IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 8

Criminal Appeal No 29 of 2016

Between

Zainudin bin Mohamed

… *Appellant*

And

Public Prosecutor

… *Respondent*

JUDGMENT

[Criminal Law] — [Statutory Offences] — [Misuse of Drugs Act]

[Criminal Procedure and Sentencing] — [Sentencing]

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

Zainudin bin Mohamed
v
Public Prosecutor

[2018] SGCA 8

Court of Appeal — Criminal Appeal No 29 of 2016
Sundaresh Menon CJ, Tay Yong Kwang JA and Steven Chong JA
11 May 2017

12 February 2018 Judgment reserved.

Steven Chong JA (delivering the judgment of the court):

Introduction

1 This appeal raises the following question of undeniable importance: when is a drug trafficker who claims to be a mere "courier" not merely a "courier"? The answer to this question has a direct impact on a convicted person's eligibility for the alternative sentence of life imprisonment under s 33B(2) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the MDA").

2 The mandatory death penalty for specified drug trafficking offences was first introduced in Singapore in 1975. Since then, it has remained the governing regime for drug trafficking offences until 2012 when amendments were introduced to the MDA to vest the court with the discretion to sentence a convicted person to a term of life imprisonment in lieu of the death penalty. The person convicted is required to prove on a balance of probabilities that (a) he

was merely a "courier" – that is to say, that his role in the offence was restricted only to the transporting, sending, or delivering of a controlled drug or acts incidental or necessary thereto – *and either* (b)(i) the Public Prosecutor certifies that he has substantively assisted the Central Narcotics Bureau ("the CNB") in disrupting drug trafficking activities within or outside Singapore; *or* (b)(ii) that he was suffering from such abnormality of mind as substantially impaired his mental responsibilities for the acts and omissions constituting the offence. It is therefore apparent that in order to qualify for the alternative sentence of life imprisonment, the basic condition that must be satisfied – irrespective of the Public Prosecutor's certification of substantive assistance or the court's finding of abnormality of mind – is that the convicted person must be found to be a "courier".

3 Since the introduction of s 33B of the MDA, a number of decisions have been handed down by our courts to explain when an offender would be considered to have crossed the boundary beyond merely "transporting, sending or delivering a controlled drug" or acts that are related or ancillary thereto. In an oft-cited passage from *Public Prosecutor v Chum Tat Suan and another* [2015] 1 SLR 834 ("*Chum Tat Suan*"), this court held at [68] that "a courier is someone who receives the drugs and transmits them in exactly the *same form* in which they were received without *any alteration and adulteration*" [emphasis added]. In reality, it is not uncommon for an offender to be involved in doing something *more* than just "transporting, sending or delivering a controlled drug". The courts have, however, held that in a limited number of instances, an offender can nevertheless be regarded as remaining a "courier" notwithstanding his additional act so long as that act was "incidental" to or "necessary" for "transporting, sending or delivering".

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4 The appellant in the present case was convicted by the High Court of the offence of possession of not less than 22.73g of diamorphine for the purposes of trafficking under s 5(1) read with s 5(2) of the MDA and received the death sentence. He was found not to be a "courier" because at the time of his arrest, he had already embarked on the process of repacking one bundle of controlled drugs into two smaller packets of equal weight. Initially, he appealed against both his conviction and sentence. However, at the hearing of his appeal, he abandoned his appeal against conviction and elected to focus his submissions entirely on the issue of whether he could be considered a "courier". This judgment will examine and rationalise the breadth of activities which would be considered "incidental" to and/or "necessary" for the purposes of "transporting, sending or delivering" within the meaning of s 33B(2)(*a*) of the MDA, with a particular focus on the division and packing of drugs since this was the act undertaken by the appellant in the present case.

Facts

The Appellant and his co-accused

5 The appellant is Zainudin bin Mohamed ("the Appellant"), a 44-year-old male Singapore citizen. The Appellant faced a total of three charges for offences under the MDA. Two of those charges, involving consumption of a controlled drug and possession of drug-related utensils respectively, were stood down at trial. The Appellant claimed trial to the remaining charge against him, which states:

> That you … on 16 May 2014 at about 6.10 pm, at Block 631 Ang Mo Kio Avenue 4 #03-924 Singapore, did traffic in a Class A controlled drug listed in the First Schedule to the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the MDA"), to wit, by having in your possession for the purpose of trafficking two packets of granular substance and some loose granular/powdery substance weighing not less than 897.08 grams which were

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> analysed and found to contain not less than 22.73 grams of diamorphine, without authorisation under the MDA or the Regulations made thereunder, and you have thereby committed an offence under section 5(1) read with section 5(2) of the MDA, which is punishable under section 33(1) of the said Act, or you may alternatively be liable to be punished under section 33B of the MDA.

6 The Appellant was jointly tried with one Shanti Krishnan ("Shanti"), a 51-year-old female Singapore citizen. Shanti was charged with the offence of trafficking under s 5(1)(*a*) of the MDA, for delivering two packets of granular/powdery substance containing not less than 22.73g of diamorphine to the Appellant on 16 May 2014 at about 6pm.

Background facts

7 In mid-2013, the Appellant found himself in dire financial straits and unable to pay the instalments for a home loan that he had taken. The debt that he owed grew over the coming months.[1] In May 2014, he was contacted by one "Boy Ahmad", a male whom the Appellant described as his friend. After the Appellant informed "Boy Ahmad" of his financial difficulties, "Boy Ahmad" suggested that he "deal with heroin to make fast cash".[2] The Appellant agreed.

8 "Boy Ahmad" told the Appellant the role he was to play in the trafficking of diamorphine. He would send a person to the Appellant's flat to deliver diamorphine. Having received the diamorphine, the Appellant was to await "Boy Ahmad's" instructions. "Boy Ahmad" would then direct the Appellant to repack the diamorphine into small Ziplock packets and hand those packets over to "customers" who would come to the second floor lift lobby of the block of flats where the Appellant lived. Each packet prepared by the

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1 ROP vol 2A p586 at para 4.

2 ROP vol 2A p587 at para 5.

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Appellant was to contain 7.8g of drugs containing diamorphine. The Appellant was to receive two "batu" each time, which, as he explained, referred to a total of about one kg of drugs (thus one "batu" contained about 500g of drugs).[3] "Boy Ahmad" also informed the Appellant that he would be paid $300 for his efforts each time.[4]

9 On 10 May 2014, the Appellant met "Boy Ahmad" and they further discussed the arrangements between them. "Boy Ahmad" told the Appellant to buy small Ziplock packets, and passed the Appellant a digital weighing scale which he was to use to ensure that each packet of drugs weighed 7.8g. He also told the Appellant that he would be getting someone to deliver two "batu" to the Appellant on 12 May 2014, and the Appellant agreed.[5] In addition, "Boy Ahmad" handed the Appellant a plastic bag containing $8,200 in cash, which was to be paid to the person who would pass the Appellant the diamorphine. He also gave the Appellant $300 as a prepayment for the latter's efforts in receiving and packing the diamorphine.[6]

10 On 12 May 2014, "Boy Ahmad" contacted the Appellant and asked him to get ready to receive two "batu". Later in the afternoon, "Boy Ahmad" contacted the Appellant again and gave him Shanti's contact number. The Appellant then called Shanti, who asked the Appellant where she should meet him. The Appellant gave Shanti his block number and told her to meet him on the second floor of the block.[7] When they met, the Appellant handed Shanti the

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3 ROP vol 2A p587 at para 5; p591 at para 11.

4 ROP vol 2A p588 at para 6.

5 ROP vol 2A p588 at para 6.

6 ROP vol 2A p589 at para 7.

7 ROP vol 2A p590 at para 9.

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plastic bag containing $8,200 and received from her a plastic bag containing a bundle wrapped in newspaper. The Appellant returned to his flat and unwrapped the bundle. He found two transparent packets containing diamorphine within the newspaper. About 15 minutes later, "Boy Ahmad" called the Appellant and instructed him to divide one of the two packets of diamorphine into two. Each of the two divided portions was to be placed into a Ziplock packet (each of which, according to "Boy Ahmad's" directions, would contain about 226g of drugs). The Appellant complied, using the weighing scale to assist him.[8] Upon "Boy Ahmad's" further instructions, the Appellant distributed the two packets and the remaining "batu" to various recipients, who met the Appellant at or near his block to receive the diamorphine.[9]

11 On 13 May 2014, "Boy Ahmad" met the Appellant to pass him an envelope containing $8,200 in cash, as well as another payment of $300.[10] "Boy Ahmad" called the Appellant in the morning of 16 May 2014, informing him that there would be a delivery of diamorphine at about 6pm that day.[11] This delivery led to the charge which forms the subject matter of the present appeal. At about 6pm, "Boy Ahmad" contacted the Appellant again and told him that a person had arrived to deliver diamorphine to the Appellant. The Appellant replied that he would meet that person on the second floor of his block.[12] The Appellant took the plastic bag containing $8,200 cash and went down to the second floor lift lobby of his block, as he had done before. He saw Shanti waiting there for him. Shanti passed the Appellant a plastic bag containing the

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8 ROP vol 2A pp591–592 at para 11.

9 ROP vol 2A pp592–593 at para 12.

10 ROP vol 2A p595 at para 16.

11 ROP vol 2A p596 at para 17.

12 ROP vol 2A p596 at para 18.

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diamorphine, and the Appellant in turn handed her the plastic bag containing the $8,200 cash. Thereafter, the Appellant went back to his flat and locked the metal gate behind him.[13]

12 The Appellant then called "Boy Ahmad", informing him that he had received the two "batu" from Shanti. "Boy Ahmad" then instructed the Appellant to divide one of the two "batu" into half and pack each of the two half-"batu" into Ziplock packets, as he had done before. "Boy Ahmad" also told him that he should wait for further instructions regarding the delivery of the diamorphine.[14] The Appellant found a bundle wrapped in newspaper and masking tape within the plastic bag that Shanti had delivered to him. He tore open the newspaper wrapping and found two packets of diamorphine within the bundle. He then began to use a pair of scissors to cut open one of the packets, intending to divide and repack the contents of that packet as "Boy Ahmad" had directed.[15]

13 The Appellant only managed a few cuts on the packet before he heard the sounds of CNB officers attempting to enter his flat. The Appellant then grabbed the two "batu" and all of the empty packets and went to the kitchen. There, he opened the lid of the rubbish chute and threw the two "batu" as well as the empty Ziplock packets down the chute. In his hurry to dispose of those items, he did not realise that he had spilled some of the diamorphine onto the kitchen floor and near the lid of the rubbish chute. CNB officers then entered the flat and arrested the Appellant.[16] Subsequently, CNB officers retrieved the

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13 ROP vol 2A p597 at para 19.

14 ROP vol 2A pp597–598 at para 20.

15 ROP vol 2A p598 at para 21.

16 ROP vol 2A p599.

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diamorphine that the Appellant had dropped within his flat as well as that which ended up at or near the rubbish collection point of his block, after the Appellant had thrown them down the rubbish chute. A total of 897.08g of granular/powdery substance, containing not less than 22.73g of diamorphine, was collected.

The Judge's decision

14 Notably, the Appellant elected to remain silent at the close of the Prosecution's case and did not give oral evidence in his defence. Shanti, however, took the stand and was cross-examined on the third and final day of trial. There was only one plank to the Appellant's defence, which was that the Prosecution had not proven beyond a reasonable doubt that the Appellant was in possession of "each and every piece of loose granular/powdery substance recovered from the rubbish collection point".[17]

15 See Kee Oon JC (as he then was) ("the Judge") found that both accused persons had committed the offence under s 5(1) of the MDA, and he convicted and sentenced them accordingly. His grounds of decision can be found in *Public Prosecutor v Zainudin bin Mohamed and another* [2016] SGHC 245 ("the GD").

16 The Judge rejected the Appellant's argument that the Prosecution had failed to prove that all the loose portions of diamorphine found at the rubbish collection point originated from the Appellant. The Judge found that the possibility that some other person in the same block might have thrown some quantities of diamorphine down the rubbish chute at or around the same time as the Appellant's arrest was a "highly implausible possibility" that was "simply

[17] 1st Accused's closing submissions at p5.

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insufficient to raise any reasonable doubt in the circumstances": the GD at [58]. He made three points in this regard. First, there was only a very short lapse in time (about 20 minutes) from the point that the Appellant threw the two "batu" down the rubbish chute to the point when the diamorphine was retrieved by CNB officers. Second, given the street value of diamorphine, it was very unlikely that someone else would have thrown it down the *same* rubbish chute. Further, the total weight of the granular/powdery substance retrieved was 897.08g, which was close to the weight of two "batu" that the Appellant had described, *ie,* about 1 kg of drugs containing diamorphine.[18] Third, the Appellant never disputed in any of his statements that the entirety of the diamorphine retrieved by CNB officers belonged to him and had been in his possession prior to his arrest. Indeed, he expressly and positively accepted in his statements that the drugs retrieved came from him: the GD at [58]–[63].

17 In addition, the Judge held at [64] that an adverse inference should be drawn against the Appellant for electing to remain silent after his defence was called. The Judge reasoned that if the Appellant had really handled a much smaller quantity of diamorphine on that day than what was eventually retrieved by CNB officers, "it would have been eminently reasonable for him to seek to offer an explanation and provide clarification in his own defence". Given the circumstances, the Judge held at [66] that the charge against the Appellant had been proved beyond reasonable doubt.

18 The Judge then turned to consider the appropriate sentence to be imposed on the Appellant. He noted at [96] the observations made in *Chum Tat Suan* and *Public Prosecutor v Abdul Haleem bin Abdul Karim and another* [2013] 3 SLR 734 ("*Abdul Haleem*") on the "narrow meaning to be accorded to

[18] ROP vol 2A at p588 at para 5.

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the definition of a 'courier' in s 33B(2)(*a*) of the MDA", and highlighted that in *Chum Tat Suan*, this court "clarified (at [68]) that packing is *not* an act that is contemplated within the meaning of 'transporting, sending or delivering', as set out in s 33B(2)(*a*) of the MDA" [emphasis in original].

19 Applying the case law, the Judge found that the Appellant's "act of repacking the drugs was not an act that is contemplated within the meaning of 'transporting, sending or delivering', as set out in s 33B(2)(*a*) of the MDA" and he therefore could not be considered as a courier. In addition, the Prosecution had not issued the Appellant a certificate of substantive assistance. As the Appellant did not satisfy either of the requirements in ss 33B(2)(*a*) and (*b*) of the MDA, the Judge imposed the mandatory death penalty on him: the GD at [99].

20 In relation to Shanti, the Judge found that she had done nothing more than to transport the diamorphine and was therefore properly regarded as a courier. In light of the fact that Shanti received a certificate of substantive assistance (unlike the Appellant), the Judge exercised his discretion under s 33B(1)(*a*) of the MDA to sentence her to life imprisonment.

21 The accused persons each appealed against their respective conviction and sentence. At the close of the hearing of the appeals, we dismissed Shanti's appeal in its entirety. In brief, we held that it was incumbent on Shanti to rebut the presumption of knowledge under s 18(2) of the MDA and found that she had not come close to rebutting that presumption. In the circumstances, we dismissed her appeal against conviction and sentence. We reserved our judgment in relation to the Appellant and will now explain our decision for that appeal.

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The appeal

22 During the hearing, counsel for the Appellant, Mr Eugene Thuraisingam, informed us that the Appellant no longer intends to pursue the appeal against conviction and will instead only contest the sentence of death imposed on him, specifically, the High Court's determination that the Appellant was not a courier for the purposes of s 33B(2)(*a*) of the MDA.

23 The following six key arguments can be distilled from the Appellant's oral and written submissions:

(a) First, the Appellant's act of handing $8,200 cash to Shanti on 16 May 2014 was "necessary to allow him to take the drugs from her". As described at [11] above, "Boy Ahmad" had passed the cash to the Appellant in an envelope on 13 May 2014.[19]

(b) Second, "the Appellant's act of dividing one of the two 'batu' of drugs into two was on 'Boy Ahmad's' instructions". The Appellant was "not exercising his own business decision-making powers in dividing the 'batu'".[20]

(c) Third, the Appellant's act of dividing the "batu" was "necessary for his onward transmission of the correct quantity of drugs to the other parties who collected the drugs from the Appellant". It is "important to note that had the 'batu' that the Appellant received been halved at the outset, he would not have had to divide the drugs".[21] In this regard, the Appellant's act of dividing the "batu" into two was "clearly not meant

19 Appellant's written submissions at para 13(a).

20 Appellant's written submissions at para 13(e).

21 Appellant's written submissions at para 13(f).

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to facilitate distribution or sale", given that the divided "batu" was "many times above the retail size". The division was therefore "merely to divide the drugs to facilitate the correct amount for onward transmission".[22]

(d) In *Chum Tat Suan*, this court erred in adopting an "overtly narrow" interpretation of s 33B of the MDA. The reason was that the court in *Chum Tat Suan* had read a particular exchange in Parliament between Ms Lina Chiam and Deputy Prime Minister and then-Minister for Home Affairs Mr Teo Chee Hean ("DPM Teo") out of context. When that exchange is seen in its proper light, it "becomes clear that [s 33B] should be read more widely".[23]

(e) Adopting a "wider interpretation of [s 33B]" would still be "in line with the purpose of [s 33B]". The reason for the enactment of s 33B(2)(*a*) was to "find more ways of targeting those who are higher up in the drug syndicates, compared with the couriers", and such higher positions refer to the "kingpins, producers, distributors, retailers and those who fund, organise or abet these activities" (referring to the relevant parliamentary debates which we will describe later). Therefore a "wider interpretation" of s 33B "would not go against the purpose of its enactment as those who clearly play a larger role than merely transporting drugs would still be subject to the mandatory death penalty and would not avail themselves of [s 33B]".[24]

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22 Appellant's written submissions at para 15.

23 Appellant's written submissions at paras 18–22.

24 Appellant's written submissions at para 24.

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(f) Finally – in what is essentially a corollary of the preceding argument – a "narrow interpretation" of s 33B would "remove the incentive for offenders to volunteer information about the syndicate that they work for as once they have been found to have committed an act beyond purely transporting the drugs, they fall outside of the narrow ambit of s 33B(2)(*a*)". Section 33B(2)(*a*) should therefore be "read less narrowly to allow for more offenders to qualify" and therefore "be more inclined to provide information about the drug syndicates in the hope of being offered the certificate of substantive assistance".[25]

24 Since s 33B came into force on 1 January 2013, the courts have had a number of occasions to consider the scope of the so-called "courier exception" in the provision and to determine whether the acts of offenders fall within that scope. This appeal presents an opportunity to embark on a full and structured examination of the provision, having close regard to the reasoning found in the cases that have been decided thus far on the scope of the "courier exception", in a bid to ascertain Parliament's intention as regards the breadth of that exception. As it is the core issue in the appeal, we will focus in particular on the question of whether the division and packing of drugs permits an offender to remain within the ambit of the "courier exception".

Section 33B of the MDA

Applicable principles of statutory interpretation

25 We begin with a brief word on the applicable principles of statutory interpretation as outlined by this court in two recent cases, *Attorney-General v Ting Choon Meng and another appeal* [2017] 1 SLR 373 ("*Ting Choon Meng*")

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[25] Appellant's written submissions at para 25.

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and *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 ("*Tan Cheng Bock*"). The governing provision on the interpretation of statutes is, of course, s 9A of the Interpretation Act (Cap 1, 2002 Rev Ed) ("the IA"), which establishes that the court should prefer an interpretation that promotes the purpose or object underlying the written law (s 9A(1)), and identifies the circumstances in which the court may have resort to material not forming part of the written law that is capable of assisting in the ascertainment of the meaning of the provision (s 9A(2)). In *Ting Choon Meng*, Menon CJ explained at [59] that the court should begin by ascertaining the possible interpretations of the text, having regard to both the provision in question as well as the context of the text within the written law as a whole. The court should then seek to identify the legislative purpose or object of the statute, having regard to extraneous material such as parliamentary debates where appropriate. It would, however, only be appropriate to use such extraneous material in order to (a) confirm the ordinary meaning deduced from the text of the provision and the context of the written law; (b) ascertain the meaning of the text when the provision is ambiguous or obscure; or (c) ascertain its meaning where the ordinary meaning is absurd or unreasonable. Finally, the court compares the possible interpretations of the text against the purposes or objects of the statute.

26 It is therefore clear that the ascertainment of Parliament's intent in enacting the statutory provision at issue lies at the very heart of the interpretative exercise. In this regard, the following useful observations are to be found in *Tan Cheng Bock* at [41]:

> … in a truly exceptional case, it may be that the specific intention of Parliament is so clear that the court should give effect to it even if it appears to contradict, undermine, or go against the grain of the more general purpose. Such cases would, however, be rare (as noted in *Ting Choon Meng* at [60]), if they ever occurred at all. *The court must begin by* ***presuming that a statute is a coherent whole, and that any specific***

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> ***purpose does not go against the grain of the relevant general purpose****, but rather is subsumed under, related or complementary to it. The statute's individual provisions must then be* ***read consistently with both the specific and general purposes, so far as it is possible****.* [emphasis in original removed; emphasis added in italics and bold italics]

As summarised in *Public Prosecutor v Low Kok Heng* [2007] 4 SLR(R) 183 at [50], a purposive interpretation "requires one to approach the literal wording of a statutory provision bearing in mind the overarching and underlying purpose of that provision as reflected by and in harmony with the express wording of the legislation" [emphasis in original removed]. We bear this and the guidance set out in *Ting Choon Meng* and *Tan Cheng Bock* well in mind in the following analysis.

Language of s 33B

27 Section 33B of the MDA states 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 —
>
> > (*a*) may, if the person satisfies the requirements of subsection (2), instead of imposing the death penalty, sentence the person to imprisonment for life and, if the person is sentenced to life imprisonment, he shall also be sentenced to caning of not less than 15 strokes; or
> >
> > (*b*) shall, if the person satisfies the requirements of subsection (3), instead of imposing the death penalty, sentence the person to imprisonment for life.
>
> (2) The requirements referred to in subsection (1)(*a*) are as follows:
>
> > (*a*) ***the person convicted proves****, on a balance of probabilities, that his involvement in the offence under section 5(1) or 7 was* ***restricted*** *—*

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

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

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

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

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

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

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

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

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

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

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

(*b*) he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in relation to the offence under section 5(1) or 7.

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

[emphasis added in italics and bold italics]

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28 In summary, in order for a person who has been convicted of an offence under ss 5(1) or 7 that is punishable with death to bring himself within the scope of s 33B(1), he must satisfy the court that he meets one of two conditions. These alternative conditions are respectively found in ss 33B(2) and (3), each of which in turn contains two distinct requirements. As explained at [2] above, the first of these requirements is common to both sub-sections. This requirement (which is found in ss 33B(2)(*a*)(i)–(iv) and (3)(*a*)(i)–(iv)) is that the offender's involvement in the offence must have been *restricted* to (a) transporting, sending or delivering a controlled drug; (b) offering to transport, send or deliver a controlled drug; (c) doing or offering to do any act preparatory to or for the purpose of his transporting, sending or delivering a controlled drug; or (d) any combination of the aforementioned activities. In short, this is the requirement that the offender be a "mere courier" and no more.

29 The central feature of each of these four limbs of s 33B(2)(*a*) (and s 33B(3)(*a*)) is definitively the *transporting, sending or delivering* of a controlled drug. If an offender does nothing more than this, he will satisfy the requirement under s 33B(2)(*a*)(i) (and s 33B(3)(*a*)(i)) of the MDA. Section 33B(2)(*a*)(ii) and (iii) (and s 33B(3)(*a*)(ii) and (iii)) envisage acts that are related or ancillary to such transporting, sending or delivering. Section 33B(2)(*a*)(ii) (and s 33B(3)(*a*)(ii)) is satisfied if there is an *offer* to do such acts, signifying the offender's intention and willingness to perform them and hence establishing the requisite degree of culpability. (For completeness, we observe that in *Abdul Haleem*, the High Court accepted at [52] that "offering" to do such acts within the meaning of s 33B(2)(*a*)(ii) encompasses not only situations where the request to do the act emanates from the offender himself, but also scenarios where the offender accedes to a request by someone else to do the act in question.) The situation under section 33B(2)(*a*)(iii) (and s 33B(3)(*a*)(iii))

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covers an offender who has done (or offered to do) *any act preparatory to* or *for the purpose of* his transporting, sending or delivering of a controlled drug, but has not yet accomplished such transporting, sending or delivering at the time of his arrest. Section 33B(2)(*a*)(iv) (and s 33B(3)(*a*)(iv)) is a blanket provision establishing that even if an offender performs more than one of these specified acts, he would nevertheless remain within the definition of a courier and hence potentially eligible for discretionary life imprisonment under s 33B(1).

30 The second requirement differs between ss 33B(2) and (3). Under s 33B(2)(*b*), the Public Prosecutor must certify to the court that, in his determination, the offender has substantively assisted the CNB in disrupting drug trafficking activities within or outside Singapore. Under s 33B(3)(*b*), the burden lies on the offender to demonstrate that he was suffering from such abnormality of mind as substantially impaired his mental responsibility for his acts and omissions in relation to the offence. The consequence of satisfying the court that the offender is a courier differs between ss 33B(2) and (3), assuming the second requirement in the subsection in question (*ie,* ss 33B(2)(*b*) or (3)(*b*)) is satisfied. Under s 33B(1)(*a*) and (*b*), life imprisonment is discretionary under s 33B(2) but mandatory under s 33B(3).

31 In our judgment, the language of s 33B does not in itself provide any sufficiently clear indication as to whether an offender such as the Appellant who divides and repacks drugs and intends thereafter to deliver those divided packets of drugs to recipients has committed an act that excludes him from the definition of a courier. The following two points are apparent upon a reading of s 33B(2)(*a*) (and likewise s 33B(3)(*a*)). First, and most obviously, the division and packing of drugs is not explicitly included within the acts listed in the provision. All this means is that it is necessary to construe the language of the provision in order to determine if and when the division and packing of drugs

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removes an offender from the definition of a courier. Second, it is evident even upon a superficial consideration of ss 33B(2)(*a*)(i)–(iv) that the division and packing of drugs can conceivably only fall within the scope of s 33B(2)(*a*)(iii) – that is, "doing or offering to do any act preparatory to or for the purpose of [the offender's] transporting, sending or delivering a controlled drug".

32 This, however, is the limited extent to which the express wording of s 33B provides any tolerably clear answer to the question before us. We find that this is not a case in which the ordinary or literal meaning of the statutory language provides such an obvious indication of the answer as regards the division and packing of drugs that extraneous material may only be used, pursuant to s 9A(2)(*a*) of the IA, to confirm that the ordinary meaning is the correct and intended meaning (*ie,* the *confirmatory* function of extraneous material). In our judgment, resort to extraneous material – in the form of the parliamentary debates on the introduction of s 33B – in the present case may be justified under s 9A(2)(*b*)(i) of the IA, in order to ascertain the meaning of the text given that the provision remains ambiguous as to the correctness of either possible interpretation (*ie,* the *clarificatory* function of such material).

33 Before we proceed, however, we make three observations on the language of s 33B that – while not dispositive in and of themselves – provide important pointers as to its correct interpretation.

34 First, it is noteworthy that s 33B(2)(*a*) (and s 33B(3)) places the legal burden of proving, on a balance of probabilities, that the offender satisfies the requirements of a courier *on the offender himself*. As we will elaborate below, this has important practical implications on the offender's decision at trial as to whether he should give evidence on the nature and purpose of his involvement in the drug trafficking activities. Second, the offender is required to prove that

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his involvement in the offence was "restricted" to the acts listed in ss 33B(2)(*a*)(i)–(iv). In our view, Parliament's use of the word "restricted" provides a preliminary but compelling indication that the court must be wary of an overly expansive interpretation of ss 33B(2)(*a*)(i)–(iv). Through the language it employed, Parliament conspicuously intended to place limits on the types of activities that an offender can carry out without excluding himself from the court's sentencing discretion. It cannot be seriously disputed that the court's sentencing discretion under s 33B represents an exception to the general rule, which is the mandatory death penalty as established in the Second Schedule to the MDA. Indeed, as we have observed at [30] above, even if an offender satisfies the requirements under ss 33B(2), the imposition of a life sentence and caning in lieu of death remains at the court's discretion and does not occur as a matter of course. Our third and final observation is related to a point that we made at [29] above. All of the acts identified at ss 33B(2)(*a*)(i)–(iv) are closely tied to the transporting, sending or delivering of drugs – and *only* such transporting, sending or delivering. Specifically, in relation to s 33B(2)(*a*)(iii), the aim of the offender's facilitative act must be for such transporting, sending or delivering of the drugs; it cannot serve any other aim.

35 We will return to each of these observations, which will appropriately inform the approach to be taken given the centrality of the text of the provision in the process of statutory interpretation, at suitable junctures in our analysis below.

Rationale for the enactment of s 33B of the MDA

36 On 9 July 2012, DPM Teo delivered a statement in Parliament titled "Enhancing Our Drug Control Framework and Review of the Death Penalty". The focus of DPM Teo's address was on the proposed introduction of s 33B of

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the MDA. This was followed by two days of debate in Parliament on the Misuse of Drugs (Amendment) Bill (Bill No. 27 of 2012) ("the Amendment Bill"), on 12 and 14 November 2012. The Amendment Bill was passed on the second day of debate. While the Amendment Bill presented a raft of important measures aimed at supporting enforcement and increasing punishment (such as the introduction of enhanced penalties for repeat drug traffickers and importers under s 33(4A) of the MDA), the focus of the debates was undoubtedly on the changes to the death penalty regime under s 33B of the MDA.

37 In his statement and in his responses to questions from several Members of Parliament ("MPs"), DPM Teo identified three reasons for the Government's intention to enact s 33B of the MDA. The first reason pertained to the introduction of the element of discretion to the death penalty regime which, prior to 2012, had been mandatory if the offender was convicted of the relevant offence. DPM Teo explained that "society's norms and expectations [were] changing" and that "[w]hile there [was] a broad acceptance that we should be tough on drugs and crime, there [was] also increased expectation that, where appropriate, more sentencing discretion should be vested in the courts": *Singapore Parliamentary Debates, Official Report* (9 July 2012) vol 89. The need to reflect a shift in social attitudes toward sentencing therefore provided the impetus for this feature of the legislative amendment.

38 The second reason concerned the requirement that the offender has substantively assisted the CNB, pursuant to s 33B(2)(*b*) of the MDA. DPM Teo explained the objective of the amendment as follows (*Singapore Parliamentary Debates, Official Report* (9 July 2012) vol 89):

> The reasons for making the changes are as follows: as I have earlier stated, the drug menace is growing internationally. We need to find *more ways of targeting those who are higher up in the drug syndicates*, compared with the couriers. If the couriers

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> give us substantive co-operation leading to concrete outcomes, such as the *dismantling of syndicates or the arrest or prosecution of syndicate member*s, that will help us in our broader enforcement effort. [emphasis added]

39 This amendment to the MDA was intended to provide enforcement agencies with "an extra set of tools to encourage the couriers, in this case, to assist us, to dismantle drug syndicates, or to arrest or prosecute members of the syndicates": *Singapore Parliamentary Debates, Official Report* (9 July 2012) vol 89. The aim was to "keep pace with the evolving operating landscape and more effectively tackle drug trafficking", and "enhance the operational effectiveness of the CNB, by allowing investigators to reach higher into the hierarchy of drug syndicates": *Singapore Parliamentary Debates, Official Report* (12 November 2012) vol 89. In his response to queries from MPs on the Amendment Bill, DPM Teo emphasised that there was a need to "be clear about what the policy intent is". He went on to make the following important clarification regarding couriers (*Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89):

> … The policy intent of this substantive cooperation amendment to our mandatory death penalty regime is *to maintain a tight regime – while giving ourselves an additional avenue to help us in our fight against drugs, and not to undermine it.*
>
> *Couriers do play a key role in the drug network*. In fact, they are often our key point of contact with the drug network. Let me explain why. Illicit drugs are not manufactured or grown in Singapore because of our tough laws and enforcement. All our drugs therefore have to be couriered into Singapore. Thus, ***couriers are a key part of the network which has to be vigorously targeted and suppressed in order to choke off the supply to Singapore***. And they are *the main link to the suppliers and kingpins outside Singapore.*
>
> Earlier in my speech, I made the point that *the mandatory death penalty is applied only to those who traffic in large quantities of drugs, enough to bring misery in that one act, to hundreds, if not thousands, of lives.* ***Every such convicted courier has thus already crossed the threshold of culpability under our laws and is subject to the death penalty***.

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> What we are proposing is that where the Public Prosecutor has certified that substantive cooperation has been provided, judges will have the discretion to sentence them to life imprisonment with caning, rather than death.
>
> We cannot be sure how exactly couriers or the syndicates will respond to this new provision. But we have weighed the matter carefully, and are *prepared to* ***make this limited exception if it provides an additional avenue for our enforcement agencies to reach further into the networks****, and save lives from being destroyed by drugs and hence make our society safer.*
>
> Syndicates may now be forced to re-organise their operations to more tightly compartmentalise the information. Or they may have to stop using experienced couriers who may have, through several trips, gleaned more information about the networks. They may have to look for new couriers, which will make their supply chain less reliable. All in all, it will create an atmosphere of risk and uncertainty in the organisation, because they do not know if one of them gets caught, whether he will reveal secrets that will then cause problems for all of them. *Our intent is to make things as difficult as possible for the syndicates and to keep them and drugs out of Singapore.*
>
> [emphasis added in italics and bold italics]

We will provide our observations on the points raised by DPM Teo in the above passage later in this judgment.

40 The third reason identified by DPM Teo for introducing s 33B of the MDA concerned the requirement under s 33B(3)(*b*) that the offender have suffered such abnormality of mind as substantially impaired his mental responsibility for the offences committed. The aim was to address "a legitimate concern that [the death penalty] may be applied without sufficient regard for those accused persons who might be suffering from an abnormality of mind": *Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89.

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Observations on the parliamentary debates

41 From our reading of the parliamentary debates on the introduction of s 33B of the MDA, we discern certain prominent themes and concerns that are not only relevant to the issues in this judgment but are indeed highly instructive as to the proper interpretation of s 33B.

42 To begin, we observe that DPM Teo repeatedly stressed that the requirements under s 33B of the MDA are "specific" and "tightly-defined". This was a recurring theme throughout his several speeches on the topic prior to the passing of the Amendment Bill. We reproduce the following remarks given by DPM Teo by way of illustration (*Singapore Parliamentary Debates, Official Report* (9 July 2012) vol 89):

> Mr Speaker, Sir, the changes that we propose to make to the drug regime are carefully calibrated. There are some risks indeed, as Mr Christopher de Souza has pointed out, with regard to the deterrent effect and whether that will be diminished. However, *we have proposed to* ***define it in a very careful way so that there will still be a very strong deterrent effect*** *because the mandatory death penalty will still apply in most circumstances*. The discretion only acts in ***very specific, tightly-defined conditions*** and those two conditions which I have listed out are: first, *the trafficker must only have been* ***involved as a courier and not in any other type of activity associated with drug supply and distribution***; and, secondly, either he has provided cooperation, substantial cooperation, in a substantive way, or he has a mental disability which substantially impairs his appreciation of the gravity of the act. So it is *a* ***very tightly-defined set of conditions*** and we believe that this will *still preserve the very strong deterrent value of the legislative framework.* [emphasis added in italics and bold italics]

43 Indeed, the fact that the conditions in s 33B are "tightly-defined" was emphasised on no less than seven occasions by DPM Teo. He also referred to s 33B(2) as a "limited exception" that was meant to provide "an additional avenue for our enforcement agencies to reach further into the [drug syndicate]

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networks, and save lives from being destroyed by drugs and hence make our society safer" (*Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89).

44 Various MPs spoke on the Amendment Bill on 12 November 2012, for the most part expressing strong support for the Bill. But a common concern was that the introduction of the discretionary death penalty for couriers would send the message to the public that there was a relaxation of the strict policy against drug-related activities and erode the deterrent effect of the drug laws (*Singapore Parliamentary Debates, Official Report* (12 November 2012) vol 89).

45 These concerns were directly addressed in the speeches of then-Senior Minister of State for Home Affairs Mr Masagos Zulkifli ("Mr Zulkifli") and DPM Teo on 14 November 2012 (*Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89). Mr Zulkifli responded that "[o]ur stand on drugs is clear. Drug use is harmful to the individual, his family and society, and is undesirable. *We must therefore continue our zero tolerance approach against drugs*, and I am happy that the community is also behind us in this" [emphasis added]. Similarly, DPM Teo noted that a number of MPs had "cautioned that we do not send out the wrong signals with the changes that we are making", and stated that he "agree[d] wholeheartedly with them". He explained that "this [was] not the signal that we want to send at this point of time, when, as [DPM Teo] had said in [his] speech on Monday, we are facing serious and new challenges on the drug front." DPM Teo then made the following remarks which, in our view, leave little doubt as to the intention of the Government to maintain an unyielding stance toward the blight of drug trafficking:

> *Let me state categorically that we are maintaining our "zero tolerance" stance against drugs. We are maintaining our "zero tolerance" stance against drugs.* Taken in totality, these amendments will make our regime tougher against repeat

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> offenders, introduce new offences especially against those who target the young and vulnerable, and *enhance the effectiveness of the death penalty regime.* … [emphasis added]

46 Indeed, the persistence of the threat posed by drugs and the continuing need for strong deterrence against drug-related activities was very much the focus of DPM Teo's address to Parliament (*Singapore Parliamentary Debates, Official Report* (9 July 2012) vol 89). DPM Teo explained that the law mandating the death penalty for trafficking in above 15g of diamorphine was justified because that quantity is "enough to feed the addiction of more than 300 abusers for a week.

47 Accordingly, while the drug situation had improved over the years, DPM Teo stressed that "it still remain[ed] a serious threat" and it was critical "to maintain severe penalties for drug trafficking including the death penalty". After further describing ss 33B(2) and (3), he concluded as follows:

> Taken together, *these provisions retain the strong deterrent posture of our capital punishment regime*, while providing for a more calibrated sentencing framework when specific conditions are met. At the same time, we are *providing a framework for accused persons to assist our agencies to target those who play more significant roles in drug syndicates*. …
>
> …
>
> … The Government's duty is, first and foremost, to provide a safe and secure living environment for Singaporeans to bring up their families. We must be *constantly vigilant, adapt our law enforcement strategies and deterrence and punishment regime to remain ahead of criminals.* We must do what works for us, to achieve our objective of a safe and secure Singapore. The changes announced today will sharpen our tools and introduce more calibration into the legal framework against drug trafficking, and put our system on a stronger footing for the future.
>
> [emphasis added]

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Summary

48 We now summarise our observations on the legislative debates.

49 First, DPM Teo put it beyond any doubt that the conditions in s 33B were intended by Parliament to be *limited and "tightly-defined" exceptions* to the general rule that the death penalty is the appropriate punishment for those who traffic or import drugs in a quantity exceeding the prescribed threshold. The reason for this restrictive approach towards s 33B is that drug abuse remains a serious social menace in Singapore and therefore high levels of punishment must be maintained to deter the importation and trafficking of drugs. In other words, deterrence remained the predominant objective in relation to drug-related activities due to the unceasing and, in some key respects, mounting threat posed by drugs to the well-being of the community. In our judgment, this is entirely consonant with our observation at [34] above that s 33B(2)(*a*) requires the acts of a courier to be *"restricted"* to those identified in ss 33B(2)(*a*)(i)–(iv) – all of which centre on the transporting, sending or delivering of drugs and nothing else – strongly suggests that Parliament intended the provision to be interpreted cautiously and restrictively.

50 In addition, Parliament did not intend the enactment of s 33B of the MDA to reflect any relaxation of the strict policy against drug-related activities (including the transporting, sending and delivering of drugs in Singapore) or to send any signal to the public to this effect. As DPM Teo recognised (see the extract from his statement quoted at [39] above), a person who carries out such acts is highly culpable because of the key role that he plays in the activities of drug syndicates. DPM Teo provided a vivid illustration in his explanation of this point – the trafficking of what might be seen as a small quantity of drugs

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(such as 15g of diamorphine) can in fact serve to fuel the drug habits of hundreds of abusers over an extended period of time (see [46] above).

51 Indeed, far from heralding a softening of the attitude toward drug-related activities, s 33B(2) was enacted to further disrupt such activities by incentivising drug couriers to volunteer information that would assist enforcement agencies in targeting those who hold higher positions in drug syndicates. Put another way, s 33B(2) of the MDA serves an instrumental and facilitative function. It is a means to achieve the end of combating drug syndicates by encouraging the supply of useful intelligence to police investigations. This – quite contrary to any mellowing of the strict policy against drugs and drug couriers – is the *sole purpose and justification* for the "courier exception" under s 33B(2) of the MDA. As Minister for Law Mr K Shanmugam made clear during the debates (*Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89), "[t]he issue is not what we can do to help couriers avoid capital punishment. It is about what we can do to *enhance the effectiveness of the [MDA]* in a non-capricious and fair way without affecting our underlying fight against drugs" [emphasis added]. It must accordingly be borne in mind that 33B(2) is not based on a policy of leniency or forbearance but rather on one of continued rigour and vigilance.

52 In our judgment, the points we have identified above should inform and provide the necessary context to the courts' interpretation and application of s 33B(2) of the MDA. The aim in construing the provision must of course be to promote and give effect to Parliament's purpose or object behind its enactment of the provision (see s 9A(1) of the IA). This should likewise remain the lodestar for the courts in determining the scope of the courier exception.

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53 It is apposite at this juncture to consider how s 33B(2)(*a*) has been applied in the cases that have come before the courts thus far and the guidelines that have emerged in the jurisprudence.

Judicial interpretation and application of s 33B of the MDA

54 From our review of the cases, we find that the courts have adopted a cautious and generally narrow approach toward the interpretation of the requirements under s 33B(2)(*a*) of the MDA. In our judgment, this is entirely consistent with Parliament's emphasis that these conditions are "tightly-defined" and should represent a limited exception to the general rule represented by the mandatory death penalty.

55 From the language employed by the courts to describe the requirements under s 33B(2)(*a*), it is evident that the courts have taken heed of Parliament's intended approach. In *Abdul Haleem*, Tay Yong Kwang J (as he then was) held at [50]–[51] that the court's discretion under s 33B was given only in two "narrowly circumscribed situations" and that Parliament had intended that "the exception in s 33B(2)(*a*) [be] confined solely to those who are typically referred to as 'drug mules' and whose involvement is limited to delivering or conveying drugs from point A to point B". In *Chum Tat Suan* at [63], this court similarly referred to the "narrowness of the definition of a courier in s 33B(2)(*a*)" and noted that ss 33B(2) and (3) of the MDA "were intended to be 'tightly-defined' conditions". The observation in *Chum Tat Suan* regarding the narrowness of the definition has since been cited in a number of decisions of the High Court (see *Public Prosecutor v Azahari bin Ahmad and another* [2016] SGHC 101 ("*Azahari*") at [34], *Public Prosecutor v Christeen d/o Jayamany and another* [2015] SGHC 126 ("*Christeen*") at [68] and *Public Prosecutor v Suhaimi bin Said* [2017] SGHC 86 ("*Suhaimi*") at [23]).

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56 We now turn to examine specific types of acts performed by offenders that the courts have considered in determining whether these offenders remain within the scope of s 33B(2)(*a*), or if they have by those acts been rendered ineligible for discretionary life imprisonment under s 33B(1)(*a*). We begin by identifying and categorising the types of acts that the courts have considered thus far. This is obviously not intended to be a closed or exhaustive list of relevant conduct, and we do so to provide a useful context to ultimately evaluate the nature of the Appellant's acts in relation to his conviction for drug trafficking. We reiterate our observation in *Rosman bin Abdullah v Public Prosecutor* [2017] 1 SLR 10 ("*Rosman"*) at [30]–[31] that the inquiry as to whether an offender is a courier is "a *fact-sensitive* one in which the court must pay close attention to both the facts as well as the context of the case at hand" [emphasis in original removed; emphasis added] and that in the light of the "myriad permutations of fact situations that could possibly arise … the list of relevant factors cannot be closed". We will list the types of acts that have been accepted as falling within the scope of s 33B(2)(*a*) followed by those that have not. Thereafter, we will provide our observations and set out our approach, before examining the division and packing of drugs in particular detail.

Acts that fall within the scope of s 33B(2)(a)

Storing or safe-keeping drugs in the course of transporting, sending or delivering those drugs

57 In *Abdul Haleem*, the two accused persons obtained diamorphine and were instructed to hold on to the diamorphine until instructions were given regarding its collection. Tay Yong Kwang J (as he then was) held at [55] that the accused persons were not excluded from the scope of s 33B(2)(*a*) merely because they had intended to keep the bundles of drugs for at least a short period

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of time before delivering or sending the bundles to the customers of their supplier. Tay J then observed as follows:

> … While s 33B(2)(*a*) applies strictly only to an accused person acting in the narrow role of a courier, it should not be construed pedantically such that *an incidental act of storage or safe-keeping by the accused person in the course of transporting, sending or delivering the drugs* would mean that he is also playing the role of storing or safekeeping drugs within the drug syndicate. *Such incidental acts would arguably fall within s 33B(2)(a)(iii) as well.* There was no dispute in any case that both accused persons satisfied the requirements in s 33B(2)(*a*). [emphasis added]

On the facts of the case, Tay J found (at [55]–[56]) that the accused persons were only involved either in "offering to transport, send or deliver a controlled drug" under s 33B(2)(*a*)(ii) (by agreeing to their supplier's request to deliver the drugs to third parties) or "doing or offering to do any act preparatory to or for the purpose of … transporting, sending or delivering a controlled drug" under s 33B(2)(*a*)(iii) (by collecting the bundles of drugs from their supplier). In our view, this must be right because the brief period of "storage" was the direct consequence of the delayed delivery and would not have been necessitated otherwise.

58 In *Azahari*, the second accused agreed to safe-keep two "batu" containing diamorphine in his locker for the first accused. About two days later, he handed the diamorphine back to the first accused. In determining whether the second accused could be regarded as a courier, Hoo Sheau Peng JC (as she then was) referred (at [34]) to *Abdul Haleem* and *Chum Tat Suan*, and held (at [39]) that the safe-keeping by the second accused "was merely incidental to the act of delivering the diamorphine, and did not expand his role beyond that of a courier as defined in s 33B(2)(*a*) of the MDA".

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59 In *Chum Tat Suan*, this court expressed agreement with the approach adopted in *Abdul Haleem* and held at [67] that:

> … if it is clear that the accused person's involvement was truly that of a courier, the *mere incidental act of storage or safe-keeping by the accused person in the course of transporting, sending or delivering the drugs, should not take him outside of the definition of a courier*. … [emphasis in original removed; emphasis added]

Collection of drugs for the purpose of subsequent transporting, sending or delivering of those drugs

60 As described at [57] above, Tay J found in *Abdul Haleem* that the mere collection of drugs by an offender who intends to subsequently transport, send or deliver those drugs to another party is an act that is preparatory to those subsequent acts. In our judgment, this is entirely sound as a matter of logic – it would be difficult to imagine how a person who intends to transport, send or deliver drugs could do so if he did not collect or receive them in the first place.

Collection of money upon sending, transporting or delivering of drugs

61 In *Christeen*, the second accused handed over five packets of diamorphine to the first accused, who was then to await instructions regarding the individuals to whom she should subsequently deliver the packets. Following the trial, Tay J found both accused persons guilty of the offence of trafficking under s 5(1) of the MDA. In determining whether the second accused could be regarded as a courier under s 33B(2)(*a*), Tay J considered the fact that the second accused had collected money from the first accused (by way of physical collection and bank transfers) that represented the proceeds of the drug transactions. He held at [77] that the collection of money by the second accused did not in itself take him out of the scope of the "courier exception", reasoning that "Parliament could not have intended that someone who transports drugs

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from point A to point B and collects payment for those drugs upon delivery is not a courier". Tay J also noted that the second accused had only collected money for the drugs that he delivered. Further, it made "no difference whether [the second accused] collected the money on a separate occasion or if the money he collected in one delivery related to a previous delivery by him", since "[t]his [was] the ordinary result when credit is extended to purchasers". Even if the second accused was paid for his collection of money, "that would not by itself make him more than a courier".

62 Importantly, Tay J cautioned that "the analysis might be different if, for example, [the second accused] regularly collected payment for drugs which he did not deliver or if he could decide how much to charge the recipients for the drugs". However, it did not matter that the second accused knew that the money he collected from the first accused came from the clients and not from the first accused herself. Tay J explained that "[t]he money for the drugs ultimately comes from the end-users but … the law allows for a 'relay team' of couriers in one transaction as appear[ed] to be the case" on the facts of *Christeen*.

Relaying of information regarding subsequent deliveries in the course of transporting, sending or delivering drugs

63 In *Christeen*, the second accused also passed messages from several third parties to the first accused, informing the latter of (a) the identity or description of the "clients" to whom she was to deliver the drugs that the second accused had handed over to her; (b) the quantity of drugs to be passed to each "client"; (c) the time of these subsequent deliveries; and (d) how much money, if any, was to be collected from each "client" in exchange for the drugs. Counsel for the second accused argued that it was necessary to pass messages for the purpose of delivery, especially in a case where a "relay team" was involved. Tay J accepted the argument and held at [81] that on the facts, the second

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accused's act of forwarding information in and of itself did not make him more than a courier. Tay J reasoned that it was "common for a courier to deliver goods to an intermediary, who is then informed of who the ultimate recipient of the goods should be". The mode through which the second accused relayed these instructions to the first accused – whether by way of text message or by calling her – was also immaterial.

64 Tay J made two important points in addition. First, it was highly relevant that the second accused had simply been relaying and acting on instructions; "there was no evidence that [the second accused] possessed executive decision-making powers". Tay J held that his conclusion "[might] well be different" if, for example, the second accused was able to decide the individuals to whom the first accused was to subsequently deliver the drugs. Second, Tay J observed that apart from relaying instructions to the first accused, the second accused also passed information from the first accused to the third parties (from whom the second accused had himself received his instructions) regarding the locations at which the first accused's subsequent deliveries would take place. The second accused also subsequently sought confirmation from the first accused that she had delivered the drugs. Tay J held that "[i]n this limited sense, [the second accused] was not just a one-way conduit of information about subsequent deliveries but was playing an active role in the distribution process. That would disentitle him to claim to be a mere courier."

Acts that fall beyond the scope of s 33B(2)(a)

Recruitment of drug couriers and administration of remuneration

65 The second accused in *Christeen* recruited the first accused into the drug syndicate and made arrangements for her to be paid for each job. Tay J held at [83] that such recruitment was "akin to the human resource function in an

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organisation" and could not be said to be incidental to the work of a courier. He also found that the fact that the second accused had been entrusted with money that was to be paid to the first accused as her remuneration hinted at the trust that the drug syndicate had reposed in the second accused as well as the position that he held within the syndicate. Likewise, this precluded the second accused from claiming to be a mere courier.

Efforts to expand the drug consumer base

66 In *Christeen*, the second accused asked the first accused to find more customers to buy drugs, informing her that if she did so, then he could pay her more than her current remuneration. The first accused replied that she did not know anyone who consumed or bought drugs. The second accused sought to assuage her concerns, telling her that there was no hurry and that she could do so slowly. Tay J held at [85] that "[a]sking someone to find more customers clearly falls outside the definition of a courier" because "[d]oing so is unnecessary and irrelevant to the delivery of goods from point A to point B" and was instead "analogous to a marketing or business development function in a business". Further, "the fact that [the second accused] said he could increase [the first accused's] remuneration showed his authority in determining her remuneration". Tay J concluded that the second accused's "involvement in business development therefore disentitled him from claiming to be a mere courier".

Sourcing for drug supply and acting as a go-between in negotiations for drug transactions

67 In *Rosman*, the offender played an active role in sourcing for a supply of diamorphine by contacting a Malaysian supplier for this purpose. He also acted as a "middleman" in negotiations between the supplier and a third party

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for the sale and purchase of the diamorphine, by conveying the third party's offer to the supplier so as to allow the two of them to eventually reach an agreement where the third party would be given a three-day credit to pay the outstanding sum to the supplier. The High Court found that the offender's involvement went beyond that of a mere courier within the meaning of s 33B of the MDA.

68 This court agreed with the decision of the High Court, finding at [34]–[36] that the High Court judge was "wholly justified" in arriving at his findings. The offender did "not only actively source for the heroin in question but also actively participated in negotiations as a middleman or go-between with regard to the price to be paid for the heroin as well as the terms of delivery of the heroin between [the supplier] as seller and [the third party] as buyer". The court held that the offender was "no mere conduit pipe" and concluded as follows (at [36]):

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

Division and packing of drugs

69 Finally, we come to review the case law on whether the division and packing of drugs into packets containing smaller quantities takes an offender outside the courier exception. As this is the central issue in this appeal, the case law in this regard merits full and careful examination. Following this review of the cases, we will then set out our analysis on the effect of an offender's division

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and packing of drugs on his eligibility for alternative sentencing under s 33B(2)(*a*) of the MDA. For this reason, we do not seek to categorise the division and packing of drugs as acts that fall either within or outside the scope of s 33B(2)(*a*) at this juncture.

70 We begin with *Chum Tat Suan*. One of the questions before the Court of Appeal in that case was whether a person who intended to sell the controlled drugs can be considered to be a courier. Chao Hick Tin JA, giving the judgment of the court, held that the answer to this question was "a clear 'no'", and proceeded to explain that Parliament had intended ss 33B(2) and (3) of the MDA to be "tightly-defined" conditions, as we have pointed out. Chao JA also referred to DPM Teo's explanation in Parliament that accused persons must "only have been involved as a courier and *not in any other type of activity associated with drug supply and distribution*" [emphasis added] (see [42] above). He emphasised "the transportational function" of couriers and held that it was "abundantly clear that the statutory relief afforded under s 33B does not apply to those whose involvement with drugs extends beyond that of transporting, sending or delivering the drugs": *Chum Tat Suan* at [66]. After clarifying that mere incidental acts of storage or safe-keeping in the course of transporting, sending or delivering drugs do not take an accused outside the definition of a courier (see [59] above), Chao JA then provided at [68] the following statement of principle that has since been recited and applied in several decisions of the High Court:

> *While the question of whether a particular act is necessary for couriering, so to speak, is fact-specific,* ***in keeping with legislative intention, this caveat has to be construed strictly***. ***Acts necessary for transporting, sending or delivering the drug cannot include packing***, for instance, as packing is not a necessary element of moving an object from one point to another. Simply put, *a courier is someone who receives the drugs and transmits them in exactly the same form*

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> *in which they were received* ***without any alteration or adulteration***. [emphasis added in italics and bold italics]

71 In the subsequent case of *Public Prosecutor v Yogaras Poongavanam* [2015] SGHC 193 ("*Yogaras*"), the offender was charged with the offence under s 7 of the MDA for importation of three packets of diamorphine into Singapore, having arrived in Singapore from Malaysia on a motorcycle. The diamorphine was found concealed within the front fender area of the motorcycle. The offender admitted that on the day of his arrest, he had been brought to a warehouse. He further explained in his statement (which is reproduced in *Yogaras* at [27]) as follows:

> … One of the men working for the "boss" then divided the 1 packet of the drugs into 2 equal halves. He weighed it to make sure that the 2 packets of drugs were of equal weight. I was told by the same man to *hold onto the opening of the 2 plastic packets of drugs while he used a lighter to burn and seal the opening of the 2 plastic packets* (Recorder's notes: Accused person was shown photographs of exhibits marked "A1", "A1A", "A1B", "A2" and "A2A". Accused person identified the 2 packets of "ubat" that he held onto were exhibits marked "A1A" and "A1B". He identified exhibit "A2A" as the big packet of "ubat" that was remained intact). They then cut a piece of black garbage bag and put the big packet of "ubat" (Recorder's note: Accused identified the packet of "ubat" to be exhibit marked "A2A") onto the cut piece of black garbage bag and told me to watch. They demonstrated how to fold the cut piece of black garbage bag and then told me to do the same. *I then folded the cut piece of garbage bag and wrapped the big packet of "ubat" inside. After that I used black tape to tape around the cut piece of black garbage bag. For the other 2 packets of "ubat", I wrapped them together as one bundle and also used black tape to tape all over the cut piece of black garbage bag*. [emphasis added]

72 In summary, what the offender did was to (a) hold two of the packets of diamorphine that he eventually brought into Singapore while they were being sealed by another person; (b) wrap a piece of a garbage bag over the third packet of diamorphine (that he likewise brought into Singapore) and secure the wrapping with tape; and (c) similarly wrap the earlier two packets of

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diamorphine in a piece of a garbage bag and secure that with tape. The offender was told that the reason why the packets of diamorphine had been treated in this manner was so that they "could not be scanned": *Yogaras* at [9]. The offender had then concealed the bundles in the front fender area of his motorcycle before entering Singapore.

73 Tay J found at [28] that the "packing" done by the offender was "incidental to his delivery job". The "packing" had been carried out essentially for two purposes. First, it was to ensure that the bundles were "compact enough to fit into the space behind the front fender of his motorcycle". Second, the offender had believed that wrapping the bundles in that manner would assist him to avoid detection. In that latter regard, Tay J reasoned as follows (at [28]):

> …The fact that the wrapping material was also supposed to help him evade scanning at the checkpoint was *not really different from a courier trying to* ***camouflage bundles of drugs by wrapping them*** *in some food packaging.* Similarly, a courier might decide to "pack" the bundles in some clothing in his bag in order to avoid detection." *The "packing" contemplated by the Court of Appeal in* Chum Tat Suan *which would enlarge the role of the deliverer to that beyond a mere courier would be in the nature of someone who* ***packs drugs into bundles as a routine after ensuring that the right type and quantity of drugs go into the right packaging****. It* ***does not encompass the wrapping and camouflaging work*** *that I mentioned.* [emphasis added in italics and bold italics]

Tay J accordingly found that the offender was merely a courier and, given that the Prosecution had tendered a certificate of substantive assistance, was eligible for the court's exercise of sentencing discretion. It is of critical significance to note that the court's finding that the wrapping and packing of the drugs was to facilitate concealment and to avoid detection was based on the offender's evidence which the Prosecution did not dispute and which the court accepted. It was the offender's evidence that the purpose of the concealment was to facilitate delivery of the bundles "to a male Chinese".

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74 The next case in which acts of division and packing were found to have been committed was *Public Prosecutor v Syed Suhail bin Syed Zin* [2016] SGHC 8. The police found numerous empty sachets, a digital weighing scale, four packets of diamorphine and a metal container likewise containing diamorphine (amongst other drug-related items) in the offender's apartment after his arrest. The offender was charged with the offence of possession of the diamorphine for the purpose of trafficking. Tay J convicted the offender, finding (at [51]) that the equipment was used by him to repack drugs for sale. In sentencing the offender, Tay J held at [53] that he was "not a mere courier of drugs" since he "had the intention and the means of repacking the drugs he had obtained from [his supplier] *for sale* to third parties" [emphasis added]. Accordingly, the offender did not come within the ambit of ss 33B(2)(*a*) or (3)(*a*).

75 In *Public Prosecutor v Ranjit Singh Gill Menjeet Singh and another* [2017] 3 SLR 66 ("*Ranjit Singh*"), Hoo JC found that the second accused ("Farid") was guilty of the offence of possession of diamorphine for the purpose of trafficking, having received five packets containing diamorphine from the first accused. In Farid's flat, the police found numerous empty plastic packets and two electronic weighing scales, amongst other things. Farid admitted in his statements that the empty sachets and weighing scales had been used by him to divide, weigh and pack diamorphine. He would use one of the weighing scales to measure the diamorphine to pack half or one-pound orders, and the other weighing scale to weigh diamorphine for packing into packets of 7.7–7.9g. In sentencing Farid, Hoo JC held as follows:

> 63 For completeness, I wish to state that Farid had not shown, on a balance of probabilities, that he was a mere courier. It was clear that repacking drugs for the purpose of further distribution was integral to Farid's role. Paraphernalia such as weighing scales and empty plastic bags, meant for

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> weighing and repacking drugs, were found in the Unit. In fact, Farid clearly admitted in cross-examination that he was going to use that paraphernalia to repackage the heroin in the Robinsons bag before delivering it. Mr Singh sought to downplay that admission in closing submissions, pointing out that the heroin in five packets in the Robinsons bag had come "pre-packed into one and half pound packages … unlike the first two consignments that were all delivered in one pound packages". I did not think the point assisted Farid, as he had also testified that the paraphernalia found in the Unit were used by him to repack heroin into smaller packages as light as 7.7–7.9g. Thus, the fact that the consignment on 6 February 2014 came in one-pound and half-pound packages did not suggest that repacking by Farid would have been unnecessary.
>
> 64 I noted Mr Singh's argument that even if Farid's role with regard to the offence charged involved repacking, such repacking was merely incidental to his role as a courier. However, Mr Singh did not (and could not) dispute that a person who does acts which are "not a necessary element of moving an object from one point to another" goes beyond playing the role of a courier: *PP v Chum Tat Suan* [2015] 1 SLR 834 at [68]. Thus, ***although a person who repacks drugs because such repacking is necessary to transport the drugs may still be a courier, "someone who packs drugs into bundles as a routine after ensuring that the right type and quantity of the drugs go into the right packaging"*** *– in other words, someone like Farid –* ***would certainly not be***: *PP v Yogaras Poongavanam* [2015] SGHC 193 at [28]. *This distinction explained the outcome in PP v Siva a/l Sannasi [2015] SGHC 73, which Mr Singh relied on. That case concerned an accused who had* ***wrapped already packaged drugs in newspaper secured with rubber bands for transportation purposes****. In contrast, Farid's role to weigh and repack the drugs (into half-pound packages or smaller packets of 7.7–7.9g as required) was* ***essentially a matter of convenience for facilitating distribution or sale; it was not necessary for or incidental to enabling the drugs to be transported****.* I was therefore unable to accept Mr Singh's submission that Farid's repacking was the act of a mere courier.
>
> [emphasis in original removed; emphasis added in italics and bold italics]

Hoo JC's analysis of *Chum Tat Suan*, *Yogaras* and *Public Prosecutor v Siva a/l Sannasi* [2015] SGHC 73 ("*Siva*") in these above-quoted paragraphs merits closer examination and we will do so in our subsequent analysis.

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76 In *Suhaimi*, the offender received four "batu" containing diamorphine and repacked two of the "batu" into 90 small packets and half a "batu". He then passed 10 of the small packets to a third party. The offender was then arrested with the remaining drugs, together with a digital weighing scale and numerous empty plastic packets. Foo Chee Hock JC convicted the offender of the offence of possession of the remaining drugs for the purpose of trafficking, finding at [17] that the offender had intended to deliver those remaining packets. Foo JC then turned to consider the appropriate sentence to be imposed on the offender. While there was a dispute between the Prosecution and the defence as to whether the offender had intended to sell as opposed to merely deliver the diamorphine, Foo JC found at [32] that this dispute was "overshadowed by the fact that [the offender] had repacked the [remaining drugs]" that he had been arrested with. He noted at [33] that the offender had been arrested with a digital weighing scale and numerous empty plastic packets and that he had explained in his statements how he had weighed and repacked the two "batu" using that paraphernalia, and proceeded as follows:

> 34 In submitting that the accused was a mere courier, the Defence argued that not all instances of repacking would preclude an offender from falling within the Courier Exception. However, in my view it was clear from the case authorities that ***acts of repacking had to be necessary for or incidental to the delivery (and other statutory acts) if the accused were to be a mere courier***: see *Chum Tat Suan* at [68]; *Ranjit Singh* at [64]; and *Christeen* at [68]. In this regard, *Ranjit Singh was especially instructive given its close similarities with the present case*. Therein, the second accused ("Farid") was charged for possessing 35.21g of diamorphine for the purpose of trafficking. Weighing scales and empty plastic bags were found in Farid's rented apartment, which Farid had intended to use to repackage the diamorphine into smaller packets each containing 7.7–7.9g of the drug. In rejecting Farid's submission that such acts of repacking were that of a mere courier, *the High Court found that Farid's role of weighing and repacking the drugs "was essentially a matter of convenience for* ***facilitating distribution or sale****; it was not necessary for or incidental to enabling the drugs to be transported"* … (at [64]). The High Court therefore imposed the mandatory death sentence on Farid.

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> 35 The facts of *Ranjit Singh* were much like those in the present case, and in the circumstances, I agreed with the Prosecution that the accused fell outside the Courier Exception. It was apparent from the above facts that *one of his core functions was to weigh and repack the batus into small packets after he had collected them from the drug suppliers*. As the Prosecution highlighted, *the accused's act of repacking had* ***substantially altered the form of the drugs***. *Such repacking was* ***neither necessary for nor incidental to the acts listed under s 33B(2)(a) of the MDA***. *Instead,* ***one could fairly describe what the accused did as "breaking bulk" for his suppliers***. Certainly, the two *batus* were *broken down into small packets of retail size, and this act of repacking was done "essentially [as] a matter of convenience for facilitating distribution or sale" …*: see *Ranjit Singh* at [64]. In my view, this formulation in *Ranjit Singh* was most apposite for the present case. It applied *a fortiori* to the present case given that the accused had already repacked the diamorphine unlike Farid in *Ranjit Singh* who had not actually repacked the diamorphine at the time of his arrest.
>
> [emphasis in original removed; emphasis added in italics and bold italics]

In addition to the above, Foo JC observed at [38] that the Prosecution had not issued a certificate of substantive assistance to the offender, and concluded at [39] that the mandatory death penalty applied.

77 In the recent case of *Public Prosecutor v Muhammad Farid bin Sudi and others* [2017] SGHC 228 ("*Muhammad Farid*"), the first accused collected a plastic bag and a sling bag containing packets of diamorphine. Two of those packets were the subject of the charge against the first accused. After receiving the drugs, the first accused found that the drugs were "very messy". He then proceeded to wrap the two packets of diamorphine in newspaper and place them in a plastic bag, after having been told that those two packets were for his intended recipient (who was the second accused). The first accused subsequently passed those two packets to the second accused in a car.

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78 Hoo JC found that the first accused was guilty of the charge of trafficking those two packets of diamorphine, and held at [83] that his involvement "was restricted to delivering the drugs to [the second accused]" since "his packing of the drugs in a plastic bag pursuant to [the third accused's] instructions was incidental to the act of delivery". She noted at [84] that the two packets of diamorphine "had already been packed in that form when the [first accused] collected them"; all he did was to wrap them in newspaper and put them in a plastic bag. After setting out the passage from *Chum Tat Suan* at [68] that is reproduced at [70] above, Hoo JC held as follows:

> 85 However, *the kind of packing contemplated by the Court of Appeal was someone who packs by "ensuring that the right type and quantity of drugs go into the right packaging" Public Prosecutor v Yogaras Poongavanam* [2015] SGHC 193 ("*Yogaras*") at [28]; ***it is the kind of packing that facilitates further distribution or sale. Hence, segregating the drugs into smaller packets is not the kind of "packing" that is incidental to delivery*** (see, *eg*, *Public Prosecutor v Ranjit Singh Gill Menjeet Singh and another* [2017] 3 SLR 66 at [63]–[64] and *Public Prosecutor v Zainudin bin Mohamed and another* [2017] 3 SLR 317 at [57] and [99]), ***whereas the wrapping or camouflaging of bundles containing drugs is*** (*Yogaras*).
>
> 86 In this case, wrapping the two bundles A1A1 and A1A2 in newspaper was ***purely for the purpose of identifying that these were the bundles to be delivered*** *to Hamzah. It was an act* ***incidental*** *to delivery.*
>
> [emphasis added in italics and bold italics]

Since the Prosecution had also issued the first accused with a certificate of substantive assistance, Hoo JC exercised her discretion to impose a sentence of life imprisonment and 15 strokes of the cane in lieu of the death sentence on the first accused.

79 Finally, Choo Han Teck J's decision in *Public Prosecutor v Tan Kah Ho and another* [2017] SGHC 61 provides a useful illustration that any finding as to whether an offender is a courier or otherwise is, by the very nature of the

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inquiry, not only fact specific but more importantly typically premised on the court's assessment of the offender's evidence. In that case, the two accused persons, Tan and Mui, were jointly tried on two charges, both of which were in furtherance of their common intention to traffic drugs. Both accused persons were convicted following a trial in which both testified. Both Tan's and Mui's DNA were found on the bundles containing the diamorphine. After considering Tan's evidence, Choo J gave Tan the benefit of the doubt, finding at [12] that "his DNA may have been left on the adhesive side of the black tapes at the ends of the bundle when he was handling them for delivery" and thus held that "he was acting only as a courier". It is important to note that Choo J found no evidence that Tan was involved in the division or packing of the drugs. Therefore, his finding that Tan was merely a courier was consistent with the evidence before the court. In contrast, the court found at [20] that Mui was not a courier because the presence of his DNA on the diamorphine bundles together with the phone records proved that "he was a packer and instruction giver".

80 As some of the cases examined above are subject to pending appeals, we should make it clear that our review of the cases should not be taken as our endorsement of the findings by the High Court. They provide useful illustrations as to when the division and packing (or repacking) of drugs falls within or outside the scope of the courier exception. As we will explain, it is notable that a central feature of the inquiries in each of the cases is the offenders' evidence as regards the purpose or reason for the division and packing of the drugs.

Analysis and approach

81 In our judgment – leaving aside acts that consist of transporting, sending or delivering of controlled drugs *simpliciter* and offering to do such acts – the common thread that runs through the other types of conduct that have been

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found to fall within the scope of s 33B(2)(*a*) is that they are all acts that are *facilitative of* or *incidental to* the transporting, sending or delivering of the controlled drugs by the offender to the intended recipient. We will unpack and elaborate upon this statement of principle.

Facilitative acts

82 Acts that are *facilitative of* the transporting, sending or delivering of drugs are, in other words, acts that are "preparatory to" or "for the purpose of" such transporting, sending or delivering, within the meaning of s 33B(2)(*a*)(iii) of the MDA. They enable or assist the offender to transport, send or deliver the drugs (and not to accomplish any unrelated aims which the offender may have in mind).

83 Illustrations of such facilitative acts can be found in the cases described above. By way of example, if a person is handed a bundle of drugs by a supplier and tasked to deliver the bundle to a third party in a week's time, and that person keeps the bundle in his home in the intervening period before meeting the third party to deliver the bundle to him, we consider that the person's storage or safe-keeping of the drugs during that period of time can plainly be said to be performed for the purpose of his delivery of the drugs to the third party. Likewise, if an offender externally wraps a packet of drugs with a separate layer of material in order to render the bundle more compact and therefore permit ease of transport, or so as to better camouflage and conceal it during transportation and therefore enable its delivery, the offender is nonetheless performing these acts in preparation for the transportation of the drugs and/or for the purposes of ensuring its delivery to the intended recipient.

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Incidental acts

84 Acts that are *incidental to* the sending, transporting or delivering of controlled drugs are secondary or subordinate acts that occur or are likely to occur in the course or as a consequence of such sending, transporting or delivering. Again, the primary act at issue is the offender's sending, transporting or delivering of the drugs, which lies at the heart of each of the four limbs of s 33B(2)(*a*). We make several points in relation to construing such acts.

85 First and foremost, a cautious and restrained approach must be adopted in determining whether an act can properly be considered incidental to the primary acts of transporting, sending or delivering. Broad assertions that the offender's act can be regarded as incidental, unsupported by any explanation of how the act in question satisfies the definition provided above and without adequate reference to the factual circumstances of the case, will generally not be accepted. A controlled and generally restrictive approach to the matter is mandated by Parliament's clear signal that the conditions governing an offender's eligibility for sentencing discretion under s 33B should be narrowly circumscribed.

86 Second, for the offender's act to be incidental to the transporting, sending or delivering of the controlled drug, it must be highly proximate to the *nature and purpose* of those primary acts. Conduct such as the recruitment of couriers, sourcing for supply and the identification of potential customers are plainly very far removed from the nature and objective of conveying drugs to a designated recipient – they concern instead the expansion of the drug distribution network, the enlargement of drug supply and the growth of the volume of drug sales. In contrast, the receipt of money in exchange for the delivery of drugs is not only a common and ordinary occurrence in the course

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of the handing and taking over of drugs, but more importantly it is natural and appurtenant to such delivery given the inherently transactional nature of the activity. (We reiterate, however, the ruling in *Chum Tat Suan* at [62] that if what the offender in question is really doing is *selling* the drug to the recipient, then he cannot be considered a courier.) We likewise accept that the relaying of instructions from one courier to another – exclusively with regard to information that the latter courier needs to know in order to transport, send or deliver the drug handed to him by the former – is incidental to those primary acts in the light of the fact that couriers often act as "relay teams" and would not be able to carry out their conveyance of the drugs were it not for such information. But if the offender does not merely relay instructions but is in reality the source of those instructions, in the sense that he decided the contents of the instructions, we do not think that the giving of such instructions can be regarded as incidental to his transporting, sending or delivering of the drugs.

87 This leads into our third point, which involves an observation made by Tay J in *Christeen* (at [72]) that a courier simply carries out instructions given to him and has practically no room for his own exercise of discretion or decision-making. We agree with Tay J's observation and add that if the acts carried out by the offender indicate that he possesses some executive decision-making power in the organisation and activities of the drug syndicate, then it is highly unlikely that he can be considered a mere courier. For the reasons as explained at [117] below, the converse is not necessarily true.

Approach toward division and packing of drugs

88 We now turn to the crux of this appeal, which is whether and when the division and packing of drugs takes an offender out of the definition of a courier as stated in s 33B(2)(*a*) of the MDA. As described at [69]–[79] above, a

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considerable body of case law has developed in relation to this issue since the amendments to the MDA came into force on 1 January 2013 and it is useful to have close regard to these cases and the reasoning contained therein.

Definitions and preliminary observations

89 It is appropriate to begin by clearing up any definitional ambiguity so as to preclude misconceptions about the nature of the activity that is the subject of our analysis here. The division of drugs refers to the *breaking up of an existing quantity of drugs into any number of smaller amounts*. In practice, this is often accomplished by using a weighing scale to ensure that the original mass or quantity of drugs (once removed from its original packaging) is separated into the desired number of parts, each consisting of the desired weight or amount of drugs. What commonly occurs thereafter is the packing (or repacking) of the drugs. This generally consists of the *individual parcelling of each of the divided parts of the drugs*, typically by placing each of those parts into separate packets or bags. By dividing and packing or repacking the original quantity of drugs in his possession, the offender therefore segregates that original quantity into discrete smaller portions. The process of dividing and packing or repacking drugs necessarily involves (to use the language in *Chum Tat Suan* at [68]) the "alteration or adulteration" of the original mass or quantity of the drugs. The above description elucidates how that alteration or adulteration takes place when an offender divides and packs drugs. These are the activities that we refer to in the following analysis. In the interests of concision, any subsequent references to "packing" should also be understood to include "repacking".

90 We return to a point that we made at [31] above in our consideration of the text of s 33B. Out of the acts identified in ss 33B(2)(*a*)(i)–(iv), the division and packing of drugs can conceivably only fall within the scope of

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s 33B(2)(*a*)(iii), *ie*, "doing or offering to do any act preparatory to or for the purpose of [the offender's] transporting, sending or delivering a controlled drug". And in line with both the language of the provision as well as Parliament's explicitly articulated desire in this regard (see [34], [42]–[43] and [49] above), s 33B(2)(*a*)(iii) must be interpreted with due caution and restrictiveness. The *direct applicability* of DPM Teo's remark that the legislative amendments are intended to be "very specific [and] tightly-defined" to the courier exception is amply reflected in the fact that DPM Teo proceeded immediately after making that remark to describe in detail the exact requirements that an offender must satisfy *in order to be a courier*. The full extract from DPM Teo's speech has been set out at [42] above but we reproduce the relevant segment of it again here for immediate reference:

> … *we have proposed to* ***define it in a very careful way*** *so that there will still be a very strong deterrent effect because the mandatory death penalty will still apply in most circumstances.* The discretion only acts in ***very specific, tightly-defined conditions*** and ***those two conditions which I have listed out are: first, the trafficker must only have been involved as a courier and not in any other type of activity associated with drug supply and distribution***; and, secondly, either he has provided cooperation, substantial cooperation, in a substantive way, or he has a mental disability which substantially impairs his appreciation of the gravity of the act. So it is *a* ***very tightly-defined set of conditions*** and we believe that this will *still preserve the very strong deterrent value of the legislative framework.* [emphasis added in italics and bold italics]

In particular, DPM Teo's statement that the offender "must only have been involved as a courier and not in any other type of activity associated with *drug supply and distribution*" articulates a sharp and important contrast between permissible acts relating to the *transporting, sending or delivering* of drugs and the impermissibility of *distributive* acts. We return to this point later.

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91 Consequently, the inquiry is brought into sharper focus. Our analysis will be directed to the question of whether the division and packing of drugs can properly be considered to be an act that is preparatory to or for the purpose of the transporting, sending or delivering of the drugs, or can otherwise be regarded as incidental to such transporting, sending or delivering. As defined at [82] and [84] above, acts that are preparatory or for the purpose of transporting, sending or delivering are *facilitative* acts – *ie,* acts that enable or assist the offender to transport, send or deliver the drugs (and not to accomplish any unrelated aims which the offender may have in mind); and acts that are *incidental* to transporting, sending or delivering are secondary or subordinate acts that occur or are likely to occur in the course or as a consequence of such sending, transporting or delivering.

Reason or purpose for division and packing

92 We must emphasise at the outset of this part of our analysis that not every act of division and packing of drugs would *necessarily* take such an offender outside the courier exception. In our judgment, the case law illustrates that in determining whether an offender's division and packing of drugs is preparatory to or for the purpose of transporting, sending or delivering the drugs, it is of the first importance to have close regard to the *reason or purpose* for the division and packing, objectively ascertained. In line with this court's observation in *Rosman* at [30] (see [56] above), such reason or purpose is to be determined with careful reference to the facts and context of the case. The corollary of this observation is that one *cannot*, without having due regard to such reason or purpose, properly arrive at the conclusion that an offender who either intends to or has carried out acts of division and packing is not a courier. It is of critical importance to bear in mind that the analysis is inherently fact-sensitive and no *a priori* conclusion can be drawn as to whether an offender is

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or is not a courier based on his acts (or intended acts) of division and packing alone. Insofar as any bright-line approach was suggested in the GD, we do not agree with it.

93 The fact-sensitive nature of the inquiry is borne out by the cases, all of which demonstrate that it is crucial to have regard to the reason or purpose behind the offender's acts of division and packing. We begin with *Yogaras* (see [71]–[73] above). As Tay J found in *Yogaras*, the offender's "packing" had been carried out for two reasons: first, to ensure that the bundles were compact enough to fit into the space behind the front fender of his motorcycle; and second, to elude the scanning of the drugs at the immigration checkpoint. Neither was found to be sufficient to exclude the offender from the definition of a courier, and we agree. In essence, both reasons provided by the offender pertained to his aim of preventing detection of the drugs as he imported them into Singapore. Ensuring sufficient compactness of the bundles of drugs so that they might fit into the designated space in his motorcycle was a key part of his attempt to conceal the drugs in his motorcycle and thus reduce the possibility of detection by the immigration officers. Likewise, he had believed that wrapping the bundles in garbage bags and tape would confound the scanners at the checkpoint, and thus enable him to move the bundles through the checkpoint without impediment. We therefore find that the "camouflaging work" (to use the language in *Yogaras* at [28]) that was carried out by the offender was facilitative of his *transporting, sending or delivering* of the bundles of drugs, as they enabled or assisted him to accomplish those specific aims. Accordingly, they were acts preparatory to or for the purpose of his transporting, sending or delivering of the drugs pursuant to s 33B(2)(*a*)(iii).

94 It is also essential to point out that in any event, the offender in *Yogaras* had *not* in fact divided and packed the drugs within the meaning of those terms

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as described at [89] above. He did not break up any existing quantity of drugs into smaller amounts. All he did was to hold packets containing diamorphine that had already been divided by one of the other men working for the offender's "boss" while they were being sealed by someone else, and then wrap pieces of garbage bag and tape over the sealed packets (see [71]–[72] above). More importantly, he was specifically briefed on the *purpose* for the division and repacking. There was hence no alteration or adulteration of the original quantity of drugs *by* the offender. This is also undoubtedly the reason why, in *Yogaras* at [28], Tay J employed inverted commas to describe the offender's acts as "packing" and further remarked that the "packing" contemplated in *Chum Tat Suan* concerned "pack[ing] drugs into bundles as a routine after ensuring that the *right type and quantity of drugs* go into the right packaging" [emphasis added] (see [73] above). That was not the sort of "packing" done by the offender in *Yogaras*. Consistent with our view that the reason or purpose is crucial in this inquiry, the court accepted the offender's evidence that the "packing" was ultimately to facilitate the concealment of the drugs into various part of his motorcycle to avoid detection in order to achieve delivery of the drugs.

95 As for the offender in *Muhammad Farid* (see [77]–[78] above), he had not actually divided or packed the two packets of diamorphine handed to him. He had simply wrapped those packets in newspaper and placed them in a plastic bag. In any event, the offender explained that he had done so with the aim of identifying that these were the packets to be delivered to the recipient and for no other reason. We therefore think that these acts could be considered to be purely facilitative of his *sending or delivering* of the diamorphine to the recipient.

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Division and packing for the purpose of distribution

96 We now turn to examine the cases in which the offenders were found to have performed acts of division and packing that excluded them from the definition of a courier.

97 We begin with *Ranjit Singh*, a case in which the offender was arrested with various empty sachets and weighing scales in his possession and admitted to using that apparatus to divide and pack diamorphine. We have reproduced Hoo JC's reasoning in full at [75] above. Crucially, at [64] of her judgment, she held that "a person who repacks drugs because such repacking is necessary to transport the drugs *may still be a courier*" [emphasis added], and drew a distinction between such a person and "someone who packs drugs into bundles as a routine after ensuring that the right type and quantity of the drugs go into the right packaging" (quoting from *Yogaras* at [28] for the latter description). According to Hoo JC, this distinction explained the outcome in *Siva*, where the offender wrapped already packaged drugs in newspaper secured with rubber bands for transportation purposes, and was held to be a courier. That offender was to be contrasted to the second accused in *Ranjit Singh*, who had weighed and repacked drugs into packages of half a pound or 7.7–7.9g as required "essentially as a matter of convenience for facilitating distribution or sale". Unlike the acts of the offender in *Siva*, she found that those of the second accused in *Ranjit Singh* were "not necessary for or incidental to enabling the drugs to be transported".

98 Hoo JC's reference to *Siva* illustrates her understanding of acts of "repacking" that are "necessary to transport the drugs". The acts of the offender in *Siva* are markedly similar to those of the offender in *Yogaras* in that both had wrapped *pre-packed* drugs with exterior material and fastened such wrapping

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(with rubber bands and tape respectively). It is critical to observe that both of them did so in order to *facilitate their transportation of the drugs* – the former to ensure that the contents were properly secured when they were carried about, and the latter to render the drugs compact enough that they would fit into a designated compartment of a vehicle as well as to elude police scanning. In contrast, what the second accused in *Ranjit Singh* did was to "*facilitat[e] distribution or sale*" [emphasis added] by weighing and repacking drugs into smaller packages (whether of half a pound or 7.7–7.9g each) and subsequently handing these smaller packages to various customers of the first accused. Those could not be said to be acts facilitating *transportation*, but were instead properly regarded as acts facilitating *distribution or sale*.

99 Similar reasoning was employed by Foo JC in *Suhaimi* (see [76] above), where the offender had repacked original quantities of diamorphine into smaller packets. Foo JC surmised from the case law that "acts of repacking had to be necessary for or incidental to the delivery (and other statutory acts) if the accused were to be a mere courier" (at [34]) and held that *Ranjit Singh* was "especially instructive given its close similarities with the present case". He found, as Hoo JC did in *Ranjit Singh*, that the offender's acts of division and repacking in *Suhaimi* were "neither necessary for nor incidental to the acts listed under s 33B(2)(*a*) of the MDA" and were carried out "essentially [as] a matter of convenience for *facilitating distribution or sale*" [emphasis in original removed; emphasis added] (at [35]).

100 This reasoning was again adopted by Hoo JC in *Muhammad Farid* (see [77]–[78] above), where Hoo JC held – perhaps even more explicitly – at [85] that "the kind of packing" that involved "ensuring that the right type and quantity of drugs go into the right packaging" (using the language in *Yogaras* at [28]) was "the kind of packing that *facilitates further distribution or sale*"

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[emphasis added] in the context of repacking the drugs into a number of smaller packets.

101 In our judgment, the foregoing analysis demonstrates the central importance of having regard to the reason or purpose of the offender's division and packing of the drugs in determining whether those acts are sufficient to take the offender out of the definition of a courier. As we will explain in the next section of this judgment, the need for an accounting of the reason or purpose for such division and packing bears an integral relation to Parliament's casting of the burden on the offender to explain that the division and repacking was nonetheless an act preparatory to or for the purpose of "transporting, sending or delivering". If that reason or purpose is, for instance, to ensure that the drugs can be transported securely without fear of inadvertent leakage or to allow for placement of the drugs into confined spaces within the transporting vehicle, then the division and packing of the drugs could be considered to be facilitative of the transporting, sending or delivering of the drugs. However, breaking bulk for the purpose of enabling the original quantity of drugs to be transmitted to more than one recipient is not a preparatory step to deliver but is an antecedent step that is involved in facilitating distribution to more than one recipient. Therefore, properly understood, the act of breaking bulk is an act that enables *distribution* rather than an act that is preparatory to or for the purposes of delivery. That purpose does not fall within the scope of s 33B(2)(*a*)(iii) of the MDA and hence excludes an offender from eligibility for discretionary life sentencing under s 33B(1). This approach is not only supported by the consistent jurisprudence on the subject but, as will become clear, equally consonant with principle and parliamentary intent.

102 It is essential to appreciate the distinction between mere transporting, sending or delivering, on the one hand, and distribution, on the other. When an

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offender is instructed to divide and pack an original quantity of drugs into smaller portions before delivering those divided portions to intended recipients, he is being asked to impart to that original quantity of drugs an important characteristic that it did not initially have. The additional characteristic imparted is *a hitherto non-existent ability or readiness for the drugs to be transmitted to a wider audience*. Without the offender's intervention, the drugs handed to the offender would have remained in its original undivided quantity and packaging. It is virtually impossible for a single "batu" of drugs to be distributed to more than one intended recipient (regardless of the actual number of such recipients) if the "batu" remains in its original undivided form and quantity. In order to meet the scale and scope of the desired distribution, it must be "cut" into the requisite number of smaller quantities, each of which must then be packed separately to enable individual distribution. This is not just a theoretical or abstract possibility but an empirical fact. Drug distribution networks are only made possible because of such division and packing. Once a batch of drugs has been produced by a manufacturer or supplier, it is then divided and packed and those parts delivered to any number of persons, each of whom may effect further division and subsequent distribution and so on until the drugs reach the eventual consumers.

103 One might argue that the court's decision as to whether an offender can be regarded as a courier ought not to turn on something so arbitrary as whether the drugs handed to him comes in an undivided whole or in already divided portions. But this argument entirely misses the significance of the act of division and packing for the purposes of distribution. In examining whether an offender was a courier, the inquiry must necessarily be focussed on the acts of the offender and not their eventual consequences. In the case of an offender who receives and delivers an undivided whole, his act is both physically and legally

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restricted to delivering the drugs. The position is different in the case of an offender who, after receiving the undivided whole, does *additional* acts in dividing and packing the undivided whole. By dividing the drugs into smaller portions, whether of his own accord or in compliance with instructions, so as to create the possibility of wider transmission, the offender in the second scenario would necessarily have performed an expanded role *beyond* that of transporting, sending or delivering the drugs. He has instead contributed to the drug trade in a real and different way. The nature and scope of the acts of these two offenders are therefore starkly different. For the purposes of determining whether an offender is a courier, the inquiry is necessarily focussed on his specific role and not on the ultimate consequences to the end-users of the drugs.

104 For the foregoing reasons, in the absence of any satisfactory explanation to the contrary, we find that the division and packing of drugs for the *purpose* of giving the drugs the capacity for wider transmission *cannot* be considered merely to be an act that is preparatory to or for the purpose of transporting, sending or delivering the drugs. Nor can it be considered to be conduct that is merely incidental to transporting, sending or delivering, given that the function of division and packing for the purpose of distribution is clearly distinct from the nature or the purpose of mere conveyance from point to point, and that it cannot be said to have occurred in the course or as a consequence of transporting, sending or delivering.

105 For completeness, we should add that even if an offender is not involved in breaking bulk, the court must examine the *substance* of the offender's act and that an offender who is asked to deliver a quantity of packets of drugs may nevertheless be found not to be *delivering* but in substance to be *distributing* and hence fall outside the scope of s 33B(2).

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106 In the interest of clarity, we draw out and dismiss two irrelevant distinctions to the court's determination of whether the *reason or purpose* of an offender's division and packing is that of distribution rather than transporting, sending or delivering the drugs. First, it is immaterial whether the direct recipients of the divided portions of the drugs from the offender are end-consumers or persons who are going to pass the drugs along to someone else. There is nothing in the idea of distribution that even vaguely connotes that the recipient should only be a consumer. Indeed, as we have explained, it is an empirical fact that drug distribution networks often work as "relay teams" (see also *Christeen* at [77]) in which the drugs only reach end-consumers after they have been passed along a chain of division and distribution. There is accordingly no reason to think that *only* those who directly hand the drugs over to individual consumers should be regarded as having performed an act of distribution. In addition, offenders who divide and pack drugs, intending to pass the divided amounts to recipients, may themselves be clueless as to whether those recipients are couriers, distributors, wholesalers, retailers, consumers or otherwise. As a practical matter, it may therefore be extremely difficult – if not altogether impossible – for the police or the court to ascertain the roles of the intended recipients.

107 For these reasons, we also have little sympathy for the argument that because the divided amounts of drugs remain substantial in quantity, it is unlikely that they were meant to be directly delivered to drug abusers for their consumption, and more likely that they would be moved further along the chain of distribution and subsequently further subdivided into smaller portions intended for immediate consumption. This line of argument is misguided. What is crucial – as we have already explained – is the fact that the reason or purpose for the offender's division and packing is to create the prospect for wider

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dissemination of the drugs. Such a prospect materialises when he breaks down the original quantity of drugs into smaller amounts for this purpose, even if those smaller amounts remain substantial and therefore subject to possible further sub-division down the line. The identity of the intended immediate recipient of the divided quantities is therefore of no legal significance. If those divided amounts are subsequently further subdivided by another individual likewise for the purposes of enabling a broader scope of transmission, then that individual may likewise be disentitled from claiming to be a courier.

108 Second, we do not think that any principled distinctions can be drawn between offenders who divide and pack drugs into two, three, four or more parts. The exact numerical figure of the divisor is irrelevant not only because no inferences can safely be drawn from it, but more importantly because an offender's division and packing will be for the purpose of distribution as long as he intends, by doing those acts, to impart to the original quantity of the drugs the capacity for it to be transmitted to more than one person.

Burden of accounting for acts of division and packing

109 Given the cardinal importance of ascertaining the reason or purpose for an offender's division and packing of drugs, it is imperative that the *offender* furnishes an explanation for his conduct if he is seeking to persuade the court that he is a mere courier. This is plain from s 33B(2)(*a*) which establishes that the burden lies on the person convicted to prove, on a balance of probabilities, that his involvement in the offence was restricted to one of the permitted types of activities set out in ss 33B(2)(*a*)(i)–(iv). We have identified the importance of this point in our analysis of the text of the provision (see [34] above), and we note that the court in *Chum Tat Suan* likewise emphasised this crucial point – it held at [19] that it is "obvious" that "the person convicted bears the burden of

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proving on a balance of probabilities that he was only a courier". In our judgment, in the absence of any such explanation or evidence in this regard, the court will, in the face of evidence that the offender had divided and repacked the drugs which had been delivered to him, be led ineluctably to the conclusion that the offender has failed to discharge his burden, rendering him ineligible for discretionary life sentencing. We further add that the offender's reason or purpose for carrying out his acts of division and packing is a matter that is uniquely within his knowledge. He is not only legally required to provide evidence of such reason or purpose if he is to discharge the burden of proving that he is a courier, but is also plainly in the best position to do so.

110 It is worth noting that in *Yogaras* and *Muhammad Farid*, the respective offenders provided evidence as to the reason or purpose for their division and packing. In *Yogaras*, this was minutely detailed in the offender's statements to the police, the relevant portions of which are reproduced at [71] above. In *Muhammad Farid*, the explanation was likewise provided in the first accused's statements, which the court found at [22] to contain "an extensive account of [his] involvement in the transaction for which he was arrested and similar previous transactions". Based on these explanations, the court in *Yogaras* and *Muhammad Farid* were satisfied that the respective offenders had discharged their burden in proving that they remained within the definition of a courier despite their additional acts.

111 It is difficult to imagine how the court in *Yogaras* and *Muhammad Farid* would have been able to ascertain the specific reasons for the offenders' division and packing of drugs if there were no evidence of this and the offenders were to elect not to testify on the matter. And it is completely inconceivable that an offender would be able to persuade the court that he satisfied the requirement in s 33B(2)(*a*) if the account provided in his police statements was that he had

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intended to divide and pack the drugs for the purposes of distribution, but chose not to testify at trial to explain or rebut such an account.

Summary of principles

112 We pause to draw together the various strands of analysis above by way of the following summary of principles on whether the division and packing of drugs by an offender falls within the scope of s 33B(2)(*a*)(iii) of the MDA:

(a) The division of drugs refers to the breaking up of an existing quantity of drugs into any number of smaller amounts. The packing (or repacking) of drugs consists of the individual parcelling of each of the divided parts of the drugs.

(b) It is crucial to have close regard to the offender's *reason or purpose* in carrying out such acts of division and packing, in determining whether the offender can nevertheless be considered a courier. The analysis is *inherently fact-sensitive*. No *a priori* conclusion can be drawn as to whether an offender is or is not a courier based on his acts (or intended acts) of division and packing alone.

(c) Division and packing that is carried out in order to enable the bundles of drugs to be (for example) (i) transported securely without fear of inadvertent leakage; (ii) placed into confined spaces within the transporting vehicle; (iii) concealed or disguised to prevent detection; or (iv) identified more easily during delivery are acts that can be considered to be purely facilitative of or incidental to the transporting, sending or delivering of the drugs.

(d) In contrast, if the *reason or purpose* of the division and packing is to *enable the original quantity of drugs to be transmitted to a wider*

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audience (that is, more than one person), then the division and packing was intended to be facilitative of the *distribution* of the drugs and not the mere transporting, sending or delivering of those drugs from point to point. It is irrelevant whether (i) the intended direct recipient of those drugs is an end-consumer or a person who will pass the drugs along to someone else; and (ii) the divided and packed drugs are to be distributed to two, three or more persons.

(e) It is crucial to note that the burden under s 33B(2)(*a*) of the MDA lies on the *offender* to satisfy the court on a balance of probabilities that his involvement in the offence was merely that of a courier. This means that it is imperative for the offender to *account for the reason or purpose* for his division and packing of drugs. If he does not provide any or any sufficient evidence that he had a permissible reason or purpose for dividing and packing the drugs, then he will have failed to discharge that burden and will be ineligible for alternative sentencing.

113 Having explained and summarised these principles, we now turn to apply them to the facts of the present case.

Application to the present case

114 We will take each of the Appellant's submissions (see [23] above) in turn, applying the preceding analysis.

115 As mentioned at [14] above, the Appellant chose to remain silent at the close of the Prosecution's case and did not offer oral evidence in his defence. Consequently, he did not allow himself the opportunity to substantiate certain factual claims made in his submissions, such as that his division of the "batu" was "not meant to facilitate distribution or sale as the divided ["batu"] was many

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times above the retail size".[26] The Appellant's defence was simply that the Prosecution had not proven that all of the loose diamorphine that was retrieved from the rubbish collection point had been in his possession (see [14] above). In these circumstances, we consider that it would be wholly inappropriate to attach any weight or credit to factual assertions made in the Appellant's submissions for which no oral (or any other type of) evidence was adduced in support. Even more crucially – and as we have explained – *the burden rests with the Appellant to prove on a balance of probabilities that his role was "restricted" to that of "transporting, sending or delivering" or preparatory or incidental acts thereto.* If, in order to discharge that burden, the Appellant intended to satisfy the court that the reason or purpose for his intended division and packing of the diamorphine was to facilitate the transporting, sending or delivering (rather than for distribution) of those drugs, then it was incumbent on him to put before the court evidence – including his oral evidence – that he had such a purpose in mind, just as the offenders in *Yogaras* and *Muhammad Farid* had done. We fail to see how that burden can be discharged by electing to remain silent in the face of clear evidence, found in the statements provided by the Appellant himself, that the Appellant was to await instructions from "Boy Ahmad" on how the drugs that he had divided and repacked into smaller packets were subsequently to be distributed, just as he had done so on a previous occasion (see [12] above). In the light of those statements, the need for the Appellant to adduce evidence either to rebut or account for what was recorded therein was a matter of particular urgency. For this reason, we are also of the view that it is no answer to say that the facts are largely not in dispute and therefore nothing should turn on the Appellant's election to remain silent. The onus lies on the Appellant to prove to the court's satisfaction that – quite

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[26] Appellant's written submissions at para 15.

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contrary to what is indicated in the Appellant's statements – he had a reason or purpose for his dividing and repacking that fell within the scope of s 33B(2)(*a*) of the MDA. In our judgment, it would therefore not merely be speculative to suggest that nothing meaningful would have emerged from his cross-examination if he had elected to testify; such an assertion would also overlook the fact that Parliament has deliberately chosen to cast the burden on the Appellant to prove his qualification as a courier notwithstanding his intention to divide and repack the drugs. It is correct that it is the Appellant's prerogative to remain silent but equally he must accept the consequences that his election may result in him failing to discharge his burden of proof. In that regard, it must be borne in mind that the burden to establish that an offender is a courier rests with that offender, and in deciding whether that burden has been discharged, there is no reason why the court ought only to have regard to the evidence adduced by the Prosecution.

116 We now turn to the Appellant's substantive submissions. We accept the Appellant's argument that his act of handing $8,200 to Shanti on 16 May 2014 (the day of his arrest) was necessary to allow him to receive the diamorphine from her and therefore that act in itself did not take him out of the definition of a courier. We have explained our view at [86] above that an offender's receipt of money in exchange for the drugs that he delivers to the recipient does not, *in itself*, take an offender out of the definition of a courier. It is an incidental act to his delivery of the drugs because of the inherently transactional nature of the activity. Employing the same line of reasoning, the passing or paying of money to an individual who hands the offender the drugs that he is to transport, send or deliver can be considered to be incidental to those latter acts.

117 We turn to the Appellant's submission that he was "not exercising his own business decision-making powers in dividing the 'batu'", but was only

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acting upon the instructions of "Boy Ahmad". This argument is flawed because even if it is true that the Appellant had only been following instructions given to him, the fact that he carried out those acts for the purpose of intended distribution suffices to exclude him from the scope of s 33B(2)(*a*)(iii) of the MDA. Nothing in s 33B suggests that an offender ought to be recognised as a courier merely because he was acting under instructions. If an offender is following instructions to sell and/or distribute the drugs, his role remains no less that of a seller or distributor. Put another way, the mere fact that he was following instructions does not and cannot alter the nature of his acts. For completeness, we note that if he had in fact made his own decision to divide the "batu" so that smaller portions might be given to the designated recipients, this may provide a compelling indication that the offender's role in the system of drug distribution goes beyond that of a mere courier, but the court will of course examine all the evidence before arriving definitively at such a conclusion. In other words, an offender's ability to exercise decision-making power *may* provide a strong reason to find that he is not merely a courier (see [87] above), but the fact that he does not possess such ability is not *in itself* sufficient to establish that he is in fact a mere courier.

118 The Appellant's third argument is that his act of division and packing was "necessary for his onward transmission of the correct quantity of drugs" to the intended recipients. We have set out full reasons at [92]–[104] above to explain why this is a mischaracterisation and understatement of the nature of the Appellant's conduct. In our judgment, what the Appellant really sought to accomplish, in the absence of any satisfactory explanation by the Appellant, after receiving "Boy Ahmad's" instructions to divide one of the "batu" into two and pack each of the resulting half-"batu" into separate packets is the division and packing of drugs *for the purpose of distribution*. This is entirely consistent

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with his statement about the role he was to play for the purposes of trafficking diamorphine. It should be recalled that prior to the Appellant's commencement of his drug trafficking activities, as stated at [8] above, he met "Boy Ahmad" to discuss the nature of his involvement in the trafficking of diamorphine. "Boy Ahmad" told the Appellant that he would send someone to deliver the drugs to his flat. He was then to await "Boy Ahmad's" instructions to repack the delivered drugs into smaller parcels and deliver the repacked parcels to customers who would come to the second floor of his flat's lift lobby to collect the divided and repacked drugs. Consistent with the Appellant's role, "Boy Ahmad" passed him a digital weighing scale to ensure accuracy in the division of the drugs. On the face of his statement, it would appear that his role in the drug trafficking enterprise – indeed his *central role* – was to divide and repack the diamorphine on "Boy Ahmad's" instruction for distribution to "Boy Ahmad's" customers. Shanti would head to the Appellant's block to pass him the undivided "batu". "Boy Ahmad's" customers would then travel to the Appellant's block or near it to collect the divided and repacked drugs from the Appellant (see [10] above). Indeed, one would not be unreasonable in characterising the Appellant's residence as a sort of "distribution hub". In the circumstances, it behoves the Appellant to explain that the reason and purpose for the intended division and repacking was unrelated to that of distribution. There can be little doubt – and, significantly, the Appellant himself does not dispute – that the Appellant would have gone on to deliver those packets of half-"batu" to recipients, just as he had done before on 12 May 2014 (see [10] above), if CNB officers had not then entered the flat. Division and packing for such a purpose cannot be regarded either as facilitative of or incidental to the transporting, sending or delivering of drugs. The Appellant's involvement in the offence of possession of diamorphine for the purposes of trafficking therefore does not fall within the scope of s 33B(1)(*a*)(iii). We also reject the Appellant's

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assertion that his division was "not meant to facilitate distribution or sale" as the divided portions were still "many times above the retail size". For the reasons that we have set out at [107] above, this is an irrelevant consideration. In any event, given the Appellant's choice to remain silent and the lack of any supporting evidence from the defence, it remains nothing but an unsubstantiated assertion (see [115] above).

119 The Appellant asserts that in *Chum Tat Suan*, this court adopted an "overtly narrow" interpretation of the exchange between Ms Chiam and DPM Teo in determining that ss 33B(2) and (3) of the MDA were "intended to be 'tightly-defined' conditions" (see [23(d)] above). This exchange occurred during the Parliamentary debates on the Amendment Bill on 14 November 2012. We reproduce it here:

> **Mrs Lina Chiam (Non-Constituency Member):** Thank you, Mr Speaker. I would like the Minister to clarify the point I made yesterday about one section – that is, whether section 33B(2)(a) of the Bill covers offenders who are found to have participated in acts such as packing, storing or safekeeping drugs, as their culpability may be similar to those who are involved in transporting, sending or delivering the drugs and should not be excluded for consideration for discretionary sentencing. Can I get his clarification?
>
> **Mr Teo Chee Hean**: They are not couriers, so they are not covered by the exception that is provided, unless Mrs Chiam thinks that they are couriers.
>
> **Mrs Lina Chiam**: No, they are not couriers.

120 We do not think that any error was made by the court in *Chum Tat Suan*. The exchange between Ms Chiam and DPM Teo ended with a consensus that persons who pack, store or safe-keep drugs are not couriers and therefore do not fall within the scope of s 33B(2)(*a*) of the MDA (without, we note, speaking on the issue of facilitative or incidental acts). This is clearly consonant with the court's finding that the scope of s 33B(2)(*a*) is indeed an extremely restricted

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one. In any event, the numerous references by DPM Teo in his speeches during the debates on the Amendment Bill on the "tightly-defined" nature of s 33B (see [42]–[43] above) serve to put the matter beyond any doubt.

121 Finally, we address the Appellant's remaining two arguments, which really concern points of policy. To reiterate, the Appellant claims that a "wider interpretation of s 33B" (*ie,* one that would encompass his claim to be a courier) is "still in line with the purpose of s 33B" because such an interpretation would still exclude persons such as kingpins, producers and retailers. We do not see this as a positive argument or justification in favour of implementing a "wider interpretation" of s 33B. Assuming *arguendo* that the Appellant is correct in suggesting that a broader definition of a "courier" does not diminish the law's ability to punish persons who are more heavily involved in the drug trade, it does not follow from this proposition that persons who are arguably less heavily involved – but who nevertheless carry out activities such as the division and packing of drugs for the purpose of distribution – should not receive a particular type and degree of punishment. The conclusion that the Appellant seeks to draw simply does not flow from his argument.

122 The Appellant further submits that a "narrow interpretation of s 33B" (*ie,* one that would exclude his claim to be a courier) would disincentivise offenders from volunteering information because they would not come within the scope of the court's discretion under s 33B(1) in any event. In our judgment, while it is conceivable that broadening the definition of a courier – such that more offenders could satisfy the requirement under s 33B(2)(*a*) of the MDA – may encourage a larger number of offenders to offer information to the CNB to disrupt drug trafficking activities, this is ultimately a policy call for Parliament to make. It is clear from the legislative debates on the Amendment Bill that Parliament has made a considered decision to restrict the class of persons who

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are in a position to receive the court's discretion. Stretching the meaning of transporting, sending and delivering, and preparatory or incidental acts thereto – as the Appellant proposes – would not accord with the policy position that Parliament has evidently preferred. If Parliament considers that levels of cooperation with the CNB will be increased if the relief under s 33B is extended to a wider class of offenders, and that this justifies a broader definition of a "courier", then it might give effect to that objective by expanding the scope of the permissible conduct envisaged under s 33B(2)(*a*). But that is a decision for Parliament to make. In interpreting a statute, it is not for the courts to do more than to give effect to Parliament's intent, much less override it in the manner that the Appellant proposes.

Conclusion

123 For the foregoing reasons, we find that the Appellant's submission that he should be considered a "courier" because his involvement in the offence falls within the scope of s 33B(2)(*a*)(i)–(iv) of the MDA, is without merit. We accordingly dismiss his appeal and affirm the High Court's decision to pass the sentence of death on the Appellant.

Sundaresh Menon Chief Justice	Tay Yong Kwang Judge of Appeal	Steven Chong Judge of Appeal

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

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