# Johari bin Kanadi and Another v Public Prosecutor
# [2008] SGHC 62

**Case Number** : MA 56/2007, 57/2007, Cr M 14/2007

**Decision Date** : 25 April 2008

**Tribunal/Court** : High Court

**Coram** : Tay Yong Kwang J

**Counsel Name(s)** : S K Kumar (S K Kumar & Associates) for the appellants; Gillian Koh-Tan (Attorney-General's Chambers) for the respondent in Magistrate's Appeals Nos 56 and 57 of 2007, Janet Wang (Attorney-General's Chambers) for the respondent in Criminal Motion No 14 of 2007

**Parties** : Johari bin Kanadi; Bahtiar bin Mohd Rahim — Public Prosecutor

*Constitutional Law – Accused person – Protection – Rights – Whether Arts 9(1), 11(1) and 12(1) Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) were violated by prosecution of accused persons for consumption of Subutex*

*Courts and Jurisdiction – Court of criminal appeal – Points reserved – Whether there were questions of law of public interest – Section 60 Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed)*

*Criminal Law – Statutory offences – Misuse of Drugs Act – Consumption of Subutex – Section 8(b)(ii) Misuse of Drugs Act (Cap 185, 2001 Rev Ed)*

*Criminal Procedure and Sentencing – Criminal references – Discretion of subordinate court to refer constitutional question to High Court – Whether there was a constitutional question not dealt with previously – Section 56A(1) Subordinate Courts Act (Cap 321, 2007 Rev Ed)*

*Criminal Procedure and Sentencing – Sentencing – Appeals – Penalties – Drug offenders having drug consumption antecedents – Drug offenders facing enhanced punishment for repeat offenders under s 33A Misuse of Drugs Act (Cap 185, 2001 Rev Ed) – Whether drug offenders should have been sentenced as repeat offenders under s 33A Misuse of Drugs Act (Cap 185, 2001 Rev Ed)*

25 April 2008 Grounds of Decision.

Tay Yong Kwang J:

**Magistrate's Appeals Nos 56 and 57 of 2007**

**The charges**

1 The two appellants ("Johari" and "Bahtiar") appealed to the High Court against the sentences imposed by District Judge Kow Keng Siong ("the DJ") on the following charges under the Misuse of Drugs Act ("MDA")(Cap 185):

> You, Johari Bin Kanadi
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> Male 31 years (DOB: 16.9.1975)
>
> NRIC No S7527600-A

are charged that you, on or about the 17th January 2007, in Singapore, did consume a Class A

Controlled Drug listed in the First Schedule to the Misuse of Drugs Act (Cap 185) as well as a Specified Drug listed in the Fourth Schedule to the Misuse of Drugs Act, Cap 185, to wit, Norbuprenorphine, without authorisation under the said Act or the Regulations made thereunder and you have thereby committed an offence under Section 8(b)(ii) of the Misuse of Drugs Act, Chapter 185.

And further,

that you, prior to the commission of the current offence, that is to say, on 7th June 2002, had been convicted in the Subordinate Courts 24, (DAC 24418/2002) in Singapore, for an offence under Section 8(b)(ii) of the Misuse of Drugs Act, Chapter 185 punishable under Section 33A(1) of the Misuse of Drugs Act, which conviction has not been set aside, and you are now liable to be punished with enhanced punishment under Section 33A(2) of the Misuse of Drugs Act, Chapter 185.

You, Bahtiar Bin Mohd Rahim,

M/34

NRIC No S7241118-H

are charged that you, on or about the 29th day of December 2006, in Singapore, did consume a specified drug listed in the Fourth Schedule to the Misuse of Drugs Act, Cap 185, to wit, Buprenorphine, without any authorisation under the said Act or the Regulations made thereunder and thereby committed an offence under Section 8(b)(ii) of the Misuse of Drugs Act.

And further,

that you, before the commission of the said offence, had been admitted to an approved institution, namely Sembawang Prison/Drug Rehabilitation Centre (DRC) on 16th January 1999 and 22nd March 2000 respectively pursuant to the orders made by the Director of the Central Narcotics Bureau in Singapore under Section 37(2)(b) of the Misuse of Drugs Act, and you are now liable to be punished under Section 33A(1) of the Misuse of Drugs Act.

**The statements of facts**

2 The facts of the two offences were straightforward. On 14 August 2006, by a Ministerial Order, the Minister for Home Affairs exercised his power under s 59 of the MDA to amend the First Schedule of the MDA to include buprenorphine and norbuprenorphine as Class A "controlled drugs." On 1 October 2006, they were classified as "specified drugs" under the Fourth Schedule of the MDA. On 17 January 2007, Johari reported to the police for his routine urine test. His urine specimens were subsequently found to contain norbuprenorphine and he was arrested. On 29 December 2006, Bahtiar reported for his routine urine test and provided two urine specimens. These were subsequently analysed and found to contain buprenorphine. He was also arrested. The antecedents set out in the respective charges were not disputed. The two substances, norbuprenorphine and buprenorphine, are commonly known as "Subutex" and I will use this term to describe both of them.

**The proceedings before the DJ and his decision**

3 At the trial below, after the charges had been read to Johari and Bahtiar, their counsel,

Mr S K Kumar, rose to make a preliminary objection to the charges. Mr Kumar objected to the prosecution of the appellants under s 33A of the MDA and applied for the proceedings before the DJ to be stayed so that the DJ could refer a constitutional question to the High Court under s 56A(1) of the Subordinate Courts Act ("SCA")(Cap 321). The prosecution opposed the application as it was of the view that the question stated by Mr Kumar (see [5] below) was not a Constitutional issue and that the DJ had the discretion whether or not to refer any such question in any event. After hearing the arguments of the prosecution and the defence, the DJ dismissed the appellants' application. Both appellants then pleaded guilty to the respective charges and were sentenced to the mandatory minimum punishment prescribed by law. Johari was sentenced to 7 years' imprisonment and 6 strokes of the cane while Bahtiar was sentenced to 5 years' imprisonment and 3 strokes of the cane. Their sentences were backdated to the date of their remand and the caning was stayed pending their appeals to the High Court.

4 S 56A(1) of the SCA provides:

> Where in any proceedings in a subordinate court a question arises as to the interpretation or effect of any provision of the Constitution, the court hearing the proceedings may stay the proceedings on such terms as may be just to await the decision of the question on the reference to the High Court.

The DJ was of the view that s 56A(1) did not make it mandatory for a subordinate court to refer a case to the High Court whenever a Constitutional question arose. He held that the subordinate court retained the discretion to decide whether it should so refer after considering the merits of the particular case before it. As held in *Chan Hiang Leng Colin and Others v PP* [1994] 3 SLR 662 at [10], this was to prevent unnecessary stays of proceedings each time a party purported to raise a Constitutional question. The DJ also held that case law had established that a subordinate court could decline to refer a case to the High Court if the issues in question were not new or difficult points of law or were not of sufficient importance (see *Liong Kok Keng v PP* [1996] 3 SLR 263, *Kok Hoong Tan Dennis and Others v PP* [1997] 1 SLR 123 and *Ang Cheng Hai & Others v PP* [1995] SGHC 97).

5 The constitutional question put forward by Mr Kumar was:

> Whether it is against the Constitution to sentence Subutex consumers to enhanced punishment under s 33A of the MDA when it is clear that Subutex was legally consumable in Singapore at least since the year 2002 right up to 14 August 2006 when it was declared a controlled drug and listed as a Class A drug as well as a specified drug since 1 October 2006.

Mr Kumar argued that the Ministerial order classifying Subutex as a controlled drug and a specified drug under the MDA contravened the following constitutional provisions:

> Art 9(1) which states:
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> No person shall be deprived of his life or personal liberty save in accordance with law.
>
> Art 11(1) which provides:
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> No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.
>
> Art 12(1) which provides:

All persons are equal before the law and entitled to the equal protection of the law.

6 Mr Kumar argued that it was arbitrary and unfair to classify Subutex as a controlled drug on 14 August 2006 and as a specified drug on 1 October 2006 as it had been touted as a panacea for weaning drug abusers off opiate addiction. The appellants had relied on the government's assurance that this was so and, consequently, became addicted to Subutex. They were not informed that Subutex was addictive or that it would subsequently come within the MDA. Mr Kumar also submitted that it was unfair to invoke s 33A of the MDA because the appellants would be made to suffer enhanced punishment for what was actually their first conviction for Subutex consumption.

7 The DJ declined to make the Constitutional reference as he found that the appellants' cases did not raise any question as to the interpretation or effect of the said Constitutional provisions. He reasoned as follows:

(a) Art 9(1) was not infringed because there was no evidence or suggestion that the classification of subutex as a controlled drug and a specified drug was procedurally flawed or irregular.

(b) Article 11(1) was not infringed because:

(i) The appellants' cases did not involve either the creation of new offences or the enhancement of the punishment for existing offences with retrospective effect.

(ii) Section 33A of the MDA did not require the accused to have abused the same type of drug on a previous occasion before he was liable for enhanced punishment.

(iii) An accused could be liable for enhanced punishment under legislation targeted at repeat offenders, even if the subsequent offence was defined more widely than the predicate offence on which an accused had previously been convicted. This proposition was supported by *Teo Kwee Chuan v PP* [1993] 3 SLR 908 (on the Road Traffic Act (Cap 276)) and by *PP v Chen Chih Sheng and another* [1999] 1 SLR 714 (on the then Employment of Foreign Workers Act (Cap 91A)).

(iv) Legislative intent to expeditiously and effectively curb Subutex abuse in Singapore would be defeated if s 33A of the MDA did not apply to first-time Subutex abusers.

(c) Article 12(1) was not infringed because the classification of Subutex as a controlled and specified drug was not arbitrary or unreasonable. The decision to make such a classification was a carefully considered and reasonable one in light of the following:

(i) Subutex turned out not to be a harmless drug but one that produced a host of adverse side effects.

(ii) The government gave clear and early indication of its possible criminalisation from as early as 2 March 2006.

Rehabilitation and an amnesty for Subutex addicts were also provided before prosecution under the MDA commenced. The appellants could not therefore claim that prosecuting them under s 33A of the MDA was contrary to their legitimate expectations.

(iv) The classification of Subutex as a controlled and specified drug was effective in

meeting the object of executive action.

**The appeal**

8 The appellants then brought these appeals against sentence on two grounds:

(a) the DJ should have made the Constitutional reference under s 56A of the SCA.

(b) the appellants should not have been sentenced as repeat offenders under s 33A of the MDA, their sentences should be set aside and they should be sentenced under s 33 of the MDA as first time offenders.

9 A subordinate court has the discretion whether or not to stay proceedings when an application is made before it under s 56A of the SCA. This discretion, properly exercised after judicious consideration of the merits of the application, will prevent unnecessary delay and possible abuse every time a party in the proceedings purports to raise an issue of Constitutional interpretation or effect. To merit a reference under s 56A, the applicant must show that there are new and difficult legal issues involving the Constitution which have not been previously dealt with by the superior courts. It is not sufficient merely to set out a new factual situation because new factual permutations will always arise. Where questions of law have already been decided or principles relating to an Article in the Constitution have been set out by the superior courts, a subordinate court need not stay proceedings under s 56A but should proceed to apply the relevant case law or extrapolate from the principles enunciated to reach a proper conclusion on the facts before it.

10 There is a strong presumption of constitutional validity of written law. The appellants bear the burden of placing all relevant materials before the court to show that a statutory provision or the exercise of the power under it is arbitrary and unsupportable (see the Court of Appeal's decision in *PP v Taw Cheng Kong* [1998] 2 SLR 410 at [60]). The appellants have not adduced evidence to rebut the strong presumption of constitutional validity of the classification of Subutex as a controlled drug and a specified drug.

11 The decision to classify Subutex in this manner was made after careful consideration of its effects and abuse and with due regard to existing Subutex users to ensure that they had the opportunity to undergo rehabilitative treatment. It was explained in Parliament that it was initially thought that Subutex could be part of the overall scheme to help heroin abusers kick their addiction. When Subutex was introduced here, six countries had already done so. When the Central Narcotics Bureau reported that there was abuse of Subutex, the government tried to arrest the abuse by administrative measures and guidelines issued to the medical profession (which dispensed Subutex). It was only when such measures could not stop the abuse that the decision was taken to make Subutex a controlled drug under the MDA.

12 It was also explained that the side effects to health caused by Subutex were similar to those caused by other opiates and that instead of consuming Subutex in the correct way, drug addicts were abusing it by mixing it with sleeping medication and injecting the mixture into their bodies. The result of such abuse could be fatal. Hence, instead of being a drug that could help heroin abusers kick their addiction, Subutex had become another drug of abuse.

13 As early as 2 March 2006, the government had already warned that it would not hesitate to make Subutex a controlled drug should the need arise. This was months before the decision to do so was finally made, giving existing users of the drug ample warning and time to make adjustments. In addition, the government encouraged existing users of Subutex to enrol in the Subutex Voluntary

Rehabilitation Programme ("SVRP") from 14 August 2006 (when Subutex was classified as a controlled drug) to 27 August 2006. Those who were caught abusing Subutex were encouraged to enrol in the SVRP and, if they refused to do so, were sent for compulsory treatment and rehabilitation. For those who signed up for the programme, prosecution under s 33A of the MDA commenced only after the last patient in the SVRP had completed the detoxification phase of the programme. Where users of Subutex who did not enrol in the said programme were concerned, prosecution began only after 27 August 2006. The appellants contended that the one-week programme of the SVRP was inadequate to wean users of Subutex from their dependence on the drug. It was suggested that a more reasonable period would be a programme lasting about six months. The appellants have not adduced any evidence, other than relying on their own inability to cope, to show that the programme was an unreasonably short and unworkable one. On the contrary, there was evidence that the SVRP was successful in helping a large number of Subutex users stay off the drug.

14 The appellants also contended that sentencing a first-time consumer of Subutex under s 33A of the MDA was arbitrary as it left the court with no discretion to decide on a lower sentence even in deserving cases. A similar challenge was mounted in *Ong Ah Chuan v PP* [1980-1981] SLR 48 where the arguments centred on the question whether the mandatory death sentence for trafficking in more than 15g of diamorphine was contrary to Article 12(1) in that it prevented the court from imposing different punishments on offenders according to their individual blameworthiness. The Privy Council said (at [35] to [38]):

> 35 … Equality before the law and equal protection of the law require that like should be compared with like. What Article 12(1) of the Constitution assures to the individual is the right to equal treatment with other individuals in similar circumstances. It prohibits laws which require that some individuals within a single class should be treated by way of punishment more harshly than others, it does not forbid discrimination in punitive treatment between one class of individuals and another class in relation to which there is some difference in the circumstances of the offence that has been committed.
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> 36 … The dissimilarity in circumstances between the two classes of individuals lies in the quantity of the drug that was involved in the offence.
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> 37 The questions whether this dissimilarity in circumstances justifies any differentiation in the punishments imposed upon individuals who fall within one class and those who fall within the other, and, if so, what are the appropriate punishments for each class, are questions of social policy. Under the Constitution, which is based on the separation of powers, these are questions which it is the function of the legislature to decide, not that of the judiciary. Provided that the factor which the legislature adopts as constituting the dissimilarity in circumstances is not purely arbitrary but bears a reasonable relation to the social object of the law, there is no inconsistency with art 12(1) of the Constitution.
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> 38 The social object of the Drugs Act is to prevent the growth of drug addiction in Singapore by stamping out the illicit drug trade …

The Privy Council was of the opinion that there was no violation of Article 12(1).

15 In this case, the law draws a distinction between individuals who consume Subutex and who have relevant antecedents under s 33A of the MDA on the one hand and those who consume Subutex but who have no such relevant antecedents on the other. Far from being arbitrary, such a distinction is entirely in keeping with the social object of the MDA of preventing drug abuse from becoming a blight on society and one of the ways of accomplishing that object is to punish repeat abusers (not

necessarily of the same drug – see [16] below) more severely.

16 The appellants also argued that they should not suffer enhanced punishment under s 33A of the MDA as this was their first conviction for consuming Subutex. However, s 33A does not require an offender to have an antecedent relating to the same drug. The appellants were not being punished for having consumed Subutex before that drug was made illegal. Further, the enhanced punishment relates to the consumption of Subutex after it was made a controlled drug and a specified drug and not to any previous cases of consumption of prohibited drugs. There was no retrospective creation of an offence or the retrospective enhancement of punishment for offences already committed. There was therefore no issue of Article 11(1) of the Constitution having been contravened.

17 The appellants relied on *Offen and others* [2001] 1 Cr App R 372 to support their contention that the DJ ought to have made a reference to the High Court in this case. In *Offen*, the English Court of Appeal certified the following as a point of law of general public importance under s 33(2) of the (English) Criminal Appeal Act 1968:

> Whether in accordance with Article 7 of the European Convention on Human Rights and section 3 of the Human Rights Act 1998, section 2(1)(b) of the Crime (Sentences) Act 1997 must be read to mean 'at the time when that offence was committed, he was 18 years or over and had been convicted *after the date on which this section came into force*, in any part of the United Kingdom of another serious offence'. In other words, whether it is necessary to read into the section the phrase '*after the date on which this section came into force*' in order to prevent a retrospective aggravation of the penalty that was applicable for the original offence at the time it was committed.
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> (The italicised words appear as such in the original).

The English Court of Appeal also refused leave to appeal to the House of Lords.

18 The appellants argued that Article 7 of the European Convention on Human Rights was almost identical with Article 11(1) of our Constitution and that the English Court of Appeal had thought it fit to certify the above question as one of general public importance. It followed, they reasoned, that this case also merited a reference to the High Court.

19 The Public Prosecutor pointed out that the certification by the English Court of Appeal was merely a pre-requisite for an appeal to lie to the House of Lords under s 33(2) of the Criminal Appeal Act 1968 which provides:

> (2) The appeal lies only with the leave of the Court of Appeal or the House of Lords; and leave shall not be granted unless it is certified by the Court of Appeal that a point of law of general public importance is involved in the decision and it appears to the Court of Appeal or the House of Lords (as the case may be) that the point is one which ought to be considered by that House.

In any event, the English Court of Appeal refused leave to appeal despite the certification. It did not follow therefore that the certification in *Offen* meant that a significant Constitutional issue was at stake.

20 I agreed with the Public Prosecutor. The English Court of Appeal had no hesitation in making its pronouncements on the appeals before it in any case. I would add that even if a court in some other jurisdiction thought it fit to refer to a superior court a question of law relating to some legal provision based on a particular set of facts, it did not follow that our subordinate courts ought to

follow suit simply because we have a broadly similar legal provision. Whether a reference to the High Court ought to be made depends on the circumstances of the case and is subject to the principles stated in [9] above. A question of law is not elevated to a Constitutional issue of significance merely because a party has asked whether a certain factual situation contravenes any particular Articles in the Constitution. Where an issue is novel only because it is so obviously unsustainable, it makes perfect sense for the subordinate court to rule on it and not refer it to the High Court (see for instance *PP v Raman s/o Raman Nair and others*, Magistrate's Appeals No 365/95/01-23).

21 In my opinion, the DJ's decision and his reasoning were unimpeachable. As the appellants were sentenced to the mandatory minimum sentences provided in s 33A of the MDA, there could be no argument about the sentences being manifestly excessive. Accordingly, I dismissed both appeals.

**Criminal Motion No. 14 of 2007**

22 Following the dismissal of their appeals, the appellants applied under s 60 of the Supreme Court of Judicature Act ("SCJA")(Cap 322) for three questions, said to be questions of law of public interest, to be reserved for the decision of the Court of Appeal. The Public Prosecutor objected to this application. The questions were:

> (a) Whether the classification of Subutex, a drug made readily available since 2002 as a treatment drug, under s 59 of the [MDA] as a controlled drug and/or specified drug tantamounts to a violation of Article 9(1) of the Constitution in that it was done so suddenly and/or swiftly that those persons like your Appellants already very dependent on Subutex could not cope and/or adjust themselves such that making them liable to be punished so very severely to mandatory minimum terms and/or to caning on account of their previous antecedents is unfair, disproportionate and/or contrary to their legitimate expectation as embodied in the aforesaid Article.
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> (b) In the event it is ruled that Article 9(1) is not violated, whether it still violates Article 11(1) in that to punish your Appellants under s 33A(1) and (2) respectively amounts to a retrospective punishment for they, relying on the authorities' assurance and without any knowledge whatsoever of the ill-effects of Subutex, had already become so very dependent that they could not cope with or stay away from Subutex, such that they are being punished, in essence, for an addiction acquired prior to Subutex being made a controlled or a specified drug and/or when it was touted as an effective treatment drug and made freely available.
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> (c) Whether the classification of Subutex as a Class "A" drug and then as a specified drug violates Article 12(1) of the Constitution in that the classification is so very arbitrary as it is founded on reasons purely to quell widespread usage of Subutex on account of it being made a treatment drug earlier than on it (Subutex) being dangerous or unwholesome such that its classification is not rational, logical and/or fair.

23 In *Abdul Salam bin Mohamed Salleh v PP* [1990] SLR 301, Chan Sek Keong J, in construing the scope of s 60 of the SCJA (which was then worded slightly differently from the present version, but not materially so) said (at 311):

> It is not an ordinary appeal provision to argue points of law which are settled or novel points which can be decided by the application or extension of established principles of law or the application of statutory provisions which have been authoritatively construed by higher courts. Hence, Suffian ACJ's caution that the provision be used sparingly lest it be made use of as an appeal provision.

Chan J decided in the circumstances of that case to refer four questions to the then Court of Criminal Appeal.

24 The Court of Criminal Appeal in that case (see *Abdul Salam bin Mohamed Salleh v PP* [1991] SLR 235) said (at 239):

> It is clear from the terms of s 60 that the court has discretion whether or not to refer a question to the Court of Criminal Appeal when the application to the court is made by a party other than the public prosecutor, even if the question satisfies all the prescribed conditions.

The court also endorsed the views expressed by Chan J, including the passage cited at [23] above.

25 Similarly, in *Ng Ai Tiong v PP* [2000] 2 SLR 358, Yong Pung How CJ, in dismissing an application under s 60 of the SCJA, said (at [8] and [10]):

> 8 … Although s 60 of the SCJA was repealed and re-enacted by the Supreme Court of Judicature (Amendment) Act 1998 (No 43 of 1998), it is obvious that the essence of s 60(1) has remained unchanged and therefore the principles laid down in the previous authorities should nevertheless remain applicable to the present case.
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> …
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> 10 … In all these cases, it has been the common emphasis that the discretion under s 60, SCJA, must be exercised sparingly by the High Court. This is to give recognition and effect to Parliament's intention for the High Court to be the final appellate court for criminal cases commenced in the subordinate courts. The importance of maintaining finality in such proceedings must not be seen to be easily compromised through the use of such a statutory device. … Hence, it is imperative that s 60 of the SCJA is utilised only in exceptional cases so as to ensure that the proper purpose of the section is not abused to serve as a form of 'backdoor appeal'.

It was also held (at [9] in that case) that the question of law must be one of public interest and not of mere personal importance to the parties alone.

26 In *Cigar Affair v PP* [2005] 3 SLR 648 (at [8]), Woo Bih Li J distilled from the case authorities that one of the principles pertaining to s 60 SCJA is:

> A question of law does not constitute a question of public interest just because it involves the construction or interpretation of a statutory provision which is likely to apply to other members of the public.

27 Whether a question of law is of public interest must depend on the circumstances of each case. Most of the arguments in this application mirrored those in the Magistrate's Appeals. The central theme of the first two questions posed appeared to be the inability of the appellants here to cope with the change in the drugs law. As explained earlier, the classification of Subutex as a prohibited drug was neither swift nor sudden such as to leave users of the drug in a lurch. If the appellants could not cope in spite of all the very reasonable measures taken to ensure a smooth and fair change in the drugs law, that is something personal and unique to them.

28 The appellants have not provided any material to counter the clear case put forward by the Public Prosecutor before the DJ and before the High Court that, contrary to the bare assertions by the appellants, the decisions taken on Subutex in 2006 were not without a rational basis. The said

decisions were entirely in keeping with the social object of the MDA when it was subsequently discovered that the cure was threatening to become the curse.

29 There was clearly no violation of any Constitutional protection and referring the questions, or any of them, to the Court of Appeal would be essentially permitting the appellants to re-argue what are, in my view, hopeless positions. As I found the three questions posed not to be of public interest within the meaning of s 60 SCJA, I dismissed the appellants' application.