinkel referred to *Hinds v The Queen* [1977] AC 195 at 226 as follows:]

"In the exercise of its legislative power, Parliament may, if it thinks fit, prescribe a fixed punishment to be inflicted upon all offenders found guilty of the defined offence - as, for example, capital punishment for the crime of murder. Or it may prescribe a range of punishments up to a maximum in severity, either with or, as is more common, without a

> minimum, leaving it to the court by which the individual is tried to determine what punishment falling within the range prescribed by Parliament is appropriate in the particular circumstances of his case. Thus Parliament, in the exercise of its legislative power, may make a law imposing limits upon the discretion of the judges who preside over the courts by whom offences against that law are tried to inflict on an individual offender a custodial sentence the length of which reflects the judge's own assessment of the gravity of the offender's conduct in the particular circumstance of his case. What Parliament cannot do, consistently with the separation of powers, is to transfer from the judiciary to any executive body whose members are not appointed under Chapter VII of the Constitution, a discretion to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders."
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> ...
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> The legislature here has not, by any provision of [the MDDA], prescribed the penalty to be imposed in any individual citizen's case. What it has purported to do, however, is to authorise [the MDPP], an officer of the executive branch of government, to select the punishment to be inflicted upon an individual accused convicted under section 28(1)(*c*) and found to be a trafficker. If [the MDPP] chooses to prosecute before a judge without a jury, the judge has no discretion as to punishment but must impose the death penalty. That means that it is [the MDPP], by his decision about the court of trial, who has selected the death penalty. ...
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> …
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> … The vice of the present case is that [the MDPP's] discretion to prosecute importation with an allegation of trafficking either in a court which must impose the death penalty on conviction with the requisite finding or in a court which can only impose a fine and imprisonment enables him in substance to select the penalty to be imposed in a particular case.
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> As their Lordships have observed, a discretion vested in a prosecuting authority to choose the court before which to bring an individual charged with a particular offence is not objectionable if the selection of the punishment to be inflicted on conviction remains at the discretion of the sentencing court. Here one of the courts before which [the MDPP] might choose to prosecute the offence, namely a judge without a jury, was given no such discretion. It follows that the constitutional vice which their Lordships have found to exist stems from section 38(4) of [the MDDA], which must accordingly be held to be invalid. …

18 The Privy Council then went on to hold that the convictions themselves were not vulnerable to any attack on constitutional or other grounds but that the sentences of death, having been imposed under an invalid enactment (*viz*, s 38(4) of the MDDA), must be set aside since the judge sitting without a jury in the Supreme Court before which the appellants in *Mohammed Muktar Ali* were tried and convicted with a finding of trafficking had no power to impose the death penalty. The Privy Council then remitted the cases to the Mauritian Supreme Court to substitute such a sentence under other provisions of the MDDA (see *Mohammed Muktar Ali* at 105).

19 Before we deal with counsel's argument on the applicability of the observations in *Mohammed Muktar Ali*, it should be noted that counsel for the applicant had raised the same argument before us in *Dinesh Pillai CA* but had withdrawn it. In *Dinesh Pillai CA* at [14], we said:

> 14 [The applicant] also filed supplementary written submissions contending that s 33 of the MDA was unconstitutional because the MDA allowed the Public Prosecutor to act arbitrarily by

> selecting the punishment to be inflicted upon an individual member of a class of offenders with the same legal guilt, either by choosing between bringing proceedings in the Subordinate Courts and bringing proceedings in the High Court, or by manipulating the amount of drugs stated in the charge, regardless of the actual amount involved in the offence. Such arbitrary power, it was argued, was a breach of Art 93 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint). However, at the hearing before us, counsel for [the applicant] withdrew this ground of appeal. If this ground of appeal had not been withdrawn, we would have rejected it as completely without merit.

20 We rejected counsel's argument that the reasoning in *Mohammed Muktar Ali* had any bearing on s 53 of the MDA as neither counsel's reasoning nor rationale in trying to impugn the constitutionality of the provision made any sense to us. A discretion in the prosecuting authority to prosecute for a more serious offence rather than for a less serious one is not open to any constitutional objection (see Lord Diplock in *Teh Cheng Poh alias Char Meh v Public Prosecutor, Malaysia* [1980] AC 458 at 474–475) unless it is in breach of Article 12 of the Constitution (which has not been alleged in this case). Even if s 53 of the MDA were declared unconstitutional, it would only have meant that the District Court could not impose punishments beyond its ordinary sentencing jurisdiction under s 303(2)(*a*) of the Criminal Procedure Code 2010 (Act 15 of 2010) ("the CPC 2010") (which is up to 10 years' imprisonment). Since the applicant was not charged in the District Court, the argument had no relevance to his conviction in the High Court.

21 Consequent upon this conclusion, counsel's argument that the Second Schedule in the MDA was also unconstitutional had no merit. The Second Schedule merely calibrates the punishments applicable to the quantity of controlled drugs for which an offender has been convicted for offences under the MDA.

22 There are other features in the MDA which distinguish the legislative scheme from that enacted in the MDDA, such as that the MDDA did not differentiate the quantity of drugs that were being trafficked, and that, perhaps, a capital charge under the MDDA was tried before a jury. However, we should like to comment on two aspects of s 53 of the MDA in order to clarify its scope. First, s 53 of the MDA provides that "a District Court shall have power to impose the full penalty or punishment in respect of any offence provided by this Act except the punishment of death". So drafted, s 53 of the MDA appears to suggest that the Public Prosecutor may bring a drug trafficking charge in the District Court that is punishable with death. In *Nguyen Tuong Van v Public Prosecutor* [2005] 1 SLR(R) 103, this Court appeared to have adopted such a construction at [51] and [53] of the judgment:

> 51 We finally refer to the arguments based on s 53 of the MDA where a lower court tries the offence of unauthorised import of diamorphine of more than 15g. This section, in our view, is solely applicable to the specific and particular situation where the Public Prosecutor, in his sole discretion, prefers such a charge before the lower court. In preferring the lower court as the trial court, it is then clear that the Public Prosecutor, in his sole discretion, has come to the view that the sentence of death is not appropriate. It is an exceptional situation. In fact, the Public Prosecutor has never invoked s 53 of the MDA. In the event, on any reasonable reading of the section, the District Court can lawfully impose a sentence on an offence under s 7(4)(*a*) of the MDA as set out in the Second Schedule. This approach would consistently promote the purpose and object of the MDA. …
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> …
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> 53 The punishment for the unauthorised import of more than 15g of diamorphine is, in our view, prescribed expressly and in clear terms. There is but one sentence for the High Court to impose

and that is the sentence of death.

23 In our view – and this is our second comment – the purpose of s 53 of the MDA was not to enable the Public Prosecutor to bring a trafficking charge for a capital offence in the District Court so as to effectively reduce it to a non-capital charge. That would explain why there has been no such prosecutions in the Subordinate Courts. Indeed, if the Public Prosecutor were to do so, it would raise an issue as to whether the Public Prosecutor's decision might have been arbitrary or might not have been made in good faith. In our view, the purpose of s 53 of the MDA was to vest in the Subordinate Courts sentencing powers with respect to non-capital drug offences beyond their normal sentencing powers under the CPC 2010 (previously the Criminal Procedure Code (Cap 68, 1985 Rev Ed)).

24 With respect to ground (c), counsel argued that the Public Prosecutor had acted in bad faith in "targeting" the applicant for capital punishment. In substance, his argument was that the evidence showed that the applicant did not know (or at least there was a reasonable doubt that he knew) that he was carrying a controlled drug or that he did not know the nature of the controlled drug, and therefore the Public Prosecutor in bringing the capital charge against the applicant had acted in bad faith. This argument was a non-starter as the Public Prosecutor is the sole decider as to the merits of a prosecution. In any event, the fact that the Judge found the applicant guilty on the evidence confirmed the propriety as well as the validity of the Public Prosecutor's prosecutorial decision. Furthermore, counsel's submission was, in effect, that the applicant was wrongly convicted on the evidence, and that this Court was wrong to have affirmed the conviction. There was no basis for us to reopen our previous decision.

Conclusion

25 For the reasons given above, we therefore dismissed the application.

[note: 1] Para 7 of K Raja Retnam's affidavit (10 July 2012).