IN THE GENERAL DIVISION OF THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 13

Criminal Case No 27 of 2019

Between

Public Prosecutor

And

Teo Ghim Heng (Zhang Jinxing)

GROUNDS OF DECISION

[Criminal Law] — [Offences] — [Murder]
[Evidence] — [Witnesses] — [Rebuttal evidence]
[Evidence] — [Weight of evidence] — [Expert evidence]
[Criminal Law] — [Special exceptions] — [Diminished responsibility]
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v
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22 January 2021

Kannan Ramesh J:

Introduction

1 This was a tragic case of a double homicide. In addressing the question of the accused's guilt, the court had to consider the approach to analysing expert psychiatric evidence and the applicable medical diagnostic criteria for depressive disorders in ascertaining whether the accused met the legal criteria for the presence of mental disorder that was relevant to culpability. The court was also presented with novel issues of law concerning the constitutionality of the statutory provisions on murder under the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code").

2 The accused, Teo Ghim Heng, was charged with the murder of his wife, Choong Pei Shan ("Pei Shan"), and his daughter, Teo Zi Ning ("Zi Ning"). The two charges he faced were as follows:

(a) The first charge was for committing murder, by causing the death of Pei Shan, an offence under s 300(*a*) of the Penal Code and punishable under s 302(1) of the said Act.

(b) The second charge was for committing murder, by causing the death of Zi Ning, an offence under s 300(*a*) of the Penal Code and punishable under s 302(1) of the said Act.

The Prosecution stood down a further charge against the accused under s 316 of the Penal Code for causing the death of the unborn baby that Pei Shan had been carrying at the time of her death.

3 There was little disagreement over whether the elements of the offence of murder were made out. The Prosecution and the Defence co-tendered an Agreed Statement of Facts ("ASOF") pursuant to s 267(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC") – in the ASOF, it was agreed that the accused performed the acts which caused the deaths of Pei Shan and Zi Ning. It was also not disputed that the accused possessed the requisite *mens rea* of the offence (see [70] below). Indeed, in written closing submissions, the Defence did not contest the issues of *actus reus* and *mens rea*.

4 It was therefore common ground that the main question was whether the Defence had succeeded in establishing the defences which the accused relied on, which were as follows:

(a) The partial defence of diminished responsibility under Exception 7 to s 300(*a*) of the Penal Code (henceforth referred to as "diminished responsibility" or "the defence of diminished responsibility"). The nub of the Defence's case was that the accused suffered from a depressive disorder known as Major Depressive

Disorder of *moderate severity* ("MDD Moderate") at the time of the alleged offences which substantially impaired his mental responsibility for his acts which caused the deaths of Pei Shan and Zi Ning.

(b) The partial defence of grave and sudden provocation under Exception 1 to s 300(*a*) of the Penal Code (henceforth referred to as "provocation" or "the defence of provocation"). The Defence argued that the accused took the lives of Pei Shan and Zi Ning because he lost self-control as a result of provocation by Pei Shan.

The burden of proof was on the accused to prove any of the relevant defences on a balance of probabilities. If the Defence succeeded in proving its case on either diminished responsibility or provocation, the accused would instead be guilty of the offence of culpable homicide not amounting to murder, punishable under s 304(*a*) of the Penal Code.

5 In addition, in closing submissions, the Defence challenged the constitutionality of ss 299 and 300(*a*) of the Penal Code. The Defence argued that ss 299 and 300(*a*) ought to be struck down for being (a) in violation of the separation of powers under the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution"); and/or (b) in contravention of Article 12 of the Constitution. If the Defence succeeded in this challenge, ss 299 and 300(*a*) of the Penal Code would be void for being inconsistent with the Constitution – the accused would then have to be either acquitted or tried on an amended charge.

6 The Prosecution submitted that the defences relied upon were not made out. As regards diminished responsibility, they primarily based their case on the expert psychiatric evidence adduced. They argued that diminished

responsibility was inapplicable as it was evident that the accused had not been suffering from Major Depressive Disorder ("MDD") or any other abnormality of mind at the material time that substantially impaired his mental responsibility for his actions. The Prosecution also argued that (a) provocation was not made out as the circumstances showed that the accused was not deprived of self-control, and (b) the constitutional challenge was without merit. I shall canvass the parties' detailed arguments later in these grounds.

7 Having considered the evidence before me and the parties' submissions, I found that the elements of the offence of murder were established beyond a reasonable doubt for both charges. I also found that the defences of diminished responsibility and provocation were not proven on a balance of probabilities for both charges. Further, I did not accept the Defence's constitutional challenge as I was of the view that ss 299 and 300(*a*) of the Penal Code were *not* inconsistent with the Constitution. I accordingly convicted the accused on both charges, and imposed the mandatory death penalty on him. Following conviction, the Prosecution applied for and was granted leave to withdraw the further charge under s 316 of the Penal Code.

8 The accused has appealed against my decision. I delivered detailed oral grounds on 12 November 2020 and now set out the full grounds of my decision. I will address first the elements of the offence and the defences relied on by the accused, before addressing the constitutional challenge raised by the Defence.

The facts

9 A significant portion of the facts were undisputed at trial and are set out in the ASOF. The facts set out below comprise not only those in the ASOF, but

also the facts asserted in portions of the accused's evidence (either in his testimony or recorded statements) that have not been challenged by either party.

Background facts

10 Prior to and at the time of the offences, the accused, Pei Shan and Zi Ning resided at Block 619 Woodlands Drive 52, #06-64, Singapore ("the flat"). The accused was the sole breadwinner of the family. He was a committed husband and father. The accused had been previously working as a property agent for over a decade. He performed well as a property agent and was financially stable. Between 2013 and 2015, he held the position of Divisional Director at two different real estate companies. According to the accused, he had been drawing a five-figure monthly salary.

11 In 2015, the accused's income declined significantly principally because of a downturn in the property market. His family's expenses, however, did not suffer a corresponding decline. These expenses remained high and well beyond the accused's income. The accused had to dip into his savings to meet the expenses. Unable to sustain a meaningful income as a property agent, the accused decided to switch employment. By this time, he had resorted to borrowing from friends, colleagues and various financial institutions, and was heavily in debt.

12 In October 2016, a friend, Lim Zi Jian, Jordan ("Mr Jordan Lim"), introduced the accused to Carpentry Design Works Pte Ltd ("CDW"). Mr Jordan Lim was a sales manager at CDW. The accused was offered employment by CDW as a sales coordinator at a monthly salary of about $1,500. He accepted the offer and worked under the supervision of Mr Jordan Lim. The accused was a conscientious and committed employee and was well regarded,

both professionally and personally, by his colleagues and superiors. Mr Jordan Lim described his attitude as "very good"; Mdm Husniyati binte Omar ("Mdm Husniyati", also known as "Sharlyn"), the accused's director at CDW, described him as "reliable" and "very hardworking". The accused kept a consistent and rigorous work schedule, the details of which I will elaborate upon later in these grounds (see [164] below). The accused was working at CDW at the time of the offences.

13 However, the accused's income at CDW was wholly insufficient to sustain the accused's family expenses, and his financial situation continued to deteriorate. He struggled to pay Zi Ning's school fees. Also, the accused resorted to gambling which became habitual. By the end of 2016, the accused owed some $120,000 to various creditors. He even listed the flat for sale and made plans to sell his car.

14 Creditors demanded payment from the accused and on one occasion, on 13 January 2017, a former colleague, Dickson Pang Choon Chuang ("Mr Dickson Pang"), turned up at the flat, albeit at the invitation of the accused, to discuss settlement of the debt owed to him. This sparked heated arguments between the accused and Pei Shan over the family's finances. There were also arguments with Pei Shan over transferring Zi Ning to a less expensive school and Pei Shan's refusal to take up employment to ameliorate the family's financial difficulties.

15 On the evening of 18 January 2017, the accused and Pei Shan had another argument over the state of the family's finances. The accused informed Pei Shan that he was $70,000 in debt, and was unable to pay Zi Ning's school fees. Also, he felt pressured because the Lunar New Year was approaching, and his friends were pressing him for repayment of his debts. He again asked Pei

Shan to look for part-time employment to help with the family's expenses. According to the accused, upon hearing this, Pei Shan "hit the roof". Harsh words were exchanged. During this fight, in anger, the accused brought up Pei Shan's extra-marital affair with one Mark Mu which allegedly occurred in October 2014. The couple fought for a while, after which they smoked cigarettes before going to bed for the night.

16 The next day, 19 January 2017, the accused received a text message from the principal of the school that Zi Ning attended. The principal requested payment of overdue school fees amounting to about $1,700. The accused felt "very vexed" by this as he did not have the money to pay the overdue fees. This was not the first time that the accused had received such messages from the principal.

The offences

17 The next day, 20 January 2017, at about 8.00am, the accused and Pei Shan were readying Zi Ning for school. All three of them were in the master bedroom. Zi Ning had put on her school uniform. As the accused was unable to pay the overdue school fees, he told Zi Ning to change out of her school uniform and into her home clothes. He switched on the television in the master bedroom and told Zi Ning to "watch TV". Pei Shan, who was sitting at the edge of the bed in the room, asked the accused why Zi Ning was not going to school. He told Pei Shan that he "[did not] have the money to pay [Zi Ning's] overdue school fees". He feared that if Zi Ning were to go to school, she might be asked to leave, which would be "very embarrassing" and "[s]hameful". This again sparked a heated argument between the accused and Pei Shan over the family's financial situation.

18 The accused described Pei Shan as "super angry". The accused claimed that Pei Shan had scolded him and "[said] that [he] was a useless father and husband". The last thing he recalled Pei Shan saying (in Mandarin) was, "[Zi Ning], look at how useless your father is!" The accused found Pei Shan's words very "sarcastic and hurtful". He found the words hurtful and degrading. He testified that he had warned Pei Shan several times in the past not to belittle him in front of his daughter. The accused became "very agitated" and his mind "went blank".

The strangulation of Pei Shan

19 As Pei Shan continued scolding him, the accused walked to the *en suite* bathroom of the master bedroom. There, he retrieved a bath towel and held it in his right hand. He walked up to Pei Shan, who remained seated at the edge of the bed, and stood in front of her. He looped the bath towel around her neck "quite quickly and did not give her much time to react", and pulled it tightly at the ends forming a tight noose. In his long statement dated 3 February 2017, the accused said that when Pei Shan attempted to pull the bath towel away from her neck, he "pulled with all [his] might and overpowered her". In his long statement dated 9 February 2017, the accused said that five minutes into strangling Pei Shan, his mind cleared, and he asked himself whether he should stop. He then decided to continue strangling her as he did not want Pei Shan to be saddled with his debts.

20 The accused released his grip on the bath towel after strangling Pei Shan for about 15 minutes. He observed that she was breathing faintly and that bubbles had formed around her lips. The accused wanted to ensure that Pei Shan was dead. Thus, he removed the bath towel from around Pei Shan's neck, and proceeded to strangle her with his hands. The accused strangled her "for about

ten to 15 minutes". While he was strangling Pei Shan with his hands, the accused spoke to her in Mandarin telling her to "leave first", and that he and Zi Ning would "join [her] shortly". In his long statement dated 3 February 2017, he said that at this point, he had "the intention of killing his entire family". As Pei Shan was being strangled, Zi Ning remained in the master bedroom playing with her toys and watching television. She did not appear to be aware of what was going on. The accused continued strangling Pei Shan until she stopped breathing completely and was motionless. He then moved Pei Shan's body further up the bed (as she had been lying on the edge of the bed) and rested her head on a pillow.

21 The accused then turned his attention to Zi Ning. He reflected on Zi Ning's situation. After some deliberation, he decided that it would be best to take Zi Ning's life as well. He rationalised that with her parents gone, Zi Ning would have no one to take care of her.

The strangulation of Zi Ning

22 The accused sat down on the bed close to Zi Ning. He asked her to sit in front of him, with her back facing him – she complied. He then looped the same bath towel around Zi Ning's neck. He pulled it tight "with all [his] strength". As Zi Ning struggled "furiously", he repeatedly told her to "leave first", that Pei Shan had "left already" and that he would "join [them] shortly". After about ten to 15 minutes, the accused felt Zi Ning's body go limp, and released the bath towel.

23 The accused observed that Zi Ning was breathing faintly and "wanted to end her life". He retrieved Zi Ning's pillow from her bed and rested her head on it. He then strangled her with his hands "for a short while" until she stopped

breathing and became motionless. The accused spoke to Zi Ning in Mandarin as he was strangling her. He told her "[y]ou have to go… Daddy will join you shortly". The accused then left Pei Shan's and Zi Ning's bodies on the bed and went to the study to have a cigarette.

The aftermath of the offences

Immediate aftermath

24 Following the commission of the offences, on the same day, the accused attempted suicide by slitting his wrists but did not succeed. The cuts did not seem deep enough as the accused stopped bleeding "after about 15 to 20 minutes" and his wounds were "scabbing over" by then. He then decided to commit suicide by consuming "many pills of Panadol" (*ie*, paracetamol). He left the flat to buy Panadol pills as well as his lunch. He returned with 20 Panadol pills and his lunch. He consumed the pills later in the day (see [27] below).

25 In order to evade his debtors, the accused used Pei Shan's handphone instead of his own. Also, the accused recalled receiving what appeared to be a text message from Zi Ning's teacher, who asked why Zi Ning did not attend school. He replied, using Pei Shan's handphone, that Zi Ning was unwell. He claimed that he did so because he "did not want [his] wife and daughter to be discovered dead before [he] had committed suicide successfully".

26 Later that day, the accused drafted several suicide notes. He prepared a total of four handwritten notes (collectively, the "suicide notes"), which were seized upon his arrest and marked "WDL-W001" to "WDL-W004" respectively. The accused claimed in his long statement dated 3 February 2017 that he wrote a "few notes" addressed to his parents and Pei Shan's parents,

which broadly pertained to how Pei Shan's and his assets were to be divided after their deaths. He also wrote a note to Pei Shan's father "posing as [Pei Shan]". It is important to note that the suicide notes either asserted or suggested that Pei Shan and the accused had agreed to commit suicide after taking Zi Ning's life. In other words, the suicide notes conveyed the impression that there was a suicide pact between the accused and Pei Shan.

27 After writing the suicide notes, the accused consumed the 20 Panadol pills he had bought. He then lay on the bed in the master bedroom, next to Pei Shan's and Zi Ning's bodies. He claimed that he felt "groggy", and expected not to wake up. However, this suicide attempt was also not successful.

Events from 21 January 2017 to 27 January 2017

28 The next day, 21 January 2017, the accused woke up sometime between 7.00am and 9.00am next to Pei Shan's and Zi Ning's bodies. The accused in fact continued sleeping next to Pei Shan's and Zi Ning's bodies daily until he was arrested on 28 January 2017. He said that in the days that followed (until his arrest), he "made sure that [the bodies of Pei Shan and Zi Ning] were kept in the master bedroom where the air-conditioning was switched on". He did so partly "out of habit", and partly because he did not want their bodies to decompose.

29 Between 21 January and 27 January 2017, the accused claimed that he attempted or intended to commit suicide on several occasions:

(a) On the morning of 21 January 2017, the accused hoped to commit suicide by consuming rat poison. However, he was unable to obtain rat poison from the shops he visited and returned home empty-handed. The accused claimed that on the same day, he "resolv[ed] to

commit suicide by jumping to [his] death" the next day. He eventually did not do so.

(b) On 24 January 2017, he contemplated jumping out of his kitchen window but did not have the courage to do so. He claimed he thought of postponing it to the next day but made no attempt then either.

(c) On 25 January 2017, he attempted suicide by consuming 105 Panadol tablets. He felt nauseous and vomited.

(d) On 26 January 2017, he attempted suicide by slitting his left wrist with a penknife but failed to kill himself. On the same day, he mixed a large quantity of insecticide with water and drank the mixture. He suffered from an upset stomach and diarrhoea.

30 During this period, various persons were looking for the accused, Pei Shan and/or Zi Ning. Many reached out through Pei Shan's handphone and the accused responded. The accused made up multiple excuses to explain why he and his family were busy or uncontactable. He allegedly did so because he did not want Pei Shan's and Zi Ning's bodies to be discovered before he had succeeded in committing suicide. In addition to the incident involving Zi Ning's teacher (see [25] above), there were other instances of questionable conduct by the accused. These were:

(a) On 21 January 2017, at about noon, he lied to his mother-in-law on the phone that he and his family would not be going over for dinner that evening because he would be busy at work.

(b) On 22 January 2017, he told his mother that he would not be visiting her for their weekly dinner as he, Pei Shan and Zi Ning were

busy "getting ready for Chinese New Year". He also told her that his handphone was not working, and asked her to contact him on Pei Shan's handphone number.

(c) On 23 January 2017, at about 9.00am, he received a text message from Zi Ning's English teacher, who asked if Zi Ning was going to school. He replied saying that Zi Ning was not feeling well, and would not be going to school until 25 January 2017. At about 2.00pm on the same day, three of the accused's colleagues including Mr Jordan Lim and the accused's director, Mdm Husniyati, arrived at the flat to look for him. From outside the flat, Mdm Husniyati shouted for the accused. The accused recognised his colleagues' voices. In order to avoid detection, he lowered the television volume and remained silent. Before leaving, one of the accused's colleagues tripped the main power switch outside the flat in a bid to lure the accused out. The accused did not fall for this. As there was no response from inside the flat, Mdm Husniyati left her name card with the accused's neighbours.

(d) On 24 January 2017, the accused received WhatsApp messages on Pei Shan's handphone from Ms Fai, the principal of the school Zi Ning attended, and one of Zi Ning's teachers. They wanted to inform Pei Shan of matters to note in anticipation of Zi Ning's return to school the next day. There was also a WhatsApp message from Pei Shan's brother, Choong Mun Chen ("Gordon"). Gordon sent the message to remind Pei Shan of the Lunar New Year reunion dinner that Friday (27 January 2017). The accused replied "Ok" to all these messages.

(e) On 26 January 2017, the accused accessed Pei Shan's Facebook account and changed her cover photo, thereby giving the impression that she was active on social media.

(f) On 27 January 2017, the eve of the Lunar New Year, the accused, Pei Shan and Zi Ning were to attend a reunion dinner with the accused's parents at 5.00pm, and another dinner with his in-laws at 8.00pm. The accused's brother called Pei Shan on her handphone at about 5.00pm that day to ask what time they would arrive for the dinner at 8.00pm. The accused answered and said they would not be joining. He promised to update his family (*ie*, the accused's family) later on the details. At about 7.30pm, he called Gordon and lied to him that Pei Shan was not feeling well and that he would be sending her to the hospital. The accused also lied that Zi Ning would be spending the night at his sister's place. At about 8.30pm, he called Gordon again and informed him that Pei Shan was resting in the hospital. He then called Pei Shan's mother to convey the same. He did so "[e]ven though [Gordon] and [Pei Shan's mother] were together at the same dinner", because he "did not want [Pei Shan's] parents to be overly worried and come visit [him] at [the flat]". These were all lies. The accused claimed that he made up the story about Zi Ning spending the night at his sister's place because he "knew that [his] father-in-law loved Zi Ning a lot and would rush down to [his] house to take care of Zi Ning if… Zi Ning was left alone unattended".

31 The accused spent the rest of his time between 21 January and 27 January 2017 watching television and YouTube videos in the master bedroom, playing games on his handphone, consuming pornography on the internet, surfing the internet on methods of committing suicide, and smoking in

the study. He left the flat to buy food or substances for the purpose of committing suicide.

The arrest of the accused

32 On the first day of the Lunar New Year (28 January 2017), the accused's in-laws were looking for him and his family. The accused received two phone calls from Gordon. He wanted to know when the accused and his family would be visiting his in-laws' house. The accused informed Gordon that Pei Shan was showering and "could not come to the phone", and that they would reach his in-laws' house at about 11.00am. By this time, the accused was feeling tremendous pressure as he felt that he "could no longer hide the fact that [he] had killed [his] wife and daughter". He resolved to burn the bodies of Pei Shan and Zi Ning and immolate himself in the process. He lay next to Pei Shan's and Zi Ning's bodies, poured thinner on the blanket, covered himself and them with it and set it on fire. However, after lying under the blanket for "about 5 seconds", the accused "[found] the heat unbearable" and rushed out of the master bedroom. He then left the flat and drove to Sembawang Beach planning to drown himself in the sea, but did not do so.

33 At about 3.30pm that day, the accused returned to the block where the flat was located. He kept a look out for the police and officers from the Singapore Civil Defence Force ("the SCDF") as he thought that they might have turned up at the flat in light of the fire that he had started. He did not spot any police or SCDF officers. The accused used the payphone at the void deck of the block to make calls to his mother and Pei Shan's mother. He told them that as a result of an argument between Pei Shan and him, he had been chased out of the flat. He said that the lie was his "excuse to explain why [he] did not visit them". He explained in the 5 February 2017 long statement that by lying he hoped "to

buy [himself] more time to think about what to do next", and to avoid a situation where his mother and mother-in-law would turn up at the flat. The accused returned to the flat shortly after making the calls from the payphone. He found that the flat was very smoky. He sprayed air freshener in the master bedroom and living room before going to the study to smoke.

34 At about 6.30pm, Gordon visited the flat, accompanied by his brother-in-law. They rang the doorbell, knocked on the door and windows, and shouted for the family. The accused did not respond. Gordon forced open one of the windows to the flat and noticed a pungent odour. He called the police and reported smelling gas from inside the flat. A short while later, the police and officers from the SCDF arrived. The police officers shouted out to the accused and told him that if he did not open the door, they would enter the flat by force. Just as the SCDF officers were about to force an entry, the accused opened the door. At the insistence of the police officers, he unlocked the metal gate of the flat. The accused then stepped out of the flat, approached Gordon and told him in a calm and soft voice that Pei Shan was dead. He then dashed past Gordon but was apprehended by him, and the police and SCDF officers present.

35 One of the police officers, Sergeant Jonathan Low Jin Hua ("Sgt Jonathan"), asked the accused what had happened. The accused replied that "[i]t was my fault." The SCDF officers who entered the flat identified a charred body in the master bedroom. Another police officer, Senior Staff Sergeant Nur Farhana binte Mohamad Nasir ("SSSgt Farhana"), also confirmed the presence of a charred body in the master bedroom of the flat. However, when the accused informed her that he had set fire to the bodies of Pei Shan and Zi Ning earlier in the day, she realised that there were in fact *two* charred bodies in the master bedroom, which she then confirmed. She placed the accused under arrest for murder.

36 Shortly after the accused's arrest, Assistant Superintendent Ravindra s/o Subramaniam ("ASP Ravindra") from the Special Investigation Section of the police arrived at the flat. ASP Ravindra asked the accused to show him around the flat. The accused pointed ASP Ravindra to a handwritten suicide note, which was placed on the bedside drawer in the master bedroom. The accused told ASP Ravindra that the suicide note had been written by Pei Shan and was addressed to Pei Shan's father. The accused then pointed ASP Ravindra to three further handwritten suicide notes in the study, which he claimed were written by Pei Shan and him. These four notes collectively were the suicide notes forged by the accused (see [26] above). The suicide notes were seized and sent for forensic analysis.

The recorded statements

37 After his arrest, the accused was warded at Changi General Hospital ("CGH"). On 29 January 2017, police officers recorded the following statements from the accused at CGH:

(a) a long statement recorded by Assistant Superintendent Arun s/o Guruswamy ("ASP Arun") on 29 January 2017 at about 2.20pm ("the 29 January long statement"); and

(b) a cautioned statement recorded by Deputy Superintendent Tang Wenhao Jonathan ("DSP Tang") on 29 January 2017 at about 5.25pm ("the first cautioned statement").

38 Subsequently, a total of five long statements (under s 22 of the CPC) and one cautioned statement (under s 23 of the CPC) were recorded from the accused at the Police Cantonment Complex. I have referred to some of these statements in the preceding paragraphs (see *inter alia* [19] and [20] above).

These statements, which were recorded by the Investigating Officer Deputy Superintendent Au Yong Kok Kong, Jonathan ("DSP Au Yong"), were as follows:

(a) a long statement recorded on 1 February 2017 at about 8.40am ("the 1 February long statement");

(b) a long statement recorded on 3 February 2017 at about 2.55pm ("the 3 February long statement");

(c) a long statement recorded on 5 February 2017 at about 8.40pm ("the 5 February long statement");

(d) a long statement recorded on 9 February 2017 at about 5.00pm ("the 9 February long statement");

(e) a long statement recorded on 12 February 2017 at about 3.25pm; and

(f) a cautioned statement recorded on 12 February 2017 at about 7.05pm ("the second cautioned statement").

39 The eight statements in the two preceding paragraphs are collectively referred to as the "recorded statements". All of the recorded statements were admitted into evidence by agreement, and the Defence did not challenge any of these statements on the grounds that they had been procured by a threat, inducement or promise from the police officers made during the statement recording process. There was also no challenge to the accuracy of the contents of the recorded statements.

The autopsy report

40 On 29 January 2017 at or about 9.30am, Dr George Paul ("Dr Paul"), a Senior Consultant Forensic Pathologist with the Health Sciences Authority ("HSA"), conducted autopsies on Pei Shan and Zi Ning. The relevant portions of his autopsy reports were admitted into evidence through the ASOF.

41 Dr Paul certified Pei Shan's cause of death as "strangulation". He observed multiple injuries on Pei Shan's neck and near her jaw. His view was that the burns on Pei Shan's body were inflicted post-mortem. Based on his observations, he concluded that Pei Shan's external injuries and the injuries to her neck structures within were a result of strangulation, and were sufficient to cause death in the ordinary course of nature.

42 Dr Paul also observed that the foetus in Pei Shan's uterus, which was of a gestational age of a little more than six months, was non-viable and its cause of death was the death of the mother.

43 Dr Paul certified Zi Ning's cause of death as "consistent with smothering". He observed multiple injuries on her neck and near her jaw, and was of the view that this was suggestive of smothering. He was of the further view that Zi Ning's body showed advanced decomposition and post-mortem burn injuries. Based on this, he concluded that the injuries to Zi Ning's lower face and neck region were representative of a blunt force being applied to those areas, and were sufficient to cause death in the ordinary course of nature by smothering.

The parties' cases

44 I shall briefly set out here the parties' respective cases on the elements of the offence of murder and the relevant defences. I will address the parties' respective positions on the constitutional issues in the latter portion of these grounds (see [206]–[207] below).

The Prosecution's case

45 The Prosecution submitted that the elements of the offence of murder were established beyond a reasonable doubt in relation to both charges. They relied on the facts in the ASOF, as canvassed above, as well as the recorded statements. The Prosecution pointed out that the accused admitted to strangling both Pei Shan and Zi Ning, and these were the acts that caused death. This issue was uncontentious. They argued that based on his acts, it was clear that the accused intended to cause Pei Shan and Zi Ning's deaths. The Prosecution emphasised that the accused, on multiple occasions, admitted that he intended to strangle both Pei Shan and Zi Ning, and that it was clear he wanted to ensure that both Pei Shan and Zi Ning were "motionless" before he stopped.

46 The Prosecution also submitted that none of the general exceptions to murder was applicable. On diminished responsibility, they relied primarily on the evidence of Dr Yeo Chen Kuan Derrick ("Dr Yeo"), a Consultant with the Department of Forensic Psychiatry of the Institute of Mental Health ("IMH"). In brief, Dr Yeo's position was that the accused did not suffer from any mental disorder at the time of the offences. Instead, his view was that the accused "snapped", wanted to teach his wife a lesson, and demonstrated "hatred" towards her. I will address Dr Yeo's evidence in detail in the discussion on whether the accused had established diminished responsibility (see [76]–[190] below).

47 The Prosecution also relied on the evidence of two other experts – Dr Ong Pui Sim ("Dr Ong") and Dr Stephen Phang ("Dr Phang"). I will also address the specifics of their evidence at the relevant junctures in the discussion on diminished responsibility. Dr Phang gave evidence as a *rebuttal* witness, which gave rise to an evidential issue which I will address shortly (see [52]–[61] below).

48 On provocation, the Prosecution argued that the accused's conduct, in particular the manner in which he carried out the killings of Pei Shan and Zi Ning, showed that he did not lose self-control. They further argued that the provocation by Pei Shan was neither grave nor sudden and that the accused's response was entirely disproportionate to whatever provocation he might have received.

The Defence's case

49 The Defence's case centred on the defences mentioned earlier, and not the elements of the offence of murder. In fact, in closing submissions, the Defence did not contest the elements of the offence. Instead, they advanced a three-pronged defence: (a) diminished responsibility; (b) provocation; and (c) the constitutionality of ss 299 and 300(*a*) of the Penal Code.

50 On diminished responsibility, the Defence argued that the accused was suffering from MDD Moderate *before, during and after* the commission of the offences. They relied primarily on the expert evidence of Dr Jacob Rajesh ("Dr Rajesh"), a Senior Consultant Psychiatrist with the Singapore Prison Service, Promises (Winslow) Clinic and the Department of Psychology Medicine at the National University Hospital. I will address Dr Rajesh's evidence in detail in my analysis of the defence of diminished responsibility (see [76]–[190] below).

Dr Rajesh was of the opinion that the accused started suffering from MDD in mid-2016, and the condition progressively worsened. The accused's performance and behaviour at work, his poor financial circumstances, and his behaviour before, during and after the commission of the offences demonstrated this. The Defence argued that the MDD Moderate substantially impaired the accused's mental responsibility for the acts that caused the deaths of Pei Shan and Zi Ning. The Defence therefore argued that the court ought to find that diminished responsibility had been made out.

51 On provocation, the Defence argued that the accused had lost his self-control as a result of the words uttered by Pei Shan on 20 January 2017 immediately before he proceeded to strangle Pei Shan and Zi Ning. It was argued that the facts, as per the ASOF, disclosed that the accused had in fact lost his self-control in response to Pei Shan's provocation, thereby fulfilling the requirements for provocation under Exception 1 to s 300(*a*) of the Penal Code.

Preliminary evidential issue: Rebuttal evidence

52 At the close of the Defence's case, the Prosecution applied under s 230(1)(*t*) of the CPC for leave to call Dr Phang as a rebuttal witness. Leave was sought for the purpose of addressing the following: (a) the proper "assessment protocol for forensic examinations"; (b) the correct interpretation of the diagnostic criteria for a diagnosis of MDD (see [113]–[125] below); and (c) the use of "legal definitions" in psychiatric reports, such as Dr Rajesh's reliance on the doctrine of "masked depression". The Defence objected on the basis that it would be inappropriate to allow Dr Phang to give evidence after the close of the Defence's case.

53 Section 230(1)(*t*) of the CPC reads as follows:

> (*t*) at the close of the defence case, the prosecution shall have the right to call a person as a witness or recall and re-examine a person already examined, for the purpose of rebuttal, and such witness may be cross-examined by the accused and every co-accused, after which the prosecutor may re-examine him…

Section 230(1)(*t*) "statutorily enshrine[s] the prevailing practice [prior to the 2012 CPC amendments]" (see *The Criminal Procedure Code of Singapore: Annotations and Commentary* (Jennifer Marie & Mohamed Faizal Mohamed Abdul Kadir eds) (Academy Publishing, 2012) ("*CPC Commentary*") at paragraph 12.060). Accordingly, the body of jurisprudence prior to the 2012 CPC amendments on the court's approach to allowing rebuttal witnesses was relevant.

54 The Prosecution relied on the cases of *Public Prosecutor v BNO* [2018] SGHC 243 ("*BNO*") and *Osman bin Ali v Public Prosecutor* [1971–1973] SLR(R) 503 in support of their application. Specifically, they argued that where *the burden of proof on/concerning a particular issue was on/upon the accused*, the Prosecution ought to be allowed to call rebuttal evidence: see *BNO* at [61]. This was regardless of whether the Prosecution had anticipated and led evidence on the issue in its case.

55 In response, the Defence made two arguments relying on the Court of Appeal's decision in *Public Prosecutor v Bridges Christopher* [1997] 3 SLR(R) 467 ("*Bridges*"), as well as the *CPC Commentary* at paras 12.061–12.062:

(a) First, the Prosecution could not adduce rebuttal evidence as they had "already put in medical evidence" in the case for the Prosecution; as they had done so, there had been "a complete joinder of issue". The Prosecution could only adduce rebuttal evidence if they had "elect[ed]

not to call an expert as part of [their] case, but rather wait[ed] for the defence" to make their case.

(b) Second, since the Prosecution has already adduced evidence on the relevant issue in the case for the Prosecution, the *only* situation where they could adduce rebuttal evidence on the same issue *after* the Defence's case was if further matters (related to the issue) arose which could not have been reasonably foreseen. That was not the case here – the issues Dr Phang's evidence sought to address were foreseen by the Prosecution and addressed by Dr Yeo.

56 I agreed with the Prosecution. *Bridges* did not in fact support the Defence's submissions. I reproduce the relevant extract from *Bridges* below:

> 51 … [The calling of rebuttal evidence] will be allowed only in the case of a matter arising *ex improviso*, *ie* ***one which the plaintiff could not reasonably have foreseen. In other words*** where the plaintiff has been misled or taken by surprise ***or in answer to evidence of the defendant in support of an issue the proof of which lay upon the defendant***.
>
> [emphasis added in bold italics; additional emphasis in bold underlined italics]

While the Court of Appeal did state in the reproduced extract (in the first sentence) that rebuttal evidence was permissible if the issue was not reasonably foreseeable, the subsequent sentence makes it clear that rebuttal evidence was permissible in *two alternative situations*. First, where the plaintiff (or in this case, the accused) was misled or taken by surprise, *ie*, the issue was not reasonably foreseeable. The second was where the burden of proof was on the accused. The two situations are mutually exclusive. Accordingly, the fact that the issue was or could have been reasonably foreseen was not a bar to allowing rebuttal evidence if the burden of proof was on an accused.

57 This interpretation of *Bridges* is consistent with the decision in *BNO*. In *BNO* (at [61]), the court considered whether the rebuttal evidence the Prosecution sought to adduce was *either* to address an issue that the Prosecution could not reasonably have foreseen, *or* to address "an issue in respect of which the burden of proof lay upon the Accused". The court eventually ruled against the Prosecution on both counts, but the analysis in *BNO* reveals that the court's approach was to consider both questions (reasonable foreseeability and burden of proof) as *alternative*, and *not* cumulative requirements. This, in my view, is the appropriate reading of *Bridges*. *Bridges* therefore does not assist the Defence.

58 The Defence submitted that the analysis in paragraph 12.062 of the *CPC Commentary* of the case of *Jusri bin Mohamed Hussain v Public Prosecutor* [1996] 2 SLR(R) 706 ("*Jusri*") supported their argument. The Defence asserted that *Jusri* stood for the proposition that the Prosecution could call rebuttal evidence *only if it elected not to call an expert as part of its case*. *Jusri* does not in fact say that; also, in my view, the *CPC Commentary* did not support the Defence's submission.

59 Referring to *Jusri,* the *CPC Commentary* noted that where the Prosecution relies on statutory presumptions, and the burden of proof is thus shifted to the accused, the Prosecution "need not" include in its case evidence that directly addresses the accused's defence (*Jusri* at [31]). In such a case, it would be "far more preferable to allow the Prosecution to call expert evidence in rebuttal" (*Jusri* at [33]). Two things are clear from this. Where the burden of proof is on the accused:

(a) the Prosecution has *no obligation* to (*ie*, "need not") include evidence in its case that addresses the accused's defence; and

(b) the Prosecution is at liberty to call a rebuttal witness to address the accused's defence.

The *CPC Commentary* does *not*, however, state if the Prosecution chooses to call evidence in their case, they lose their right to call rebuttal evidence. In other words, it is not authority for the proposition that in order to preserve their right to lead rebuttal evidence, the Prosecution ***must not*** *introduce evidence that addresses the accused's defence in the Prosecution's case*. Such a proposition cannot be found anywhere in *Jusri*.

60 The Defence expressed concerns over the apparent unfairness of allowing the Prosecution to have "two bites of the cherry", as they would effectively be able to adduce evidence on the same issue before *and* after the case for the Defence. In my view, this argument misses the point for the following reasons.

(a) First, the Prosecution was entitled to call rebuttal evidence because the burden of proof was on the accused to prove his defence. The fact that the Prosecution led evidence in their case on the issue did not change that fact. This is the effect of the decisions in *BNO* and *Bridges* (see [57] above).

(b) Second, the accused was in fact advantaged by the Prosecution calling evidence on the issue in their case. Ordinarily, the Prosecution's evidence on this issue would have been adduced in rebuttal. To the extent that the Prosecution had introduced evidence in their case, the accused had a preview of it. I made the point to counsel for the accused who fairly accepted it.

(c) Third, case law makes it clear that an accused *always* possesses a right of surrebuttal. The authors of the *CPC Commentary* noted the observation in *Jusri* that when the Prosecution calls an expert witness in rebuttal, it would also be preferable to allow *the* ***recall*** *of the Defence's expert to reply* to the Prosecution's rebuttal. I informed the Defence that they would be entitled to call an expert, whether he be Dr Rajesh or some other witness, in *surrebuttal* if anything arose during the course of Dr Phang's evidence that called for a response.

61 I therefore granted the Prosecution leave to call Dr Phang to give rebuttal evidence. This was subject to the Defence leading evidence on any point in surrebuttal, provided leave is granted. However, the Defence did not make this application.

Issues

62 There were four main issues before me, which I address in turn.

(a) First, whether the elements of the offence of murder were made out on both charges. The burden in this respect, as stated, was on the Prosecution to prove the elements of the offence beyond a reasonable doubt.

(b) Second, assuming the elements of the offence of murder were made out, whether the defence of diminished responsibility was made out on both charges. The burden of proof was on the Defence to prove diminished responsibility on a balance of probabilities.

(c) Third, whether the defence of provocation was made out on both charges. Here, likewise, the burden of proof was on the Defence to prove the defence on a balance of probabilities.

(d) Fourth, whether ss 299 and 300(*a*) of the Penal Code were inconsistent with the separation of powers as provided for in the Constitution, and/or Article 12 of the Constitution.

63 I will briefly address the elements of the offences first, before discussing each of the three defences in turn.

The elements of the offences

The law on murder

64 The parties did not dispute the elements of the offence of murder under s 300(*a*) of the Penal Code. The two conjunctive elements under s 300(*a)* are: (a) an act by the accused that causes death (the *actus reus*); and (b) the act by which death is caused must be done with the *intention* of causing death (the *mens rea*).

65 The *actus reus* of murder under s 300(*a*) of the Penal Code is uncontroversial. Whether an act committed by an accused *caused* the death of the victim is a question of fact that is to be resolved on the evidence, such as the autopsy report, that is before the court.

66 On *mens rea*, it is well-settled that an accused is said to possess an intention to cause death if he or she "aims" to cause death, and strives to "bring about" the outcome of death (see A P Simester *et al*, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (Bloomsbury Publishing, 5th Ed, 2014) ("*Simester and Sullivan*") at p 135). This is to be discerned from the accused's

admission or by inferring intention from an accused's actions. Further, the Court of Appeal noted in *Iskandar bin Rahmat v Public Prosecutor and other matters* [2017] 1 SLR 505 ("*Iskandar*") at [34] that it suffices if the intention to cause death under s 300(*a*) of the Penal Code is formed just before the actual killing takes place. The Prosecution need not prove pre-meditation or a particular motive by an accused. The inquiry focuses on an accused's subjective state of mind at the time of commission of the relevant offence.

Whether the elements of the offences were made out

Actus reus

67 In the ASOF, the accused agreed that he strangled Pei Shan followed by Zi Ning, and that he adopted the same *modus operandi* on both occasions. He first strangled each of them with a bath towel before strangling them with his bare hands until they were motionless. He maintained this position in the recorded statements and in his oral testimony. It was also relevant that in the ASOF, the accused accepted *that he caused the deaths of Pei Shan and Zi Ning*.

68 Dr Paul's findings (see [40]–[43] above) confirmed that the accused's acts caused Pei Shan's and Zi Ning's deaths. In the autopsy report, Dr Paul noted injuries on their necks and near their jaws. He concluded that Pei Shan's death was caused by "strangulation", and Zi Ning's was "consistent with smothering". The Defence did not dispute the accuracy of Dr Paul's findings.

69 I was therefore satisfied that for both charges, the Prosecution had proved the *actus reus* of the offence of murder beyond a reasonable doubt.

Mens rea

70 On *mens rea*, the question was whether the accused had the intention to cause the deaths of Pei Shan and Zi Ning when he acted in the manner that caused their respective deaths. All the evidence pointed to the conclusion that the accused possessed such intention in both cases.

71 First, the accused's intentions could be discerned from his conduct at the time of the offences. As noted, the accused stated that while he had been strangling Pei Shan and Zi Ning, he told each of them to "leave first". It is clear from these statements that his intention was to end their respective lives.

72 The accused's answers to questions posed by the Deputy Public Prosecutor in cross-examination put the issue beyond doubt:

> Q: So, now can you answer my question: You could have stopped what you were doing at any time, couldn't you?
>
> A: Yes, Your Honour.
>
> Q: Not just for Adeline, but for Zi Ning as well, isn't it?
>
> A: (No audible answer)
>
> Q: You have to answer the question. Have you answered?
>
> A: Yes, Your Honour.
>
> Q: *But you did not stop because you were determined to kill both of them isn't it?*
>
> A: *Yes, Your Honour.*
>
> Q: Not only that. Whilst you were strangling them, you even had time to talk to them isn't it?
>
> A: Yes, Your Honour.
>
> Q: And it is clear from your farewell message to them that you wanted them dead isn't it?
>
> A: *It's my intention to have the whole family dead. Yes, Your Honour.*
>
> [emphasis added]

From the above, it was clear that the accused possessed the intention to cause the deaths of Pei Shan and Zi Ning. While strangling Pei Shan and Zi Ning, the accused knew exactly what he was doing and the likely outcome of his actions – that of Pei Shan's and Zi Ning's deaths. He was actively attempting to "bring about [that] outcome" (see *Simester and Sullivan*, [66] *supra* at p 135). In other words, the accused strangled Pei Shan and Zi Ning with the intention of causing their deaths.

73 The recorded statements corroborated this.

(a) In the 1 February long statement, the accused stated that he strangled Pei Shan "with the intention of killing her as [he] felt that there was no way out financially for [his] family".

(b) Similarly, in the 3 February long statement, the accused stated that when he was strangling Pei Shan's neck with his hands, he had "the intention of killing [his] entire family and committing suicide thereafter as [he] felt there was no way for [them] to repay all [his] debts". He also stated that he was "committed … to seeing that [his] entire family die[d] with him", and that he wanted to end Zi Ning's life. Following this, he proceeded to strangle Zi Ning. These were admissions by the accused that he had possessed the requisite intention.

(c) The 9 February long statement was also pertinent. The accused stated that he had asked himself whether he should have stopped *midway into* (*ie*, after around five minutes) strangling Pei Shan. However, he "reasoned" that killing her would release her from the burden of his debts. The accused also claimed that in the moments before he decided to strangle Zi Ning, he had considered whether his sister would be able to look after her and how unhappy she would be as an orphan. In his

> opinion, it was better for Zi Ning to join him and Pei Shan in death. These admissions again demonstrated that the accused intended to cause Pei Shan's and Zi Ning's deaths.

74 It was therefore clear from his answers in cross-examination and the recorded statements that the accused intended to kill Pei Shan and Zi Ning. I therefore found that the *mens rea* of the offence of murder had been established beyond a reasonable doubt on both charges.

Conclusion on the elements of the offences

75 As the elements of the offence of murder were made out on both charges, the question that remained was whether the defences the accused relied on were made out.

The defence of diminished responsibility

76 The defence of diminished responsibility, if established, reduces the offence of murder to culpable homicide not amounting to murder. The defence is found in Exception 7 to s 300 of the Penal Code, which provides as follows:

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

77 The law on diminished responsibility is well-settled. The burden of proof was on the accused to satisfy the court, on a balance of probabilities, that he fulfilled the following three elements of the legal test that (a) he was suffering from an abnormality of mind, (b) such abnormality of mind arose from inherent causes or was induced by disease or injury, and (c) the abnormality of mind

substantially impaired his mental responsibility for the acts that caused the deaths of Pei Shan and Zi Ning: see *Nagaenthran al/l K Dharmalingam v Public Prosecutor and another appeal* [2019] 2 SLR 216 ("*Nagaenthran*") at [21]; *Iskandar*, [66] *supra* at [79]; *Ong Pang Siew v Public Prosecutor* [2011] 1 SLR 606 ("*Ong Pang Siew*") at [58]; *Public Prosecutor v Wang Zhijian* ("*Wang Zhijian*") [2014] SGCA 58 at [50].

78 The second limb was of particular importance in the present case as the central plank of the accused's defence was that he suffered from an abnormality of the mind which was caused by a disease – MDD Moderate – which in turn substantially impaired his mental responsibility for the acts that caused the deaths of Pei Shan and Zi Ning. The accused did not rely on an "inherent cause" or "injury". Therefore, much of the focus of the evidence at trial and in the closing submissions of the Defence was on the second limb, *ie*, whether the accused suffered from MDD Moderate at the material time. Significantly less emphasis was placed on the first and third limbs.

79 As the burden was on the accused, it was crucial to carefully examine how the accused defined his case on MDD Moderate. As MDD is a depressive disorder and therefore a question of expert opinion, extensive expert psychiatric evidence was adduced by the parties in support of their respective positions. I set out below the experts' respective positions.

The parties' positions on whether the accused suffered from MDD Moderate

The Defence

80 The Defence submitted that the accused suffered from MDD Moderate before, during and after the commission of the offences. The condition

"substantially weakened his ability to make rational judgments and control his actions", and this was said to satisfy the test for diminished responsibility. The Defence relied primarily on Dr Rajesh's evidence in this regard.

81 Dr Rajesh's evidence comprised two reports – a report dated 19 October 2018 ("Dr Rajesh's first report"), and a second report dated 7 May 2019, which was prepared in response to Dr Yeo's evidence ("Dr Rajesh's reply report"). Dr Rajesh also gave oral evidence at trial. He examined the accused on four occasions between 28 August and 16 October 2018. The accused was remanded in Changi Prison Cluster B at that time. In forming his opinion, Dr Rajesh also relied on the following sources:

(a) In preparing his first report, Dr Rajesh obtained information on the accused from:

(i) interviews with the accused's family members;

(ii) the recorded statements;

(iii) the charge sheets; and

(iv) Dr Yeo's first report (see [85] below).

(b) In preparing his reply report, Dr Rajesh obtained further information on the accused based on:

(i) an interview with Mdm Husniyati;

(ii) an interview with Mr Dickson Pang; and

(iii) three further interviews with the accused on 18 April, 25 April and 7 May 2019.

82 Dr Rajesh's position was that the accused suffered from MDD Moderate at the time of the offences. According to Dr Rajesh, the accused's MDD started in or around mid-2016 with the symptoms *progressively worsening* with time such that by the time the offences were committed, he was suffering from MDD Moderate. The condition persisted even after the offences. Thus, on the basis of Dr Rajesh's evidence, the time frame for assessing whether the accused suffered from MDD was the period from mid-2016 to after the commission of the offences.

83 The specific diagnostic criteria used by Dr Rajesh are addressed below in the discussion on the parameters and analytical framework for my decision (see [95]–[125] below).

The Prosecution

84 The Prosecution challenged the Defence's assertion that the accused suffered from MDD Moderate. They argued that the accused was *not*, at the time of the offences, labouring under any disease that caused an abnormality of mind. They relied primarily on Dr Yeo's evidence, and on Dr Ong's and Dr Phang's evidence where relevant.

85 Dr Yeo provided two reports – (a) a report dated 21 April 2017 ("Dr Yeo's first report"), which was prepared shortly after he examined the accused, and (b) a second report dated 15 March 2019 in response to Dr Rajesh's reply report ("Dr Yeo's reply report"). He also gave oral evidence in court. Dr Yeo examined the accused on six occasions between 20 February 2017 and 17 April 2017. Dr Yeo also obtained information on the accused from the following sources:

(a) interviews with the accused's family members namely, his father, mother, older sister and younger brother;

(b) an interview with Mdm Husniyati;

(c) interviews with the accused's ex-colleagues, Mr Dickson Pang and Mr Jeremy Peh Eng Kuan ("Mr Jeremy Peh");

(d) documented observations by the nursing staff at the Complex Medical Centre during the accused's period of remand; and

(e) the charge sheets and summary of facts provided by the police.

86 Dr Yeo was of the opinion that the accused did not suffer from MDD or any other disease that caused an abnormality of the mind. He accepted that the accused might have suffered from adjustment disorder *after* the offences, but was of the view that it did not, for obvious reasons, offer him a defence to the charges he faced.

87 The thrust of Dr Yeo's evidence was that the accused's self-reporting of symptoms that supported a diagnosis of MDD was unreliable and unsupported by corroborative evidence. This being the case, there was little to no basis to conclude that he suffered from the symptoms necessary to support a diagnosis of MDD Moderate. Dr Yeo's further position was that the accused did not suffer from impairment to his social, occupational or other important areas of functioning. This, in his view, was mandatory under the diagnostic criteria for MDD. I will discuss this criteria shortly (see [95]–[125] below).

88 Before turning to my analysis of the facts of the case, I address two important matters: (a) the approach that ought to be taken in assessing expert

psychiatric opinion evidence; and (b) the parameters of my analysis on whether the accused suffered from MDD Moderate.

How expert medical evidence ought to be analysed in the diminished responsibility inquiry

89 It is established jurisprudence that the second limb of the test for diminished responsibility is a matter of expert medical evidence, and the first and third limbs are findings of fact for the court to make: see *Nagaenthran* at [27]; *Iskandar* at [80]; *Ong Pang Siew* at [59]. Having said that, it must be remembered that: (a) the expert testimony rests on a *bedrock of facts* that supports the medical opinion being advanced; and (b) the court must be satisfied that those facts have been properly established. The failure to establish the facts will naturally raise questions on the sustainability of the medical opinion. This is established jurisprudence for the defence of diminished responsibility. Indeed, it is true generally speaking of expert testimony of any kind, as *per* the observations in *Anita Damu v Public Prosecutor* [2020] 3 SLR 825 at [30] ("*Anita Damu*"), citing Heydon J in *Dasreef Pty Ltd v Hawchar* [2011] HCA 21 with approval:

> Opinion evidence is a bridge between data in the form of primary evidence and a conclusion which cannot be reached without the application of expertise. The bridge cannot stand if the primary evidence end of it does not exist. …

90 This is *particularly* true of depressive disorders where the medical opinion is based on a set of symptoms elucidated from self-reporting by the accused and/or from other sources. The recent observations of the court in *Kanagaratnam Nicholas Jens v Public Prosecutor* [2019] 5 SLR 887 ("*Kanagaratnam*") as well as *Anita Damu* at [31] are apposite. *Kanagaratnam* emphasised the need to evaluate the soundness of an expert's evidence with

reference to underlying evidence relied upon and the analytical process that was used:

> 1 … In the context of criminal cases, psychiatric reports prepared by psychiatrists or psychologists are commonly tendered by the Prosecution and the Defence respectively. These reports typically contain a professional assessment of the offender's mental culpability, which is a key factor in questions of liability as well as sentencing. It is therefore no exaggeration to say that psychiatric reports are of vital importance because they can have a real impact on an offender's life and liberty.
>
> 2 Given the importance of such evidence, experts must appreciate that they *cannot merely present their conclusions without also presenting the underlying evidence and the analytical process by which the conclusions are reached.* Otherwise, the court will not be in a position to evaluate the soundness of the proffered views. Where this is the case, the court will commonly reject that evidence…
>
> [emphasis added]

91 *Anita Damu* reiterated the same point, and stressed that in evaluating an expert's evidence, the court's task is to scrutinise the *underlying facts* that form the basis of an expert's opinion:

> 31 … since the court is ultimately tasked with evaluating the expert opinion, the premise on which the expert's conclusions are drawn must necessarily be before the court so as to allow the court to ascertain whether the expert's conclusions are properly founded…
>
> 32 In the context of psychiatric evidence, where there is a substantial dispute over the truth of an accused person's account of the events, which has been conveyed to the psychiatrist, the basis rule would generally require that the accused person testify before the court as to the relevant factual basis. Only then can the psychiatrist's opinion be properly assessed. …

Anita Damu dealt with a related but different question of how the court ought to deal with situations where the facts undergirding an expert's opinion (*eg*, an accused's recount of events) were not placed before the court. That was not the case here, as the accused elected to give evidence. Nevertheless, it is clear from

the extract reproduced above that when dealing with expert psychiatric evidence, the court must examine the underlying evidence in order to determine whether and to what extent an expert's conclusions are properly founded.

92 Where the factual basis upon which the expert evidence is premised is rejected at trial, the expert evidence "may also be cast in doubt or rejected entirely": *Nagaenthran* at [29]. This approach comports with the notion that it is the trial judge, not the expert(s), who is the ultimate finder of fact. As the finder of fact, the trial judge's task is to scrutinise all the *underlying facts* that form the basis of an expert's opinion, and consider *all* the facts of the case, in particular the specific events before, during and after the offence(s) (see also *Nagaenthran* at [28]–[29]).

93 Accordingly, I shall first address the key factual question: whether, based on the established diagnostic criteria for MDD, the facts relevant to support the medical opinion that the accused suffered from MDD Moderate at the material time existed. If this question is answered in the negative, there can be no diagnosis of MDD Moderate, and the accused's defence of diminished responsibility must accordingly fail. This approach to assessing expert psychiatric evidence for the purpose of the defence of diminished responsibility mirrors that of the Court of Appeal's in precedents such as *Ong Pang Siew* and *Nagaenthran*.

The parameters of my analysis

94 I now turn to the analytical framework for assessing whether the accused suffered from MDD Moderate. As mentioned, expert medical evidence played a significant role in the parties' respective cases on this issue. There was no

dispute as to the credentials of the experts called to testify, with the disagreement being solely on the conclusions they each advanced.

The diagnostic criteria for MDD

95 There was consensus amongst the experts on the relevant diagnostic criteria for assessing MDD Moderate. Two sets of diagnostic criteria were relied upon. These were the *Diagnostic and Statistical Manual of Mental Disorders* (5th Ed) ("DSM-V"), published by the American Psychiatric Association, and the *International Classification of Disorders* (10th Ed) ("ICD-10"), published by the World Health Organisation ("WHO"). DSM-V and ICD-10 each delineate a set of requirements that have to be fulfilled before an individual can be clinically diagnosed as suffering from MDD.

96 DSM-V in particular was pertinent. The court has in previous cases applied DSM-V in determining the presence of psychiatric illness in accused persons: for example, in *Ong Pang Siew*, where the question was whether the accused who was charged with murder suffered from MDD, the Court of Appeal applied the previous iteration of DSM-V, DSM-IV, in assessing the experts' opinions. For present purposes, there is no material difference between DSM-IV and DSM-V.

97 ICD-10 is worded slightly differently from DSM-V but for all intents and purposes is consistent with DSM-V as regards the symptoms of and diagnostic methodology for MDD. My analysis is based principally on DSM-V given that DSM-V was used by both sets of experts for their analyses. Where pertinent, I supplement my reasoning with reference to relevant portions of ICD-10.

98 DSM-V sets out five *cumulative* criteria for the diagnosis of MDD, namely, Criteria A through E (which I refer to collectively as the "MDD diagnostic criteria").

> **Major Depressive Disorder**
>
> Diagnostic Criteria
>
> A. Five (or more) of the following symptoms have been present during the same 2-week period and represent a change from previous functioning; at least one of the symptoms is either (1) depressed mood or (2) loss of interest or pleasure.
>
> 1. Depressed mood most of the day, nearly every day, as indicated by either subjective report (*eg*, feels sad, empty, hopeless) or observation made by others (*eg*, appears tearful). …
>
> 2. Markedly diminished interest or pleasure in all, or almost all, activities most of the day, nearly every day (as indicated by either subjective account or observation).
>
> 3. Significant weight loss when not dieting or weight gain (*eg*, a change of more than 5% of body weight in a month), or decrease or increase in appetite nearly every day. …
>
> 4. Insomnia or hypersomnia nearly every day.
>
> 5. Psychomotor agitation or retardation nearly every day (observable by others, not merely subjective feelings of restlessness or being slowed down).
>
> 6. Fatigue or loss of energy nearly every day.
>
> 7. Feelings of worthlessness or excessive or inappropriate guilt (which may be delusional) nearly every day (not merely self-reproach or guilt about being sick).
>
> 8. Diminished ability to think or concentrate, or indecisiveness, nearly every day (either by subjective account or as observed by others).
>
> 9. Recurrent thoughts of death (not just fear of dying), recurrent suicidal ideation without a specific plan, or a suicide attempt or a specific plan for committing suicide.

> B. The symptoms cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.
>
> C. The episode is not attributable to the physiological effects of a substance or to another medical condition.
>
> **Note:** Criteria A–C represent a major depressive episode.
>
> …
>
> D. The occurrence of the major depressive episode is not better explained by schizoaffective disorder, schizophrenia, schizophreniform disorder, delusional disorder, or other specified and unspecified schizophrenia spectrum and other psychotic disorders.
>
> E. There has never been a manic episode or a hypomanic episode.

Criteria C through E were not disputed; I therefore restrict my analysis to Criteria A and B, which were the areas of focus for both parties.

Criterion A of DSM-V

99 DSM-V states that the common feature of *depressive disorders*, of which MDD is a variety, "is the presence of sad, empty, or irritable mood, accompanied by somatic and cognitive changes that significantly affect the individual's capacity to function." DSM-V further states that MDD "is characterised by discrete episodes of at least 2 weeks' duration (although most episodes last considerably longer)" involving clear-cut changes in affect, cognition and neurovegetative functions and inter-episode remission. The nine symptoms listed in Criterion A as well as Criterion B are indicia of such changes in the individual and his behaviour in the relevant period. I refer to the Symptoms in Criterion A as Symptoms (1) through (9) respectively.

100 As regards Criterion A, DSM-V stipulates the following requirements for a diagnosis of MDD.

(a) Five or more Symptoms must be present during the same two-week period and represent a change in previous functioning.

(b) At least one of the five Symptoms must be either Symptom (1), depressed mood, or Symptom (2), loss of interest or pleasure in nearly all activities. They must be present most of the day, nearly every day.

(c) If neither of these two cardinal symptoms is present and for the requisite duration, there cannot be a diagnosis of MDD.

(d) With the exception of Symptom (3) (in so far as weight change is concerned) and Symptom (9) (suicidal ideations), the other Symptoms must be present nearly every day.

101 DSM-V notes that loss of interest or pleasure (Symptom (2)) is "*nearly always present, at least to some degree"*. In other words, a person with depressed mood will nearly always exhibit loss of interest or pleasure in nearly all activities, at least to some degree. Therefore, if Symptom (2) is absent, that ought to be adequately explained.

102 The Symptoms may be observed by third-parties *and/or* self-reported by the accused. This is plain from the text of the DSM-V (see [98] above, specifically the descriptions of each of the Symptoms) and other passages in DSM-V. The need for third-party observation of the Symptoms was an important aspect of the present case as the thrust of the Prosecution's case on Criterion A in their written closing submissions was that the accused's self-reporting was dishonest, and inconsistent or at least unsupported by corroborative evidence, and hence ought to be rejected.

103 The importance of corroborative evidence was emphasised in *Ong Pang Siew* at [43] where the Court of Appeal, in referring to DSM-IV, highlighted the significance of ensuring that "the interviews with the patient are carried out carefully", and explained that "[a]dditional information from people who would ordinarily interact with the patient would be especially useful". In this regard, DSM-V notes that additional information is relevant and usually required when assessing whether an accused met the legal criteria for the presence of a mental disorder that is relevant for a finding of culpability. DSM-V further notes that "family members often notice social withdrawal or neglect of pleasurable avocations"; this was cited with approval in *Ong Pang Siew* at [41]. Dr Phang also made the same point in his evidence; he highlighted the importance of "information from collateral sources, such as from relatives".

104 There is good reason for requiring additional or corroborative evidence in *forensic* psychiatric examinations. This court in *Public Prosecutor v Chia Chee Yeen* [1990] 1 SLR(R) 525 observed at [43] that:

> … by their very nature such facts and circumstances must be carefully scrutinised and matched against the objective evidence, particularly the conduct of the accused shortly before and after the incident, bearing in mind that it is all too easy for an accused person to say that he was depressed or had insomnia or had poor appetite.

This observation was upheld on appeal. This is consistent with the observations in *Ong Pang Siew* (see [103] above). Dr Phang made very much the same point. The context of a forensic psychiatric assessment was, he emphasised, important. He made the point that "forensic psychiatric patients are actually facing charges". He was therefore of the view that "it is fundamental in a forensic psychiatric assessment that one has to obtain collateral information". He pointed out that such information could be from "collateral sources, such as from relatives". He observed that in present day, it would be easy for an accused

person to access the official diagnostic criteria for any psychiatric disorder, "memorise" such criteria, and then "portray" or "rattle off" symptoms to the examining psychiatrist. Accordingly, it would be "absolutely vital and critical to obtain collateral information" in such circumstances.

105 Dr Yeo also said the same. He emphasised the importance of corroborative evidence in a forensic psychiatric examination undertaken for the purpose of a diagnosis in criminal proceedings. The purpose for which the diagnosis was being sought (*ie*, to support an acquittal or a conviction) warranted a greater degree of "objectivity". This could be achieved by seeking corroborative evidence.

106 The Defence did not disagree that seeking corroborative evidence was appropriate. They accepted that "this is correct practice."

107 Therefore, in so far as it was possible, the presence of corroborative evidence supporting the accused's self-reported Symptoms was important in my determination of whether the MDD diagnostic criteria had been satisfied. This approach was especially warranted in the present case because the accused had not been truthful on several occasions. I cite some instances.

(a) First, upon his arrest, the accused told ASP Ravindra that some of the suicide notes had been written by Pei Shan.

(b) Second, after his arrest, the accused told SSSgt Farhana that he had entered into a suicide pact with Pei Shan.

(c) Third, in the 29 January long statement, the accused stated that Pei Shan was silent when he suggested to her (on either 18 or 19 January 2017) that they end their lives, and that "[n]ormally when [Pei Shan]

does not reply [him], it means she agrees with [him]". The accused stated this in order to suggest that Pei Shan had agreed to a suicide pact.

(d) Fourth, in the 3 February long statement, the accused stated that when he suggested to Pei Shan that the family kill themselves, he "took her silence… as a form of implied consent".

All of these were lies. The accused forged the suicide notes. Ms Nellie Cheng, a Senior Forensic Scientist with the HSA, stated in her forensic report it was "highly probable" that the same author wrote *all* of the suicide notes. The accused in fact *admitted* in the 3 February long statement that he had forged one of the notes to Pei Shan's father while "posing as [Pei Shan]". There was in fact no suicide pact. This is evident from the account of events in the ASOF and the recorded statements, *ie*, that the accused took Pei Shan's and Zi Ning's lives against both their wills and not pursuant to a suicide pact between the accused and Pei Shan (see [19]–[23] above).

108 The lies about the suicide notes and the suicide pact were considered steps by the accused. In this regard, his conduct following arrest is important. As noted at [36] above, when arrested at the flat, the accused had the presence of mind to point ASP Ravindra to a handwritten suicide note, which was placed on the bedside drawer in the master bedroom. The accused then proceeded to lie to ASP Ravindra that this suicide note had been written by Pei Shan and addressed to Pei Shan's father. He furthered the lie by pointing ASP Ravindra to three more handwritten suicide notes in the study, which he claimed were written by Pei Shan and him. He also lied to SSSgt Farhana that he and Pei Shan had agreed on a suicide pact.

109 The accused, as outlined above, showed clear and dishonest thinking. He conjured a possible reason or excuse for the killings by fabricating four suicide notes and a suicide pact. The accused planned this. He had the presence of mind to write the four suicide notes on the same day after he had killed Pei Shan and Zi Ning. He had the further presence of mind to point out the four suicide notes to ASP Ravindra after he was arrested. Thereafter, he lied on no fewer than four occasions (as enumerated in [107] above) about the suicide notes and the suicide pact.

110 The Defence asserted that the lies about the suicide pact were pointless as they did not afford the accused a substantive defence – they emphasised that the lie about the suicide pact was subsequently recanted, and thus contended that the accused never made "a genuine attempt to deceive the authorities".

111 With respect, the Defence's contention misses the point. The issue is not whether the suicide pact or notes afforded a defence or were subsequently recanted. What was relevant was that the accused had the presence of mind to formulate a plan and subsequently implement it by lying to the police. The fact is the accused fabricated the suicide notes with a plan in mind and then proceeded to implement it by drawing the attention of the police to their existence in the immediate aftermath of his arrest and thereafter making one lie after another. That he did this spoke to the need for caution and corroborative evidence in examining the truthfulness of the accused's self-reported symptoms. Dr Phang sounded a similar caution. He stated that where an accused person "has purveyed falsehood at one given point of his narrative", as the accused had done at present, it would not be unreasonable to infer that "all of his subsequent narrative may also likewise… be nothing more than a tissue of lies". He took issue with Dr Rajesh "just rely[ing] on self-reported symptoms", and emphasised that one "has to be sceptical when one interviews accused persons".

I accept Dr Phang's view on the need for caution and objective or corroborative evidence where there are clear instances where the accused has lied. Having said that, I am hesitant to go further and infer that the accused's *entire subsequent narrative* was "a tissue of lies". That might be pushing the envelope too far. Each specific aspect of the accused's testimony had to be closely scrutinised.

112 I accordingly approached my analysis on Criterion A bearing in mind that as far as possible, there ought to be objective evidence supporting the accused's self-reported symptoms. Before I turn to examine each Symptom, I should mention that the fabrication of the suicide notes, and the lies conveyed to the police about them and the suicide pact were relevant for another reason. These were post-mortem acts. As it was the Defence's position that the accused *continued* to suffer MDD Moderate after he killed Pei Shan and Zi Ning, these acts were also important in assessing whether the accused suffered from MDD Moderate prior to and at the time of the killings. I will address this below (see [177] below).

Criterion B of DSM-V

113 Criterion B is satisfied when "[t]he [Criterion A] symptoms cause clinically significant distress *or* impairment in social, occupational, or other important areas of functioning" [emphasis added]. A significant disagreement between the experts was whether the two limbs of Criterion B were conjunctive or disjunctive, *ie*, whether Criterion B requires *both* clinically significant distress *and* socio-occupational impairment to be present. The Defence's position was that it was disjunctive while the Prosecution argued that it was otherwise.

114 Dr Rajesh advanced a disjunctive reading. Dr Rajesh accepted that "[i]n some cases, you can have both [distress and impairment present]". He acknowledged that the Criterion B elements reflect the "effect[s]" of the Criterion A symptoms. However, Dr Rajesh explained that "a lot of the time", the symptoms and distress that patients suffered from "may not really manifest in impairment [in] functioning because they are still able to push through, try harder and try to go about their daily lives". To this end, Dr Rajesh emphasised that "psychiatric conditions are heterogeneous… not every depression is the same".

115 Dr Ong took a similar position. She testified that while clinically significant distress *and* impairment of functioning would *usually* occur concurrently, the presence of either would suffice for Criterion B to be met. Dr Ong also explained, when re-examined by the Prosecution, as follows:

> A: Sometimes, if [MDD patients] have… very strong ego strength, they may be able to hide their distress, I think.
>
> Q: … My question is, ***the patient only has distress***. You found that he has clinically significant distress. ***But he has no social, occupational impairment***, would you say that this patient fits [Criterion B]
>
> A: ***It could still fulfil [Criterion B] if they can sort of force themselves to function in… a regular way***. Yup.
>
> [emphasis added in bold italics]

116 On the other hand, Dr Yeo was of the opinion that Criterion B should be read as a composite whole, *ie*, *both* distress and impairment were required to be present. He pointed out that Criterion A referred to a "change from previous *functioning*" [emphasis added], which meant that impairment in functioning was a necessary feature of MDD. Further, he reasoned that mental disorders, by definition, are characterised by clinically significant symptoms that cause

impairment. Distress or mental pain would also be an extremely subjective criterion; there was accordingly the need for the *objectively observable* factor of impairment to also be fulfilled.

117 Dr Phang was of the same position save for a caveat. Dr Phang accepted that there might not be *visible signs of impairment* in functioning. However, he explained it was possible that a person suffering from MDD might make effort to overcome the Symptoms. As the Symptoms progressively worsened, the effort required would *markedly increase in difficulty*. In Dr Phang's view, such difficulty in maintaining ordinary unimpaired functioning constituted impairment for the purpose of Criterion B. In other words, clinically significant distress accompanied by a *markedly increased effort to maintain normal functioning* (which in Dr Phang's view would amount to impairment) would satisfy Criterion B even if there was no visible manifestation of impairment.

118 Having considered the experts' views, I was of the view that Criterion B ought to be read *disjunctively*. DSM-V clearly states that "[t]he [depressive] episode must be accompanied by clinically significant distress ***or*** impairment in social, occupational, or other important areas of functioning" [emphasis added]. The use of "or" suggests a disjunctive reading. It should be noted, in its definition of "mental disorder", DSM-V again uses "or" in the same manner, suggesting that the limbs are disjunctive.

119 Crucially, DSM-V states that "*[f]or some individuals with milder episodes, functioning may appear to be normal but requires markedly increased effort*" [emphasis added]. This suggests that in some cases with *milder* episodes of MDD, there may be no visible impairment – but that is only so because of the *marked effort* on the part of the individual to function normally. In this regard, it is relevant that MDD can manifest itself across a spectrum of severity

ranging from "mild" to "with psychotic features". Thus, to the extent that the MDD is mild, it is possible that there is no visible impairment in social, occupational or other important areas of functioning. However, as the Symptoms increase in severity, it will become increasingly difficult for an individual to function normally. He will then manifest impairment in social, occupational or other important areas of functioning.

120 ICD-10 is consistent with this interpretation.

(a) Under the "Mild Depressive Episode" portion of ICD-10, it is stated that "[a]n individual with a mild depressive episode is *usually* distressed by the symptoms and has some difficulty in continuing with ordinary work and social activities, *but will probably not cease to function completely*" [emphasis added].

(b) ICD-10 then states that "[a]n individual with a *moderately* severe depressive episode will *usually* have *considerable* difficulty in continuing social, work or domestic activities" [emphasis added].

(c) ICD-10 states that "disorder" "impl[ies] the existence of a clinically recognisable set of symptoms or behaviour associated in *most* cases with distress *and* with interference with personal functions" [emphasis added].

The above collectively suggest that while there could be situations of MDD, particularly in *mild* cases, where there are no visible signs of and no actual impairment. This becomes less probable as the Symptoms become more severe.

121 Dr Phang's evidence was consistent with DSM-V and ICD-10 (see [118]–[120] above). As noted (see [117] above), Dr Phang accepted that in

certain cases of MDD, impairment might not be visible. His point is really that while the impairment may not be perceptible, the effort to overcome the effects of the Symptoms in and of itself constituted impairment for the purpose of Criterion B. While I do not discount this as one possible way of construing impairment for the purpose of the second limb of Criterion B, it is unnecessary for me to express a definitive view given my opinion that the two limbs of Criterion B are disjunctive, though one would expect to see impairment as the Symptoms increase in severity.

122 I also make an observation on an aspect of Dr Rajesh's evidence. His evidence was that the accused suffered from MDD of *moderate, not mild, severity* at the material time. As noted in ICD-10 (see [120] above), a person suffering from MDD Moderate would usually have *considerable* difficulty in continuing social, work or domestic activities. In fact, the ICD-10 also states that *most* cases of mental disorders such as MDD would involve both distress *and* impairment to functioning (see [120(c)] above). Similarly, DSM-V states that persons with mild MDD might appear to function normally only because of marked effort, suggesting therefore that if the MDD was moderate, the effort to appear normal would be considerably greater. In other words, one would expect to see impairment on the part of the accused.

123 In his reply report, Dr Rajesh offered as an explanation "masked depression", *ie*, the suppression and concealment of symptoms of depression by the accused. However, he failed to consider ICD-10 on the considerable difficulty that a person suffering from MDD Moderate would face in functioning without impairment. Impairment would therefore ordinarily be visible. Dr Rajesh simply assumed that the accused would have been able to function without impairment or not manifest impairment *without explaining*

why the accused was the exception rather than the rule. I did not find this satisfactory.

124 Dr Phang criticised "masked depression" as a concept which did not have much credence in medical science. He said that the concept was no longer "a recognised clinical entity", and no longer existed in present day operationalised criteria (*ie*, DSM-V). I find it not necessary to express a view on this. Having said that, as noted above, ICD-10 and DSM-V recognise that patients may not manifest impairment because of efforts made to overcome the effects of the Symptoms, though that becomes considerably more difficult as the severity of the disorder increases. This may suggest that Dr Phang's criticism has some traction subject to this caveat.

125 Accordingly, without any explanation from Dr Rajesh, I was not persuaded that the accused would have been able to function without impairment to his socio-occupational and other important areas of functioning. Therefore, for the purpose of Criterion B, I expected the accused to have exhibited clinically significant distress *as well as* impairment in social, occupational or other important areas of functioning.

126 With these parameters in mind, I turn to analyse the facts.

My decision on whether the accused suffered from MDD

Criterion A

127 I begin with Criterion A. The setting of the time period for assessing the facts that supported the diagnosis of MDD is important. As noted earlier, the Defence's case is that the accused started suffering from MDD in the middle of 2016 with the symptoms progressively worsening with time (see [82] above).

Their position was that the MDD persisted even *after* the offences had been committed. Thus, the relevant period for assessing the facts was from the middle of 2016 to after the commission of the offences. Bearing in mind that, on the Defence's case, the Symptoms worsened with the passage of time and, based on ICD-10, would become increasingly difficult to overcome, how the accused presented and conducted himself from the latter part of 2016 would be particularly pertinent. This coincided with the accused's employment with CDW right up to his arrest on 28 January 2017, making his post-offence conduct also relevant. In assessing the facts, I am cognisant of the guidance of the Court of Appeal in *Nagaenthran* at [28] that the proper approach is to examine *all the evidence* holistically, in a "broad common sense" manner.

128 As noted (see [99] above), according to DSM-V, the common feature of depressive disorders "is the presence of sad, empty, or irritable mood, accompanied by somatic and cognitive changes that significantly affect the individual's capacity to function." Each of the Symptoms in Criterion A is an indicium of this and Criterion B is, as Dr Phang observed, a "summation" of Criterion A, and "flows from and stems from Criterion A". In other words, the collective effect of the presence of the five or more Symptoms necessary for a diagnosis of MDD is an individual who is distressed and suffering from and manifesting impairment in functioning (subject to the individual overcoming impairment through effort).

(1) Symptoms (1) and (2)

129 I begin with Symptoms (1) and (2). As earlier explained (see [100(b)] above), either Symptom (1) or (2) must have been present in the accused during the relevant period and for the requisite duration for a diagnosis of MDD under

DSM-V. Also, since Symptom (2) is almost always present (see [101] above), its absence needs to be explained.

(A) SYMPTOM (1)

130 Symptom (1) is present where the individual has depressed mood most of the day, nearly every day. This symptom may be discerned either from subjective reports *or* observations made by others. The accused constantly maintained that he suffered from a depressed mood: he reported this to both Dr Yeo and Dr Rajesh.

131 In his reports, Dr Rajesh attributed the accused's depression to his severe financial situation and unabating family expenses, being mocked by Pei Shan and discovering Pei Shan's relationship with another man. Dr Rajesh reiterated the same points in his oral testimony.

132 Dr Yeo accepted that based on the accused's self-reporting *alone*, he might have suffered from Symptom (1). He, however, testified that the accused's self-reported account was unreliable and ought to be discounted as the accused exaggerated and/or lied when self-reporting. He further testified that the accused had a penchant for lying and being dishonest. For these reasons, Dr Yeo concluded that Symptom (1) was not in fact present.

133 In light of the importance of corroborative evidence (see [102]–[112] above), I closely scrutinised the evidence to assess whether the accused's self-reporting was corroborated. In this regard, I was mindful of the observations in *Ong Pang Siew* at [43] on the importance of corroborative evidence of *persons who ordinarily interact and have frequent contact with the accused*.

134 I accepted that the accused might have been *upset or felt down* over his difficult financial circumstances and the acrimony that had been building between him and Pei Shan for various reasons. The points raised by Dr Rajesh to this effect (see [131] above) were relevant. But being *upset or feeling down* is not the same as being *depressed* – the latter involves a far more serious and sustained slump in emotional state, as DSM-V and ICD-10 make clear. The evidence did not show the accused to be depressed.

135 First, all of the accused's colleagues and ex-colleagues, save for two, who were called as witnesses testified that they did *not* observe depressed mood on the part of the accused prior to the offences.

(a) The evidence of Mr Jordan Lim, the accused's supervisor, was critical as he had constant contact with the accused between October 2016 and January 2017. Mr Jordan Lim testified that he observed no change in the accused's mood in his time at CDW. Mr Jordan Lim also testified that the accused was "willing to learn" – the accused "would always ask questions about the job [scope]" and had "a very good working attitude" – and exhibited this behaviour "frequently". Mr Jordan Lim's further testimony was that the accused had "good" relationships with his colleagues, meaning that "there was no dispute" between them, and that "[e]verything was fine" as far as their working relationship was concerned.

(b) Mr Dickson Pang did not observe depressed mood on the accused's part. He had met the accused sometime in October 2016 to discuss a debt owed to him by the accused. Thereafter, Mr Dickson Pang and the accused had further discussions on this issue between 14 October 2016 and 20 January 2017. Specifically, on 13 January

2017, he went to the flat to discuss repayment of the debt with the accused. During these conversations, Mr Dickson Pang did not observe any depressed mood on the part of the accused.

(c) Mdm Husniyati was one of the two exceptions. She testified that she suspected that the accused might have been depressed. However, apart from saying she felt this way because she had suffered from depression herself, Mdm Husniyati was not able to point to anything concrete to support her view. In fact, Mdm Husniyati's evidence was that the accused had positive working attitude; she described him as a "reliable and good worker", who was "a very smart man", "a fast learner", and "very hardworking". She also gave evidence that when she had met the family on Christmas day on 25 December 2016, she observed the accused to be a loving father and husband (see [137(d)] below). Her evidence did not paint the picture of a man who suffered from depressed mood.

(d) Mr Jeremy Peh was the other exception. He observed that the accused was "pretty haggard… [there was] no life, he look[ed] so dull"; this was in mid-January 2017. However, this was a single isolated incident, and inconsistent with the observations of Mr Jordan Tan and Mr Dickson Pang, and the members of the accused's family (see below).

136 Second, the evidence of the accused's family members was not consistent with the accused suffering from depressed mood. Pei Shan's family, whom the accused met for dinner every week, did not report any signs of depression. Similarly, the accused and his family visited his parents for weekly dinners – they too did not report any signs of depression.

137 Third, other aspects of the evidence also pointed to the same conclusion.

(a) The accused's WhatsApp message exchanges with Pei Shan were affectionate and suggested that he was constantly concerned about the needs of the family. They showed a loving husband who was constantly showering his wife with affection, and not one who suffered from depression.

(b) The accused's decision not to abort Pei Shan's foetus in November 2016 after receiving counselling showed hope and positivity for the future.

(c) The accused was determined to turn his career around and put in significant effort in this regard – he informed Dr Yeo that he was optimistic about clearing his debts and would "fight to the end" and not "give up". He set a goal of earning $20,000 a month and wrote this on a whiteboard in his study. He had also been trying to co-broke a property transaction with Mr Jeremy Peh just before the offences.

(d) The accused was a loving father who showered affection on Zi Ning. He took Zi Ning out on multiple occasions in the weeks preceding the offences: First, on 24 December 2016, Mdm Husniyati met the family at "Kiddy Palace", a shop selling babies' toys. She observed that "he love[d] his wife, his daughter… [and] he's a good father". The next day (25 December 2016), the accused brought Zi Ning to Sentosa to celebrate Mdm Husniyati's birthday. They spent some two hours there and Mdm Husnayati observed him to be a loving husband and father. In addition, each day, the accused dropped Zi Ning off at school in the morning, left the office in the evening to pick her up from school and

drop her off at home, and bought dinner for the family, before returning to work.

138 DSM-V requires depressed mood to be there most of the day, nearly every day. The evidence as outlined above hardly suggested that. The accused's colleagues, particularly Mr Jordan Lim, and the accused's family did not notice any signs of depression. His work performance and attitude towards his family was inconsistent with depressed mood. He demonstrated an uplift in mood, positivity in attitude, and care and concern for his family.

139 The Defence's position was that the accused continued to suffer from MDD Moderate after the offences. His behaviour after the offences was telling. The accused's internet browsing history showed that he spent a significant amount of time surfing the web, using Facebook, watching videos on YouTube, and consuming pornography. Further, his appetite and sleep did not seem affected. The accused left the flat to buy meals regularly and slept fairly regular hours every night. Shortly after committing the offences, he had the presence of mind to formulate the plan about the suicide pact, fabricate the suicide notes and follow through with the plan by lying to the police. His behaviour was not that of a person suffering from depression most of the day, nearly every day. I thus found that Symptom (1) was absent.

(B) SYMPTOM (2)

140 Symptom (2) requires the accused to have suffered markedly diminished interest or pleasure in daily activities for most of the day, nearly every day. This symptom may be self-reported or observed by others.

141 Dr Rajesh did not state that the accused suffered from this Symptom. Dr Yeo accepted that if the accused's self-reported account was true,

Symptom (2) would have been present. However, Dr Yeo disputed the accused's credibility for the reasons mentioned earlier (see [132] above).

142 In written closing submissions, the Defence relied on the accused's loss of libido, as reported to Dr Yeo, as the basis for the presence of this symptom. However, in oral closings, the Defence accepted that they were not pursuing this point. Accordingly, there was no evidence or submissions being advanced on Symptom (2). This was important for reasons I will explain.

143 The fact that Dr Rajesh did not find Symptom (2) present in the accused was troubling. DSM-V indicates that Symptom (2) will *nearly always* be present (see [101] above). Dr Rajesh made no attempt to explain its absence in the accused. The absence of Symptom (2) and Dr Rajesh's failure to explain its absence raised questions on his opinion that the accused suffered from MDD Moderate at the material time.

144 The absence of Symptom (2) in the accused was relevant for another reason. Symptom (2) is closely intertwined with Symptom (1). A person with Symptom (1) – depressed mood – will nearly always exhibit Symptom (2). Accordingly, in the absence of a cogent explanation, the absence of Symptom (2) would support a finding that Symptom (1) was also not present and *vice versa*. Accordingly, my conclusion that the accused did not suffer from Symptom (1) was reinforced by the absence of Symptom (2) in the accused.

145 There was good reason why Dr Rajesh and the Defence did not make or pursue the point that the accused suffered from Symptom (2). The evidence suggested that Symptom (2) was not in fact present.

146 The accused adduced *no* evidence demonstrating that he had lost interest in all aspects of life. As noted by the authors of DSM-V, Symptom (2) is nearly always present, at least to some degree. It flows from Symptom (1) – depressed mood. Putting loss of libido to one side, anyone who ordinarily interacted with the accused should therefore have observed the accused's loss of interest or pleasure in daily activities. However, there was no evidence to this effect at all. The evidence I have examined in my analysis of Symptom (1) also speak to the conclusion that Symptom (2) was not present. The accused was positive, motivated, and kept a meaningful and productive schedule in many aspects of his life. He did not lose interest in his work (see [137(c)] above); he was loving towards and cared for his family (see [137(a)] and [137(d)] above); he had hope for the future and decided against aborting Pei Shan's foetus (see [137(b)] above).

147 In addition, in the months preceding the offences, the accused had been gambling regularly. He regularly placed "4D" bets with Mr Jordan Lim. The Prosecution clarified the accused's gambling habits with the accused in cross-examination, and with Mr Jordan Lim in examination-in-chief.

(a) The accused confirmed that:

(i) Between 9 November 2016 and 30 November 2016, he placed bets amounting to $2,088 with Mr Jordan Lim.

(ii) In December 2016, he placed bets amounting to $2,871 with Mr Jordan Lim.

(iii) From 1 January 2017 to 14 January 2017, the accused spent $1,878 on gambling.

(b) Mr Jordan Lim testified that on each occasion, he would place "4D" bets on the accused's behalf with Singapore Pools. This occurred "on a weekly basis", and the accused would place bets "[m]ore than once a week".

(c) Mr Jordan Lim also testified that the accused persisted with the gambling habit despite his financial circumstances. He would usually place the bet for the accused using his own money, and the accused would repay him thereafter on a weekly basis. This was their practice during the accused's first two weeks at CDW. However, thereafter, the accused started "dragging his payment[s]", and did not repay Mr Jordan Lim promptly. Such late repayment was a "frequent" occurrence.

(d) On several occasions, Mr Jordan Lim refused to help the accused place "4D" bets. On those occasions, the accused "would beg" Mr Jordan Lim to help him.

In other words, the accused was gambling regularly *immediately before* the offences were committed. This was not the picture of a man who had lost significant interest in quotidian activities.

148 I now turn to the alleged loss of libido/sexual pleasure. The accused's evidence in this regard was inconsistent. His position changed in the course of his evidence.

(a) The accused did not report to Dr Rajesh a drop in libido.

(b) The accused did report a drop in sexual activity to Dr Yeo. The accused informed Dr Yeo that he had sexual intercourse with Pei Shan

only one to two times a week in 2013, and one to two times a month in 2014.

(c) Subsequently, the accused testified that he had sexual intercourse with Pei Shan *two to three times a week* between 2012 and 2014.

The accused's fluid and inconsistent evidence raised doubts on his credibility. In any event, this was not the relevant period of assessment as, according to the Defence, the accused only started suffering from MDD in mid-2016.

149 The accused brought up the drop in libido during the relevant period for the first time on the stand. He claimed that he had "[n]o interest" in having sex with his wife *since 2015*. This was after questions were directed at him by counsel for the Defence. I believed that this was an afterthought for two reasons.

150 First, the accused was clearly engaged in sexual activity with Pei Shan during the relevant period, as demonstrated by the fact that she had conceived in 2016. When she visited the hospital on 1 November 2016 to consider aborting the foetus, Pei Shan was 17 weeks pregnant. This suggested that the accused was sexually active in or around July 2016.

151 Second, the accused's claim that he suffered from loss of sexual pleasure was shown up by his consistent consumption of pornography both before and after the offences. The accused's browsing history showed that he had constantly visited pornographic sites throughout January 2017, *both before and after* the offences. The accused accepted this during cross-examination. As an example, on the day before the offences were committed, he visited a particular site 132 times. The accused explained that he had just been "browsing" this site.

I found the explanation improbable. It was difficult to believe that the accused was just "browsing" given the frequency with which the accused visited the same site in a single day, and other sites of a similar nature.

152 Dr Yeo explained that watching pornography and engaging in masturbative acts related to the pornography would cast doubt on whether Symptom (2) was present. The Defence did not challenge Dr Yeo's evidence. I agreed with Dr Yeo's views. As loss of libido was the sole factor relied upon (and then withdrawn) by the Defence for Symptom (2), I found the Symptom not to be present.

153 In conclusion, as neither Symptom (1) nor (2) was present, there could be no diagnosis of MDD under DSM-V. For completeness, I explain why the evidence showed that the remaining seven Symptoms were also not present.

(2) The remaining Symptoms under Criterion A

(A) SYMPTOM (3)

154 Symptom (3) relates to a change in body weight of more than 5% in a month, *or* a decrease/increase in appetite nearly every day. The experts did not dispute that weight loss had to be a consequence of the presence of Symptom (1) and/or Symptom (2) (or the other MDD Symptoms), and not because of unrelated factors.

155 The Defence relied primarily on the accused's self-reporting to Dr Rajesh. The accused informed Dr Rajesh that he had decreased appetite since mid-2016, and had lost 15kg several months prior to the offences. Dr Rajesh attributed the weight loss to the accused's depressed mood. The accused similarly reported to Dr Yeo a loss of appetite and weight. The Defence also

relied on the fact that Dr Rajesh was told by Mdm Husniyati that the accused had lost a bit of weight between December 2016 and January 2017.

156 I found Symptom (3) to be absent. I shall first address the weight loss/gain aspect. The evidence was unclear and insufficient to support the accused's self-reported account.

(a) Mr Jordan Lim, who saw the accused frequently and immediately preceding the offences, testified that the accused did *not* appear to have lost weight.

(b) Mr Dickson Pang also gave evidence that the accused's weight had not fluctuated. He had last seen the accused on 13 January 2017.

(c) The accused's relatives, including his parents and siblings, did not notice that the accused suffered weight loss (see [136] above). Gordon's evidence was in fact that the accused had *gained* weight.

157 While Mdm Husniyati suggested that the accused had experienced weight loss, she was not able to provide details of the extent of the loss or when it occurred. Her evidence was contradicted by Mr Jordan Tan's evidence outlined above. Mdm Husniyati also conceded that any weight loss or gain might be attributable to irregular meal timings because of the nature of work at CDW. If this were true, the weight loss, if any, would not be attributable to Symptoms (1) and (2) (see [154] above). Accordingly, I did not place weight on Mdm Husniyati's evidence.

158 The evidence therefore was against the accused's self-reported account of weight loss and I accordingly did not accept the account.

159 On appetite loss, Mr Jordan Lim's testimony was that the accused finished his meals and his appetite appeared normal. This was consistent with there being no weight loss. The accused's WhatsApp messages with Pei Shan showed that he had been eating regularly. Multiple WhatsApp messages to this effect were exchanged between the accused and Pei Shan in December 2016.

160 Further, the accused showed no loss of appetite following the commission of the offences. He testified that he had been eating regularly post-offence. He left the flat regularly to buy his meals (see [31] above). He consumed the meals he had bought.

161 I was therefore not satisfied that the accused experienced the requisite weight fluctuation or appetite loss for the purpose of Symptom (3). There was no corroborative evidence that backed up his self-reporting. In fact, the independent objective evidence contradicted the accused's account.

(B) SYMPTOM (4)

162 Symptom (4) is where the accused suffered from insomnia or hypersomnia *nearly every day*. The Defence's case relied heavily on the accused's self-reporting. The accused reported to both Dr Yeo and Dr Rajesh that he had been suffering from insomnia. The accused informed Dr Rajesh that he had been waking up frequently at night and did not feel rested, and that the sleep issues had persisted for several months before the offences. There were several issues with the accused's account.

163 First, the accused's evidence on how frequently, and to what extent, he experienced insomnia prior to the offences was not consistent.

(a) His account to Dr Yeo and Dr Rajesh was that he had poor sleep, sleeping only for *three to four hours* a night since mid-2016.

(b) Under cross-examination, the accused testified that his struggles with sleep began in mid-2014 (from around June onwards) though the extent of the problem was not explained.

(c) In re-examination, the accused testified that he *barely slept at all* in January 2017. This was not mentioned to Dr Yeo and Dr Rajesh.

These inconsistencies raised questions over the veracity of the accused's self-reported account.

164 Second, the accused's account of his insomnia was not readily reconcilable with his strong performance at work. The accused's colleagues testified to his busy work schedule, diligence and good work ethic. Mdm Husniyati and Mr Jordan Lim gave evidence of the accused's *rigorous* schedule as follows:

(a) The accused reported to work before 10.00am daily.

(b) He would pick Zi Ning up from school between 4.00pm to 5.00pm each evening.

(c) After dropping Zi Ning off at home, the accused would return to the workplace and leave for home between 9.00pm and 10.00pm.

(d) The accused rarely, if ever, deviated from this schedule in the months preceding the offences.

The Defence did not challenge Mdm Husniyati and Mr Jordan Lim's evidence. I had difficulty understanding how someone who suffered from insomnia of the severity asserted by the accused – nearly every day, three to four hours since mid-2016 and barely without sleep in January 2017 – would have been able to keep the schedule and show the work performance that the accused did.

165 The accused's post-offence conduct also supported the conclusion that his evidence on insomnia was exaggerated. The Defence accepted in oral closings that the sleep patterns post-offence were relevant. In the recorded statements, the accused did not report any insomnia on 18 January 2017, and between 20 and 27 January 2017. The recorded statements indicated that the accused slept quite regular hours *every single day* post-offence until he was arrested. That the accused could sleep adequately after causing the deaths of his wife and child was significant. One would have expected his insomnia to have worsened after the killings. There were, however, no signs of his sleep being impacted following the killings.

166 Accordingly, there was insufficient evidence that the accused in fact suffered from insomnia "nearly every day" as required by DSM-V. I therefore found Symptom (4) to be not present.

(C) SYMPTOMS (5) AND (6)

167 The parties agreed that Symptom (5) – psychomotor agitation or retardation – and Symptom (6) – fatigue or loss of energy – were absent. I accordingly did not consider them.

(D) SYMPTOM (7)

168 Symptom (7) relates to feelings of worthlessness, or excessive or inappropriate guilt *nearly every day*. DSM-V states that the feelings of worthlessness or guilt cannot be "merely self-reproach or guilt about being sick".

169 This Symptom was self-reported by the accused to both Dr Yeo and Dr Rajesh. The accused told Dr Yeo that he experienced feelings of low confidence and self-esteem because of his financial circumstances and inability to pay for the family's expenses. Dr Rajesh suggested that these circumstances caused depressed mood (see [131] above) – Symptom (1) – and "feelings of hopelessness [and] worthlessness" – Symptom (7).

170 I was not satisfied that Symptom (7) was present. The accused's self-reporting was questionable. There was scant evidence of the accused suffering from feelings of worthlessness or "excessive or inappropriate guilt". As mentioned (see [137(c)] above), the accused had set clear goals for his career. This was highlighted by Dr Yeo who found that up until the time of the offences, the accused was optimistic about settling his debts, and "extremely optimistic about being able to score a good business deal from his real estate business… so there was no feelings of worthlessness".

171 The accused showed vigour and drive at the workplace, and constantly sought to improve his work performance (see [135] and [164] above). His colleagues testified that he performed consistently well at work and constantly sought to improve himself (see [135] above). This was not the behaviour of a person who felt worthless and lacked confidence nearly every day.

172 I accepted that the accused might have on occasion felt down given his financial situation. In the 29 January long statement, the accused explained his circumstances as such:

> I owe a lot of people money. I was in debt of about $70,000. The debt was due to recurring expenses. [Pei Shan] was not working and I was the sole breadwinner. My income was not enough to support my family. Chinese New Year was coming and I was desperate. I did not know how to face my family nor my wife's family.

173 The above suggested a degree of shame and self-reproach. But that is not the same as feeling worthlessness, or excessive or inappropriate guilt nearly every day. DSM-V states that Symptom (7) ought to be present *nearly every day*. It is important to distinguish self-reproaching from Symptom (7). It seemed to me that someone who suffered from Symptom (7) nearly every day would not have shown such ambition and drive, nor the work performance of the standard demonstrated by the accused.

174 I therefore found that Symptom (7) was absent.

(E) SYMPTOM (8)

175 Symptom (8) relates to a diminished ability to think or concentrate nearly every day. The Symptom may be based on self-reporting or observations by others. Dr Yeo and Dr Rajesh were in agreement that if the accused's self-reporting was accepted, the Symptom might be said to be present. The accused informed Dr Rajesh that he had difficulties concentrating at work. While Dr Rajesh accepted the accused's account, Dr Yeo took the same objection as he did with the other symptoms, *ie*, that the accused's self-reporting was dishonest.

176 In my view, Symptom (8) was absent. Dr Rajesh was of the view that it would have been difficult for the people around the accused to "pick up" this

Symptom. I found that difficult to accept. If the accused had difficulty in thinking or concentrating, or was indecisive nearly every day, his work performance and attitude would surely have been affected. That would surely have been quite easily picked up by his colleagues and superiors. As noted earlier, the accused's colleagues in fact praised his work ethic and performance. *He was doing well at work*. I have explained this in detail at [135], [164] and [171] above. Dr Rajesh made no attempt to explain how the accused was able to show such exemplary performance when suffering from the Symptom. Dr Rajesh relied on "masked depression" to explain the accused's strong work performance but as explained at [123] above, I did not accept his evidence on this point. Dr Rajesh needed to offer cogent reasons as to why the accused was capable of overcoming the Symptom, which he failed to do.

177 There were several aspects of the accused's conduct post-offence that were pertinent. First, in the immediate aftermath of the offence, formulating the plan about the suicide pact and fabricating the suicide notes (see [108] above). Second, following his arrest, having the presence of mind to point out the suicide notes and lying about them and the suicide pact to the police. Third, constantly thinking of excuses to buy time to decide how to act when Pei Shan's family was looking for her – he even changed Pei Shan's Facebook cover photo *after* her death thereby conveying the impression that she was alive and active on social media.

178 Dr Rajesh did not properly consider the impact of the suicide pact, the fabrication of the suicide notes and the lies to the police on the Criterion A analysis. When the accused's conduct in this regard was brought to his attention, he maintained his position on Symptom (8) without providing a satisfactory explanation. Dr Rajesh simply stated that the accused had explained why he lied to the authorities, and that he (Dr Rajesh) therefore "[did not] think… [the

accused] was lying about… the symptoms". His explanation was unsatisfactory. It failed to take into account the fact that the accused was acting with thought and planning, and dishonestly in the aftermath of the offences and following his arrest. This was not reconcilable with a diminished ability to think or concentrate nearly every day.

179 There were other facets of the accused's post-offence conduct that were relevant and showed that he was able to think clearly. I cite several pertinent examples.

(a) He refused to answer the door when Mdm Husniyati and Mr Jordan Lim rang the doorbell of the flat on 23 January 2017 (see [30(c)] above). The accused in fact lowered the television volume and remained silent in order to remain undetected. This was part of a pattern of behaviour to evade those that were looking for him, Pei Shan and/or Zi Ning (see [30] above).

(b) He kept the air-conditioning running between 20 and 28 January 2017 to slow down the decomposition of Pei Shan's and Zi Ning's bodies (see [28] above).

(c) He kept the windows shut and bought air fresheners to mask the smell of burning and decomposition (see [33] above).

(d) Upon returning to the block where the flat was located after the drive on 28 January 2017, he stopped and waited in his car to check for the presence of police and SCDF officers (see [33] above).

(e) On the same day, in order to explain the family's absence from the Lunar New Year festivities, he called his mother-in-law and mother

and lied that he had been chased out of the flat because of a fight with Pei Shan (see [33] above).

(f) When Gordon pried open a window to the flat on 28 January 2017, the accused did not give himself up. It was only when the SCDF officers were about to force an entry that the accused surrendered himself (see [34] above).

The accused's post-offence conduct outlined above demonstrated shrewd cognitive ability and spoke to there being no diminished ability to think or concentrate at all, let alone nearly every day. I accordingly found Symptom (8) to be absent.

(F) SYMPTOM (9)

180 Symptom (9) relates to *recurrent* thoughts of death or suicide attempts. The Symptom is present if a patient (a) possessed recurrent thoughts of death (not just a fear of dying), (b) had recurrent suicidal ideations without a specific plan, (c) thought of a specific plan for committing suicide, or (d) made a suicide attempt.

181 Two aspects of the accused's self-reporting were relevant.

(a) First, the accused reported suicidal *ideations* pre-offence. He reported to Dr Yeo that for a period of about 12 months, he "felt like he just would want to die". The accused reported similarly to Dr Rajesh and Dr Ong. He informed them that in the week before the offences, he allegedly "told his wife that a better way to avoid [the burden of his debts] was for them to kill themselves". Dr Rajesh observed that the accused reported "recurrent suicidal ideation of wanting to end his life

due to his financial debts" though he did not "make any attempts on his life" prior to the commission of the offences.

(b) Second, the accused reported suicide *attempts* post-offence (see [27], [29] and [32] above). Dr Rajesh emphasised that after the offences, the accused made multiple suicide attempts. According to Dr Rajesh, there had in fact been an "escalation of his suicidal attempt" in the period following the offences.

182 While the accused testified that he had made one suicide attempt in 2015, there were two problems with this aspect of his evidence.

(a) First, 2015 was not the relevant period as *per* Dr Rajesh's diagnosis. Indeed, Dr Rajesh's position was that the accused's depressive symptoms only started from mid-2016. Further, without the onset of a depressive disorder, it is difficult to understand why suicide would have been contemplated by the accused.

(b) Second, the Prosecution contended that the accused must be lying in so far as he claimed that he had suicidal thoughts in 2015 as "he had adequate income in 2015". In response, the Defence pointed out that *per* the ASOF, as well as the evidence of Mr Dickson Pang, the accused had already been mired in debt at that time. In my view, while it was true that the accused was mired in debt then, it was early days in his financial turmoil. It was, to my mind, unlikely at that stage that the accused would have had harboured serious thoughts, if at all, of taking his life. Further, such thoughts were inconsistent with his consistent efforts in 2015 and 2016 to reverse his fortunes.

183 I turn to the relevant period – from mid-2016 when MDD started to afflict the accused on his case. First, I consider the period pre-offence. The suicidal *ideations* pre-offence were, in my view, not "recurrent" (as required under DSM-V; see [180] above). Dr Yeo's evidence was pertinent. He accepted that there had been a period between October 2016 and January 2017 during which the accused was feeling down and had suicidal thoughts at various points. However, Dr Yeo opined that up to the point of the commission of the offences, there was no evidence of "recurrent thoughts of death every day, as evidence[d] from what [Dr Yeo] could gather from [the accused's] friends and family". I accepted Dr Yeo's view. The evidence was insufficient to suggest that the accused had recurrent thoughts of suicide. In fact, one might even say that the circumstantial evidence suggested that the suicidal ideations were not recurring. Recurrent suicidal ideations would as a matter of logic accompany despondency and a lack of hope for the future. However, as explained (see [137(b)] and [146] above), the accused demonstrated drive, a willingness to fight for the future, and hope that his fortunes would be reversed in time.

184 Further, there was no cogent evidence that the accused had *attempted* suicide prior to the commission of the offences. In his oral evidence, the accused cited *one* instance between December 2016 and January 2017 when he allegedly attempted to jump from the window of the flat, and pulled back after half his body was out of the window. This, however, was *never* mentioned to Dr Rajesh, who in fact gave evidence that the accused "did not make any attempts on his life prior to the alleged offence". This raised doubts as to whether the accused was being honest in his testimony.

185 I next turn to the post-offence conduct. It is relevant that the accused did not make any serious attempt to take his life. The attempts might best be

described as half-hearted. Notably, on each occasion, the accused got cold feet and changed his mind (see [29] above). The occasions were as follows:

(a) On 20 January 2017, right after the offences, the accused slit his wrist. The wounds appeared to be not deep enough and quickly scabbed (see [24] above).

(b) On the morning of 21 January 2017, the accused wanted to commit suicide by consuming rat poison. He attempted to obtain the poison but returned home empty-handed.

(c) The accused claimed that on the same day, he decided to commit suicide by jumping out of the window of the flat. But he eventually did not follow through. Similarly, on 24 January 2017, the accused contemplated jumping out of his kitchen window but did not have the courage to do so.

(d) On 26 January 2017, the accused attempted to again slit his left wrist with a penknife but he failed.

(e) On 28 January 2017, the accused planned to immolate himself along with Pei Shan's and Zi Ning's bodies. He lay under the blanket, which had been set ablaze, for "about 5 seconds, before finding the heat unbearable". He thus "chickened out and decided not to kill [himself] by burning [himself]".

(f) On the same day (28 January 2017), the accused drove to Sembawang beach intending to drown himself. He did not follow through with this intention (see [32] above).

186 In my view, these attempts or thoughts were half-hearted. They did not speak to someone who suffered from recurrent suicidal ideations. It seemed to me that the efforts post-offences were explicable on the basis of the accused's circumstances. They were borne out of desperation. He had killed his wife and child, and knew that there would be severe consequences – this much was clear from his attempts to evade those that were looking for him and his family (see [30] above).

187 I accordingly concluded that Symptom (9) was not present.

188 Criterion A was therefore not satisfied. There was thus no need for me to address Criterion B. I nonetheless note, briefly, that the analysis in this regard would be closely intertwined with my findings on Criterion A.

Criterion B

189 The absence of the Symptoms meant that they could not have caused the accused significant distress or impairment in socio-occupational or other important areas of functioning under Criterion B. As Dr Phang testified, Criterion B "flows" from Criterion A and this stands to reason as a matter of logic and common sense.

190 I also did not accept that the accused had experienced difficulty with ordinary socio-occupational functioning while *masking* his Symptoms – I have explained this point in detail earlier (see [122] above). On the Defence's case, the accused was suffering from MDD Moderate. It was difficult to understand how the accused would have been able to maintain the regular and intense work/daily routine that he did if he had been suffering from MDD Moderate. I emphasise that it was not the case that the accused was performing averagely, or at merely a passable level, at work. He had been *excelling* at work and pulling

long hours regularly. If the accused had indeed been struggling, he would surely have shown some signs of this, given the weight of his circumstances. His colleagues, however, never once detected any such signs. Further, the accused's behaviour as a husband and a father, as outlined above, did not suggest that he suffered from impairment (see [137] above). Dr Rajesh made no attempt to explain how all of these were consistent with the presence of impairment apart from the reference to "masking", which I did not accept. Even here, Dr Rajesh made no attempt to explain how the accused was capable of "masking" given the severity of the MDD.

191 I thus concluded that Criterion B was not satisfied.

Conclusion on diminished responsibility

192 In the circumstances, I found that the accused had not proven that he was suffering from MDD Moderate at the time of the offences. There was consequently no basis to find that the accused suffered from any "disease" under the second limb (see [78] above). This finding also had implications for the first and third limbs. The Defence's case was that the abnormality of the mind was caused by the disease (the first limb), and that this in turn substantially impaired the accused's mental responsibility (the third limb). As such, a finding that there was no disease would on the Defence's case mean: (a) that the accused did not suffer an *abnormality of mind* under the first limb, and (b) his mental responsibility was not *substantially impaired*.

193 The defence of diminished responsibility was accordingly not made out.

The defence of grave and sudden provocation

194 The two cumulative elements for the defence of provocation were stated by the Court of Appeal in *Pathip Selvan s/o Sugumaran v Public Prosecutor* [2012] 4 SLR 453 ("*Pathip Selvan*"). First, it must be shown that the accused was deprived of self-control by the provocation ("the Subjective Test"). Second, the provocation must be grave and sudden, and it has to be determined whether an ordinary person of the same sex and age as the accused, and sharing his characteristics, would have been so provoked as to lose self-control ("the Objective Test"). In my view, the accused's case on provocation fell at the first element.

The Subjective Test: loss of self-control

195 The *locus classicus* on what constitutes a loss of self-control under the Subjective Test is *R v Duffy* [1949] 1 All ER 932 ("*Duffy*"), which was cited with approval in *Pathip Selvan* at [35]. The English Court of Criminal Appeal in *Duffy* endorsed the following formulation (at 932):

> … sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his [*sic*] mind. …

I was not persuaded that the accused suffered from a loss of self-control when he committed the offences within the meaning espoused in *Duffy*.

The murder of Pei Shan

196 The Defence rested on the accused's testimony that his mind went "blank" as a result of what Pei Shan had said to the accused in Zi Ning's presence. The Defence argued that the accused had "snapped" and was blinded by rage because of the manner in which Pei Shan berated him (see [18] above).

197 I was prepared to accept that what Pei Shan said to the accused could and perhaps would have made him angry. A person in his shoes would arguably have felt incensed. The accused was being mocked and verbally torn down by his wife in front of his child. According to the accused, this was not the first time such berating had occurred and he had warned Pei Shan against repeating it. There had also been a building of tension between the couple due to *inter alia* the arguments they had over the family's finances, and Pei Shan's unwillingness to find employment and allow Zi Ning to move to a less expensive school. There was also the accused's lingering unhappiness with Pei Shan over her extra-marital affair with Mark Mu in 2014. The accused had informed Dr Yeo that he had only forgiven her "60%", and there was evidence that he harboured doubts over whether Pei Shan had ceased contact with Mark Mu. It was therefore plausible, on a balance of probabilities, that the accused had "snapped" and retaliated. He thus retrieved the bath towel from the toilet and proceeded to strangle Pei Shan.

198 But that was not the end of the inquiry. By the accused's own account, the red mist that descended upon him and made his mind go blank cleared *five minutes* into strangling Pei Shan with the bath towel. The accused stated this in the 9 February long statement:

> … About 5 minutes into strangling [Pei Shan] with the towel, my mind cleared and I thought to myself, "Should I stop?" However, I reasoned that if I were to stop now, she would still have to live with the burden of my debts for the rest of her life. As such, I felt that in killing her, I was releasing her from this burden.

At that time, Pei Shan was still alive. Despite the mist lifting, the accused decided to continue strangling Pei Shan with the bath towel. The accused's testimony in court confirmed this: he admitted during cross-examination that after the mist lifted, he *intended* to kill his whole family. As he was strangling

Pei Shan, the accused told her in Mandarin to "leave first", and that he and Zi Ning would "join [her] shortly" (see [20] above). Thus, it is clear that the accused made a conscious decision to continue strangling Pei Shan and take her life after the effects of any provocation had ceased.

199 The entire process of strangling Pei Shan with the bath towel took ten to 15 minutes, of which the time when the accused's mind allegedly went blank was about five minutes. He therefore continued strangling her with the bath towel for between five and ten minutes after the effects of any provocation had ceased. It is also pertinent that when the accused felt Pei Shan go limp, he observed that she was still breathing. He then decided to strangle her with his bare hands to make sure that she was dead. He did so for a further ten to 15 minutes (see [201] below). As the accused was doing this, he continued speaking to her. He said that "we owe too much money, you leave first. Zi Ning and I will join you shortly. I don't want you and Zi Ning to have to bear the burden of my debt after I [am] gone." The accused admitted in the 3 February long statement and in court that at this point, he "had the intention of killing [his] entire family".

200 The foregoing sequence of events clearly demonstrated that the accused was in full control of his faculties about five minutes into strangling Pei Shan when the effects of any provocation had ceased. He made a conscious decision to continue strangling Pei Shan with the bath towel and thereafter to finish matters by strangling her with his hands. It seemed evident that any provocation that was caused by Pei Shan's words did not deprive the accused of self-control when he took Pei Shan's life. This was not the behaviour of a person who had lost his senses in blind rage – far from it, the accused's conduct, after the mist had cleared, was conscious, deliberate and outcome-orientated.

The murder of Zi Ning

201 By the time the accused turned his attention to Zi Ning, he had, by his own account, "maintained [his] grip" on the bath towel around Pei Shan's neck for "about 15 minutes", and "pressed down on [Pei Shan's] neck" with his hands for "about 10 to 15 minutes". In other words, he had spent *between 25 to 30 minutes* strangling Pei Shan. Any residual effects of the red mist would surely have dissipated by then. Indeed, the surrounding circumstances supported this conclusion. The accused did not kill Zi Ning in a frenzied rage – he thought about what he should do with Zi Ning and rationalised that it was best that he took her life as well. Having decided to end her life, the accused "asked" Zi Ning to sit on his lap, before strangling her. He spoke to Zi Ning as he was strangling her, telling her to "leave first". The accused clearly had control of himself. He knew exactly what he was doing, and his actions were goal orientated.

202 There was a significant difficulty with the Defence's case on provocation as regards the killing of Zi Ning. Any provocation was from Pei Shan, not Zi Ning. The Defence submitted in oral closing submissions that Zi Ning was the subject of the provocation specifically that Zi Ning was the root of the argument between the accused and Pei Shan. The Defence submitted that "the defence is wide enough… to encompass a situation where the mother is using the daughter to provoke the husband because she says that, you know, 'Look at your father. He can't even look after you'".

203 However, there were no authorities cited to support the submission that this was *relevant* provocation. As a matter of common sense, it was difficult to see how the submission could be correct. Zi Ning was not a participant in the argument between the accused and Pei Shan. Zi Ning was not at fault for Pei

Shan's behaviour. She was an innocent. It was inconceivable that the accused could have blamed Zi Ning for anything that transpired on the morning of 20 January 2017. Indeed, in his oral testimony, the accused stated that when he decided to kill Zi Ning, his thinking was that he "[could not] leave her alone… here where nobody can take care of her". Any anger that resulted from Pei Shan's words was not directed at Zi Ning.

204 I was therefore not persuaded that the accused had lost self-control when he took the lives of Pei Shan and Zi Ning. During the relevant period in the killing of Pei Shan, he had resumed and was in full control of his faculties. He had full control of his faculties during the killing of Zi Ning. Any provocation that was caused by Pei Shan's words dissipated shortly after the accused started strangling her, and in any event was of no relevance to the killing of Zi Ning.

Conclusion on grave and sudden provocation

205 Based on the above conclusion, there is no need for me to address the Objective Test. The accused's case on grave and sudden provocation fell at the first element. Accordingly, I found that the defence of grave and sudden provocation was not made out.

The arguments on the constitutionality of ss 299 and 300(*a*) of the Penal Code

206 The constitutional challenge by the Defence was against ss 299 and 300(*a*) of the Penal Code. The Defence contended that ss 299 and 300(*a*) were inconsistent with: (a) the separation of powers enshrined in the Constitution; and/or (b) Article 12 of the Constitution.

207 Both arguments were premised on the *overlap* between the first limb of s 299 and s 300(*a*). In the recent decision of *Public Prosecutor v P Mageswaran and another appeal* [2019] 1 SLR 1253 ("*Mageswaran*") at [35], the Court of Appeal observed that the "ingredients of the crime under the first limb of s 299 are *exactly the same* as the ingredients of the crime under s 300(*a*)" [emphasis in original]. The Defence emphasised that although both offences have the same ingredients, a person charged for culpable homicide under s 299 faced a maximum imprisonment term of 20 years under s 304(*a*) of the Penal Code, whereas a person charged for murder under s 300(*a*) faced the mandatory death penalty under s 302 of the Penal Code, if convicted. The Defence accordingly argued that the prescription of different sentencing regimes for penal provisions that overlapped offended the two aforementioned aspects of the Constitution.

208 I note that these issues are novel; this was the first instance of a challenge of this nature being brought against s 300(*a*) of the Penal Code. Whilst the constitutionality of the *punishment* under s 300(*a*), *ie*, the mandatory death penalty, has been challenged in prior cases (see *inter alia Yong Vui Kong v Public Prosecutor and another matter* [2010] 3 SLR 489), the offence creating provision of s 300(*a*) has yet to face a challenge in the courts. If the Defence was correct, then pursuant to Article 4 of the Constitution, *ie*, the Supremacy Clause, the offending penal legislation had to be struck down and rendered void.

209 In its recent decision of *Saravanan Chandaram v Public Prosecutor and another matter* [2020] SGCA 43, the Court of Appeal clarified the scope of the presumption of constitutionality where there is a challenge to the constitutionality of legislation (at [154]):

> … In our judgment, such a presumption of constitutionality in the context of the validity of legislation can be ***no more than a starting point that legislation will not presumptively be treated as suspect or unconstitutional***; otherwise, relying on

> a presumption of constitutionality to meet an objection of unconstitutionality would entail presuming the very issue which is being challenged. The enactment of laws undoubtedly lies within the competence of Parliament; but ***the determination of whether a law that is challenged is or is not constitutional lies exclusively within the ambit and competence of the courts***, and this task must be undertaken in accordance with the applicable principles.
>
> [emphasis added in bold italics]

In proceeding with my analysis, I bore these words in mind.

Separation of powers

210 The Defence argued that ss 299 and 300(*a*) "allow the Prosecution to select the sentence to be imposed on an individual member of a class of offenders, thus violating the separation of powers". Based on the apparent complete overlap between the two provisions as explained in *Mageswaran*, the Defence argued that where a person has caused death with the intention of causing death, the Prosecution's "liberty to choose between [ss 299 and 300(*a*)] effectively enables it to determine the penalty to be imposed". They submitted that the Prosecution's ability to make such a choice was tantamount to the Prosecution exercising judicial power.

211 The key issue therefore was whether by reason of (a) the overlap between s 299 and s 300(*a*), ***and*** (b) the different sentences provided for each offence, judicial power was being exercised by the Prosecution. For several reasons, I rejected the Defence's argument.

212 First, overlapping penal provisions in our criminal law are commonplace. This was discussed extensively in the recent decision of *Ong Ming Johnson v Attorney-General and other matters* [2020] SGHC 63. This court noted that there was nothing objectionable *per se* about a given factual

matrix potentially falling within two or more offences of the Penal Code. The court noted as follows (at [130]):

> Furthermore, the "no overlap" argument is hardly compelling when it is clear that throughout our penal legislation, and specifically the Penal Code itself, there are numerous examples of overlapping offences (*eg* ss 323 and 325; ss 354 and 354A; ss 379 and 379A[;] ss 406 and 408 of the Penal Code). This has not hitherto been found to be objectionable, and I see no reason why it should now be so for s 377 and s 377A specifically. Indeed, in the recent High Court decision of *Tan Liang Joo*, the court noted that ***it was common for offences to overlap and this drew no criticism from the court***.
>
> [emphasis added in bold italics]

In the same vein, the Prosecution, in written reply submissions, pointed to overlaps between ss 143 and 147, and ss 417 and 420 of the Penal Code. Thus, the *mere existence of an overlap* cannot suffice as grounds to treat s 299 or s 300(*a*) of the Penal Code as unconstitutional.

213 That there is a complete overlap between ss 299 and 300(*a*) does not mean that either is rendered *obsolete.* A distinction remains between ss 299 and 300(*a*) – the former is meant to be invoked in cases of intentional murders that are, in relative terms, less heinous. The relative lack of heinousness in such cases warranted a lower punishment, justifying the Prosecution exercising its discretion to prefer a charge under s 299 instead of s 300: this was made clear in *Mageswaran* ([207] *supra*, at [38]–[40]) and in *Parliamentary Debates Singapore: Official Report* (9 July 2012) vol 89 at pp 266–267 (K Shanmugam, Minister for Law).

214 Second, taking the Defence's argument to its logical conclusion would mean that on *each and every occasion* the Prosecution exercises its discretion to charge an accused where there are two or more applicable provisions with different sentencing regimes, the executive would be "deciding" the sentence

an accused is to face. *Ergo*, the upshot of the Defence's argument is that prosecutorial discretion is unconstitutional in situations of overlapping provisions with different sentencing regimes.

215 This must be patently incorrect. Prosecutorial discretion is enshrined in Article 35(8) of the Constitution. In *Dinesh Pillai a/l K Raja Retnam v Public Prosecutor* [2012] SGCA 49 ("*Dinesh Pillai*") at [20], the Court of Appeal stated that the Prosecution's discretion to "prosecute for a more serious offence rather than for a less serious one is not open to any constitutional objection… unless it is in breach of Article 12 of the Constitution". The courts have in fact expressed the same view on numerous occasions: see *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 ("*Ramalingam*") at [69]–[71]; *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872 ("*Yong Vui Kong (Prosecutorial Discretion)*") at [34]–[39]; *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947 ("*Mohammad Faizal*") at [54]. The Defence, in written submissions, failed to address this.

216 Third, the Defence's argument demonstrated a lack of appreciation of what judicial power is and how it is exercised, and the distinction between executive power, legislative power and judicial power. The exercise of the Prosecution's discretion to select the offence with which to charge an accused in a situation where there exists more than one option is *not* a delegation of judicial power but an exercise of the discretion enshrined in Article 35(8) of the Constitution. Let me explain:

(a) When selecting the offence to charge an accused with, the Prosecution exercises prosecutorial discretion. The Prosecution is doing exactly what the Constitution reserves to the Attorney-General under Article 35(8). Further, by charging the accused and bringing him before

the court to be tried, the Prosecution invokes and enforces the law enacted by the legislature. The Prosecution is therefore doing exactly what the executive is designed to do – *enforcing the laws enacted by the legislature*.

(b) Ultimately, it is still the legislature, not the Prosecution, that determines the content of statutory penal provisions and the corresponding sentences.

(c) It is the trial judge, as a member of the judiciary, who then tries the accused following the charging decision by the Prosecution – the trial judge assesses the evidence and interprets the law in deciding whether to acquit or convict the accused on the charge that has been preferred. In doing so, the trial judge *exercises judicial power*. It is also the trial judge who *exercises judicial power in sentencing the accused* in accordance with the relevant penal provision(s) after he has convicted the accused.

This is exactly how separation of powers under the Constitution is designed to operate.

217 The Defence relied on two precedents in support of their case. They were *Moses Hinds v The Queen* [1977] AC 195 ("*Hinds*") and *Mohammed Muktar Ali v The Queen* [1992] 2 AC 93 ("*Muktar Ali*"). The Court of Appeal has in previous cases, discussed below, explained why these precedents do *not* support the proposition that the exercise of prosecutorial discretion where there exist overlapping penal provisions with distinct sentencing regimes is unconstitutional.

218 In *Hinds*, Lord Diplock took objection with the fact that a non-judicial organ – a Review Board comprising a judge or former judge of the Jamaican courts and four other members who were not members of the judiciary – was conferred powers under Jamaican gun laws to *select and impose* sentences on persons accused and convicted of gun-related offences. The situation in *Hinds* was quite different from the case under our criminal justice system. As just explained, the Prosecution makes a charging decision in accordance with powers conferred under the Constitution based on the laws enacted by Parliament. It is ultimately the court, the State's judicial organ, that convicts *and* sentences an accused person in accordance with the laws enacted by Parliament. The Prosecution alone cannot *impose a sentence under statute on an accused person*. To this end, *Hinds* was distinguishable, as noted by the Court of Appeal in *Prabagaran a/l Srivijayan v Public Prosecutor and other matters* [2017] 1 SLR 173 at [61] and [68].

219 Similarly, and as correctly pointed out by the Prosecution, the case of *Muktar Ali* was also distinguishable. In *Muktar Ali*, the Privy Council considered the question of whether a provision in the Mauritius Dangerous Drugs Act 1986 infringed the principle of separation of powers. That provision conferred on a member of the Mauritian executive, the Director of Public Prosecutions of Mauritius (the "DPPM"), the discretion to determine *the court in which* a drug importer should be tried. If the DPPM chose the Mauritian Supreme Court, an offender would face the death penalty if convicted; if the DPPM chose an Intermediate or District Court, the offender would be sentenced to a fine and penal servitude. The Privy Council found that the DPPM's discretion to select the court in which an offender would be tried was unconstitutional, as this in effect allowed the DPPM to select different fora in

which to try the exact same offence. The Privy Council stated as follows (per Lord Keith of Kinkel at 104):

> … [t]he vice of the present case is that [the DPPM's] discretion to prosecute importation with an allegation of trafficking either in a court which must impose the death penalty on conviction with the requisite finding or in a court which can only impose a fine and imprisonment enables him in substance to select the penalty to be imposed in a particular case.

220 As the Prosecution rightly argued, the present case bore no similarity with *Muktar Ali*. Whereas *Muktar Ali* involved a situation of a *single* offence potentially being tried in different courts at the DPPM's discretion, the Defence's argument at present concerned *two* separate and distinct penal provisions. Also, the Prosecution could not select the forum in which an offender might be tried for an offence under s 299 or s 300(*a*). The distinction between *Muktar Ali* and the Prosecution's exercise of prosecutorial discretion in situations of overlapping provisions has been addressed on several other instances by our courts, to similar effect: see *Mohammad Faizal* ([215] *supra*) at [53]–[54]; *Dinesh Pillai* ([215] *supra*) at [17]–[20].

221 Accordingly, there is nothing unconstitutional about the Prosecution's discretion to choose between s 299 and s 300(*a*) when prosecuting an offender. If the Prosecution's choice is inappropriate or incorrect, *there is recourse* – not least by an acquittal, and in certain cases, through the judicial review mechanism. As I mentioned (see [215] above), and as emphasised in local jurisprudence, such recourse, if any, would be under Article 12 of the Constitution, which I turn to next.

Article 12 of the Constitution

222 The Defence submitted that the law "clearly treats persons charged under [ss 299 and 300(*a*)] differently" – they argued, on this basis, that *the*

coexistence of ss 299 and 300(*a*) of the Penal Code was a violation of Article 12 of the Constitution. The Defence relied on the reasonable classification test, and submitted that ss 299 and 300(*a*) failed the test because: (a) there was no intelligible differentia between ss 299 and 300(*a*) since the offences "have the same ingredients"; and (b) even if there was an intelligible differentia, it could not have been Parliament's intention to "treat offenders under section 299 more leniently than offenders under section 300(*a*) for the same offence, solely because of the charge brought". Based on the foregoing, the Defence submitted that the court should strike down ss 299 and 300(*a*) as inconsistent with Article 12 of the Constitution.

223 In my view, the Defence's argument was incorrect. The coexistence of ss 299 and 300(*a*) of the Penal Code *ipso facto* was not a breach of Article 12. The *mere existence* of fully overlapping penal provisions was not even an act of discrimination to begin with. As rightly pointed out by the Prosecution, offences carrying similar ingredients but having different punishments were neither novel nor controversial – I have explained this earlier (see [212] above).

224 The only issue that *could* arise was that overlapping penal provisions could *create the possibility* of discriminatory outcomes – however, whether discrimination did occur would hinge on ***how*** the Prosecution made the choice when exercising prosecutorial discretion. That is an inquiry under Article 12 as stated numerous times in case law (*eg*, in *Dinesh Pillai* ([215] *supra*) at [20]; *Ramalingam* ([215] *supra*) at [69]–[71]; *Yong Vui Kong (Prosecutorial Discretion)* ([215] *supra*) at [34]–[39]; and *Mohammad Faizal* ([215] *supra*) at [54]). In other words, there is no issue of classification or discrimination simply by reason of the coexistence of ss 299 and 300(*a*).

225 Discrimination – and a consequential violation of Article 12 – may possibly occur where, *all things being equal*, the Prosecution charges one offender under the first limb of s 299 and another under s 300(*a*) despite both committing murder. This was clarified by the Court of Appeal in *Ramalingam* at [24], where the Court of Appeal similarly considered the overlap between the penal provisions on culpable homicide and murder. The court stated, in relevant part, as follows:

> … In general, like cases must be treated alike with respect to all offenders involved in the same criminal conduct. If there is evidence that A and B have committed murder, and A is charged with murder, then, *all other things being equal*, B should be charged with murder as well. Likewise, if the evidence indicates that A and B have committed culpable homicide not amounting to murder, and A is charged with that offence, then (if all other things are equal) B should be charged with the same offence. An unbiased consideration of A's and B's respective cases, if the circumstances of the two cases are identical, should lead to the same prosecutorial decision being taken in respect of A and B…

Based on the excerpt above, it is clear that the inquiry on equality of treatment, if any, is one directed *only* at the Prosecution's exercise of discretion, not the mere existence of the relevant overlapping statutes. But that was not the Defence's argument. The Defence's argument was that the *mere existence* of overlapping penal provisions, and not the manner of exercise by the Prosecution of their discretion, was unconstitutional. This went against the weight of authority and was, in my view, incorrect.

226 More recently, the Court of Appeal in *Mageswaran* ([207] *supra*) acknowledged that there was an "anomalous" complete overlap between the first limb of s 299 and s 300(*a*) of the Penal Code. The court also noted that the exercise of prosecutorial discretion as to which provision the Prosecution proceeds under in a given case would "inevitably have an impact on … the

eventual sentence" (at [35] and [37]). *Despite the recognition of the above*, the Court of Appeal did not express any views on the efficacy of the *lex lata*.

227 The Defence's proposed *application* of the reasonable classification test also presented difficulties. To begin with, the reasonable classification test has only been applied to situations where a piece of legislation, by its terms, purports to discriminate between different individuals or groups by criminalising the acts of one group and not another. This requires the *individual legislation* to classify and differentiate a class of individuals based on the traits possessed by that class. As correctly argued by the Prosecution, neither s 299 nor s 300(*a*) of the Penal Code, on their face, discriminate against any individual or group. They are *individually* non-discriminatory, and only classify individuals for the purposes of punishment based on their conduct and state of mind; such classification is part and parcel of the ordinary operation of penal provisions. Since ss 299 and 300(*a*) are each non-discriminatory to begin with, there is no room for the reasonable classification test to operate.

228 There was therefore no basis to regard ss 299 and 300(*a*) of the Penal Code as being in contravention of Article 12.

Conclusion on the arguments on the Constitution

229 I accordingly rejected the Defence's arguments in their entirety. There was no basis to impugn the constitutionality of either s 299 or s 300(*a*).

Conclusion

230 In light of the foregoing, I found that the elements of both charges were made out, and none of the defences raised were established. I accordingly convicted the accused of the two charges he faced.

231 On sentence, if an offender is found guilty of the offence of murder under s 300(*a*) of the Penal Code, s 302(1) of the Penal Code requires the court to impose the mandatory death penalty. I therefore imposed the death penalty on the accused.

Kannan Ramesh
Judge of the High Court

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