Rosman bin Abdullah *v* Public Prosecutor
[2015] SGHC 287

Case Number : Criminal Motion No 17 of 2015

Decision Date : 03 November 2015

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : Harpreet Singh Nehal SC, Shobna Chandran, Jerald Foo (Cavenagh Law LLP) for the applicant; Ng Cheng Thiam and Soh Weiqi (Attorney-General's Chambers) for the respondent.

Parties : ROSMAN BIN ABDULLAH — PUBLIC PROSECUTOR

Criminal Procedure and Sentencing – Sentencing

[LawNet Editorial Note: The appeal to this decision in Criminal Appeal No 31 of 2015 was dismissed by the Court of Appeal on 21 November 2016. See [2016] SGCA 62.]

3 November 2015

Tay Yong Kwang J:

Introduction

1 Criminal Motion No 17 of 2015 ("CM 17/2015") was a re-sentencing application by Rosman bin Abdullah ("the applicant") to set aside the death sentence imposed on him and to substitute a sentence of life imprisonment in its place ("the application") on the grounds that:

(a) he was only a courier of the diamorphine (hereinafter referred to as "heroin") that he was convicted of trafficking in; and

(b) he had rendered substantive assistance to the Central Narcotics Bureau ("CNB").

2 After hearing the parties, I dismissed the application and affirmed the death sentence imposed earlier at the trial. The applicant had appealed unsuccessfully to the Court of Appeal against his conviction.

Background facts leading to CM 17/2015

3 On 20 March 2009, CNB officers raided the applicant's hotel room in Bencoolen Street. The applicant provided the combination number to the room safe, which contained four bundles of heroin. As one of the black bundles contained two smaller packets, there were a total of five packets of heroin.

4 In Criminal Case No 19 of 2010, I tried the applicant on the capital charge of trafficking not less than 57.43g of diamorphine. Six other related non-capital charges under the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA") were stood down at the start of the trial, which took place in June and July 2010. The applicant claimed that he had no knowledge that the drugs inside the packets were heroin. He had collected them for one Mahadhir bin Chari (also known as "May Day") and thought that

they contained Erimin.

5 The prosecution's evidence included two statements that the applicant made shortly after his arrest. The first statement, which comprised 33 sets of questions and answers, was recorded in the hotel room on 20 March 2009 from about 6.25pm to 7.18pm ("the first statement"). The applicant told a CNB officer that the bundles belonged to him and contained about 800g to 900g of heroin. The heroin was for him to sell. This would be done by repacking the heroin into smaller packets before selling them. Each packet of about 8g would be sold for about $300. The second statement, which was recorded on 21 March 2009 from about 2.14am, was the applicant's cautioned statement that he made after another CNB officer read and explained the capital charge to him ("the second statement"). He said that his girlfriend (who was also in the hotel room) did not know about the heroin. He further stated: "I admit to the drug possession is belong to me." The applicant claimed that he was wrongfully induced into giving these statements but I found that they were voluntarily made and reliable. At the conclusion of the trial on 16 July 2010, I convicted the accused on the capital charge: see *Public Prosecutor v Rosman bin Abdullah* [2010] SGHC 271.

6 In Criminal Appeal No 15 of 2010, the applicant appealed against the conviction and sentence. On 26 April 2011, the Court of Appeal dismissed the appeal. On 25 July 2011, the applicant's petition for clemency was submitted to the President. It was not acceded to.

7 On 14 November 2012, Parliament passed the Misuse of Drugs (Amendment) Act 2012 (Act 30 of 2012) ("the Amendment Act"). The statute introduced a new s 33B into the MDA with effect from 1 January 2013. The provision allows a court to sentence a convicted drug trafficker to life imprisonment instead of the death penalty if he proves on a balance of probabilities that he was merely a courier and the Public Prosecutor issues a certificate that he has substantively assisted the CNB in disrupting drug activities. The relevant parts of the provision read as follows:

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

(iv) to any combination of activities in sub-paragraphs (i), (ii) and (iii); and

(*b*) the Public Prosecutor certifies to any court that, in his determination, the person has substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities within or outside Singapore.

…

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

8 Section 27(6) of the Amendment Act allows a person, who has been convicted of an offence under ss 5(1) or 7 of the MDA and sentenced to death, and whose appeal against conviction and sentence has been dismissed by the Court of Appeal before the coming into force of s 33B of the MDA, to apply to the High Court to be re-sentenced in accordance with s 33B of the MDA.

9 On 24 February 2015, the applicant filed his re-sentencing application. He sought:

(a) An order to re-sentence him to life imprisonment; and

(b) A declaration that the requirement under s 33B(2)(*b*) of the MDA is satisfied if an applicant renders substantive assistance to the CNB which either disrupts or has the potential to disrupt drug trafficking activities within or outside Singapore.

10 The applicant had applied successfully to adduce additional evidence in support of his application. This evidence comprised various long statements that he had made to the CNB. The applicant said that these statements demonstrated that he was only a courier of heroin and that he had provided substantial assistance to the CNB. The applicant also adduced some records of SMS messages retrieved from his and May Day's mobile phones.

The parties' arguments

11 The applicant submitted that he was only a courier of the heroin. As of the date of his arrest, he had only couriered heroin twice ("the first transaction" and "the second transaction"). He relied on the case of *Public Prosecutor v Abdul Haleem bin Abdul Karim and another* [2013] 3 SLR 734 ("*Abdul Haleem*") and submitted that the evaluation of whether he was a mere courier should be based only on the facts of the second transaction, which formed the subject of the capital charge. To the extent that his acts went beyond transporting, sending or delivering the heroin in that transaction, such acts were incidental and necessary to the role of a courier. These acts included making payment for the heroin with money that he received from May Day, collecting the heroin for May Day and storing the heroin with a view to delivering to May Day subsequently. At all times, the applicant had no executive decision-making powers as he acted solely within May Day's instructions. He received no additional benefit. As he had only couriered heroin twice, the extent in scope and time of the functions which he performed was extremely limited.

12 On the requirement of substantive assistance, the Public Prosecutor ("the respondent") confirmed that he would not certify that the applicant had substantively assisted the CNB in disrupting drug activities within or outside Singapore. The applicant did not challenge the respondent's

discretion in deciding whether to grant the certificate and he did not allege that the respondent had made his determination in bad faith or with malice. However, the applicant submitted that it was for the courts to construe the meaning of the words "substantively assisted" in s 33B(2)(*b*) of the MDA. This would clarify the "ambiguity and uncertainty" of the threshold test and assist the applicant to make representations to the respondent to persuade him that the applicant had indeed provided substantive assistance to the authorities and should be given the certificate. It was also in the public interest that the courts provide a "definitive interpretation" of substantive assistance. To this end, the applicant submitted that the requirement in s 33B(2)(*b*) of the MDA was satisfied if an applicant renders substantive assistance to the CNB which either disrupts *or has the potential to disrupt* drug trafficking activities within or outside Singapore.

13 The respondent submitted that the applicant's conduct should be viewed in its entirety, *ie*, his conduct in both the first and second transactions must be considered in the evaluation of whether he was merely a courier. The applicant had clearly carried out more functions than those of a mere courier. In both transactions, the applicant, among other things, sourced for a heroin supplier and acted as the middle-man in the negotiation on the price. After the first transaction was executed, the applicant, together with May Day, packed the heroin into smaller packets of 8g each and he took two packets for sale. After the second transaction was executed, the applicant likewise had the intention to re-pack and sell the heroin but was arrested by CNB before he could pass the heroin to May Day. In his first statement (see [5] above), the applicant admitted that the drugs were meant for repacking and sale. In his second statement (see [5] above), he did not set out his defence that he was a mere courier. Further, it was wrong to say that no benefit accrued to the applicant.

14 The respondent submitted that the applicant was seeking to introduce a wider concept of "substantively assisted" by introducing an element of "potential value" of the information provided by an accused person into s 33B(2)(*b*) of the MDA. The re-sentencing proceedings were not meant for that purpose. Under s 27(6) of the Amendment Act, the court determines if the requirements in s 33B of the MDA are satisfied. If the requirements are not met, the court affirms the sentence of death. If the requirements are met, the court re-sentences in accordance with s 33B of the MDA. Therefore, the court has no power to grant the declaration sought by the applicant. The respondent also relied on the High Court decision of *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2014] 4 SLR 773 ("*Ridzuan*"), which recognised that the Public Prosecutor is much better-placed than the courts to decide on the operational value of the assistance provided by an accused. (The Court of Appeal released its decision in the appeal from *Ridzuan* on 5 Oct 2015, after the present application had been dealt with by me. The appeal was dismissed). The decision of whether a person had substantively assisted the CNB involved extra-legal and operational considerations which the courts are not in a position to deal with.

The decision of the court

Whether the applicant was a courier

15 The statutory relief provided in s 33B of the MDA does not apply to those who are involved in more than transporting, sending or delivering the drugs. However, mere incidental acts in the course of transporting, sending or delivering the drugs would not take a trafficker outside the scope of being a mere courier. The question of whether a particular act is necessary for the work of a courier is fact-specific but this caveat must be construed strictly: see *Chum Tat Suan v Public Prosecutor* [2015] 1 SLR 834 ("*Chum Tat Suan*") at [66]–[68].

16 As a general proposition, the more functions an accused person performs beyond bringing drugs from point A to point B and the longer the duration of those functions, the less he can be said to be a

mere courier: *Public Prosecutor v Christeen d/o Jayamany and another* [2015] SGHC 126 ("*Christeen*") at [71]. A few factors provide some guidance on whether a particular role makes an accused person more than a courier. In *Christeen* at [68], I stated that these included whether the role is a common and ordinary incident of being a courier, whether such involvement is necessary to deliver the drugs, the extent in scope and time of the functions, the degree of executive decision-making powers and whether the offender receives a distinct form of benefit for performing his extra functions. However, these factors are non-exhaustive and non-exclusive. No one factor or group of factors is determinative. As emphasised above, the inquiry is fact-specific.

17 On the evidence, the applicant's conduct went beyond transporting, sending or delivery of drugs from one point to another. The applicant's conduct should be considered in its entirety. His actions in the first transaction could be gleaned from his long statement on 22 March 2009. Three to four days before the applicant was arrested for the second transaction on 20 March 2009, May Day asked him to source for heroin. The applicant complied. He contacted a Malaysian supplier known as Ah Yong, who agreed to sell two pounds of heroin for $18,000. When May Day told the applicant that he had only $16,900, the applicant told Ah Yong, who then agreed to give May Day "credit" (May Day would pay the remaining $1,100 three days later). Ah Yong spoke to the applicant on how the transaction, which took place in Simei, would be executed. On the night of the transaction, the applicant took $16,900 from May Day and went to a coffee shop, where he showed the money to Ah Yong's associate. Another associate subsequently passed May Day the heroin at a housing block in Simei. The applicant handed the money to Ah Yong's associate at the coffee shop when May Day confirmed receipt of the heroin. The applicant then went to May Day's flat in Simei, where they used a weighing scale and empty packets to pack the heroin into 8g packets. The applicant helped May Day to arrange the heroin deal and pack the drugs as he owed May Day money after a failed deal to buy Ice, or methamphetamine.

18 It was clear from the above that the applicant's conduct in the first transaction was more than that of a mere courier. During the hearing, the applicant said that in regard to the first transaction, he was only passing the money on and did not even collect the heroin. However, in the lead-up to the execution of that transaction, he helped May Day to source for heroin and was the middleman in the negotiations. He helped to broker the deal. After the transaction, the applicant was even involved in packing the heroin into smaller packets. He knew that two pounds of heroin could be packed into more than 100 packets weighing 8g each. In his statement, the applicant also said that he took two packets of the heroin for sale after the first transaction. He said: "I also take supply of ecstasy, Erimin 5 tablets and Heroin from 'Mayday' to sell. For Heroin I only took from him on two occasions and on each occasion I take one packet of 8 grams of Heroin from 'Mayday'". During the trial, the applicant said that he was about to go home from May Day's flat when someone called May Day asking to buy heroin. May Day then asked him to deliver the heroin to the buyer on his way back. However, the applicant was unlikely to have been simply a deliveryman. Later in the same statement, he repeated the fact that he had taken heroin from May Day to sell:

> 21 I help 'Mayday' to make arrangement for the Heroin deal and subsequently help him to pack Heroin is because I owe 'Mayday' money. By doing this 'Mayday' will charge me cheaper if I get Ice and Heroin from him. When I get the drugs at a cheaper price from 'Mayday', I will be able to get more profit and repay everything which I owe 'Mayday' faster".

19 The facts concerning the first transaction were relevant to my evaluation of the applicant's role in the second transaction. The applicant relied on *Abdul Haleem* in submitting that it was important to delineate the facts surrounding the first transaction from the facts concerning the second transaction, which formed the subject of the charge. However, the situation in *Abdul Haleem* was different. That case involved two accused persons, Abdul Haleem bin Abdul Karim ("Abdul Haleem")

and Muhammad Ridzuan bin Md Ali ("Ridzuan"), who had entered into an agreement to buy one "ball" of heroin and repack it into smaller sachets for sale. Two transactions followed. In the first transaction, they received half a ball of heroin, which they repacked into 21 sachets for the purpose of sale. In the second transaction, they received a total of eight bundles of heroin, of which only one bundle comprised the other half ball that was due to them. They were arrested and each faced two charges of trafficking in heroin in furtherance of their common intention. The first charge, which was the capital charge, was framed in terms of the seven bundles containing not less than 72.50g of heroin. The other charge was a non-capital charge for the 21 smaller sachets and the eighth bundle containing not more than 14.99g of heroin, *ie*, the one ball that they had agreed to buy and then sell. In convicting them on both charges, I found that while they had the intention to sell in relation to the non-capital charge, they were mere couriers in relation to the capital charge. I was able to do so as the facts supported such a finding. It was undisputed that their intention to sell extended only to the one ball of heroin that they had bought. In the second transaction, their supplier had asked them to hold on to seven of the bundles which were to be collected by or delivered to other customers of the supplier. It was an uncontroverted fact that these bundles were received for the purpose of passing them to third parties. Therefore, there were distinct purposes underlying the first and second transactions in *Abdul Haleem*, notwithstanding that the eight bundles in the second transaction were received as an undifferentiated whole.

20 In the present case, no such distinct purposes between the first and the second transactions were discernible. The second transaction was detailed in the applicant's long statement on 23 March 2009. On 19 March 2009, May Day again asked the applicant to source for two pounds of heroin. The applicant complied. Again, he called Ah Yong, who quoted $8,500 for one pound of heroin (a $500/pound discount compared to the first transaction as Ah Yong had promised a lower price for repeat purchases). However, Ah Yong required the $1,100 that was outstanding from the first transaction before the second transaction could go through. The applicant relayed a series of messages between May Day and Ah Yong on the price of the consignment. A price of $16,600 was eventually agreed upon. May Day asked the applicant to collect the $1,100 from him, which the applicant did before paying the amount to Ah Yong's associate. At night, the applicant went to May Day's flat again to collect the $16,600. However, May Day told him that he was not feeling well, whereupon the applicant said that he would collect the heroin. At about 1am on 20 March 2009, the applicant called Ah Yong, who told him to go to a shopping centre in Bukit Timah with the money. There, the applicant passed the money to Ah Yong's associate in return for the bundles of heroin. The applicant called May Day but he did not answer the phone. The applicant then took a taxi to May Day's flat but there was no response on the phone or at the door. The applicant then returned to the hotel in Bencoolen with the drugs, which he kept in the room safe. Over the course of the day, May Day called the applicant three times to ask when the applicant was going to send the heroin to him but the applicant was arrested before he could do so.

21 From the above, it was clear that the second transaction started in the same way as the first. The applicant helped May Day to source for another two pounds of heroin and was the middleman in the negotiations. He helped to broker the deal. The second transaction took place only a few days after the first transaction and there was no evidence that his personal circumstances had changed such that he would have no further reason to help May Day in the same way. The applicant said that he helped May Day in the first transaction as by "doing this 'Mayday' will charge me cheaper if I get Ice and Heroin from him" (see [18] above). His reason for helping May Day in the second transaction was likewise to "get some discount when I get drugs from 'Mayday' to sell". He said:

> 36 I wish to say that the Heroin that was found in my room safe was meant to pass to 'Mayday'. I am doing all the Heroin arrangements and runnings for 'Mayday' because I owe him money. I do not get anything out of it. The only thing that I get out of this is to get some

discount when I get drugs from 'Mayday' to sell. By having this discount, I will be able to make more money and repay what I owe 'Mayday' faster. I am helping 'Mayday' also in the hope that he would deduct my loan when he makes profit from selling the Heroin. I do know that Heroin is illegal and this amount is a big amount which will lead to death penalty but I was desperate in repaying 'Mayday' the debt. I got no choice but to do the Heroin run.

22 The applicant said that he had not even intended to deliver the drugs in the second transaction. He had simply intended to relay the money (as he did in the first transaction) while May Day collected the heroin. He only volunteered to collect the drugs when May Day said he was not well. When he could not locate May Day after the second transaction, all he did was to stash the drugs in the hotel room safe. There was no evidence of an intention to repack or sell the drugs. However, there was similarly no evidence that the applicant had a distinct purpose in the second transaction, *eg*, he only intended to deliver the heroin to May Day. From the evidence adduced at the trial, it would follow that had the arrests not taken place, the applicant would have met May Day later that day to repack the heroin and taken some of it for sale (as he did in the first transaction). This would not be inconsistent with his first statement, in which he said that the heroin belonged to him and was for him to sell after repacking it into smaller packets (see [5] above) although he claimed that he did not want to implicate May Day at the initial stage of the investigations.

23 In any event, the applicant's role had exceeded that of a courier even if the second transaction was examined by itself. His actions leading up to the second heroin transaction were the conduct of someone who was more than a mere courier. He played an active part in sourcing for the heroin and played the middleman in the negotiations between May Day and Ah Yong. He facilitated the payment of the outstanding sum of $1,100 to Ah Yong, which was required before he would supply the heroin. The applicant argued that he had absolutely no discretion or decision-making powers and was merely a conduit in the price discussions between May Day and Ah Yong. He said that everything he did was on May Day's instructions. Further, the applicant dealt with Ah Yong only because he was under the misapprehension that May Day and Ah Yong were not acquainted. Therefore, the applicant argued, this was a situation where May Day had simply used the applicant as a conduit and not one where May Day was actually dependent on the applicant's contact for drug supply. However, the facts remained that the applicant's actions were not a common and ordinary incident of couriering and were not necessary for the delivery of the drugs. Even if he had no executive decision-making powers, this did not necessarily mean that he was a mere courier. As an example, a person who occupies a higher position in a syndicate can still act entirely as directed but he is nevertheless not a courier. Similarly, a person may be used as a mere pawn but this does not mean that his conduct will necessarily be confined to acts that are incidental and necessary to couriering. In helping to source for drugs and in serving as the go-between between May Day and Ah Yong, the applicant had already gone beyond the role of a mere delivery boy. The fact that he was the lesser party in his relationship with May Day and simply followed instructions was not determinative.

24 In any event, the applicant did not seem to know that May Day and Ah Yong knew each other at the material time and therefore could deal directly with each other. It should be pointed out that May Day's request was to "look for two pounds of Heroin". The request was not to source for heroin specifically from Ah Yong. In fact, there was evidence that the applicant also tried to source from other suppliers. The applicant sent an SMS message to May Day on 10 March 2009. When he was asked to explain the contents of the message which was in Malay, the applicant said in his statement dated 3 February 2010, "'Mayday' wanted me to look for heroin so I called Seetoh and Seetoh quoted the price of SGD 8800 for one pound of heroin."

25 On the facts, the applicant had therefore failed to prove on a balance of probabilities that he was involved in the trafficking offence as a "courier" within the meaning of s 33B(2)(*a*) of the MDA.

The applicant's statements showed clearly that he was involved in more than mere delivery work and anything incidental thereto.

Whether the applicant has substantively assisted CNB

26 Both requirements in s 33B(2) of the MDA must be met before the court can consider a sentence of life imprisonment. The accused failed to meet the first requirement in s 33B(2)(*a*). The applicant also failed to satisfy the second requirement in s 33B(2)(*b*) as the respondent did not certify that the applicant had substantively assisted the CNB. However, the applicant asked me to define the meaning of "substantive assistance" so that the Public Prosecutor could decide if the applicant could receive the certificate after applying the elucidated meaning to the facts. On his interpretation, a person would have substantively assisted the CNB not only when his information disrupts drug trafficking activities but also when his information "has the potential to disrupt" drug trafficking activities.

27 The respondent submitted that the court has no power to make a declaratory order in hearing a re-sentencing application as it is only empowered under s 27(6) of the Amendment Act to arrive at one of two conclusions – to affirm the death sentence or re-sentence the person (see [14] above). Leaving aside the question of whether the court can grant a declaratory order in this context, the court obviously has the power to interpret statutes in order to arrive at its determination in any given case. However, the words "substantively assisted" in the context of the regime prescribed in s 33B of the MDA are not amenable to judicial interpretation and they certainly do not lend themselves to the particular interpretation sought by the applicant.

28 During the second reading of the Misuse of Drugs (Amendment) Bill (see Singapore Parliamentary Debates, Official Report (12 November 2012) vol 89), the Deputy Prime Minister and Minister for Home Affairs, Mr Teo Chee Hean, said that it was for the Public Prosecutor to determine if substantive assistance had in fact been provided in a particular case:

> The aim of the "substantive assistance" condition is to enhance the operational effectiveness of the CNB, by allowing investigators to reach higher into the hierarchy of drug syndicates. "Substantive assistance" in disrupting drug trafficking activities may include, for example, the provision of information leading to the arrest or detention or prosecution of any person involved in any drug trafficking activity. Assistance which does not enhance the enforcement effectiveness of the CNB will not be sufficient. In order to ensure that this significant power is used judiciously and in a fair manner, the Public Prosecutor will determine whether there is in fact "substantive assistance" in any particular case. The new section 33B of the MDA provides that where the Public Prosecutor certifies that the defendant substantively cooperated with the CNB, the court will have the discretion to sentence the convicted person to life imprisonment with caning of at least 15 strokes, or death.

29 This is underscored by s 33B(4) of the MDA (see [7] above) which provides that the determination shall be at the sole discretion of the Public Prosecutor and no action or proceedings shall lie against the Public Prosecutor in relation to his determination unless it is proved to the court that the determination was made in bad faith or with malice. Besides these two grounds, the Public Prosecutor's determination can only be challenged on the basis of unconstitutionality, such as where the executive act amounts to intentional and arbitrary discrimination see *Ridzuan* at [38] and *Cheong Chun Yin v Attorney-General* [2014] SGHC 124 ("*Cheong Chun Yin*") at [36].

30 In response to questions on who should decide on whether a courier had provided substantive assistance and on what criteria, the Minister for Law, Mr K Shanmugam, said (Singapore Parliamentary

Debates, Official Report (14 November 2012) vol 89):

> The Courts decide questions of guilt and culpability. As for the operational value of assistance provided by the accused, the Public Prosecutor is better placed to decide. The Public Prosecutor is independent and at the same time, works closely with law enforcement agencies and has a good understanding of operational concerns. An additional important consideration is protecting the confidentiality of operational information.
>
> The very phrase "substantive assistance" is an operational question and turns on the operational parameters and demands of each case. Too precise a definition may limit and hamper the operational latitude of the Public Prosecutor, as well as the CNB. It may also discourage couriers from offering useful assistance which falls outside of the statutory definition.

31 Clearly, Parliament had considered the question of whether the words "substantive assistance" should be further defined and decided against doing so. By providing a definition of "substantive assistance", the courts would in effect be interfering with the decision-making process of the Public Prosecutor. This would be tantamount to telling the Public Prosecutor what to do and what not to do. The courts should not do so because of the multi-faceted and fact-sensitive nature of each case.

32 To attempt a definition will conceivably give rise to an infinite number of such applications seeking directions as to whether some fact ought to be considered or excluded. As part of its multi-faceted inquiry, the Public Prosecutor may well take into account the potential value of any information given in disrupting drug trafficking activities. However, this is just one among a multitude of extra-legal factors that it may choose to take into account. In this regard, no exhaustive definition is possible. Ultimately, whether a courier is deemed to have substantively assisted is largely a value judgment that the Public Prosecutor is better placed to make. I alluded to this in *Ridzuan* at [50]:

> In this regard, I accept the AG's submission that the determination of whether a person has substantively assisted the CNB involves a multi-faceted inquiry, which may include a multitude of extra-legal factors, such as:
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> (a) the upstream and downstream effects of any information provided;
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> (b) the operational value of any information provided to existing intelligence; and
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> (c) the veracity of any information provided when counterchecked against other intelligence sources.
>
> The overarching question will inevitably be whether the operational effectiveness of the CNB has been enhanced. This is largely a value judgment which necessarily entails a certain degree of subjectivity. In this regard, the court should be careful not to substitute its own judgment for the PP's judgment. Realistically speaking, the PP is much better placed to assess the operational value of the assistance provided by the accused. Hence the grounds of review have been confined to bad faith, malice and unconstitutionality.

33 In the recent decision of *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] SGCA 53, the Court of Appeal, in dismissing Ridzuan's appeal against my refusal to grant leave for judicial review, also held (at [66]) that "the Judge is not the appropriate person to determine the question of whether a convicted drug trafficker has rendered substantive assistance". In my view, to attempt to define the meaning of substantive assistance would be a hindrance rather than a help to the Public Prosecutor's determination of that question on the facts of each case.

34 In *Ridzuan* at [50], I was not laying down various factors that were relevant to the ascertainment of whether substantive assistance had been provided. I was merely providing some examples of extra-legal factors that the Public Prosecutor could possibly take into account in coming to his determination. The applicant's submission that the courts had already given clarity on the factors that go toward substantive assistance was therefore not correct. In *Ridzuan* at [45], I also said that an offender's criminal conduct was not relevant to the determination of whether he had provided substantive assistance to the CNB. I was simply responding to a particular argument that was made in *Ridzuan*, which was an application for leave for judicial review. Ridzuan argued that his right to equal protection in Article 12 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) had been breached as Abdul Haleem received the certificate of substantive assistance while he did not, although they were both couriers who had engaged in the same criminal conduct. I was not commenting on the meaning of substantive assistance. I think it is not controversial that an offender's actions before arrest (his criminal conduct) should have no bearing on whether he provides substantive assistance after arrest.

35 The particular interpretation sought was also of no utility because an assessment of whether the assistance given has the "potential to disrupt" drug trafficking activities similarly calls for a value judgment that the Public Prosecutor has been tasked to make and which cannot be challenged except on the grounds of bad faith, malice and unconstitutionality. In *Cheong Chun Yin*, the applicant contended that the Public Prosecutor had made an error of law by not directing his mind to the question of whether the information that the applicant provided could have substantively assisted the CNB (at [23]). The applicant submitted that the negative assistance determination and non-certification decision should be quashed as it could be deduced that the Public Prosecutor had failed to consider the potential value of the information (at [25]). I held that there was no separate ground of jurisdictional error of law available besides the grounds of bad faith, malice and unconstitutionality and said at [32]:

> In any case, the alleged errors of law amounted to no more than the Applicant's dissatisfaction over the way the CNB conducted its investigations in this case. Presumably, the PP, in exercising his discretion whether to give a certificate under s 33B(2)(*b*), would consider the views of the CNB about the results of its investigations into any information or assistance provided by the Applicant. How the CNB decides to conduct its investigations in each case is not something which is within the purview of the courts under the statutory scheme in s 33B unless the Applicant can show bad faith or malice on the part of the CNB which may then potentially taint the PP's decision. The Applicant is practically asking the court to adjudicate on the adequacy of the investigations and to speculate on what would have happened if the CNB had done this or that. If the court accedes to this, I think the court will be making a jurisdictional error.

36 Further, there was no basis to accept the particular interpretation sought by the applicant, who drew my attention to the United States' mechanism to recognise cooperation for the purpose of sentencing. Title 18, s 3553(e) of the United States Code states:

> **Limited Authority To Impose a Sentence Below a Statutory Minimum.**—
>
> > Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

Further, s 5K1.1 of the 2011 Federal Sentencing Guidelines Manual states:

1. SUBSTANTIAL ASSISTANCE TO AUTHORITIES

§5K1.1. Substantial Assistance to Authorities (Policy Statement)

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

Commentary

Application Notes :

1. Under circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence.

2. The sentencing reduction for assistance to authorities shall be considered independently of any reduction for acceptance of responsibility. Substantial assistance is directed to the investigation and prosecution of criminal activities by persons other than the defendant, while acceptance of responsibility is directed to the defendant's affirmative recognition of responsibility for his own conduct.

3. Substantial weight should be given to the government's evaluation of the extent of the defendant's assistance, particularly where the extent and value of the assistance are difficult to ascertain.

Background : A defendant's assistance to authorities in the investigation of criminal activities has been recognized in practice and by statute as a mitigating sentencing factor. The nature, extent, and significance of assistance can involve a broad spectrum of conduct that must be evaluated by the court on an individual basis. Latitude is, therefore, afforded the sentencing judge to reduce a sentence based upon variable relevant factors, including those listed above.

> *The sentencing judge must, however, state the reasons for reducing a sentence under this section. 18 U.S.C. § 3553(c). The court may elect to provide its reasons to the defendant in camera and in writing under seal for the safety of the defendant or to avoid disclosure of an ongoing investigation.*

37 Based on the above, the applicant submitted that while the prosecution has been designated as the authority which decides if substantial assistance had been given, the US courts have nevertheless provided guidance on what constitutes substantial assistance. However, the US legislation seems to be different in one material aspect. There is no equivalent of s 33B(4) of the MDA, which circumscribes the power of the courts to review the Public Prosecutor's determination.

38 The applicant also submitted that in providing guidance, the US courts have adopted an interpretation that accommodates not just the actual but also the potential impact of an accused's cooperation. However, the cases cited by the applicant do not seem to go that far. In *United States v Rosado* [2001] WL 1360224, the accused enjoyed a reduction in his sentence even though his evidence was not ultimately used, given the role that his evidence played in the larger context of corroborating evidence obtained from elsewhere. Pursuant to s 5K1.1, the judge granted a "downward departure" and sentenced him to 10 months' imprisonment. The relevant portion of the judgment states:

> The Government recommends a downward departure pursuant to § 5K1.1, because Rosado's cooperation has been of substantial assistance to the government's investigation of this case. Rosado began meeting with the Government in May 1999 and provided detailed information about the structure and scope of the narcotics organization for which he worked. He was the first defendant to plead guilty, and was ready and willing to testify at the trial of David Caraballo, the head of the narcotics organization. Although his testimony was not ultimately used, the information Rosado provided was vital to the Government in corroborating evidence and negotiating guilty pleas.

39 Nothing in the case suggests that the court was laying down guidance on what constituted substantial assistance. In marking down the sentence, the court was giving weight to the recommendation of the government, which was fully entitled to evaluate and take the potential value of his evidence into account in concluding if he had rendered substantial assistance (or not). This would also be the case in Singapore (see [32] above).

40 The applicant also cited *United States v Harris* 188 F Supp 2d 394 (WDNY 2001). In that case, a drug dealer entered into an agreement with the government to provide information to the authorities, on the understanding that the decision to reduce his sentence based on substantial assistance was within the sole discretion of the prosecution. He provided assistance but his sentence was not reduced. The court found that the authorities had failed to act adequately on the information and held that he should receive a reduction in his sentence given that the value of his cooperation was reduced for reasons outside his control. However, this was a case where the court found, on the facts, that the government had acted in bad faith in refusing to make a motion to reduce the drug dealer's sentence. The court held:

> This is not a case where the Government was simply dissatisfied with what Harris produced. In this case, the Government affirmatively and actively thwarted Harris' efforts to fulfill his obligations under the Agreement. To act in such a manner constitutes bad faith and under such circumstances the Government should be compelled to live up to its obligations under the Agreement.

41 The applicant submitted that the New Zealand courts also recognise the potential value of an accused's cooperation in the sentencing context and cited the case of *R v Cartwright* (1989) 17 NSWLR 243 ("*Cartwright*"). In that case, the court accepted held that reward should be granted for assistance if the offender had genuinely cooperated with the authorities whether or not the information supplied objectively turns out in fact to have been effective. The court therefore accepted that the potential value of the information provided, as comprehended by the offender himself and not just the actual effectiveness of the information, should attract a substantial discount. As a general principle, the courts are certainly free to recognise the potential value of an accused's cooperation during sentencing. However, the statutory regime in s 33B of the MDA specifically provides for the Public Prosecutor to decide if a courier has provided substantive assistance. The courts cannot review the determination except on the three grounds mentioned earlier. In this context, it is not for the courts to recognise the potential value of an accused's cooperation.

42 The court in *Cartwright* justified its decision on the basis that it is in the public interest that offenders should be encouraged to supply information to the authorities which will assist them to bring other offenders to justice and to give evidence against those other offenders in relation to whom they have given such information. The applicant submitted that the Parliamentary intent behind the substantive assistance test from the accused's perspective is to incentivise him to come clean and assist the CNB, as he may be reluctant to cooperate without some assurance that he will be accorded credit for his efforts. However, while *Cartwright* held that genuine cooperation should be rewarded, the fact that an offender has cooperated in good faith with CNB does not lead necessarily to the enhancement of CNB's operational effectiveness, which is the aim of the substantive assistance condition. In responding to questions of whether a courier should qualify for the certificate of substantive assistance once he had done his best and acted in good faith, Mr K Shanmugam said (*Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89):

> The short answer is that it is not a realistic option because every courier, once he is primed, will seem to cooperate. Remember we are dealing not with an offence committed on the spur of the moment. We are dealing with offences instigated by criminal organisations which do not play by the rules, which will look at what you need, what your criteria are and send it to you. So if you say just cooperate, just do your best, all your couriers will be primed with beautiful stories, most of which will be unverifiable but on the face of it, they have cooperated, they did their best. And the death penalty will then not be imposed and you know what will happen to the deterrent value. Operational effectiveness will not be enhanced. Will we be better off? Will we be worse off?

43 As Mr Teo Chee Hean said in Parliament (see [28] above), the assistance that is provided has to enhance the enforcement effectiveness of the CNB before it can be considered substantive. The applicant cited *Chum Tat Suan* at [81] in submitting that the substantive assistance condition was premised on encouraging accused persons to come clean and provide assistance to the CNB. This comment, which was made by Woo Bih Li J and me, should not be taken out of context. We were explaining our view as to why an accused person should not be allowed to give evidence about his being a courier at the sentencing stage although he had deliberately withheld such evidence during trial on the ground that such evidence would be inconsistent with his primary defence. We therefore explained at [80]-[81]:

> 80 This 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. He also had to elect whether or not to cooperate and come clean with the authorities by providing information. If he did, he might persuade the Prosecution not to press a capital charge against him. There was no suggestion then that he was being put in an invidious

position.

81 The purpose of the recent amendments to the MDA is to state formally that if he provides substantive assistance to the authorities (if he is a courier) and if he obtains the relevant certificate stating the fact of such assistance, the court may decide not to impose capital punishment. The accused person does not have to avail himself of this opportunity. The purpose of the amendments is therefore to give him an incentive to come clean. There is no suggestion in the parliamentary debates that the amendments will result in changing the trial process and give the accused person a chance to deliberately stifle evidence to gain an advantage and then to speak the truth when that strategy fails. If he were allowed to do so, it may even be said that the court is condoning such a strategy which it should be discouraging instead. Furthermore, if the trial process is changed for capital offences under the MDA, then one may argue that it should also be changed for the offence of murder for the same reason, *ie*, not to put the accused person in an invidious position where the evidence withheld would be inconsistent with his primary defence.

44 For the above reasons, I declined to grant the declaration sought. The applicant did not challenge the respondent's refusal to issue the certificate of substantive assistance. In the absence of any allegation based on the three specified grounds, the respondent's decision is unassailable in law.

Conclusion

45 Both requirements of s 33B were not satisfied in this case. I therefore affirmed the death sentence imposed at the trial and which was subsequently affirmed by the Court of Appeal. For the reasons set out above, the application for a declaration was dismissed.

46 I made no order as to costs as the parties did not wish to ask for any costs order.

47 On 5 October 2015, the applicant filed a notice of appeal (in CA/CCA 31/2015) to the Court of Appeal against my decision.

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