IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2016] SGCA 62

Criminal Appeal No 31 of 2015

Between

ROSMAN BIN ABDULLAH

… Appellant

And

PUBLIC PROSECUTOR

… Respondent

JUDGMENT

[Criminal procedure and sentencing] — [Sentencing]

[Criminal law] — [statutory offences] — [Misuse of Drugs Act]

Version No 1: 27 Oct 2020 (22:40 hrs)

TABLE OF CONTENTS

INTRODUCTION **1**

PRELIMINARY POINTS **4**

THE FACTS **7**

THE DECISION BELOW **9**

THE PARTIES' ARGUMENTS **11**

THE APPELLANT'S ARGUMENTS 11

THE RESPONDENT'S ARGUMENTS 12

OUR DECISION **13**

ISSUE 1 13

ISSUE 2 19

ISSUE 3 25

CONCLUSION **33**

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

Rosman bin Abdullah
v
Public Prosecutor

[2016] SGCA 62

Court of Appeal — Criminal Appeal No 31 of 2015
Chao Hick Tin JA, Andrew Phang Boon Leong JA and Judith Prakash JA
9 September 2016

21 November 2016 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 The Appellant had been convicted of the capital charge of trafficking in not less than 57.43g of diamorphine in 2010 (see *Public Prosecutor v Rosman bin Abdullah* [2010] SGHC 271). The Appellant then appealed against the conviction and sentence and this court dismissed the appeal in April 2011. On 25 July 2011, the Appellant also submitted a petition for clemency to the President, which was rejected.

2 Subsequently, on 14 November 2012, the Singapore Parliament passed the Misuse of Drugs (Amendment) Act 2012 (Act 30 of 2012) which introduced the new s 33B into the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"). We set out the relevant provisions of s 33B of the MDA ("s 33B") below:

Discretion of court not to impose sentence of death in certain circumstances

33B.—(1) Where a person commits or attempts to commit an offence under section 5(1) or 7, being an offence punishable with death under the sixth column of the Second Schedule, and he is convicted thereof, the court —

(*a*) may, if the person satisfies the requirements of subsection (2), instead of imposing the death penalty, sentence the person to imprisonment for life and, if the person is sentenced to life imprisonment, he shall also be sentenced to caning of not less than 15 strokes; or

(*b*) shall, if the person satisfies the requirements of subsection (3), instead of imposing the death penalty, sentence the person to imprisonment for life.

(2) The requirements referred to in subsection (1)(*a*) are as follows:

(*a*) the person convicted proves, on a balance of probabilities, that his involvement in the offence under section 5(1) or 7 was restricted —

(i) to transporting, sending or delivering a controlled drug;

(ii) to offering to transport, send or deliver a controlled drug;

(iii) to doing or offering to do any act preparatory to or for the purpose of his transporting, sending or delivering a controlled drug; or

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

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

(3) The requirements referred to in subsection (1)(*b*) are that the person convicted proves, on a balance of probabilities, that —

(*a*) his involvement in the offence under section 5(1) or 7 was restricted —

(i) to transporting, sending or delivering a controlled drug;

Version No 1: 27 Oct 2020 (22:40 hrs)

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

3 The enactment of s 33B, in particular s 33B(2), led the Appellant to commence Criminal Motion No 17 of 2015 ("CM 17/2015") where he sought a re-sentencing on the basis that he fulfilled the requirements stated therein. In short, s 33B(2) of the MDA ("s 33B(2)") read with s 33B(1)(*a*) of the same allows the court to sentence a convicted drug trafficker to life imprisonment instead of the death penalty if he proves on a balance of probabilities that: (a) his involvement in the offence was limited to that stated in s 33B(2)(*a*) of the MDA (*ie*, he was merely a "***courier***"); and (b) if the Public Prosecutor issues a certificate to affirm that he has substantively assisted the Central Narcotics Bureau ("CNB") in disrupting drug activities. In *Rosman bin Abdullah v Public Prosecutor* [2015] SGHC 287 ("the GD"), the High Court judge ("the Judge") held that the Appellant had not fulfilled the two requirements, and therefore affirmed the death sentence which he had imposed

Version No 1: 27 Oct 2020 (22:40 hrs)

on the Appellant earlier at the trial. The present appeal is an appeal against this particular decision.

4 Before proceeding to set out the relevant background, it would be appropriate to note a couple of (significant) preliminary points that were raised.

Preliminary points

5 The first preliminary point relates to an issue that was raised in the Appellant's Petition of Appeal but which his counsel, Mr Low Cheong Yeow ("Mr Low"), stated he was *not* pursuing on behalf of his client, *viz*, the alleged unconstitutionality of s 33B(4) of the MDA ("s 33B(4)") inasmuch as it violated Art 93 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("Art 93").

6 Secondly, in his written submissions, the Appellant advanced a *new* point that was not raised in the court below: that he was suffering from an abnormality of mind at the material time within the meaning of s 33B(3)(*b*) of the MDA ("s 33B(3)(*b*)") and that this court therefore ought to remit this particular issue to the High Court for its decision. The significance of his bringing this new point is that, if the Appellant succeeds in establishing the requirements in s 33B(3) of the MDA ("s 33B(3)"), the court must, pursuant to s 33B(1)(*b*) of the MDA ("s 33B(1)(*b*)"), sentence him to life imprisonment instead of the death penalty. Notwithstanding the fact that Mr Low was not counsel for the Appellant in the court below, we find it disturbing that the Appellant is only raising this issue on appeal. This smacks of a drip-feed approach that might result in an abuse of the process of court. Henceforth, all applicants pursuant to the re-sentencing procedure under s 33B ***must*** indicate

Version No 1: 27 Oct 2020 (22:40 hrs)

whether they intend to rely upon s 33B(2) or s 33B(3) of the MDA – or both provisions – at first instance. This court will not hesitate to exercise its discretion to reject any belated reliance on either of these provisions should they only arise on appeal.

7 Mr Low sought to explain to this court during oral submissions the reasons for raising s 33B(3) on behalf of the Appellant only at this stage of the proceedings. Upon taking instructions from the Appellant, Mr Low stated that the Appellant had indicated that he felt that he was suffering from some mental condition at the time of the commission of the offence. It should be noted that a Report from the Institute of Mental Health ("IMH") dated 13 February 2013 ("the IMH Report") had, in fact, already been filed and served on the Appellant much earlier (on 6 May 2013), a point which Mr Low candidly acknowledged in his written submissions. More importantly, the IMH Report stated clearly that the Appellant was not suffering from any symptoms of mental disorder at the time of the commission of the offence. Nevertheless, Mr Low sought, on behalf of the Appellant, a review and assessment of the Appellant by Dr Munidasa Winslow ("Dr Winslow"), whose report (in Mr Low's view) had (contrary to the IMH Report) stated that the Appellant was in fact suffering from an abnormality of mind at the time of the commission of the offence. He is now therefore asking this court to remit the issue of the Appellant's mental state at the time of the commission of the offence to the High Court for determination.

8 Mr Low also argues that this court should not render any ruling on whether or not the Appellant was merely a courier until after the Judge had considered evidence of as well as determined the issue of the Appellant's mental state at the time of the commission of the offence, although he

Version No 1: 27 Oct 2020 (22:40 hrs)

(Mr Low) was prepared to argue on the courier issue at the hearing before us. However, as we pointed out to Mr Low during the hearing, the issue as to whether or not the Appellant was a courier is a ***threshold*** issue and that if this particular issue is decided against the Appellant, the present appeal would have to be dismissed, ***regardless*** of whether or not the Appellant is able to bring himself within the ambit of s 33B(3)(*b*) in relation to his mental state at the time of the commission of the offence (see above at [2]).

9 It bears repeating that, in order for the applicant concerned to avail himself or herself of s 33B(3), the applicant *must* satisfy *both* limbs therein (*viz*, s 33B(3)(*a*) and (*b*)) *cumulatively*. Put simply, a *failure* to satisfy *any one* of the limbs would *disentitle* the applicant from obtaining the benefit in s 33B(1)(*b*) (see above at [6]). This is clear not only from the express wording of s 33B(3) but also from the Parliamentary debates surrounding the enactment of this new provision where the following was stated (*Singapore Parliamentary Debates, Official Report* (12 November 2011) vol 89 ("the *12 November Parliamentary Debates*") (Teo Chee Hean, Deputy Prime Minister and Minister for Home Affairs ("Mr Teo")):

> Finally, I will speak about the changes to the death penalty regime. … Under the new section 33B, the court will have the discretion to decide whether to impose a sentence of life imprisonment and caning, or the death sentence *if the following two specific conditions are both met*. … *First*, the offender must prove, on a balance of probabilities, that his role in the offence is restricted only to that of a courier which, in essence, is a person whose role is confined to transporting, sending or delivering a controlled drug, and who does not play any other role within the drug syndicate.
>
> *Second, if having satisfied this first requirement*, in order for the mandatory death penalty not to apply, either the Public Prosecutor must have certified that the person has substantively assisted the CNB in disrupting drug trafficking activities within or outside Singapore, *or the person must prove, on a balance of probabilities, that he is suffering from*

Version No 1: 27 Oct 2020 (22:40 hrs)

> *such abnormality of mind that it substantially impaired his mental responsibility for his acts and omissions in relation to the offences he has committed.*
>
> [emphasis added]

10 It follows that *even if* the applicant is able to bring himself or herself within the second limb of this provision (*viz*, s 33B(3)(*b*)), this would *not* be sufficient to invoke s 33B(1)(*b*) successfully if he or she were unable to satisfy the first limb (*viz*, s 33B(3)(*a*)) by demonstrating that he or she was merely a courier. Indeed, Mr Low candidly admitted during oral submissions before this court that that was why he had not filed a second criminal motion for re-sentencing pursuant to s 33B as he was aware that the determination of the threshold issue pursuant to s 33B(3)(*a*) (*viz*, whether the Appellant was a courier) might well be determinative of the present appeal in the manner just stated.

11 In the circumstances, it was, in our view, appropriate to proceed with hearing the arguments with regard to the *threshold* issue as to whether or not the Appellant was a "courier" within the meaning of s 33B(3)(*a*) because his mental condition would be relevant, pursuant to s 33B(3)(*b*), ***if (and only if)*** this threshold issue is decided in his favour.

12 We should also note that counsel for the Respondent, Mr Ng Cheng Thiam ("Mr Ng"), objected strenuously to the admission of the report by Dr Winslow ("Dr Winslow's Report") on the basis that it was irrelevant, inadmissible and unreliable. We will deal with this objection in a later part of this judgment.

13 This would be an appropriate juncture at which to turn to the facts as well as the decision in the court below.

Version No 1: 27 Oct 2020 (22:40 hrs)

The facts

14 On 20 March 2009, CNB officers raided the Appellant's hotel room in Bencoolen Street and five packets of heroin were seized. This formed the subject matter of the capital charge which was brought against the Appellant.

15 Prior to his arrest, the Appellant had already been involved in one drug transaction which did not form the subject matter of the charge brought against him ("the First Transaction"). The facts surrounding the First Transaction are as follows. Three to four days before his arrest, the Appellant had been asked by one Mahadhir bin Chari (also known as "Mayday") to source for heroin. The Appellant complied and contacted a Malaysian supplier known as Ah Yong, who agreed to sell two pounds of heroin for $18,000. When Mayday told the Appellant that he only had $16,900, the Appellant informed Ah Yong of the same and it was subsequently agreed that Mayday would be given a three-day credit to pay the remaining $1,100. On the night of the transaction, the Appellant met Ah Yong's associate at a coffee shop and paid him the $16,900 while another associate concurrently passed Mayday the heroin at a housing block in Simei. Subsequently, the Appellant went to Mayday's flat in Simei where they used a weighing scale and empty packets to pack the heroin into 8g packets. The Appellant helped Mayday to arrange the heroin deal and pack the drugs as he owed Mayday money after a failed deal to buy methamphetamine. The Appellant also took two packets of heroin for sale after the First Transaction. According to the Appellant, he would receive the drugs at a cheaper price from Mayday and this would allow him "to get more profit and repay everything which [he] owe[d] 'Mayday' faster".

16 After the First Transaction, on 19 March 2009, Mayday again asked the Appellant to source for two pounds of heroin ("the Second Transaction").

Version No 1: 27 Oct 2020 (22:40 hrs)

Again, the Appellant called Ah Yong who quoted $8,500 for one pound of heroin. The Appellant relayed a series of messages between Mayday and Ah Yong and a price of $16,600 was eventually agreed upon. This time, however, the Appellant collected the heroin personally as Mayday was not feeling well. The Appellant, after collecting the money from Mayday, proceeded to a shopping centre in Bukit Timah where the Appellant passed the money to Ah Yong's associate in exchange for the heroin. The Appellant then went to Mayday's flat but there was no response at the door or to the Appellant's calls. He therefore returned to the hotel in Bencoolen with the drugs and it was there that he was arrested.

The decision below

17 The Judge first held that the Appellant was not simply a courier and therefore did not meet the first requirement encapsulated in s 33B(2)(*a*) of the MDA. The Judge found that the Appellant's conduct went beyond transporting, sending or delivery of drugs from one point to another. In this regard, the Judge took into account the Appellant's course of conduct in the First Transaction where he had sourced for the heroin and brokered the deal between Ah Yong and Mayday. Further, the Judge noted that the Appellant would assist Mayday in repacking the heroin and would also take heroin from Mayday to sell (see the GD at [17]−[18]).

18 In the Judge's view, the facts pertaining to the First Transaction were relevant to his evaluation of the role of the Appellant in the Second Transaction, in so far as the context and purpose surrounding both Transactions were similar. The Judge considered that in the Second Transaction, the Appellant was similarly asked to source for the heroin and he similarly brokered the deal between Ah Yong and Mayday as well. In this

Version No 1: 27 Oct 2020 (22:40 hrs)

regard, the Judge noted (see the GD at [21]) that "it was clear that the second transaction started in the same way as the first" and that "there was no evidence that his personal circumstances had changed such that he would have no further reason to help [Mayday] in the same way". The Judge also took into account that the Appellant had stated in his long statement that the reason he helped Mayday in the Second Transaction was likewise to get a discount when he received drugs from Mayday to sell (see the GD at [20]−[22]).

19 The Judge further found that even if the facts of the Second Transaction were examined in isolation, they still showed that the Appellant's role had exceeded that of a mere courier given that he played an active part in sourcing for the heroin and played the role of a middleman in the negotiations between Mayday and Ah Yong (see the GD at [23]).

20 In so far as the second requirement of having substantively assisted the CNB as encapsulated in s 33B(2)(*b*) of the MDA ("s 33B(2)(*b*)") was concerned, the Judge found that this was for the Public Prosecutor to decide and that the Public Prosecutor's determination in this regard could only be challenged on the basis of bad faith, malice or unconstitutionality, which had not been raised by the Appellant (see the GD at [29]).

21 The Judge also declined to accede to the Appellant's request to define the meaning of "substantively assisted" so that the Public Prosecutor could decide if the Appellant could receive a certificate of assistance after applying the elucidated meaning to the facts. The Judge noted that by providing a definition of "substantively assisted", the courts would in effect be interfering with the decision-making process of the Public Prosecutor (see the GD at [31]). Further, the Judge found that there was no basis to accept the particular

Version No 1: 27 Oct 2020 (22:40 hrs)

interpretation of "substantive assistance" which was advocated for by the Appellant (*ie*, there would be "substantive assistance" where an accused person provides information which is of "potential value" and it need not be assessed on the actual effectiveness of the information) (see the GD at [36]).

22 Accordingly, the Judge affirmed the death sentence imposed on the Appellant.

The parties' arguments

The Appellant's arguments

23 As already noted, at the hearing before us, the Appellant did not pursue the argument to the effect that s 33B(4) was unconstitutional as it violated Art 93. He has three principal arguments which were pursued in both his written and oral submissions to this court.

24 The *first* (and most crucial) argument is that the Appellant was only a "courier" within the meaning of s 33B ("Issue 1"). In particular, Mr Low argues, on behalf of the Appellant, that the Judge should not have taken into account the First Transaction in finding that the Appellant was not a courier. He submits that because the Appellant had not been charged for the First Transaction, it had no relevance in determining the Appellant's role in the Second Transaction, which was the subject matter of the proceeded charge. He takes the position that the Judge should not have assumed that the Appellant's purpose in carrying out the First and Second Transactions were the same (*ie*, that after collecting the drugs, he would help Mayday repack the drugs before taking some of the drugs for himself). He argues further that, taking into

Version No 1: 27 Oct 2020 (22:40 hrs)

account only the facts of the Second Transaction (which constituted the charge against the Appellant), the Appellant was merely a courier.

25 The *second* argument is that the court can – and should – define the phrase "substantively assisted" in s 33B(2)(*b*) ("Issue 2").

26 The *third* argument is one that we have already referred to earlier in this judgment: that this court should remit the issue as to whether the Appellant was suffering from an abnormality of mind at the time of the commission of the offence within the meaning of s 33B(3)(*b*) to the Judge for his decision ("Issue 3"). As also noted above, this particular argument will be of no avail to the Appellant if Issue 1 is decided against him.

The Respondent's arguments

27 The Respondent argues that the Appellant was clearly not a courier. In particular, during oral submissions before this court, Mr Ng stated that, even if the First Transaction was not taken into account, there was more than sufficient evidence for this court to conclude that the Appellant was not simply a courier in so far as the Second Transaction was concerned.

28 The Respondent argues further that the Judge was correct in declining to provide a definition of "substantive assistance" within the meaning of s 33B(2)(*b*) as the determination as to whether or not "substantive assistance" had in fact been provided by the accused lay solely within the discretion of the Public Prosecutor. Citing from the relevant Parliamentary Debates, Mr Ng argues that it was Parliament's intention that such an approach was necessary to ensure the operational effectiveness of the CNB. He also argues (again citing from the relevant Parliamentary Debates) that acceding to the

Version No 1: 27 Oct 2020 (22:40 hrs)

Appellant's argument would give rise to a floodgate of future applications to the court (which was never Parliament's intention in the first place).

29 In so far as the Appellant's third argument is concerned, the Respondent highlights, first, that the Appellant had never raised any allegation of any abnormality of mind during the hearing below, notwithstanding the fact that he had been represented by counsel at the time. Further, the Respondent submits that, in any event, the court should not accept the Appellant's contention that he was suffering from an abnormality of mind as Dr Winslow's Report was inadmissible and irrelevant (see above at [12]).

Our decision

Issue 1

30 The decision as to whether or not an applicant is a courier within the meaning of s 33B is ***a fact-sensitive one in which the court must pay close attention to both the facts as well as the context of the case at hand***. In this regard, the Judge laid down the following guidelines at [15]−[16] of the GD:

> ***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

Version No 1: 27 Oct 2020 (22:40 hrs)

> ("*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.*
>
> [emphasis added]

31 We agree with the Judge's observations as cited in the preceding paragraph. In the nature of things, it is impossible to lay down more specific guidelines simply because of the myriad permutations of fact situations that could possibly arise. In this regard, we also agree with the Judge that the list of relevant factors cannot be closed.

32 As is often the case, however, the difficulty lies in the *application* of the relevant guidelines to the facts at hand. In this regard, we will take the Appellant's case at its highest and disregard the facts as well as effect(s) of the First Transaction. Indeed, at the hearing before us, Mr Low pointed to the thorny difficulties surrounding the admissibility as well as probative value of what has been termed "similar fact evidence". However, it is well-established that there is no *blanket* rule against the admission of "similar fact evidence"; such evidence may be utilised in the *limited* manner envisaged within a *strict* application of, for example, ss 14 and 15 of the Evidence Act (Cap 97, 1997 Rev Ed) (see Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 5th Ed, 2015) at para 3.001). That this is so is evident from, for example, the decision of this court in *Tan Meng Jee v Public Prosecutor* [1996] 2 SLR(R) 178. Hence, for example, in so far as the present appeal is concerned, it could possibly have been argued that it was appropriate for the

Version No 1: 27 Oct 2020 (22:40 hrs)

court to take the First Transaction into account for the *limited* purpose of demonstrating a *specific* state of mind on the part of the Appellant to the effect that (as the Judge found at [22] of the GD) he did intend to assist Mayday in repacking the heroin for sale in the Second Transaction as well, especially when regard is also had to the fact that the First Transaction and the Second Transaction were *just a few days apart*. In this regard, s 14 of the Evidence Act and (in particular) Explanation 1 thereof are potentially relevant. Explanation 1 reads as follows:

> Explanation 1.—A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists not generally but in reference to the particular matter in question.

33 However, as we have already reiterated, we will take the Appellant's case at its highest and, to this end, will *disregard* the facts of the First Transaction and its possible effect(s) altogether. Indeed, the Judge himself was of the view that, *even if* he did *not* consider the facts as well as effect(s) of the First Transaction and had considered only the Second Transaction in isolation, he would still have found the Appellant's involvement in the Second Transaction to have gone *beyond* that of a mere "courier" within the meaning of s 33B. In this regard, it is imperative to, *inter alia*, examine closely the Judge's reasoning when considering the Second Transaction in isolation. He reasoned as follows (at [23]−[25] of the GD):

> 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

Version No 1: 27 Oct 2020 (22:40 hrs)

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.

[emphasis added in bold italics and underlined bold italics]

Version No 1: 27 Oct 2020 (22:40 hrs)

34 It will be immediately apparent from the paragraphs of the GD quoted above that the ***key*** paragraph is ***para 23***, which does not refer, whether directly or indirectly, to the First Transaction. Indeed, it should be noted that the Judge himself *commenced* that particular paragraph by noting that "***[i]n any event***, [the Appellant's] role had exceeded that of a courier ***even if*** the ***second transaction was examined by itself***" [emphasis added in bold italics and underlined bold italics]. It will also be immediately apparent from that particular paragraph that what prompted the Judge to find that the Appellant's conduct had made him ***more*** than a mere courier was, in the main, the fact that he had both ***sourced*** for the heroin concerned ***and*** had ***played an active part as a middleman or go-between with regard to negotiations between Mayday and Ah Yong***. In our view, the Judge was wholly justified in arriving at these findings. In this particular regard, Mr Ng helpfully brought our attention to the very pertinent paragraphs in the cautioned statement of the Appellant himself, which read as follows:

> 24 On 19 March 2009 at about 6 plus in the evening, 'Mayday' called me on my handphone which bears the number 81068486.1 cannot remember what number did 'Mayday' call from. It must be from either one of the four numbers which was shown to me earlier from my Nokia N73 handphone. ***During the conversation, 'Mayday' asked me to look for two pounds of Heroin. I then told him that I will try to call my friend 'Ah Yong'. I did not give 'Mayday' 'Ah Yong's number because only I can deal with 'Ah Yong' as he trust me. 'Mayday' will not be able to deal with 'Ah Yong' as 'Ah Yong' does not know 'Mayday'.***
>
> 25 After talking to 'Mayday', ***I then called 'Ah Yong' at the same number which I called previously. During the conversation, I told 'Ah Yong' that I needed two pounds of Heroin.*** 'Ah Yong' then quoted me S$8500 for one pound of Heroin. This price was agreed during the first transaction that we have with 'Ah Yong'. During the first transaction conversation, 'Ah Yong' had already told me that he will charge me S$8500 per pound if I get from him on subsequent occasions. 'Ah Yong' also tell me that I have got to pay up the S$1100 which I owe previously before the second deal can go

Version No 1: 27 Oct 2020 (22:40 hrs)

> through. ***After that I then called 'Mayday' and inform him that he will need to pay S$17000 for two pounds of Heroin and also have to clear up what he owe for the previous consignment before the second deal can go through. 'Mayday' told me that he is only willing to pay S$16500. I then called back 'Ah Yong' and convey the message to him. However, 'Ah Yong' is not agreeable to the price, and he told me the best price he can give me is S$16600. I then convey this message back to 'Mayday'. 'Mayday' was not agreeable to paying that amount and he say that he want to cancel the Heroin deal. I then called 'Ah Yong' back and convey this message. However, 'Ah Yong' told me that they had already packed the Heroin in Malaysia and is on the way to Singapore. As such, I then called up 'Mayday' and inform him about this. I also told 'Mayday' that the deal cannot be cancel already, 'Mayday' then agreed to take the two pounds of Heroin for S$16600. 'Mayday' then asked me to go to his house to get the S$1100 to clear what was owe during for the last consignment. After collecting the S$1100 at 'Mayday's' house, 'Mayday' informed me to go to his house again at 11 plus in the night to collect the money for the Heroin. After this, I then went to 'Raffles City' to pay the same Chinese man the money which we owe 'Ah Yong' for the previous transaction. For this deal I made a lot of phone calls between 'Mayday' and 'Ah Yong'. I cannot remember exactly how many calls I made to them.***
>
> [emphasis added in bold italics and underlined bold italics]

35 In our view, it is clear, from the Appellant's own words as quoted in the preceding paragraph that he did (as the Judge found at [23] of the GD) not only actively source for the heroin in question but also actively participated in negotiations as a middleman or go-between with regard to the price to be paid for the heroin as well as the terms of delivery of the heroin between Ah Yong as seller and Mayday as buyer.

36 It is true that, on a ***literal*** reading of the aforementioned paragraphs of his cautioned statement, the Appellant had simply been involved in passing messages. However, in our judgment, he was *no mere conduit pipe*. Bearing in

Version No 1: 27 Oct 2020 (22:40 hrs)

mind the need to strictly construe the question of whether a particular act is necessary for the work of a "courier" (see above at [30]), in our view, *it could not be said that he was performing acts which were merely incidental in the course of transporting, sending or delivery of drugs*. On the present facts, not only did he *suggest, and initiate contact with, the drug supplier* (*ie*, Ah Yong), he was *also systematically involved in helping to negotiate the terms of the Second Transaction*. This clearly went ***beyond*** the role of a "courier" as envisaged under s 33B.

37 In the circumstances, the Appellant's arguments with regard to Issue 1 are without merit and he therefore fails to meet the threshold requirement of demonstrating that he was merely a courier.

Issue 2

38 As already noted, this particular issue relates to the Appellant's argument that the court can – and should – define what the phrase "substantively assisted" in s 33B(2)(*b*) means. It is important at the outset to note that this concept of "substantive assistance" pertains to assisting ***the CNB "in disrupting drug trafficking activities within or outside Singapore"***. The ***plain language*** of s 33B(2)(*b*) could not, in our view, be clearer ***in its context and import***. Indeed, it is of the first importance to point out, right at the outset, that this particular provision ***relates to subject matter that is clearly beyond the jurisdiction and power of the courts***. Put simply, it concerns the ***extra-legal situation relating to the CNB's disruption of drug trafficking activities both within as well as outside Singapore***. Such a situation pertains to ***quintessentially operational matters that concern the CNB, and the CNB alone***. Looked at in this light, it would, in our view, be ***wholly inapposite*** for ***the courts, in the exercise of their judicial power***, to even attempt to define

Version No 1: 27 Oct 2020 (22:40 hrs)

what the phrase "substantively assisted" in s 33B(2)(*b*) should be. Indeed, as the ***language*** of s 33B(2)(*b*) ***makes clear***, whether or not substantive assistance has, in fact, been rendered to the CNB within the meaning and scope of that particular provision is to be determined by ***the Public Prosecutor***. This is the short – and in our view – definitive response to the Appellant's argument that is, with respect, a ***non-starter*** in the circumstances.

39 At this juncture, we pause to make an obvious point. However, it is necessary to do so because, towards the end of oral submissions before this court, the Appellant, through Mr Low, made the point most strenuously to the effect that he had furnished substantive assistance to the CNB and was therefore entitled to receive a certificate pursuant to s 33B(2)(*b*). Whilst we understand that the Appellant might ***subjectively*** believe that he had rendered substantive assistance to the CNB pursuant to this particular provision, this would ***not necessarily*** entitle him to a certificate of substantive assistance if ***the Public Prosecutor*** was of the view that there was, in fact, ***no*** substantive assistance rendered within the meaning of s 33B(2)(*b*). Indeed, as this court has observed in *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222 at [44]−[48]:

> 44 It is not entirely clear what the Appellant means by "sufficient information". In making this argument he refers to a portion of his examination-in-chief during the criminal trial where he stated that he would have given CNB any information he had pertaining to the drug syndicate he was dealing with. Therefore, we understand him to be arguing that he should be given the substantive assistance certificate because he had been forthcoming in disclosing all he knew to CNB.
>
> 45 It is abundantly clear from the Parliamentary debates at the Second Reading of the Bill that an offender's good faith cooperation with CNB is not a necessary or sufficient basis for the PP to grant him a certificate of substantive assistance. The Minister moving the Bill stated that "[a]ssistance which does

Version No 1: 27 Oct 2020 (22:40 hrs)

not enhance the enforcement effectiveness of CNB will not be sufficient" (*Singapore Parliamentary Debates, Official Report* (12 November 2012), vol 89 (Mr Teo Chee Hean, Deputy Prime Minister and Minister for Home Affairs)). Rather, the certificate would only be granted when the offender's assistance yields actual results in relation to the disruption of drug trafficking.

46 The question of whether the offender had cooperated with CNB in good faith is an irrelevant consideration because the purpose of giving the court the discretion to sentence "couriers" (a term used during the Parliamentary debates to refer to persons whose involvement in the trafficking offence is limited to those acts enumerated in s 33B(2)(*a*) of the MDA) who have rendered substantive assistance to CNB to life imprisonment and caning instead of death is to enhance the operational effectiveness of CNB. It was thought that providing an incentive for offenders to come forward with information would enhance the operational effectiveness of CNB in two ways. First, it would give CNB an additional source of intelligence to clamp down on drug trafficking activities. Second, it would disrupt drug trafficking syndicates' established practices and create an atmosphere of risk for the members of these syndicates as there would be uncertainty as to whether an apprehended courier would reveal all their secrets. …

47 The fact that an offender cooperates in good faith with CNB in and of itself does not enhance CNB's operational effectiveness. The Minister for Law explained this point in the following manner (*Singapore Parliamentary Debates, Official Report* (14 November 2012), vol 89 (Mr K Shanmugam, Minister for Law)):

> Some Members have asked, would it be better to say that the courier has done his best, that he has acted in good faith − should he not qualify. …
>
> 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

Version No 1: 27 Oct 2020 (22:40 hrs)

> and you know what will happen to the deterrent value. Operational effectiveness will not be enhanced. …
>
> 48 In the premises, we do not accept the Appellant's first argument. In fact, the PP would be acting *ultra vires* if he were to exercise his discretion under s 33B(2)(*b*) of the MDA in favour of an offender simply on the basis that he was forthcoming in disclosing all he knew to CNB even though the information he gave did not lead to the actual disruption of drug trafficking activities within or outside Singapore.

40 To return to the reasoning encapsulated above at [39], such reasoning was, in fact, elaborated upon in more detail by the Judge in the court below. In particular, the Judge referred to ***the relevant Parliamentary Debates*** during the Second Reading of the Misuse of Drugs (Amendment) Bill (No 27 of 2012). He referred, first (in the GD at [28]), to the following observations by Mr Teo in the *12 November Parliamentary Debates*, where Mr Teo had stated 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.

41 The issue as to whether the courts should decide on, or provide criteria for determining, whether an accused person had provided "substantive assistance" was canvassed in the Parliamentary debates. The Minister for Law,

Version No 1: 27 Oct 2020 (22:40 hrs)

Mr K Shanmugam, made the following observations (see *Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89 ("the *14 November Parliamentary Debates*")):

> Next, on the issue of who decides cooperation ***and by what criteria***. ***The Bill provides for the Public Prosecutor to assess whether the courier has substantively assisted CNB***.
>
> I think Ms Sylvia Lim, Mr Pritam Singh, Mrs Chiam and Ms Faizah Jamal have concerns here. Their view is: it is an issue of life and death – the discretion should lie with the courts to decide on cooperation.
>
> …
>
> 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.
>
> [emphasis added in bold-italics]

42 The observations cited in the preceding paragraph underscore the point made earlier to the effect that it is for *the Public Prosecutor* to determine whether substantive assistance has been provided in the case concerned. More importantly, the Judge also elucidated the negative developments which could result if the courts attempted to define "substantive assistance" (see the GD at [32]−[35]):

Version No 1: 27 Oct 2020 (22:40 hrs)

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:
>
> (a) the upstream and downstream effects of any information provided;
>
> (b) the operational value of any information provided to existing intelligence; and
>
> (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.

Version No 1: 27 Oct 2020 (22:40 hrs)

> 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. …

43 We agree with the reasoning of the Judge as set out above as well as with the manner in which he distinguished the Singapore position from that in the United States and New Zealand (see the GD at [36]−[40] and [41]−[43], respectively).

44 For the reasons set out above, we find no merit in the Appellant's arguments in so far as Issue 2 is concerned.

Version No 1: 27 Oct 2020 (22:40 hrs)

Issue 3

45 As already noted above, in light of our decision with regard to *Issue 1*, Issue 3 is moot inasmuch as evidence of the Appellant's mental condition at the time of commission of the offence will not suffice to avail the Appellant of s 33B(1)(*b*) as he has not demonstrated that he satisfies the threshold requirement set out in s 33B(3)(*a*).

46 However, ***even if*** the Appellant satisfies the threshold requirement set out in s 33B(3)(*a*), we are of the view that he would ***not***, ***in any event***, satisfy the requirement set out in s 33B(3)(*b*). At this juncture, it would be apposite for us to make certain observations about the exception under s 33B(3)(*b*). Section 33B(3)(*b*) is, in substance, a reproduction of what is the doctrine of diminished responsibility to a charge of murder pursuant to Exception 7 to s 300 of the Penal Code (Cap 224, 2008 Rev Ed). *However*, s 33B(3)(*b*) must be read and applied *within the context of s 33B in general and s 33B(3) in particular*. Put simply, s 33B(3)(*b*) is ***not, in and of itself,*** of ***general or (more precisely) standalone*** application (***unlike*** a ***general*** defence) inasmuch as ***the mere demonstration that the applicant possessed an abnormality of mind within the meaning of this provision will not avail the applicant***, as noted above, ***except to (and only to) the extent*** *that his involvement in the offence concerned was as a "courier" within the meaning of s 33B(3)(*a*)*. In this regard, s 33B(3)(*b*) is not unlike Exception 7 to s 300 of the Penal Code which similarly does not operate as a general defence. In other words, s 33B(3) encompasses ***a very limited exception*** inasmuch as Parliament was not minded, as a matter of ***policy*** , to extend the benefit of s 33B(1)(*b*) to applicants whose involvement in the offence concerned went *beyond* that of a courier, ***regardless*** of their mental condition. It should also be noted that the

Version No 1: 27 Oct 2020 (22:40 hrs)

exception should be construed ***narrowly***, as is evident from the observations made by Mr Teo during the Parliamentary debates surrounding the enactment of s 33B(3)(*b*) (see the *14 November Parliamentary Debates*):

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

47 With the above considerations in mind, we turn now to consider the content of Dr Winslow's Report. Dr Winslow's Report states that "[the Appellant's] results indicated that he ***likely*** *meets* diagnostic criteria for ADHD [*viz*, Attention Deficit Hyperactivity Disorder]" [emphasis added] and that the results "also indicated significant problems with self-concept, learning difficulties, inattentive symptoms, and restlessness consistent with his self-report". *However*, *notwithstanding* the fact that it was initially stated that the Appellant only "***likely*** *meets* diagnostic criteria for ADHD", the Report proceeds (in the very next paragraph) to state a ***definitive*** diagnosis for ADHD as follows:

> 18 In our opinion. Mr. Rosman met diagnostic criteria for **Attention Deficit Hyperactivity Disorder, Predominantly inattentive presentation, Severe** (ADHD; DSM-V; 314.00) at

Version No 1: 27 Oct 2020 (22:40 hrs)

> the material time. Mr. Rosman reported (Criterion A) a persistent pattern of inattention and hyperactivity-impulsivity that has interfered with his functioning and development as characterized by; (Alb) often has difficulty sustaining attention in tasks and remaining focused; (Ale) has difficulty organizing tasks and activities; (Alf) often avoids engaging in tasks that require sustained mental effort; (Alh) is easily distracted by extraneous stimuli; and (Ali) is often forgetful in daily activities. Mr. Rosman also reported (A2a) fidgeting, squirming in seat; (A2c) feeling restless; (A2e) is often 'on the go'. Mr. Rosman's symptoms were present prior to 12 years of age (Criterion B), and his symptoms are present in two or more settings including home, school, work, and with relatives (Criterion C). Mr. Rosman's symptoms have interfered with and reduced the quality of his social, academic, and occupational functioning (Criterion D). His symptoms do not occur exclusively during the course of schizophrenia or another psychotic disorder and are not better explained by another mental disorder. [Bold font in original]

48 The Report proceeds to state, with reference to *the Appellant's history of drug abuse*, as follows:

> 19 In our opinion Mr. Rosman also met diagnostic criteria for **Stimulant Use Disorder, Amphetamine-Type Substance, Severe (DSM-V; 304.40)** at the material time. He also met diagnostic criteria for **Sedative Use Disorder, Severe (DSM-V; 304.10)** at the material time. Mr. Rosman's pattern of methamphetamine (ice) and sedative (Erimin) use (Criterion A) led to clinically significant impairment and distress as manifested by the following within a 12 month period: (A1) stimulant and sedative taken in larger amounts over a longer period of time that was intended; (A2) persistent desire and unsuccessful effort to cut down or control his stimulant and sedative use; (A3) a great deal of time was spent in activities necessary to obtain the stimulant and sedative; (A4) strong cravings and desires to use the stimulants and sedatives; (A6) continued stimulant and sedative use despite having persistent and recurrent social and interpersonal problems exacerbated by the use; (A8) recurrent use of stimulants and sedatives in situations that are physically hazardous; (A9) continued use despite knowledge of having physical or psychological problem that is exacerbated by use; (A10) tolerance defined by a) markedly increased amount of stimulants and sedatives to achieve desired effect; (All) withdrawal manifested by characteristic withdrawal symptoms.

Version No 1: 27 Oct 2020 (22:40 hrs)

> 20 Mr. Rosman's long-term polysubstance use history from a very young age is likely due to a combination of factors including underlying low IQ and learning difficulties exacerbated by undiagnosed *and* untreated ADHD, long-term physical abuse and neglect from early childhood, and the resulting subsequent stunted emotional and cognitive development.
>
> 21 Mr. Rosman's tendency towards using substances from an early age is extreme but somewhat typical for an individual with his developmental trajectory. He has developed a core belief of inadequacy, lack of self-esteem and self-confidence, and chronic low-mood that has been masked by a lifetime of coping with substances.
>
> [Bold font in original; emphasis added in italics]

49 Dr Winslow's Report then ***concludes*** as follows:

> 22 Mr. Rosman was assessed to be **of sound mind and fit to plead**. His underlying ADHD symptomology, low IQ, and stunted emotional development would have ***contributed to*** the commission of his offences. Mr. Rosman's difficulties controlling his impulses, inattention, and long-term need for substances to dull his emotional pain from a childhood of abuse were significant factors that predisposed and perpetuated his substance use. It is ***also likely*** that his heavy methamphetamine use and dependence at the time of the offenses ***would have*** impacted his judgement [*sic*] and impulse control. [Bold font in original; emphasis added in bold italics]

50 Leaving aside the point (as noted above at [47]) that there appears to be an inconsistency in the level of definitiveness in the diagnosis by Dr Winslow of the Appellant with regard to ADHD, even accepting that particular diagnosis, there is, first, *no clear connection* established between the diagnosis of ADHD on the one hand and the diagnosis of Stimulant Use Disorder as well as Sedative Use Disorder on the other. Put simply (and with respect), the connection (if any) is ***extremely general and vague***.

Version No 1: 27 Oct 2020 (22:40 hrs)

51 More importantly, perhaps, the ***conclusion*** of the Report (reproduced above at [49], and which, by its very nature, is of ***crucial importance***) is, with respect, ***also extremely general and vague – at least in so far as it purports to be relevant to the satisfaction of the criterion laid down in s 33B(3)(b)***.

52 In so far as the Appellant's alleged ***ADHD*** condition is concerned, it is true that the phrase "contributed to" is used in Dr Winslow's Report in relation to the commission of the offence for which he was charged. However, in our judgment, the use of this particular phrase does not sufficiently explain how and to what extent this condition contributed to the commission of the offence; put simply, we fail to see a causal link between the Appellant's alleged ADHD condition and the offences which he committed. In our view, such a broad and sweeping conclusion does not come close to controverting the more contemporaneous IMH Report, wherein it was concluded that first, the Appellant "does not have any mental disorder currently or at around the material time [*ie*, the time of the offence]" and secondly, "he does not have an 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) that substantially impaired his mental responsibility for his act of drug trafficking". It should be noted that the latter finding was framed in terms of the legal test for establishing whether a defence of diminished responsibility may be made out which, as noted above (at [46]), is similar to the inquiry under s 33B(3)(*b*).

53 More specifically, whilst there is ***also*** a subsequent reference to the Appellant's ***drug use and dependence*** in Dr Winslow's Report, the conclusion drawn is that "[i]t is ***also likely*** that his [the Appellant's] heavy methamphetamine use and dependence at the time of the offenses [*sic*] ***would***

Version No 1: 27 Oct 2020 (22:40 hrs)

have impacted his judgement [*sic*] and impulse control" [emphasis added in bold italics and underlined bold italics]. This last-mentioned conclusion is, with respect, ***not only extremely general and vague but is also speculative in nature***. Indeed, this is why the Respondent (in relation to the point made in the report with regard to the Appellant's drug use and dependence) argues in his Supplementary Submissions – and we agree – that Dr Winslow's Report is ***irrelevant***.

54 The Respondent also argues – persuasively, in our view − that the IMH Report and the Appellant's own investigation statements as well as the evidence adduced at his trial clearly demonstrate that the Appellant exhibited clarity of mind at or around the time of the commission of the offence. For example, the Respondent points to certain excerpts of the Appellant's testimony under cross-examination where he explained his decision not to implicate Mayday in a cautioned statement he had given to a CNB officer shortly after his arrest:

> A: … I got no reason to implicate Mayday. I was thinking that if I inform the officer at that time that the drugs belong to Mayday, I will still be charged. There was no difference, Your Honour. And also, I did not implicate Mayday because I do not want to add to my problem because Mayday will look for me. Any time, he can take revenge on me. If I betray Mayday, I may face problem in prison. I may have enemies in prison. So when I informed the officer, when I gave this statement to the officer, I was thinking that this was not going to be a capital charge. So, I take responsibility to it and I do not implicate Mayday.

55 The Respondent further relies on the awareness of the Appellant as to what was transpiring when he agreed to be involved in the Second Transaction:

Version No 1: 27 Oct 2020 (22:40 hrs)

> Court: Yes. Why was there a need for you to be the middleman? Why couldn't Ah Yong speak to Mahadhir directly?
>
> Witness: Because, Your Honour, Mahadhir is the boss. So he just instructed me to do all these and if I was caught, I would be the one who had---who carry this burden.
>
> Court: No, but these are negotiations on price. … Why don't you let the two bosses speak to each other? …
>
> Witness: Because Mayday does not want to expose himself, Your Honour.
>
> Court: Meaning to the police or to Ah Yong?
>
> Witness: To both.

56 In addition to the above, we note in his further statement, dated 23 March 2009, his thought process in deciding to embark on his criminal behaviour:

> 36 … I do know that Heroin is illegal and this amount is a big amount which will led to death penalty but I was desperate in repaying 'Mayday' the debt. I got no choice but to do the Heroin run.

In our judgment, the above shows that the Appellant did weigh the costs and benefits of embarking on this criminal conduct and made the conscious and informed decision to do so, notwithstanding that he was fully apprised of the consequences of his actions. It should also be noted that the debt which the Appellant owed to Mayday did not arise as a result, for example, of the Appellant having to satiate his drug addiction but was as a result of a botched deal in early 2009 when the Appellant went to Malaysia to source Ice for both him and Mayday.

57 We note that in the recent Singapore High Court decision of *Phua Han Chuan Jeffery v Public Prosecutor* [2016] 3 SLR 706 ("*Jeffery Phua*"), Choo Han Teck J held (at [15]) that even if the applicant knew that what he was

Version No 1: 27 Oct 2020 (22:40 hrs)

doing was wrong and risky, he may still lack the will to resist the commission of the offence and a man may know what he is doing and intend to do it and yet suffer from such abnormality of mind as substantially impairs his mental responsibility. In that case, Choo J found (at [16]) that although the accused person knew that he was committing an illegal act, he still fell within the ambit of s 33B(3)(*b*) because the abnormality of mind had "an influence on the applicant's ability to resist the act in question". It should be noted, however, that the medical experts in that case had both diagnosed the accused person with a Persistent Depressive Disorder and a Ketamine Dependence and it was on this basis that Choo J had found (at [17]) that the accused person was probably incapable of implementing any internal rationality that might have dissuaded him from committing the offence.

58 In our view, what separates the present case from that of *Jeffery Phua* is that Dr Winslow's Report is, ***at best,*** as noted above, ***neutral*** and does not even support the assertion that the Appellant was suffering from such abnormality of mind that impaired his mental responsibility for his criminal act.

59 ***More importantly***, given the nature of the findings in Dr Winslow's report, we find that it cannot even be said that they are ***inconsistent with those in the IMH Report***. There was therefore nothing substantive that could, in fact, have been remitted to the High Court in order for (as the Appellant requested) further evidence to be taken. Indeed, it was ***not even new evidence*** that could pass muster under the established legal principles – not least because it would not, as already explained, have had an important influence on the outcome of the case.

Version No 1: 27 Oct 2020 (22:40 hrs)

60 To summarise, Issue 3 is moot in light of our decision on Issue 1. In any event, Dr Winslow's Report is, at best, neutral and is of no avail to the Appellant as it is not inconsistent with the IMH Report.

Conclusion

61 For the reasons set out above, the appeal is dismissed.

Chao Hick Tin	Andrew Phang Boon Leong	Judith Prakash
Judge of Appeal	Judge of Appeal	Judge of Appeal

Low Cheong Yeow (Tito Isaac & Co LLP), Daniel Koh Choon Guan (Eldan Law LLP), Dawn Tan Ly-Ru and Adriel Chia (ADTvance Law LLC) for the appellant;
Ng Cheng Thiam and Chan Yi Cheng (Attorney-General's Chambers) for the respondent.

Version No 1: 27 Oct 2020 (22:40 hrs)