IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 70

Criminal Motion No 1 of 2018

Between

Abdul Kahar bin Othman

… *Applicant*

And

Public Prosecutor

… *Respondent*

GROUNDS OF DECISION

[Constitutional Law] — [Judicial power]

[Courts and Jurisdiction] — [Court of Appeal] — [Power to reopen concluded criminal appeal]

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v
Public Prosecutor

[2018] SGCA 70

Court of Appeal — Criminal Motion No 1 of 2018
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16 August 2018

25 October 2018

Tay Yong Kwang JA (delivering the grounds of decision of the court):

1 In 2013, the applicant, Abdul Kahar bin Othman, now 62 years old, was convicted on two capital charges of drug trafficking ("the Charges") and subsequently sentenced to the mandatory death penalty. In 2015, this court heard and dismissed his appeal against conviction and sentence. By the present Criminal Motion No 1 of 2018 ("CM 1"), the applicant applied for his appeal to be reopened and reviewed on the principal grounds that a previous decision of this court was decided wrongly and the sentencing regime in s 33B of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the MDA"), under which he was sentenced, is unconstitutional.

2 On 16 August 2018, we heard CM 1 and were satisfied that there was no merit in the application. Accordingly, we dismissed it after giving brief oral grounds and informing the parties that we would be giving detailed grounds in

due course. After we dismissed CM 1, the Prosecution indicated to us that it was seeking an order of costs against counsel for the applicant ("Mr Seah") personally. We directed the parties to file written submissions sequentially and they did so. After reviewing the parties' written submissions, we decided on 7 September 2018 not to make any costs order against Mr Seah and directed the Supreme Court Registry ("the Registry") to inform the parties about our decision. We now give the detailed grounds of our decision on the merits of CM 1 and on the issue of costs.

Facts

3 On 6 July 2010, the applicant was driving a car when he was arrested by officers of the Central Narcotics Bureau ("the CNB"). The officers searched the car and found a packet containing 26.13g of diamorphine. This was the subject matter of the first charge against the applicant: see *Public Prosecutor v Abdul Kahar bin Othman* [2013] SGHC 164 ("*Abdul Kahar (Conviction)*") at [1].

4 The CNB officers escorted the applicant to his home. They searched his room and found a total of not less than 40.64g of diamorphine in a sachet and two packets. This resulted in the second charge against the applicant: see *Abdul Kahar (Conviction)* at [2]. Besides the drugs, the officers also found paraphernalia that indicated that the applicant was repacking and selling drugs (numerous plastic sachets, a stained spoon, a weighing scale and a packet of rubber bands): see *Abdul Kahar (Conviction)* at [2]–[3].

5 On 27 August 2013, the applicant was convicted by a High Court Judge ("the Judge") on the Charges. The Judge noted that the drug paraphernalia "indicated that [the applicant] was re-packing and selling the diamorphine that he had received" and it "could also be inferred … that [the] diamorphine was not intended for personal consumption": see *Abdul Kahar (Conviction)* at [15].

6 On 24 October 2013, the Judge decided that the applicant was a courier for the purpose of s 33B(2)(*a*) of the MDA: see *Public Prosecutor v Abdul Kahar bin Othman* [2013] SGHC 222 ("*Abdul Kahar (Sentencing)*") at [5].

7 The Prosecution then brought two criminal references on issues of law to this court, one of which arose out of *Abdul Kahar (Sentencing)*. On 28 November 2014, we held that a person who intended to sell drugs forming the subject matter of a charge was not a courier for the purpose of ss 33B(2)(*a*) and 33B(3)(*a*) of the MDA: see *Public Prosecutor v Chum Tat Suan and another* [2015] 1 SLR 834 ("*Chum Tat Suan*") at [62]. We therefore held that the Judge was wrong to have found that the applicant was a courier, set aside that finding and remitted the case to the Judge: see *Chum Tat Suan* at [70], [72] and [73].

8 On 4 February 2015, the Judge found that the applicant was not a courier for the purpose of s 33B(2)(*a*) of the MDA. The Prosecution informed the Judge that the applicant would not be granted a certificate of substantive assistance ("CSA") under s 33B(2)(*b*) of the MDA ("the CSA Decision"). Accordingly, the Judge passed the death sentence on the applicant in accordance with the law.

9 The applicant filed an appeal against his conviction and sentence ("CA 4"). In that appeal, he was also represented by Mr Seah, his counsel in the present application. On 1 October 2015, we heard and dismissed CA 4 and issued our grounds of decision thereafter: see *Abdul Kahar bin Othman v Public Prosecutor* [2016] SGCA 11. We held at [98] that the applicant could not avail himself of s 33B(2)(*a*) of the MDA and we found "no reason to interfere with the Judge's finding that the [applicant] was actively involved in purchasing, re-packaging and selling drugs".

10 On 11 February 2016, the applicant filed Originating Summons No 134 of 2016 ("OS 134") in the High Court for leave to commence judicial review in respect of the CSA Decision.[1] The hearing of OS 134 was adjourned pending the delivery of our judgment in *Prabagaran a/l Srivijayan v Public Prosecutor and other matters* [2017] 1 SLR 173 ("*Prabagaran*").

11 On 2 December 2016, we delivered our judgment in *Prabagaran*. On 11 July 2017, the High Court heard OS 134 and dismissed it. The applicant did not appeal against the dismissal of OS 134. Subsequently, the applicant filed CM 1.

The parties' submissions on the merits of CM 1

The applicant's submissions

12 The applicant's preliminary submission was that the test for reopening a concluded criminal appeal set out in *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135 ("*Kho Jabing*") did not apply to CM 1 as it should be confined to the facts in that case. He stressed that *Kho Jabing* involved an application brought very soon before the convicted person's death sentence was to be carried into effect and which traversed largely the same grounds that had been raised in the concluded appeal. However, CM 1 raised points that had not been ventilated in CA 4 and was not a last-ditch effort to avoid the death sentence.[2] The applicant submitted that prior to *Kho Jabing*, this court had reopened concluded criminal appeals simply because they raised constitutional issues of public importance. Accordingly, this court should also reopen CA 4 given that CM 1 raised important constitutional issues.[3]

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1 OS 134: Respondent's Bundle of Documents, Tab 1.

2 Applicant's submissions dated 22 June 2018 at paras 14(1)–14(3).

3 Applicant's reply submissions dated 3 August 2018 at paras 15–17.

13 The applicant presented arguments relating to the constitutionality and interpretation of s 33B of the MDA. In respect of the constitutionality of s 33B, he submitted the following:

(a) First, the role of the Public Prosecutor ("the PP") in determining whether an accused has provided substantive assistance to the CNB under s 33B(2)(*b*) of the MDA is unconstitutional, for two reasons:

(i) The PP's role amounts to a usurpation of judicial power, and thus violates the principle of separation of powers which is part of the basic structure of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution"). This court's reasoning in *Prabagaran* rejecting a similar argument was flawed.[4] We will refer to this argument as the "Judicial Power Argument".

(ii) The PP's role under s 33B(2)(*b*) of the MDA is *ultra vires* the PP's constitutional role under the Constitution ("the Constitutional Role Argument").[5]

(b) Second, s 33B(4) of the MDA is unconstitutional because:

(i) it is "self-referentially inconsistent and is consequently self-defeating in purpose";[6] and

(ii) it infringes the rules of natural justice, and thus breaches Arts 9(1) and 12 of the Constitution.[7]

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4 Applicant's submissions dated 22 June 2018 at paras 92–109.

5 Applicant's submissions dated 22 June 2018 at paras 110–118.

6 Applicant's submissions dated 22 June 2018 at paras 130–134.

7 Applicant's submissions dated 22 June 2018 at paras 135–139.

(c) Third, s 33B(2)(*a*) of the MDA is unconstitutional. There is an "inherent confusion" in this provision that has manifested itself in its evolving interpretation. This has led to "possible unfair discrimination between [prisoners awaiting capital punishment] who are of the same class in legal guilt". Section 33B(2)(*a*) therefore breaches Art 12(1) of the Constitution. The applicant emphasised that he was first found to be a courier by the High Court in *Abdul Kahar (Sentencing)*, and then found not to be a courier by the Court of Appeal in *Chum Tat Suan*.[8]

14 In his written submissions, the applicant raised two arguments on the interpretation of s 33B of the MDA. First, the applicant contended that he should be reclassified as a courier in the light of our decision in *Zainudin bin Mohamed v Public Prosecutor* [2018] 1 SLR 449 ("*Zainudin*").[9] Second, he submitted that the substantive assistance condition under s 33B(2)(*b*) of the MDA should be construed as requiring only that an accused person try his best to assist the CNB ("the Best Effort Interpretation"), even if this does not lead to desired outcomes.[10]

15 Finally, in his written submissions, the applicant invited us to sever the allegedly unconstitutional parts of ss 33B(2)(*b*) and 33B(4) of the MDA from the rest of s 33B, by "deleting" s 33B(4) and substituting the court in place of the PP in s 33B(2)(*b*) as the authority which determines whether a CSA is granted.[11] However, Mr Seah accepted at the hearing that the law did not permit the court to take this approach and therefore, if s 33B of the MDA was found to

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8 Applicant's submissions dated 22 June 2018 at paras 16(2) and 77(1)–(4).

9 Applicant's submissions dated 22 June 2018 at para 16(1).

10 Applicant's submissions dated 22 June 2018 at para 16(3).

11 Applicant's submissions dated 22 June 2018 at para 164.

be unconstitutional, the law prior to the introduction of this provision would make it mandatory for the applicant to be sentenced to death.

The PP's submissions

16 The PP submitted that the *Kho Jabing* test applied to CM 1.[12] The applicant did not satisfy the *Kho Jabing* test because none of the applicant's arguments was "new" and "compelling".

17 The PP emphasised in particular that even if the applicant was found to be a courier and succeeded in establishing the unconstitutionality of the relevant portions of s 33B of the MDA, the law prior to the introduction of this provision would still require him to be sentenced to death. Therefore, the court should not exercise its inherent power of review since the success of the applicant's arguments could not affect the outcome of the case.[13]

The issues

18 Three issues arose in this application:

(a) First, did the *Kho Jabing* test apply to CM 1 and if so, was that test satisfied such that this court should reopen CA 4 ("Issue 1")?

(b) Second, was there merit in the applicant's arguments as to the constitutionality and interpretation of s 33B of the MDA ("Issue 2")?

(c) Third, should this court make the costs orders that the PP sought against Mr Seah ("Issue 3")?

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12 PP's submissions dated 20 July 2018 at para 19.

13 PP's submissions dated 20 July 2018 at para 37.

Issue 1: The *Kho Jabing* test

19 In our judgment, the *Kho Jabing* test applied to CM 1 and the test was not satisfied. There was thus no basis for this court to reopen CA 4.

The applicability of the* Kho Jabing *test

20 The applicant submitted that the *Kho Jabing* test did not apply to CM 1 because CM 1 raised points that had not been raised in CA 4, was not filed close to his scheduled execution and raised constitutional issues (see [12] above). We rejected this submission.

21 In *Kho Jabing*, a five-judge court held that this court, as the final appellate court in Singapore, has the power to reopen and review a concluded criminal appeal: see *Kho Jabing* at [77(a)]. However, this power would only be exercised in exceptional cases. In this connection, the court laid down the following propositions of law:

> (a) The general test: This court will only exercise its power of review if the applicant satisfies the court that "there is sufficient material on which it may conclude that there has been a miscarriage of justice". Further, "the mere fact that the material relied on by the applicant consists of new legal arguments involving constitutional points does not, without more, suffice": see *Kho Jabing* at [77(b)].
>
> (b) Sufficient material: To be "sufficient", the material put forward by the applicant has to be "new" and "compelling". We elaborated on these two conditions in *Kho Jabing* at [77(d)] as follows:
>
> > (i) New: There are two requirements for the material to be "new". First, it "must not previously have been canvassed at any

stage of the proceedings prior to the filing of the application for review". Second, "it must be something which could not, even with reasonable diligence, have been adduced in court earlier" ("the Non-Availability Requirement"). Notably, we explained in *Kho Jabing* at [58] that in respect of new legal arguments, the Non-Availability Requirement would "ordinarily be satisfied only if the legal arguments concerned are made following a change in the law".

(ii) Compelling: The material would only be compelling if it is "reliable, substantial, powerfully probative, and therefore, capable of showing almost conclusively that there has been a miscarriage of justice".

(c) Miscarriage of justice: A court would only find a miscarriage of justice if its earlier decision is "demonstrably wrong", or is "tainted by fraud or a breach of natural justice, such that the integrity of the judicial process is compromised": see *Kho Jabing* at [77(e)(i)]–[77(e)(ii)].

22 In laying down this test, the court in *Kho Jabing* clearly intended to lay down a universal test applicable to all applications for the court to review a concluded criminal appeal. The court did not limit the test to applications made at the eleventh hour before the scheduled execution of a convicted person. No such limitation was intended or alluded to in the judgment. The court also did not limit the test to applications raising grounds that had been raised before. On the contrary, the fact that the court laid down the Non-Availability Requirement shows that it intended that the *Kho Jabing* test would apply to applications that raised points that had not been raised in earlier proceedings. The court in *Kho Jabing* also stated expressly that it would not suffice that the application raised "legal arguments involving constitutional points". Thus, *Kho Jabing* did not

support the applicant's contention that the test laid down in that case did not apply to CM 1.

23 Any doubt as to whether the *Kho Jabing* test applied to CM 1 should have been dispelled by *Prabagaran*. The facts in that case were very similar to the facts here. In *Prabagaran*, four applicants, like the applicant here, were convicted of offences under the MDA and sentenced to death. This court dismissed their appeals. The Public Prosecutor did not issue any CSA to the applicants. They then brought criminal motions challenging the constitutionality of ss 33B(2)(*b*) and 33B(4) of the MDA. In dismissing the criminal motions, this court applied the *Kho Jabing* test, holding that three applications did not satisfy the Non-Availability Requirement and there was no "miscarriage of justice" with regard to any of the applications because the applicants' sentences would remain unchanged even if ss 33B(2)(*b*) and 33B(4) of the MDA were unconstitutional: see *Prabagaran* at [18] and [20]. Given the similarity between CM 1 and the applications in *Prabagaran*, it should have been clear that the *Kho Jabing* test applied to CM 1 in the same way that it applied in *Prabagaran*.

24 To the extent that Mr Seah's submission was that we should depart from *Kho Jabing*, by ruling that the test laid down in that case did not apply to all applications to this court to review a concluded criminal appeal, we rejected this submission as well. In our judgment, there is no reason to restrict the scope of *Kho Jabing*. In that case, this court considered carefully our earlier decisions, the law in other jurisdictions and the relevant policy factors before laying down the test: see *Kho Jabing* at [10]–[51]. Mr Seah could not convince us that any aspect of the test in *Kho Jabing* was inappropriate or that we should limit its scope. We affirm that the test in *Kho Jabing* is applicable to all applications to this court for the review of a concluded criminal appeal.

25 For these reasons, we decided that the *Kho Jabing* test applied to CM 1.

Application of the Kho Jabing *test*

26 For reasons similar to those which we gave in *Prabagaran*, we found that CM 1 did not meet the *Kho Jabing* test.

27 First, besides the argument based on *Zainudin* (see [14] above), which as we explain below had no merit at all, none of the applicant's arguments met the Non-Availability Requirement. His arguments were legal arguments that could all have been raised at the hearing of CA 4 if reasonable diligence was exercised.

28 We noted in *Kho Jabing* at [58] that the Non-Availability Requirement would usually only be satisfied in respect of legal arguments following a change in the law (see [21(b)(i)] above). Faced with this obstacle, Mr Seah tried to persuade us that his constitutional arguments could only have been raised after *Prabagaran*. He explained that when he acted for the applicant in CA 4, it did not dawn on him that he could challenge the constitutionality of s 33B of the MDA. He realised this only after reading *Prabagaran*. However, in our view, it was immaterial that Mr Seah did not realise subjectively that he could have challenged the constitutionality of s 33B of the MDA until he read *Prabagaran*. This is because the Non-Availability Requirement sets out an *objective* test of whether the arguments could have been advanced earlier with reasonable diligence. As noted above, the constitutional arguments in CM 1 did not meet that test.

29 Some portions of Mr Seah's arguments challenged parts of the reasoning of this court in *Prabagaran*. We recognise of course that those portions could

not have been raised until after we released our decision in *Prabagaran*. However, as we pointed out to Mr Seah, this could not suffice to satisfy the Non-Availability Requirement. Otherwise, whenever this court gives reasons for dismissing legal arguments in an application by convicted person A to reopen a concluded criminal appeal, another convicted person B will be able to bring a subsequent application in another case to challenge the reasoning of this court. Thereafter, would another convicted person C or even A be entitled to challenge the reasoning in B's application? This would result in absurd, never-ending applications and nothing would ever be final.

30 For these reasons, we held that the Non-Availability Requirement was not satisfied in respect of all but one of the applicant's arguments. Those arguments were not "new" material under the *Kho Jabing* test.

31 Second, in respect of the applicant's arguments that parts of s 33B of the MDA were unconstitutional, we decided that the applicant could not establish a "miscarriage of justice" even if these arguments succeeded. This is because, as we noted in *Prabagaran* at [15], if s 33B was ruled to be unconstitutional, we would then have to disregard s 33B as if it had never been enacted and the applicant would have to be sentenced under the Second Schedule to the MDA to undergo the mandatory death penalty. We reached this view in *Prabagaran* after considering and rejecting several arguments raised there. One of those arguments was the very argument raised by the applicant in his written submissions – that s 33B could be "cured" by "deleting" s 33B(4) and reading s 33B(2) to provide that the court, not the Public Prosecutor, decides whether an accused person has provided substantive assistance: see *Prabagaran* at [40]. When we put this issue to Mr Seah during the hearing, he did not challenge the reasoning in *Prabagaran* on this point. On the contrary, he accepted that even

if parts of s 33B of the MDA were unconstitutional, the law would still require the applicant to be sentenced to death (see [15] above).

32 This point was vital because, as we explained in *Prabagaran* at [17]–[18], [20] and [54], material would only establish a "miscarriage of justice" under the *Kho Jabing* test if it would affect the outcome of the case. Given that the applicant's constitutional arguments would not have affected the outcome of his case even if they were successful, those arguments could not establish a miscarriage of justice that would justify the exercise of our power of review.

33 Third, for the reasons given below, we were satisfied that none of the applicant's arguments had any merit. The arguments were not "compelling" material upon which we could find that there was a miscarriage of justice.

34 For these reasons, we held that the *Kho Jabing* test applied to CM 1 and that the test was not fulfilled in this case. There was therefore no basis for us to exercise our inherent power of review to reopen the criminal appeal.

Issue 2: The merits of the substantive arguments

35 Although we held that CM 1 did not meet the *Kho Jabing* test, we allowed Mr Seah to advance his substantive arguments. In the end, we found again that there was no merit in those arguments.

The constitutionality of s 33B of the MDA

36 It was a struggle to identify what argument Mr Seah was advancing on many points. Mr Seah asserted boldly that parts of s 33B of the MDA were unconstitutional without explaining how that was so. A mere assertion that a law is unconstitutional without giving proper reasons for that assertion surely cannot amount to a constitutional argument.

Section 33B(2)(b) of the MDA

(1) The Judicial Power Argument

37 The applicant argued that s 33B(2)(*b*) of the MDA is unconstitutional on the ground that the PP's role in that provision amounts to a usurpation of the judicial power to sentence accused persons. This is unconstitutional, the applicant submitted, because it violates the principle of the separation of powers which is part of the basic structure of the Constitution.

38 In *Prabagaran*, we rejected a version of the Judicial Power Argument. We began by identifying the judicial power in relation to sentencing, observing at [60] that "the power to prescribe punishment is part of the legislative power while the courts' power is to exercise its sentencing discretion as conferred by statute to select the appropriate punishment". In other words, the judicial power in sentencing is the power to "determine the appropriate punishment for a particular offender": see *Prabagaran* at [61].

39 We then reasoned at [65], [72] and [76] as follows:

> 65 Nevertheless, as the PP submits, the discretion of the PP to certify whether an offender has substantively assisted the CNB in disrupting drug trafficking activities is not an unfettered one. Much like ss 33A(1)(*a*), 33A(1)(*d*) and 33A(1)(*e*) of the MDA that were subject to challenge in *Faizal*, s 33B(2)(*b*) prescribes a subjective assessment of an objective condition for the triggering of an alternative sentence. We note that the risk that the PP may refuse to issue a certificate even where substantive assistance has been provided was raised during the Parliamentary debates … the PP is duty-bound to so certify if the facts justify it: …
>
> 72 It is significant, in our view, that none of these cases deal with the subjective assessment by the Executive of an objective condition for the exercise of the court's sentencing powers (see [65] above). It is this characteristic that distinguishes the cases set out above. As noted in *Faizal* ([56] *supra*) at [57], the legislation in *Muktar Ali* empowered a member of the Executive "to *choose* the court in which to try an

> offender so as to obtain a *particular* sentencing result on the facts" [emphasis added]. But that is not the nature of s 33B(2)(*b*). Unlike the discretion exercised by the Executive in the cases cited by the applicants, the discretion exercised by the PP under s 33B(2)(*b*) is circumscribed by the legislative purpose underlying the MDA Amendments and specifically, the provision itself. It is a general provision applying with equal force in an equal manner to all offenders who have been convicted of an offence under the MDA and are liable to be sentenced to suffer the punishment of death. …
>
> 76 Regardless of where these limits may lie, we are satisfied that a determination by the Executive under s 33B(2)(*b*) does not violate the principle of separation of powers. We stress that the exercise of the PP's discretion is not tailored to the punishment it thinks should be imposed on a particular offender but is circumscribed to the limited question of whether the prescribed criterion – that the offender has substantively assisted in disrupting drug trafficking activities within and/or outside Singapore – has been satisfied. …

40 A central reason why we rejected a version of the Judicial Power Argument in *Prabagaran* is that under s 33B(2)(*b*) of the MDA, the PP cannot issue or withhold a CSA and thus affect the sentence imposed on an accused, based on his view of what the appropriate punishment is. The PP cannot issue or withhold a CSA simply because he considers that an accused person deserves to suffer the death penalty or life imprisonment. The sole basis on which a CSA may be issued is that the accused has provided substantive assistance to the CNB and the only ground on which a CSA may be withheld is that such substantive assistance was not provided. Even when a CSA is issued, the discretion whether to impose the death penalty or the alternative sentence still remains with the court. Hence, s 33B(2)(*b*) of the MDA does not give the PP the power to decide the appropriate punishment for a particular offender. It follows that s 33B(2)(*b*) does not amount to a usurpation of judicial power.

41 We noted in *Prabagaran* at [72] that the limitation on the PP's power under s 33B(2)(*b*) of the MDA distinguished that provision from the provisions found to be unconstitutional in the cases cited by the applicant. In *Moses Hinds*

v The Queen [1977] AC 195, the impugned Jamaican law "effectively allowed the Review Board", an arm of the Executive, to "determine the duration of the offender's custodial term": see *Prabagaran* at [68]. In *Mohammed Muktar Ali v The Queen* [1992] 2 AC 93, the Mauritian legislation, which gave the Director of Public Prosecutions ("the Mauritius DPP") the discretion to choose the court where an accused would be tried for drug trafficking, "effectively allowed a member of the Executive to select the punishment to be imposed … since the sentencing court had no discretion to determine the appropriate sentence upon the decision of the Mauritius DPP": see *Prabagaran* at [71]. The Executive there was effectively deciding the appropriate sentence for accused persons.

42 During the hearing, we invited Mr Seah to identify specific errors in the reasoning in *Prabagaran* on this point. He submitted that in *Prabagaran*, this court rejected a version of the Judicial Power Argument on the basis that s 33B(2)(*b*) of the MDA provides for the PP to make a subjective assessment of the objective requirement of whether an accused person has given substantive assistance to the CNB. Mr Seah argued that "a subjective assessment is unconstitutional".

43 Mr Seah did not cite any case or advance any argument of principle for the proposition that "a subjective assessment is unconstitutional". More importantly, he did not address the reasoning in *Prabagaran*. In particular, he did not address the critical point that the PP's subjective assessment under s 33B(2)(*b*) of the MDA is constrained by the objective condition to which it pertains and thus, in granting or withholding a CSA, the PP cannot be said to be wielding the judicial power of determining the appropriate punishment (see [40] above).

44 In his written submissions, the applicant appeared to claim that the mere fact that the PP's decision on whether to grant a CSA has an impact on the sentence imposed on an accused person renders the PP's role under s 33B(2)(*b*) of the MDA a usurpation of judicial power. He relied on a classification of cases ("the Classification") where legislative provisions were found to have violated the separation of powers. The Classification derives from Chan Sek Keong CJ's judgment in *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947 ("*Faizal*") at [51], and was endorsed in *Prabagaran* at [62] where we stated as follows:

> In fact, as observed in *Faizal* at [51] … there have been cases in which legislative provisions conferring powers upon the Executive were found to have intruded into the sentencing power of the court and violated the principle of separation of powers. The cases can be divided into three classes:
>
> > (a) Legislation which enabled the Executive to select the sentence to be imposed in a particular case after the accused person was convicted: eg, *Deaton*, *Hinds* and *Palling v Corfield* (1970) 123 CLR 52 ("*Palling*").
> >
> > (b) Legislation which enabled the Executive to make administrative decisions which were directly related to the charges brought against a particular accused person at the time of those decisions, and which had an impact on the actual sentence eventually imposed by a court of law: eg, *Mohammed Muktar Ali v The Queen* [1992] 2 AC 93 ("*Muktar Ali*").
> >
> > (c) Legislation which enabled the Executive to make administrative decisions which were not directly related to any charges brought against a particular accused person, but which had an impact on the actual sentence eventually imposed by a court of law pursuant to legislative directions that the Executive's administrative decisions were a condition which limited or eliminated the court's sentencing discretion: eg, *State of South Australia v Totani* (2010) 242 CLR 1 ("*Totani*").

45 The applicant contended that the PP's discretion [under s 33B(2)(*b*)] is "dangerously identical" with the decisions under class (c) of the Classification,

namely, "executive decisions not directly related to any charges 'but which had an impact on the actual sentence eventually imposed by a court'".[14]

46 We could not accept this submission. In our judgment, Chan CJ did not intend to convey, in describing class (c) of the Classification in *Faizal*, that *any* legislation enabling the Executive to make decisions that affected an accused person's sentence would amount to a usurpation of the judicial power in sentencing. This cannot be what Chan CJ meant given his decision in *Faizal* itself. In *Faizal*, Chan CJ held that ss 33A(1)(*a*), 33A(1)(*d*) and 33A(1)(*e*) of the MDA – which required the court to impose enhanced minimum sentences on accused persons who were directed by the Director of the CNB, a member of the Executive, to be admitted to an approved institution – did not intrude into the judicial power in sentencing. The decision of the Director of the CNB to order an accused to be admitted to an approved institution is a decision of the Executive, which undoubtedly may impact the sentence imposed on an accused under s 33A of the MDA. Yet Chan CJ did not think that that sufficed to render ss 33A(1)(*a*), 33A(1)(*d*) and 33A(1)(*e*) of the MDA an intrusion into the judicial power.

47 In our judgment, in describing class (c) of the Classification, Chan CJ was broadly delineating a residual category of cases. Class (c) ("administrative decisions which were not directly related to any charges") was defined in wide terms, in contradistinction to class (b) ("administrative decisions which were directly related to the charges"). Not all provisions falling within the description of class (c) amount to an intrusion into the judicial power in sentencing.

48 Further, as we noted in *Prabagaran* at [77], the facts of the case cited by Chan CJ in *Faizal* as a case in class (c) of the Classification - *State of South*

[14] Applicant's submissions dated 22 June 2018 at para 100.

Australia v Totani (2010) 242 CLR 1 – are far removed from the facts here. We repeat the following observations of this court in *Prabagaran* at [77]:

> In *Totani*, legislation was passed compelling the court to impose control orders on an individual upon a finding that he was a member of an organisation declared by the Executive to be a risk to public safety and order. These control orders, which imposed restrictions on the personal freedom of such individuals, could be made without any assessment by the court as to whether the defendant himself posed a risk to public safety and order, or whether he had previously engaged, was engaging or would engage in serious criminal activity: *Totani* at [434]. As *Faizal* ([56] *supra*) notes at [57], it is significant that the legislative scheme in *Totani* involved the imposition of a sentence absent a finding of guilt. That is, the imposition of the control orders was in fact executive, and not judicial, in nature. Section 33B(2)(*b*) does not give rise to such concerns; it is the court that determines the guilt of the party and imposes the sentence prescribed under the Second Schedule of the MDA. Where the requirements of s 33B(2) are made out, it is the court that may sentence the offender to imprisonment for life where s 33B(1)(*a*) applies. The independence and impartiality of our courts are left intact.

49 For the above reasons, we rejected the applicant's submissions that the PP's role under s 33B(2)(*b*) of the MDA in determining whether to grant a CSA or not constitutes a usurpation of the judicial power to sentence accused persons.

(2) The Constitutional Role Argument

50 The applicant argued that the PP's role under s 33B(2)(*b*) of the MDA is *ultra vires* the PP's proper role under the Constitution. Article 35(8) of the Constitution states that the Attorney-General ("the AG"), who is also the PP, "shall have power … to institute, conduct or discontinue any proceedings for any offence". The applicant emphasised that Art 35(8) does not refer to the PP exercising any role in relation to the sentencing of accused persons.

51 We agreed with the PP that this argument was unmeritorious.[15] Article 35(7) of the Constitution states:

> It shall be the duty of the Attorney-General to advise the Government upon such legal matters and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the President or the Cabinet and to discharge the functions conferred on him by or under this Constitution or any other written law.

52 Article 35(7) recognises that the AG's constitutional role is not confined to that of instituting, conducting or discontinuing prosecutions. The AG also has the role of "[discharging] the functions conferred on him … under … any other written law". The PP's role under s 33B(2)(*b*) of the MDA is a function conferred on the PP under "written law". Thus, the PP's role under s 33B(2)(*b*) cannot be said to be *ultra vires* his constitutional role.

Section 33B(4) of the MDA

53 The applicant submitted that s 33B(4) of the MDA is unconstitutional because it is "self-referentially inconsistent and is consequently self-defeating in purpose". The submission appeared to be as follows:

(a) the aim of s 33B(4) of the MDA is to provide an avenue for accused persons to challenge the PP's exercise of his discretion under s 33B(2)(*b*) on the grounds of bad faith or malice;

(b) however, it is extremely difficult for an accused person to establish bad faith and malice on the PP's part; and

(c) therefore, s 33B(4) of the MDA is unconstitutional.

54 We rejected this argument. We accepted that it would only be in a rare case that an accused person would be able to adduce sufficient evidence to obtain leave to commence judicial review in respect of the PP's decision to

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15 PP's submissions dated 20 July 2018 at para 34b.

withhold a CSA on the ground that it was made in bad faith or with malice. However, in our judgment, the difficulty faced by an accused person in impugning the PP's decision to withhold a CSA is not so extreme that it renders s 33B(4) inconsistent and self-defeating in purpose. In *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222 ("*Ridzuan*"), we held at [43] that an accused person does not have to produce evidence directly impugning the process by which the PP reaches his decision not to grant a CSA, *eg*, records of meetings, to meet his evidentiary burden in challenging the PP's decision. Inferences may be made from the objective facts. For example, we held at [51] that in relation to an alleged breach of Art 12 of the Constitution, an accused person need only show that (1) his involvement in the offence and knowledge was practically identical to that of a co-offender and (2) both he and his co-offender gave the same information to the CNB. The PP would then have to justify its decision to grant a CSA to the co-offender but not to the accused.

55 The applicant also argued that s 33B(4) of the MDA is unconstitutional because it violates the rules of natural justice. The premise of this submission was that s 33B(4) ousts judicial review.

56 In our judgment, this submission did not assist the applicant. We begin by noting that in *Ridzuan* at [76] and *Prabagaran* at [98], this court expressly left open the question of whether s 33B(4) of the MDA effectively ousts judicial review on all grounds except bad faith, malice and unconstitutionality. The High Court has now held in *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 ("*Nagaenthran*") at [69] that s 33B(4) of the MDA is a constitutionally valid ouster clause that ousts judicial review except on the basis of bad faith, malice and unconstitutionality, although s 33B(4) may, in principle, be circumvented where the PP's decision is tainted by a jurisdictional error of law. *Nagaenthran* is now pending appeal to this court.

57 In our judgment, it was unnecessary to determine the point addressed in *Nagaenthran* in this application. Any alleged breach of natural justice in an application for this court to reopen a concluded criminal appeal can be relevant only if it is shown that it could have led to a different outcome. Here the applicant had to but failed to articulate (1) what it was that he could or would have put to the PP, (2) how he was not allowed to do so and (3) how, if he had been able to do so, it could, would or even might reasonably have led to a different outcome in terms of what the PP decided. This is not an unreasonable standard. The Court of Appeal has applied it in the context of attempts to set aside arbitration awards and adjudication determinations. Absent this, no argument on natural justice has any hope. It would be a purely theoretical point. At the same time, if an applicant could prove these elements, he might have a case.

Section 33B(2)(a) of the MDA

58 The applicant argued that the "evolving interpretation" of s 33B(2)(*a*) reflected an inherent confusion in the provision which violated his rights under Art 12 of the Constitution. He emphasised that in his case, he was first found to be a courier by the Judge but this finding was then overturned by this court.

59 This argument was without basis and we rejected it accordingly. First, the "evolving interpretation" of s 33B(2)(*a*) was simply the unremarkable result of the incremental development of case law relating to that provision. There was no basis to conclude that it reflected an "inherent confusion" in s 33B(2)(*a*), let alone that the provision violated the applicant's rights under Art 12 of the Constitution. Second, the sequence of events in relation to the applicant's case was the natural consequence of this court disagreeing with the Judge as to the interpretation of s 33B(2)(*a*) and thus, whether the applicant fell within the

scope of that provision. It was not a basis on which we could find a breach of the applicant's rights under Art 12 of the Constitution.

The interpretation of s 33B of the MDA

60 In his written submissions, apart from submitting that s 33B of the MDA is unconstitutional, the applicant also raised arguments as to the interpretation of s 33B. We will now address these arguments briefly.

61 First, the applicant argued that he should be reclassified as a courier in the light of our decision in *Zainudin*. We rejected this submission. The High Court found that the applicant possessed the diamorphine that formed the subject matter of his charges for repacking and sale (see [5] above). This finding was affirmed by this court on appeal (see [9] above). In this light, the applicant was plainly not a mere courier of the drugs he was found in possession of since he intended to sell them. Nothing in *Zainudin* suggested otherwise. On the contrary, in *Zainudin*, this court held at [112(d)] that one who divided and packed drugs "to enable the original quantity of drugs to be transmitted to a wider audience" would not fall within s 33B(2)(*a*)(iii) of the MDA. As the applicant was repacking the drugs for sale, he intended to transmit them to a wider audience. Hence, under *Zainudin*, the applicant could not be considered a mere courier.

62 Second, the applicant argued that this court should adopt the Best Effort Interpretation of s 33B(2)(*b*) of the MDA. We were not persuaded. We rejected the Best Effort Interpretation in *Ridzuan*, holding at [45] that Parliament's intent was that "an offender's good faith cooperation with the CNB is not a necessary or sufficient basis for the PP to grant him a [CSA]"; rather, a CSA would only be granted where "the offender's assistance yields actual results in relation to

the disruption of drug trafficking". The applicant could not convince us that the reasoning in *Ridzuan* was incorrect. We therefore rejected this submission.

Conclusion

63 For the reasons set out above, we decided that the substantive arguments advanced in CM 1 were without merit and rejected them. Accordingly, we dismissed CM 1.

Issue 3: Costs

64 In its written submissions for CM 1, the Prosecution stated that it would not be seeking any costs order against Mr Seah on the understanding that he had been appointed to act for the applicant under the Legal Assistance Scheme for Capital Offences ("LASCO").[16] In the course of the hearing, however, it transpired that LASCO had not appointed Mr Seah to act for the applicant in CM 1. Mr Seah clarified that he was acting *pro bono* (it appeared that he was not charging the applicant professional fees but was paid for disbursements.)

65 At the hearing, after we had dismissed CM 1, the Prosecution applied for a costs order against Mr Seah. We were concerned that in the context of what transpired in [64] above, Mr Seah might not be adequately prepared to respond to the Prosecution's submissions on costs. We therefore directed the parties to file written submissions on costs.

The parties' submissions

66 The Prosecution urged this court to make two costs orders: (1) a costs order of $5,000 against Mr Seah personally and (2) an order under s 357(1)(*a*) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC") disallowing

[16] PP's submissions dated 20 July 2018 at para 44.

disbursements as between Mr Seah and the applicant.[17] The Prosecution made the following submissions:

(a) First, the court has the inherent power to order defence counsel to bear the costs of the Prosecution directly. At common law, the court had the inherent power to order a solicitor to bear personally the costs of litigation in civil and criminal proceedings: see *Zhou Tong and others v Public Prosecutor* [2010] 4 SLR 534 ("*Zhou Tong*") at [22]–[24]. This power was not excluded impliedly or limited by the enactment of s 357 of the CPC. In this regard, the Prosecution argued against the decision of the High Court in *Arun Kaliamurthy and others v Public Prosecutor and another matter* [2014] 3 SLR 1023 ("*Arun Kaliamurthy*") which held at [14]–[15] that Parliament had excluded the court's inherent power to order defence counsel to pay the costs of the Prosecution, in the absence of a costs order being made against an accused person.[18]

(b) Second, the court should make the proposed costs orders against Mr Seah because he conducted CM 1, which was "a hopeless foray", in an extravagant and unnecessary manner and that led to costs being incurred improperly and unreasonably. Mr Seah also did not conduct proceedings with reasonable competence and expedition and it was therefore just that the proposed costs order be made.

67 Mr Seah submitted that this court should not make any costs order against him:

(a) First, he argued that the court did not have the inherent power to order defence counsel to bear the costs of the Prosecution directly. He

17 PP's submissions dated 23 August 2018 at para 1.

18 PP's submissions dated 23 August 2018 at paras 2–7 and 21.

submitted that *Arun Kaliamurthy* was decided by the High Court correctly.[19]

(b) Second, although he did not deny the mistakes in the making of this application, this court should not award costs against him in the circumstances of this case.[20] He submitted that he did not conduct the application in an extravagant and unnecessary manner, the application was "not of zero legal basis or of nil prospects" and he did not incur costs unreasonably or improperly.

Our decision

68 Having considered the parties' submissions, we decided not to make any costs order against Mr Seah although we agreed with the Prosecution that the applicant's submissions in CM 1 were without merit. Mr Seah filed an affidavit deposing to the events surrounding the filing of CM 1 and there was nothing before this court which contradicted his account. We therefore proceeded on the basis that Mr Seah's version of the events was accurate.

69 In his affidavit, Mr Seah stated the following:[21]

(a) After the High Court dismissed OS 134, he visited the applicant and advised him not to appeal against the dismissal of OS 134. However, the applicant wanted to appeal and asked Mr Seah to write to LASCO to request another counsel to represent him. Mr Seah did so by a letter to the Registry.

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19 Mr Seah's submissions dated 30 August 2018 at paras 7–9.

20 Mr Seah's submissions dated 30 August 2018 at paras 6 and 10–27.

21 Mr Seah's affidavit dated 3 August 2018 at paras 9–11.

(b) The Registry replied by a letter noting that Mr Seah had been discharged as counsel and requested him to inform the applicant that LASCO would not appoint another counsel to represent him. Mr Seah informed the applicant's family about this. At this stage, he was no longer acting for the applicant.

(c) Subsequently, the applicant's family contacted Mr Seah. He was told that the applicant wished to make a fresh application to the court "on psychiatric grounds". Mr Seah advised that there was no merit in such an application but that "a possible real issue which [was] not plainly or obviously bound to fail [was] the constitutionality of [s 33B of the MDA]". The applicant knew, however, that it was not likely that the application would succeed – he was "hoping against hope".

(d) Mr Seah advised the applicant's family to appoint another lawyer to represent the applicant. However, they returned to him and he acceded eventually to their request to represent the applicant because the applicant was facing the death penalty.

70 It appeared that Mr Seah had believed in good faith that a challenge to the constitutionality of s 33B of the MDA was not bound to fail. He was mistaken of course but his conduct was unlike that of the solicitor acting for the applicant in the unreported case of Criminal Motion No 3 of 2018, *Bander Yahya A Alzahrani v Public Prosecutor* ("*Bander Yahya A Alzahrani*").[22] That application involved a criminal reference to the Court of Appeal on purported questions of law of public interest. The Court of Appeal in that case noted that the solicitor in question had been told by the High Court in an earlier application that the questions raised were not of law but of fact and therefore, the criminal

22 Applicant's bundle of authorities on costs submissions at Tab 1.

reference was unlikely to succeed. However, the solicitor persisted in the application before the Court of Appeal and conducted himself unreasonably in doing so. The solicitor there was ordered to pay $5,000 personally to the PP. It was stated in a media report that the $5,000 would be given to the Law Society of Singapore which administers the Criminal Legal Aid Scheme.[23] In the present application, Mr Seah advised the applicant's family and agreed to act only after the applicant's family returned to seek his help. In this light, we decided that it was not necessary to make the costs orders sought by the Prosecution.

71 Since the parties made submissions on the question whether the court has the power to order counsel in criminal matters to bear the costs of the Prosecution directly, we will state our views on this issue as well. The relevant provision is s 357 of the CPC which states:

> **Costs against defence counsel**
>
> **357.**—(1) Where it appears to a court that costs have been incurred unreasonably or improperly in any proceedings or have been wasted by a failure to conduct proceedings with reasonable competence and expedition, the court may make against any advocate whom it considers responsible (whether personally or through an employee or agent) an order —
>
> > (*a*) disallowing the costs as between the advocate and his client; or
> >
> > (*b*) directing the advocate to repay to his client costs which the client has been ordered to pay to any person.

72 It has been held that before s 357 of the CPC was enacted, the court had the inherent power to order counsel to pay costs to the Prosecution directly, that is, without making a costs order against the accused: see *Zhou Tong* at [22]–[24]. The issue is whether Parliament excluded this power when it enacted s 357.

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[23] Applicant's bundle of authorities on costs submissions at Tab 1.

73 In *Zhou Tong*, V K Rajah JA was sitting as the High Court hearing criminal appeals from a District Court. In the course of his decision, he had the occasion to make observations on the conduct of the solicitor acting for the appellants in the appeals and (at [33]) considered invoking the court's inherent jurisdiction over the solicitor as an officer of the court to order him to refund the legal costs paid by the clients. In doing so, he also discussed s 357 (which was not in operation at the time of that decision in July 2010) and O 59 rr 8(1) and 8(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the 2006 Rules of Court").

74 V K Rajah JA said at [22] that "the court may always order a solicitor to personally bear the costs of litigation by exercising its inherent jurisdiction". At [25], he said that "the court's inherent jurisdiction to make personal costs orders against solicitors was first codified in O 59 r 8 … in respect of civil proceedings, and more recently in s 357 of the Criminal Procedure Code … in respect of criminal proceedings". He added that both these provisions of law were based on the same practical and ethical considerations. He observed at [27] that s 357 corresponded with O 59 rr 8(1) and 8(2) and opined at [34] that s 357 "merely codifies the court's existing inherent jurisdiction" and is an "alternative procedural rule or route that allows the court to render a punitive response to a solicitor's breaches of prescribed professional substantive standards". The discussions on the two provisions did not affect the outcome in that case as the solicitor in question undertook to refund the legal fees paid by the clients and did so eventually. The judgment did not indicate that any costs order was sought by or made in favour of the Prosecution.

75 On the views expressed in *Zhou Tong*, s 357 did not exclude or limit the court's inherent power to make costs orders against counsel directly.

76 The High Court arrived at a different conclusion in *Arun Kaliamurthy*. In that case, Tan Siong Thye JC (as he then was) held at [15] that a court did not have the power to order counsel to pay the costs of the Prosecution without first making a costs order against the client. He emphasised that s 357(1) was based on O 59 r 8(1) of the 2006 Rules of Court and noted that s 357(1)(*a*) and 357(1)(*b*) corresponded with O 59 rr 8(1)(*a*) and 8(1)(*b*) respectively. He observed that there was no equivalent of O 59 r 8(1)(*c*) which empowers the court to make an order "directing the solicitor personally to indemnify such other parties against costs payable by them". He opined (at [10]) that this omission must be taken to be a deliberate one in the absence of evidence to the contrary. Tan JC concluded that s 357(1) could not "be interpreted as implicitly allowing a court to order a defence counsel to pay the costs of the prosecution directly without making a costs order against the accused".

77 With respect, we do not agree with the conclusion in *Arun Kaliamurthy* on the scope of s 357. Under s 357(1)(*b*), the court may direct the solicitor to "repay" to the client (or the applicant here) costs which the client was ordered to pay to any person. It may be argued that the word "repay" suggests that counsel would only be required to "reimburse" (this was the word used in the order in *Arun Kaliamurthy* at [63]) the client if the client was first ordered to pay costs to the Prosecution and the client has paid the Prosecution the costs ordered. However, we think that such a reading of this provision is unduly narrow and not in keeping with the statutory intention which is really to penalise and discipline the solicitor in question for the sort of conduct set out in that provision.

78 Further, there could be practical difficulties should the client not pay the Prosecution. For example, the client could be a foreigner without assets in Singapore and who had already left Singapore with no intention of paying the costs ordered against him. Another instance would be where the client is impecunious and in no position to pay the Prosecution. In such situations, on the reasoning in *Arun Kaliamurthy*, the solicitor at fault would not be required to pay any costs at all because his duty to "reimburse" is merely a secondary one.

79 Thus, if the court could not order a solicitor to pay the Prosecution's costs directly under s 357(1)(*b*) or under its inherent power, an impecunious applicant could be egged on by a solicitor or some other person to make a totally unmeritorious application to the court with impunity. A costs order against such an applicant would in all likelihood be worthless. In such a situation, if the solicitor is merely directed to "repay" or "reimburse", he would get away with paying nothing since the impecunious client would not have paid anything. This situation would be absurd because the costs order is caused by and directed at the solicitor's conduct.

80 In any event, the effect of an order of costs under s 357(1)(*b*) is that a solicitor is to pay costs personally to the Prosecution although in a circuitous way which entails that the client pays first and then gets reimbursed by his solicitor. There is no prejudice whatsoever to the solicitor because the court's clear intention is to show disapproval of the solicitor's conduct in the proceedings in question. Indeed, it was with the statutory intention and such practical considerations in mind that the Court of Appeal in *Bander Yahya A Alzahrani* (which comprised three of the five Judges in the present case) made the order in that case that "counsel for the applicant … be personally liable to pay costs of SGD$5,000 to the Respondent" (who was the PP in that case). This

order was made despite the Prosecution there highlighting to the court after the hearing that the ruling in *Arun Kaliamurthy* required it to make the circuitous order as to costs instead of an order against the solicitor personally. Therefore, we do not agree with the reasoning in *Arun Kaliamurthy* on this issue.

Conclusion

81 For the reasons set out above, we dismissed CM 1. However, we decided not to make any costs order against Mr Seah.

Sundaresh Menon Chief Justice	Judith Prakash Judge of Appeal	Tay Yong Kwang Judge of Appeal

Chao Hick Tin Senior Judge	Belinda Ang Saw Ean Judge

Rupert Seah Eng Chee (Rupert Seah & Co) for the applicant;
Francis Ng SC, Lim Jian-Yi, Ho Lian-Yi and Senthilkumaran s/o Sabapathy (Attorney-General's Chambers) for the respondent.