IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 222

Criminal Motion No 16 of 2015

Between

NAGAENTHRAN A/L K DHARMALINGAM

… *Applicant*

And

PUBLIC PROSECUTOR

… *Respondent*

JUDGMENT

[Criminal Law] — [Statutory offences] — [Misuse of Drugs Act] — [Discretion of court not to impose sentence of death when offender was suffering from an abnormality of mind]

[Criminal Procedure and Sentencing] — [Sentencing] — [Mentally disordered offenders]

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Nagaenthran a/l K Dharmalingam
v
Public Prosecutor

[2017] SGHC 222

High Court — Criminal Motion No 16 of 2015
Chan Seng Onn J
11 April; 2 June 2017

14 September 2017 Judgment reserved.

Chan Seng Onn J:

Introduction

1 This judgment deals with Criminal Motion No 16 of 2015, which is an application by Nagaenthran a/l K Dharmalingam ("the applicant") to be re-sentenced to life imprisonment under s 33B(1)(*b*) read with s 33B(3) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"), having previously been convicted and sentenced to death ("re-sentencing application").

2 This re-sentencing application was heard over a single day on 11 April 2017. The parties each led evidence from their respective psychiatric experts: the applicant led evidence from Dr Ung Eng Khean ("Dr Ung"), a psychiatrist from Adam Road Medical Centre; the respondent led evidence from Dr Koh Wun Wu Kenneth Gerald ("Dr Koh"), a senior consultant from the Department of General and Forensic Psychiatry at the Institute of Mental Health ("IMH").

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As will be evident from my analysis below, the conflicting expert opinions of Dr Ung and Dr Koh on the mental condition of the applicant at the time of the offence constitute the very crux of the dispute in these proceedings.

3 At the close of proceedings, I reserved judgment.

Procedural history

4 The applicant had been charged under s 7 of the MDA for importing not less than 42.72g of diamorphine on 22 April 2009. On 22 November 2010, I found the applicant guilty following a trial, and sentenced him to death as mandated by s 33 read with the Second Schedule to the MDA: *Public Prosecutor v Nagaenthran a/l K Dharmalingam* [2011] 2 SLR 830 ("the Trial Judgment"). He appealed against his conviction. The appeal was dismissed by the Court of Appeal on 27 July 2011: *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2011] 4 SLR 1156 ("the CA Decision").

5 The applicant's execution was stayed in the midst of the government's review of the mandatory death penalty regarding drug offences. On 14 November 2012, the Singapore Parliament passed the Misuse of Drugs (Amendment) Act 2012 (Act 30 of 2012) ("the Amendment Act"). The Amendment Act introduced s 33B of the MDA, which confers upon the court the discretion to sentence an offender convicted of a capital drug charge to life imprisonment if:

> (a) his involvement in the offence was merely as a courier as described under s 33B(2)(*a*) *and* he has been issued a certificate of substantive assistance by the Public Prosecutor within the meaning of s 33B(2)(*b*) (s 33B(1)(*a*) read with s 33B(2) of the MDA) ("the substantive assistance provision"); or

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(b) his involvement in the offence was merely as a courier as described under s 33B(3)(*a*) *and* he was suffering from an abnormality of mind within the meaning of s 33B(3)(*b*) (s 33B(1)(*b*) read with s 33B(3) of the MDA) ("the abnormality of mind provision").

Section 27(6) of the Amendment Act allows persons who had been convicted and sentenced to death under the MDA prior to the amendments, and had their appeals dismissed, to be re-sentenced in accordance with s 33B.

6 On 10 December 2014, the Prosecution informed the court and the then-counsel for the applicant that the Public Prosecutor would *not* be issuing a certificate of substantive assistance to the applicant. Despite this, the applicant filed the present application on 24 February 2015 to seek to be re-sentenced to life imprisonment under the substantive assistance provision.

7 The applicant also commenced various other applications. On 27 March 2015, the applicant commenced Originating Summons No 272 of 2015, seeking judicial review of the Public Prosecutor's decision not to grant the certificate ("the judicial review application"). The proceedings for the judicial review application have been adjourned pending the outcome of the present re-sentencing application. On 8 January 2016, the applicant filed Criminal Motion No 2 of 2016 seeking, *inter alia*, a declaration that s 33B of the MDA is unconstitutional and contrary to the rule of law ("the constitutional challenge"). The Court of Appeal dismissed the constitutional challenge on 2 December 2016: *Prabagaran a/l Srivijayan v Public Prosecutor and other matters* [2017] 1 SLR 173.

8 During the hearing for the re-sentencing application on 11 April 2017, the parties agreed to proceed on the basis that the applicant was seeking to be

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re-sentenced to life imprisonment under the abnormality of mind provision. The applicant has since, with my leave, amended the Notice of Motion on 7 August 2017 to update the grounds of the re-sentencing application to reflect this position.

Background facts

9 The facts surrounding the offence have previously been compendiously summarised by the Court of Appeal when the Trial Judgment went on appeal. I thus gratefully adopt the facts as restated in the CA Decision and set out the portions that are pertinent to the present analysis as follows (the CA Decision at [5]–[15]):

> 5 The [applicant] testified that he met a Chinese man by the name of King on 21 April 2009, and asked King for a loan of RM500 in order to pay for his father's heart operation on 23 April 2009 in Kuala Lumpur. King agreed. The next day, 22 April 2009, the [applicant] met King at a food shop in Johor Bahru at about 6.00pm. King handed the [applicant] what the [applicant] believed to be a packet of food together with a transparent plastic packet of curry, telling the [applicant] to deliver those items to a person in Woodlands, Singapore. King gave the [applicant] a telephone SIM card, and asked the [applicant] to put the said card into his phone and activate it upon entering Singapore. King also told the [applicant] to wait in front of a designated "7-Eleven" convenience store, and to give the items to a person in a "dark blue Camry". After the delivery, the [applicant] was to return to Malaysia. King told the [applicant] that he had to complete the delivery of the items before he would lend the RM500 to the [applicant].
>
> 6 Just as the [applicant] was about to leave with the said items, King invited him into his (King's) car, where he told the [applicant] that he had changed his mind and that he needed the [applicant] to deliver something else instead. King handed the [applicant a packet wrapped in newspaper ("the Bundle")] … King said that the Bundle contained "company product" or "company spares". King told the [applicant] that the Bundle had to be tied to the [applicant's] thigh for the delivery. According to the [applicant], he initially resisted King's request, but King slapped and punched him, threatening that if he refused to deliver the Bundle, King would "finish" and "kill" Shalini (the [applicant's] girlfriend). King made the [applicant] remove one

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side of his trousers and raise his leg such that it rested on the dashboard of King's car. Thereafter, King tied the Bundle around the [applicant's] left inner thigh with yellow tape. King again instructed the [applicant] to go to Singapore and put the SIM card into his phone, and wait in front of the designated "7-Eleven" convenience store. As before, King informed the [applicant] that a "dark blue Camry" would come, that the person in the said Camry would be wearing blue-coloured spectacles, and that the [applicant] was to hand the Bundle to that person.

7 King then sent the [applicant] to the [applicant's] apartment to prepare for the delivery trip. When the [applicant] alighted from King's car, the [applicant] telephoned Kumarsen and told Kumarsen that he had to take some money to Singapore. Kumarsen agreed to give him a ride. The [applicant] returned to his room in the apartment and put on a pair of trousers which belonged to one Tamilselvam (Kumarsen's nephew, who was staying in the [applicant's] room). Because Tamilselvam was much bigger sized than the [applicant], the [applicant] had to use a belt to secure the fit. According to the [applicant], he wore Tamilselvam's trousers because King had told him to wear bigger trousers as it was important that what was in the Bundle was not damaged. Although Shalini, Tamilselvam and one Ramesh were in the apartment at that time, the [applicant] testified that he did not tell any of them what King had done or said to him.

8 Kumarsen rode his motorcycle, with the [applicant] riding pillion, to the Woodlands Immigration Checkpoint. At about 7.45pm, the [applicant] and Kumarsen were stopped at the Woodlands Immigration Checkpoint by the passport screening officer and taken to an office. In the office, the [applicant] called Shalini. The [applicant] and Kumarsen were thereafter brought to different rooms by various officers of the Central Narcotics Bureau ("CNB").

9 Staff Sergeant Syed Anis Bin Syed Omar Alsree ("SSgt Anis"), a CNB officer, commenced the strip search of the [applicant] … During the strip search, the [applicant] was asked by SSgt Anis to remove his trousers, which he did. At this point, SSgt Anis saw the Bundle secured to the [applicant's] left inner thigh with yellow tape over the red pair of boxer briefs that he was wearing. Later, Sergeant Muhd Zaid Bin Adam and Sergeant Shahrulnizam s/o Abdullah ("Sgt Shahrulnizam") entered the room and SSgt Anis left the room. Sgt Shahrulnizam spoke to the [applicant] in Tamil, handcuffed him, and then proceeded to remove the Bundle from the [applicant's] thigh. While doing so, part of the Bundle's newspaper wrapping tore, enabling Sgt Shahrulnizam to see that the Bundle contained a transparent plastic bag with white

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granular substance in it. The white granular substance was subsequently analysed and found to contain not less than 42.72g of heroin.

…

12 At about 12.10am on 23 April 2009, Sgt Shahrulnizam handed the seized exhibits to Sergeant Vasanthakumar Pillai s/o M M Iruthaya Nathen Pillai ("Sgt Vasanthakumar") for the purpose of recording statements from the [applicant] and Kumarsen … Sgt Vasanthakumar recorded Kumarsen's statement first, and later recorded the [applicant's] statement between 1.20am and 1.35am. The material portions of the [applicant's] statement recorded by Sgt Vasanthakumar read:

> Q1) What is this? (Pointing to a zip lock Bag consisting of 1 big packet of white granular substance, Crushed Newspaper & yellow Tape)
>
> A1) Heroin.
>
> Q2) Whom does it belong to?
>
> A2) It belongs to my Chinese friend who goes by the name of king who strapped it on my left thigh.
>
> Q3) Why did he strapped it on your left Thigh?
>
> A3) He Strapped it on my left thigh is because it was for my safety and no one will find it.
>
> Q4) Whom is it to be delivered to?
>
> A4) It is to be delivered to one Chinese recipient who will be driving a dark blue Camry and he will be meeting me in front of [the] 7-11 store at Woodlands Transit.
>
> Q5) Why do you have to deliver the Heroin?
>
> A5) I have to deliver [the] Heroin is because I owe king money & he promised to pass me another five hundred dollars after my delivery.

…

15 At about 6.02am on 23 April 2009, Assistant Superintendent Sivaraman Letchumanan recorded the [applicant's] cautioned statement, the material part of which is as follows:

> I was forced and sent into Singapore. I had borrowed money on interest. My father is undergoing an operation this morning. I went and asked the same person an additional RM500/-. And he told me to deliver something. First he gave me a package with Roti

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> Channai and gravy. As I was leaving the shop, he called me by my name 'Raja' and requested me to return to the shop. He asked me to remove my pants and he placed a bundle wrapped up in Chinese Newspaper on my left upper thigh and he used a tape and taped the packet around my thigh. He went 3 time round. I asked him 'what is this' and he told me it is for your safety and the thing will be save. He is a male chinese known to me as 'King'. I did not know what was inside the package and only when it was opened up, one of the sirs told me it was Heroin. The rider of the motorcycle does not know anything about this. I was threatened that if I didn't return the money, they will knock down my girlfriend using a car. That is all.

10 In the Trial Judgment, I accepted that the statements made by the applicant to the CNB officers had been provided voluntarily and recorded accurately (at [33]). Also, I "did not accept the [applicant's] version of facts to be true, in particular the alleged fact that King had assaulted the [applicant] and threatened to kill [the applicant's girlfriend] if the [applicant] refused to (a) let King strap onto his left thigh the Bundle, which King told him contained 'company spares' or 'company product' and (b) deliver the strapped Bundle to King's 'brother' in Singapore" (at [34]). I thus found that the applicant had failed to establish the defence of duress on a balance of probabilities (at [18]–[19]). I also found that the applicant did have actual knowledge of the contents of the Bundle at the material time of the offence (at [33]).

11 On appeal, the Court of Appeal affirmed all of the aforementioned findings made at trial: see the CA Decision at [18]–[19].

The expert evidence

12 For the purposes of this re-sentencing application, the following expert reports were tendered:

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(a) A psychiatric report from Dr Koh dated 11 April 2013 ("Dr Koh's 2013 Report);

(b) A psychological report from Ms Eunice Seah ("Ms Seah"), a psychologist at the Department of Psychology of the IMH, dated 12 April 2013 ("Ms Seah's Report");

(c) A psychiatric report from Dr Ung dated 22 August 2016 ("Dr Ung's Report");

(d) A further psychological report from Dr Patricia Yap ("Dr Yap"), the Principal Clinical Psychologist at the IMH, dated 1 February 2017 ("Dr Yap's Report"); and

(e) A further psychiatric report from Dr Koh dated 7 February 2017 ("Dr Koh's 2017 Report").

Dr Koh's 2013 Report

13 The applicant was first referred to Dr Koh for a forensic psychiatric evaluation while he was awaiting the execution of his sentence following his conviction at trial. Dr Koh examined the applicant on 14 and 21 March 2013. He perused the statement of facts of the case and the applicant's prison psychiatric notes, and interviewed the applicant's sister over the phone as well as his prison officer.[1]

14 In Dr Koh's 2013 Report, he offered the following opinion of the applicant's mental condition:[2]

> Mr Nagaenthran had no mental illness at the time of the offence. Although not clinically mentally retarded, his

[1] Dr Kenneth Gerald Koh's Psychiatric Report dated 11 April 2013, p 1.

[2] Dr Koh's 2013 Report, p 3.

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> *borderline range of intelligence* might have made him more susceptible than a person of normal intelligence to over-estimating the reality of the alleged threat that had been made to his girlfriend if he refused to make the delivery of the drugs. It, however, would not have diminished his ability to appreciate that the package that was taped to his thigh would most likely have contained drugs and that bringing this to Singapore was illegal.
>
> [emphasis added]

Ms Seah's Report

15 Following his conviction, the applicant was also referred to Ms Seah for an assessment of his intellectual functioning. Ms Seah conducted an assessment of the applicant on 4 April 2013, which involved her conducting first an intake interview with the applicant followed by two psychometric measures, *viz*, the Wechsler Adult Intelligence Scales (Fourth Edition) ("WAIS-IV") and the Test of Memory Malingering ("TOMM"). Ms Seah also referred to Dr Koh's 14 March 2013 interview with the applicant, and called the applicant's sister on 6 April 2013.[3]

16 In Ms Seah's Report, she made the following conclusion:[4]

> … From this assessment, Nagaenthran's [Full Scale Intelligence Quotient ("FSIQ")] indicated that his overall intellectual functioning was assessed to be in the *Extremely Low* range. However, Nagaenthran's FSIQ was at the high end of the *Extremely Low* range of functioning. The FSIQ confidence interval also indicated that he was functioning between the *Extremely Low* and *Borderline* range of functioning. This was consistent with his performance on the [Verbal Comprehension Index ("VCI"), Perceptual Reasoning Index ("PRI") and Processing Speed Index ("PSI")]. Furthermore, Nagaenthran's VCI, PRI, [Working Memory Index ("WMI")] and PSI scores were consistent with his socio-occupational history, education history, adaptive functioning abilities and his current presentation. Hence, Nagaenthran's overall intellectual functioning was more accurately represented by his VCI, PRI,

[3] Ms Eunice Seah's Psychological Report dated 12 April 2013, p 1.

[4] Ms Seah's Report, p 5.

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> WMI and PSI scores, which assessed him to be functioning at least within the *Borderline* range.
>
> In view of Nagaenthran's performance on the various WAIS-IV indexes, socio-occupational history, education history, his adaptive functioning abilities and his presentation during the assessment, Nagaenthran is functioning at least within the *Borderline* range of functioning and he is assessed **not to be intellectually disabled**.
>
> [emphasis in original]

Dr Ung's Report

17 The applicant was subsequently referred by his counsel to Dr Ung for the purposes of conducting a psychiatric assessment specifically for the purposes of the present re-sentencing application. Dr Ung assessed the applicant on 19 April and 19 July 2016,[5] and also relied on the findings made in Dr Koh's 2013 Report.[6]

18 In Dr Ung's Report, he made the following conclusions about the applicant's mental condition:[7]

> 52. I am of the opinion that Mr Nagaenthran suffered from an **abnormality of mind** at the time of his arrest, namely: **Severe Alcohol Use Disorder, Severe Attention Deficit Hyperactivity Disorder ADHD) [*sic*] Combined Type** and **Borderline Intellectual Functioning/ Mild Intellectual Disability**.
>
> 53. Psychological Assessment had revealed his Full Scale Intelligence Quotient (IQ) to be 66 to 74. This is in the range of Mild Intellectual Disability suggested in [the American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Association Publishing, 5th Ed, 2013) ("DSM-V")].

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5 Ung Eng Khean's Affidavit dated 19 September 2016, exh UEK-1, Appendix 1 and Appendix 2.

6 Ung's Affidavit, exh UEK-1, para 8.

7 Ung's Affidavit, exh UEK-1, paras 52–56.

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> 54. Intellectual Disability requires the presence of functional disability as well and I am of the opinion that Mr Nagaenthran had functional disability in the conceptual domains and to a lesser extent in his social and practical domain.
>
> 55. The triad of conditions above is individually associated with **significant neuro-cognitive effects and deficits**.
>
> 56. It is my opinion that the synergistic effect of these conditions **significantly affected his judgment, decision making and impulse control leading up to his arrest**. There was total **preoccupation with the short and immediate term** with little regard of the long-term consequences of his action.
>
> [emphasis in original]

Dr Yap's Report

19 In light of Dr Ung's Report, the applicant was referred by Dr Koh to Dr Yap for the purposes of conducting a neuropsychological assessment to explore the possibility that the applicant was suffering from ADHD. Dr Yap conducted seven assessment sessions on the applicant totalling 15 hours and 55 minutes in the period from November 2016 to January 2017. 18 psychometric tests, including the TOMM and the WAIS-IV, were performed on the applicant. Dr Yap also conducted a one-hour interview with the applicant's sister on 29 December 2016, and referred to Dr Koh's 2013 Report, Ms Seah's Report and Dr Ung's Report.[8]

20 In Dr Yap's psychological report dated 1 February 2017, she made the following conclusions about the applicant's mental condition:[9]

> The results indicate that Mr Nagaenthran is ***not intellectually disabled***. In addition, his cognitive functioning was well-preserved in the following domains: basic attention span, working memory and visuo-spatial skills. Notably, his performance was impaired in information processing tasks, but this slowness was likely to be due to his concern with

[8] Dr Patricia Yap's Psychological Report dated 1 February 2017, p 1.

[9] Dr Yap's Report, pp 5–6.

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performing well and not a true deficit. In contrast, Mr Nagaenthran's visual memory was impaired and did not improve significantly with recognition cues. With regards to verbal memory, when he was asked to remember unstructured information (i.e., word lists), his performance was impaired; but his recall and recognition improved to be within the *Low Average to Average* range when the information was structured and within a context (i.e., stories). These results are generally consistent with Mr Nagaenthran's complaints of poor memory. Additionally, testing revealed that ***while many of Mr Nagaenthran's executive functioning skills were impaired (including verbal fluency, set-shifting, abstract reasoning, judgment, strategy formation, and problem-solving) he was able to plan and organise on simpler items and there were no indications of problems with impulsivity and vigilance***.

Both Mr Nagaenthran and his sister rated him as significant for ADHD symptoms on the Conners' Adult ADHD Rating Scales (CAARS), and indications of issues with inattentiveness and sustained attention in a computerised test suggested that it would be ***ADHD of the inattentive subtype***. Mr Nagaenthran's performance on the computerised test was associated with a ***moderate rather than high likelihood of having a disorder characterized by attention deficits***. This is generally consistent with Mr Nagaenthran's reports of a history of hyperactive behaviour since childhood.

Consistent with his recounting of a history since childhood of anger, aggression and gang violence, Mr Nagaenthran indicated in self-report measures that he has an angry temperament and was prone to *Very High* levels of anger expression. Mr Nagaenthran's account suggests that gangs that he joined since adolescence have assumed a position of top priority to him, and his loyalty to the gang is so fervent that it unquestionably guides his actions. His sister has observed that Mr Nagaenthran has always been his friends' scapegoat and does not think about himself and his family when he does whatever his friends ask him to do. While there are some indications in the current assessment that Mr Nagaenthran may have adult ADHD, his account of the incidents leading to his arrest suggests that he acted in a pre-meditated fashion and understood the potential consequences of his behaviour. Mr Nagaenthran now regrets his misplaced loyalty to the gang.

[emphasis in italics in original; emphasis added in bolditalics]

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Dr Koh's 2017 Report

21 The respondent also sought a further opinion from Dr Koh specifically for the purposes of this re-sentencing application. In a report dated 7 February 2017, Dr Koh made a few observations in response to the conclusions drawn in Dr Ung's Report. First, Dr Koh disagreed with Dr Ung that the applicant was mildly intellectually disabled. The conclusions drawn in Dr Yap's Report about the applicant's intelligence are in agreement with those reached in Ms Seah's Report:[10] both Dr Yap and Ms Seah had concluded that the applicant was not intellectually disabled. Second, Dr Koh rejected Dr Ung's diagnosis that the applicant had ADHD. Dr Koh called into question Dr Ung's reliance on the Adult ADHD Self-Report Scale ("ASRS"), given that the ASRS is a self-rating scale that carries the attendant possibility of bias. Dr Koh suggested that Dr Yap's employment of the more objective Connor's Continuous Performance Test (3rd Edition) ("CPT3") was more instructive. Dr Koh's opinion was that even if the applicant has ADHD, his condition is mild, with features of inattentiveness, but not hyperactivity or impulsiveness.[11] Third, Dr Koh questioned Dr Ung's diagnosis of severe alcohol use disorder, given that the applicant's account of his alcohol use to Dr Ung greatly differed from that provided to Dr Koh when he was preparing his 2013 psychiatric report.[12]

22 However, Dr Koh also acknowledged that the applicant's "borderline intelligence and concurrent cognitive defects may have contributed toward his misdirected loyalty and poor assessment of the risks in agreeing to carry out the offence [that he was convicted for]".[13]

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10 Dr Kenneth Gerald Koh's Report dated 7 February 2017, p 1.

11 Dr Koh's 2017 Report, pp 1–2.

12 Dr Koh's 2017 Report, p 2.

13 Dr Koh's 2017 Report, p 4.

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Issues to be determined

23 As mentioned earlier, the applicant seeks to be re-sentenced to life imprisonment pursuant to s 33B(1)(*b*) read with s 33B(3) of the MDA. These provisions state as follows:

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

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It is thus clear that for the applicant to succeed in this re-sentencing application, he has to satisfy *both* requirements under s 33B(3)(*a*) and s 33B(3)(*b*) *cumulatively*; a failure to satisfy either requirement would disentitle the applicant from obtaining the benefit of the sentence of life imprisonment under s 33B(1)(*b*): see *Rosman bin Abdullah v Public Prosecutor* [2017] 1 SLR 10 ("*Rosman*") at [9].

24 At the outset, I find that the applicant is a courier within the meaning of s 33B(3)(*a*) of the MDA. It was common ground that the applicant meets the requirements under s 33B(3)(*a*) for him to be classified as a mere courier.[14] In any event, even if this issue had been in dispute, I am of the view that the applicant's involvement in the offence only extended to "transporting, sending or delivering" the drug. This is abundantly clear from the applicant's evidence given in his long statement that he had to deliver the drugs that he was caught with because he owed King money and King promised to pay him another RM500 after the delivery, and that he knew little about the transaction beyond the fact that the drugs were to be "delivered to one Chinese recipient who will be driving a dark blue Camry and [who] will be meeting [the applicant] in front of [the] 7-11 store at Woodlands Transit" (see [9] above). The applicant was thus clearly a mere courier within the meaning of s 33B(3)(*a*) of the MDA.

25 Accordingly, the only issues that remain alive for my determination in this re-sentencing application pertain to whether the applicant meets the requirements under s 33B(3)(*b*) of the MDA. The issues may be stated as follows:

(a) Whether the applicant was suffering from an abnormality of mind;

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[14] Respondent's Submissions dated 26 May 2017, para 22.

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(b) Whether the abnormality of mind arose from a condition of arrested or retarded development of mind or any inherent causes or was induced by disease or injury (*ie*, aetiology of the abnormality of mind); and

(c) Whether the abnormality of mind substantially impaired the applicant's mental responsibility for the offence.

The parties' arguments

The applicant's arguments

26 Counsel for the applicant, Mr Eugene Thuraisingam ("Mr Thuraisingam"), asserts that the applicant was suffering from an abnormality of mind because it is allegedly common ground amongst Dr Koh, Dr Yap, Ms Seah and Dr Ung that, at minimum: (a) the applicant was of borderline intelligence, (b) the applicant's executive functioning skills were impaired, and (c) the applicant did, on a balance of probabilities, suffer from ADHD of the inattentive subtype.[15] According to Mr Thuraisingam, Dr Koh agreed at trial that the applicant's ADHD and impairment of his executive functioning skills are considered abnormalities of the mind,[16] and that the applicant's borderline intelligence and concurrent cognitive deficits may also be considered an abnormality of mind.[17] Dr Koh also allegedly acknowledged the possibility that the applicant's alcohol use disorder had contributed to his abnormality of mind.[18]

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15 Applicant's Submissions dated 26 May 2017, para 36.

16 Applicant's Submissions, para 38; NE pp 96:31–97:2.

17 Applicant's Submissions, para 39; NE pp 98:26–99:6.

18 Applicant's Submissions, para 42; NE p 99:17–21.

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27 Next, Mr Thuraisingam argues that the aetiology of the applicant's abnormality of mind falls within the three possibilities listed under s 33B(3)(*b*). According to Mr Thuraisingam, the applicant's ADHD abnormality of mind was allegedly induced by disease or injury because the applicant was suffering from ADHD.[19] Alternatively, the applicant's abnormality of mind may have arisen from inherent causes because: (a) the applicant suffered from impaired executive functioning skills which might have been present in him congenitally; and (b) the applicant's history of alcohol abuse could have led to his cognitive deficits.[20]

28 Finally, Mr Thuraisingam submits that the applicant's abnormality of mind substantially impaired his mental responsibility for his acts and omissions in relation to the offence. According to Mr Thuraisingam, the applicant's psychiatric conditions significantly affected his decision-making and sense of judgment, as they may lead him to focus on his immediate needs and disregard the future consequences of his actions, and they may impair his internal rationality in relation to his assessment of risks.[21] Also, Mr Thuraisingam contends that it is immaterial that the applicant was able to plan and execute detailed steps prior to the commission of his offence because the mere fact that a person is able to take detailed steps in the commission of his offence is not necessarily inconsistent with the person's mental responsibility for his acts being substantially impaired.[22] Finally, Mr Thuraisingam submits that it is also immaterial that the applicant might have had ample time to reconsider his decision to carry out his criminal acts because it is possible for an abnormality

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19 Applicant's Submissions, para 45.

20 Applicant's Submissions, para 46.

21 Applicant's Submissions, paras 52–55.

22 Applicant's Submissions, paras 58–62.

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of mind to impair one's decision-making and impulse control for a sustained period of time.[23]

The respondent's arguments

29 Counsel for the respondent, DPP Lau Wing Yum ("DPP Lau"), asserts that the applicant was not suffering from an abnormality of mind. He first casts doubt on Dr Ung's diagnosis of intellectual disability by pointing out that the applicant does not fulfil the criteria stated in Dr Ung's Report for intellectual disability; the applicant merely has borderline intelligence, which is not considered a disorder in the DSM-V.[24] DPP Lau also argues that Dr Ung's diagnosis of alcohol abuse disorder is unreliable because it is premised entirely on the information provided by the applicant, which is itself unreliable.[25] DPP Lau then calls into question Dr Ung's diagnosis of ADHD, mainly on the basis of the lack of rigour in the methodology employed by Dr Ung in assessing the applicant for ADHD.[26] Finally, DPP Lau suggests that, far from having any mental disorders, the applicant has in fact shown himself to be fully capable of a significant degree of deliberation and intelligence in his dealings with others, given that he was able to draw up multiple conflicting accounts that were each internally consistent, logical and rich in detail when questioned by the investigation agencies, before the court and by all the examining psychiatrists thus far.[27]

30 DPP Lau then argues that it cannot be said that the applicant's abnormality of mind was induced by disease or injury, because Dr Koh

23 Applicant's Submissions, paras 63–64.

24 Respondent's Submissions, paras 35–46.

25 Respondent's Submissions, paras 62–68.

26 Respondent's Submissions, paras 72–76.

27 Respondent's Submissions, paras 26–33.

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explained that the applicant's alleged ADHD, which Dr Ung claimed to be the alleged "disease or injury", does not cause the cognitive deficits that have been identified by Dr Ung.[28] DPP Lau also asserts that the applicant's abnormality of mind did not arise from any inherent cause because Dr Ung failed to furnish any evidence of actual brain damage sustained due to the applicant's alcohol abuse, which Dr Ung touted as the alleged "inherent cause".[29]

31 Finally, DPP Lau contends that even if the applicant is found to be suffering from mental deficits, the applicant is unable to show that the deficits had substantially impaired his mental responsibility for the offence for the following reasons:

(a) First, DPP Lau casts doubt on the factual matrices that Dr Ung relies on to suggest that the applicant's borderline intelligence had substantially impaired his mental responsibility. According to him, Dr Ung's opinion that the applicant's cognitive deficits could have caused him to be more susceptible to over-estimating the threats from King ought to be rejected because his claims of duress had been dismissed at trial. Also, Dr Ung's opinion that the applicant's cognitive deficits could have caused him to be more susceptible to misguided gang loyalty also ought to be rejected because this account is a mere afterthought. Ultimately, DPP Lau suggests that the applicant's true motivation for committing the offence was simply that he owed King money and he needed to perform the delivery to earn more money; this showed that the applicant's mental responsibility could not have been substantially impaired as he took a calculated risk.[30]

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28 Respondent's Reply Submissions dated 2 June 2017, para 10

29 Respondent's Reply Submissions, para 11.

30 Respondent's Submissions, paras 47–61.

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(b) Second, DPP Lau argues that the applicant's alcohol use disorder also could not have substantially impaired his mental responsibility for the offence because Dr Ung had conceded in cross-examination that the applicant was not addicted to alcohol and that his drinking would not influence him much unless the alcohol abuse had caused brain damage, which Dr Ung in turn had no proof of.[31]

(c) Third, DPP Lau submits that the applicant's ADHD could not have substantially impaired his mental responsibility for the offence because, even assuming that the applicant was suffering from severe ADHD of the combined type, the manner in which the applicant had carried out the offence showed that he could not have been labouring under the effects of any impulsivity.[32]

(d) Finally, even if the applicant's mental responsibility had indeed been impaired in any way by any of the alleged cognitive deficits suggested by Dr Ung, the impairment was not substantial, but was at most mild.[33]

The applicable legal principles

32 I now turn to explain briefly the applicable legal principles.

*Section 33B(3)(*b*) of the MDA*

33 Addressing first the general principles governing the application of s 33B(3)(*b*) of the MDA, I set out, again, s 33B(3)(*b*) for ease of reference as follows:

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[31] Respondent's Submissions, para 69.

[32] Respondent's Submissions, paras 77–84.

[33] Respondent's Reply Submissions, paras 13–14.

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> **Discretion of court not to impose sentence of death in certain circumstances**
>
> **33B.**— …
>
> (3) The requirements referred to in subsection (1)(*b*) are that the person convicted proves, on a balance of probabilities, that —
>
> …
>
> (*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.

34 As is already evident from the delineation of the issues to be determined in this judgment (see [25] above), in order to be re-sentenced to life imprisonment, the applicant must establish, on a balance of probabilities, each of the following three distinct requirements under s 33B(3)(*b*) of the MDA:

(a) the applicant was suffering from an abnormality of mind ("the first limb");

(b) such abnormality of mind: (i) arose from a condition of arrested or retarded development; (ii) arose from any inherent cause; or (iii) was induced by disease or injury ("the second limb"); *and*

(c) the abnormality of mind substantially impaired the applicant's mental responsibility for his acts and omissions in relation to his offence ("the third limb").

35 Strangely, this three-limb test has not been expressly enunciated by both the Court of Appeal and the High Court in *Rosman* ([23] *supra*) and *Phua Han Chuan Jeffery v Public Prosecutor* [2016] 3 SLR 706 ("*Jeffery Phua*") respectively, which are the two most recent cases dealing with the application of s 33B(3)(*b*). However, it has been repeatedly applied in the context of

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determining whether the diminished responsibility exception to murder under Exception 7 to s 300 of the Penal Code (Cap 224, 2008 Rev Ed) is satisfied: see *Iskandar bin Rahmat v Public Prosecutor and other matters* [2017] 1 SLR 505 ("*Iskandar*") at [79], citing *Ong Pang Siew v Public Prosecutor* [2011] 1 SLR 606 ("*Ong Pang Siew*") at [58] and *Public Prosecutor v Wang Zhijian and another appeal* [2014] SGCA 58 ("*Wang Zhijian*") at [50].

36 Exception 7 to s 300 of the Penal Code provides that:

> *Exception* 7.—Culpable homicide is not murder if the offender was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in causing the death or being a party to causing the death.

Section 33B(3)(*b*) is, in essence, a near-identical reproduction of Exception 7: *Rosman* at [46]; *Jeffery Phua* at [6]. It thus stands to reason that this three-limb test ought to be applied with the same level of methodical rigour in the context of s 33B(3)(*b*) of the MDA as in cases involving Exception 7 to s 300 of the Penal Code.

37 As a brief aside, I note that the structuring of the analysis for the abnormality of mind provision as a "three-stage test" has previously been criticised in the Court of Appeal decision of *G Krishnasamy Naidu v Public Prosecutor* [2006] 4 SLR(R) 874 ("*Naidu*"), which dealt with Exception 7 to s 300 of the Penal Code. The court in *Naidu* took the view that the "three-stage test" is a "misapplication of the law" because the exception is a "composite clause that must be read and applied as a whole" (at [4]); the exception requires the court to merely answer the straightforward question of whether the offender was suffering from such abnormality of mind as substantially impaired his mental responsibility (at [6]).

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38 However, the *Naidu* decision goes against the considerable weight of previous Court of Appeal jurisprudence on this point: it presents a marked departure from the approach adopted in previous Court of Appeal decisions like *Took Leng How v Public Prosecutor* [2006] 2 SLR(R) 70 ("*Took Leng How*") and *Chua Hwa Soon Jimmy v Public Prosecutor* [1998] 1 SLR(R) 601, which all affirmed the "three-stage test". More critically, the *Naidu* approach has also not been endorsed in subsequent Court of Appeal decisions like *Ong Pang Siew* ([35] *supra*), *Wang Zhijian* ([35] *supra*) and *Iskandar* ([35] *supra*), which have all affirmed the "three-stage test". Given the guidance from these later Court of Appeal decisions, it appears that the same "three-stage test" ought to be applied when conducting the present analysis in relation to s 33B(3)(*b*) of the MDA.

39 I am disinclined to apply the approach espoused in *Naidu*. In my view, the "three-stage test" promotes conceptual clarity by making clear the distinction between the elements that ought to be a matter of expert evidence (*ie*, the second limb) and elements that ought to be exclusively a matter for judicial determination (*ie*, the first and third limbs) (see [40] below). For myself, the key principle that should be extracted from *Naidu* is that there simply must be "appropriate links established by the evidence between these three elements" of s 33B(3)(*b*): Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (LexisNexis, Rev 2nd Ed, 2015) ("*Yeo, Morgan & Chan*") at para 27.8. If anything, the court's single-minded focus in *Naidu* on the composite inquiry – of whether the offender was suffering from such abnormality of mind as substantially impaired his mental responsibility – ought to simply be interpreted as a recognition of the fact that among the three limbs of s 33B(3)(*b*), the third limb is the critical question that brings together all the other limbs of this provision: *Yeo, Morgan & Chan* at para 27.34.

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40 Turning back to the application of this three-limb test, it is trite that while the second limb, which concerns the aetiology or root cause of the abnormality, is a matter largely within the purview of expert opinion, the first and third limbs are matters that cannot be the subject of any medical opinion and must be left to the determination of the judge as the finder of fact: *Iskandar* ([35] *supra*) at [80]; *Ong Pang Siew* ([35] *supra*) at [59]. In arriving at a determination for the first and third limbs, the judge is "entitled and indeed bound to consider not only the medical evidence but the evidence upon the whole facts and circumstances of the case": *Walton v The Queen* [1978] AC 788 at 793 (*per* Lord Keith of Kinkel), quoted in *Ong Pang Siew* at [59]. It also bears further emphasis that s 33B(3)(*b*) of the MDA ought to be construed *narrowly*, given that Parliament's intent is for this provision to "operate in a measured and narrowly defined way" and avoid inadvertently opening the backdoor for offenders to escape harsh punishment notwithstanding their understanding of the consequences of their offences: see *Rosman* ([23] *supra*) at [46].

Evaluating expert evidence

41 Given that this application also requires me to decide which party's expert evidence ought to be preferred, I turn next to set out the principles pertaining to evaluating expert evidence.

42 When a court is presented with expert evidence, as a matter of general practice, the following observations of V K Rajah JA in the Magistrate's Appeal decision of *Sakthivel Punithavathi v Public Prosecutor* [2007] 2 SLR(R) 983 ("*Sakthivel*") (at [76]) are highly instructive:

> What is axiomatic is that a judge is not entitled to substitute his own views for those of an uncontradicted expert's: *Saeng-Un Udom v PP* [2001] 2 SLR(R) 1. Be that as it may, a court must not on the other hand unquestioningly accept unchallenged evidence. Evidence must invariably be sifted, weighed and

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> evaluated in the context of the factual matrix and in particular, the objective facts. An expert's opinion "should not fly in the face of proven extrinsic facts relevant to the matter" *per* Yong Pung How CJ in *Khoo James v Gunapathy d/o Muniandy* [2002] 2 SLR(R) 414 at [65]. In reality, substantially the same rules apply to the evaluation of expert testimony as they would to other categories of witness testimony. Content credibility, evidence of partiality, coherence and a need to analyse the evidence in the context of established facts remain vital considerations; [the expert witness's] demeanour, however, more often than not recedes into the background as a yardstick.

This passage was quoted with affirmation by the Court of Appeal in *Poh Soon Kiat v Desert Palace Inc (trading as Caesars Palace)* [2010] 1 SLR 1129 at [22].

43 Additionally, in respect of conflicting expert evidence in particular, the following observations in *Sakthivel* from Rajah JA (at [75]) are pertinent:

> Where there is conflicting evidence between experts it will not be the sheer number of experts articulating a particular opinion or view that matters, but rather the consistency and logic of the preferred evidence that is paramount. Generally speaking, the court should also scrutinise the credentials and relevant experience of the experts in their professed and acknowledged areas of expertise. Not all experts are of equal authority and/or reliability. In so far as medical evidence is concerned, an expert with greater relevant clinical experience may often prove to be more credible and reliable on "hands-on" issues although this is not an inevitable rule of thumb. Having said that, there is no precise pecking order or hierarchy relating to expert evidence. Experts may sometimes be abundantly eminent while lacking credibility in a particular matter.

My decision

44 Having considered all the facts of the case, the expert evidence tendered before me, as well as the parties' respective submissions, I have come to the conclusion that the applicant has not met any of the three elements prescribed under s 33B(3)(*b*) of the MDA. I thus dismiss this application for the applicant to be re-sentenced to life imprisonment.

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Whether the applicant was suffering from an abnormality of mind

45 I commence with the analysis of the first limb of s 33B(3)(*b*). In my view, the applicant was not suffering from an abnormality of mind.

46 The definition of what amounts to an "abnormality of mind" has been accepted by the Court of Appeal to be the following passage explicated by Lord Parker CJ in the English Court of Criminal Appeal decision of *Regina v Byrne* [1960] 2 QB 396 ("*Byrne*") (at 403):

> 'Abnormality of mind,' … means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the *perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise the will power to control physical acts in accordance with that rational judgment.* The expression 'mental responsibility for his acts' points to a consideration of the *extent to which the accused's mind is answerable for his physical acts* which must include a consideration of the extent of his ability to exercise will power to control his physical acts.
>
> [emphasis added]

(See *Iskandar* ([35] *supra*) at [81], *Wang Zhijian* ([35] *supra*) at [64] and *Ong Pang Siew* ([35] *supra*) at [61].)

47 Two key principles may be extracted from the *Byrne* definition of "abnormality of mind". First, the court, in assessing whether the applicant suffers from an "abnormality of mind", must determine whether the evidence shows an abnormally reduced mental capacity to: (1) understand events; (2) judge the rightness or wrongness of one's actions; or (3) exercise self-control (*Iskandar* ([35] *supra*) at [82], citing *Yeo, Morgan & Chan* at para 27.12). Second, the first limb "requires the court to be satisfied not only of the fact that the accused was suffering from a condition that a reasonable man would

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consider abnormal, but further that the abnormality was of such a *degree* as to impair the accused's cognitive functions or self-control" [emphasis added]: *Took Leng How* ([38] *supra*) at [47]. This means that it is necessary for the applicant in this case to show that any alleged abnormality of mind that he is suffering from is an abnormality to such an *extent* that his cognitive functioning or self-control is impaired. In the words of the Chao Hick Tin JA in *Took Leng How* (at [47]), this first limb under s 33B(3)(*b*) of the MDA "should never be deemed satisfied unless the extent of the purported abnormality is also established".

48 It must also be emphasised that it is the applicant's mental condition *at the time of the offence*, and not at any other time, that is relevant when assessing whether the applicant was suffering from an abnormality of mind: *Took Leng How* ([38] *supra*) at [48]; see also *Yeo, Morgan & Chan* at para 27.17.

49 In the present case, Dr Ung diagnosed the applicant to be suffering from the following conditions: (1) Severe Alcohol Use Disorder, (2) Severe ADHD Combined Type and (3) Mild Intellectual Disability (see [18] above). Based on the principles set out in the foregoing paragraphs, it is necessary for me to determine whether the evidence in respect of each of the three alleged conditions shows a mental capacity that is abnormally reduced to such an extent that the applicant's ability to understand events, judge the rightness or wrongness of one's actions, or exercise self-control can be said to have been impaired at the time of the offence.

50 I will now address each condition in turn.

Alcohol use disorder

51 I begin with Dr Ung's diagnosis of severe alcohol use disorder.

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52 Dr Ung's diagnosis of this condition was based on his administration of the Alcohol Use Disorders Identification Test ("AUDIT") when interviewing the applicant on 19 July 2016 and his evaluation of the applicant using the alcohol use disorder diagnostic criteria under the DSM-V. According to Dr Ung, the applicant's AUDIT score of 30 apparently corresponds to harmful use and dependence on alcohol. Also, Dr Ung claims that the applicant's alleged pattern of harmful alcohol use corresponds to alcohol use disorder.[34] None of the expert reports adduced by the respondent agrees with Dr Ung's diagnosis of alcohol use disorder.

53 In my judgment, the applicant was not suffering from alcohol use disorder, severe or otherwise. I find Dr Ung's diagnosis to be unconvincing because it is premised entirely upon the applicant's own account of his drinking habits, which is unreliable.

54 In Dr Ung's Report, the applicant's alcohol history was stated as follows:[35]

> **H. Mr Nagaenthran's Drug and Alcohol History**
>
> 14. Mr Nagaenthran's [*sic*] reports starting to consume alcohol at the age of about 13 years. His drinking gradually escalated until he was drinking to the point of being unable to remember events during the drinking bout. His routine was to drink through the night until morning and to sleep till midday.
>
> 15. He said that he was *drinking a few times a week to every day prior to the time of his arrest*. His longest period of abstinence over the last few years was for a few weeks because he was working. His dependence on alcohol was not total in that he was able to reduce his amounts for short periods and even stop drinking for short periods. He told me that *when he stopped drinking alcohol he would feel [an] intense craving to drink again, have tremulousness and experienced* [*sic*] *a 'disturbed' mind and moodiness*.

[34] Ung's Affidavit, exh UEK-1, paras 27–28.

[35] Ung's Affidavit, exh UEK-1, paras 14–15.

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> …
>
> [emphasis added]

55 This differs significantly from the account provided by the applicant to Dr Koh. In Dr Koh's 2013 Report, it was stated that:[36]

> Mr Nagaenthran gave a history of excessive alcohol use at times. There had been a *period in the past* when he would develop withdrawal tremors and cravings when deprived of alcohol. *However, he then cut down his usage*. Nonetheless, he said that he would sometimes drink till he was drunk and get into quarrels and fights with his friends and girlfriend. …
>
> [emphasis added]

Dr Koh further clarifies in his 2017 report that:[37]

> [The account reflected in Dr Ung's Report] was not the picture Mr Nagaenthran had presented to me in 2013. At that time, he had told me that he "won't drink when working or about to work" and he said that *alcohol generally did not get him into trouble*. He also told me that he *drank around 2 times a week*. He reflected to me that *he did not think that he was addicted to alcohol at the time of the arrest*.
>
> [emphasis added]

56 Even more compellingly, the applicant's account provided to Dr Ung also differed markedly from his drinking history as presented at trial. When cross-examined at trial, the applicant testified that his alcohol consumption was dependent on whether or not he had spare cash; when he did not have the money to purchase alcohol, he would not drink.[38] He also testified on re-examination that he had in fact stopped drinking since his girlfriend moved in with him in March 2009 because he was unemployed at that time and she did not like it when he drank.[39]

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36 Dr Koh's 2013 Report, pp 1–2.

37 Dr Koh's 2017 Report, p 2.

38 ROP vol 2, Day 3, p 48:2–6; ROP vol 3, Day 5, p 62:15–21.

39 ROP vol 3, Day 6, p 5:8–10.

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57 In my view, the very fact that all these differing accounts were presented by the applicant at various junctures in the proceedings shows that the applicant's description of his alcohol history to Dr Ung is not reliable. Dr Ung himself has admitted that the information on which his diagnosis of the applicant's alcohol use disorder is premised comes exclusively from the applicant.[40] It thus follows that Dr Ung's diagnosis of the applicant's alcohol use disorder must be treated as unreliable.

58 Moreover, my rejection of Dr Ung's diagnosis finds additional support in how the evidence shows that the applicant was very much in control of his drinking habits at the time of the offence. The most accurate picture of the applicant's alcohol consumption is probably the version provided at trial, given that the applicant had no reason to lie about his alcohol consumption at trial as it was relevant to neither his guilt nor his sentence. On the applicant's own evidence, he was fiscally responsible in curbing his drinking and had in fact stopped drinking for a significant period before the time of the offence. The applicant thus clearly did not suffer from alcohol use disorder at the time of the offence.

ADHD

59 I turn next to Dr Ung's diagnosis of severe ADHD with combined presentation.

60 It is useful for me to first set out the relevant portions of the DSM-V diagnostic criteria for ADHD as follows:[41]

Attention-Deficit/Hyperactivity Disorder

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40 NE 11/04/2017, p 9:1–7.

41 Ung's Affidavit, exh UEK-1, pp 59–61.

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> Diagnostic Criteria
>
> A. A persistent pattern of inattention and/or hyperactivity-impulsivity that interferes with functioning or development, as characterized by (1) and/or (2):
>
> 1. **Inattention:** Six (or more) of the following symptoms have persisted for at least 6 months to a degree that is inconsistent with developmental level and that negatively impacts directly on social and academic/occupational activities:
>
> …
>
> 2. **Hyperactivity and impulsivity:** Six (or more) of the following symptoms have persisted for at least 6 months to a degree that is inconsistent with developmental level and that negatively impacts directly on social and academic/occupational activities:
>
> …
>
> **314.01 (F90.2) Combined presentation:** If both Criterion A1 (inattention) and Criterion A2 (hyperactivity-impulsivity) are met for the past 6 months.
>
> **314.00 (F90.0) Predominantly inattentive presentation:** If Criterion A1 (inattention) is met but Criterion A2 (hyperactivity-impulsivity) is not met for the past 6 months.
>
> **314.01 (F90.1) Predominantly hyperactive/impulsive presentation:** If Criterion A2 (hyperactivity-impulsivity) is met and Criterion A1 (inattention) is not met for the past 6 months.
>
> …
>
> **Mild:** Few, if any, symptoms in excess of those required to make the diagnosis are present, and symptoms result in no more than minor impairments in social or occupational functioning.
>
> **Moderate:** Symptoms or functional impairment between "mild" and "severe" are present.
>
> **Severe:** Many symptoms in excess of those required to make the diagnosis, or several symptoms that are particularly severe, are present, or the symptoms result in marked impairment in social or occupational functioning.
>
> [emphasis in original]

61 Dr Ung's diagnosis of the applicant's ADHD condition is based on his interview with the applicant and the results of the ASRS (see [21] above)

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administered on the applicant.[42] The ASRS is a self-report screening scale of adult ADHD which "includes 18 questions about frequency of recent DSM-IV Criterion A symptoms of adult ADHD".[43] According to Dr Ung, the symptoms reported by the applicant in his interview together with his responses in the ASRS are consistent with the clinical diagnosis of ADHD with combined presentation based on the DSM-V criteria (*ie*, diagnosis of a persistent pattern of *both* inattention and hyperactivity-impulsivity that interferes with one's functioning or development).[44]

62 In contrast, Dr Yap's Report states that the applicant suffers from ADHD of the inattentive subtype, with no features of hyperactivity or impulsivity.[45] Dr Yap's methodology and diagnosis are described in Dr Koh's 2017 Report in the following manner:[46]

> Dr Patricia Yap conducted several tests on Mr Nagaenthran to determine if he indeed had ADHD. The [CAARS] was administered to Mr Nagaenthran and to his sister … This instrument has 3 subscales that assess ADHD symptoms: an Inattention subscale, a Hyperactivity-Impulsivity subscale and a Total ADHD Symptoms Subscale. Mr Nagaenthran rated himself as *Very Much Above Average* on all three subscales. His sister rated him as *Very Much Above Average* on the inattentiveness subscale, *Slightly Above Average* on the Hyperactivity-Impulsivity subscale and *Much Above Average* on the total ADHD symptoms subscale.
>
> On a computerised and therefore more objective test, the [CPT3], Mr Nagaenthran demonstrated problems with *Inattentiveness* and *Sustained Attention*. There were, however, no problems of *Impulsivity* detected.
>
> [emphasis in original]

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42 Ung's Affidavit, exh UEK-1, paras 23–26.

43 Ung's Affidavit, exh UEK-1, pp 46–47.

44 Ung's Affidavit, exh UEK-1, para 26.

45 Dr Yap's Report, pp 5–6.

46 Dr Koh's 2017 Report, p 2.

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63 In Dr Koh's 2017 Report, Dr Koh concurs with Dr Yap's diagnosis. Dr Koh stated in his 2017 report as follows:[47]

> … it is worth pointing out that both Dr Ung and I did not find Mr Nagaenthran to be overtly inattentive, hyperactive or impulsive during our lengthy interviews with him …
>
> In conclusion, my opinion as to whether Mr Nagaenthran has ADHD or not would be in line with Dr Yap's – that he has features of inattentiveness but does not have features of hyperactivity or impulsiveness. Further, I would assess his condition to be mild at most.

However, Dr Koh insisted when cross-examined that the applicant was *not* suffering from ADHD, given that Dr Yap had only diagnosed the applicant to be suffering from a "moderate likelihood of a disorder".[48]

64 In my judgment, the opinion provided in Dr Koh's 2017 Report – that the applicant suffers from ADHD of the inattentive subtype – paints the most accurate picture of the applicant's ADHD condition. I do not accept Dr Ung's evidence that the applicant suffers from ADHD with combined presentation. I am unconvinced that the ASRS is a reliable assessment tool to determine if the applicant has ADHD and, if so, of what type. As Dr Koh has rightly pointed out in his 2017 Report, the ASRS is a "self-rating [scale] and comes with the attendant possibility of bias in the light of secondary gain".[49] Furthermore, Dr Ung may have overreached in his administration of the ASRS by asking the applicant questions about his childhood and school life, even though the ASRS questions are meant to elicit how the applicant felt and conducted himself over the previous six months.[50] This meant that Dr Ung was effectively partially relying upon the applicant's behaviour in his childhood to provide an indicator

47 Dr Koh's 2017 Report, p 2.

48 NE 11/04/2017, pp 94:27–95:5.

49 Dr Koh's 2017 Report, p 1.

50 Ung's Affidavit, exh UEK-1, para 25 and p 47.

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for whether he had adult ADHD in the past six months. Finally, it also bears mentioning that Dr Ung himself has conceded that he did not interview any other subjects, like the applicant's sister, in order to obtain a corroborative account of the information obtained from the applicant.[51]

65 Dr Koh's diagnosis provided in his 2017 report is more reliable. It is based on his interview conducted with the applicant, his sister and his prison officer for the purposes of his 2013 report, and his perusal of Dr Yap's opinion of the applicant's ADHD condition in her report, which is itself based on the several tests administered by Dr Yap on the applicant (see [62] above). Dr Koh's opinion is thus formed on the basis of: (1) Dr Koh's clinical assessment of the applicant as well as Dr Yap's psychological testing results, and (2) corroborative information obtained from Dr Koh's interviews with the applicant's sister and the prison officer in charge of his housing unit. Although Dr Koh insisted, when cross-examined, that the applicant only had a *moderate likelihood* of a disorder characterised by attention deficits – and not an actual disorder – he subsequently conceded that this could be taken to indicate that on the balance of probabilities, the applicant *was* suffering from such a disorder.[52]

66 However, to my mind, a mere finding that the applicant suffers from ADHD of the inattentive subtype is insufficient for me to conclude that the applicant suffers from an "abnormality of mind" for the purposes of s 33B(3)(*b*). It was earlier mentioned that Dr Koh has diagnosed the applicant's ADHD condition to be only of the inattentive subtype and only "mild at most" (see [63] above). Although Dr Ung opines that the applicant labours under a "severe" ADHD condition with combined presentation, I have already dismissed his diagnosis as unreliable for the reasons stated above (see [64] above). As stated

[51] NE 11/04/2017, p 11:9–17.

[52] NE 11/04/2017, pp 94:27–95:17.

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under the DSM-V diagnostic criteria for ADHD, a diagnosis of ADHD of "mild" severity entails "no more than minor impairments in social or occupational functioning" (see [60] above). In addition, the DSM-V diagnostic features for ADHD state that ADHD of the inattentive subtype merely involves "wandering off task, lacking persistence, having difficulty sustaining focus, and being disorganized and is not due to defiance or lack of comprehension".[53] One would struggle to associate these behaviours with a limited ability to understand events, judge the rightness or wrongness of one's actions, or exercise self-control. Therefore, I am of the view that, based on Dr Koh's diagnosis of mild ADHD of the inattentive subtype, it has not been proved on a balance of probabilities that the applicant's ADHD condition was an abnormality of such a degree as to impair the applicant's mental capacity to understand events, judge the rightness or wrongness of one's actions, or exercise self-control.

Intellectual disability

67 Finally, I deal with Dr Ung's diagnosis of mild intellectual disability.

68 It is once again useful for me to first set out the DSM-V diagnostic criteria for intellectual disability as follows:[54]

> **Intellectual Disability (Intellectual Developmental Disorder)**
>
> Diagnostic Criteria
>
> Intellectual disability (intellectual development disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. The following three criteria must be met:
>
> A. *Deficits in intellectual functions*, such as reasoning, problem solving, planning, abstract thinking, judgment, academic

53 Ung's Affidavit, exh UEK-1, p 61.

54 Ung's Affidavit, exh UEK-1, p 55.

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> learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.
>
> B. *Deficits in adaptive functioning* that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.
>
> C. *Onset of intellectual and adaptive deficits during the developmental period.*
>
> [emphasis added]

I set out also the diagnostic features for the three DSM-V diagnostic criteria for intellectual disability as follows:[55]

> ***Criterion A refers to intellectual functions that involve reasoning, problem solving, planning, abstract thinking, judgment, learning from instruction and experience, and practical understanding***. Critical components include verbal comprehension, working memory, perceptual reasoning, quantitative reasoning, abstract thought, and cognitive efficacy. Intellectual functioning is typically measured with individually administered and psychometrically valid, comprehensive, culturally appropriate, psychometrically sound tests of intelligence …
>
> …
>
> IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks. … Thus, clinical judgment is needed in interpreting the results of IQ tests.
>
> ***Deficits in adaptive functioning (Criterion B) refer to how well a person meets community standards of personal independence and social responsibility***, in comparison to others of similar age and sociocultural background. ***Adaptive functioning involves adaptive reasoning in three domains: conceptual, social and practical***. The *conceptual (academic) domain* involves competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations, among

[55] Ung's Affidavit, exh UEK-1, pp 57–58.

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> others. The *social domain* involves awareness of others' thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment, among others. The *practical domain* involves learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behaviour, and school and work task organization, among others. Intellectual capacity, education, motivation, socialization, personality features, vocational opportunity, cultural experience, and coexisting general medical conditions or mental disorders influence adaptive functioning.
>
> Adaptive functioning is assessed using both clinical evaluation and individualized, culturally appropriate, psychometrically sound measures. …
>
> ***Criterion B is met when at least one domain of adaptive functioning – conceptual, social, or practical – is sufficiently impaired*** that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community. To meet diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be directly related to the intellectual impairments described in Criterion A. ***Criterion C, onset during the developmental period, refers to recognition that intellectual and adaptive deficits are present during childhood or adolescence***.
>
> [emphasis in italics in original; emphasis added in bold italics]

69 Dr Ung's diagnosis of the applicant's mild intellectual disability is based on his assessment that the applicant fulfils all three DSM-V diagnostic criteria for intellectual disability. In Dr Ung's Report, he concludes that the applicant fulfils criteria A and C without further elaboration.[56] He also claims that the applicant fulfils criterion B for the following reasons:[57]

> Mr Nagaenthran manifests poor functioning in his conceptual and to a lesser degree his practical and social domain. His inadequate performance at a practical level is manifest by his inability to last in any one job for more than 3 months (even shorter durations in non-security jobs). With respect to his social domain, he has difficulty regulating emotion and

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56 Ung's Affidavit, exh UEK-1, para 31.

57 Ung's Affidavit, exh UEK-1, para 33.

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> behaviour in age-appropriate fashion as well as gullibility manifest by his acting as a guarantor for his friend and acting as a courier leading to his current offence …

70 Conversely, Dr Koh, Ms Seah and Dr Yap all opine in their respective expert reports that the applicant is *not* intellectually disabled, and merely suffers from borderline intellectual functioning (see [14], [16], [20]–[21] above).

71 In my judgment, the applicant only suffered from borderline intellectual functioning, and did not suffer from mild intellectual disability. First, Dr Ung's conclusion that criterion A is clearly satisfied is questionable. It is true that Ms Seah's Report states that the applicant obtained an FSIQ score of merely 69 following the administration of the WAIS-IV, which placed him within the high end of the *Extremely Low* range. However, as rightly observed in the DSM-V diagnostic features for intellectual disability (see [68] above), "IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks". Indeed, Ms Seah goes on to observe in her report that the applicant's FSIQ confidence interval from 66 to 74 indicates with 95% certainty that the applicant was in fact operating between the *Extremely Low* to *Borderline* range of functioning. This is more consistent with the applicant's performance on the VCI, PRI and PSI, all of which place the applicant within the *Borderline* range of functioning. This was then subsequently confirmed by Dr Yap in her report, where she concluded after administering numerous tests, including the WAIS-IV, that the applicant was not intellectually disabled. In particular, the applicant scored within the *Borderline* range for both the PRI and WMI. Also, while the tests showed that many of the applicant's executive functioning skills were impaired, Dr Yap emphasised that the applicant was able to plan and organise on simpler items, which I take to be an indication that he is not intellectually disabled.

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72 Second, Dr Ung's conclusion that criterion B is satisfied is also dubious. In this regard, I agree with the respondent's submission that Dr Ung's basis for finding that the applicant fulfils criterion B does not withstand scrutiny. The bare fact that the applicant has not been able to last in any one job for more than three months does not appear to be sufficient to show a supposed deficiency in the applicant's *practical* domain of adaptive functioning. There may be other reasons why the applicant left those jobs: the applicant previously revealed inMs Seah's interview that he "typically left his previous jobs after a few months as they either did not pay well or … he did not like some of the jobs".[58] The applicant used to hold low-paying jobs, which included working as a security officer, a car wash worker and a welder. It was thus not entirely unexpected that the applicant would switch jobs frequently in search of higher pay. In fact, given that the applicant clearly demonstrated an ability to seek and obtain employment both in Malaysia and Singapore and travel between both countries on his own, I find that the applicant was relatively adept at living independently. He thus should not be considered to be deficient in the practical domain of adaptive functioning.

73 As for the applicant's apparent gullibility as evinced in his acting as a guarantor for his friend (see [69] above), I disagree that this in itself shows that the applicant is deficient in the *social* domain of adaptive functioning. There are many reasons why someone would be willing to act as a guarantor for a friend. This fact relied on by Dr Ung is thus neither here nor there. Even if gullibility could somehow be equated with deficiency in the social domain of adaptive functioning, it is highly questionable whether the applicant was indeed truly gullible. The applicant is no babe in the woods: his actions adopted in respect of the drug importation itself reveal that he is capable of manipulation and

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58 Ms Seah's Report, p 2.

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evasion. In order to obtain a ride into Singapore, the applicant first lied to Kumarsen that he wanted to enter Singapore to collect money.[59] When the applicant was stopped at the checkpoint, he attempted to forestall a search by telling the CNB officers that he was "working in security", and asked them why they were checking him.[60] The applicant clearly demonstrated his capacity to appeal to the colour of his office in order to take advantage of the social perception of the trustworthiness of security officers. Therefore, it cannot be said that the applicant is deficient in the social domain of adaptive functioning.

74 Third, Dr Ung's finding that the applicant fulfils criterion C is also questionable. Although it is unclear how Dr Ung determined that criterion C was met, it can be inferred from Dr Ung's interview notes with the applicant that Dr Ung assessed that the applicant suffered from developmental delays due to the applicant's suggestion that he did not even pass his secondary school examinations.[61] In my view, Dr Ung's conclusion must be rejected given the unreliability of the applicant's own account of his education qualifications. At trial, the applicant testified that he passed his *Sijil Pelajaran Malaysia* ("SPM", which is the Malaysian equivalent of the GCE 'O' Levels).[62] However, when he was interviewed for Dr Koh's 2013 Report, he claimed that he had passed his *Ujian Penilaian Sekolah Rendah* ("UPSR", which is the Malaysian equivalent of the Primary School Leaving Examinations), but failed his SPM.[63] Subsequently, when he was interviewed by Ms Seah and Dr Yap, he claimed that he did not even manage to pass his USPR.[64] This showed that the applicant

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59 ROP vol 2, Day 3, pp 21:31–22:1.

60 ROP vol 1, Day 1, p 41:20–21.

61 Ung's Affidavit, exh UEK-1, p 39.

62 ROP vol 2, Day 3, p 3:12–18.

63 Dr Koh's 2013 Report, p 1.

64 Ms Seah's Report, p 2; Dr Yap's Report, p 2.

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was continuously altering his account of his education qualifications, ostensibly to reflect lower educational qualifications each time he was interviewed. His account to Dr Ung must thus be treated as unreliable.

75 I note that Dr Ung uses equivocal language in his own report when dealing with the applicant's intellectual disability. At various points in his report, Dr Ung hedges his position by stating that the applicant has either mild intellectual disability or borderline intellectual functioning,[65] even though he makes clear that they are separate conditions.[66] More tellingly, Dr Ung even agreed, during cross-examination, with Dr Yap's opinion that the applicant is *not* intellectually disabled.[67] I thus conclude that the applicant was not suffering from mild intellectual disability, and was merely suffering from borderline intellectual functioning.

76 A diagnosis of borderline intellectual functioning, in turn, is not enough to discharge the applicant's burden of proving on a balance of probabilities that the applicant's condition was an abnormality of such a degree as to impair the applicant's mental capacity to understand events, judge the rightness or wrongness of one's actions, or exercise self-control. Dr Ung himself has expressly acknowledged in his report that "[u]nlike Mild Intellectual Disability, Borderline Intellectual Functioning is not considered a 'disorder' in DSM-V".[68] Not being classified as a "disorder" in DSM-V does not *ipso facto* preclude a condition from being considered an abnormality of mind. Having said that, this is nevertheless a telling indication that the condition of borderline intellectual functioning should not be considered an abnormality that is severe enough to be

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65 Ung's Affidavit, exh UEK-1, paras 40, 49 and 52.

66 Ung's Affidavit, exh UEK-1, paras 49; NE 11/04/2017, pp 11:18–12:3.

67 NE 11/04/2017, pp 55:18–23.

68 Ung's Affidavit, exh UEK-1, para 49.

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considered an "abnormality of mind" for the purposes of s 33B(3)(*b*) of the MDA.

Conclusion

77 Following from my analysis above, I find that the applicant was not suffering from an abnormality of mind at the time of the offence. The applicant did not suffer from any alcohol use disorder, severe or otherwise. Also, the applicant's mild ADHD condition of the inattentive subtype as well as his borderline intellectual functioning are both conditions that are not of such a degree as to impair the applicant's mental capacity to understand events, judge the rightness or wrongness of one's actions, or exercise self-control.

78 At this juncture, I note that the applicant relies heavily on the decision of *Jeffery Phua*, where Choo Han Teck J held that the applicant fell within the ambit of s 33B(3)(*b*) because his abnormality of mind had an influence on his ability to resist his act of importation (at [16]), and because he was probably incapable of resisting any internal rationality that might have dissuaded him from committing the offence (at [17]). In my view, *Jeffery Phua* does not assist the applicant here. It is trite that each case must turn on its own facts. The two psychiatric experts in *Jeffery Phua* had agreed that the applicant was suffering from Persistent Depressive Disorder and Ketamine Dependence, and Choo J accepted that both conditions amounted to an abnormality of mind (at [2]). As already canvassed above, the same cannot be said for the applicant in the present re-sentencing application.

79 In the light of this conclusion, the applicant's bid to be re-sentenced to life imprisonment fails at the very first hurdle. It is thus technically unnecessary for me to decide whether the other two limbs of s 33B(3)(*b*) of the MDA are

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satisfied. Having said that, out of an abundance of caution, I will nevertheless proceed to briefly consider them.

Aetiology of the abnormality of mind

80 I now turn to address the second limb of s 33B(3)(*b*) of the MDA. In my view, the applicant has also failed to satisfy this limb of the provision.

81 For this part of the analysis, the court has to determine, with the help of the expert evidence adduced, whether the applicant's abnormality of mind arose from or was induced by one of the prescribed causes listed in the second limb. It has been recognised that the wording of the prescribed causes in the second limb "appear[s] wide enough to include most recognised medical conditions"; having said that, the onus still remains squarely on the applicant to identify which of the prescribed causes is applicable to his case: see *Iskandar* ([35] *supra*) at [89].

82 In my judgment, even assuming that the applicant was indeed suffering from all of the three abnormalities of mind as diagnosed by Dr Ung, the applicant has not been able to identify which of the prescribed causes is applicable to his case. The Court of Appeal has recently issued a salutary reminder in *Iskandar* for expert witnesses testifying in such matters to, "on top of diagnosing whether the accused person was suffering from a recognised mental condition, identify which prescribed cause, if any, in their opinion gave rise to the accused's abnormality of mind" (at [89]). Yet, this is precisely what Dr Ung has failed to do in his expert report. It bears mentioning that this is a significant lacuna in Dr Ung's Report, given the fact that identifying the aetiology of the abnormality has been recognised to be a matter largely within the purview of expert opinion (see [40] above).

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83 Mr Thuraisingam tries to make some arguments in favour of showing that the second limb has been satisfied. He first asserts that "it is clear that the [applicant's] abnormality of mind was induced by disease or injury, namely, the [applicant's] ADHD".[69] I reject this argument. For it to make sense, the applicant must show that the applicant's ADHD condition, which is in itself one of the applicant's abnormalities of mind, *induced* the onset of either of the applicant's other two abnormalities of mind, *viz*, his mild intellectual disability or severe alcohol use disorder, such that the ADHD condition is now the "disease or injury". The applicant has not shown any evidence of such linkages amongst the different abnormalities of mind diagnosed by Dr Ung; this argument is simply a bare assertion. Mr Thuraisingam next contends that the applicant's mild intellectual disability arose from inherent causes – the cognitive deficits may have been present in the applicant congenitally, or may have arisen from heavy alcohol use. While that may all very well be the case, the fact remains that Dr Ung has failed to offer his opinion regarding these potential inherent causes. The result, as Dr Koh has rightly pointed out in his 2017 report, is that "[t]he origin of these mild cognitive deficits in Mr Nagaenthran is speculative".[70] In my view, mere speculation ought not to suffice when deciding whether this limb has been satisfied.

84 The burden remains on the applicant to establish each limb of s 33B(3)(*b*) of the MDA on the balance of probabilities. I find that the applicant has failed to discharge this burden in respect of the second limb.

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69 Applicant's Submissions, para 45.

70 Dr Koh's 2017 Report, p 3.

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Whether there was substantial impairment of the applicant's mental responsibility

85 Finally, I consider the third limb of s 33B(3)(*b*) of the MDA. In my view, the applicant has also failed to show that there was a substantial impairment of his mental responsibility for the offence.

86 It is trite that "substantial impairment" requires neither total nor minimal impairment; what amounts to a substantial impairment of mental responsibility falls somewhere in between, and is a matter for the finder of fact to decide on in a commonsensical way: *Ong Pang Siew* ([35] *supra*) at [64]; *Public Prosecutor v Juminem and another* [2005] 4 SLR(R) 536 at [30], quoting *Regina v Lloyd* [1967] 1 QB 175 at 178; see also *Yeo, Morgan & Chan* at para 27.34. More instructively, this requirement does not require the abnormality of mind to be the *cause* that led to the applicant's offending act; it merely requires the abnormality of mind to have had an *influence* on the applicant's ability to resist any "internal rationality" that might have dissuaded him from committing the offence in question: *Jeffery Phua* ([35] *supra*) at [16]–[17].

87 In the present re-sentencing application, I am of the view that even if I take the applicant's case at its absolute highest – that the applicant is suffering from one of the three abnormalities of mind diagnosed by Dr Ung, and that they all arose from or were induced by one of the prescribed causes listed in the second limb – the applicant would still be unable to satisfy the third limb. The applicant would be unable to show that any of the diagnosed abnormalities of mind has substantially impaired his mental responsibility for his offence as there is no factual basis on which to make any such finding of substantial impairment.

88 The applicant has, at various points in time from his arrest till now, furnished vastly distinct accounts of why he had committed the offence:

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(a) When the applicant was first arrested, he admitted in his contemporaneous statement that he knew that the Bundle contained heroin which he was delivering for King. He also stated that he had to deliver the heroin as he owed King money and was promised another RM500 after delivery. There was no mention of any threat made by King towards the applicant's girlfriend if he had refused to make the delivery (see [9] above).

(b) During trial, the applicant denied knowledge of the contents of the Bundle, insisting that he was told that it contained "company products". The applicant then claimed that he had made the delivery under duress – King had assaulted him and threatened to kill his girlfriend unless he made the delivery (see [9] above). The applicant repeated this account to Dr Koh when he was examined in on 14 and 21 March 2013.[71]

(c) When the applicant was examined by Dr Ung on 19 April and 19 July 2016, he claimed that he had lied to Dr Koh. He had agreed to deliver the heroin for King because he was desperate for money, having owed a loanshark money.[72] He was also motivated to obey King by a mixture of loyalty, awe, fear and gratitude. While he claimed that King possessed a gun, he omitted any mention of any threat to his girlfriend.[73]

(d) When the applicant was examined by Dr Yap in the period from November 2016 to January 2017, he claimed that he belonged to a gang and had volunteered to deliver the Bundle on behalf of a fellow gang member who was reluctant to do so. He explained that he did so out of

71 Dr Koh's 2013 Report, p 2.

72 Ung's Affidavit, exh UEK-1, para 10.

73 Ung's Affidavit, exh UEK-1, para 11.

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> his loyalty to the gang and his gratitude to his gang leader, who had provided him with emotional and financial support. He emphasised that he was not coerced into performing the delivery.[74]

89 It is immediately evident that these distinct accounts of the applicant's motivations for committing the offence are all utterly irreconcilable. Indeed, Dr Ung agrees, conceding when cross-examined that he could not know for sure whether or not the applicant was telling him the truth when he was interviewing the applicant, and that the applicant "gives different stories to … different people … at different times".[75]

90 It is thus nigh impossible for me to conclude in the present application that the applicant's mental responsibility was indeed substantially impaired at the time of the offence. In the first place, I do not accept the applicant's suggestion that his mental responsibility was substantially impaired because his condition made him more susceptible to over-estimating the threat from King. At trial, I had already rejected the applicant's claim that he was coerced by King to make the delivery. My finding was subsequently upheld on appeal. Hence, there was simply no threat for the applicant to be more susceptible to.

91 Next, the applicant's alternative suggestion – that his mental responsibility was substantially impaired because his condition contributed to his misguided loyalty to his gang – must also be rejected. I do not believe that the applicant's accounts to Dr Ung and Dr Yap are credible accounts of events. I am unable to accept, on a balance of probabilities, that the applicant had indeed transported the Bundle out of misguided gang loyalty. This was not the version of facts that was elicited at trial; this account only emerged in late 2016, more

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74 Dr Yap's Report, p 3.

75 NE 11/04/2017, p 19:18–32.

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than seven years after the commission of the offence. I thus reject this account of events as a bare afterthought.

92 Having rejected both accounts based on coercion by King and misguided gang loyalty, we are accordingly left with the account provided at the point of arrest, which is that the applicant delivered the Bundle, which he knew contained heroin, simply because he needed money. Taking this account to once again be the most believable account of events (having been previously accepted at trial as the true state of affairs as well), I agree with the respondent's submission that this account shows that the applicant's mental responsibility could not have been substantially impaired. The applicant clearly understood the nature of what he was doing and did not lose his sense of judgment of the rightness or wrongness of what he was doing. He also did not appear to lose his self-control, given that he had ample time to consider his actions and took multiple deliberate steps to execute the importation of the Bundle. These steps included taking precautions to conceal the drugs by wearing larger trousers, tricking Kumarsen into giving him a ride into Singapore, and attempting to manipulate the CNB officers into not searching him (see [73] above).

93 On the whole, I find that there is no basis to draw an inference that the applicant's mental responsibility was substantially impaired in the commission of his offence, even if he is regarded to have been labouring under an abnormality of mind.

Conclusion

94 For all of the reasons set out above, I dismiss this re-sentencing application. Even though the applicant was a mere courier within the meaning of s 33B(3)(*a*) of the MDA, I find that he has not satisfied the requirements under s 33B(3)(*b*). He has not shown that he "was suffering from such

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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 his offence. The applicant thus cannot avail himself of the benefit of being re-sentenced to life imprisonment pursuant to s 33B(1)(*b*).

Chan Seng Onn
Judge

Eugene Singarajah Thuraisingam (Eugene Thuraisingam LLP) for the applicant;
Lau Wing Yum and Tan Wee Hao (Attorney-General's Chambers) for the respondent.

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